

Doctoral Thesis

2014

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A Moral Investigation on the Brain Drain of Healthcare Professionals - The Rawls-Nozick Debate Framework

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Departamento de Filosofia

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Acknowledgements

I would like to express my gratitude and respect towards all people who helped me to make this work possible.

Firstly, I would like to thank my supervisor, Àngel Puyol González, for all the support, guidance and understanding, and especially for his helpful arguments and observations.

This research would not have been possible without the colleagues and professors I have had the occasion to meet. Some of the illuminating ideas presented here came to surface after the challenging discussions we had during various summer schools or conferences.

Most of all, I am grateful for my dear family and friends who offer me unconditional love and support.

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List of Abbreviations

ASU Anarchy, State and Utopia

TJ A Theory of Justice

PL Political Liberalism

HP Healthcare Professionals

JH-MHNF Just Health- Meeting Health Needs Fairly

JH Just Health

Introduction

The World Bank Report from October 2011 shows that there is a global shortage of 4.300.000 of healthcare professionals, which includes doctors, nurses, midwives and support workers. There is 1/3 of global population that lacks regular access to essential medicine.¹

Nowadays, the context of economic crisis has created special circumstances that have the tendency to strengthen intuitions that we have an obligation to help each other. We are inclined to be more and more aware of the connections that exist not only between individuals but even between states.

The “brain drain” is not a new issue in philosophy and other disciplines. This expression incorporates the migration of skilled workers from poor and developing countries to developed countries. Software developers, engineers, researchers in all fields and healthcare professionals are leaving their countries of birth and education in search for opportunities to improve their lives. Brain drain is a special concern for the medical sector because it produces big shortages on the number of healthcare professionals who stay in their country of birth and education. It seems that education cannot guarantee their staying in the country which needs them most, and educating more doctors in developing countries, does not guarantee proper medical care on the long run for the citizens of that country.²

The brain drain problem first appeared in 1940s, when many European emigrated to USA and UK. By the end of 1979, WHO reported that almost 90% of healthcare professionals were migrating to Canada, Australia, UK, USA and Germany.³ Nowadays, the phenomenon of brain drain is still present, even though countries are trying to find solutions for it. The most recent (2013) WHO assembly tried to find ways to undermine the bad effects of the brain drain of

¹ World Bank Report October 2011: http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2011/10/10/000386194_20111010051613/Rendered/PDF/648060WP0Hands00Box361545B00PUBLIC0.pdf, (accessed July 20, 2012).

² Ruth Groenhout, “The “Brain Drain” Problem: Migrating Medical Professionals and Global Health Care,” *International Journal of Feminist Approaches to Bioethics* 5, no. 1 (Spring 2012): 1-24.

³ O.B. Ahmad, “Brain Drain: The Flight of Human Capital,” *Bulletin of the World Health Organization* 82, (2004): 797-8.

healthcare professionals. They proposed states to adapt universal health coverage for all people, regardless of their status, so that poverty does not stay in the way of achieving health.⁴

The main concern of this thesis is to find an answer to the brain drain of healthcare professional, from a moral point of view. At the national level, the urgent concern is to provide solution to the stringent problem of people who are left without access to important services, such as medical care. The migration of healthcare professionals is causing a significant absence of care specialists in developing and poor countries. One of the consequences is that a great number of people are left in a worse position because they do not have access to medical care. Such flow demands a work on policies for solving this problem, but first of all it is necessary to clarify the problem and to proceed to a deeper investigation.

My question is, however, should interest based actions of healthcare professionals (e.g. leaving the country of education) be limited in virtue of the existence of a moral duty to help the disadvantaged co-nationals (people who have restricted access to vital services that only skilled workers can provide, e.g. medical care or education.)

My aim is to investigate if healthcare professionals have a moral duty not to worsen the position of people from their countries of education and birth when searching for their own good and happiness in other countries. I will try to analyze these problems from a social contract perspective, with the help of authors like John Locke, Jean Jacques Rousseau, David Gauthier, Robert Nozick, John Rawls and others, with emphasis on the last two mentioned.

The main question of this research is if the right to free movement of healthcare professionals should be somehow limited by equality of opportunity in healthcare. I will try to answer if healthcare professionals have a special bond with the citizens of the country where they were born and educated. If this is the case, is this a sufficient reason to impose a special duty towards their co-nationals or to limit their right to free movement? Are we justified to advance the idea of a moral duty in this case? If yes, what kind of duty are we talking about? How can we find a middle way between duties of the medical personnel and the right of every citizen to minimum medical care? Further, is this duty to assistance more important that the individual's right to free movement and creation of his own good? Can autonomy of movement for the more advantaged be balanced against justice for the disadvantaged?

⁴ WHO, The World Health Report 2013: Research for Universal Health Coverage, <http://www.who.int/whr/2013/report/en/index.html> (accessed November 15, 2013).

My thesis is that even if people should be provided basic access to healthcare, this is not a reason to limit the healthcare professionals' right to free movement. There are other ways that the government or the communities can apply to protect as many liberties as possible and at the same time, respect equality between people and equality of opportunity. At the same time, I do not argue for liberties or freedom in the absolute sense, where everything is permitted. My argument is that there are duties to be respected and the healthcare professionals have an imperfect duty to help the citizens from the country where they were born and educated⁵, but this duty is extended in a cosmopolitan way, to all the citizens of the world.

My argument is partially based on Robert Nozick's refutation of Rawlsian idea of social cooperation. I start from the Rawlsian⁶ premise that if we cooperate, then we have a moral duty to help each other and base my argument on the idea of self-ownership arguing that we can trade ourselves to the country that gives us more money and offers us conditions to maximize our welfare, but only as long as we are not the direct and only cause of people's lack of healthcare opportunities. As Daniel Brudney points out in his recent article about civic friendship, there is a real difficulty or even impossibility, of knowing the exact interdependence between individuals.⁷ Despite this inconvenient, political philosophers try to establish the rules and justification regarding the relations between people.

Political attitude, as Brudney puts it, consist of two connected objects: our fellow citizens and our basic political institutions. This research is concerned with both these dimensions. Firstly, when I speak about duties, obligations and responsibilities, I have in mind mostly the relation between people and what they owe to one another. I consider them to be connected with political

⁵ I chose to address the problem of brain drain of healthcare professionals in connection with their country of both birth and education and not just one dimension alone, because I consider the arguments related to both camps taken alone lack power to provide strong justification for duty or obligation in health care. First, if we only speak of duties towards our country, without education involved, we cannot find sufficient reasons for a duty of the healthcare personnel. Maybe we can find duties of all citizens towards each other based on communitarian aspects, but these duties concern every citizen or member of community, in case they are recognized. Some may argue, and the general opinion is that citizens of a certain country can study in other countries on their own expenses or on scholarships of foreign governments, without any obligation to the country of birth regarding their education. Secondly, if we speak only of the country of education without considering the problem of citizenship, solidarity or fraternity with our peers, we ignore the connection we have as a nation and the Rawlsian argument of duties from collaboration.

⁶ Rawls' thesis is that since the society is a system of cooperation, and we all cooperate, everyone has to take advantage from this cooperation.

⁷ Daniel Brudney, "Two Types of Civic Friendship," *Ethics Theory Moral Practice* 16, no. 4 (2013) :730.

attitudes like self-esteem, respect or trust. Secondly, I take account of political institutions mostly when discussing the Rawlsian theory and its criticism. My opinion is that these two dimensions are interconnected, and basic institutions should be flexible to people's continuing changing values. Basic institutions should be the reasonable pillars of stability when individuals are moving away from the path of fairness, but I believe we also need something to rely on when we acknowledge the interconnections between people. Imperfect duty seems a good candidate for the former demand.

In the first chapters I will try to offer the necessary theoretical support, to set the context and to design the theoretical framework but most of all, to provide arguments for my choices. The last part is dedicated to offer possible solutions to the problems generated by the brain drain of healthcare professional.

I will use both realistic and idealistic theoretical approach, analyzing the existing problems connected with the brain drain of healthcare professionals and then try to find the most legitimate moral justifications for policies that could better cope with both healthcare professionals' right to free movement and also with the citizens' right to health.

Moreover, when construing a theory of justice in healthcare we have to include as much liberties as possible if we want to find solutions to the brain drain problem. One of the steps will be to show the importance of the healthcare system and the impact of brain drain of healthcare professionals. I argue that we can and should preserve liberties when creating just healthcare in order to respect as much as we can from individual autonomy. By respecting these values and applying prioritarian principles under a cosmopolitan framework there will be more benefits for all citizens-patients or healthcare professionals and we could prevent greater amount of harm.

The answers to this thesis questions are important not only to shape policy regarding the relation between individuals and state but even at an international level, between states, especially regarding immigration. But the most important asset of this investigation would be the clarification of the moral problems that emerge from the brain drain of healthcare personnel. Maybe this clarification could give us an idea on how the domestic and international policies could be shaped, so that the rights of every person are fully respected.

To sum up, the main idea of this research is how liberty and equality can be balanced when advancing the problem of healthcare professionals' brain drain. The first chapter, *Liberty and Equality in Healthcare*, starts with a description and clarification of the sense in which I believe

equality and liberty should be used when applied to the healthcare sector. Moreover, I will point out the main aspects which emerge when connecting liberty and equality with the healthcare sector, and how they are balanced when we try to build a theory of just distribution in healthcare. Realizing how distribution in healthcare works and should work gives us a better clarification of how liberties and equalities are to be embraced in the healthcare sector and what are the main arguments for refuting or accepting principles designed on these values.

Furthermore, to see how the balance between liberties and equalities should be set, we need to figure out if there are any special duties or rights that could change the terms of the game. The aim of the chapter *The Right to Health?* is to determine if healthcare professionals have some sort of duty towards the citizens from their country of birth and education. In order to do this, I will investigate the existence of the right to health, which would be a powerful binder for some to argue for the existence of a positive duty for healthcare, and some of the main bearers of it could be the healthcare professionals. I argue that we cannot realistically speak of a right to health as being feasible in today's world and even if a weaker right to health care is adopted, attaching positive duties to healthcare professionals in order to fulfill it, cannot be morally justified. Moreover, switching the focus from duties to obligations is a possible solution, but in case of duties, the only acceptable duties toward others are negative duties.

We also have to keep in mind that the argumentation of this research is made under the framework of social contract. The chapter *Connecting Social Contract and Health Care* presents and clarifies the main aspects of social contract, firstly by introducing the historical part and afterwards the theories of John Rawls and his opponent, Robert Nozick, which represent the main framework of my thesis. After a thoroughly clarification of their perception of social contract, together with the critical assessment, I will proceed and clarify how Norman Daniels and Tristram Engelhardt have succeeded to connect Rawls' and Nozick's theories to health care.

I will argue that social contract and cooperation, are not enough to keep HP in the country of origin and conclude that beside the social contract and justice for institutions, we should also think at the level of justice between individuals, or what we owe to each other in terms of duties.

This is made clear in the part called *Ethical Concerns and Possible Solutions Regarding the Brain Drain of Healthcare Professionals*, where I also try to offer some possible solutions to the problem of healthcare professionals in response to the underlined ethical concerns. In addition, I intend to clarify in a certain matter if we can justify some restrictions on immigration of skilled

medical personnel and how developing states should work in providing special incentives for healthcare specialists in order to keep them in the country.

The conclusion will emphasize the elements of originality presented in this research but it will also draw attention to the most important limitations and present some ideas for further investigation.

CAP. I Reconciling Equality and Liberty in Health Care

Introduction

For years now, we are facing a major issue regarding the healthcare system. World population, but especially Europe, is aging and this causes a continuous grow in need for health care. The healthcare system has to cope with the continuous changing needs people encounter over time.

In this chapter, I will not try to make a definite statement about equality's and liberty's role in society and individuals' life. Instead, I will try to depict what is the best way to balance equalities and liberties when talking about the brain drain of healthcare professionals. The discussion does not try to depict the entire conceptual conflict between the value of equality and the value of liberty, but rather to indicate how these values can be reconciled in health care.

I believe liberty and equality can be reconciled by finding a balance especially in the field of healthcare, where if we are guided by liberty or equality alone, there will result more harm than accepting a balanced position.⁸ To underline this view, Menzel states: "Understanding better the moral ingredients of liberty and equitable distribution as well as the complexity of how liberty and equality actually intersect in a healthcare system opens the door to seeing the possibility of significant reconciliation."⁹

Moreover, I will try to find what moral aspects we have to consider when we talk about distribution of health care resources, in order to give a pertinent justification for it. This is a relevant matter in respect to the brain drain of healthcare professionals, because not only that they could be treated as resources but they also have the crucial role in health care distribution. Doctors have the role to help patients fight against illnesses and they also have a crucial role in distributing other health resources, such as medicines, organs, care etc. Nurses and midwives have the role of caring, they are auxiliary help in surgeries of all types and support patients throughout their healing process.

⁸ See also Ronald Dworkin's idea "the priority of liberty is secured, not at the expense of equality, but in its name." Ronald Dworkin, *Sovereign virtue* (Cambridge, Mass: Harvard University Press, 2000), 133.

⁹ Paul T. Menzel, "How Compatible Are Liberty and Equality in Structuring a Health Care System?" *Journal of Medicine and Philosophy* 28, no. 3 (2003): 282.

Distribution of resources is a common problem not only for philosophers but also for public policy makers or economists. If there had not been a scarcity of health resources, the problem of distribution would not have been so important. There are also some inequalities in distributing health care resources and Daniels divides them into three categories¹⁰:

1. Those that result from domestic injustice in distributing the socially controllable factors determining population health and its distribution;
2. Those that result from international inequalities in other conditions that affect health;
3. Those that result from international practices – institutions, rule-making bodies, treaties – that harm the health of some countries.

There are some major arguments for reducing inequalities in health care. One of the reasons is that inequalities are unfair when poor health is the consequence of maldistribution of social determinants of health, e.g. equal opportunities in education. Also, inequalities affect everyone and can be avoided if they are the result of policy making. Lastly, we can intervene to reduce health inequalities, because this intervention is not only moral, but also cost effective.¹¹ On a more general basis, elimination of inequalities may be demanded because of humanitarian reasons in order to relieve suffering and deprivation. Actions to diminish inequalities may be required when it comes to problems of status, domination, procedural fairness or equal benefits.¹² Even if science is more advanced than 100 years ago and technological developments are continuously increasing, people still suffer from deadly diseases. On top of that, medical professionals are not in sufficient number to cover every community that needs their help, especially when we have in mind poor communities. There are inequalities in distribution of health care that are considered unfair because they create inequalities between people that can affect our dignity as human beings. We want to avoid pain, sufferance, harm to others and aiming for a better world. Health is a stringent factor in this equation, and because resources are limited we need not only a reliable cost-effective distribution of health care resources but also a fair one in terms of justice.

¹⁰ Norman Daniels, *Just Health: Meeting Health Needs Fairly* (New York: Cambridge University Press, 2007), 341.

¹¹ Alistair Woodward and Ichiro Kawachi, “Why reduce health inequalities?” *Journal of Epidemiology Community Health* 54, no. 12 (2000): 923-929.

¹² For this classification see Thomas Scanlon, “When Does Equality Matter?” conference paper (2004)16-17 http://politicalscience.stanford.edu/sites/default/files/workshop-materials/pt_scanlon.pdf (accessed March 10, 2013).

There are some important ways in which we can think of distributing health care resources when taking account of the moral aspects of our lives. I will go through the major ones, adopting some of those principles and arguing against others.

1.1. Setting the framework: Equality and Liberty in Healthcare

There are many ways in which equality can be seen. We can speak about equality of condition or equality of status, social equality, democratic equality or economic equality. All these can be perceived as strongly interconnected but at the same time independent. The ideal of equality as well as the ideal of liberty have to be justified in order to commit to one or both of them. It is not difficult to justify their importance, it is rather more difficult to find a balance or to choose between those two ideals when it comes to their applications in the real world.

When I speak of the right to welfare that we have to assess for all citizens, no matter if they are patients or healthcare professionals, I will interpret it as negative right, on left-libertarian grounds, as: “a right to the absence of forcible interference by others when: (1) the agent is taking resources possessed by others, (2) it is not possible for the agent to satisfy her basic needs without non-consensually taking resources from others, and (3) the persons from whom the resources are taken do not need them to satisfy their basic needs....It does not require others to take any action (e.g. to give the agent some resources). It only requires that others refrain from interference with the agent’s taking of the needed resources....Finally, the right to welfare is enforceable. Thus, the right to welfare is an enforceable negative right to a certain kind of positive liberty.”¹³

I consider negative liberty more desirable than substantive equality, because of what the world would look like if we adopt the latter- worse, I believe, than if we adopt the former- In addition, people detest barriers and coercion. Too many limits would be destructive for the human spirit. If

¹³ Peter Vallentyne, “Equal Negative Liberty and Welfare Rights”, *International Journal of Applied Philosophy* 25, no. 2 (2011): 237-241. In the same article, Vallentyne distinguishes, as libertarians do, between negative and positive liberty: “The right is to *negative liberty* (as opposed to positive liberty) in that interferences from nature (e.g., natural congenital disabilities or lack of external resources imposed by nature) do not count as restrictions of one’s liberty. Moreover, the right to negative liberty is a *negative right* in that it does not require others to take any positive action (e.g., to protect one’s negative liberty). It can be satisfied by inaction. Finally, the right is *enforceable* in that those who infringe the rights of others lose some of their rights and those whose rights are infringed gain certain liberties to use force against infringers to protect their rights.”

I had to choose, I would consider liberty together with formal equality better than substantive equality. This is because substantive equality alone leaves little room for liberty rights and what they mostly stand for: individuality, autonomy. People are not robots, they need to have the freedom to fulfill their individualism, to act free and to acknowledge their responsibilities.

There is indeed a real difficulty to prioritize one of those two: equality or liberties. But we do not need to do that, because we need both dimensions, so instead of separating, philosophers endure a hard work trying to reconcile them. So, instead of thinking at equality as absolute equality or as an equality which weakens or exterminates liberties, as most libertarian do, I will adopt a softer version where equalities and liberties must go hand in hand in order to comply with justice. Authors like Rawls tried to combine the value of equality with liberties, making this the first principle in lexical order, and on the second place put equality of opportunities, followed by distribution of advantages for the worse-off. If we separate the two dimensions, equality and liberty, by thinking of them individually, we might come to the conclusion that we cannot have liberty without the value of equality. The problem becomes more complex when the value of equality is used to create egalitarian theories that undermine liberties.

So, when we speak of liberty, we may have various definitions in mind, but for this research I make use of negative rights to liberty (e.g. the right to free movement of healthcare professionals and patients) and use the term as Robert Nozick sees it as side-constraints.

When it comes to prioritizing liberties or equality, the choices are made more on beliefs or opinions and arguments, but both sides have enough arguments to win a battle, depending on which convictions prevail on a certain society. Let us take for example Sweden and USA. Sweden has a social system based on equal opportunity and positive equality. On the other, USA still struggles with their medical system. People there are more inclined to protect liberties with the risk of sacrificing equal opportunities for all citizens. The uninsured will not get medical services in case of a disease, unless they pay the procedures. But the uninsured are preponderantly the ones that do not have sufficient income and even though the costs of monthly medical insurance are not as high as separately paying from your own pocket, there are a lot of people that do not afford it. But it seems there is a slightly increase in number of people with health assurance in USA. According to United States' Census Bureau, there were 50 million uninsured in 2010, 16.3 percent of people living in USA. Apparently this number decreased in 2011 to 48.6 million people and 15.7 percent. The percentage of people with health insurance

increased in 2011 to 84.3 percent and 260.2 million, up from 83.7 percent and 256.6 million in 2010.¹⁴

According to Euro Found, in Sweden, the most recent problem is how to manage the choice-based care and to cut the waiting lists. One possible solution for this is the liberalization of markets, a step that has beginning to develop not only in Sweden but in the whole world.¹⁵

So, in order to provide equal opportunity to people, we can observe that liberties are not only important but vital. These two dimensions go hand in hand, have to trade off, because one without other creates discrepancies that are unacceptable for our modern society. The challenge is of course for many authors, to argue for a solution that include principle that make this world better and more fair, taking into account both liberties and egalitarian principles. Thinkers like Rawls have argued for the priority of liberties, including the equality value but not extended to a theory of equality of resources or equality of outcomes as other egalitarian authors did.¹⁶ Nozick on the other hand, is committed to respect the right to life, liberty and property, without making use of patterned distributions that can interfere with liberties.¹⁷

I agree with Milton Friedman's opinion from *Free to Choose* that equality of opportunity is an important aspect of liberty but I go further and say that liberties are an important aspect of equality of opportunity. If we only admit the first part of the enunciation, then liberties prevail and like most libertarian or liberal scholars we will have to put liberties on the first place. On the other hand, if we accept that equality of opportunities overcomes liberties, then we will have to surpass liberties every time there is a choice to be made.

The problem is how we make a fair choice if we put both liberties and egalitarian principles of distribution on the same level, if we do not lexically order them. Authors like Amartya Sen and Martha Nussbaum thought a list of capabilities could solve the problem and enhance the human flourishing. But this solution tends to prioritize the equality of opportunity, and the idea is more obvious if we think that the capability approach was Amartya' Sen answer to the question that gives the name of the article *Equality of What?*¹⁸

¹⁴ Census Bureau <http://www.census.gov/hhes/www/hlthins/data/incpovhlth/2011/highlights.html> (accessed January 12, 2013).

¹⁵ Eurofound, <http://www.eurofound.europa.eu/eiro/studies/tn1008022s/se1008029q.htm>, (accessed January 20, 2013)

¹⁶ See John Rawls, *A Theory of Justice*, (Cambridge: Harvard University Press, (revised edition), 1999 (2001)).

¹⁷ See Robert Nozick, *Anarchy, State and Utopia*, (New York: Basic Books, 1974).

¹⁸ Amartya Sen , "Equality of What?" in *Choice, Welfare and Measurement* by Amartya Sen (Oxford: Blackwell, 1982), 54-67.

Liberal thinkers of all sorts, regardless the type of equality they embrace, believe that equality of opportunity is fundamental. But as we have earlier agreed, there are discrepancies when it comes to the level or type of equality they accept. For example, affirmative action is not accepted by libertarians whilst egalitarian liberals do. One side argues that we do not need affirmative action and the latter argues that we do need it. When it comes to affirmative action, egalitarians argue that the ones who will benefit most are the ones somehow excluded by the actual system. This is the case of women in politics or high rated jobs or positions, people with disabilities, people of other races than white (mostly in case of USA), minorities like Roma people etc. On the contrary, the other category that does not agree affirmative action argue that more people will be discriminated by accepting it, especially the endowed ones, and talent and hardworking will not be put on top of the list.

Menzel points out, stereotypical conflicts between liberty and equality in health care system have their limits. He argues that semi-libertarians should embrace universal coverage of health care and that egalitarians should not regard different levels of access to health care for different people with different incomes as unacceptable from the point of view of justice.¹⁹ The philosopher believes that the principle of Equal Opportunity for Welfare (EOW), also exposed by Richard Arneson, reduces the tension between equality and liberty. Menzel believes that there are five essential principles which allow us to do this, and are attached to Equal Opportunity for Welfare principle. These other principles are: Just Sharing Between Well and Ill, Anti-Free-Riding Principle (AFRP) which implies two secondary and substantive principles- Presumed Prior Consent, and Personal Integrity.

The Anti- Free-Riding Principle (AFRP) is stated as follows: *“A person should pay for any costs she imposes on others through voluntary action that she initiates without their informed consent, and a person should be required to pay her share of a collective enterprise that produces benefits from which she cannot be excluded, unless she would actually prefer to lose all of the benefits of the enterprise rather than pay her fair share of its costs.”*

As we can see, the principle implies two situations; firstly, when people impose costs on others they should be responsible for it by paying and secondly, people should pay for the unintended

¹⁹ Paul T. Menzel, “How Compatible Are Liberty and Equality in Structuring a Health Care System?” *Journal of Medicine and Philosophy* 28, no. 3 (2003): 282.

benefits they receive when living under a certain social scheme.²⁰ When we apply this to the health care framework, we see that there are people who pay their dues and sometimes there are people who pay more than they benefit from and people who do not pay as much as they benefit. We can observe this if we take the example of a patient who has to take an expensive treatment for his disease, more expensive than he will be ever able to repay by his whole contributions to the medical system, and a patient who has got only some influenza almost all his life, and possible that this is all he will suffer from in terms of disease.

Another principle is The Principle of Just Sharing Between Well and Ill: “*The financial burdens of medical misfortunes ought to be shared equally by well and ill alike unless individuals can be reasonably expected to control those misfortunes by their own choices.*”(his emphasis)²¹ We also have the principle called The Principle of Personal Integrity which states that “*People ought to be held to the implications of their beliefs, values, and preferences as they confront both later events and other dimensions of their current lives.*”²² The last principle is the “*Principle of Presumed Prior Consent: A person’s prior consent to welfare limiting or liberty restricting policies or actions may be presumed by others both to the extent that it is impossible, not feasible, or prohibitively costly to have solicited the person’s actual consent and to the extent that others can reasonably accurately judge what the person’s prior preferences would have been*”²³

Liberties are also accepted or consented by all parties, the problem resides again in deciding the kind of liberties we should embrace. If we are to prioritize liberties, this does not necessarily mean that we permit greater liberties that we would have if we chose to prioritize equality of opportunity. We could only choose to value it more when it comes to decide what is just. On the other hand, one could argue that prioritizing liberties or equality of opportunities implicitly offers a greater importance and value to the prioritized one. Indeed, this could easily happen if we did not treat both equality of opportunity and liberties as interdependent and balanced.

But how can we keep this balance between them? A possible answer, as I previously stated, is to try to use equality of opportunity and liberties inseparable, trying to find a solution that interferes as little as possible with both of those principles. The just solution or the best one will be the one

²⁰ Paul T. Menzel, *op. cit.*, p. 290.

²¹ *Idem*, p. 296.

²² *Idem*, p. 299.

²³ *Idem*, p. 300.

that least interferes or breaks the principles of equality of opportunity and liberties, taken together at a specific time. But what if we have the restrictions on liberties but not on equality of opportunity or viceversa? If a certain action interferes with the principle of equal opportunity but not with the liberties, what should we do then? The answer could be that when we analyze an action to be just or unjust by considering these two principles, we should consider them only interconnected, without separating one from another.

1.2. Liberty and Health Care

The state concerned about liberty is a state where we cannot have coercion from others on arbitrary grounds: “The state in which a man is not subject to coercion by the arbitrary will of another or others is often also distinguished as “individual” or “personal” freedom”.²⁴

As Nozick, Hayek adopts the idea of negative liberty where the only constraint can be imposed by law. The latter considers that being a free person depends on “whether he can expect to shape his course of action in accordance with his present intentions or whether somebody else has power so to manipulate the conditions as to make him act according to that person’s will rather than his own.”²⁵ So the choice a person has should be his true will and intentions, without any exterior manipulation.

In *On Liberty*, Mill defines liberty as: The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.²⁶ Mill’s Principle of Liberty or Harm Prevention Principle states that “The sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”²⁷

Huei Chun Su thinks that we could interpret Mill’s Liberty principle in a positive way, contrary to how most scholars see it. He argues that if we take the weaker people from a society, Mill’s

²⁴ See F. A. Hayek, *The Constitution of Liberty* (London: Routledge & Kegan Paul, 1960).

²⁵ Hayek, *op. cit.*, p. 13.

²⁶ John Stuart Mill, “On Liberty,” in *Collected Works*(vol. XVIII), edited by J. M. Robson (Canada: University of Toronto Press, 1965), 226.

²⁷ J. S .Mill, *op. cit.* p. 223.

principle could be seen as protecting their positive liberties by limiting the most powerful people's liberty and protect the life and body integrity of the former ones.²⁸ I also agree that sometimes we have to protect the weak not to be crushed by the powerful, because the excess of power on one part could interfere with the principle of liberty that Mill and the aforementioned philosophers talk about.

As Mill, correctly, I believe, notices: "The perfection both of social arrangements and of practical morality would be, to secure to all persons complete independence and freedom of action, subject to no restriction but that of not doing injury to others."²⁹

Furthermore, most scholars believe there should be a precondition for liberty. People who starve would rather accept food and slavery than liberty. Some might argue that you can be free and starving or rich and prisoner of society without the possibility to exercise your freedom. But as Mill mentions, "after the primary necessities of food and raiment, freedom is the first and strongest want of human nature"³⁰ we should have the basic needs fulfilled first, and after that we can have liberty. This idea might sustain arguments for having an obligation to provide health care to people in need because only this way the value of liberty and their freedom could be protected. If freedom per se is protected, then health care professionals are free to move and exercise their skills whenever they want.

Richard Arneson comes to grips with Nozick in that it accepts his idea stating that egalitarians should accept that horizontal equity may appeal to forced labor. He concludes that liberal egalitarians should accept the tension between their doctrine and the liberal commitment to free labor and give priority to egalitarian principles and not to liberal principles as Rawls does.³¹

We have two kinds of natural resources: our human capacities and natural nonhuman resources. Classical liberals believe that freedom has to do mostly with the ownership of our capacities. If we acquire nonhuman resources, there has to be fair transactions between people who correctly gained their share of resources, and the right to rent your capacities. As Kolm observes, people

²⁸ Huei Chun Su, "Is Social Justice for or Against Liberty? The Philosophical Foundations of Mill and Hayek's Theory of Liberty," *Review of Austrian Economics* 22, no. 4 (2009): 411.

²⁹ John Stuart Mill, "Principles of political economy: with some of their applications to social philosophy," in *Collected Works* (vol. II, III), edited by J. M. Robson (Canada: University of Toronto Press, 1965), 208-209.

³⁰ John Stuart Mill, "The Subjection of Women," in *Collected Works* (vol. XXI), edited by J. M. Robson (Canada: University of Toronto Press, 1984), 336.

³¹ Richard Arneson, "Property Rights in Persons," *Social Philosophy and Policy* 9, no. 1 (January 1992): 204.

have capacities that are seen as assets. The rights to these assets imply the right to destroy the asset, the right to use the asset and the benefits from its use, the right to benefit the spontaneous effect of the asset.³² A person's right to her capacity can be owned by her or by another person called external right in her capacity, but freedom require limitations on the latter, the only acceptable being the right to rent your capacities.³³ Applying this idea to the main topic of this thesis, a doctor or any other healthcare professional can rent his capacities for a period of time, but when he stops considering the agreement suitable for him, he must have the possibility to readjust the contract or close it. Kolm also believes, unlike Nozick or other right libertarians, that social freedom does not imply fully self-ownership, but allows the idea of social redistribution of income on social aspects.³⁴

An important question for libertarian thinkers is if the libertarian conception seen as the negative right to non-interference is compatible with egalitarian distribution. While Narveson defends the idea of a minimal state, Sterba believes not only that liberty is compatible with equality, but he makes a stronger statement- that liberty requires equality. Contrary to right libertarians, Sterba considers egalitarian redistribution has a lot to do with the right to non-interference. He believes that coercive redistribution does not create collision between the interests of poor people and the liberty of the rich, but it is rather an internal conflict of negative liberty per se, because the liberty of the poor is also in stake: "the liberty of the rich not to be interfered with in using their surplus resources for luxury purposes, and the liberty of the poor not to be interfered with in taking from the rich what they require to meet their basic needs".³⁵ This implies not only that rich people have to be protected against interference but also poor people have to be left alone when taking from the rich.³⁶ As a response to this conflict, Sterba depicts a principle which seems to favor the poor: "people are not morally required to do what they lack the power to do or what would involve so great a sacrifice or restriction that it is unreasonable to ask them, in cases of

³² Serge-Christophe Kolm, "Liberty and Distribution: Macrojustice From Social Freedom," *Social Choice and Welfare* 22, no. 1 (2004): 120.

³³ *Ibidem*.

³⁴ Serge-Christophe Kolm, *op. cit.*, pp. 113-145.

³⁵ Ian Narveson and James P. Sterba, *Are Liberty and Equality Compatible?* (Cambridge: Cambridge University Press, 2010), 117.

³⁶ Niels Holtung, "Book Review- Ian Narveson and James Sterba's *Are Liberty and Equality Compatible?*" *Mind* 121, (2012): 1107-1108.

severe conflict of interest, unreasonable to require them to abide by.”³⁷ Moreover, he believes that rich people should recognize every person’s right to basic welfare and considers using necessary resources important for global and inter-generational purpose.³⁸ Holtung notices that Sterba’s position is more one that meets the principle of sufficiency rather than egalitarian.³⁹ Narveson argues that the only way to interfere in one’s liberty is when trying to stop him to interfere with the exercise of liberty of someone else (excluding the ones who act under unshared libertarian principles like killing or stealing etc.⁴⁰ In addition, the principle of liberty is the only principle able to help reaching unanimous agreement and interest from people.⁴¹ On the other side, Sterba believes that the social contract should integrate not only our selfish interests but also the altruistic ones, in Sterba’s words: “a nonarbitrary compromise between self-interested and altruistic reasons”.⁴²

Philip Pettit describes a conception of freedom which distinguishes itself from freedom as non-interference and freedom as self-determination or autonomy. In Pettit’s view, an agent dominates another agent if he has the capacity of arbitrary interfering (not subject to suitable control) in the actions and choices of the other agent. But what if there is reciprocity? Can we call this domination anymore? According to Pettit, there are two types of arbitrary interference, the one from the state and from private individual or private collective agents. The state interference is arbitrary when it does not ensure the common interest of citizens. In the other case, the individual or private collective agents are arbitrarily interfering when they have the possibility to willingly act against an individual interest and opinions of another person. Someone is free if he is not dominated by either one of these two type of agents.⁴³ He believes structural dominance is bad in itself, even if there is a low level of interference or even if in the dominated person’s eye the dominance is inexistent. It may be considered this way because of the manipulative or

³⁷ Jan Narveson and James P. Sterba, *Are Liberty and Equality Compatible?* (Cambridge: Cambridge University Press, 2010), 15.

³⁸ Ian Narveson and James P. Sterba, *idem*, p. 109, p. 87.

³⁹ Niels Holtung, *op. cit.* pp. 1107-1108.

⁴⁰ Ian Narveson and James P. Sterba, *op. cit.*, p. 170.

⁴¹ *Idem*, p. 206.

⁴² *Idem*, p. 101.

⁴³ See Philip Pettit, “The domination complaint,” in *Nomos 46: Political Exclusion and Domination*, edited by Melissa Williams and Stephen Macedo, (New York: New York University Press, 2005), 92-94 and Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1999), 52-58.

seduction of the dominant person, private collective or state. Let us take the example of a spiritual leader who seizes from the naivety and weakness of some people, monopolizing their thought and believes and guiding their actions in order to achieve his aim. Even if the followers do not feel coerced, they may have been charmed by the spiritual leader's action of manipulation. Pettit's answer to the problem is to obey the rule of law and policies which increase the power of bargaining of poor situated people. Moreover, he pleads for very well designed democratic institutions which are able to balance the state's power and foster citizens who are able to contest public decision in an easier way.

For libertarians, liberty rights are the only fundamental rights and are at the same time negative rights. As Narveson observes, libertarian rights cannot be positive rights because positive rights force people to do something, to help others for example, and liberty or freedom presuppose non-coercive actions.⁴⁴ He makes a statement about the libertarian ideals, identifying himself with libertarianism. Private property and the negative right to liberty are the essential aspects that can be recognized in the works of most famous libertarians: "What we libertarians think is that private property, with all its "inequalities," is, if properly acquired, perfectly all right, and is so because it is a natural outcome of a principle of general liberty – more specifically, a principle proclaiming that everyone has the general right to liberty, which amounts to a right against aggression from others, initiated against the agent and his activities."⁴⁵

He argues that none of the natural resources or initial holdings, such as talent for example are responsible or accountable for the inequality in our world. In order to accentuate that we should not see the natural resources as an "unfair initial distribution" as Cohen does, Narveson gives the example of Bill Gates and Oprah Winfrey who achieve their status in a fair way, using their skills, personalities, together with the public's demand to what they have to offer.⁴⁶ He also believes Cohen addresses an incorrect question regarding the compatibility between liberty and equality. We can bring together liberty and equality, but the more important issue here is, in Narveson's opinion, if liberty and compelled equality can live under the same roof.⁴⁷

⁴⁴ Ian Narveson, "Libertarianism vs. Marxism: Reflections On G. A. Cohen's Self-Ownership, Freedom and Equality," *The Journal of Ethics* 2, no. 1 (1998): 10.

⁴⁵ *Idem*, p. 3.

⁴⁶ Jan Narveson, *idem*, p. 16.

⁴⁷ *Idem*, p. 3.

The libertarian philosopher proposes a model of consensual behavior which states: “where actions affect others, we should do what is good for some (normally including oneself, at a minimum) while refraining from inflicting evil on any others.”⁴⁸ He concludes that only by following this rule, people with diverse interests and abilities may collaborate for general advantage.⁴⁹ If we follow this libertarian principle and apply it to the brain drain problem, we may notice that its implications are that HP can freely move on the earth and to each country they want, and can treat illnesses as long as by doing this they do not intentionally harm others. They cannot be expected to sacrifice themselves in the name of others, in the name of the community, whichever is that community: the one they are born and educated or the one they choose to live in and use their skills. It requires accepting our individuality as the primary guidance and act according to it and surpassing the desires of others, of the community.

States tend to adopt policies regarding health that comply either to the more libertarian view that emphasizes individual liberties, e.g. USA, or an egalitarian one, that gives priority to equality of opportunity for people in need, e.g. Europe where social rights have equal importance as civil and political rights. But in the recent years, even European governments tend to adopt neo liberal ideas that cope with the social and economic dimensions, by increasing the role of the economic market and reducing government’s employments in the healthcare sector. Devices like co-payment, private assurance, incentives for healthcare professionals or other type of market oriented actions have been rising through waves of reforms.⁵⁰

When he speaks about self-ownership, the left-libertarian Otsuka suggests that we can understand Locke’s political thinking to be more egalitarian than authors from the right-libertarian wing like Nozick.⁵¹ He argues, against Nozick and Cohen, that “the supposed conflict between libertarian self-ownership and equality is largely an illusion” and that “a nearly complete reconciliation of the two can in principle be achieved through a properly egalitarian understanding of the Lockean principle of justice in acquisition”⁵²

⁴⁸ *Idem*, p. 26.

⁴⁹ *Idem*, p. 26.

⁵⁰ See Danielle da Costa Leite Borges, “European Systems and the Internal Market: Reshaping Ideology?” *Health Care Analysis* 19, no. 4 (2011): 365-387.

⁵¹ Michael Otsuka, *Libertarianism Without Inequality* (Oxford University Press, Oxford, 2003), 2.

⁵² M. Otsuka, *idem*, p. 6.

Unlike Nozick who argues that we have to preserve self-ownership, Cohen argues that we have to renounce to self-ownership and give room for the egalitarian principle of distributive justice. Michael Otsuka on the other hand, sees this conflict between self-ownership and equality as an illusion and envisages reconciliation between those two by reinterpreting the Lockean principle of justice in acquisition in a more egalitarian way.⁵³ As Otsuka correctly observes, egalitarians do not agree on such extensive right to ownership as libertarians do. He also disagrees that libertarians are totally committed to what he calls a full right of self-ownership which he defines as full “if and only if that person possesses, to the greatest extent and stringency compatible with the same possession by others, the aforementioned rights ‘to decide what would become of himself and what he would do, and...to reap the benefits of what he did’.”⁵⁴ As Otsuka mentions in a footnote, he develops the last part of his definition having in mind Cohen’s understanding of fully self-ownership which he understands as being morally legitimate only if every individual also has such right.⁵⁵

Otsuka’s understanding of the right to self-ownership encompasses two rights: “(1) A very stringent right of control over and use of one’s mind and body that bars others from intentionally using one as a means by forcing one to sacrifice life, limb, or labor, where such force operates by means of incursions or threats of incursions upon one’s mind and body (including assault and battery and forcible arrest, detention, and imprisonment).

(2) A very stringent right to all of the income that one can gain from one’s mind and body (including one’s labor) either on one’s own or through unregulated and untaxed voluntary exchanges with other individuals.”

Otsuka gives the following example of a farmer who is coerced to give half of his harvest to orphans. The philosopher believes that in case the farmer purchased the land for farming on the condition she will give the half to the needy, it would not be wrong for the state to coerce her to give the portion away. This force would not violate or infringe on the farmer’s property rights, but it would be a justifiable manner of enforcing contractual obligation between the parties.⁵⁶ From this perspective it might seem that MP do not have the right to undermine the contract they

⁵³ *Idem*, p. 11. See also Nozick ASU chapters 7 and 8; G.A. Cohen, *Self-Ownership, Freedom and Equality* (Cambridge, Cambridge University Press, 1995), 15, 105.

⁵⁴ M. Otsuka, *idem*, p. 12.

⁵⁵ Cohen, *Self-Ownership, Freedom and Equality* (Cambridge, Cambridge University Press, 1995) p. 213.

⁵⁶ Michael Otsuka, *Libertarianism Without Inequality* (Oxford University Press, Oxford, 2003), p. 21.

signed, because as long as they signed that contract their right to property of their own body, self-ownership, is not violated.

Furthermore, libertarians such as Nozick are not drawn by the idea of diminishing liberties because of needs. He criticizes Bernard Williams' idea⁵⁷ of considering need the main basis to provide health care rights by stating that if this is the case, we can also state to be a necessary truth that "The proper ground of the distribution of barbering care is barbering need". He further asks why should healthcare professionals respond to need and not to incentives like who pays more for the health care service, the highest bidder as he puts it or other criteria.⁵⁸

As Jonathan Wolff⁵⁹ observes, Nozick provides an excellent observation when he writes that egalitarians tend to consider people as consumers rather than producers, like all the resources are in a social recipient and the role of the government is to distribute them. In this sense, I believe we have to see health care not just as a big social pot, but we also need to see the efforts and the work behind every result and health service. The health care providers are not just objects that expect to be used, they are in part producers of this important good which is health care.

I.2.1. Rawls on Liberty

Even though I have discussed Rawls' theory in a different chapter, when discussing the idea of the healthcare professionals' brain drain through the social contract framework, I will develop here one of Rawls' ideas about the priority of liberty versus the second principle of equal opportunities. Not only will this step clarify John Rawls' arguments, but it will also help advance my own arguments.

Rawls distinguishes between liberty and the worth of liberty, where "liberty is represented by the complete system of the liberties of equal citizenship, while the worth of liberty to persons and groups depends upon their capacity to advance their ends within the framework the system defines. Freedom as equal liberty is the same for all;" But Rawls also says that "the worth of

⁵⁷ Bernard Williams considers that need is the currency that should be applied in case of health care, and for him this is a necessary truth. (Bernard Williams, "The Idea of Equality," in *Philosophy, Politics and Society*, 2nd series, edited by P. Laslett and W.G. Runciman (Oxford: Blackwell, 1962), 121-122.

⁵⁸ Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Basil Blackwell, 1974), 233-234.

⁵⁹ Jonathan Wolff, "Review Article: Equality: The Recent History of an Idea," *Journal of Moral Philosophy* 4, no. 1(2007): 126-127.

liberty is not the same for everyone.” There are people that have greater capacity to achieve their goals, bigger wealth and authority.⁶⁰

There are also ways in which the worth of liberty can be undermined. Rawls believes that “The inability to take advantage of one’s rights and opportunities as a result of poverty and ignorance, and a lack of means generally” are some of the most important issues that can interfere with the worth of liberty.⁶¹

When addressing the idea of basic liberty, Rawls refers to liberty of conscience and freedom of thought, liberty to own private property, freedom of speech and freedom of assembly and not to be held against one’s will “freedom of thought and liberty of conscience, freedom of the person and the civil liberties, ought not to be sacrificed to political liberty, to the freedom to participate equally in political affairs.”⁶²

As we can observe, in a democratic society, these liberties must be equally available for all people. Since the first principle of equal liberty is prior to the second principle of equal opportunity, liberty can be restricted only for the sake of liberty itself, not for the sake of equality. Rawls is very clear about the priority of liberty, leaving on the second place the second principle which deals more with egalitarian concerns: “By the priority of liberty I mean the precedence of the principle of equal liberty over the second principle of justice. The two principles are in lexical order, and therefore the claims of liberty are to be satisfied first. Until this is achieved no other principle comes into play.”⁶³ He further explains that “the precedence of liberty means that liberty can be restricted only for the sake of liberty itself. There are two sort of cases. The basic liberties may either be less extensive though still equal, or they may be unequal. If liberty is less extensive, the representative citizen must find this a gain for his freedom on balance; and if liberty is unequal, the freedom of those with the lesser liberty must be better secured.”⁶⁴

⁶⁰ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, (revised edition), 1999 (2001)), 179.

⁶¹ Rawls, *idem*, p. 179.

⁶² Rawls, *idem*, p. 177.

⁶³ Rawls, *TJ*, second ed. p. 214.

⁶⁴ Rawls, 2nd ed. *TJ*, pp. 214-215. *See also* the Priority rule: “The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty. There are two cases: (a) a less extensive liberty must strengthen the total system of liberty shared by all, and (b) a less than equal liberty must be acceptable to those citizens with lesser liberty.” p. 220.

Are we conserving equal liberty by encouraging the HP's leaving or by permitting it? Letting aside political equal liberty, one argument would be that when there are not enough HP, the public system suffers a shortage and people that do not have enough resources to treat themselves are left aside. Even if in theory they could turn to private care, this can be too expensive for some. People that have enough resources, can turn to the public system of healthcare from their country or other countries.

Rawls believes that if a certain level of wealth is maintained, people will not exchange their freedoms for economic advantages.⁶⁵ Even if at the ideal theoretic level people in the original position favor liberties against equality of opportunity or economic equality, in practice and in the real world there are people who would sacrifice their liberties for equal economic advantages or opportunities, and people who would do otherwise. This could be the case even if Rawls maintains his position that his theory is valid only when there are not insufficient resources in the sense of severe scarcity. We cannot apply his theory of justice in very poor countries, and if we were to live under total abundance, his theory would not be needed. Maybe in the end it depends on letting people choose what they want and hope it is good for them, leaving them the option to make a choice. Having this freedom implies having people's governed by the principle of liberty. Being able to choose to leave your liberties (or some of them) in order to have equal resources for example, demands the existence and guidance of a principle of liberty. We also have to keep in mind Rawls' idea that people who cooperate willingly, giving their liberty in exchange for benefits from mutual cooperation, have the right to a fair share:

“...when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission. We are not to gain from the cooperative labors of others without doing our fair share.”⁶⁶

According to Rawls, there are certain specific features of obligations which distinguish them from other moral requirements. Firstly, they emerge as voluntarily acts, tacit or clearly expressed, such as agreements and promises. Secondly, when it comes to analyzing the content

⁶⁵ Rawls, TJ (1971), 542.

⁶⁶ Rawls, TJ 2nd ed. (2001), 96.

of obligation, it is specified by what institutions require. The final distinction is that specific individuals that cooperate together to maintain agreements are the beneficiaries of obligations.⁶⁷

Victoria Costa argues that Rawls sees freedom as non-domination rather than freedom as non-interference as others might think.⁶⁸ In order to speak of liberty not as a mere ideal but in more feasible terms, Rawls gives us a list of liberties necessary for a democratic society.⁶⁹ He speaks of liberty of conscience and freedom of thought which includes the freedom to practice any particular religion, or no religion, to pursue our moral beliefs and set of values. Freedom of thought helps us express our opinion and beliefs in various domains of life like art, history, literature etc.

Another important aspect of a free society is the freedom of association which allows us to associate with whomever we want in order to live in a peaceful society. Citizens also have equal political liberties that include “the right to vote and to hold office, freedom of political speech, freedom of assembly, freedom to criticize the government, and to form and join political parties.”⁷⁰

Besides social liberties, which promote liberty inside the community and are more concerned with the relations between people, rights and liberties that protect the integrity and freedom of the person are more individualistic and prohibit coercion, harm or enslavement. They also include the right to private property and the freedom to choose whatever occupation, work and employment we desire. Lastly, people have rights and liberties covered by the rule of law which include among others the right to a fair trial and freedom from arbitrary arrest.⁷¹

Rawls tries to avoid the label of negative and positive freedom, arguing that we can give an account for what liberty is, by answering what is an agent and what activities is he free to practice or refrain from and what is a restriction of freedom.⁷² He discusses liberty in connection with institutions as he does with justice as fairness and defines liberty as “a certain structure of institutions, a certain system of public rules defining rights and duties” where “persons are at liberty to do something when their doing it or not doing it is protected from interference by other

⁶⁷ Rawls, TJ (2001), 97.

⁶⁸ M. Victoria Costa, “Rawls on Liberty and Domination,” *Res Publica* 15, no. 4 (2009): 397-413.

⁶⁹ Rawls, *Political Liberalism*, revised ed. (New York: Columbia University Press, 1996), 291.

⁷⁰ Rawls, PL (1996), 291.

⁷¹ Rawls, PL (1996), 291.

⁷² John Rawls, TJ (2001), 177.

persons.”⁷³ For Rawls, a just society is a free society, one that encourages citizens to follow their own personal conceptions of good as long they respect and obey the rules emerged from fairly design institutions guided by justice as fairness.

The worth of liberty comes from the person’s capacity to do the best with her abilities and resources but this may be restricted in case of poor people, people with disabilities or people who lack their full body or mind capacity, overwhelmed by illness. This is one reason why we should help them, to protect their liberties, and Rawls seems to agree with this as long as he considers equal liberties of first importance. The problem is that there are more liberties at stake, and fulfilling one may end in overlooking other or violating it. It seems that there is need to prioritize and rank liberties in order to be capable to choose which one is more important to meet when acting. Otherwise, if two or more liberties come into conflict, then we will not be able to act if we want to obey all the rules and principles. And in real world, we need policies that enable us to act. To do all these, there is need for justification, and this is our role, the philosophers to do it. So, I believe equalizing the worth of basic liberties, it may work but only in theory but not in practice. Rawls also agrees that the value of liberty for different people is different, since people themselves are different in desires, choices, etc. In this respect, Rex Martin observes that “there will be significant differences among persons in the real social world, it is no part of his program to achieve equality in fact for the actual value of liberties to various persons”.⁷⁴

When he first states the theory of justice, Rawls argues that the first principle of equal liberties could have unequal worth, but later reshapes it and guarantees a basic set of equal liberties with equal worth, made up of political liberties: “liberty and the worth of liberty are distinguished as follows: liberty is represented by the complete system of the liberties of equal citizenship, while the worth of liberty to persons and groups depends upon their capacity to advance their ends within the framework the system defines. Freedom as equal liberty is the same for all; the question of compensating for a less than equal liberty does not arise. But the worth of liberty is not the same for everyone.”⁷⁵

This reshaping of the first principle comes as a response to Norman Daniels’ historical criticism, who considers that the first principle in its original form permits important inequalities in the

⁷³ *Ibidem*.

⁷⁴ Rex Martin, *Rawls and Rights* (Lawrence: University Press of Kansas, 1985), 55.

⁷⁵ Rawls, *TJ* (2001), 179.

political process, wealthier citizens having more advantage on influencing the political process than the poor ones.⁷⁶ Daniels notices that when we want to apply egalitarian reforms in society, we usually think at three dimensions: first, we are trying “to make people equally happy or *satisfied*, or at least to guarantee them *equal opportunity for such welfare*”, secondly, other scholars argue for “assuring people greater equality in *resources* needed to pursue their ends.” In the third place, Daniels mentions Amartya Sen’s capabilities approach which rejects both equality of welfare and equality of resources.⁷⁷

1.3. Equality

One of the aims of this section is to clarify what the concept of equality refers to and see in what sense people use the term. Well known questions like “What is equality?”, “What is the scope of equality?” and some of the issues raised by the currency debate will help to distinguish between different forms of equality. All these are to be analyzed in connection with some relevant problems of the healthcare system. This is a step further in shaping the framework of this research. But first, I will clarify the main aspects regarding equity and health.

1.3.1. General Consideration on Equity and Health

There is a common way to think at health equity: horizontally and vertically. Horizontal equity requires the like treatment for like individuals, while vertical equity demands unlike treatment for unlike individuals, according to the differences between them. If we add ‘merit’ into equation, horizontal equity demands that patient with equal merit should have equal treatment, and vertical equity requires us to favor those with more merit than others.⁷⁸ But what makes a patient meritorious of better treatment than others? One possible answer is that patients who have a healthy lifestyle, who do not smoke, drink or do drugs can be good candidates for such type. The problem is that all these factors may be conditioned by other dimensions like income or

⁷⁶ Norman Daniels, “Equal Liberty and Unequal Worth of Liberty,” in Reading Rawls: Critical studies on Rawls’ *A Theory of Justice*, edited by Norman Daniels (Stanford: Stanford University Press, 1975), 255.

⁷⁷ Daniels, Equality of What: Welfare, Resources, or Capabilities? Norman Daniels Source: Philosophy and Phenomenological Research, Vol. 50, Supplement (Autumn, 1990), pp. 273-296., pp. 273-274.

⁷⁸ Anthony J. Culyer, “Equity- Some Theory and Its Policy Implications,” Journal of Medical Ethics 27, no. 4 (2001): 275–283.

education. Poor education and low level of income are ingredients that can make a person to have an unhealthy lifestyle. If this is the case, should we consider a healthy lifestyle or other aspect connected to personal merit when we talk about health care distribution? In case of health care, I believe that personal merit does not need to be taken into consideration as much as in other dimensions like income. My position regarding this issue is that health care has an intrinsic aspect that income lacks.

People may easier accept inequalities in income than inequalities in health care distribution. Health care distribution can be a more sensitive subject, and one of the reasons is that you cannot trade health as you trade money. Money has only instrumental value while health has intrinsic value and instrumental value. Being healthy is an important ingredient that leads to creating opportunities. We can find this idea as well as the idea of health as special good incorporated in Sudhir Anand's writings where he argues that "we should be more averse to, or less tolerant of, inequalities in health than inequalities in income. The reasons involve the status of health as special good, which has both intrinsic and instrumental values. Health is regarded to be critical because it directly affects a person's wellbeing and is a prerequisite to her functioning as an agent. Inequalities in health are thus closely tied to inequalities in the most basic freedoms and opportunities that people can enjoy." He considers that health has a special status because: "(a) it is directly constitutive of a person's wellbeing, and (b) it enables a person to function as an agent- that is, to pursue the various goals and projects in life that she has reason to value."⁷⁹

Furthermore, we are born with certain degree of health, with genetic predispositions and with the certainty that sometime we will be deserted by all health. We can own resources all our life, we can trade them and leave them to our descendants, but we cannot do the same with our health. The only positive think we can do, is to take care of it and guide it so that we can have the chance to a flourishing life. But if we are not able to do that from various reasons like lack of ambition, consciousness, education or resources, we should not be blamable. I think that we have to do the best we can, but at the same time be aware that people are different and respect their decision regarding their way of life.

What affects us most in every domain of life is the absence of health. If we are born with an incurable disease, every effort we do, cannot cure us, whereas if we are born poor, it is possible

⁷⁹ See S. Anand, "The Concern for Equity in Health," *Journal of Epidemiological Community Health* 56, (2002):485-487.

to become rich, to cure poverty. In the latter case, individual effort is an important aspect and inequalities in income may be an incentive for individuals, while in the first case individual effort has no use. Even though the patient's effort is in vain, it is possible that other people's effort can cure her in the future, or maybe her effort will be important with the new scientific discoveries. For example, if a person is born with the worst form of diabetes, she cannot be cured, no matter how well she eats, how many sports she practices or how stress free her life is. She can be helped by providing her free insulin but unless researchers do not discover a definitive cure, she will live all her life like this. But it is possible that by the common or individual effort of scientists, such cure will be found. Also, health lacks flexibility in the sense that we cannot take health from one person and give it to other, like we can do with other resources such as income, but we can take health resources and redistribute them and this will have a decisive influence on health.

We have to be aware that there are not enough resources for every patient. In hospitals, doctors are put in the position to choose between which patient to cure first, which patient is more suitable to receive a liver or kidney. Less resources there are, more these practices become common at all levels, from simple vaccines to medicines or organ transplants. We need to figure out the way we could prioritize these resources in a morally acceptable way.

1.3.1.1. What Kind of Good is Health Care?

The question that I raise tries to identify what sort of good is health care. Is health care a positional or another type of good? All type of resources from education to health can have positional aspects, because health or education can have a major impact on opportunities to achieve something that we desire or can influence our status. Like all resources, healthcare is limited. Inequalities are seen between poor people who have more limited access than rich people. The latter have the opportunity to access both public and private clinics, while the poor do not have the substantive opportunity to access both of them and sometimes none, because they do not have insurance. What is left for them is the emergency room.

But there are also cases when resources have the same importance. Even if we may say that rich people have better access to healthcare, a poor person who receives an anti-AIDS vaccine has the same benefits as a rich person. The main point is that there are certain goods that are valuable per se and add the same value for a person, regardless of her status.

There are also goods that are very scarce and valuable, like human organs. If a poor person needs an organ for transplantation, this will be as valuable for her as it will be for a rich person. We have to deal with the value of life that is priceless for every person. It is true though, that the advantaged ones could have access to the black market of organs to buy what they need. There are also cases when the status of a person, being a well-known actor for example, influences the way distribution of scarce resources is made. Of course, giving a kidney to a person only because she is famous or owns money, is very discriminatory towards others, and this act diminishes the value of human life. But this should not be the case for the public or private system of healthcare that must imply fairness and work under the legal framework.

The level of health and education can be increased without resorting to leveling down the better-off. When it comes to education, development or science for example, the most important thing is to have the capacity to make new discoveries to improve our lives, to have the intelligence to deal with questions and puzzles of all kinds, to pierce the unknown. The whole level of knowledge that can lead to better flourishing for all has the meaningful importance. Moreover, the social status is not important when it comes to the great bundle of knowledge. Not only the better off will benefit of the knowledge, but even the worst off. No matter the degree of benefits, people's efforts are to be enjoyed by all of us, or at least this is the way it should be. Same way, people are to benefit from healthy people. A healthy person or a person who tries to make the best of her health status has to be admired. In an Aristotelian way of approaching things, becoming the best that you can be both spiritually and physically, is a virtue. And people have to have examples to follow. Furthermore, healthy people can use their capacities at maximum and will avoid hurting or making others sick. Of course, this does not exclude the fact that the not so fortunate cannot have the same opportunities. We should all have the best, but as resources are scarce, some of us can only afford a lower level of welfare. This does not mean though that we should be envious on what others have and take that away from them, only to acquire the same level of living.

Of course, there is the possibility that a part of the population does not reach the benefits of new discoveries, improvement in various fields like education and health or other types of goods. This demands a better fluidity of knowledge and resources, but must not necessarily imply leveling down the well-off.

Brighton and Swift identify three types of positional goods.⁸⁰ First, there are the *manifestly competitive* goods, where competition is the main criteria of classification. A suitable example is education, where people have to compete with others in society in order to have the chance to achieve desirable goals.

Another type of positional goods which is called *latently competitive* includes health. What separates this type of good from the former one is the visibility they have when it comes to each individual's chance to achieve better opportunities. In this sense, the manifestly competitive have a better visibility than the latently competitive goods, but both are important and relative to the other people in the society. Other things being equal, a person who is better educated and healthier has better chances of acquiring a certain job if her opponent is worst educated and unhealthy. On the other hand, the best candidate for a certain job is the one that fulfills the greatest amount of demands, no matter the education. But as I have already mentioned earlier, if two people are qualified for the same job and equally fulfill all the requirements, education and health can be a decisive criteria when accepting one of them on the job. Also, nowadays there are jobs that are advertised for people with disabilities, so a person can be less healthy than another and still have more opportunities for a specific job. This is related to affirmative action and positive discrimination and I will not go further on the subject in this part of the work. Another idea is that there are people that want to educate themselves for their personal development and take education as aim not as a means to achieve a certain position in society. This means that when it comes to positional goods, we have to consider only education as means, because this aspect influences the opportunities. Personal choices to educate oneself could influence the opportunities but in an indirect way.

The third type of goods is the *latently positional*. These are goods whose unequal distribution creates a disadvantage. For example, wealth is a latently positional good because if some have more, they can put the ones that have less in an inferior position when it comes to self-respect, opportunities, inclusion etc. This aspect can be true on one part. But I also believe that the welfare of the worse-off could be diminished if we try to level down the well-off. If, for example, entrepreneurship spirit is reduced by the leveling down, then there will be a great lack

⁸⁰ Harry Brighouse and Adam Swift, "Equality, Priority and Positional Goods," *Ethics* 116, (2006): 478. For the classification see also Christopher Freiman, "Priority and Position," *Philosophical Studies* 44, (Jan. 2013): 1-20.

of jobs from the private sector. The worse-off could suffer and worsen their position because the reduced number of jobs. But we must decide what is more important: comparing ourselves to others or improving our welfare without looking inside our neighbor's yard. If we can achieve self-respect only by comparing us with the others, and if this dimension of self-respect is vital to us and more important than the economic well-being, then we may say that leveling down the better-off is a possible solution for our misery.

On the other hand, if we do not draw our self-respect from comparison to our peers, and maybe we rely upon ourselves and our self-development in time, we do not have any reason for leveling down, except maybe envy, which cannot be (at least nowadays) a powerful moral fundament. Furthermore, the difficulty arises when we realize that we have to consider others in every step of our life. And without relating ourselves to others, we cannot even speak of morality. But we also have to keep our individuality, so maybe self-respect it is a one's self duty. This is a very idealistic opinion, far from actual reality. Recent empirical research agrees with the statement that ranking is very important for us.⁸¹ Moreover, most scholars believe that we have the tendency to compare ourselves with others who live in the same circumstances or similar groups. Rawls, for example, considers that: "We tend to compare our circumstances with others in the same or in a similar group as ourselves, or in positions that we regard as relevant to our aspirations."⁸² Germans do not compare themselves to Mexicans, they rather tend to make a comparison with citizens that are closer to their status, or have similar circumstances of living such as the Swiss. They will not assess their status by comparing their life to the one of people from East Africa.

If we see justice in terms of luck and responsibility, then an important feature comes along. Instead of seeing health only establishing equality of opportunity, justice takes account of how people are to respond to health care and health. Responsibilities and preferences are taken into account and also people's ability to conserve their health.

Is health care a fungible good? Can we replace it with other types of goods? There are individuals who do not consider health the ultimate good. There are people that sell their organs with the purpose of buying a new car or maybe to travel around the world. Moreover, we can also say about prostitutes or escorts that they are selling their body for money, to achieve other

⁸¹ Brown G. and others, "Does Wage Rank Affect Employees' Well-Being?" *Industrial Relations*, 47, no. 3 (2008): 355-389.

⁸² Rawls, TJ (1999), 470.

type of resources, like shelter, food, clothes and sometimes more luxury or club goods like an expensive car or a modern flat. This category of people is more susceptible to others when it comes to endanger their health, but the risk is not as important for them as the outcome of their action.

Some philosophers, and I take here Susan Hurley's account, consider that health generates wealth out of resources more than lack of health: a healthy person can better enjoy a resource than an unhealthy one.⁸³ A person bursting with health, will enjoy watching a movie or going on a trip more than an unhealthy person (assuming that being in the same health condition, they would have the same benefit from watching the film). But I believe that this is more a problem of taste and prioritizing our needs and desires. It can be the case when a disabled person would better enjoy a trip with her friends even if she is in a wheelchair. At the same time, a healthy and fit person could have a bad time with her friends in the same trip. It depends on each person's needs, desires or personality. It is true though, that if we think at the same person, she will enjoy better the trip being healthy than being sick, because she is able to better fulfill her capabilities. We should also have in mind the fact that sometimes, an unhealthy person is able to appreciate life more than a healthy person does, maybe because she is more aware what taking things for granted means. People with different health conditions tend to consider themselves less bad than other people do.⁸⁴ Even if at first a disability may reduce a person's capacity to produce further welfare or flourish, in time the impact of it will be reduced.⁸⁵ Another point that she argues is that people may have reasons for treating health special when trying to answer how we should distribute and not what should we distribute.⁸⁶

If utilitarians consider that healthy people can extract more welfare from resources than unhealthy ones, then they will foster the former to the detriment of the latter. From this

⁸³ See Susan Hurley, "The 'What' and the 'How' of Distributive Justice and Health," in *Egalitarianism: New Essays on the Nature and Value of Equality*, edited by Nils Holtug, Kasper Lippert-Rasmussen (Oxford: Oxford University Press, 2007), 304-334.

⁸⁴ See Christopher Murray, "Rethinking DALY's," in *The Global Burden of Disease*, edited by Christopher J. L. Murray and Alan D. Lopez (Cambridge: Harvard University Press, 1996), 1-98.

⁸⁵ Brock, Daniel, "Quality of Life Measures in Health Care and Medical Ethics," in *The Quality of Life*, edited by Martha C. Nussbaum and Amartya Sen (Oxford: Clarendon Press, 1993), 125-126. See also Susan Hurley, *idem*.

⁸⁶ See Susan Hurley, *idem*.

perspective, the consequences are very unfortunate for the unhealthy ones.⁸⁷ Not many people approve this view, we now tend to incline towards prioritarianism where helping the needy is the top concern or on the other side, we have the liberal view where individualism and personal liberty are best conserved.

1.3.1.2. The Role of Medical Personnel in the Distribution of Health Care

Doctors, nurses and midwives, play an important role in the distribution of health care. Not only are they resources of health care but doctors also decide what treatment is most suitable for the patient or what resources to allocate considering the framework established by the healthcare system policy makers. As patients, we do not know exactly what treatment is best for us. The doctor usually informs us about the most appropriate treatments. Even if we are informed about all the treatments there exist, and their possible risks, it is very hard to choose one without proper counseling from medical staff.

Doctors need to cure patients with the idea in mind that medical resources will not be spent on unnecessary treatment or that patients get more than they need. They need to keep an objective eye on the resources, because no matter the rich a state is, spending more resources on patients than they actually need, it is morally wrong. Wasting medical resources is unjust because there are people who do not have access to minimal or basic health care, and struggle for surviving. So, doctors have to be guardians of medical resources, having in mind not only justice for the patients they treat, but for all patients. But if we are in the patient's shoes, when seeking help, no one believes that the help that she's asking could lead to waste of resources.

In conclusion, every patient has to be taken care of the best way possible, and at the same time, in the limits of what the healthcare system considers appropriate so that any waste of resources is avoided. There is a tension here, because doctors are caught between their duty to take care of their patient the best they can and the duty of keeping the use of resources to a certain level.

⁸⁷ See Amartya Sen , "Equality of What?" in Choice, Welfare and Measurement (Oxford, England: Blackwell, 1982).

I.3.2. Egalitarianism

Dennis McKerlie distinguishes between the teleological equality view and deontological equality view. Teleological equality view “says that inequality makes an outcome worse, and it tells us to aim at the best outcome”⁸⁸ Deontological equality view considers inequality it is not bad, but unfair and “treating people unequally count as treating them unfairly” also “we have a duty to treat people fairly and that some ways of bringing about inequality violate that duty.”⁸⁹ As McKerlie notices, philosophical egalitarians tend to propose very strong versions of egalitarianism, based either on content of the egalitarian principle where strong version promotes strict equality rather than elimination of extreme inequalities or either on the relation between egalitarian principle and other principle, where strict priority to equality is stronger than a view which sometimes allows other principles to be prior.⁹⁰

Elisabeth Anderson adopts relational egalitarianism which implies that equality should be seen in the relations between people, and in this sense it has a predominant social component where mutual respect altogether with self-respect is important in order to overcome hierarchy in society. She rejects the idea of luck egalitarians, that brute luck should be neutralized. In a nutshell, according to relational egalitarians, the relations between people are more important for an egalitarian society, than how to distribute a certain currency.⁹¹

One of the most important proponents of egalitarianism is James Tobin. He argues for ‘specific egalitarianism’ which he defines as “non-market egalitarian distributions of commodities essential to life and citizenship.”⁹² This conception underlines the idea that basic resources like health care should be distributed so that the result is to create as less inequality as possible. These resources should be distributed less unequally than people’s capacity to pay for them. In other words, no matter how much you want or you are able to pay for health, the public healthcare system should provide health care resources to everyone, no matter if the person is rich or poor. The author considers that as social human beings, we are more touched by deep inequalities in basic resources like food, shelter or health care than inequalities in things he considers

⁸⁸ Dennis McKerlie, “Equality,” *Ethics* 106, no. 2 (Jan., 1996): 275.

⁸⁹ *Ibidem*.

⁹⁰ McKerlie, *idem*, p. 278, note 5.

⁹¹ Jonathan Wolf, “Review Article: Equality: The Recent History of an Idea,” *Journal of Moral Philosophy* 4, no. 1 (2007): 13.

⁹² James Tobin, “On Limiting the Domain of Inequality,” *The Journal of Law and Economics* 13, no. 2 (1970): 263–277.

unnecessary such as luxuries or other things that a person has the possibility to live without. In Tobin's words: "...why we cannot arrange things so that certain central crucial commodities are distributed less unequally than is general income...The idea has great social appeal. The social conscience is more offended by severe inequality in nutrition and basic shelter, or access to medical care or legal assistance, than by inequality in automobiles, books, clothes, furniture, boats. Can we somehow remove the necessities of life and health from the prizes that serve as incentives for economic activity, and instead let people strive and compete for non-essential luxuries and amenities?"⁹³

Moreover, Tobin argues that a specific distribution of resources like education and medical care, will definitely help future generations to "improve the distribution of human capital and earning capacity".⁹⁴

We cannot distribute health, but we can distribute health care resources that promote health. In a strict egalitarian approach, we might ask ourselves if we should distribute all resources so that we achieve equal health among people or we should rather distribute the same amount of resources, no matter what each patient needs or the health outcome. One of the problems that comes with this way of thinking is that it is almost impossible to do a strict measurement on how healthy a person is. In our attempt to do this, we consider some parameters, such as the life style the patient has- for example if she practices sports, if she eats healthy-, the community she lives in, economic or political aspects of that society, the genetic inheritance.

The common sense may tell us that people who live an unhealthy life are using more frequent healthcare services than people who live a healthy life, because they are more predisposed to illnesses. If we tax more these people, then maybe we should overtax also the ones who live a risky life, like people who jump with the parachute or dive into the ocean for fun. On the other hand, people who go every day to work at the office and in the evenings go home and watch TV and then go to bed, are maybe more likely to use the healthcare system. One can argue that it is more unhealthy to sit all day long at the office, maybe have a stressful job and go home and watch TV, than having an active life, even if the latter is more dangerous according to others. If

⁹³ *Ibidem.*

⁹⁴ *Ibidem.*

we draw the line we can conclude that what it is seen as a 'normal' way of living could be as dangerous or maybe more dangerous than another lifestyle.

Here is another argument that can be raised against giving the same treatment opportunities to people who take drugs or other risky things on their own choice and not merely because of luck. The healthcare system is constructed such way that people representing similar cases are provided with the same opportunities for treatment. Patient X, a twenty years old female with lung cancer at the beginning stage is treated the same way as Y who is also a twenty years old female with lung cancer at the same stage. But if X smokes and the other one is a non-smoker, some may argue that when resources are scarce, the non-smoker should be given priority. Both X and Y have equal opportunities as lung cancer patients, but these opportunities change when X decides to act on her choice and start smoking, that way maybe forcing cancer to develop. It is possible though that cancer appeared without any influence from smoking. So it is not clear here is X suffers from bad brute luck or it is just the result of the risk he could have avoided.⁹⁵

There are two major ways to understand egalitarianism when taking the criteria of responsibility: The Responsibility View which states that "it is unjust for one to be worse off than others through no fault of one's own, and it is also unjust that one is equally well off as others while being comparably less responsible" and the Non-Responsibility View according to which "it is unjust for one to be worse off than others through no fault of one's own".⁹⁶ One who argues for the Responsibility View seems to say that people being equally well off is sometimes wrong as long as they are not equally responsible for their status, while an advocate of the second position will not think of this problem. When dealing with persons with addictions for example, proponents of the first view may argue that we should not give them the same treatment as we give to the ones with no addiction in case of same illness, e.g. lung cancer, this equality in treatment being unfair as long as the results are the same well-being. Once the patients are cured and are equally well-off, the proponents of the Responsibility View would consider this unfair because the patients with addiction did not act as responsible as the ones leading a healthy life. It is true that the person who has smoked for all her life and is treated for lung cancer the same way

⁹⁵ See G.A. Cohen's definition where he explains that a person "suffers from (bad) brute luck when his bad luck is not the result of a gamble or risk which he could have avoided," in "On the Currency of Egalitarian Justice," *Ethics*, 99, no. 4 (1989): 908.

⁹⁶ Shalomi Segall, "Why Egalitarians Should Not Care About Equality," *Ethical Theory and Moral Practice* 15, no. 4 (2012):507-519.

as a person who has had a healthy behaviour, can achieve equal well-being at the end of the treatment. Even if the person with addiction has taken some risks when smoking, she may have the same treatment as the person without any vices. The only difference between the Responsibility View and the Non-Responsibility view in this specific case is that the first view implies that patients with addictions should do something in order to equalize the level of responsibility the other patients have. If they enjoy smoking and do not want to quit, one of the methods would be to contribute more to the health system in order to receive the same health benefits.

Treatments have to be prescribed according to the illness one has, so we cannot give same resources to patients with different diseases. Instead, we can provide same resources for patients with same conditions, for example we can give insulin to patients with a certain type of diabetes. But even in this case, patients are prescribed different doses of insulin, according to their particular needs. So, we can distribute the same *type* of resource but the quantity has to do more with the particular characteristics of each patient. There are also diseases where we can distribute the same amount of resources of the same type, and here we can enumerate vaccines against hepatitis B, HPV, HIV etc. The main idea that I want to stress here is that there are various patients and illnesses, and each of them needs specific and personalized treatment. If a vaccine had been enough to treat all patients or if people from different communities had had the same curable illness, maybe treatments would not have been so costly. The reality shows that there are many diseases around the world, and for many of them we still have not found the cure. Beside the fact that these illnesses cause a lot of pain and sufferance, they bring enormous costs into the healthcare system.⁹⁷

Also, we have to be aware that not all health care that is supposed to be effective meets its purpose. There are cases when treatments are in vain, because the patient has no gain or when treatments produce less good than they claim. Another idea is that some health care services may not be so important for equity in health, such as first class food or luxury rooms in the hospitals,

⁹⁷ According to American Cancer Society in its study “The Global Economic Cost of Cancer” (2010), death and disability from colon, lung and breast cancer account for the largest economic costs on the global scale. The economic costs are around 1.5 percent of GDP, \$895 billion in 2008. Also, the economic tool for cancer is 20% higher than for heart disease, the second largest cause of economic loss. See <http://www.cancer.org/acs/groups/content/@internationalaffairs/documents/document/acspc-026203.pdf>

because these aspects do not make a big difference on the health status of a patient.⁹⁸ These elements may be important for the self-esteem of the patient. Being in a second class room that has all she needs, will not harm her health, if the important resources for her health are attributed correctly. For example, a patient with hepatitis A from a high class hospital room needs the same medical treatment as the patient from the modest hospital room. We have to make the distinction between medical treatment, the treatment that is intended to cure the specific disease and other resources provided by the healthcare system, like special food or accommodation, according to the type of insurance or resources each patient has.

Inequalities in health exist, but they are not necessarily unfair. People may be born with disabilities or become sick during their life, not because of their own fault, but because unfavorable circumstances or lack of luck. On the other hand, we have to be aware that we are humans, have finite lives and illness is a bad thing that is part of our existence. We almost never hear of a person that has never had a disease. Of course, people may be more or less lucky when it comes to what type of illness they have.

Strict equality demands that a person has the same amount of health as others in a specific group. But is it possible to achieve strict equality in health and how can we do that? Some argue that by reducing inequalities in health we become closer to the ideal of equality where people are as healthy as others. Alistair Woodward and Ichiro Kawachi argue that health inequities harm people, “some types of health inequalities have obvious spillover effects on the rest of society, for example, the spread of infectious diseases, the consequences of alcohol and drug misuse, or the occurrence of violence and crime.”⁹⁹ As Yukiko Asada argues, this view is utilitarian in the sense that some health inequalities affect people by preventing them from attaining the best health or general well-being they can have.¹⁰⁰ Unlike utilitarians, egalitarians are concerned how resources are distributed regardless of the overall well-being or level of health within prospected population. They are concerned in achieving the best equality possible and eliminate inequalities. In order to have a strong argument, it is important for egalitarians to acknowledge that health has a special status. If health has a special status, then it becomes easier to argue the necessity for

⁹⁸ See Anthony J. Culyer, “Equity- Some Theory and Its Policy Implications,” *Journal of Medical Ethics* 27, no. 4 (2001): 275–283.

⁹⁹ Alistair Woodward and Ichiro Kawachi, “Why Reduce Health Inequalities?” *Epidemiology Community Health* 54, no. 12 (2000): 923-929.

¹⁰⁰ Yukiko Asada, *Health Inequality: Morality and Measurement* (Toronto: University of Toronto Press Incorporated, 2007), 21.

equality in this area, at least for egalitarians. This is a presupposition accepted by Anthony J. Culyer who argues that we should seek strict equality of health outcome. This could be accomplished by reducing health inequalities without worsening the health of people in good health. As he argues:

“An equitable health care policy should seek to reduce the inequality in health (life expectations, self-reported morbidity, quality of life in terms of personal and social functioning) at every stage of the life-cycle. [...]Moreover, it is probably not ethical to seek greater quality of health by reducing the health of the already relatively healthy.”¹⁰¹

Strong egalitarianism also suffers from serious problems. The leveling- down objection suggests that it is a good thing to reduce the level of welfare of the better-off, as long as inequality decreases, even if this step does not benefit anyone.¹⁰² It is true though that leveling- down can have some benefits in the long term, in that it can reduce inequality, but the welfare of individuals could be detracted. If we apply the strong egalitarian perspective, people who are extremely poor are likely to become poorer, but this is not a problem as long as equality on all levels triumphs. Of course, this is an extreme idea and very mathematically considered, not applicable or embraced by the current way of thinking. Nowadays, we agree that the well-being and flourishing of all individuals is important per se and poor people are helped without causing a big disturbance on the welfare of the rich.

To avoid the leveling-down objection, scholars thought about conditional egalitarianism, which suggests that equality is valuable only together with some conditions. Such version of conditional egalitarianism is considered by Andrew Mason. He believes that: “When some benefit from equality, we should value it for its own sake even though its value is partly grounded in its benefiting some.”¹⁰³ Therefore, equality is important on itself but in order to be grounded it must benefit people. Without this condition, equality becomes only an ideal without any instrumental value.

But sometimes we should give credit to inequality, because there are cases when the worse-off can be made better-off only by increasing the level of it. Such circumstances can be encountered

¹⁰¹ Anthony J. Culyer, *op. cit.*, 275–283.

¹⁰² See Niels Holtung, “Egalitarianism and the Levelling-Down Objection,” *Analysis* 58, (1998): 166-174.

¹⁰³ Andrew Mason, “Egalitarianism and the Levelling Down Objection.” *Analysis* 61, no. 3 (2001): 248.

when the better-off increase their level of welfare. This way, both the rich ones and the poor ones benefit. Furthermore, the global welfare increases, so this theory is suitable for the utilitarians too. The problem that a strong egalitarian will see is that this strategy strongly inflicts on equality.

Another version of conditional egalitarianism is Paretian egalitarianism. This view is described in detail by Peter Vallentyne and Bertil Tungodden and it is concerned to achieve equality with an efficiency requirement. Moreover, a state of affairs should not be worse for some and better for others. In other words, to be compatible with the Paretian egalitarianism, a state of affairs must not worsen a position while benefit other. According to this view, any loss in the welfare of the advantaged people is justified as long it increases the welfare of the disadvantaged one and equality.¹⁰⁴

There is also the version of equality of outcome, which Ronald Dworkin considers to be undesirable. The philosopher asks what should an egalitarian equalize: welfare or resources?¹⁰⁵ Dworkin's answer is that egalitarians should equalize resources and not welfare. The main reason is that if we try to equalize welfare individuals would no longer be accountable for their preferences and the society will keep compensating them to equalize the welfare. Instead, equality of resources "offers no [similar] reason for correcting for the contingencies that determine how expensive or frustrating someone's preferences turn out to be...Under equality of resources, however, people decide what sorts of lives to pursue against a background of information about actual cost their choices impose on other people and hence on the total stock of resources that may fairly be used by them."¹⁰⁶

We have to keep in mind that resource egalitarians do not want people to have the same resources, but rather equalizing the level of utility and need of those resources for different individuals. A person from Alaska needs different resources than a person from California: a sledge is of no use in California where there is no snow, while in Alaska may be the main

¹⁰⁴ Bertil Tungodden and Peter Vallentyne, "On the Possibility of Paretian Egalitarianism," *Journal of the Philosophy of Science* 60, no 3 (2007): 521-555.

¹⁰⁵ Ronald Dworkin, "What is Equality? Part 2: Equality of Resources," *Philosophy and Public Affairs*, 10, no. 4, (Autumn, 1981): 283-345.

¹⁰⁶ Ronald Dworkin, "What is Equality? Part 2: Equality of Resources," *Philosophy and Public Affairs*, 10, no. 4, (Autumn, 1981): 283-345.

transportation device. Yet, it is hard to establish the most suitable way to achieve equality between different types of resources depending on necessity of people.

Furthermore, we can enjoy the same things, no matter how rich or poor we are, in the same manner, therefore the level of utility could be equal. Paul Weirich gives us an example, where two persons with different wealth status enjoy caviar at the same level: "...some Russian caviar is to be given either to a poor, hungry person or to a rich, well-fed caviar aficionado. And suppose that because the aficionado enjoys caviar immensely, the utility of receiving it is the same for him as for the poor person."¹⁰⁷ This example avoids the rule of diminishing marginal utility, although utilitarians such as R.M. Hare, have embrace it in order to promote policies that foster equality of resource distribution.¹⁰⁸

Dworkin is aware that we cannot have an ideal like strict resource egalitarianism applied to the practical world. He envisions that the solution rests in a theory of redistribution that imitates the outcomes of his auction example. The example imagines an equal auction between the members of a society, shipwreck survivors that are given equal bidding power and they bid until the equilibrium is reached. The objects of the bid are all abundant resources of the society. They also have to pass the envy test, where "No division of resources is an equal division if, once the division is complete, any immigrant would prefer someone else's bundle of resources to his own bundle."¹⁰⁹

Furthermore, Dworkin argues that if we accept people are meant to have approximately the same level of living or of health, an equality of outcomes, we should not take the criteria of personal preferences. People should take responsibility for their preferences, but only if those are chosen and wanted. For instance, if a person decides to spend her life in a dangerous way, smoking, drinking, taking drugs or climbing mountains we cannot consider these dimensions when we have to provide her the best or optimum conditions for health.

The author also makes a distinction between brute luck and option luck, where "Option luck is a matter of how deliberate and calculated gambles turn out - whether someone gains or loses through accepting an isolated risk he or she should have anticipated and might have declined.

¹⁰⁷ Paul Weirich, "Utility Tempered with Equality." *Noûs* 17, (1983): 431.

¹⁰⁸ Campbell Brown, "Priority or Sufficiency ...or Both?" *Economics and Philosophy* 21, no. 2, (October, 2005): 199-220 and R.M. Hare, "Justice and Equality," in *Justice and Economic Distribution*, edited by J. Arthur and W. Shaw (Englewood Cliffs, NJ: Prentice-Hall, 1978), 116-131.

¹⁰⁹ Ronald Dworkin, "What is Equality? Part 2: Equality of Resources," *Philosophy and Public Affairs* 10, no. 4, (1981): 285.

Brute luck is a matter of how risks fall out that are not in that sense deliberate gambles.”¹¹⁰ In case of brute bad luck, like being blind from birth or having Down Syndrome, people are eligible to receive injustice compensation, whereas it is not the case for bad option luck, where the bad luck comes from freely chosen actions. Dworkin’s idea is that people born with disabilities have a deficit of internal resources, where internal resources consist of natural endowments, positive genetic traits, health or talents. These innate features are called positive internal resources and are opposed to negative internal resources such as disabilities or people vulnerable to major health problems.¹¹¹

I agree Dworkin’s idea that we should put under the veil of justice the deficit of internal resources (which can include the partial or total absence of them), but I do not fully agree the second part, that we should not compensate people who are in a bad condition because of their own choice. The choice has to be made in full consent and being aware of the most important consequences. One may argue that if your choices had bad impact on you, we should not punish you further asking you compensation. We can take the example of a smoker, who becomes ill with lung cancer. Even if he had chosen to smoke being aware of the consequences, do we have to make him pay more for the healthcare system, for his disease? Is not his own sufferance enough? But this is not the problem here. Of course we do not want people to suffer, even if they were fully aware of the outcomes of their own actions. We want them to be responsible, but not necessarily by paying extra taxes. Paying for what they consume, like healthcare resources, it is a distinct matter. With this part I agree, but I do not agree that people have to pay extra only because their disease has much to do with their lifestyle and it is not a matter of brute luck. No matter their choices, people have to pay the same amount for the same services. Let us take for example two people with lung cancer, one a smoker and one a non-smoker that had a healthy way of living all his life. The treatment is the same for both, the resources they need are the same, so what do they have to pay differently?

It is hard to determine if a person’s choice implies total, partial or no responsibility or freedom. But on the other hand, we cannot eliminate responsibility on those grounds, because we do not have perfect knowledge to decide if a person is responsible or not for a certain action. We can

¹¹⁰ Dworkin, “What is Equality? Part 2: Equality of Resources,” (1981): 283-345.

¹¹¹ For this idea and a recent interpretation of Dworkin account on health care (on this specific point) *see* Yvonne Denier, *Efficiency, Justice, and Care: Philosophical Reflections on Scarcity in Health Care* (The Netherlands: Springer, 2007), 235.

make a decision even under the framework of incomplete knowledge or determinism. Here we can bring to the forefront Harry Frankfurt's distinction between first order desires and second order volitions, where a person is responsible only if she could have done otherwise after rational deliberations. That way, we can be accountable for our choices, even if determinism is true.¹¹²

Another idea worth mentioning is that we do not think the same when we are in a good position, for example when being healthy or when we get to the point where our choices have made us unable to continue living. For a better explanation of the above idea, let us envision the following. A person named John, started smoking while he was in high-school, persuaded by the environment. All his friends and colleagues had this habit, and he did not want to be perceived as an outsider. In time, smoking became a necessity for him and also a vice that lead to serious health complication. Even if he tried to quit smoking several times, his will has not been so powerful to conquer an almost whole life habit. His wife was in the same situation, but unlike John, she did not want to quit smoking, she accepted it like a part of her life. We can see in this example that when both John and his wife started smoking, the choice was not totally free or responsible, but it became like this after a while. Also, even if John wants to quit smoking and his wife does not, the repercussions on their health are serious and will cost a lot. I believe we should provide them healthcare just as we do with other people, because no choice can be said to be completely free or responsible, even if we know what is possible to happen in the future, the risks. Everyone is subjected to risk, no matter their living choices. The most suitable and just thing to do, would be to first compensate individuals with deficit of internal resources, with brute bad luck and then to pass to the ones with bad option luck. External health resources can alleviate pain or cure diseases, and when they cannot do it directly, we can offer other kind of compensation to the ones that need it. The priority remains the same as stated earlier, bad brute luck overcomes option bad luck. I must add though, that we need responsibility and I do not exclude personal responsibility for ones actions. Even if we should not hold individuals responsible by coercion, we should attribute responsibility to individuals in other ways, informing them regarding their possible choices and give them the opportunity to choose under a non-coercive framework where education and information prevail.

There is plenty of literature and there are many aspects of large and important interest on this subject, but for the purpose of sticking to the main topic of this work, I will not discuss it further.

¹¹² See Harry G. Frankfurt, "Freedom of the Will and the Concept of a Person," *The Journal of Philosophy* 68, no. 1 (1971): 5-20.

Now, let me give some reasons why I reject equalization of welfare, taking some ideas from Susan Hurley. Equalization of welfare supposedly implies that the worst-off would receive more resources than the well-off. There are people with disabilities or other illness that can have a better attitude and be happier than the well-off, regardless their lack of health. Since these people already have a great degree of welfare, equalization of welfare will ignore their disabilities or lack of health. But only because some people can be happier than others, *caeteris paribus*, does not mean that we should ignore disabilities or lack of health when applying justice. We should focus on the person's condition, no matter how she copes with it.¹¹³

It is almost impossible to achieve the same level of health for everyone, considering the genetic traits of every person and their style of living. Even if we could equalize the level of health or of living, all these require, on one hand, that people earn the same quantity of money for different jobs, because the social and economic level are influencing the level of health. Another solution would be to redistribute resources. On the other hand, if an equalization of health is possible, the time, money and effort will be spend more on people with disabilities or diseases, than on people who simply want to optimize their health. The threshold would be lower for people that are in good health, and it would be very difficult for them to acquire more health or disease prevention. In other words, it would be hard to level up the optimum state of health, and in time people will be incapable to optimize it.

Maybe in time, the new technologies will give us the opportunity to have the best health one might have, and not only to maintain an optimum level of health for a specific era, age or community. If there were such possibility in the future, if people were able to be healthy without any extra cost, then maybe the responsibility that Dworkin suggests as being necessary, would not be so important. This implies abundant and no limited resources to treat patients, which is impossible to achieve nowadays. On the contrary, responsibility is vital if taking care of one's health involves a lot of effort and costs from community, as it is today in most parts of the world. Liberty to choose and do whatever we want when it comes to our life and health comes attached with the same amount of responsibility. If not, liberty will be a pure ideal that cannot be introduced to people on a day to day basis.

¹¹³ See Susan Hurley, "The 'What' and the 'How' of Distributive Justice and Health," (2007): 304-334.

First important criticism for Dworkin's theory was from luck egalitarians, G.A. Cohen and Richard Arneson in 1989. Elisabeth Anderson distinguishes between luck egalitarians and relational egalitarians such as Rawls, Samuel Scheffler, Josh Cohen and herself. The two parties disagree about how equality is supposed to be conceived: "as an equal distribution of non-relational goods among individuals, or as a kind of social relation between persons- an equality of authority, status, or standing." Relational egalitarians, and I take the example of Rawls here, believe that when it comes to natural distribution of native endowments, we cannot talk of justice or injustice, but we can argue that "what is just and unjust is the way that institutions deal with these facts."¹¹⁴

Susan Hurley believes the neutralization of luck does not have to be a basis for egalitarianism. She makes a distinction between what is to be distributed- currency- and how we should distribute-pattern:

"Even when people are responsible for their own positions, it doesn't follow that they are responsible for the *relations* between their own positions and the positions of others. Judgments of responsibility seem prima-facie not to have the right form to specify a pattern of distribution across persons. Examples of relevant judgments are: I am not responsible for my musical gifts, but I am responsible for the wages I earn for my hard work as a psychiatric nurse. Such responsibility judgments are primarily about *relations between people and goods*: between individuals and the goods to which they are causally related, whether by choice or by factors that are a matter of luck...certain goods are up for redistribution to the extent they are a matter of luck for their possessors."¹¹⁵

So, according to luck egalitarianism, if me being a doctor and having the necessary skills to do it is a matter of luck, then my work should be redistributed, but if they are a matter of choice, then they do not need to be redistributed. It is impossible though to redistribute the skills or work without using the person. If we try to use any person without her consent we commit infringement into her private sphere and personal rights. Another difficulty is to measure how much luck and hard working there is in one's life, and how much do these elements give account for what one is.

Elisabeth Anderson categorizes Dworkin as being in an ambiguous position because of his "responsibility-catering" egalitarianism. Unlike "desert-catering" luck egalitarians such as G.A. Cohen, he permits unequal outcome from markets based on desert, as long as people depart from

¹¹⁴ See John Rawls, TJ (1999).

¹¹⁵ See Hurley, "Luck and Equality," Proceedings of the Aristotelian Society, Supplement Volume LXXV (2001): 51-72.

the same position and inequalities are a result of their choices.¹¹⁶ Luck egalitarians believe that they should neutralize brute luck, things that people are not responsible for. Cohen introduces the idea of “equal access to advantage”, a version of egalitarianism which includes welfare but is meant to be wider. He goes on and explains why he does not use the term *opportunity* instead of *access*: “Your opportunities are the same whether you are strong and clever or weak and stupid: if you are weak and stupid, you may not use them well- but that implies that you have them. But shortfalls on the side of personal capacity nevertheless engage egalitarian concern, and they do so because they detract from access to valuable things, even if they do not diminish the opportunity to get them.”¹¹⁷ This expression also states that the main distinction for an egalitarian is between choice and luck.¹¹⁸ This is a way for him to introduce choice and responsibility to egalitarianism and it comes as a reply for Dworkin’s distinction between preferences and resources, arguing that luck has to do with both preferences and resources.¹¹⁹ In Cohen’s view “...a large part of the fundamental egalitarian aim is to extinguish the influence of brute luck on distribution...Brute luck is an enemy of just equality, and, since effects of genuine choice contrast with brute luck, genuine choice excuses otherwise unacceptable inequalities.”¹²⁰

The philosopher replied that there are cases when arbitrary circumstances teach us to live certain way, and rejects Dworkin’s ideas that people should have full responsibility for their preferences: “I shall myself so criticize Dworkin’s equality of resources proposal, since I think that (among other things) it penalizes people who have tastes for which they cannot be held responsible but which, unluckily for them, cost a lot to satisfy”¹²¹

For example, a person who was born into an aristocratic family and develops expensive taste or preferences cannot be put on the same level with a beer consumer. In what way could we blame her for the tastes she embraces? Let us apply this to people and their interest in living a healthy life. If a person was raised in a poor environment where her parents were drug addict and she

¹¹⁶ Elisabeth Anderson, “The Fundamental Disagreement between Luck Egalitarians and Relational Egalitarians,” *Canadian Journal of Philosophy*, Supplementary Volume: Justice and Equality, no. 36 (2010): 1.

¹¹⁷ G.A Cohen, “On the Currency of Egalitarian Justice,” *Ethics* 99, no. 4 (1989): 917.

¹¹⁸ G.A Cohen, “On the Currency of Egalitarian Justice,” 907-908.

¹¹⁹ For further comments see Susan Hurley, “Luck and Equality,” (2001) and G.A Cohen, “On the Currency of Egalitarian Justice,” (1989).

¹²⁰ G.A Cohen, *idem*, p. 931.

¹²¹ *Ibidem*.

was taught to neglect her health or to be a drug addict, then how is she to blame? Some may argue that this person could change, despite what she was taught, that she must obey the rules of the society she lives in and she must embrace both moral and formal rules of it. But her family is a more powerful and influential environment, and maybe cannot be defeated by the desirable moral framework of society. Few people manage to change after these types of experiences.

Even if Dworkin argues that: “Equality of resources, however, offers no similar reason for correcting for the contingencies that determine how expensive or frustrating someone’s preferences turn out to be”¹²² and continues “Would it now be fair to treat as handicaps eccentric tastes, or tastes that are expensive or impossible to satisfy because of scarcity of some good that might have been common? We might compensate those who have tastes by supposing that everyone had an equal chance of being in that position and then establishing a hypothetical insurance market against that possibility.”¹²³ He also believes that a person should be hold responsible for her preferences only if she enjoys them. This may exclude addiction and compulsion, but not necessary. There are people who enjoy not only the object of the addiction but their status too. For example, there are people who do not want to quit drinking or smoking, even if they are offered the chance to do so without many efforts. On the other hand, there are individuals who do want to quit their bad habits, but their addiction is stronger than them. We can say about the latest category that they do not live with those preferences, like smoking or drinking, as the former ones surely do. Dworkin considers these types of tastes, handicaps not preferences: “For some people these unwanted tastes include tastes they have (perhaps unwittingly) themselves cultivated, such as a taste for a particular sport or for music of a sort difficult to obtain. They regret that they have these tastes, and believe they would be better off without them, but nevertheless find it painful to ignore them. These tastes are handicaps; though for other people they are rather an essential part of what gives value to their lives.”¹²⁴

As Alan Carter¹²⁵ observes, Cohen seems to embrace a pluralist egalitarian view when he argues that both resource deficiencies and welfare deficiencies are disadvantages which cover different subtypes: “poverty and physical weakness are very different kinds of resource limitation, and

¹²² What is Equality? Part 2: Equality of Resources.” *Philosophy and Public Affairs* 10, no. 4 (1981): p. 288.

¹²³ Dworkin, *idem*, p. 301.

¹²⁴ Ronald Dworkin, *idem*, p. 303.

¹²⁵ Alan Carter, “Value-Pluralist Egalitarianism,” *The Journal of Philosophy* 99, no. 11 (2002): 581.

despondency and failure to achieve aims are very different kinds of illfare. Whatever the boundaries and types of welfare may be, lack of pain is surely a form of it, and lack of disability, considered just as such, is not, *if* there is to be a contrast between equality of resources and equality of welfare.”¹²⁶ In order to point out what egalitarians might believe, Cohen gives the example of happy Tiny Tim, the disabled person who needs an expensive wheelchair. Even if Tim has a great quantity of welfare, egalitarians will not take this into consideration when distributed resources such as wheelchairs because they “do not think that wheelchair distribution should be controlled exclusively by the welfare opportunity requirements of those who need them”. In Cohen’s interpretation of egalitarianism, resources should be attributed to disabled people, no matter their degree of welfare, where compensation should be “for the disability *as such*, and not only, for its deleterious welfare effects.”¹²⁷ This can be applied if resources are not that limited, but as the scarcity of resources increases, we have to choose what to prioritize by taking account of other aspects. I believe that when it comes to prioritize between disabled people with low welfare and the ones with high welfare under the framework of scarce resources, other things being equal, we cannot embrace the former solution, compensating for disability as such, without taking into account other dimensions. We could give the chair to the worst-off person, and the outcome will consist in lower inequalities than the ones it would have been if we had chosen the other disabled person. If we take into account only the criteria of being disabled, then we can toss the coin, an equal fair procedure, and let the odds decide who will get the chair, no matter their welfare.

Unlike Cohen, Michael Otsuka does not believe that the aim of egalitarian justice is to compensate for unchosen differences in mental and bodily abilities, because, as he underlines “the claim to compensate for certain unchosen disabilities does not generalize to a claim to compensate for all unchosen differences in abilities as such.”¹²⁸ In order to strengthen his argument, Otsuka imagines the case of Deft Tim who is equally well off as anyone in terms of opportunity for welfare. In case anyone in society would prefer Deft Tim’s special deftness to any other ordinary deftness, Otsuka believes that Cohen would call for a transfer of resources

¹²⁶ Cohen, “On the Currency of Egalitarian Justice,” p. 921.

¹²⁷ Cohen, *idem*, p. 918.

¹²⁸ Michael Otsuka, *Libertarianism without inequality* (Oxford: Oxford University Press, Oxford, 2003), 27.

from Deft Tim to other ordinarily deft people, in order to compensate to their inequalities in deftness. The left libertarian believes that regardless of the differences in capacities between Deft Tim and the other people affected by deftness, there should not be any compensation because is “only when people’s lesser capacities fall short of the level of normal human functioning that a sound non-welfarist case can be made for compensating those whose capacities are lower than other’s.”¹²⁹

Let us now pass to another critique of equality of resources and equality of welfare - Richard Arneson’s, who argued that we should not equalize resources or welfare but there should rather be an equal opportunity for welfare. The philosopher rises the argument against equality of resources by envisioning the following example: “if Smith and Jones have similar tastes and abilities except that Smith has a severe physical handicap remediable with the help of expensive crutches, then if the two are accorded equal resources, Smith must spend the bulk of his resources on crutches whereas Jones can use his resource share to fulfill his aims to a far greater extent.”¹³⁰ Arneson acknowledges that people are born with different talents and under different circumstances, things that are relevant for their opportunities. Some may have a rich set of opportunities of no merit or choice while others have a very restrictive set of opportunities. What he considers unfair is “the disparity in the initial unearned opportunities that individuals face.”¹³¹ Years later, John E. Roemer tries a distinction between circumstances and effort, where the former are arbitrary and people should not be held responsible for, and the latter depends on each person’s capability and desire, so they are accountable for it.¹³² According to Roemer, “An equal-opportunity (EOp) policy is an intervention (e.g., the provision of resources by a state agency) that makes it the case that all those who expend the same degree of effort end up with the same outcome, regardless of their circumstances.”¹³³ This means that an equal-opportunity policy

¹²⁹ *Ibidem*.

¹³⁰ Richard J. Arneson, “Equality and Equal opportunity for Welfare,” *Philosophical Studies* 56, no. 1 (May, 1989): 77-93.

¹³¹ Richard J. Arneson, “Equality of Opportunity for Welfare Defended and Recanted,” *The Journal of Political Philosophy* 7, no. 4 (1999): 489.

¹³² See Roemer, J.E. “A Pragmatic Theory of Responsibility for the Egalitarian Planner,” *Philosophy & Public Affairs* 22, (1993): 146-166 and *Equality of opportunity*, (Harvard: Harvard University Press, 1998).

¹³³ Roemer, John E. "Equality of opportunity," *The New Palgrave Dictionary of Economics*. Second Edition. Eds. Steven N. Durlauf and Lawrence E. Blume. Palgrave Macmillan, 2008. *The New Palgrave Dictionary of Economics Online*. Palgrave Macmillan. 27 January 2013 <http://www.dictionaryofeconomics.com/article?id=pde2008_E000214> doi:10.1057/9780230226203

equalizes the circumstances framework so that people could have the same outcome when making the same efforts. Thus, effort must be the only relevant part when designing the outcome. Furthermore, equality of opportunity is achieved when all individuals that experience the same degree of effort, regardless their type, have the same chances of achieving their well-being.¹³⁴ And if we reach a level where we have equal opportunities for health, differences in health will be a matter of option luck not of brute luck.¹³⁵

Most of egalitarians embrace value pluralism, they want people to be able to make autonomous choices, to dispose of their liberties as they see fit, but as Alan Carter correctly notices “many would not want this to lead to great inequalities in either resource or welfare distribution.” And it is also very unlikely to achieve equality in all dimensions that egalitarians want to equalize, e.g. welfare or resources, without leaving other dimensions partially or totally unfulfilled.¹³⁶

1.4. Prioritarianism

Unconvinced by egalitarianism, Derek Parfit endorses prioritarianism. He explains the difference between prioritarianism and egalitarianism in that when it comes to prioritarianism “it is morally more important to benefit the people who are worse off. But this claim, by itself, does not define a different view, since it would be made by all Egalitarians. If we believe that we should aim for equality, we shall think it more important to benefit those who are worse off. Such benefits reduce inequality. If that is why we give such benefits priority, we do not hold the Priority View. On this view, as I define it here, we do *not* believe in equality. We give priority to the worse off, not because this will reduce inequality, but for other reasons. That is what makes this a distinctive view.”¹³⁷

It can be observed that Parfit introduces the idea that benefits have greater moral weight for those who are worse-off, without trying to equalize the outcomes.

¹³⁴ Dardanoni, Valentino and others, “How Demanding Should Equality of Opportunity Be, and How Much Have We Achieved?” in *Mobility and Inequality: Frontiers of Research from Sociology and Economics*, edited by S. Morgan and others (Palo Alto, CA: Stanford University Press, 2006), 59-82.

¹³⁵ Roemer, J.E, “A Pragmatic Theory of Responsibility for the Egalitarian Planner,” *Philosophy & Public Affairs* 22, no. 2 (1993): 146-166.

¹³⁶ Allan Carter, “Value-Pluralist Egalitarianism,” (2002): 599.

¹³⁷ Derek Parfit, “Equality or priority?” *The Lindley Lectures* (Kansas: The University of Kansas, 1995), 103.

The priority view is also antiutilitarian because prioritarians consider most important to allocate resources to the worst-off, to improve their welfare per se, while utilitarians consider that we should increase the total sum of welfare. Utilitarians consider that we should allocate each unit of resources to the ones that will best use it and increase the degree of welfare. Most likely, the worst-off are the ones that would benefit of basic resources like flour or grains. The difference is that the priority view takes the well-being of the worst-off like an aim in itself, while the utilitarians consider it a means to achieve the greatest well-being in the community.

Moreover, prioritarians argue that: 1) Benefits have absolute value - how much it matters to benefit others it depends on how worse off they are, there is not any comparison with others. But, when we say that a person is worse off or better off, do not we use the criteria chosen with respect to the status of the people in the respective society? This points out that there is some sort of implicit comparison. In this respect, indirectly, we always have to take into consideration the better off. 2) Contrary to egalitarianism, it does not matter how well off people are relative to one another, as Parfit underlines: “Egalitarians are concerned with *relativities*: with how each person’s level compares with the level of other people. On the Priority View, we are concerned only with people’s absolute levels.”¹³⁸ This statement also implies that the benefits for people that are absolutely worse-off have greater moral value than the benefits to those who are worse-off relative to others. In case of prioritarianism, benefits have declining marginal value, the more worst off a person is, the importance of benefiting her grows.

Derek Parfit borrows Thomas Nagel’s ideas from “Equality” and takes them further.¹³⁹ In conceiving a test for the value of equality, Nagel imagines two children, one that is happy and healthy and the other one suffering from some kind of disability. Their family has the choice to move either to a city where the later child will be well taken care of, or to a suburb where the healthy child could flourish. He goes on and adds that the gain of the healthy child moving to the suburbs is substantially greater than the second child moving to the city. If the family decides to move to the city it would be an egalitarian decision, because it is more urgent to benefit the

¹³⁸ Derek Parfit, “Equality or Priority?” p. 104.

¹³⁹ See Derek Parfit, *idem*.

second child, than the healthy and happy one. It does not matter if the value of the benefit is not as high as the other one would have had received by moving to the suburbs.¹⁴⁰

A classic utilitarian would certainly choose the other version, by moving to the suburbs to benefit the healthy and happy child, because the total sum of benefits is greater. What ultimately counts for utilitarians is the sum of benefits whilst for egalitarians it is more important that the parts have fair shares according to a fair distribution. The better sum of benefits is outrun by an equal distribution. This is similar to what John Rawls presented in *A Theory of Justice* when argued for the difference principle. The big difference between the two theories is that prioritarianism is concerned about wellbeing whilst when applying the difference principle we have to think at primary goods. But let us continue with our presentation on prioritarianism and see which are the main ideas of this view.

Prioritarians, or “extended humanitarians” like Larry Temkin calls them, are concerned about people who are worse off, rather than the distribution itself like egalitarians do.¹⁴¹ We may observe though, that in practice both prioritarians and egalitarians seek to level down inequalities, but in a different manner. Inequalities per se, are not that important for prioritarians, as long as they do not worsen the position of people who are worse off. If the self-concerned actions of the advantaged people create a better situation for the disadvantaged, it is not a problem for the prioritarians, even if the inequalities between the parties increase. On the other hand, egalitarians take into account the inequalities between people created at this level. Hard egalitarians tend to create equality at the level of well-being. But if we think deeper, prioritarians have to take account of the inequalities if those inequalities are meant to worsen the disadvantaged’s status. Yet, is true that if by repeated actions inequalities deepen, it could create a separation between classes and the main idea of moral equality between individuals will disappear.

Derek Parfit poses this distinction between egalitarians and prioritarians from the point of view of well-being. He believes there are two ways in which we can look at equality: deontic and teleological. The first type is concerned if something has been wrongly let to persist. According to the second type, inequalities in well-being are bad in themselves: “We may believe that

¹⁴⁰ Thomas Nagel, *Mortal Question* (Cambridge: Cambridge University Press, 1979): 123–124; See also *Equality and Partiality* (New York: Oxford University Press, 1991).

¹⁴¹ Larry Temkin, *Inequality* (Oxford University Press, 1993), chapter 9.

inequality is *bad*. On such view, when we should aim for equality, that is because we shall thereby make the outcome better. We can then be called *Teleological*- or for short *Telic* – Egalitarians. Our view may instead be *Deontological* or, for short, *Deontic*. We may believe we should aim for equality, not to make the outcome better, but for some other moral reason.[...]On the Telic View, Inequality is bad; on the Deontic view, it is unjust.”¹⁴²

Deontic egalitarians do not believe that inequality in natural endowments is itself bad, but we can argue that “if we *could* distribute talents, it would be unjust or unfair to distribute them unequally. But, except when there are bad effects, we shall see nothing to regret in the inequalities produced by the random shuffling of our genes.”¹⁴³

Furthermore, what is significant for the prioritarians is the individual’s level of well-being, without comparing it to others, as we have mentioned earlier. The important thing is how well a person could be. Let us take an example from the problem that concerns us in this work, related to the healthcare sector. A prioritarian would agree that we should give as much care to a patient so that he becomes as healthy as he can be. It is of no importance how healthy others are. But if we take Parfit’s definition, the egalitarians will tend to minimize inequalities between patients by appealing to the distribution of healthcare. This is plausible if we have in mind that the distribution of healthcare resources is not the only aspect that should be taken into account when talking about lessening the inequalities. As we have mentioned in other parts of this work, there are many aspects correlated with health issues, from social status, circumstances of living, genetics, economic environment etc.

We must also have in mind that some inequalities in well-being are important and necessary, in order to maintain moral reasoning. For example, no one expects that a person who killed people in cold blood should have the same treatment or be treated equally to a distinguished citizen. It is true that we have conserved the respect for individuals as human beings, we respect a criminal or a terrorist but we do not approve the same level of well-being for them as for people who obey the law.

Prioritarianism could suffer some contra arguments. If we imagine a society composed only of rich people, for example a private island or a specific community isolated from others, prioritarianism would protect the least rich of the rich individuals living on that island or

¹⁴² Parfit, “Equality or Priority?” p. 84, p. 90.

¹⁴³ Parfit, “Equality or Priority?” p. 90.

community. It is true that if we accept the idea that all individuals and societies are connected, then it would be wrong to consider the least rich of the rich on the same level of priority with the worse off from a community or society of disadvantaged people. Nowadays, societies are independent, and the accent is put on their individuality, so it is acceptable for the moment to prioritize the least advantaged from a society of rich people, even though on the other part of the globe or even near them there are people suffering from hunger. For example, Sweden has a very good health system, and prioritizes its health resources towards Swedish, no matter their status not to Indians. Of course, when it comes to social security, the least advantaged from the system will be helped to redress his status. But Sweden is leaned towards reducing inequalities and the priority they give to the least advantaged is to reduce the existing discrepancies. Every government will prioritize its citizens, not the citizens of other countries that maybe are suffering from severe poverty. We are not giving our resources to the poor or hungry people, but use it for our interest that includes the care for the close ones or for our peer citizens.

As Richard Arneson notices, The Difference Principle implies the norm of Priority to the Worse Off, because institutions are to be regulated as to benefit individuals that are worse off.¹⁴⁴ It is also true, according to the marginal utility theory, that the same benefit can be more valuable for the worst off than for the advantaged people. This is also the prioritarian interpretation which considers things to have more value for the disadvantaged than for the advantaged people. In other words, same resources have meaningful value for the worse-off and have no important value of the better situated. But I believe it depends on the type of resources we allocate or distribute. There are resources that can be achieved very easy with money and resources that are more abundant than others. Ten kilos of flour will bring more value and satisfaction to a person who does not have sufficient food but it will not bring the same satisfaction to a rich person that does not have any problem in acquiring flour. Lack of food can be a stringent problem for the poor but at the same time a minor issue for the rich. On the other hand, the need for organ transplantation is the same, because the value of life has to have the same importance, no matter the status of a person and even if people value their life differently.

Recent arguments from philosophers like Thomas Scanlon, Brian Barry or Adam Swift, include the idea of *positional goods*. These are goods whose value is determined by their relative amount. A necessary condition for a good to be a positional one is that “an increase in the good’s

¹⁴⁴ Richard J. Arneson, “Against Rawlsian Equality of Opportunity,” *Philosophical Studies* 93 (1999): 77–112.

supply cannot increase the value of the good for those with less without altering their relative position in the distribution of the good.”¹⁴⁵ Egalitarians like the ones mentioned above, consider that we should incline towards an egalitarian distribution of positional goods, action that implies worsening the position of the better-off so that the worse-off have a better position. According to them, leveling down the better-off can be justified on prioritarian grounds, even if the conclusion we arrive at is an egalitarian one. The argument starts from the prioritarian premise that accepts leveling down the positional goods of the advantaged people in order to increase the welfare of the disadvantaged.

1.5. Sufficiencyarianism

In 1987, Harry Frankfurt outlined that “what is important from the point of view of morality is not that everyone should have *the same* but that each should have *enough*”.¹⁴⁶ It is hard to delimit what *enough* stands for and it is very hard to draw the lines of what sufficient implies, since we have to consider what different people or communities define a good life. There is a tight connection between those two parameters that also implies relativity because people have various conceptions of what good life should be. Knowing what a person believes a good life should be, offers the possibility to set the threshold of sufficiency. We do not deny that this is hard and complicated work, but it becomes more complicated when we have a pluralistic society, with different conceptions of good. What it may be sufficient for an individual can be insufficient for other. Also, the indicators of what to have sufficient X implies, have to be general so that we can extend them to all the pluralistic views inside the society.

Moreover, in case the threshold is set very low (in poor countries for example), if we always give priority to the ones below it, (like Roger Crisp argues in his theory), then the people above it may also be worse off. This is very likely to happen if we take what we believe to be a reasonable sufficiency that all people should have, meaning that all people should have as much as necessary so that their human rights are not violated. Another point that we should highlight is that there would be important differences between countries at the global level. What may be sufficient for the average Romanian citizens, may not be sufficient for a German. And inside

¹⁴⁵ Harry Brighouse and Adam Swift, Equality, Priority and Positional Goods, *Ethics* 116, (2006): 471-497.

¹⁴⁶ Harry Frankfurt, “Equality as a Moral Ideal.” *Ethics* 98, no. 1 (October 1987): 21.

each society, because of the plurality of good life conceptions, there is likely to be big discrepancies regarding what sufficiency may consist of. In this respect, there are people who cannot live without cultural activities, who consider their life meaningless unless having them, and there are people who can live without them but cannot imagine their life without a good meal or a glass of wine per day.

So, there is a big challenge to set the threshold when it comes to sufficientarianism and this includes the field of health care. When it comes to health, things are rough, because we discuss an important part of our life, maybe the most important.

Roger Crisp tries to prove that we have to give more credit to sufficientarianism than to prioritarianism, contrary to scholars' tendency. His argument is presented as a dilemma. Crisp argues that the correct way we must understand prioritarianism is by either giving *absolute* priority to the worst off, either *weighted priority view* where "benefiting people matters more the worse off those people are, the more of those people there are, and the greater the benefits in question". In Crisp's words, *The Absolute Priority View* is "when benefiting others, the worst-off individual (or individuals) is (or are) to be given absolute priority over the better off" and when it comes to *The Weighted Priority View* "benefiting people matters more the worse off those people are, the more of those people there are, and the greater the benefits in question."¹⁴⁷

After rejecting the prioritarian view, Crisp argues for a sufficientarian view, proposing a 'sufficientarian threshold', where those below it are to be given priority. From this emerges *The Sufficiency Principle* implying that "compassion for any being B is appropriate up to the point at which B has a level of welfare such that B can live a life which is sufficiently good." The threshold is set by the compassionate impartial spectator, forming The Compassion Principle where "absolute priority is to be given to benefits to those below the threshold at which compassion enters. Below the threshold, benefiting people matters more the worse off those people are, the more of these people, and the greater the size of the benefit in question. Above the threshold, or in cases concerning only trivial benefits below the threshold, no priority is to be given."¹⁴⁸

As we can see, people situated above the threshold are not given any priority whatsoever. This is also the case when we have to deal with 'trivial benefits' below the threshold. My problem here

¹⁴⁷ Roger Crisp, "Equality, Priority and Compassion," *Ethics* 113, no. 4 (July 2003): 745–763.

¹⁴⁸ *Ibidem*.

is that we cannot say exactly what ‘trivial benefits’ imply, because something considered trivial at one moment can transform in something vital the other moment. Or maybe, more of these so called trivial things taken together on a specific time or on time intervals can turn into something of major importance. Perhaps a person that wants to go to the seaside or to have some fun, more specifically leisure time, and that this is taken to be a trivial desire. It is possible that in time, the lack of sun and fun, of leisure time, would lead to great health damage, to illness caused by ongoing stress etc.

These are just a small part of the egalitarian, prioritarian and sufficientarian ideas, but because of limited time and space we cannot develop each idea at a more profound and intimate level, we took into consideration the most relevant parts for this study, in order to have coherent and complete framework when it comes to health care distribution and implicitly on the moral problem of brain drain of healthcare professionals.

After analyzing egalitarianism, sufficientarianism and prioritarianism, I conclude the latter as being more suitable to adopt in the context of the arguments I provide. Prioritarianism creates also the framework when discussing the brain drain of healthcare professionals and my view regarding the possible advanced solutions. Even if the aforementioned theories of distribution can have important elements which we could take into account when distributing health care, I believe prioritarianism can avoid some important shortcomings even though it is not a complete or perfect theory, but I consider it more appropriate to apply to the main subject of this work.

1.6. Liberty, Equality and the Brain Drain of Healthcare Professionals

In what follows I will try to explain my position by considering the case of healthcare professionals. When it comes to liberties, I will emphasize medical personnel’s right to free movement and when it comes to opportunities, the opportunities of equal access to healthcare.

As stipulated by The Declaration of Human Rights, the right to free movement is important for every person, regardless of their specific status: “(1) Everyone has the right to freedom of movement and residence within the borders of each state and (2) Everyone has the right to leave any country, including his own, and to return to his country.”¹⁴⁹ Every liberty comes together with certain responsibility for our actions towards others. If we recognize the right to free movement as a universal right, we have the responsibility to help others to exercise this right.

¹⁴⁹ Universal Declaration of Human Rights, Article 13, <http://www.un.org/en/documents/udhr/index.shtml#a13>.

This is because if we do not act so as to fully accomplish the recognition of a right, it will become weaker in time. The same things can be said about formal or informal rules in society. For example, if we do not respect the informal rules that make a person to be polite and do not encourage others by our behavior or make an example of it, maybe in time politeness will be forgotten. In case of formal rules or laws, we have the coercion of the authorities that obligates us to respect and protect the law. But even if this is the case, we could still weaken the laws if most of us do not respect them. On the contrary, when rules are respected and people are encouraged to respect them, formal and informal rules become more powerful. If people were more aware about their responsibilities, there would be more respect for written or unwritten rules in society. Therefore, when we respect the law or the rights we make them stronger and when we disobey the law or disrespect the rights of others, they become weaker.

Same line of argument could be applied in case of the medical personnel that want to exercise the right to free movement. If healthcare professionals want to leave their country in search for their well-being, they also have to embrace the responsibility to take care of others' right to free movement, in this case the patients. If the right to free movement is recognized as an universal right, if medical personnel has the right to move, so does the patient. But most of the time, patients from undeveloped or developing countries do not have the favorable social and economic circumstances to exercise the right to free movement. On the contrary when it comes to healthcare professionals, most of them can exercise this right not only because they are helped by the social and economic circumstances from their country of origin, but also because of the global favorable circumstances. The need for medical personnel is rising from various reasons like the continuous ageing of population or the growing preoccupation for health at all levels. All this creates prolific opportunities for medical workforce.

Patients and medical personnel are exponents of citizens living in a certain country, and they all should have the opportunity to enjoy the right to free movement. The continuing process of medical personnel leaving for more developed regions, create not only the brain drain but also continuous discrepancy between liberties on both parties.

But even if no injustice occurs when medical personnel migrate to another country, the outcomes of their actions can create injustice in time. A clear example is the continuous detraction of people's health in poor or developing countries and their lack of access to medical care. Also, all

these may cause inequalities between citizens and countries, even if no unjust step has been done.

The patients are free and their freedom is not violated if they are not taken care of, because nobody acts against them. It is not the doctors' fault that people get sick, but most of people's intuitions approve that HP can be blamable if they refuse to treat sick people and offer proper care, even if the governments do not allow them to do so. In some countries for example, doctors are forbidden to treat illegal immigrants or people without health insurance, even if they have a serious health problem. This contradicts HP vow to treat every person who suffer. Libertarians might argue that the negative liberty of patients is respected in the sense of non-interference, but in this case what patients need is to be cured, interference not with their liberty but rather to protect their capacity to act how they wish to. Sometimes, though, even patients desire non-interference, and the most relevant example is when they require to be left to die. Non-interference is very important, crucial I believe, but here it is not a case of interfering, because there is no violation of the right to liberty, there is no coercion. People want to be help and require help when they cannot deal with a disease.

In case of patients, we can apply the prioritarian principle, where the value rises proportionally with the lower well-being. If we add the cosmopolitan framework, we have to give priority to patients who are well-off and have a lower level of well-being and live in a poor country, but if we consider not only the disease but also the other determinants of well-being like social or economic status, than to a patient from a rich country. But can we say this regardless if they have the same illness, let us say cancer, other things being equal, like age, state of health, habits etc.? If we take account of all dimensions the answer is affirmative, because the patient from low-income country, will have a lower well-being than the patient from the rich country if both get treated. So the resources allocated for the first patient will count as greater value reported to the quantity of well-being they provide. Though, we can add an objection, the fact that life may have the same value for both, and the patient from the rich country may have a higher level of well-being per total than the patient from the poor country. She may live longer because of the good condition of living, her status, etc. If we make use of egalitarian principles, we may say that the rich patient has lived a good life until then and on the long run, considering equality for the whole life of a person, curing the poor patient may give her the opportunity to have the same

amount of well-being at the end. The cured patient will have the opportunity to enjoy life and acquire well-being and maybe equalize the level of well-being of the untreated patient. The difficulty consists not only in measuring the level of well-being one had until one point in life, but also the one she might have under predictable or unpredictable circumstances. This means that this line of argument is very unlikely to be applied, because its impracticability. But even if the argument lacks the practical level, does not mean that it lacks moral power and we should not consider it when making difficult decisions in healthcare sector.

Being in a position of disadvantage most of the time imposes costs on you that other do not have.

Conclusion

I conclude that in case we are put in the situation to make a decision on which to prevail, liberties or equality of opportunities, e.g. free movement vs. equal access to health services, I am more inclined to say that we cannot have liberties without having some responsibilities towards others and for some this may go hand in hand with implementing the idea of equal opportunities. When it comes to liberties, both Rawls and right or left libertarian respect them, but as Victoria Costa noticed, I also believe their disagreement comes from their different ways of perceiving them: Rawls as freedom of non-dominance and libertarians like Nozick, as freedom as non-interference. The former believes that only together with other liberties and equalities we can find their full meaning while the latter believes individuals can well live and be free without the others or without a necessary collaboration.

I believe that medical personnel are free to move as long as their actions do not intentionally prevent others to have equal opportunities to healthcare. And they do not, because it is not their intention to leave others in a worse position. Liberty understood as inseparable from responsibility, not only as a mere ideal or manifesto, would guide people to make responsible decisions and think of others' opportunities and well-being. Healthcare professionals need to follow their own interest, but at the same time, be responsible for their choices. When a doctor leaves a community where he is needed the first thought is to say people lack opportunity to healthcare because of her leaving. Nevertheless, the doctor is not directly responsible for the patients' lack of opportunity, but rather the government that designs the healthcare system. On the other hand, I also embrace the idea that a doctor who leaves a community in urgent need for healthcare is not a real doctor. But this is a more extreme situation, where urgency is of prior

concern, while a society who strives for equal opportunity in healthcare can have a high level of healthcare. What I want to emphasize is that we have to consider on one hand the relations between people and also the role of institutions have in order to render people equal opportunities for healthcare.

When it comes to the manner in which liberty and equality of opportunities interact, liberties have to be closely connected with equal opportunities. In order to empower liberty rights, we should act in such manner as to give opportunities to as many people as we can. We can see access and opportunities for healthcare as an instrumental value to achieve liberties for all people, not just for some. If people are deprived of some important resources or lack of power to use their liberty (in case of illness for example), liberties are endangered. Opportunities for health care, can be seen as a means to empower liberties, and this is maybe because health offers more autonomy of movement and of thinking. Just imagine Stephen Hawking. He has a great mind and spirit in an unhealthy body. Leaving aside the fact that health is not only about physical aspects, we also have diseases of the brain and it influences all parts of our life, Hawking embodies the sheer example of a person whose free spirit conquered the illness of his body. People have always searched for liberty in every aspect of their life, and even if for some people physical liberty goes hand in hand with liberties on other fields, keeping liberties even if only as manifesto rights is a necessary step in maintaining our hope. Nevertheless, in order for liberties to prevail, we need to be able to offer everyone the chance to acquire them, and this can be made only by having equal opportunities.

CAP. II The Right to Health?

Introduction

In this chapter I will investigate if there is any moral legitimacy to have demands that hinge on the existence of a right to health, if it can be morally justified. The attempt to prove the existence or non-existence of a right to health is relevant for the entire argument of this thesis. If we have strong arguments for the right to health and if these arguments overpass the power of the opponents, some might argue that healthcare professionals have stronger reasons to stay in their country of birth and education. This is because this right implies some claims. The poor patients may be the beneficiaries of these claims, and the subjects of actions could be the healthcare professionals. My answer opposes this view, emphasizing that we cannot find a reasonable legitimate justification based on the right to health. I will argue that the idea of a right to health is not feasible, but the right to health care might be implemented. Moreover, recognizing and implementing the right to health care, need not influence the free movement of medical personnel. Doctors, nurses and other categories of health professionals can move freely in the world, no matter if we recognize and implement the right to health care or we do the opposite. Their freedom to move cannot be coerced on these grounds, they can be anywhere they are needed and respect the right to health care of every person. A better alternative is considering the problem in terms of moral duties and not in terms of positive rights.

II.1. What Is the Right to Health?

Many scholars believe there is a terminological debate concerning the right to health. If we consider all aspects that determine health, supporters of international declarations on human rights believe that the expression “*the right to health care*” is too narrow in order to comprise everything involving health. On the other hand, there are scholars who do not believe in the existence of a universal right to health or health care. After a brief clarification of what the right to health is, I will argue against it.

Most of international documents use the expression ‘the right to health’, presented in the international and national documents of many states. The *Universal Declaration of Human Rights* from 1948 indicates and demands from states an important health status for every person:

“Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”¹⁵⁰ The international community recognizes and attempts to justify the right to health based on the natural dignity which constitutes a source for all human rights: “The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights.”¹⁵¹ As the *Universal Declaration of Human Rights* states, the modern democratic state should recognize not only the rights of the first generation (political and civic rights), but also rights of the second (social and economic) and the third generation (solidarity): “Everyone ... is entitled to realization ... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”¹⁵²

The World Health Organization (WHO) first articulated the right to health in the Constitution of 1946. The right to the greatest attainable standard of physical and mental health is described in the Preamble to the Constitution as “one of the fundamental rights of every human being without distinction of race, religion, political belief, economic, or social condition... a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”.¹⁵³

According to WHO, the right to health is an inclusive right, comprised of two main and interdependent components: a right to preventive and curative health care and a right to healthy conditions and the creation of conditions that promote health. This means that the right to health requires more than mere access to services such as building hospitals, as it must take into account some key issues that determine health, some “underlying determinants of health”- as The Committee on Economic, Social and Cultural Rights calls them. These determinants include the existence of drinking water, food, adequate shelter, healthy working conditions and environment, education and health-related information and not least, gender. Apart from these, the right to health also includes freedoms such as freedom to consent to the treatment or lack of torture or other inhuman treatment.

¹⁵⁰ Universal Declaration of Human Rights, art. 25 (1).

¹⁵¹ Declaration on the Charter of Fundamental Rights of the explanations relating to [interactive]. (accessed June 28, 2011). <http://eurlex.europa.eu/lt/treaties/dat/32007X1214/htm/C2007303LT.01001701.html>.

¹⁵² UN Universal Declaration of Human Rights, *supra* note 1.

¹⁵³ The World Health Organization (WHO), The Preamble of The 1946 Constitution.

It also includes some entitlements, such as equality of opportunity in health to achieve the greater level of health, access to essential medicines, the right to prevention, treatment and disease control, maternal health, reproductive and child equal timely access to essential health services and public participation in decisions related to national health and community. In addition, health services, goods and facilities should be provided to all without discrimination and should be available, accessible, acceptable and high quality.

Another major document of international law, which designs the right of a person to health care, is the *International Covenant on Economic, Social and Cultural Rights* adopted by the United Nations: „The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’’.¹⁵⁴ At the European level, the *European Social Charter* (1961, and revised in 1996) strengthens the right to health care as an independent universal human right, which is deployed by special actions.¹⁵⁵

Article 11 of the *European Social Charter*¹⁵⁶ offers another definition of the right to health. It states that everyone has the right to benefit from any measures necessary in order for him to enjoy the greatest standard of attainable health. Furthermore, anyone without adequate resources has the right to medical and social assistance, and every party involved in the bargain (institutions, people, states, organizations etc.) must remove as far as possible the causes of ill-health. Also, the right to health promotes advisory and educational facilities for health and the encouragement of individual responsibility related to health, and the prevention epidemic, endemic and other diseases.¹⁵⁷ In this respect, the state may create all necessary circumstances for a person to take care of her health and also offer treatment in case of illness, but it cannot force her to choose a healthy lifestyle.

There are many components of the right to health. It is conceived of very broad and holistic terms, involving the idea that health status is influenced not only by medical care but by

¹⁵⁴ International Covenant on Economic, Social and Cultural Rights, *supra* note 27.

¹⁵⁵ Despite the fact that the right to health is stated in many international conventions, it appears that the decisions should be taken more at the national level.

¹⁵⁶ European Social Charter, 18 October 1961(1965) ETS No 035, (revised) 5 May 1996 ETS No 163.

¹⁵⁷ Fluss, S. S. “The Development of National Health Legislation in Europe: The Contribution of International Organizations,” *European Journal of Health Law* 2, (1995): 193.

economic, environmental, social and even political factors. One of the risks of accepting too many entitlements, is that it will be very difficult to protect the human right to health. A good health is influenced by many factors, such as the structure of the individual and biological or socio-economic conditions. The UN Economic and Social Council states that the idea of the “highest standard of health” takes into consideration the biological and social as well as economic prerequisites of a person, and on the other hand, the resources of the state. It is a reality that the state cannot solve all the health problems that a person has, and good health cannot be assured totally by the state. There are certain aspects that do not fall under the state’s duty, especially when we take into consideration the genetic factors, disorders and unhealthy risky life style, individual health, lack of resources, the existence of other levels of need to be assisted (education, shelter, social services etc.). In that respect, I agree that we should not understand the right to health as the right to be healthy. But I also believe that asserting a right to health is too demanding, because it implies almost unreachable standards both from the state and from the citizens that contribute to the health care system and we can be put in the position to disregard other important social aspects, as Allan Buchanan acknowledges: "the problem in asserting a right to health as opposed to a right to health care is that it seems too demanding. A right to health care involves, in turn, a right to certain services, by contrast, a right to health seems to imply a right to be healthy, which is an impossible standard. Some seriously ill or disabled persons will never be healthy, no matter how many resources are used to gain health. Moreover, if we seriously pursue health for all we will have to drain social resources and we leave little room, if we would leave, to pursue other social goals."¹⁵⁸

A year later, WHO clarified the difference between the right to health and the right to be healthy:

"The right to health is not the same as to be healthy. A common misconception is that the State has to guarantee us good health. However, good health is influenced by several factors outside the direct control of the States, such as individual’s biological and socio-economic conditions. Rather, the right to health refers to the right to the enjoyment of a variety of goods, facilities, services and conditions necessary for its realization. This is why it is more accurate to describe it

¹⁵⁸ Allan Buchanan, *Justice and Health Care* (Oxford: Oxford University Press, 2009), 205.

as a right to the highest attainable standard of physical and mental health, rather than an unconditional right to be healthy.”¹⁵⁹

Some authors believe that the protection of a right to health protects the equality of people, equality understood not as a formal but as a substantive. In *Just Health Care*, Norman Daniels talks about a right to medical care and argues that it should be seen as a special case, a case of equality of opportunity because the protection of this right helps protect equality.¹⁶⁰ Daniels understands the right to health care as relative to the distribution system of health resources in the context of limited resources. Daniels' position changes over the following years. In *Just Health -Meeting Health Needs Fairly*, he considers that persons who claim the right to health desire that society and citizens participate in changing the overall design of institutions and have a fair distribution of resources that influence health status.¹⁶¹ Needless to say, the opinions are shared regarding what ‘fair’ implies.

We can imagine two people, A and B who have the same disease. A is rich and B is poor and there is a cure for their illness but it is so expensive that B cannot afford but the other one can. If we understand equality in health as equalization to B’s level, then A cannot spend her money for the treatment. But this is absurd, because we all want people to have the best healthcare they could have. If a person does not have the chance or luck or opportunity to have good medical care this does not mean that other people that have this possibility must be at the same level and be deprived of healthcare in the name of strict equality. On the other hand it is true that it is very unlikely to equalize B’s level to level of A, because of the scarce resources that we have in the world. Another way of thinking is by taking into account the strong equalitarian position where there is a middle way between A and B. Of course, this would imply taking resources from A and give it to B until there remains a perfect balance.¹⁶² Strong arguments for and against this view are still on the battlefield of today’s ideas and are also a major concern of this research, but I leave the clarification and arguments on this specific topic for latter. At this point, I will pursue in acknowledging the main ways in which we can understand some problems regarding health, by bringing into discussion Amartya Sen’s Capabilities Approach.

¹⁵⁹ WHO Report (2008 and 2010), 5.

¹⁶⁰ Norman Daniels, *Just Health: Meeting Health Needs Fairly* (New York: Cambridge University Press, 2007), 144.

¹⁶¹ Norman Daniels, *JH: MHNH*, p. 145.

¹⁶² For this view see Amartya Sen, “Why Health Equity?” *Health Economics* 11, no. 8 (2002): 661.

II.2. The Capabilities Approach and Health Care

Amartya Sen makes a distinction between health achievement and the capability to achieve good health. Factors that contribute to health achievements and failures include influences of very different kind “varying from genetic propensities, individual income, food habits and life styles, on the one hand, to the epidemiological environment and work condition on the other.”¹⁶³ An adequate policy on health has to take into consideration not only social and economic factors, but also a person’s predisposition, genetics, regions, epidemiological infestations etc. The Capability Approach concentrates on what a person wants, does and should be, rather than focusing on the instrumental distribution of goods. But all acts carried out by a certain person are not necessarily good for her. There is also the distinction between well-being and agency functionings. Sometimes a person has to act in a certain way in order to do the right thing, maybe to save another person, even if this is not in the interest of her well-being. For example, a person that jumps into frozen water to save a child, makes some effort in order to do that. She is able to do that, it is her functioning, and it is not for her own well-being because the water could cause her inconveniences. One may also consider her own well-being when saving the person who is about to drown. She can save the drowning person, because she cannot stand to live with someone’s death on her conscience. Letting a person die may interfere with the future well-being of the person who acts that way and she may be left with some psychological damage. We can argue that only a cold criminal isn’t moved by the death of a person, especially if it was in his power to prevent that harm.

Another important aspect of Capabilities Approach is its focus on the inequalities of quality of life across persons. One of the reasons that make possible the existence of inequalities is the difference between individuals when it comes to convert the social circumstances and resources into doings or beings. Therefore, if we distribute a certain package of goods based on needs, if it is the same for everyone, it may not be the same in practice. For example, a man of 80 kg needs more calories to survive than a woman of 60 kg. There are also external constraints like race, gender etc., that can prevent a person to transform the social surroundings and natural endowment into functionings. Man can be preferable to woman to occupy a certain position, even if they both have the necessary skills for the job. Statistics show that the percentage of

¹⁶³ Sen, “Why Health Equity?” p. 660.

employment rate for EU in 2011 was 75.0 in case of men and for women 62.3.¹⁶⁴ Furthermore, there are cases when women are rejected from a position because of the ‘risk’ of getting pregnant. This is a case of discrimination, where a natural process characteristic to women, something that rests in their nature is an obstacle in their personal development. People that believe women are a risk to hire, because of the possible pregnancy, argue that their business or institution could be damaged by the women’s absence from work. But same thing could happen when a person gets ill or has an unfortunate accident. Some may argue that there is greater possibility for a woman to have a baby while she’s an employee then for a person to suffer an accident or a long term illness. Even if the statistics show other way, the numbers are not important in this case. It is wrong to discriminate workers on grounds that do not have to do with the skills required at the work place. If elderly, women, people with disabilities or people that become sick are discriminated and are not allowed to work, then firms or institutions will need to hire only perfect persons, maybe perfect robots. And all these do not exist yet. We have to respect people for what they are, to respect the human nature and allow them to have dignity in every stage of their life. Disabilities, oldness or being woman or man, or some health features are not things that we choose from birth, they are arbitrary. Women have the right to choose if they want to have a baby or not, as men do, but this choice does not diminish the skills that one needs for their job. If society produces policies and encourages actions for women not to have children, what will happen with the entire humanity and creation? If employers start to hire having in mind that they want the perfect skilled and healthy person for their company or institutions, what will happen with the rest of people? Even the ones that are hired will have the insecurity that maybe they will get sick and it is certain that in time they will get old. The bottom line is that we should not let arbitrariness interfering, we should rather find fair and objective criteria to promote fairness and respect human beings per se.

It is true that arbitrariness is part of our life, including health. Health is correlated with many dimensions, it is a multidimensional concept, as Amartya Sen¹⁶⁵ argues, and many of them are purely arbitrary. Every person is born with certain genetic predisposition. Some are condemned

¹⁶⁴ See EUROSTAT statistics for differences on employment rate between sexes from 2001 to 2011 http://epp.eurostat.ec.europa.eu/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=t2020_10&language=en (accessed August 10, 2012).

¹⁶⁵ Amartya Sen, “Why Health Equity?” p. 660.

to cancer, other to heart diseases or diabetes etc. The way we take care of ourselves, our lifestyle, our socio-economic status, the healthcare system that we attend and the community or country we live in, are some major indicators of our health and some variables that we can change.

Together with Sen, Martha Nussbaum acknowledges that if we are to analyze inequalities in quality of life between persons, the capability approach is the appropriate tool. She goes on and creates a list of ten 'core human entitlements' that every state should provide and respect for human dignity.¹⁶⁶ Following the footsteps of Rawls by adopting liberalism and implicitly stability¹⁶⁷, and Sen with his capabilities, Nussbaum constructs a 'partial theory of justice' as she calls it, and pleads for greater beneficence and mutual understanding. It is a partial theory of justice because she provides sufficiency by providing core human entitlements but it is not enough to complete a theory of social cooperation.¹⁶⁸ Her theory could be adjacent to other theories of justice, after the problem of minimum threshold is solved. The list of core human entitlements cannot be implemented if there aren't resources to provide them. Especially that there is positive action from the government and this means allocation of resources. In addition, she considers that the contract theories of mutual advantage are based on egoism and limits the beneficence, compassion or altruism. But a theory like Rawls' for example, does not afford compassion or beneficence since the parties are purely rational persons who judge on a Kantian terms. These are things that go behind the contractarian constructivism, but can be discussed from outside. Compassion, beneficence or altruism are actions from inclination, there are not actions from duty. If we were to adopt compassion and beneficence or altruism under the 'veil of ignorance', we have to let go the core Kantian elements.

In regard to the distribution of healthcare, Rawls argue, that utilitarians do not make distinction between people, they are only interested by the total sum of utility.¹⁶⁹ Each person should be

¹⁶⁶ Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (New York: Cambridge University Press, 2000), 12. This idea could also be found in *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard: Harvard University Press, 2006).

¹⁶⁷ Nussbaum considers the ten core human entitlements the necessary elements for an overlapping consensus that provides stability under the limits of liberalism.

¹⁶⁸ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard: Harvard University Press, 2006), 71, 75.

¹⁶⁹ *See* Rawls, TJ.

considered important, because one's illness cannot be compensated by another person's healthy condition or happiness.

There can be fair unequal distribution in some cases. For example, statistically, women live more than men. As stated by EUROSTAT, throughout the EU-27, women live longer than men. In 2006, the life expectancy of women was 82.0 years, while for men it was 75.8 years, showing a gender gap of 6.2 years.¹⁷⁰ We cannot give less health care to women in order to bring them to the same level as men, to rebalance the situation. It is not women's fault that they are genetically designed to live longer. But are we entitled to offer more health care to men? We offer special care for chronically ill persons, or for people with disabilities. If we consider that women are on the top of the pyramid, then some might argue that others need special care to achieve the state of health that women have. I think it is not the case to make this discrimination between women and men, because there are not such disparities between them regarding health. If we consider the global frame, we know that men have a greater socio-economic status, they are paid more than women, have better jobs and occupy more important positions in social and political field. All these can be seen to compensate their genetic misfortune and rebalance the health equilibrium between men and women, in case we want to alleviate luck.

I embrace the concept of human flourishing applicable to the idea of healthcare for all, in the sense that people prefer to live in peace, in a world where everyone has the capability to achieve health. If we see things from an Aristotelian approach, good health is indispensable for each person in order to contribute to her flourishing at every level and for the society as a whole. Most of us want to see good things happening in the world and refute evil in the form of poverty, disease, disaster etc. But there are people who would not give away even a part of their power or fortune even if it would help others more unfortunate. Even if we like to think otherwise about people and we would like to live in a better world, to develop the human flourishing, the facts show us that we tend to act in an egoistic manner. The flourishing is given by egoistic nations that tend to conserve themselves and prosper, mostly the rich ones. This global flourishing is

¹⁷⁰ For statistics regarding life expectancy on each sex inside EU-27 see EUROSTAT http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KE-AG-10-001/EN/KE-AG-10-001-EN.PDF, p.187 (accessed June 15, 2013).

given by the sum of all this rich nations that develop themselves and maybe even the developing ones that are pulled into development, and not by the poorest states.

Health capability refers to a person's capacity or ability to be healthy.¹⁷¹ In a fair world, all people should have equal opportunity to achieve good health. The idea of capability is considered by some authors¹⁷² a positive notion of overall freedom, there are real opportunities we have in our life. The moral concern is that deprivation minimizes our capacity to be healthy, it diminishes human flourishing by reducing the capability to exercise our agency at every dimension - economic, social, political, cultural.¹⁷³ Can we acquire these capabilities without having rights that empower us to claim from others help in case we are unable to do it by ourselves? We will clarify this aspect in the next section and see the difference between rights, duties and obligation.

II. 3. Rights, Duties and Obligations

When he analyzes the internal structure of rights, Hohfeld distinguishes between four types of rights: claim rights, which presupposes that people have claims on other people, liberties or privileges, power and immunities.¹⁷⁴

Another way of categorizing rights is to separate between rights that propagate freedom and welfare rights. Some consider these two types of rights logically incompatible. This means that we must choose which type to satisfy. In general, freedom rights are understood to impose negative obligations and welfare rights impose positive obligations.

On the other hand, we can think at the right to health in a more complex way, as a right that includes both negative and positive aspects, and also claims and liberties. A positive duty requires the explicit doing of some action, and incorporates a claim of a person on another person. On the contrary, a negative duty requires the lack of intervention, the lack of interference, liberties.

In this sense, the state's duty not to do harm by restricting citizens from access to health related information and care may count as negative duties. When it comes to positive duties, we may say

¹⁷¹ For more ideas on this topic and an extensive research which was inspiring and helpful see Sridhar Venkatapuram's doctoral thesis *Health and Justice: The Capability to be Healthy*, University of Cambridge, 2007.

¹⁷² See Amartya Sen, "Foreword. Is Inequality Bad for Our Health?" (Boston: Beacon Press, 2000).

¹⁷³ See Sen, *Commodities and capabilities* (Amsterdam: North-Holland, 1985).

¹⁷⁴ John Finnis, *Natural Law and Natural Rights* (Oxford: Calderon Press, 1980), 199.

that a state has the duty to act with the available resources in order to prevent and reduce threats to human health.¹⁷⁵ The positive action has increased over the years due to various actions undertaken by organizations that support the international treaties on human rights. Most international documents that state about the right to health have an ideal conception of human rights which brings together the interests and the claims, obligations and liabilities.

The major problem is that it is rather ambiguous or vague the kind of duties we assert when talking of the right to health. Also, it is hard to specify who has the responsibility to help, who is the duty-bearer and the people who we should help. Although it is difficult to justify the right to health care as a positive right, we can identify who is responsible to keep the harming actions as low as possible in order to avoid serious harm to health. In this respect, I agree with Allan Buchanan who believes that “every organization, whether private or public, has an obligation not to act in ways that are harmful to people’s health.”¹⁷⁶ It is unproblematic to assign responsibilities to private or public institutions or organizations when we can strictly identify the existence of the harm they do, the problem arises when we cannot justify the direct connection between the actions of a certain organization on our health. There is a difficulty in finding justifications in order to identify the responsible actor that influences health in negative ways, especially when so much of this harm is made indirectly.¹⁷⁷ To give an example, we might rightly assign responsibility for our harm to health to a company that dumps toxic waste into rivers. But it is harder, I believe, to attribute responsibility to smokers for harming the non-smokers’ health.

Asserting the right to health, implies that everyone has the right to health. If this is not the case and the reality makes it harder to accomplish such right, then it would be very difficult to argue that some people should help rather than others. A better way would be to think the problem in terms of duties.

Despite controversies over the origin, standing, and composition of rights, one aspect seems widely accepted. That is, any rights claim implies a corresponding set of duties and responsibilities. The formula for rights is straightforward: rights are protections and entitlements

¹⁷⁵ See S. D. Jamar, “The International Human Right to Health,” *Southern University Law Review* 22, no. 1 (1994): 1–68.

¹⁷⁶ Allen Buchanan and Matthew Decamp, “Responsibility for Global Health,” *Theoretical Medicine and Bioethics* 27, (2006): 107.

¹⁷⁷ Allen Buchanan, “Matthew Decamp, Responsibility for Global Health,” p. 108.

that require a corresponding set of duties and responsibilities. One way to clarify the issue of responsibility is to consider rights claims in terms of "perfect" and "imperfect" obligations. Perfect obligations are specific and direct. For example, we have the perfect obligation not to torture. Imperfect obligations are more general, less specific, and inexactly targeted. For example, in case of torture we have "to consider the ways and means through which torture can be prevented."¹⁷⁸

II.3.1. Positive and negative duties

There are also positive and negative duties. We call a positive duty, a duty that does require us to act upon certain things, to take action. On the contrary, a negative duty implies not to act, the non-interference principle, but allows the opportunity to act, when desired. There is Kant's famous distinction between perfect and imperfect duties. He considers helping others an imperfect duty, in the sense that it is not own by special individuals, it cannot be attributed to special people, contrary to what a perfect duty might imply. Imperfect duties demand to have some goals and we are free to choose what actions to undertake to achieve those ends. On the other hand, perfect duties are duties which require action under well-defined conditions, without exceptions allowed. Kant makes this distinction after he separates between duties of justice and duties of virtue. Duties of justice are imposed from outside justice in the sense that we are dealing with coercion when take actions or omissions. The other types of duties are imposed from inside ourselves, not from exterior. These duties differ in some important aspects, in the sense that the duties of virtue include wider obligations. Christine Korsgaard notes that in case of these duties we do not have the requirement to have a certain aim imposed from outside, while duties of justice require specific aims in addition to strict obligations, encompassing particular act or omission.¹⁷⁹ Is when it comes to duties of virtue that Kant distinguishes between perfect and imperfect duties.¹⁸⁰

¹⁷⁸ Amartya Sen, "Elements of a Theory of Human Rights," *Philosophy and Public Affairs* 32, no. 4(2004): 315-356.

¹⁷⁹ Christine Korsgaard, *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press, 1996), 20.

¹⁸⁰ To do this, the philosopher appeals to four examples stated in *Groundwork for the Metaphysic of Morals*, where he applies the categorical imperative. In the first example speaks of the duty to not commit suicide, the second about the duty to not make false promises, in the third example he brings into question our duty to cultivate talents, and fourthly, the duty to help others. The first

Moreover, there are special and general duties. We call a special duty, one that is based on an act, relationship or event that is given a certain historical account. But if it is a general duty it has the characteristics of being hold on independent grounds, not depending on specific acts or events or causal connections, like for example the equality of all human beings. Following this way of thinking, Robert E. Goodin believes that “There are some “general duties” that we have toward other people, merely because they are people. Over and above those, there are also some “special duties” that we have toward particular individuals because they stand in some special relation to us. Among those are standardly supposed to be special duties toward our families, our friends, our pupils, our patients. Also among them are standardly supposed to be special duties toward our fellow countrymen.”¹⁸¹

General duties are usually seen as imperfect or negative or both. As we have already underlined, it is very hard to point out who has the responsibility to help, to assess roles for persons or institutions. Nowadays we are doing that, we try to create institutions that have certain roles and responsibilities. We also try to identify who has the privilege to receive the aid, by using certain statistics, research methods, or the common sense.¹⁸² When people are seriously in need, you can see that just by looking, we do not really need hard research in this field in order to make that observation. But when it comes to distribute resources and to point out the people who should participate more, we need beside economic measurement or cost-effect analysis and social statistics some moral justification that could shape the future policies.

On the other hand, when we have causal background and specific acts or events, duties tend to be positive. In this case we can identify exactly the holder of the duty, the one that has the

and second example embody perfect duties and the last two are imperfect duties. (See David Wiggins, "Categorical Requirements: Kant and Hume on the Idea of Duty," *The Monist* 74 no. 1 (1991): 83-106.)

¹⁸¹ Robert E. Goodin, “What Is So Special About Our Fellow Countrymen?” *Ethics* 98 (July 1988): 663-686.

¹⁸² Commonly used measurements in healthcare are QALY and DALY. They are used in calculating time in terms of life years of a person or population. QALY refers to the quality adjusted life years and refers to health gain and measures the burden of death. When doctors rely on medical intervention, they use QALY, because it is a method of evaluation that takes into consideration the degree of pain, mobility and general health to calculate the costs. DALY to disability adjusted life years, health loss in the quality of life, it measures the mortality and morbidity. This method is based on the measurement of illness and poor quality of life. The evaluation is related to the numbers 1 or 0, where for QALY 1 means perfect health and 0 death and for DALY vice-versa.

responsibility to act and the receiver. The problem is, how far can we go with the causal connection and when can we say that a certain event was influenced by a certain cause and to what extent. Do Germans owe Jews compensation for what happened in the World War I and II? Our common sense says they do, but for how long? Was the Jew's sufferance something caused directly by the entire German people or only by some characters like Adolf Hitler? And why should the Germans that have not lived then should have a duty to Jews that weren't born when the tragedy happened? Why should we help a person that does not have the opportunity to have quality health care, if we weren't directly causing this situation?

We find it natural for people to care about the closed ones in their life. If the opposite would happen, we would feel morally suspicious about the kind of person that does not make any distinction if someone from his family is in danger or a stranger. We would find this very odd, even if it is acting in the framework of rigorous moral universality. If we do not feel inclined towards our close ones or cannot feel any inclination at all, we are more robots than human beings.

Moreover, I find interesting but unconvincing Henry Shue's argument that we cannot have substantial positive duties towards foreigners, because there is a disproportion between the number of duty bearer and the beneficiaries: "The germ of truth behind the tendency to deny that one has substantial positive duties to foreigners is simply that one's positive duties toward foreigners are not proportional to the number of foreigners whose rights will otherwise go unsatisfied. It would be hard to believe that as world population expands so do the duties of each individual who bears duties. We can express this in the negative principle: the positive duties of a person do not expand without limit in proportion to the expansion in the number of people with unfulfilled rights."¹⁸³

This argument seems to be lacking something when I appeal to my moral intuition, because even if we cannot help all people, this does not mean that we should not help any of them, in other words, even if we cannot have positive duties towards all, does not mean that we do not have any duty at all to help the others. I do not believe we should see the problem in terms of expansion of positive duties. It is true that 100 rich people can maybe help just one million poor people from two million, and the other million would be left at the same level. I agree with Shue in this sense that we cannot admit positive duties towards all and satisfy only half of the population, but

¹⁸³ Henry Shue, "Mediating Duties," *Ethics* 98, no. 4 (July 1988): 687-704.

I think we need a non-coercive mechanism that will make the 100 rich people help as much as they can, even if they cannot help all people in need.

On the other hand, when it comes to having a right to health care, as Arras and Fenton argue, I also believe that if we are not able to act at the universal level, the right to health remains just a ‘manifesto right’.¹⁸⁴ And, because there is a scarcity of resources, we could point out at least two weaknesses of the right to health: first, it is not possible that this right could be honored for all people, especially when more than half of the world's population is living in poverty (under two dollars a day). This is a right that can be fulfilled only for some people in the richest countries, and for the rest remains only an ideal: “to claim such a right is not only unrealistic but is also a cruel hoax on the world’s poor, who are led to believe that their rescue will come from human rights treaties and bureaucrats at the WHO - “manifesto right” in the worst sense of that term— an empty promise with no possibility of realization in sight.”¹⁸⁵

We may argue that if we are to implement the right to health care, then people around the world should have access to the same level of healthcare. This would demand healthcare professionals to move from richer countries where people already have the desired level of health care, to countries where people do not have the basic minimum. This step is quite improbable, not only because it is difficult to find a criteria regarding who should be forced to go, but even because patients are entitle and have the right to get more than the average global health care. Surely, there could be found other solutions to promote health care all over the world, without restricting healthcare professionals’ freedom. They should not be seen only as tools to promote health but also as autonomous individuals.

Even if we cannot apply the ideas of the right to health to the universal level, this does not mean that we should not help anyone. This is a noble thought and action, and I do agree that we must help people as much as we can, but we must be aware that if the right to health cannot be universally applied, then the main idea of a right to health does not exist. If we cannot fully justify or accept a right to health, does not mean that we should not help people and also try to improve the health system in order for everyone to have access to high quality health care. When we take this step, we must be sure that other fundamental rights like the right to liberty and

¹⁸⁴ John D. Arras and Elisabeth M. Fenton, “Bioethics and Human Rights: Access to Health-Related Goods,” *Hastings Center Report* 39, no.5 (2009): 27-38.

¹⁸⁵ John D. Arras and Elisabeth M. Fenton, “Bioethics and Human Rights: Access to Health-Related Goods” (2009): 27-38.

property are not overlooked and very much limited. All depends on how we prioritize rights and what scale of values we use. Even if we think of rights in a hierarchical way, we must take into account the interconnectivity that exists between different types of rights.

Until this point we have acknowledged that the idea of the right to health care covers several dimensions of social-economic life. We can talk about a right to health, just if we agree that there are social obligations that extend over several levels. Most supporters of such rights consider social and economic rights are interdependent: we cannot talk about fulfilling such rights without reaching the linkage with other rights. An example would be that of the children that cannot continue their education. They are unable to exercise their right to education because of material shortages, and because their parents cannot provide a living to enable them to go to school. Thus, the impossibility of positive exercise of the right to decent living makes impossible to exercise the right to education. As we can observe, these rights are interconnected and I agree with Buchanan that arguments against the right to health can be seen simply as application of more general arguments against all categories of social and economic rights.¹⁸⁶

There is another interesting qualification regarding the right to health made by Onora O’Neil.¹⁸⁷ She argues that the right to health is a subsistence right and does not fall into neither category of universal or special rights. As Fenton and Arras¹⁸⁸, she also believes that the right to health is just a ‘manifesto right’. The solution she finds consists in talking about duties or obligations for agents to help the needy, instead of rights and entitlements. This way we could allocate the responsibility to a certain agency. The question is who has the obligation to fulfill the duty and obligation to help the needy.

O’Neil acknowledges that universal rights impose a duty on every moral agent and they should all be able to respect them. We cannot impose on people to respect universal rights if they are not able to act to fulfill them. In this respect, we cannot coerce a poor person to help in the same way that a rich person can in order to respect and protect the fulfillment of the right to health. In this case, there is not any room left for positive action. And if some are relieved from positive action, we cannot bind others to fulfill it, because under the framework of universal rights we must

¹⁸⁶ Allen Buchanan, *Justice and Health Care* (Oxford: Oxford University Press, 2009), 206.

¹⁸⁷ Onora O’Neil, “Rights, Obligations and Needs” in *Necessary Goods: Our Responsibilities to Meet Others' Needs*, edited by G. Brock (Lanham: Rowman and Littlefield, 1998), 86-106.

¹⁸⁸ John D. Arras and Elisabeth M. Fenton, “Bioethics and Human Rights: Access to Health-Related Goods,” (2009): 27-38.

attribute every person the same status. A possible solution would be to consider the right to health universal only under the negative duties, and to let the positive aspect up to charity organizations or different associations that fight for human health. We can also think under the right to health framework, as some agents being the receivers or beneficiaries of the help and others who do not need positive action in order to have the right to health fulfilled (for example people that already have great wealth) as the givers.¹⁸⁹

If we look from another angle, social and economic rights could be seen as an act of charity.¹⁹⁰ The difference between charity and rights is that using rights we avoid the stigma of charity, assisting the needy or pity them. On the other hand, if we recognize the right to health, the state will impose a duty for all to ensure that each person is entitled to medical care, regardless of her contribution.

This is true, we must also take into consideration the problem of people unable to support themselves, or have decent healthcare. A possible solution is if we take into consideration what Bill Wringer argues when he contradicts O’Neil, namely that subsistence rights fall into a distinctive category, what he calls ‘collective obligations’: “A collective obligation is one that can only be discharged by the collaborative, coordinated action of a group comprising more than one agent.”¹⁹¹

We could take these collective obligations to be met by mutual associations, by community organizations. Generally, each community wants to protect its individuals and to protect itself. But in order to protect individual autonomy, a better way to act is by the non-coerced coalition of individuals in different agencies capable to resolve different problems, such as the ones from the health care sector.

II. 4. Bioethics and Human Rights

In this section, I will try an analysis and clarification of how bioethics uses human rights framework. This way, we can comprehend the place of a right to health care in bioethical studies.

¹⁸⁹ Onora O’Neil, “Rights, Obligations and Needs” (1998), 86-106.

¹⁹⁰ See Maurice William Craston, *What Are Human Rights?* (London: Bodley Head, 1973).

¹⁹¹ Bill Wringer, “Needs, Rights and Collective Obligations,” in *The Philosophy of Need*, edited by Soran Reader (New York: Cambridge University Press, 2005), 187-207.

Globalization entails changes in all areas and bioethics is not exempt from this process. There are authors who believe that traditional principles of bioethics focus mainly on the individual and ignore the universal-global aspect. The aim of global bioethics is moving from a strict bioethics that focuses on individuals, to one that takes into account national and global community issues. In this respect, the appeal to human rights was brought into discussion by commentators to serve as a universal moral framework in bioethics issues.

In *Bioethics and Human Rights: Access to Health-Related Goods*, John D. Arras and Elizabeth M. Fenton inquire “what exactly it means to assert that human rights can or should be the lingua franca of a globalized bioethics, and what we can reasonably expect from such a framework...”¹⁹²

They highlight the main advantages involved in the association between human rights and bioethics. As Henry Shue says, human rights paradigm focuses on the legitimate claims of individuals towards the state. This brings to the forefront the importance of the person in the state, the possibility to free expression, to build her status not only in relation to public institutions but mainly with herself. We should be careful what kind of rights we assert, the positive or negative ones. The general argument for positive rights is that negative rights alone will not do any good for those who lack economical basic good. On the other hand, there is a big disadvantage, namely that positive rights will increase the state's role in terms of affirmative action, limiting the negative liberty rights of individuals.

A second advantage would be the political and legal dimension supported by a network of organizations such as UNESCO, WHO, Amnesty International, Partners in Health, Global Lawyers and Physicians, Doctors Without Borders, etc. These organizations have a global impact, not just on individual.

In turn, bioethics presents an advantage for human rights, because the philosophical investigation leads to the correct application of these rights. Guided action is necessary to clarify the foundations of human rights, not just a simple application that can be wrong “the best thinking in bioethics and political philosophy has shown that a focus on unmediated rights to particular medical interventions is misplaced.”¹⁹³

¹⁹² John D. Arras and Elisabeth M. Fenton, *op. cit.* pp. 27-38.

¹⁹³ *Ibidem.*

But human rights are not very helpful when it comes to fair allocation of resources. In this respect, John Arras and Elizabeth Fenton argue: “At most, such a right removes the issue of access to basic health care from free-market vagaries, allowing us to say that some failures to obtain access are not simply unfortunate but actually unjust. But it cannot tell us which failures are unjust, given limited resources and an expanding list of expensive, marginally effective treatments for diseases.”¹⁹⁴ They believe that rights help to moral mediation between the fundamental interests and the allocation of responsibilities and duties. Arras and Fenton reject the Hobbesian concept that brings to the forefront human rights as legal rights. They also reject rights as claims on certain organizations or persons, but support the idea that human rights should be claimable at least theoretically to count as real. If there is no responsible party, then we can only speak of “manifesto right,” and that is not a real right.¹⁹⁵

The authors identify three ways of conceiving human rights in health-related goods. The first is demand-side conception that states that if some people in a given circumstance need a good in order to live (or to have an opportunity for a decent life), then they have a human right to that good. This conception focuses on basic interests or fundamental human capacities, but it ignores the supply side—the responsibilities, duties, or costs that must correlate with rights, especially (though not exclusively) with welfare rights and it is rejected by the authors.

Arras and Fenton reject the idealized and demand-side conception. They embrace an “Institutional Conception” of human rights. They argue that this conception brings the unity and formalism needed to apply human rights globally: “*Institutional* human rights are best understood as an attempt to spell out the demands of a universal conception of morality in particular social contexts. Different people deliberating under different conditions will come to different conclusions as to how best to realize these demands, but they should all be working toward the same ultimate goal of providing for basic human interests.”¹⁹⁶

The institutional grounding of human rights is important for other authors too. Leslie London pleads for it : “recognizing the range of institutions that should be intervening to prevent or remediate a dual loyalty conflict, a human rights approach locates the problem of dual loyalty,

¹⁹⁴ *Ibidem.*

¹⁹⁵ *Ibidem.*

¹⁹⁶ *Ibidem.*

correctly, in the systemic factors that drive both health inequalities and discrimination, as well as more egregious forms of human rights violations, such as participation in torture.”¹⁹⁷

In *What is a Human Rights-Based Approach to Health and Does it Matter?* Leslie London starts with the assumption that an approach to health through human rights is very important to address growing inequalities in global health. This brings into question the three important aspects of this approach: first the indivisibility of civil, political and socio-economic rights; the second involves the active agency by those vulnerable to human rights violations; and the third relevant aspect is the normative role of human rights in establishing freedoms and protection.

She reveals the work conducted for the Network on Equity in Health in Southern Africa (EQUINET) identified four approaches to using human rights to promote health equity.

1. the human rights framework is used to hold government accountable
2. the human rights approach offers a framework for pro-active development of policies and programs such that health objectives can be implemented in ways that are consistent with human rights
3. where systems go wrong, redress of violations is another key aspect of a human rights approach. In such instances, making use of human rights machinery such as, for example, a Human Rights Commission, or a court, to secure redress of the violation
4. to mobilize civil society action to achieve the realization of the right to health

London further argues that there are three ways in which a responsibility falling on health professionals might be constructed: 1) if employed by a state party, a health professional may become the instrument through which the state violates the right to health and should therefore guard against involvement in such violations; 2) certain human rights obligations may have horizontal applicability among individuals, such as, for example, the prohibition against torture; 3) human rights may be viewed as an essential part of one’s professional conduct.¹⁹⁸

She believes that “Ethical codes need to integrate stronger human rights language if professional self-regulation is to be more effective. Second, health professionals faced with situations of dual loyalty, where the interests of their patients conflict with those of third parties, must be able to

¹⁹⁷ Leslie London, *What is a Human Rights-Based Approach to Health and Does it Matter?* *Health and Human Rights* 10, no. 1 (2008): 65-80.

¹⁹⁸ Leslie London, *op. cit.*

find support from their professional institutions in order to avoid actions that result in violations of their patients' rights."¹⁹⁹

I think that this means that if there is a right to health, then medical personnel has a duty more than any other professionals to comply with this right, because of the nature of their work.

Thinking at health by considering a human rights framework, does not resolve the problem of distribution of health resources. In this sense, Gruskin and Daniels argue: "attention to rights leaves unresolved the priorities that must be established among programs competing for resources, each of which arguably would improve health and the satisfaction of relevant rights... human rights approach identifies problems, but does not give solution on how to distribute goods."²⁰⁰ Human rights are universal, the same for every person, they do not allow any sort of distinction that could lead to a fair distribution, but they emphasize the importance of human beings and draw the attention to the compulsory respect for human dignity

III. 5. Healthcare as Basic Need

Even if we agree that every person should have access to a decent minimum, we must also identify what it consist of and to inquire why we should have it. Some philosophers try to justify the necessity of a decent minimum by using the basic need argument. This argument starts from the assumption that every person has special needs, but there are certain needs characteristic of all people: these are the basic needs. In Psychology we find an index of basic needs in Maslow's Pyramid where people's basic needs are placed at the bottom and the more special the needs they become more refined, climbing toward the top. Thus, physiological needs like the need for food, sex (reproduction), rest (sleep), breathing, survival, etc. are located at the bottom. As needs become more sophisticated, closer to the intellect and moral life, they are no longer so urgent. Of course, this is questionable, because it can be the case that for some people moral life is more important than food or reproduction. There are people who pretend that they cannot live without moral life or culture, arts, that this is vital for them like water or shelter.

¹⁹⁹ *Ibidem.*

²⁰⁰ Sofia Gruskin and Norman Daniels, "Government. Politics, and Law." *American Journal of Public Health* 98, no. 9 (September, 2008): 1573-1577.

There are two distinctive methods more prominent in the literature. First, there are authors who think justifying needs as an objective truth, such as the human rationality. If we are all rational human beings, then we should protect this status by fulfilling some functionings.²⁰¹ Second, we could establish some basic needs by an overlapping consensus, of individuals that have different conceptions of well-being, of a good life.

There is an assumption that if people have needs that are not met, such as the need for health, society has the obligation to fulfill them. Another assumption is that the need of people that do not have universal health insurance is more important than the rights of pharmacists, doctors and taxpayers who could use resources in another way, according to their desirability. Furthermore, we must ask ourselves if the need to be healthy requires the existence of a right to health care. I think it's best to make sure that every person does not suffer from lack of access to basic health care.

Some scholars argue that it is impossible to distinguish between real/basic needs and mere pretensions. One could consider a real need to have a pool in the backyard while for another a real need would be to have a defense weapon. Needs depend also on the cultural circumstances and background certain people have. What it is considered a need could be determined by cultural aspects, beliefs, community, preferences and other arbitrary aspects. A Buddhist may have different needs from a Muslim or an Atheist. Are religious needs basic or just desires? In this sense, we could bring to the forefront the dichotomy made by Len Doyal and Ian Gough between objective and subjective need. They argue for the objective need and reject the subjective one.²⁰² We can consider health care an objective need if we take the criteria to be the necessity of all persons to have a good health in order to be capable to sustain their life, in all the levels: social, economical, political or spiritual.

Culyer believes that there are five implications of need. Firstly, by measuring the ill health, we do not measure the needs, they are not synonyms. The author contrasts this view with Daniels' which sees health as the individual's impairment within normal opportunity range. Secondly, Culyer argues that the capacity to benefit is different from need, because the capacity to benefit is defined by outputs or effects of health actions and need is defined "as the resources, valued in expenditure terms, required to exhaust capacity to benefit". We can have two individuals with the

²⁰¹ See Barbara Herman, "Mutual Aid and Respect for Persons," *Ethics* 94, no. 4 (1984): 597.

²⁰² Len Doyal and Ian Gough, *A Theory of Human Need* (Basingstoke: Palgrave Macmillan, 1991).

same need whilst their capacity to benefit might be different. Thirdly, he considers need rather forward than backward-looking, prospective rather than retrospective. This means that the future or what can be done is more important than the past or the present and what was done or what people's actual situation is. Fourthly, sometimes it is equitable if some needs are unmet, and this is because there are resources constraints. Because of this situation, some individuals might receive more and maybe not enough for their health needs and some less resources but sufficient, but this is not incompatible with equitable distribution. Fifth, Culyer believes that equal access is an incomplete equity principle because access to medical care might depend strictly on what resources a person owns. Only after equitable access is provided, needs can be met. He considers needs are instrumental- that something is needed for what it can accomplish.²⁰³

Garrett Thomson speaks of 'fundamental needs,' which are necessary conditions in order for a person not to suffer serious harm. According to him, need is unavoidable if it is not based on a desire which the person would be better off not having (like a need for drugs) but on a desire which is intrinsic to the person. His solution is to distinguish between desires and the interests that motivate them. We all have an interest in food, but the food we desire will be relative to circumstances. The interest is basic while desires are contingent and more malleable.²⁰⁴

Like Thomson, I also consider that the idea of 'basic need' needs to be devoid of the element that comes from desires, and focus on interest, on the rational. If a person needs drugs, we can say that physical desire outstrips the interest acquired by reason. The things are different if a patient is dependent on insulin, because he has a bodily need that is supported by the need to survive, to lead a normal life. I think that we can agree on the idea that the survival is vital and interest accompanied by a deep desire (for some). But even if some people do not have the desire to live anymore, as species it is in our best and basic interest to go on living.

Effects of official recognition of the right to health, lead to the initiation of forced transfers from taxpayers to the state. This will cause the inflation of demand for health care, because people will use free resources more frequently. Thus, the result is setting limits on consumers of health care, because of the rising prices due to growing inflation in the medical services.

On the other hand, the increasing demand for equality in health can lead to collectivization of health care and health itself, because there could be the case that the relation between doctor and

²⁰³ Anthony J. Culyer, "Equity- Some Theory and Its Policy Implications," *Journal of Medical Ethics* 27, no. 4 (2001): 275–283.

²⁰⁴ Garrett Thomson, *Needs* (London: Routledge and Kegan Paul, 1987), 98-108.

some patients is limited by different rules imposed by society, for example egalitarian rules of distribution. In this case, patients who want to have a better health than the average is bound to a certain level of health. Instead when it comes to private care, people who own resources can be cured by the doctor even if they are not perceived as urgent case in the public health care system. This shows that we also need private care, even if the public health care system is equalitarian, because people should be ends in themselves and we should not refuse the desire of a person to help herself. Immanuel Kant said it best in the second formulation of categorical imperative, which requires us to treat impartially all human beings: : “ *Act so that you use humanity, as much in your own person as in the person of every other, always at the same time as an end, never merely as a means.*”²⁰⁵

One may wonder if we do not leave too much force and responsibility on the state to solve all the emerging problems. I think that a more suitable solution would be to let other organism such as non-profit organizations to take action in order to limit government’s intervention and find alternative solutions. If we consider health an objective reality, the allocation of resources by the state would be an important aspect. On the other hand, if we consider health as a subjective aspect, then the role of the state would be to enforce the liberty of the person to choose the best care for herself. If it were the case, I would prefer the last alternative, but health has both a subjective and an objective dimension. We should have the opportunity to choose our lifestyle, the treatment we receive in some cases or the doctor, but at the same time there are objective facts that influence health, such as pollution, climate change, the diagnosis of some diseases, the economic, social and political status of the region we live in etc.

A common mistake is that the state should guarantee us good health. However, health is influenced by certain factors outside the direct control of the state, such as the structure of individual biological and socio-economic conditions. The right to health refers to the ability to enjoy a variety of goods, facilities, services and conditions necessary for its realization. This is why it is more accurate to describe the right to health as a right to the highest standard that can be achieved in physical and mental health, but a necessary right to be healthy.

Allan Buchanan considers that the right to health is too demanding, an impossible standard to reach, especially for people with disability: “the problem is asserting a right to health as opposed

²⁰⁵ Immanuel Kant, *Groundwork of the Metaphysics of Morals*, edited by Mary J. Gregor (Cambridge: Cambridge University Press, 1996), 98-108.

to a right to health care is that it seems too demanding. A right to health care involves, in turn, a right to certain services, by contrast, a right to health seems to imply a right to be healthy, which is an impossible standard. Some seriously ill or disabled persons will never be healthy, no matter how many resources are used to gain health. Moreover, if seriously pursue health for all have come to same social resources and we leave little room, if I leave to pursue other social goals.”

According to WHO, the right to health is an inclusive law. This means that the right to health requires more than mere access to services such as building hospitals, as it must take into account some key issues that determine health. These matters relate to the existence of drinking water, food, adequate shelter, healthy working conditions and environment, education and health-related information and not least, gender. Apart from these, the right to health also includes freedoms such as freedom of consenting to the treatment or lack of torture or other inhuman treatment.

It is essential to observe that there is an important difference between having the right to a decent minimum of care and to claim that everyone ought to have access to a decent minimum. In the first case, there is more positive action from the state more than in the second case, where we talk about a moral urge or exhortation: “It is crucial to observe that the claim that there is a right to a decent minimum is much stronger than the claim that everyone ought to have access to such a minimum...”²⁰⁶

Buchanan argues that if we show that medical care is important from a moral point of view, we can deduce that there must be a right to medical care, unless we connect it with the principles of justice: “even if we can show what makes health care, or certain kinds of health care, morally important, this in itself will not show that there is a right to health care, unless the appropriate connection with principles of justice can be made.”²⁰⁷

According to Buchanan, there are three main features associated with the right to a decent minimum. First, we must understand the idea of a decent minimum in the context of each society. The content of rights should depend on available resources as well as a ‘certain consensus of expectations among its members’²⁰⁸

²⁰⁶ Allen Buchanan, “The Right to a Decent Minimum of Health Care,” *Philosophy and Public Affairs* 13, no. 1 (1984): 57.

²⁰⁷ Buchanan, *idem*, p. 57.

²⁰⁸ Buchanan, *idem*, p. 58.

We must be aware that each community has its own specific resources. We cannot claim that a poor country should distribute the same quality of resources as a rich country does, or to have a decent minimum in a country where there are no resources to meet this requirement. Further, we cannot compare a developed country like Germany with a poor country like Rwanda. It is clear that a decent minimum in a developed country cannot have the same quality as in a poor country. Secondly, by embracing the idea of a decent minimum we avoid the excesses of a principle of equal access, while we consider a substantial universal right. There are persons who wish to spend for their health more than to secure a decent minimum. This practice is allowed today, but provided that the other persons aren't left without a decent minimum. On the other hand, if we raise the decent minimum in order for people that seek extra health care to fit this minimum, then we could get in position to drain resources from many areas, like education, social services etc. We might argue, as Buchanan does, that the right to health care should be limited in its end to avoid the consequences of a too powerful right to equal access. In this sense, we should limit ourselves to the basic services that bring a tolerable and decent life.²⁰⁹ Of course, it is hard to define what such life means. Quality of life is very hard to measure for each person or community in part, or globally. People are different, have distinct desires and special needs, are adapted to certain standard, and usually want a better life. Therefore, we cannot claim a rich man or a developed country to level down to worse standards only to have access to a basic minimum, to align to other people or countries.

Utilitarian arguments are unable to provide a foundation of the right to a decent minimum, because the theory aims the overall utility, not that of each person in particular. Utilitarianism does not take into account differences between individuals. If we are dealing with people with disabilities, they need more resources, and the contribution they make to society is not sufficient. According to this view, people with disabilities or who are born with diseases which are expensive to maintain throughout life, should be excluded from the equation that assures a right to a decent minimum.

On the other hand, egalitarian thinkers like Norman Daniels or Amartya Sen consider that there is a “normal species functioning” or capabilities, necessary for an individual to have equal opportunities in his society. The principle that Daniels acknowledges is : “Social resources are to be allocated so as to insure that everyone can attain the normal opportunity range for his or her

²⁰⁹ Buchanan, *idem*, p. 59.

society.’’²¹⁰ He considers a list of health needs 1. Adequate nutrition; 2. Sanitary, safe, unpolluted living and working conditions; 3. Exercise, rest, and such important lifestyle features as avoiding substance abuse and practicing safe sex; 4. Preventive, curative, rehabilitative, and compensatory medical services (and devices); 5. Non-medical personal and social support services; 6. An appropriate distribution of other social determinants of health.²¹¹

Buchanan finds some difficulties in Daniels’s theory. First, it is very hard to define what counts as “the array of life-plans reasonable to pursue”. People have different lives, different skills, talents etc., so it is a real burden to identify them exactly. In Buchanan’s opinion, “Daniels’s principle of equality of opportunity is vulnerable to the same objection that leads to the rejection of the strong equal access principle. Granted the gap between most individuals’ actual opportunity ranges and the array of plans it is reasonable for some individuals to pursue, and granted the almost limitless possibility for technology and other services which can help narrow the gap, a conscientious commitment to D would create an enormous drain on resources.”²¹²

Another difficulty is that we have certain circularity if we try to derive a right to health care from the right to enjoy the normal opportunity range for one’s own society, because the normal opportunity is a social artifact, different in every country. Some places it is narrow, some places it is broad, depending on the resources. Buchanan suggests that Daniels’s principle requires “maximization of the opportunity range, or at least the opportunity range is to be maximized up to some limit.”²¹³

A third objection to Daniels’s principle is that we do not have a clue how to distribute and how we ought to divide scarce resources between people that do not have the chance to have a normal opportunity range. So, the principle itself, Buchanan argues, does not guarantee us a right to a decent minimum.

Buchanan explores a pluralistic view, where he combines the principle of harm-prevention, prudential arguments used to justify public health actions and another two arguments that are meant to demonstrate that “effective charity shares features of public good (in the technical

²¹⁰ Norman Daniels, “Health-Care Needs and Distributive Justice,” *Philosophy & Public Affairs* 10, no. 2 (Spring 1981): 146-179.

²¹¹ Daniels, *Just Health: Meeting Health Needs Fairly*, p. 42.

²¹² Buchanan, “The Right to a Decent Minimum of Health Care,” p. 63.

²¹³ Buchanan, *idem*, p. 64.

sense) is sufficient to do the work of an alleged universal right to a decent minimum of health care.”²¹⁴

As Buchanan acknowledges, there are three major arguments that can be taken into consideration when talking about special rights to health care. There are arguments from rectifying past or present institutional injustices, of compensation and for exceptional sacrifices for the good of a society.

Beside arguments from special rights to health care, there are arguments from harm prevention (ex. immunization and sanitation). But these arguments, as Buchanan shows, rest upon the Harm Principle, not upon the right to health care.

II. 6. Beneficence

The third types of arguments, prudential ones, emphasize the benefits of health care. The core arguments of Buchanan’s theory are the two arguments for Enforced Beneficence. Everyone has a duty of beneficence, but we do not know exactly how we are to express the limits of beneficence as obligation.

Both arguments for Enforced Beneficence start from the assumption that most philosophers accept, that there is a moral obligation (of charity or beneficence) to help those in need. I think that here Buchanan puts on the same level charity and beneficence, but I consider it is not the case. Charity presupposes people’s will and choice, while beneficence it is understood nowadays in a broader sense, implying also positive action and obligations.

Buchanan starts from the idea that voluntary giving it is not a strong characteristic of human beings; many individuals lack the necessary will to help others. And, even if individuals recognize that there is a duty to help others, they might very well decide that they do not want to help. The conclusion of the first argument of the author is that we must help others collectively, in order to make a real difference:

“There are many ways in which I might help others in need. Granted the importance of health, providing a decent minimum of health care for all, through large-scale collective efforts, will be a more important form of beneficence than the various charitable acts A, B, and C, which I might perform independently, that is, whose success does not depend upon the contributions of others. Nonetheless, if I am rationally beneficent I will reason as follows: either enough others will contribute to

²¹⁴ Buchanan, “The Right to a Decent Minimum of Health Care,” p. 67.

the decent minimum project to achieve this goal, even if I do not contribute to it; or not enough others will contribute to achieve a decent minimum, even if I do contribute. In either case, my contribution will be wasted. In other words, granted the scale of the investment required and the virtually negligible size of my own contribution, I can disregard the minute possibility that my contribution might make the difference between success and failure. But if so, then the rationally beneficent thing for me to do is not to waste my contribution on the project of ensuring a decent minimum but instead to undertake an independent act of beneficence; A, B, or C—where I know my efforts will be needed and efficacious. But if everyone, or even many people, reason in this way, then what we each recognize as the most effective form of beneficence will not come about. Enforcement of a principle requiring contributions to ensuring a decent minimum is needed.²¹⁵

The second argument states that we need an assurance in order to give away our money, to be sure that everyone contributes to achieve the threshold of investment. If not, I might spend my money on different things where I do not need others or maybe on myself because I do not consider beneficence of primer interest. Without enforcement I cannot be sure that enough others will contribute to achieve a certain aim:

“I believe that ensuring a decent minimum of health care for all is more important than projects A, B, or C, and I am willing to contribute to the decent minimum project, but only if I have assurance that enough others will contribute to achieve the threshold of investment necessary for success. Unless I have this assurance, I will conclude that it is less than rational—and perhaps even morally irresponsible—to contribute my resources to the decent minimum project. If I lack assurance of sufficient contributions by others, the rationally beneficent thing for me to do is to expend my 'beneficence budget' on some less-than-optimal project A, B, or C, whose success does not depend on the contribution of others. But without enforcement, I cannot be assured that enough others will contribute, and if others reason as I do, then what we all believe to be the most effective form of beneficence will not be forthcoming. Others may fail to contribute either because the promptings of self-interest overpower their sense of beneficence, or because they reason as I did in the First Argument, or for some other reason.”²¹⁶

For Bernard Gert the general goal of morality is to minimize evil or harm, not to promote good. He argues that there are no moral rules of beneficence, only moral ideals and obligations in the moral life are captured by moral rules that prohibit causing harm or evil. Although rational people can act impartially at all times in regard to others with the aim of not causing evil, they cannot impartially promote the good for all at all times.

²¹⁵ Buchanan, “The Right to a Decent Minimum of Health Care,” p. 70.

²¹⁶ Buchanan, *idem*, p. 71.

Gert describes the obligations of *non-maleficence* as rules that prohibit causing harm to others, even though he rejects all principles or rules that require *helping* other persons, which includes acting to prevent harm (“Do not kill,” “Do not cause pain or suffering to others,” “Do not incapacitate others,” “Do not deprive others of the goods of life). When Gert applies this judgment in the medical field, he considers that “Doctors presumably should not turn away anyone in need of medical care; they ought to treat people regardless of their ability to pay. Doctors should always act primarily in the best interest of the patient rather than in their own interest. Doctors are dedicated to the prevention and cure of sickness and suffering. These are ideals set by the medical profession, though perhaps clarified and modified by law and society.”²¹⁷

He adopts an un-paternalistic view and rejects the rules of beneficence. These are typically more demanding than rules of non-maleficence, and rules of non-maleficence are negative prohibitions of action that must be followed impartially and that provide moral reasons for legal prohibitions of certain forms of conduct. By contrast, rules of beneficence state positive requirements of action, need not always followed impartially, and rarely, if ever, provide reasons for legal punishment when agents fail to abide by the rules.

Peter Singer distinguishes between preventing evil and promoting good and thinks people in affluent nations are morally obligated to prevent something bad or evil from happening if it is in their power to do so without having to sacrifice anything of comparable moral importance. In the face of preventable disease and poverty, for example, we ought to donate time and resources toward their eradication until we reach a level at which, by giving more, we would cause as much suffering to ourselves as we would relieve through our gift. He reformulates his position by proposing that there is no clear justification for the claim that obligations of ordinary morality do not contain a highly demanding principle of beneficence, most notably a harm prevention principle. Singer has not given up his strong principle of beneficence, but he has suggested that it might be morally wise and most productive to publicly advocate a lower standard—that is, a weakened principle of beneficence. He therefore proposed a more guarded formulation of the

²¹⁷ Bernard Gert and K. Danner Clouser, “Morality and its Applications,” in *Building Bioethics: Conversations with Clouser and Friends on Medical Ethics*, edited by Loretta M. Kopelman (Kluwer Academic Publisher, 1999), 175.

principle, arguing that we should strive for a round percentage of income, around 10 per cent, which means more than a token donation and yet also not so increased as to make us miserable or into moral saints. In his 2007 Uehiro Lectures on Global Poverty, Singer defended his lines of argument about beneficence including the public advocacy thesis and is concerned with which social conditions will motivate people to give, rather than with attempting to determine obligations of beneficence with precision. Perhaps the limit of what we should publicly advocate as a level of giving is indeed no more than a person's fair share of what is needed to relieve poverty and the like.²¹⁸

Another author that tries to clarify what we owe to each other is Liam Murphy, advocating his principle of cooperation. He considers that an individual is only required to aid others beneficently at the level that would produce the best consequences if all in society were to give their fair share. One is not required to do more if others fail in their obligations of beneficence. Unlike act-consequentialism, this theory does not demand more of agents whenever expected compliance by others decreases.²¹⁹

According to John Stuart Mill, a person's liberty (or autonomy) is justifiably restricted to prevent harm to others caused by that person. Mill agrees that the principle of paternalism, which renders acceptable certain attempts to benefit another person when the other does not prefer to receive the benefit, is not a defensible moral principle. It difficult though to specify what kind of harm it is worse, physical, economic, social, etc. and how much harm should we accept before acting.²²⁰ We can morally judge people who do not want to contribute to the welfare of others. They can be condemned on moral level and also by law in some special cases like leaving an injured

²¹⁸ Beauchamp, Tom, "The Principle of Beneficence in Applied Ethics", *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2008/entries/principle-beneficence/>> (accessed September 10, 2011).

²¹⁹ Beauchamp, Tom, "The Principle of Beneficence in Applied Ethics", *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2008/entries/principle-beneficence/>> (accessed September 10, 2011).

²²⁰ See John Stuart Mill, *On Liberty and Utilitarianism* (Oxford: Oxford University Press, 1969 (1992)); Tom Beauchamp, "The Principle of Beneficence in Applied Ethics", *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2008/entries/principle-beneficence/>>.

victim on the side of the road. But it is a long discussion what criteria we use when turning a moral law into a legal one, and I will not discuss it here. Instead, I will bring into attention the question on how we can incorporate the level of private morality on civic duty and on what criteria? I believe that the Non-Harm principle is in this case a good start, and it includes a duty to prevent the harm, for both family, friends and strangers (also future generations).

If on the other hand, we want to punish those who do not contribute to the moral level of society they live in, there are justified ways we can act. When a person does not help her peers, we can stop being their friend, we have the freedom not to help her when she needs, moreover, she can be subjected to the society's opprobrium. We are free to act in return in the same way she does. But in addition to this, we also have a duty of civility, a duty as citizens to help each other when it comes to social aspects.

Conclusion

Even if we cannot be coerced to help to the implementation of a universal right to health, I believe that we should help the others by creating the opportunity for them to access a basic minimum of health care. We should help them help themselves, to be able to exercise their capabilities.

Of course, this implies economic development, restructuring the institutions and help from civil society. We cannot improve access to medical care without improving the entire social, economic and political structure of a community, because these structures are interconnected and interdependent.

The moral problem of health care could be more feasible if we shift the focus from the right to health, to moral duties or obligations between individuals. We also need fair institutions in order to make sure that all these are respected.

CAP. III Connecting Social Contract and Healthcare

Introduction

The aim of this section is to analyze some relevant elements regarding social contract. A clarification of its main aspects is important in order to answer the question regarding how fair institutions of justice are to be designed and how we should justify our actions towards others. This step will help to further analyze the connections between governments, healthcare personnel and other citizens (prospective patients).

I will concentrate mostly on the theories of John Rawls and Robert Nozick, since the main arguments of this work are based on their ideas regarding social contract and justice. While Rawls imagines the contract between citizens to lead to the principles of justice for institutions, Nozick gives priority to individual rights and private property. There are several reasons why I use this contract framework. First, it is important to notice that when we speak of morality we assume the connection between two or more people. But beside this, justice also implies in some respect enforceable duties and it is the job of institutions to act towards accomplishment. If we accept the social contract framework, we assume a connection between healthcare professionals and patients, citizens, institutions and other entities. It is a step further that helps to answer another central question of this work- what kind of duty medical personnel has towards others or what morally legitimate basis should we consider when resolving the problem of brain drain of healthcare personnel. To do this, I consider necessary to investigate not only how justice for institutions works, but even the existing connections between individuals. In order to proceed I will assume, in the spirit of most important contractualist and contractarian thinkers, that we can think at society in a contractual way.

Even if we can or cannot derive special duties from contractual grounds, we first have to see what social contract implies in order to go on with the justification. When it comes to what contract should imply, we will see that there are shared arguments and opinions. For better clarification and understanding of social contract theories, I will review the most significant ones, and develop the two most important for this work: Rawls' theory, that sees society as a

system of cooperation implied by contract and seeks justice for institutions, and his major critic, Robert Nozick, who embraces another type of contract, without so many strings attached. These steps are very important, because they will help me see if there are special ties implied by social contract and if we can find reasons why those ties should create moral duties between medical personnel and their national peers.

My conclusion is that if we see society through the social contract framework, we also need to be aware of the responsibilities between people. If justice for institutions and moral duties between people are two distinct things, we should search to achieve both, in order to have a harmonious society. At the same time, we have to acknowledge that individuals did not choose to be born in a certain community, under a certain contract. Most of institutions or communities we are borned in, are tacitly accepted, sometimes because we do not have a real choice to do otherwise. If there is any freedom, duty towards citizens from the community we live in, should be left at the choice of each of us, but not ignored. Responsibility is accepted by virtue of our tacit acceptance of the community we live in, because of our incapacity to leave it, even if we have a formal framework of “freedom to leave”.

III. 1. The Social Contract

First, let us enumerate what are the main characteristics of social contract. For this, we will bring forward Samuel Freeman’s idea that every agreement constitutes a framework for moral justification and that every social contract has a different particularity, based on how they respond to various specific questions: who are the parties and how are they situated; what is the object of agreement; what are the intentions and interests of contracting parties; what right and powers do the parties have; what are the motivations of the parties and finally, what sort of knowledge do they have.²²¹

Social contract theories differ, but they have in common some important elements when it comes to allocate attributes to the parties involved in the agreement. In this respect, we will see in this section that scholars like Thomas Hobbes and John Locke, Immanuel Kant, Jean-Jacques Rousseau, John Rawls etc., embrace attributes like rationality, free will or autonomy. Another feature of social contract theories is that people tend to unite, to ally in order to have a better

²²¹ Samuel Freeman, “Moral and Agreement in Social Contract Views,” *Philosophy and Public Affairs* 19, no. 2, (1990): 122-157.

living and defend themselves from external or internal threats. But this observation may be redundant if we have in mind what the term ‘social’ implies.

III. 1. 2. Contractarianism and Contractualism

To clarify a step further the social contract theory, I will point out the main differences between the two interpretations of it: contractualism and contractarianism. Samuel Freeman characterizes the two types of social contract as rights-based and interest-based, where both consider the social cooperation fundamental to improve people’s life.²²² The basic principle that ground these theories is respect and reciprocity for all human beings. Also, moral norms cannot exist without mutual agreement or contract. There are some fundamental elements of social contract theory such as the initial situation, the individuals that participate to the contract and rules that guide the contract. Contractualists justify the requirements for a just and impartial agreement by external reasons, while contractarians consider that cooperation and agreement can be guided only by fair and impartial rules and principles, representing part of the contract.²²³

Furthermore, contractarians consider the equality of the contracting parties is “merely *de facto* and their choice of principles rationally self-interested” while contractualism starts from “an ideal of *reasonable* reciprocity or fairness between moral equals” where moral equality is “equality in a kind of dignity of authority (to make claims and demands of one another-in particular to command a kind of respect I have called ‘recognition respect’.”²²⁴ For the contractualists there are some norms before the contract while for contractarians moral norms are formed by the self-interested contracting parties.²²⁵

On the other hand, contractualists like Thomas Scanlon or John Rawls consider that self-interest should not be the only one guiding the terms of the contract, even though it can be an important structural element. To neutralize self-interest, Rawls brings into his theory of justice as fairness, the veil of ignorance, while Scanlon thinks individuals should be guided by reason: “an act is

²²² Freeman, *idem*, p. 123.

²²³ Cudd, Ann, "Contractarianism", *The Stanford Encyclopedia of Philosophy* (Fall 2012 Edition), Edward N. Zalta (ed.), forthcoming URL = <http://plato.stanford.edu/archives/fall2012/entries/contractarianism/> (accessed December 12, 2012).

²²⁴ Stephen Darwall, *Second- Person Standpoint: Morality, Respect, and Accountability* (Cambridge, MA: Harvard University Press, 2006).

²²⁵ Stephen Darwall, *Contractarianism/Contractualism* (Malden MA : Blackwell, 2003).

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 as a basis for informed, unforced general agreement”.²²⁶

III. 1. 2. Influential Theories of Social Contract

Thomas Hobbes is the first who delimited clearly the important aspects of what a social contract implies. After Hobbes, John Locke and Jean-Jacques Rousseau are the best known proponents of this enormously influential theory.

Each of these authors tries to design the social contract theory using different approaches. Thomas Hobbes, is the contractarian philosopher who founded the social contract on the hypothetical State of Nature. Hobbes argues that individuals are exclusively self-interested, but they are also reasonable. They have in them the rational capacity to pursue their desires as efficiently and maximally as possible. From these observations regarding human nature, Hobbes designs a compelling argument for why we ought to be willing to submit ourselves to political authority. In order to do this, he imagines individuals in a situation prior to the establishment of society, the State of Nature. Here, the individuals are equal and un-coerced by any state force, this State of Nature being prior to the formation of the State. The equality among people is a natural one, as opposed to moral equality, because he considers that people are equal in natural endowments:

“Nature had made men so equal in the faculties of body and mind as that, though there be found one man sometimes manifestly stronger in body or of quicker mind than another, yet when all is reckoned together the difference between man and man is not so considerable as that one man can there upon claim to himself any benefit to which another may not pretend as well as he. For as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination or by confederacy with others that are in the same danger with himself.”²²⁷

We can also notice in Hobbes work, the contractarian idea that morality is designed after the exit from the state of nature, so we do not have moral prerequisites to guide parties before the agreement:

²²⁶ Thomas Scanlon, *What we Owe to Each Other* (Cambridge MA: Belknap, 1999), 272.

²²⁷ Thomas Hobbes, *Leviathan*. Edited by Edwin Curley (Indianapolis IN.: Hackett Publishing Co. 1994), 74.

“To this war of every man against every man, this also is consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice, have there no place. Where there is no common power, there is no law; where no law, no injustice. Force and fraud are in war the two cardinal virtues. Justice and injustice are none of the faculties neither of the body nor mind.”²²⁸

This situation is not a peaceful one because there is distrust between individuals and cooperation is no longer possible because there is not any recognized institution able to enforce and respect contracts. Hobbes concludes that the State of Nature is the most unwanted situation, because it is a perpetual State of War. But people are reasonable and they have the natural laws that could help them arrive to a civil society. In order to do that, first they must renounce to their living in the State of Nature and second they must both agree to live together under common laws, create an enforcement mechanism for the social contract and the laws that constitute it and obey the sovereign.

Therefore, before the establishment of the basic social contract, nothing is immoral or unjust – anything goes. After the contracts between the parts are established society becomes possible, and people can be expected to keep their promises and cooperate with one another.

After Hobbes, John Locke uses the methodological device of the State of Nature, to a different end. In *Two Treatises on Government*, Locke describes the State of Nature as a state of perfect and complete liberty to conduct one’s life as one best sees fit, free from the interference of others. But individuals are not allowed to act however they see fit for their interest, because even if they are in a pre-political state, they have moral rules implied by the Law of Nature (contrary to Hobbes understanding of the State of Nature). The Law of Nature, which is on Locke’s view the basis of all morality, and given to us by God, commands that we not harm others with regards to their “life, health, liberty, or possessions”, because people are all “*equal and independent*”.²²⁹ Guided by this morality, people should not do harm to one another, and have a duty of affection that comes from equality.²³⁰ So here, we see the contractualist roots where moral prerequisites guide the parties when entering the social contract.

²²⁸ Hobbes, *op. cit.*, p. 78.

²²⁹ John Locke, *Two Treatises of Government*. Edited by Peter Laslett. (Cambridge: Cambridge, 1960), 197.

²³⁰ *Ibidem*.

However, in case they come to a state of war, people do not have any civil authority that could legislate and they are put in a situation of using force one against other to defend themselves. If they lack civil authority, the war is likely to continue, so they make a contract in this sense.²³¹ The contract must be made by free individuals, without any coercion from other people or institutions, as Locke acknowledges: “Men being, as has been said by nature, all free, equal, and independent, no one can be put out of this state, and subjected to the political power of another, without his own consent.” He goes on and outlines that individuals have a natural liberty and “The only way whereby any one divests himself of his natural liberty, and puts on the *bonds of civil society*, is by agreeing with other men to join and unite into a community, for their comfortable, safe and peaceable living one among another, in a secure enjoyment of their properties and a greater security against any that are not of it.”²³² So, people can give away freely their liberty or a part of it, solely by agreement or consent. They do this for their security and prosperity, to have the possibility to enjoy their property without the unwanted intervention of others in their lives. These actions are mirroring one of the most important aspects for John Locke: the right to liberty, life and property. The philosopher allocates a special status to these three rights, with emphasis on the right to property. He stresses that in the State of Nature people have these rights that help them to limit the power of the state or others towards their individuality: “...we must consider what state all men are naturally in, and that is a *state of perfect freedom* to order their actions and dispose of their possessions and individuality, as they think fit, within the bounds of the law of nature, without asking leave, or depending the will of any other man.”²³³

Another author who made a significant turn regarding social contract was Jean-Jacques Rousseau. The philosopher has two different approaches to social contract theory, the naturalized account from *Discourse on the Origin and Foundations of Inequality Among Men (commonly known as Second Discourse)* and the normative account from *The Social Contract*. From reasons of space, time and relevance for my work, I will present the normative account on social contract. The latter work mentioned above is probably the most influential book on politics. The main question of Rousseau here is under what condition a state that conserves its citizens’

²³¹ Locke, *Two Treatises of Government*, pp. 206-212 (chapter III).

²³² Locke, *op. cit.*, p. 279, par. 95 (chapter VIII).

²³³ Locke, *op.cit.*, p. 195, chapter II.

freedom and equality could exist. Implicitly, he is interested on the place of the individual in society and their flourishing.²³⁴ In order to preserve their freedom, individuals appeal to a social contract where each individual surrenders his natural will led by personal preferences in order to receive the benefits of the general will, the will of all people in society that design the true Sovereignty. The general will may be different from what an individual's personal will, as Rousseau states: "In fact, each individual, as a man, may have a particular will contrary or dissimilar to the general will which he has as a citizen. His particular interest may speak to him quite differently from the common interest..."²³⁵

The contractualist philosopher believes that people must be secured from 'personal dependence' and act toward the general scope of civil society, because if a person refuses to act accordingly to the general will, she will be coerced to do so. In case someone wants to follow her own will and disobey the general will, she will be coerced to come back the right way, being part of the social contract, because it is the only element that conserves the freedom of people. For Rousseau, this is the only type of forced control from the state:

"In order then that the social contract may not be an empty formula, it tacitly includes the undertaking, which alone can give force to the rest, that whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free; for this is the condition which, by giving each citizen to his country, secures him against all personal dependence. In this lies the key to the working of the political machine; this alone legitimizes civil undertakings, which, without it, would be absurd, tyrannical, a liable to the most frightful abuses."²³⁶ Here Rousseau seems to consider that exchanging natural free will with civil free will is the best bargain a person might have.

When leaving the state of nature and embrace the civil society, people become citizens who have to embrace certain principles and also to have a duty to their peers. This is possible if every person gives up her inclinations and listens to the voice of reason:

²³⁴ For recent discussion on Rousseau's work and some ideas presented here see Christopher D. Wright's *Rousseau's The Social Contract* (London: Continuum International Publishing Group, 2008).

²³⁵ Rousseau, *The Social Contract*, Translated by G.D.H. Cole (New York: Cosimo Classics, 2008), 26.

²³⁶ Rousseau, *op. cit.*, p. 27.

“Then only, when the voice of duty takes the place of physical impulses and right of appetite, does man, who so far had considered only himself, find that he is forced to act on different principles, and to consult his reason before listening to his inclinations.”²³⁷

In exchange for leaving aside the personal will and embracing the civil will, every citizen is in a better position because by there will be several advantages that in the state of nature would not be possible. Rousseau considers that the advantages the individual has from the state of nature, the ones that come from natural free will, can be left aside for the greater advantages a person encounters as a citizen like developing her intellectual and emotional parts, stepping from the savage state of nature to a stage where he can be an intelligent being:

“ he deprives himself of some advantages which he got from nature, he gains in return others so great, his faculties are so stimulated and developed, his ideas so extended, his feelings so ennobled, and his whole soul so uplifted, that, did not the abuses of this new condition often degrade him below that which he left, he would be bound to bless continually the happy moment which took him from it forever, and, instead of a stupid and unimaginative animal, made him an intelligent being and a man.”²³⁸

Because all people are equal, they all have the power to prescribe laws to all, in the same manner but “no one has a right to demand that another shall do what he does not do himself”. Rousseau argues for a strong representative democracy, where every person has the right to be represented so that the general will may be fulfilled.²³⁹

These theories of social contract are the most relevant ones when it comes to modernity. Philosophers mostly appealed to reason, theology or human irrationality to provide arguments and justification for social contract. But passing to contemporary social contract theorists, we will see that as the institutions and our perception of the world changes, scholars also need to provide up to date theories that fits the contemporary design of our society. The social contract theory is adapted to our present world, and reason is the only inheritance left from the modern world. In what follows, we will see that reason only cannot provide support to justify justice in a pluralist society: we also need reasonableness and agreement without external coercion.

²³⁷ Rousseau, *op. cit.*, p. 27.

²³⁸ *Ibidem.*

²³⁹ Rousseau, *op. cit.*, pp. 89-90.

David Gauthier is a contractarian philosopher who embraces the idea of agreement without external coercion. In his representative work, *Morals by Agreement*, the philosopher argues that both politics and morality are founded on agreement between self-interested and rational people. But unlike Hobbes, he considers that we can establish morality without the external enforcement of a Sovereign. Unlike Hobbes who considers that human desires are too strong and that is why the necessity of the sovereign, Gauthier considers that reason is sufficient to enable people to make an agreement and cooperate and also to stick to it. To argue, he appeals to the model of the Prisoner's Dilemma to reveal that self-interest can be consistent with acting cooperatively. If a person acts as to further the interests of the other, she serves her own interests as well. Gauthier imagines a mechanism of moral justification in terms of self-interest. He thinks that if we want to justify morality, we must consider something independent of it, exterior. If morality is not something given, then we must find something to guarantee or justify it, without any base on its internal construction. Gauthier believes rationality is self-warranting and that morality is justified only by practical reasons. He thinks that irrespective of preferences individuals may have, moral reasons apply to them.²⁴⁰

With the help of reason, the enforcement mechanism is internalized and we no longer need the Sovereign to guide the agreements. In addition, in the initial bargain position, Gauthier appeals to the Lockean proviso of non-coercion, meaning that people cannot be forced to act in a certain way. Having this proviso in mind, people are more inclined to cooperate, and so to satisfy in a better way their preferences. The conclusion of Gauthier's work is that morality consists in cooperation principles rationally accepted, that provide mutual advantages.

But if we do not have mutual advantages, there is not any moral constraint on cooperation. There is also the possibility that a person has to choose between a) to enter into cooperation where she does not have that great advantages but her joining will improve the others' situation in an important way and b) to enter into a cooperation where she has great advantages and also better the position of others, without the great impact she would have had if she had chosen the first option.²⁴¹

²⁴⁰ David Gauthier, *Morals By Agreement* (Oxford: Clarendon Press, 1986), 100.

²⁴¹ For these ideas and a developed analysis on moral constraints in Gauthier's theory, see Georgia Testa, "Gauthier and the Capacity for Morality," *Res Publica* 9, (2003): 223–242.

If we pass from contractarian to contractualist views, Thomas Scanlon is one of the contemporary thinkers that shares his theory starting from Kantian elements. But rather than seeking principles that everyone agrees or trying to abstract from many particular characteristics as Kantian theory requires, he has a more realist approach, where reasonableness demands principles that no one would reject.²⁴² Scanlon encloses his ideas in the following phrase: “An act 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 as a basis for informed, unforced, general agreement.”²⁴³ His theory also differs from Rawls’ view because the author of *A Theory of Justice* seeks for moral principles that everyone would agree, using the impartiality of the veil of ignorance.

III.2. Contract and Cooperation in Rawls’ view

When it comes to John Rawls’s work, it is important to see it in a coherent manner to understand better its principles and main transformation during the time. Following the steps of Rawls, I will proceed with his first major and most commented work, *A Theory of Justice*.²⁴⁴

The philosopher elaborates his theory of justice as fairness based on the idea of counterfactual 'original position'. He imagines this context where rational agents called *parties*, are under the 'veil of ignorance' and pursue their own good. Parties are agents acting guided by their ability to be rational. In the position to make a choice, the parties will agree on the principles of justice as fairness.

As Rawls tells us, the original position of equality corresponds to the state of nature in traditional theories of social contract. The original position is not thought of as a historical state and or as a primitive condition of culture. It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice.²⁴⁵

When building the original position, Rawls takes the idea of contract from Kant. One of the features of this conceptual framework, is the concept of free and equal rational agents that are in

²⁴² Ashford, Elizabeth and Mulgan, Tim, “Contractualism”, *The Stanford Encyclopedia of Philosophy* (Fall 2012 Edition), Edward N. Zalta (ed.), forthcoming URL =<http://plato.stanford.edu/archives/fall2012/entries/contractualism/> (accessed December 14, 2012).

²⁴³ Thomas Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press), 153.

²⁴⁴ Some ideas presented in this chapter, regarding Rawls’ and Nozick’s thoughts are also presented in my master thesis, but here there is a more developed analysis of both theories.

²⁴⁵ John Rawls, *TJ*, p.12.

an initial position of choice. The intention of contractualist philosophers is to derive the content of morality from the notion of agreement between all those who have the same status: free and equal people not only before the law but even morally. Rawlsian contractualism like the Kantian, looks for principles to which all rational agents agree freely, in the context of ideal circumstances. These requirements are met only if a person does not know her particular features.

The individuals in this position are in reflective equilibrium. This implies a capacity for rational agents to corroborate their own principles and insights, so that there is a balance between the principles embraced by each of those in the original position. The situation in which the parties are, must produce stability.

To ignore all private elements, including social circumstances, talents or skills acquired by birth, Rawls uses the veil of ignorance. Its role is to remove whatever is morally arbitrary, when parties are choosing the principles of justice.²⁴⁶

Characteristics related to the private life of every individual, must be eliminated to make room for impartiality. If the agents were aware of the capabilities they had, or the circumstances in which they lived, they would not be able to make a choice without being biased.²⁴⁷ Traits such as race, sex, religion or moral comprehensive doctrines that guide specific behaviour of each person should not matter, because the principles of justice must be impartial and available to all in the same way.

To agree, the parties choose principles according to their reason and autonomously. In this sense, parties do not have a pre-conception of justice, but get to choose principles of justice using the pure procedural justice. Pure procedural justice can be defined in contrast with perfect procedural justice. The latter is based on pre-established principles to construct a conception of justice. Because in the original position the parties are rational and autonomous, they cannot be justified based on the principle above, as this would mean denying their freedom, the impossibility of autonomous choices. Procedural justice involves a determination by the construction process, based on rational and autonomous individual. This way, the parties are choosing principles of justice as fairness, arranged in lexical order.

²⁴⁶ TJ, p. 18.

²⁴⁷ TJ, P. 12.

The first principle is the principle of equal rights to liberty, where "...certain sorts of rules, those defining basic liberties, apply to everyone equally and that allow the most extensive liberty compatible with a like liberty for all."²⁴⁸

This principle is egalitarian in that it distributes equal freedom for all people. The first principle has priority over the second-difference-incorporating the principle that Rawls maximin rule formulate in the following way:

"... Social and economic inequalities be arranged so as to be a) reasonable expectation that everyone's advantage and b) are to be correlated with position and services open to all".²⁴⁹

These principles provide the basic needs of free and equal citizens. But to ensure them it is necessary to allocate certain primary goods²⁵⁰ such as freedom and equal opportunities. Social inequalities are allowed but they are legitimate only insofar as they operate to the advantage of the most disadvantaged, leading to improve their position, as outlined by the difference principle. The pursuit of the advantage of the disadvantaged is a compulsory fact for Rawls, because it requires a theoretical framework created by their compensation. According to the author, people who are more fortunate or better endowed, must compensate other less endowed. If we consider our endowments arbitrary and non-meritorious as Rawls does, then it can be argued that the fruits of our labour are not totally deserved. The most endowed must use a part of their benefits to compensate the least advantaged, in order to balance the inequalities. For example, to invest "greater resources . . . on the education of the less rather than the more intelligent"²⁵¹ But even if we have some arbitrary endowments, people have to work to develop them, most of the time, and that is considered to be their deserved effort. This effort, must be compensated, and not be disregarded. But the principles of justice do not discuss moral desert "and there is no tendency for distributive shares to correspond to it." because "the effort a person is willing to make is influenced by his natural abilities and skills".²⁵²

²⁴⁸ TJ (1999), 56.

²⁴⁹ TJ, p. 60.

²⁵⁰ Rawls defines primary goods as "things which it is supposed a rational man wants whatever else he wants...The primary social goods, to give them in broad categories, are rights, liberties, and opportunities, and income and wealth" he adds to this the sense of one's own worth, or self-respect. (*See* TJ, p. 79).

²⁵¹ Rawls, TJ (1999), 86-89.

²⁵² TJ (1999), 273-276.

The foundation of the theory is the assumption that society is a system where everyone cooperates. In *A Theory of Justice*, the basic structure of a social system is defined as "the way in which major social institutions distribute social rights and duties and determine the division of fundamental advantages from social cooperation."²⁵³

However, it is quite problematic to assume that all individuals in a society cooperate. As we have seen, based on the contractualist idea of the original position, Rawls assumes that parties are rational agents. But not all people are rational people, as Rawls defines it in Kantian spirit. An example would be if we take into consideration people with certain mental disabilities or small children. It is evident that they cannot cooperate as people without disabilities. There are also people with physical disabilities who cannot cooperate to the extent that healthy people do. Moreover, unlike the latter, people with disabilities often need resources. Some scholars, like Martha Nussbaum for example, emphasizes that people with disabilities are left outside when designing the principles of justice. She pleads for an additional list of functionalities that every person should be provided with.²⁵⁴ But when designing the original position, Rawls specifically states that the parties do not know their particularities, they are neutral and rational. This means that the principles of justice are the same for everyone, and there is no bias between individuals. Of course, the parties are also fully healthy, but this is Rawls' intention.

There are people with disabilities who can be productive if the circumstances are right, but this is not true for all those with disabilities. Having a disability means you cannot perform some functions crucial to life, and creating a framework that could help these people to be productive or autonomous involves the allocation of considerable resources.

Relative to social contract theory, this idea is contrary to that of achieving the benefits through economic cooperation. These people are not included, because the logic of the social contract takes into account only individuals associated in circumstances where there is a mutual benefit from cooperation and each expects a certain gain. To include into the original position individuals that are worse situated would be contrary to this logic, because it is not reasonable to associate yourself with someone who makes limited or no contribution to social welfare.

²⁵³ TJ, p.7.

²⁵⁴ See Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard: Harvard University Press, 2006).

If we take into account individuals with disabilities we cannot measure who is most disadvantaged in society because the parameters of measurement are income and wealth. It is essential for the support of the difference principle argument for Rawls to speak of social productivity and welfare of individuals in purely economic terms. However, we must be aware of the value of the individual as moral, social, cultural human beings, we should not consider only the economic side of the problem.

But he resolves this problem in his later works, when he introduces the idea of reasonableness and when he reconsiders the difference principle. We can think that the idea of reasonableness implies tolerance, which means individuals are more likely to accept each other and cooperate on all levels, not only on comprehensive doctrines.

Another category of people who cannot cooperate, are those whom poverty prevents them from doing so, but Rawls escapes this challenge by designing the theory of justice as fairness under such circumstances that it cannot be applied to severe poverty or on the contrary, to a society where there is abundance of resources. Where there is severe poverty, people just struggle for their living and necessary resources for survival, we cannot assume the existence of primary goods for individuals. In the other case, where we have all the necessary resources, the division of resources will not be a problem and cooperation becomes superfluous, because every person would have what she needs, there would be no arguments about resources. The solution he puts forward when designing the original position is the condition of moderate scarcity.²⁵⁵

Rawls reconsiders his theory years later and tries to complete it by taking account of the relevant criticisms addressed to *A Theory of Justice*. In *Political Liberalism*, he tries to establish how this society could achieve political consensus and implicitly stability, if we consider all different moral or religious doctrines. The importance of consensus is predominant in both the works mentioned, but in *Political Liberalism* he tries to search for stability by appealing to *overlapping consensus* on the basic institutions of society. Overlapping consensus is guided by moral reasons, and in case some doctrine becomes predominant, people who share it will not withdraw their support. Rawls thinks at overlapping consensus in opposition with *modus vivendi*, which implies a political bargain or agreement guided by the self-interest. The main criteria used by Rawls

²⁵⁵ John Rawls, TJ (1999), 110.

when analyzing these opposite views is stability. In this respect, overlapping consensus creates more stability than *modus vivendi*.²⁵⁶

He sees society as a fair system of cooperation where individuals have two important moral powers: they are able to create and revise their conception of good²⁵⁷ and second, to cooperate with others.

Rawls thinks of political liberalism as a doctrine that has the general purpose to make possible the agreement on a political conception of justice. By this, he understands a conception free from any religious, moral or philosophical comprehensive doctrine²⁵⁸. The philosopher argues that diversity of doctrines is a feature of liberal societies.²⁵⁹ In order for a doctrine to enter the overlapping consensus, it does not have to contradict the principles of justice.²⁶⁰ In order to be impartial or neutral towards all different doctrines, justice as fairness must be a ‘freestanding view’ and “Their content is not affected in any way by the particular comprehensive doctrines that may exist in society”.²⁶¹ It is the eliminatory criteria for every conception of good: in case a doctrine does not pass the test of the principles of justice and contradict them, it is not an acceptable doctrine for a liberal democratic society. At the same time, the comprehensive doctrines are part of each individual’s private sphere, while the political consensus and stability are part of public sphere.

In *A Theory of Justice*, when the parties in the original position choose the principles of justice, they base their choice on reason. The original position changes, and in *Political Liberalism* it is a device that responds to political questions, not metaphysical ones, where parties are seen as

²⁵⁶ John Rawls, *Political Liberalism* (New York: Columbia University Press, (revised edition) 1996), 147-148.

²⁵⁷ In TJ, Rawls sees the idea of one’s conception of good as Kant, Aristotle or Sidgwick do, not as a dispute between utilitarianism and contract doctrine. For Rawls, “a person’s good is determined by what is for him the most rational long-term plan of life given reasonably favorable circumstances.” (p.79). In PL, we should add the reasonability of the individual when he conceives his plan of life.

²⁵⁸ We have to deal with a comprehensive doctrine “when it includes conceptions of what is of value in human life, as well as ideals of personal virtue and character, that are to inform much of our non-political conduct (in the limit our life as a whole)” (PL, p. 175). Rawls distinguishes between fully and partially comprehensive doctrines: “A doctrine is fully comprehensive when it covers all recognized values and virtues within one rather precisely articulated scheme of thought; whereas a doctrine is only partially comprehensive when it comprises certain (but not all) non-political values and virtues and is rather loosely articulated” (PL, p. 175).

²⁵⁹ PL, pp. 216-217

²⁶⁰ PL, p. 169.

²⁶¹ PL, p. 141.

representatives of citizens. Habermas writes that in PL, Rawls use of the term 'political' has three senses. First, we have the theoretical meaning, where "a conception of justice is political and not metaphysical when it is neutral toward conflicting worldviews." Rawls also uses the term in the classical sense, where we talk of issues of public interest where "political philosophy limits itself to the justification of the institutional framework and the basic structure of society." The third sense is given when Rawls refers to political values, where he "treats the political values sphere, which is distinguished in modern societies from other cultural value spheres, as something given..." Only when we have this reference point we can separate the public and the private: "For only with reference to political values, whatever they may be, can he split the moral person into the public identity of a citizen and the nonpublic identity of a private person shaped by her individual conception of the good."²⁶²

Rawls believes that in a society where we have to deal with a plurality of comprehensive doctrines, we need reasonability and reciprocity, in order that a person sees herself in each individual and resonate with them. A reasonable person acknowledges that she is equal with everyone else and embraces the opinion of their peers when willing to propose fair standards of cooperation, and viceversa, as long as there is justification for all. The comprehensive doctrines sustained by reasonable people, will be also reasonable. Also, a reasonable person will accept that there are other comprehensive doctrines that have the same values as the one she embraces.

On the other hand, a rational person affirms her interests by elaborating life plans, and follows them by adopting the most efficient means to accomplish her aims. Rawls says it best in its *Political Liberalism*:

"Persons are reasonable in one basic aspect when, among equals say, they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so. Those norms they view as reasonable for everyone to accept and therefore as justifiable to them; and they are ready to discuss the fair terms that others propose. The reasonable is an element of the idea of society as a system of fair cooperation and that its fair terms be reasonable for all to accept is part of its idea of reciprocity."²⁶³

²⁶² Jürgen Habermas, "Reconciliation Through the Public use of Reason: Remarks on John Rawls's Political Liberalism," *The Journal of Philosophy* 92, no. 3, (1995): 109-131.

²⁶³ PL, p. 198.

It may seem that Rawls modifies his theory by taking account of the communitarian critique. This can be seen if we analyze the aspects involved in the new theory from Political Liberalism, like the abandon of rational choice theory and the consideration of community and circumstances when parties choose their principles under the veil of ignorance. Another modification that we encounter in Rawls' new theory is that he renounces at the metaphysical implications to achieve a purely political conception of justice, as he argues: "justice as fairness is intended as a political conception of justice. While political conception of justice is, of course, a moral conception, it is a moral conception worked out for a specific kind of subject, namely, for political, social, and economic institutions." This conception is applied to what Rawls has called "basic structure of a modern constitutional democracy."²⁶⁴

The *criterion of reciprocity* is presented in Rawls' *Political Liberalism* as indispensable for the *liberal principle of legitimacy*. The principle states that "Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason".²⁶⁵ Citizens have to accept power only when they are reasonable. They must be sure that every citizen endorse the laws of the government same manner as all others do. The problem is how can a set of basic laws respond to the necessities of all people if we consider the plurality of doctrines? As we have seen, Rawls' answer is given by the formulation of the consensus between the plurality of comprehensive doctrines or overlapping consensus.

But not everyone is convinced of the Rawlsian ideas. Jürgen Habermas imagines another form of agreement. He believes that by the power of communicable values and principles between each person, people will come to agreement and valid norms and principles for all will come to surface. Habermas focuses more on procedural aspects on the public use of reason, on the "process of rational opinion and will formation".²⁶⁶ Contrary to Rawls, which uses a narrower definition of public reason, Habermas emphasizes the role of civil society, mass media, NGO's and other forms of associations that contribute to the communication and deliberation in the public sphere. When Rawls distinguishes between public and nonpublic, he connects the first

²⁶⁴ John Rawls, "Justice as Fairness-Political not Metaphysical," *Philosophy and Public Affairs* 14, No. 3, (1985): 224.

²⁶⁵ PL, p. 137.

²⁶⁶ Jürgen Habermas, *Reconciliation Through the Public use of Reason: Remarks on John Rawls's Political Liberalism*, *The Journal of Philosophy*, Vol. 92, No. 3, (Mar., 1995), pp. 109-131.

same number of employees with disabilities or equalizing the number of men and women in institutions or organizations.

Recalling his critics, John Rawls readdresses the ideas from *A Theory of Justice* and writes *Justice as Fairness: A Restatement* (2001). From the preface of this book we can see Rawls' underlying motivation for completing his work: "In this work I have two aims. One is to rectify the more serious faults in *A Theory of Justice* that have obscured the main ideas of justice as fairness, as I called the conception of justice presented in that book. Since I still have confidence in those ideas and think the more important difficulties can be met, I have undertaken this reformulation." The other aim of Rawls is "to connect into one unified statement the conception of justice presented in *Theory* and the main ideas in my essays beginning with 1974."²⁷⁰ The changes he does are of three types: first, Rawls tries to modify the content of the principles of justice; second, on how the argument is organized; and thirdly, he emphasizes that we have to see justice as fairness as a political conception, not as part of comprehensive moral doctrines.²⁷¹

Furthermore, when passing from *A Theory of Justice* to Rawls' restatement, the philosopher highlights the idea of primary goods. As a person's life prospects are strictly connected to those goods, theory of justice as fairness tries to focus on inequalities between citizens' prospects over a complete life. Rawls argues that an individual's life prospects are affected by three kinds of contingencies: the social class of origin, their native endowments and opportunities to develop them and their luck or bad luck over their course of life. (Rawls considers illness bad luck)²⁷²

The principles of justice must neutralize all the contingencies, so that every citizen lives according to his life prospects and vision of good. In order to achieve all these, people must cooperate. The original position is the primary device where parties cooperate in order to reach an agreement that must be seen both hypothetical and non-historical.²⁷³ Rawls considers that justice as fairness needs to be extended at the basic structure of society, but he also acknowledges the difficulty of that: "we must specify a point of view from which a fair agreement between free and equal persons can be reached; but this point of view must be

²⁷⁰ John Rawls, *Justice as Fairness: A Restatement*, Edited by Erin Kelly (Cambridge: Cambridge, 2001), xv (preface).

²⁷¹ Rawls, JFR, p. xvi (preface).

²⁷² Rawls, JFR, p. 55.

²⁷³ Rawls, JFR, pp. 15-17.

removed from and not disordered by the particular features and circumstances of the existing basic structure”²⁷⁴.

The answer to this difficulty is the “veil of ignorance”. The agreement the parties are reaching is based on agreement on reasonable grounds, rather than on mutual advantage that would imply affiliation with rational choice theory. Rawls insists that his theory is Kantian, not based on Hobbesian grounds like mutual advantage.²⁷⁵ The original position designs our convictions regarding “fair conditions of agreement between citizens as free and equal, and appropriate restrictions on reasons”²⁷⁶, and it must be understood as a device of representation.²⁷⁷

The principles that parties choose in the original position are the following (where the first principle is prior to the second):

- a) Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all;
- b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).²⁷⁸

The arguments for the two principles are organized under the idea of two comparisons with constrained and unconstrained utilitarianism. First, Rawls compares the two principles with the principle of average utility. He starts from two basic ideas: the idea of society as a fair system of cooperation between citizens regarded as free and equals and secondly, the idea of society as a social system organized so as to produce best good over its members, where the theory of social contract elaborates the first idea and the utilitarian tradition is a special case of the second. In the first case we have included the ideas of equality (first principle) and reciprocity (difference principle). In the second case, we have “maximizing and aggregative principle of political justice” and the ideas of equality and reciprocity count only indirectly, as necessary to maximize the sum of social welfare.²⁷⁹ The parties under the veil of ignorance will choose the two

²⁷⁴ Rawls, JFR, p. 15.

²⁷⁵ Rawls, JFR, p. 82.

²⁷⁶ Rawls, JFR, p. 17.

²⁷⁷ Rawls, JFR, p. 18.

²⁷⁸ Rawls, JFR, pp. 42-43.

²⁷⁹ Rawls, JFR, p. 96.

principles against the principle of average utility because they will have better assurance of equality and reciprocity and of their personal beliefs and religion.

Furthermore, the second fundamental comparison is between the two principles and constrained utility. The two principles are compared with their substitutes in form of the principle of average utility constrained by a minimum.²⁸⁰ Why should not the basic minimum together with the constrained principle of average utility, be a reliable alternative for the two principles? The answer Rawls gives is that even if the two alternatives are not very much apart and the least advantaged would not feel they are in a very bad condition or deprived so they would resort to violence to change their position, it might not be enough that “the least advantaged feel that they are a part of political society.”²⁸¹ We may arrive to redraw ourselves from the society, to protest violently against our condition or to feel excluded from the political life and tacitly reject the principles of justice.²⁸²

Another aspect we may observe when it comes to analyze the principles of justice, is that Rawls keeps in mind Hart’s critique²⁸³ of the first principle of justice, and replaces the word *liberty* from the first formulation of principles with *liberties*. Rawls agrees with Hart, that there should be a list of liberties, and we should not think as liberty in the sense of a pre-existing abstract value when stating the first principle because “no priority is assigned to liberty as such, as if the exercise of something called ‘liberty’ had a pre-eminent value and were the main, if not the sole, end of political and social justice.”²⁸⁴ Furthermore, the second principle remains almost the same in content as formulated in *A Theory of Justice*, but Rawls stresses out as a response to his critics²⁸⁵ that the difference principle and maximin rule for decision under uncertainty are two distinct things, and that he does not use it when arguing for the difference principle against other principles.²⁸⁶

The two principles are to be embraced by democratic societies, and they are prior to the private conceptions of each person, meaning that the right surpasses the good. Rawls rejects the idea of

²⁸⁰ JFR, p. 7, pp. 127-128.

²⁸¹ JFR, p. 127.

²⁸² JFR, p. 128.

²⁸³ See Hart, “Rawls on Liberty and its Priority,” *University of Chicago Law Review* 40, (1973): 34-55.

²⁸⁴ Rawls, JFR, p. 44.

²⁸⁵ He gives the example of Joshua Cohen’s work, “Democratic Equality”, *Ethics* 99 (July 1989):727-751.

²⁸⁶ Rawls, JFR, p. 43 (note 3).

democratic communities based entirely on same doctrines, because people generally have different conceptions of the good, and even if their conception may be the same, individuals should be allowed to change their beliefs or conceptions of the good. The idea of a community with unique moral convictions or institutions that embrace policies built on unique values without permitting pluralism is incompatible with the idea of democracy as Rawls sees it:

“I believe that a democratic society is not and cannot be a community, where by community I mean a body of persons united in affirming the same comprehensive, or partially comprehensive, doctrine. The fact of reasonable pluralism which characterizes a society with free institutions makes this impossible. This is the fact of profound and irreconcilable differences in citizens’ reasonable comprehensive religious and philosophical conceptions of the world, and in their views of the moral and aesthetics values to be sought in human life.”²⁸⁷

There is a public conception of the good compatible with the pluralism of moral and religious comprehensive doctrines, and this is possible by overlapping consensus. When taking a decision that affects public sphere, people should be neutral when it comes to their private beliefs and values, but it is not the case when it comes to the public sphere. The public good obtained by overlapping consensus should be respected when it comes to decisions that affect the public sphere. This step is important for Rawls, because it is the only way to maintain a well-ordered society or stability. A society regulated by a public conception of justice implies that all citizens accept the same conception of public justice, that the basic structure of social institutions publicly accept and embrace the principles of justice and that citizens understand their content and want to act according to them.²⁸⁸

In every aspect of his work, Rawls assumes social cooperation, because is “always productive, and without cooperation there would be nothing produced and so nothing to distribute”²⁸⁹ Having this in mind, Rawls is now concentrated on what we reasonably owe to each other under fair political institution, rather on rational choice under uncertainty.

There are indeed some weaknesses to Rawls’ theory of justice both from egalitarians and libertarians, and maybe because it is quite a balanced theory. Except the egalitarians already

²⁸⁷ Rawls, JFR, p. 3.

²⁸⁸ Rawls, JFR, pp.8-9.

²⁸⁹ Rawls, JFR, p. 61; TJ, pp. 456-464.

mentioned like Arneson, Roemer or Ardeson, the latest important criticism on Rawls comes from Cohen's work.

One criticism from Cohen concerns the structure of Rawls' theory. He believes that hypothetical procedures that reflect factual considerations cannot lead to fundamental principles of justice, they can only generate rules of regulation. His argument is based on three premises. He argues that when facts support principles, there is an explanation for this and second, this explanation relies on a basic normative principle that is compatible with the denial of the fact. Cohen adds that the sequence of principles followed by facts will end at a certain point in time with what he calls "fact-insensitive principle" and underlines that principles "can respond to (that is, be grounded in) a fact only because it is also a response to a more ultimate principle that is not a response to a fact".²⁹⁰ When we mix fact-insensitive principles with non-justice values and facts, they turn in rules of regulations. An example of these rules is John Rawls' principles of justice.²⁹¹

Another important point in Cohen's critique is that principles of justice must apply both to the basic structure and to relations between individuals where he states that a just society under the difference principle "requires not simply just coercive rules, but also an ethos of justice that informs individual choices".²⁹² He continues with the idea that since there is a joint effort, all beneficiaries should obey the rules implied in the scheme of cooperation. Not only that people have to respect the rules of this scheme, but because of mutual restrictions, it is fair to interfere with another person's freedom. This fairness is justified of the basis that "only so will there be an equal distribution of restrictions and so of freedom among this group of men".²⁹³

III. 3. Robert Nozick's Critique of Justice as Fairness

When it comes to justice as fairness, the most important critic of Rawls from the right libertarian wing is Robert Nozick whose major work in political philosophy is embedded in *Anarchy, State and Utopia* (1974). The construction of Nozick's theory of justice comes after he tries to develop the theory of minimal state, which he considers the key element of his book: "The nature of the

²⁹⁰ G.A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA, Harvard University Press, 2008), 229.

²⁹¹ G.A. Cohen, *Rescuing Justice and Equality*, p. 229, p. 238.

²⁹² G.A. Cohen, *idem*, p. 123.

²⁹³ G.A. Cohen, *idem*, p. 191.

state, its legitimate functions and its justifications, if any, is the central concern of this book”.²⁹⁴ He tries to show that all states that have more attributions than the minimal state, violate the rights of individuals. Coming from the Lockean tradition, the rights that Nozick emphasize are: the right to property, the right to liberty and the right to life, with a special attention on the first one. These rights are seen as side-constraints that protect each individual of the government’s inclusion in his private sphere and also against coercion:

“Our main conclusions about the state are that a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate persons’ rights not to be forced to do certain things, and is unjustified; and that the minimal state is inspiring as well as right. Two noteworthy implications are that the state may not use its coercive apparatus for the purpose of getting some citizens to aid others, or in order to prohibit activities to people for their *own* good or protection.”²⁹⁵

Nozick sees rights as side constraints to be rooted in the Kantian view that protect people against being used as means: “Side constraints upon action reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent.”²⁹⁶

The rights of individuals are postulated before any contract between them, unlike the specific social contract theories where rights arise after the social contract. In order to build his arguments for moral legitimacy of the minimal state, Nozick starts from the Lockean state of nature, where “the self-interested and rational actions of persons...will lead to single protective agencies dominant over geographical territories;”²⁹⁷ Unlike Rawls, Nozick does not imagine a veil of ignorance when it comes to people’s choices, therefore it can be said they are put in a more realistic position when they choose how to guide their action.

He goes on and uses the Adam Smith’ invisible-hand theory, to explain how the minimal state arises, where “An invisible-hand explanation explains what looks to be the product of someone’s intentional design, as not being brought about by anyone’s intentions.”²⁹⁸ The state of nature is not a secure place for individuals and Nozick further considers what kind of “arrangements

²⁹⁴ Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), p. ix, (preface).

²⁹⁵ ASU, p. ix, (preface).

²⁹⁶ ASU, pp. 30-31.

²⁹⁷ ASU, p. 118.

²⁹⁸ ASU, p. 19.

might be made within a state of nature to deal with these inconveniences.”²⁹⁹ The libertarian philosopher concludes that individuals will join each other, forming ‘mutual-protection associations’ to help them enforce rights, because on their own, individuals will not come to a final agreement: “Any method a single individual might use in an attempt irrevocably to bind himself into ending his part in a feud would offer insufficient assurance to the other party; tacit agreements to stop also would be unstable.”³⁰⁰ Individuals will need all the protection they can get, and at the end from all the associations it will be left a dominant agency on a ‘given geographical area’, that has monopoly on force.³⁰¹ The ultra-minimal state or the dominant agency becomes a minimal state after it takes under its protective wings the independents and becomes the unique legitimate monopoly for the use of force in the respective geographical area. The individuals pay voluntarily for protection and the independents will only pay what they would have paid anyway for protection.³⁰²

At the end of the book, Nozick urges for people to embrace the minimal state, because “the minimal state is the uniquely justifiable one [even if] it may seem pale and unexciting, hardly something to inspire one or to present a goal worth fighting for.”³⁰³

Starting from Kenneth Arrow's conception who claims that "the individual is entitled to what he creates"³⁰⁴ Nozick builds its own theory of justice, as a counterbalance to the famous theory of distributive justice belonging to his colleague, John Rawls. The former, distinguishes between patterned and un-patterned principles of justice, where the first type characterize Rawls' distributive justice: “Let us call a principle of distribution *patterned* if it specifies that a distribution is to vary along with some natural dimension, weighted sum of natural dimensions, or lexicographic ordering of natural dimensions.”³⁰⁵

²⁹⁹ ASU, pp. 10-11.

³⁰⁰ ASU, p. 12.

³⁰¹ ASU, pp. 15-17.

³⁰² ASU, pp. 54-56.

³⁰³ ASU, p. xii, (preface).

³⁰⁴ Barbara Fried, “Wilt Chamberlain Revisited: Nozick's "Justice in Transfer" and the Problem of Market-Based Distribution,” *Philosophy and Public Affairs* 24, no. 3, (1995): 226-245.

³⁰⁵ ASU, p. 156.

The philosopher imagines an entitlement theory that he considers to be historical and eclectic: “If the world were wholly just, the following inductive definition would exhaustively cover the subject of justice in holdings.

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holdings, is entitled to the holding.
3. No one is entitled to a holding except by (repeated) applications of 1 and 2.³⁰⁶

To strengthen his position and weaken the structured theories like Rawls’, Nozick appeals to a famous example, having in mind the basketball player, Wilt Chamberlain.³⁰⁷ Nozick concludes that people who want to see Chamberlain playing will pay 25 cents they are entitled to use, without hesitation. If a million people come to the game and the basketball player wins 250,000 dollars, he is entitled to every penny, because the transfer was made correctly, from people who were voluntarily giving the money they justly owned. Nozick acknowledges that, “Each of these persons *chose* to give twenty-five cents of their money to Chamberlain”³⁰⁸ even if they could have spent it other way. Nozick concludes that if people voluntarily transferred resources they justly owned to Chamberlain, than what the basketball player had earned, constitutes a just acquisition: “If *D1* was a just distribution, and people voluntarily moved from it to *D2*, transferring parts of their shares they were given under *D1* (what was it for if not to do something with?), is not *D2* also just? If the people were entitled to dispose of the resources to which they were entitled (under *D1*), did not this include their being entitled to give it to, or exchange it with, Wilt Chamberlain?”³⁰⁹

If people voluntarily and freely choose to transfer their resources, there will be individuals like Chamberlain who will be in a better position than others. To restore the balance, the government has to interfere: “To maintain a pattern one must either continually interfere to stop people from transferring their resources as they wish to, or continually (or periodically) interfere to take from

³⁰⁶ ASU, p. 151.

³⁰⁷ ASU, p. 161.

³⁰⁸ *Ibidem*.

³⁰⁹ ASU, p. 161.

some persons resources that others for some reason chose to transfer to them.”³¹⁰ Therefore, no patterned theory can be applied without continuously interfering in people’s life.

Nozick is not preoccupied with future consequences when someone acquires a resource. It is not important what Wilt Chamberlain will do with his money or how this acquisition will affect others. He is more interested that the procedures of transfer and acquisition are correct. The others are not allowed to decide what he is entitled to do with the money he earned. But, individuals cannot always see the big picture or predict what would happen if they all transferred resources to a certain person or institution, society etc. It is very likely that at the end there will be left only some talented, rich and powerful people who will create a monopoly and put others in a worse position. In order to protect a third party that may have no connection with a certain transaction, Nozick appeals to the Lockean proviso. He makes it clear by embracing the weaker form of the proviso that people are entitled to acquire properties only if they do not cause harm to a third party: “Someone may be made worse off by another’s appropriation in two ways: first, by losing the opportunity to improve his situation by a particular appropriation or any one; and second, by no longer being able to use freely (without appropriation) what he previously could. A *stringent* requirement that another not be made worse off by an appropriation would exclude the first way if nothing else counterbalances the diminution in opportunity, as well as the second. A *weaker* requirement would exclude the second way, though not the first.”³¹¹ I assume that any adequate theory of justice in acquisition will contain a proviso similar to the weaker of the ones we have attributed to Locke”³¹²

On the other hand, for Rawls, social inequalities are legitimate only if they act as to benefit the least advantaged³¹³. Rawls’ intention is to create an alternative to utilitarianism that does not take account of the real differences between persons and that individuals are treated as means by other individuals or groups. Nozick takes this criticism and applies it not only to Utilitarians but also to Rawls and other patterned theories. He argues that justice as fairness violates the liberties of owners of multiple properties. The people with more resources will have restrictions when using their property, because it will be re-distributed to other people. This step makes Nozick to

³¹⁰ ASU, p.163.

³¹¹ ASU, p. 176.

³¹² ASU, p. 178.

³¹³ Rawls defines the least advantaged by the criterion of primary goods. The least advantaged are the ones that do not have access to all necessary primary goods so that they can pursue their life plan and their conception of good. (JFR, pp. 57-58).

accuse Rawls of using people as means. Some may argue that we should think of one's work in an economic way, as collaboration between many people's work and efforts. But, we should wonder why two people working together towards a common goal, would have other obligations of another type, in this case moral duty, outside obligations imposed by contract purely economic or as they had explicitly agree. Suppose that X works with Y to fulfill each order Z. If only X achieves its purpose, why would he be obligated to reward Y? Why voluntary cooperation of people would create a special kind of duty between them? Regarding this issue, Robert Nozick articulates that if people work independently most of the time, they should be rewarded only for the work they undertake, excluding other types of duty.³¹⁴

Rawls assumes that the commitment of individuals to join forces to pursue their own goals and interests, would involve a duty arising from the cooperation. And this duty cannot be other than moral, a duty that comes from his idea of Kantian origin that considers all persons free and equal in the same way. The problem is that from this moral obligation he derives the need to reward those disadvantaged by using others, the advantaged as means. But this is contrary to Kantian principle to consider a person as aim in itself never only as a means - which Rawls claims.³¹⁵

Even if not all people in society cooperate in the same way, qualitatively or quantitatively, or even if only some work and others do not, I think the important issue lies in the recognition of a duty that people have towards those that cannot collaborate. It is possible that the latter's position is inadvertently (involuntary) worsened.

But I consider the accusation that Nozick brings to Rawls valid, only if the resources or proprieties people possess, were acquired in a just manner. And this step is very hard to verify. One may wonder how far in time should we search for transfers and acquisitions to verify their fairness and how it is possible to track every involved process or procedure. We must be aware that most of earth and resources were stolen and acquired by force. To solve this issue, Nozick

³¹⁴ A libertarian would argue that the fruits of one's work are entirely his, but there could be the case when society creates significant circumstances and facilities for certain individuals in order to help them. For example, there are scholarships and free education for some students which are not provided on excellence or one's capacity for research. This type of help is given to some people in order to fight inequality implied by ethnicity, poverty or disabilities. For example, in Romania there are scholarships for Roma people or citizens of Moldavia, and for very poor people from rural communities. There are also facilities created for people with disabilities when occupying a job, etc. Leaving aside arbitrary circumstances and my believe that they should be neutralized, even by positive action, by these examples I want to point out how much of one's work can we say it is entirely his, having in mind the help one receives when doing his work.

³¹⁵ See ASU.

introduces the principle of rectification, to compensate the victims who were deprived by force of their resources. The philosopher explains how this principle works: “The principle of rectification presumably will make use of its best to estimate of subjunctive information about what would have occurred (or a probability distribution over what might have occurred, using the expected value) if the injustice had not taken place.”³¹⁶

III.3.1.The Problem of Cooperation

When Nozick critically analyses the problem of social cooperation, he starts from some significant questions: “Why does social cooperation *create* the problem of distributive justice? Would there be no problem of justice and no need for a theory of justice, if there was no social cooperation at all, if each person got his share solely by his own efforts?”“What is it about social cooperation that gives rise to issues of justice?”³¹⁷The philosopher believes that people who acquire their properties following a situation of non-cooperation, are fully entitled to keep their work, because the goods were gained by their own efforts. To sustain his opinion, Nozick imagines a counterfactual example of ten Robinsons Crusoes, each of them working on a separate island for several years. They eventually discover each other, and Nozick asks if this situation will bring various claims based on need, and the ones who have less will claim from others who have more.

“If there were ten Robinson Crusoes, each working alone for two years on separate islands, who discovered each other and the facts of their different allotments by radio communication via transmitters left twenty years earlier, could they not make claims on each other, supposing it were possible to transfer goods from one island to the next? Wouldn't the one with least make a claim on ground of need, or on the ground that his island was naturally poorest, or on the ground that he was naturally least capable of fending for himself?”³¹⁸

Furthermore, the author sustains that others are not entitle to claim any part of the resources another owns, on grounds that they did not have the chance to acquire them because of lack of endowments, aptitudes or unfavorable circumstances. He concludes that in the case of Robinsons Crusoes, it is clear who owns what and that is not any need for a theory of justice: “In the social

³¹⁶ ASU, pp.152-153.

³¹⁷ ASU, p. 185.

³¹⁸ ASU, p. 185.

noncooperation situation, it might be said, each individual deserves what he gets unaided by his own efforts; or rather, no one else can make a claim *of justice* against this holding. It is pellucidly clear in this situation who is entitled to what, so no theory of justice is needed.”³¹⁹

Let us imagine along with Nozick that people are in a situation where they cooperate.³²⁰ Why in this case should be another type of sharing resources than economic transactions or maybe giving away voluntarily their resources? Suppose that from cooperation results a common property, owned equally by everyone involved in the process. It is normal in this case that every person has an equal claim on the property. In this case, we have to find the criteria to share this property, and here we have the intervention of distributive justice. But if people have decided to individually transfer entitlements, without the problem of common propriety, why should we let distributive justice interfere?

“It is difficult to see why these issues should even arise here. People are choosing to make exchanges with other people and to transfer entitlements, with no restrictions on their freedom to trade with any other party at any mutually acceptable ratio. Why does such sequential social cooperation, linked together by people's voluntary exchanges, raise any special problems about how things are to be distributed? Why is not the appropriate (a not inappropriate) set of holdings just the one which actually occurs via this process of mutually-agreed-to ex-changes whereby people choose to give to others what they are entitled to give or hold?”³²¹

If we accept Rawls' framework, it may be very possible, as Nozick believes, that the ones less endowed have more reasons and are more interested to cooperate, because they could gain more than if they did not cooperate. According to the difference principle, the inequalities are permitted only when the least advantaged have some benefits, and when an advantaged person gains something, she also has to benefit the least advantaged. Nozick draws the attention on this, by showing that the difference principle is not neutral when it comes to worse or better endowed³²² individuals.³²³

³¹⁹ *Ibidem.*

³²⁰ ASU, p. 187.

³²¹ ASU, pp. 186-187.

³²² Nozick states in a note* p. 194 that better endowed means for Rawls that “accomplishes more of economic value”.

³²³ ASU, pp. 195-197.

III.3.2. Criticism on Nozick's Theory

Nozick's ideas have attracted much criticism on many levels. His theory is considered anti-political in the sense that people are not encouraged to act as citizens and cooperate for the realm of their community.³²⁴ Nozick would answer that he accepts all cooperation or maximization of overall happiness as long as these are consequences derived from individual rights. These rights are prioritized against every other level, like social good or other values that are not strictly connected with them. The philosopher does not support consequentialist ethics, but as I have mentioned, he embraces a deontological way of thinking. The only things that matters for his procedural theory, is that the steps, or the procedures are morally legitimated and correctly followed.

It is true that lack of public good could lead to the idea that Nozick's theory does not have public or political elements. But the author embraces the idea of a minimal state, and the idea of a state is a political element, but it depends on the content of 'political'. If we think at the term in a narrow way, then we may support the idea that Nozick's theory implies political aspects. On the other hand, if we think at 'political' as a large concept that implies collaboration or cooperation between citizens, powerful civil society and other aspects that bound citizens for the realm of public good, then we may indicate as Karen Johnson does, that Nozick's theory is anti-political. She further argues that Nozick's minimal state resembles to a business: "Nozick's minimal state is not a political order but a business enterprise: a kind of insurance company which sells people protection against invasion by others of their individual rights. Politics has to do with public things, and there is no place for public things in the relationship of a business enterprise to its clients. Nozick's defence of the minimal state is thus a proposal to privatize and hence depoliticize virtually all of human life."³²⁵ I may further argue here against Johnson, that the minimal state may resemble to a business in some aspects, but this does not exclude the fact that we still have the political dimension intact. And privatization and not leaving everything in the hands of government, is not the equivalent of extermination of public and political life.

³²⁴ Karen Johnson, "Government by Insurance Company: The Antipolitical Philosophy of Robert Nozick," *The Western Political Quarterly* 29, no. 2. (1976): 177-188.

³²⁵ Karen Johnson, *op. cit.*, pp. 177-188.

Another critique is connected with Nozick's redistribution of protection. Some may wonder why he does not accept the redistribution of all resources, but when it comes to protection the things turn the opposite. When he tries to include the independents into the dominant agency, Nozick appeals to redistribution of protection.³²⁶ We may wonder if protection has a special status, and his answer is that protection is relative to others: "The worth of the product purchased, protection against others, is *relative*: it depends upon how strong the others are." He continues explaining differences between protection and other type of goods: "Yet unlike other goods that are comparatively evaluated, maximal competing protective services cannot coexist; the nature of the service brings different agencies not only into competition for customers' patronage, but also into violent conflict with each other."³²⁷ Even if normative goods as protection are different from physical goods, as gold for example, I do not think that it is a reliable 'excuse' to introduce redistribution when it comes to one type of good and dismiss it when it comes to other. Nozick argues that redistribution in this case is permissible because it better protects the individual rights of all.³²⁸ But some may argue in the same direction, that if other types of good were to be redistributed, it will help people to protect their rights. Other goods can also be relative to others, in fact almost all things are related and relative to others. Let us take for example, economic status. A person is considered rich for a certain country, when reported to other citizens of her country. The same way, she can be considered poor or rich when compared with people from other countries.

There are critics like Murray Rothbard that consider Nozick's minimal state too large, in the sense it has too many attributes and power over people. Rothbard believes that the only minimal state that could be justifiable "would emerge *after* a free-market anarchist world had been established" and that "the fallacies of social-contract theory would mean that no present State, even a minimal one, could be justified."³²⁹ Extreme anarchists consider that maybe there should not be any state at all. We could also imagine people could live within a more narrow state, maybe one limited to protection from outsiders. But in this case, we have Nozick's contra

³²⁶ ASU, p. 110-112.

³²⁷ ASU, p. 17.

³²⁸ ASU, pp. 17-18; 110-112.

³²⁹ Murray Rothbard, "Robert Nozick and the Immaculate Conception of the State," *Journal of Libertarian Studies* 1, no. 1 (1977): 45-57.

argument that we need impartial justice, court and judges in order to solve the problems that may arise between agencies or communities.

Other criticism comes from communitarians or egalitarians. Scholars from the first category criticize the lack of sense of community in Nozick's theory, the absence of public goods and the inexistent aim towards the common good. The second type mentioned, aims its criticism towards the entitlement theory and Nozick's arguments against distribution. Egalitarians base their theory on the equality of all people, not only equality in form as some philosophers do, but merely a substantive one. There are also egalitarians who argue for a 'strong' egalitarianism, where equality in status or rights is surpassed by equality of resources: economic egalitarianism.³³⁰

What all critics of Nozick's work have in common, is that they worry for the least advantaged, and what will happen with people who do not have the possibility to have enough as to live a normal life. The difference between scholars is how they manage to solve the problem, and on what values and principles they base their demonstration: on individual freedom, equality, community etc.

It is true, I believe, that poor or disadvantaged people, deserve more than to be at the mercy of the advantaged or rich people. But at the same time, we should not be at the mercy of governments. Resources as healthcare must be redistributed only with the agreement of the majority and ideally all people involved. We must respect the liberty and dignity of all people regardless of their economic status, and I am not convinced that forced redistribution does that. Indeed, when people wish for just institutions based on mutual agreement and plead for redistribution, then enforcement or coercion is justifiable, as long as they agree the contract without being forced.

III. 4. Connecting Social Contract and Healthcare: Norman Daniels' Just Health

Departing from John Rawls's theory of justice as fairness, Norman Daniels tries to extend to health and health care dimension. We may encounter his first attempt of this in *Just Health Care*

³³⁰ In "Equality as a Moral Ideal," Harry Frankfurt defines economic egalitarianism as "the doctrine that it is desirable for everyone to have the same amounts of income and of wealth (for short, "money")". He continues in the first note of same paper "This version of economic egalitarianism (for short, simply "egalitarianism") might also be formulated as the doctrine that there should be no inequalities in the distribution of money." Harry Frankfurt, "Equality as a Moral Ideal," *Ethics* 98 (October 1987): 21-43.

(1985), but the more complete work is in his later work *Just Health- Meeting Health Needs Fairly* (2007) where he offers a better justification on why health and health care matters. Contrary to Rawls who keeps his focus on the ideal part of the social contract, Daniels tries a more practical approach by implementing theoretical Rawlsian elements to basic problems such as health and health care.

The main question that guides Norman Daniels' *Just Health- Meeting Health Needs Fairly* is what we owe to each other in terms of health, this being his Fundamental Question: "As a matter of justice, what do we owe each other to promote and protect health in a population and to assist people when they are ill or disabled?" In order to answer this question, he substitutes it with three Focal Questions. The first question, "Is health, and therefore health care and other factors that affect health, of special moral importance?" tries to provide an answer regarding the moral importance of health. The second question concerns health inequalities, more specifically which inequalities are unjust. Lastly, Daniels focuses on how we must prioritize health resources in a world where there are resources constraints. The main concern here is to answer how we can meet health needs fairly when we cannot meet them all.³³¹

The philosopher defines health as the absence of disease, "the absence of pathology", and disease as the departure from species functioning.³³² He agrees with Rawls's conception that health is a natural good but he goes further and insists that distribution of health is socially determined: "In whatever sense health is a natural good, its distribution is to a large extent socially determined, as is the aggregate level of health in a population."³³³

He acknowledges that health and health care have direct impact on equal opportunity, and therefore the moral importance of these dimensions. The author believes that there are many factors or social determinants that influence health and health care like income, political participation, education, wealth, the distribution of rights and power and opportunity, goods that every theory of social justice includes.³³⁴ Daniels uses the idea of social determinants when extending Rawls' account of justice to health. Social determinants of health or Rawls' list of primary goods are important in providing fair equality of opportunity, the principle that Daniels

³³¹ Daniels, JH-MHNF, p. 11.

³³² JH-MHNF, p. 37.

³³³ JH-MHNF, p. 13.

³³⁴ JH-MHNF, p. 4, Introduction.

uses the most on his account of health. This implies the fact that every person should have equal opportunity to access health care and health or health care have a direct impact on individual's opportunity principle in general.³³⁵

Although Rawls embraces the equality of opportunity principle, this does not mean that he is fully egalitarian. In his theory, he allows inequalities in income and wealth, which Daniels considers to be key factors in health and health care inequalities.³³⁶ For Rawls, it would be irrational for individuals to insist on equal distribution, because it would worsen their lifetime prospects. This is because people have to deal with different incentive, different skills etc., and the total amount of resources will be greater than if contractors choose an equal distribution.

Daniels considers that Rawls does not take into consideration the impact each primary social good (social bases for self-respect, liberties, powers, opportunities, income and wealth) has. He considers that if we do not know the impact of each primary social good when we evaluate which inequalities in income are allowable, we cannot assume an equality between them, and "we must judge how well off groups are by reference to the *whole* index of primary goods and not simply the resulting income."³³⁷ Daniels argues that if we rely on income distribution, it may be the case that people may earn better but have more stressful jobs which could cause illness more frequently than if they worked under another management with equal income distribution: "Suppose further that hierarchical workplaces are more efficient than democratic ones, providing higher incomes for the worst-off workers than democratic workplaces. Then the difference principle does not clearly tells us whether the hierarchical workplace contains allowable inequalities since the worst off are better off in some ways (economic) but worse off in others (health and thus opportunity and self-respect). Without knowing the weighting of items in the index, we cannot use it to say clearly what inequalities are permitted."³³⁸

Daniels considers this point important, because of the connection between health status and opportunity that he argues for. In Rawls' terms, I believe that this would be an indirect connection. And as we have seen, health is multidimensional, is influenced by many factors, not merely only by Rawlsian primary social goods. Of course, Daniels' observation³³⁹ that allowing

³³⁵ JH-MHNF, p. 92.

³³⁶ *Ibidem*.

³³⁷ JH-MHNF, p. 94.

³³⁸ *Ibidem*.

³³⁹ JH-MHNF, p. 95.

some inequalities, permits enlarging the inequalities in health, may be true, but it is only a part of the problem.

Health and health care is not a special concern for Rawls. In the original position, under the veil of ignorance, when choosing principles of justice, individuals are supposed to be healthy. The philosopher does not approach or develop the problem of health care. If we recognize income as determinant of health or education, so it may be said about health to be the determinant of income and education or education to determine health and income. Daniels is aware of this interconnection and underlines it.³⁴⁰ The list of primary goods could be extended, but in order to proceed we need powerful arguments. We need to fully understand and assume what this extension means: if we consider health care between primary goods, the next step is the universalization of health care that implies some relevant difficulties.³⁴¹ Daniels does not agree to add health to the index of primary goods, basically for two reasons: the longer the list of primary goods, the harder it will be to maintain an overlapping consensus regarding the needs of citizens, we must be precautionary because “we risk generation a long list of such goods, one to meet each need that some think is important...longer the list and the index formed from it makes less plausible Rawls’ claim that the original primary social goods...include only all-purpose means that reasonable people in democratic cultures agree comprise the needs of free and equal citizens. By adding items, especially specific ones, we are likely to lose our shared political conception of the needs of citizens”; and second, it will be very difficult to see who the worse-off and the well-off are in society: who is worst-off, a very ill rich person or a person that lives in severe poverty? By adding more items, Daniels argues, it is “harder to establish an index” and it is “more difficult to avoid the complex problems of interpersonal comparison that face broader measures of satisfaction or welfare.”³⁴² The philosopher considers health inequalities unjust when social determinants of health, such as income and education, are not distributed according to Rawls’ principles of justice. But at the same time, he believes that the principles of justice as fairness are lacking practical dimension. Also, in Rawls’ theory, resources impose on people reasonable constraints, he does not imagine a society where resources are scarce. The problem is that the paradigm of real world wards off from ideal. Daniels hopes that incorporating health

³⁴⁰ JH-MHNF, pp. 83-88.

³⁴¹ See chapter from this work “The Right to Health?”

³⁴² Daniels, JH-MHNF, p. 56.

dimension into Rawls theory will better guide people to find solutions for concrete problems. If citizens cease to function normally because of their illness or lack of health, the problem extends to all society or community. Also, people should have the opportunity to normal functioning.

Daniels suggests that when it comes to find just answers for everyday problems where reasonable people disagree, Rawls' principles of justice cannot offer concise answer. They are rather just guiding people's decisions and do not offer strict solutions. But this is what Rawls intended in the first place, an ideal theory that can guide institutions to do justice, it is his primary concern. The second part, the non-ideal part of his theory is of less importance than the first part.³⁴³ Instead, Daniels believes that his theory for just health can provide practical guidance for worldwide health and health care problems. The philosopher argues not only that the principles he embraces can be accepted at the global level, but they also provide a strong argument for the existence of a human right to health.

He tries to draw the limits of the equality of opportunity principle he relies on, refuting at the same time the critique that a broader notion of opportunity that tries to protect fair shares "would require eliminating individual differences among persons in a way that the narrower view does not demand." Instead he goes on and argues for fair equality of opportunity, rejecting formal equality: "The fair equality of opportunity account does not require us to level all differences among persons in their shares of the normal opportunity range. Rather, opportunity is *equal* for purposes of the account when certain impediments to opportunity are eliminated or all persons—most importantly, discrimination in job placement or impairments of normal functioning, where possible. But fair shares of the normal opportunity range will still not be equal shares: Individual variations in talents and skills determine those shares, assuming that these have already been corrected for the effects of social and natural advantages, where possible. This correction is what is implied by appealing to fair and not just formal equality of opportunity."³⁴⁴ This paragraph suggests what Daniels sustains in his work -that in order to create equality of opportunity, we

³⁴³ "The intuitive idea is to split the theory of justice into two parts. The first or ideal part assumes strict compliance and works out the principles that characterize a well-ordered society under favourable circumstances. It develops the conception of a perfectly just basic structure and the corresponding duties and obligations of persons under the fixed constraints of human life. My main concern is this part of the theory. Non-ideal theory, the second part, is worked out after an ideal conception of justice has been chosen; only then do the parties ask which principles to adopt under less happy conditions." TJ (revised edition (1999)2003), 216.

³⁴⁴ Daniels, JH-MHNF, p. 60.

must enable positive action, so that individual variations concerning personal endowments could be corrected. Of course, this does not imply that individual advantages no longer offer personal satisfaction so that people can have incentives to use their natural and acquired skills. Like Rawls, Daniels points out that the solution for this is the difference principle: “Fair equality of opportunity does not mean that individual differences no longer confer advantages; rather, the advantages are limited by the difference principle and work to the advantage of the worst off.”³⁴⁵ The scope of meeting health needs fairly is to satisfy normal functioning for every individual, so that we have fair equality of opportunity in absence of disease or disability, to protect the normal opportunity range³⁴⁶. To assume all this, Daniels gives special moral status to health. Health is morally important not only because it is a dimension that offers opportunity for people to secure jobs and offices. It is special because it has the capacity to give people the opportunity to fulfill their life, to be able to have a plan of life. If we concentrate only on the narrow justification of health, and on the importance of health when it comes to jobs and offices, then we may forget about people that are not able to work or have done their time in the working field, such as old people or people with disabilities.³⁴⁷

When the social determinants of health are not distributed according to Rawls’ principles of justice, health inequalities become unjust. According to Daniels, “health inequalities are unjust when they result from an unjust distribution of the socially controllable factors affecting population health”³⁴⁸ From the perspective of social justice we have other factors than income and wealth which contribute to people’s health status. Daniels uses statistics to reveal that factors such as political participation, culture, policies or social organization are very significant when explaining health outcomes between individuals and nations.³⁴⁹ Nevertheless, health inequalities can be reduced if we make worst-off social groups as well-off as possible, with special focus on human capital and investing in public health.³⁵⁰ By this idea, Daniel reveals that achieving social justice is essential for justice in health.

³⁴⁵ *Ibidem*.

³⁴⁶ Daniels defines “normal opportunity range” relative to a given society as “the array of life plans reasonable persons are likely to develop for themselves.” JH-MHNF, p. 43.

³⁴⁷ Daniels, JH-MHNF, p. 60 and chapter 6 where he talks about aging, health and opportunities, pp. 161-164.

³⁴⁸ JH-MHNF, p. 6.

³⁴⁹ JH-MHNF, p. 84.

³⁵⁰ JH-MHNF, p. 87.

But when the resources are limited, it is hard to achieve good health and the process of social justice can be more difficult. When Daniels tries to answer how we can meet health needs in a world with limited resources, the third focal question, he argues that we must add to the principles of justice a fair deliberative process, accountability for reasonableness. Accountability for reasonableness is probably the most encountered model of priority setting in health care in western countries. This process consists of four primary features accountability: first, there is the *Publicity Condition*, implying that “decisions regarding both direct and indirect limits to meeting health needs and their rationales must be publicly accessible.”; secondly, we have the *Relevance Condition* where reasonable decisions are supported by “evidence, reasons and principles that are accepted as relevant by (“fair minded”) people who are disposed to finding mutually justifiable terms of cooperation.”³⁵¹ After these two conditions, Daniels outlines the *Revision and Appeals Condition* that includes “mechanisms for challenge and dispute resolution” when it comes to limit-setting decisions, and “opportunity for revision and improvement”. Lastly, we have the *Regulative Condition* in order to assure by public regulation or voluntarily that the other conditions are met.³⁵²

Daniels is aware that is very controversial what a fair process of decision-making consists of when it comes to health and he seems to give priority to basic health needs rather than what he calls health preference. He specifically argues that:

“In any health care system, then, some choices will have to be made by a fair, publicly accountable, decision-making process. Just what constitutes a fair decision-making procedure for resolving moral disputes about health care entitlements is itself a matter of controversy. It is a problem that has been addressed little in the literature. Our rights are not violated, however, if the choices that are made through fair decision-making procedures turn out to be ones that do not happen to meet our personal needs, but instead meet needs of others that are judged more important”³⁵³

³⁵¹ JH-MHNF, p. 118.

³⁵² JH-MHNF, p. 119. See also N. Daniels, and J. Sabin, *Setting Limits Fairly* (New York: Oxford University Press, 2002).

³⁵³ Daniels, Norman, “Is There a Right to Health Care and, if so, What Does It Encompass?” in *A Companion to Bioethics*, Blackwell Companions to Philosophy, (second edition) edited by Helga Kuhse and Peter Singer (Oxford: Blackwell Publishers, 2009), 362-373.

Despite Daniels' attempt to apply Rawls' theory of justice as fairness to health and health care domain, there is some criticism to be made on his account. One of the questions one can ask is why should health be more important than other goods, like education for example? How can Daniels justify that we should consider health having a more special than education? We may think at many arguments why education is important, regardless of its connection with health: education offers access to open offices and jobs, improves social level, offers the possibility to have better life and health etc. Education might be as vital as health, because life without education means live without access to culture, to knowledge, to political participation, etc. Education, as health or other goods, is vital, so we must offer it a special status. The idea that I want to underline is that the arguments offered by Daniels in order to associate health and health-care with special status, can be also made for other social goods.

On the other hand, goods like basic liberties could be considered more important than health. When using Rawls' theory, Daniels associates health and health care with fair equality of opportunity principle, which is lexically ordered after the principle of equal basic liberties. Therefore, according to both philosophers, a just society is one where is more important for a person to be free than to be healthy, even though some might argue otherwise.

III. 5. The Libertarian Approach on Health Care- Tristram Engelhardt

Beside the egalitarian liberal approach presented by Norman Daniels, there are also philosophers who tried to connect libertarian principles with health care. When libertarian thinkers try to connect health care to their believes, they usually use principles like the principle of autonomy or rights like the right to life, self-ownership or the right to liberty, concentrating mostly on how contracts and agreements can be reached without coercion. In a nutshell, the classic principles and rights on which libertarians rely, when designing the social contract. Analyzing the libertarian approach to health care is important for this work not only because it offers a different perspective than the liberal egalitarian one, but also because when we analyze the problem of the healthcare professional's brain drain we concentrate on the focal points of libertarian conception: the right to free movement, the right to own the work results of one's own body, the principle of autonomy and non-coercion. Moreover, the connections between patients and health care professionals or the existence of possible duties are seen in a different light. We can reach a balanced conclusion only by taking seriously both egalitarian and libertarian approaches to

healthcare. Finally, the libertarian insight can open the way to possible solution to solve the problem of the brain drain, without violating the aforementioned rights and principles, as we will see in what follows.

In his important work, *The Foundations of Bioethics*, H. Tristram Engelhardt argues that the principle of respect for autonomy or the principle of permission as he renames it in the second edition of the book, is the most important. There are also other authors like R. M. Sade, Charles Fried or Allen Buchanan who analyzed health care through libertarian principles, but here I will concentrate mostly on Engelhardt's ideas who dedicated most part of his life to connect libertarian principles with health care.

Before presenting and critically analyzing these ideas, especially Engelhardt's work, I will say some words about how we can apply in general libertarian principles like Robert Nozick's to health care.³⁵⁴ First of all, we have seen that in his libertarian approach, Nozick considers that there are three important negative rights that each individual should have: the right to liberty, life and property. Since there is a right to liberty, then people cannot be coerced to be treated in a way they did not choose. Also, applying the right to life and property to health care sector, can lead to the conclusion that individuals are entitle to do whatever they want with their life, they have a well- shaped autonomy together with the property of their own body. From this idea, we can deduce for example that assisted suicide is allowed. Regarding redistribution of assets or resources to help others in need for medical care, Nozick would say that every person can do whatever she wants with her property, but she cannot be coerced or forced under no circumstances. This means that if people want to help other people, voluntary and not coerced by the government, they should do it, in the spirit of imperfect duties. Instead, any type of coercion is morally wrong, as people are the owners of their work and wealth, as long as acquisition is correctly made. Positive rights such as the right to health care or education are not taken into consideration by libertarians, because they want to restrict the state to minimum, the minimal state being the desired goal. Positive rights like the right to health care would determine the redistribution of resources by coercion in order to help people that cannot afford medical care.

I think libertarians have a point when they argue we should not force people to pay health care for people less fortunate than them. It is indeed wrong to take someone's work using coercion,

³⁵⁴ For a discussion about health care in the minimal state see also Angel Puyol Gonzalez, *Justicia I Salut- Etica per al Racionament dels Recursos Sanitaris* (Bellaterra: Universitat Autònoma Barcelona, 1999), 128-131.

but as Nozick says, we have to keep in mind that we are talking about honest work and acquisition of properties, not about fortunes made from theft. I believe intuition against rich people comes from seeing so many of them enriched by unfair means, or when power of having abundant resources makes people behave badly against other people, diminishing their dignity. Some might argue that if we offer free health care to people who do not work, laziness can be promoted and there would be individuals unwilling to work as long as they are socially assisted. Maybe having access to health care without paying it would be an encouragement in this respect, but I believe minimum care should be granted to every person, no matter their flaws or shortcomings, no matter if they have ever broken the law or they are exemplary citizens. We have to have basic care for everyone, without exception, as long as we respect human dignity and as long as we want to enhance ourselves as human species.

Returning to H. Tristram Engelhardt's thought, he has a remote view from that of secular bioethics that consider that we need one particular universal secular vision for whole humankind. The philosopher considers that it is time to abandon the search for a content-full morality applicable to all people and believes that postmodernity is characterized by a sort of "moral fragmentation which leads to relativism and nihilism".³⁵⁵ Engelhardt believes that the values embraced by religions are irreconcilable, since all religions have a particular way of seeing things, it is unlikely to arrive to consensus inside this pluralism.

According to Engelhardt, secular bioethicists try to discover a content-full morality leading to certain health care policies which the government can impose and at the same time hope to find moral solutions appealing to reason alone. In addition, he accuses secular bioethicists of trying to replace moral communities based on religion or beliefs, by a bigger society, which he does not approve because the coercive character.³⁵⁶

The author of *Foundations* believes that any appeal to rational arguments when trying to establish moral content already presupposes the existence of it.³⁵⁷ Reason alone cannot solve all the disputes between people, because we also have to deal with beliefs and moral convictions at the private level. The solution for this is agreement or consensus: "By appealing to ethics as a means for peaceably negotiating moral disputes, one discloses as a necessary condition

³⁵⁵ Tristram Engelhardt, *The Foundations of Bioethics*, (New York, NY: Oxford University Press, second edition, 1996), 421.

³⁵⁶ Engelhardt, *idem*, p. 10.

³⁵⁷ T. Engelhardt. *The Foundations of Bioethics*, p. 68.

(sufficient when combined with the decision to collaborate) for a general secular ethics the requirement to respect the freedom of the participants in a moral controversy (i.e., in the sense of gaining their permission for using them) as a basis for common moral authority (i.e., from the permission of those collaborating).”³⁵⁸

Therefore, when designing the limits of secular morality, Engelhardt argues we cannot reach substantive consent on the contents of morality through moral arguments in a society of people with different moral beliefs. Regardless of that, we have to try to establish a society where people can come to agreements, without using coercion against moral agents.³⁵⁹

Furthermore, he dismisses the idea of applying the content full theory of justice to society and does this on grounds that all theories of such kind need to answer important questions about the nature of good. Also, since all people are the ultimate moral agents in every pluralistic society, the state has to acquire consent from all when trying to apply social programmes, such as minimal health care. But I believe it is unrealistic to believe we can attain full consent from all members of society, all we can hope for is to have a majority and implement their choices related to the matter. Of course, one can argue that this might be problematic and discriminatory towards the minority, but policies have to be implemented somehow and most of the time, with sacrifice. Nevertheless, states are trying to implement policies that do not put any group at a disadvantage, but as Engelhardt also observes, they fail.³⁶⁰

The libertarian philosopher considers that there are four possible ways to resolve moral controversies in a world of pluralism is either by force, conversion of one party to the other’s viewpoint, the third way is by sound rational argument, and the fourth is by agreement or consensus.³⁶¹ His libertarian way of thinking excludes force because not only that it will not provide answers to our moral questions but because using force (even authorized force) is unfair for people who do not believe in the use of force when it comes to our moral concerns.³⁶² Conversion is not an option because it has no general moral authority. Agreement or consensus are considered the best ways to resolve ethical conflicts because the requirement of secular moral

³⁵⁸ Engelhardt, *idem*, p. 69.

³⁵⁹ T. Engelhardt, *idem*, p. 13.

³⁶⁰ Engelhardt, *idem*, p. 173.

³⁶¹ Engelhardt, *idem*, p. 67.

³⁶² *Ibidem*.

authority is to “respect the freedom of the participants in a moral controversy as a basis for common moral authority”³⁶³

Engelhardt believes that state should not interfere with people’s holdings on basis of applying content-full morality to everyone. There is the danger to enforce people to do certain things when attributing welfare rights, without the consent of every person involved in the state of affair. State intervention without citizen’s agreement is wrong because it means imposing a specific morality and believes. This, I believe, can be an argument against the feasibility of a moral egalitarian or libertarian ethos in society, even though Engelhardt pleads for the second structure and a social space where libertarianism rules are convenient, where free market and personal believes reign freely.³⁶⁴ But states are not totally unnecessary, they can use force to protect people to be used without their permission, to record and enforce contracts and establish how to use common resources. They can also provide certain welfare rights, but everything states do have to be done with the permission of its citizens.³⁶⁵

Engelhardt recognizes that there are many different moral and religious views in the world, and despite this, people still manage to get along somehow and follow their well-being.³⁶⁶ He believes that secular moral community is formed of people willing to collaborate in order to resolve their disputes without appealing to force.³⁶⁷ At the same time, a member of a secular moral community has to be engaged in the deliberative process and negotiations which lead to moral consent. If I apply these ideas to my thesis, then people in a society can reach a consensus or at least can make the necessary step to resolve a problem, without any coercion or help from outside or the supervision of the state, more exactly, communities have the capacity to solve the health care issues by themselves and in a certain manner deal with the brain drain of health care professionals.

Appealing to the Kantian moral rationality, Engelhardt considers legitimate the use of force, only when the rationale of it could be universalized, when force is use to restrain the force of others.

³⁶³ Engelhardt, *The Foundations of Bioethics*, p. 69.

³⁶⁴ H. Tristram Engelhardt, *The Foundations of Christian Bioethics* (Lisse: Swets & Zeitlinger, 2000), 178.

³⁶⁵ Engelhardt and K.W. Wildes, *The Four Principles of Health Care Ethics and Post-Modernity: Why a Libertarian Interpretation is Unavoidable,* in *Principles of Health Care Ethics*, edited by T. Gillon (London: John Wiley & Sons LTD, 1994), 140 and note 2, p. 177.

³⁶⁶ Engelhardt, *The Foundations of Bioethics*, p. viii.

³⁶⁷ Engelhardt, *idem*, p.69.

The peaceable community can exist only under the framework of free association, informed consent and a minimalist state that does not use illegitimate force.³⁶⁸

In respect to Rawls, Engelhardt criticizes him for having value-laden views despite of his (Rawls') commitment to neutrality.³⁶⁹ In addition, he contrasts his view of libertarian cosmopolitanism, which allows people to live together in peace without any resort to force, with Rawls' liberal cosmopolitanism which Engelhardt believes to provide a content-full vision of what a morally good life implies: "Liberal cosmopolitanism is not cosmopolitan in being open to all as they reach out in their own terms to collaborate with moral strangers" but "It is rather cosmopolitan in the robust sense of aspiring to be the global morality that should bind persons as they shed their particular bonds."³⁷⁰

When it comes to health care, Engelhardt's believes the state only distinguishes between needs and desires and transforms the former into rights, acquiring the monopoly on health care without any moral justification.³⁷¹ Merrys has a different believe and argues that Engelhardt's view of state controlled healthcare does not have any foundation, because it does not interdict the purchase of private insurance.³⁷² But, my observation here is that even if it is true that the government does not prohibit private care or private insurance, on the other hand it coerces people to pay for public care. People who have a job or a private business are bound to pay a certain percent of their salary or profit to the healthcare system. In this respect, I think the state forces people by not offering people the possibility to choose whether to pay or not the contribution to the public healthcare system.

Engelhardt observes that healthcare and health care providers make use of the pluralist views and accept them. In his searching for foundations in bioethics, he proposes a set of procedural rules which should help designing public policies in health care, without appealing to coercion. As for the resolution for specific moral dilemmas, they can be pursued only in the specific framework of a certain religion or ideology. Bioethics should be developed in such way as to respect the

³⁶⁸ For a detailed analysis see George Khushf, "Engelhardt, the Ik, and the Foundations of Bioethics," Kluwer Academic Publishers 14, no. 4 (2002): 325-334.

³⁶⁹ Engelhardt, *The Foundations of Christian Bioethics*, p. 377.

³⁷⁰ Engelhardt, *idem*, p. 44.

³⁷¹ Engelhardt, *The Foundations of Bioethics*, p. 384.

³⁷² Michael S. Merry, "Libertarian Bioethics and Religion: The Case of H. Tristram Engelhardt, JR.," *Bioethics* 18, no. 5 (2004): 387-407.

diversity of religious, ideological or cultural views, that share common good and understanding regarding health care. We can observe the appeal to procedures is related to Nozick's theory. Another thing in common for the two libertarians is that both are trying to avoid the forced interference. They both say that we need fair procedures, Nozick when speaking about acquisition and transfer of property and Engelhardt in bioethics. Also, Engelhardt, as Nozick, sees freedom as side-constraint and not as a value.³⁷³ We can depict the libertarian aspect of Engelhardt when he speaks about the for-profit aspect of medicine. According to him, "health care corporations are one of many expressions of human freedom and as such have a presumptive claim to toleration"³⁷⁴ The main condition is that medical corporations have to respect the patient's freedom to choose which health care produce to purchase.³⁷⁵ These ideas help my argument which pleads for the advantages strict private health care could bring (as long as they do not install monopoly) because I believe as Engelhardt does, that private healthcare encompasses more freedom than public healthcare. In a private healthcare system, people can choose whether to contribute or not to their health and how to contribute.

Moreover, both Engelhardt and Nozick believe that the society is formed of strangers. The latter believes that people are not born in a certain society connected with each other, so they do not own anything one another as long as they do not collaborate. The idea of individuals as strangers is met in Engelhardt's work as well, in that he considers the citizens "moral strangers" with different believes and embracing different religions.

Engelhardt argues that the only legitimate way to interfere in patient's lives is by their own consent (e.g. If a person wants to have her life support unplugged, she has to be helped and it is nothing wrong with that.).

In his works, we observe two important principles which design the foundation of bioethics. The principle of autonomy, which he latter restates as the principle of permission and the principle of beneficence. He sees the principle of permission and the principle of beneficence the central principles of bioethics.³⁷⁶ The principle of permission focuses "on persons as the source of general secular morality" and not on freedom as value. People should freely choose what vision

³⁷³ Engelhardt, *The Foundations of Bioethics*, p. 70, p. 97.

³⁷⁴ Engelhardt, "Morality for the Medical-Industry Complex," *New England Journal of Medicine* 319, (1988): 1086.

³⁷⁵ Engelhardt, 319, *idem*, p.1088.

³⁷⁶ Engelhardt *The Foundations of Bioethics*, p. 83.

of good they want to pursue, to which community they want to belong without any outside interference.³⁷⁷ This means that healthcare professionals should freely choose their beliefs and if they want to live in another community they must not be forced to remain in their country of birth and education. Unlike the principle of permission, the principle of beneficence depends on the need for content.³⁷⁸ Beneficence must be specified under certain moral communities in order to be practical.³⁷⁹

Because of its non-procedural character, the principle of beneficence is subordinated by the principle of permission which has the procedural characteristics. Engelhardt adds that the principle of beneficence has a double constraint: it works only if the principle of permission is respected and it changes so that it can be integrated to different moral or religious beliefs. The problem here is that there are personal or common beliefs and religions where the principle of beneficence has the main role. Not respecting this, means not respecting the freedom of each person to choose whatever they want as main principle for their guidance. So if a person wants to be guided by the principle of beneficence, Engelhardt's theory should allow it.³⁸⁰

For Engelhardt, autonomy is more than a value, it is a side-constraint that makes possible for people to choose and follow their own good, as long as they do not use force against people who do not consent. Moral claims have to be fully justifiable in order to be applied and we cannot apply them to people who do not agree with them, in other words, we cannot use force to convince people to adhere to a certain moral view and we can protect ourselves from people who try to convince us of it.³⁸¹

But any kind of moral project must incorporate at some point rationality, objectivity, without being partisan. This idea is developed by Soren Holm who believes that even limited moral projects such as Engelhardt's, need at some point standards of rationality or arguments which must be unpartisan because partisan arguments "either excludes the possibility of such

³⁷⁷ Engelhardt, *idem*, p. 70.

³⁷⁸ Engelhardt, *idem*, p. 127.

³⁷⁹ H. T. Engelhardt, and K. W. Wildes, "The Four Principles of Health Care Ethics and Post-Modernity: Why a Libertarian Interpretation is Unavoidable," in *Principles of Health Care Ethics*, edited by T. Gillon (London: John Wiley & Sons LTD, 1994), 137.

³⁸⁰ For this idea and a review of Engelhardt's ideas from first edition of *The Foundations of Bioethics*, see Arthur Caplan, "The Foundations of Bioethics-Review," *Ethics* 98, no. 2 (1988): 402-405.

³⁸¹ Engelhardt, *The Foundations of Bioethics*, Oxford University Press, New York, first edition, 1986), 41.

arguments, or entails that such arguments are also partisan” making Engelhardt’s claim either as a “*reductio* of his whole position, or as a direct refutation of his claims on behalf of his own positive project.”³⁸²

Engelhardt’s ideas gathered a lot of criticism as well as for the content of his Foundations but also for the relevance of his work for the post-modern society. One of his critics, Michael Wreen, believes that the idea of “content-less morality is an oxymoron” it does not escape the criticism of nihilism and relativism.³⁸³ He also believes that it is very confusing how Engelhardt treats the secular moral authority, as purely procedural. Wreen considers impossible to have rules without content, because moral rules say what is wrong or right to do. He further states that these rules of not interference with others way of following their own good, have content same as procedural rules such as laws have.³⁸⁴ But I believe we can have rules that only give us guidance to do what we consider to be good or bad under our individual moral convictions, without violating the same right for others. It is true though that this way we have to avoid a to full-content morality.

Another critique of Engelhardt thought is directed to his idea of a community of moral strangers. One may argue we can be somewhere between moral friends and moral strangers, when we do not have total connections with others in all areas, but some or maybe just one. Maybe we live in a society where, even if we might contradict about certain things, we have others in common. For example, maybe I am Agnostic and other a Christian but we both believe it is a duty to help the poor or give money to the baggers on the streets or we can both fight for a cause even if we are totally opposite in other aspects.³⁸⁵ Or, maybe some of us believe healthcare professionals are free to emigrate and should not have any restrictions on emigration and others think the opposite, but at the same time we all believe that we all have a duty towards the ones in need of health care.

Another critic of Engelhardt is James L. Nelson who criticizes his first principle because it does not give nonstrategic reason why individuals should keep their agreements after they have no interest in them. He believes that Engelhardt needs something more than interest to ground moral

³⁸² Søren Holm , “Secular Morality and its Limits,” *Medicine, Health Care and Philosophy* 1, (1998): 76.

³⁸³ Michael Wreen, “Nihilism, Relativism, and Engelhardt” *Theoretical Medicine and Bioethics* 19, (1998)” 79.

³⁸⁴ Michael Wreen, “Nihilism, Relativism, and Engelhardt” *Theoretical Medicine and Bioethics* 19, (1998): 81.

³⁸⁵ See the idea of “moral acquaintances” advanced by Kevin Wildes and others, *At the roots of Christian bioethics: Critical essays on the thought of H. Tristram Engelhardt Jr* (Salem, MA: Scrivener Publishing, 2010).

motivation : “Apart from some no doubt local and contestable belief that people and what they do are morally important, it is hard to grasp why their agreements matter.”³⁸⁶

On the content level, Wildes believes that there are no pure procedures on grounds that there should be particular commitments on value of peace, persons and rationality, in order for the procedures to work.³⁸⁷ Another critic, Hauerwas, thinks that the principle of permission offers an “empty process” for generating moral authority.³⁸⁸

Mark P. Aulisio believes that Engelhardt’s project is flawed in two ways, internally, because the concept of person cannot be exactly defined, and secondly, even if there would not be the problem of establishing what a person is, and the solution for opposing force is consensus, it does not meet the need for bioethics which emerges from our society.³⁸⁹

Even if we cannot give an exact definition of the personhood, as the criticism addressed to Engelhardt states, he tries to sketch a definition: “One speaks of persons in order to identify entities one can with warrant blame or praise, which can themselves blame or praise, and which can as a result play a role in the core of the moral life. In order to engage in moral discourse, such entities will need to reflect on themselves; they must therefore be *selfconscious*... They will need to be *rational* beings. That rationality must include an understanding of the notion of worthiness of blame and praise: a minimal moral sense.”³⁹⁰

Together with Engelhardt, I also believe that every person has the right to live her life as she sees fit and at the same time, she should not impose by force her beliefs or moral convictions on others. Of course, she does have the right to participate to the dialogues created by citizens in the public sphere and present her beliefs as she sees appropriate by bringing arguments, but all

³⁸⁶ J. L. Nelson, “Everything Includes Itself in Power: Power and Coherence in Engelhardt’s *Foundations of Bioethics*,” in *Reading Engelhardt: Essays on the Thought of H. Tristram Engelhardt*, edited by B. P. Minogue, G. Palmer-Fernandez, and J. E. Reagan (Dordrecht, The Netherlands: Kluwer Academic Publishers, 1997), 26.

³⁸⁷ K.W. Wildes, “Engelhardt’s Communitarian Ethics: The Hidden Assumptions,” in *Reading Engelhardt: Essays on the Thought of H. Tristram Engelhardt, Jr.*, edited by B. P. Minogue, G. Palmer-Fernandez, and J. E. Reagan (Dordrecht, The Netherlands: Kluwer Academic Publishers, 1997), 91.

³⁸⁸ Hauerwas, S. “Not all Peace is Peace: Why Christians Cannot Make Peace with Engelhardt’s Peace,” in *Reading Engelhardt: Essays on the Thought of H. Tristram Engelhardt*, edited by B. P. Minogue, G. Palmer-Fernandez, and J. E. Reagan (Dordrecht, The Netherlands: Jr. Kluwer Academic Publishers, 1997), 39.

³⁸⁹ Mark P. Aulisio, “The Foundations of Bioethics: Contingency and Relevance,” *Journal of Medicine and Philosophy* 23, no. 4 (1998): 434, 336.

³⁹⁰ Engelhardt, *The Foundations of Bioethics*, (1986 first edition), 107.

these without insulting other's religion or moral belief and as I already mentioned, by no means of force.

But what if, for example, the moral convictions of a person imply using force against others or producing harm? In this case, I argue that we should not accept these people in the society, because it would simply undermine peace and the freedom of others to live by their own conception of good. So, as Engelhardt states, we should be guided by the desire to achieve peace. One of the questions that have to be answered is if in this case, we can act against those people using force. My opinion is that everyone can keep her believes or convictions, as long as they will not hurt other members of the community they belong to. Otherwise, coercive actions should be taken, in order to establish peace.

Even if I embrace libertarian principles, I cannot wonder why should we accept libertarian rules in the public space and not egalitarian? Is it perhaps that only libertarianism concentrates on procedures and fair rules, without searching for substantive equality? But one can argue that if the main goal of Egelhardt's discussion is to acquire and maintain peace in the public sphere, maybe achieving a society guided by equalitarian principles will also work. The problem is though, that a substantive egalitarian society is not grounded on libertarian principles like freedom from interference or respect for the right to property. In a libertarian society, people's autonomy must override community's interests. Egalitarianism shares a different idea: equality between people from certain communities has to prevail. Only in this way the individual's autonomy and dignity are respected.

Conclusion

Letting aside the priority between freedoms and health, a better way to treat the problem is in more holistic terms, where we try to arrange the coexistence for both health and freedoms. We should think of a theory of justice that allows individual freedoms to have an important part near equality of opportunity in health care. We will analyze and argue more on this aspect during the next chapters.

In this part of the research, we have seen that when speaking of social contracts we assume cooperation between people. Questions like "what if cooperation is something imposed on us from birth, and we do not have any viable option to escape it?" or "how legitimate is then to obey institutions which justify their existence on grounds of cooperation?" are taken into account

and develop furthermore on the other parts of this thesis. The conclusion of this chapter is that when trying to connect healthcare and social contract, we have to look for better justification than only to assume cooperation and contract between people or a duty of justice to create equal opportunities for all. If healthcare professionals are to be kept in the country of education on grounds that they have to stay there because their skills are the result of agreement and cooperation between citizens of that country, then we have to find more powerful justification for it. Why should they abandon their individual freedom, their personal choices to look for a better life or to move freely on earth? If the answer is to make sacrifices in order to keep the equality of opportunities in health care, then we have to think how to incorporate the elements of freedom into this structure of justice. Ideals like equality of opportunity in healthcare are a good thing to start with, but we have to be careful how we justify that certain opportunities are more important than others. Moreover, if we agree equality of opportunity in healthcare, then we should design social institutions so that justice in healthcare is achieved without restriction to any individual rights.

CAP. IV Ethical Concerns Regarding the Brain Drain of Healthcare Professionals

Introduction

Until recently, governments were concerned about health care issues only at the national level. Nowadays, global health issues are taken seriously, not only because people are aware that the risks of health can be resolved by working together at global level, but also because ethical aspects of cosmopolitanism like acknowledging the moral value of all people, are becoming more powerful. The major problem is that even if we identify duties and obligations that global health issues bring upon, it is unclear who should take the responsibility for them. Contrary to this idea, there are scholars who argue that the responsibilities of states when it comes to global health are more determinate than we usually believe, but we need institutional innovation in order to be able to point out the governmental and nongovernmental actors responsible for global health issues.³⁹¹ Another correlative problem is when we subscribe responsibilities, duties or obligations to institutions or individuals without trying to justify our actions, the so called Duty Dumping. An example may be saying that MP have the duty or obligation to reside in their country of origin if it is affected by the brain drain. The important thing is that we cannot ‘dump’ responsibilities or obligations on them, without solid justification and reasons. To infer their duty only because MP produce health care goods and at the same time they are health care resources, it is like saying that if they can do something, they ought to do it.³⁹² We have to be aware of all dimensions when attributing these sorts of duties and obligations, and find a balance between them. This chapter aims to argue for these ideas.

IV.1. Some Statistical Data

According to the data available on WHO, in 2009, the number of practicing physicians in Romania was 48 484, with a density rate of 22.69 per 10.000 population, while the number of

³⁹¹ Allen Buchanan and Matthew Decamp, “Responsibility for Global Health,” *Theoretical Medicine and Bioethics* 27, (2006):95-114.

³⁹² Allen Buchanan and Matthew Decamp, *op. cit.*, p. 97.

nurses and midwives was 125.699 with a density of 58.82 per 10.000 population.³⁹³ By contrast, in 2010, Spain registered the number of nursing and midwifery was 224. 800 with a density of 51.1 per 10.000 population and the number of physicians was 174 100 with a density of 39.57 per 10.000 population.³⁹⁴ But these figures are continuously changing.

OECD statistics reveals that the number of physicians in developed countries is increasing. For example, the number of practicing physicians from Spanish hospitals increased from 135.800 in 2002 to 195 600 in 2011. The same situation can be encountered in the number of practicing nurses, which grew from 169 200 in 2002 up to 245 100 in 2011. Statistics show that the number of physicians and nurses in each country is increasing. In 2008, Spain registered a total of 1. 277. 071 workers in healthcare and social field.³⁹⁵ The climax resides in the case of Sweden, where midwives and nurses density was 118. 61 per 10.000 inhabitants in 2008, four times higher than in Romania.³⁹⁶ In 2009, the density in case of practicing physicians was 3.8/1000 inhabitants for Sweden and 3.54/1000 inhabitants in Spain. Despite the visible increasing in the number of medical personnel, hospitals and care centers are in need especially of nurses, and the continuous growing rate of old people will constantly point to this direction. As the number of the patients increases, the need for health care is also increasing. So, we can predict that, at least in an aging Europe, there will be an extensive need for healthcare and implicitly for medical personnel.

The need for medical professionals determines countries to attract and employ people from all over the world. Rich countries have more resources in undertaking this type of actions, and poor and developing countries are the places of emigration. Skilled doctors and nurses from poor and developing countries are most likely to respond to the calling in searching for their own well-being. There are also some problems that countries have to respond, like small number of healthcare personnel in a system that is structurally and systemically fragile and cannot provide effective services. If the trained personnel migrate, countries will lose the resources invested in their education. If a country is left without skilled workers or specialists, then it will become unstable, political, social and economic. For example, Romania is left without healthcare

³⁹³ <http://apps.who.int/gho/data/node.country.country-ROU?lang=en> (accessed May 10, 2013).

³⁹⁴ <http://apps.who.int/gho/data/node.country.country-ESP?lang=en> (accessed May 10, 2013). See also World Health Statistics 2012).

³⁹⁵ OECD Statistics on Health http://stats.oecd.org/index.aspx?DataSetCode=HEALTH_STAT (accessed May 10, 2013)

³⁹⁶ <http://apps.who.int/gho/data/node.country.country-SWE?lang=en> (accessed May 10, 2013).

specialists, because they are massively leaving the country. This is very rational and reasonable, and is totally in accordance with human rights. The problem is that the condition of people who live in poor and developing countries is worsening.

IV.2. Effects of Brain drain of Healthcare Professionals

IV.2.1. Negative effects

The brain drain of HP brings upon some effects not only for the people from their country of origin but also for people from the country they migrate.

Firstly, we can observe the effect of brain drain on their co-nationals, present and future generations, not only as individuals but as well as community. Secondly, the effects are both negative and positive. There are people who do not like foreigners coming into their countries and consider them intruders. But this feeling is not so extensive when it comes to medical personnel, maybe because everyone fears illness, pain or death, and doctors as well as nurses are tools that can fight against these fears. Healthcare professionals are discriminated from other professionals, but in a good way mostly because of their utility and importance for a person's well-being. People who dislike having outsiders in their country, do not agree mostly with having near them people that can cause harm on some way or another. They are afraid for their security, having secure jobs and a good level of well-being, increased respect for the law etc. In case of MP, they are accepted not only because they are skilled workers that can improve the economic aspects of people's life, but mostly because everyone needs medical care. The quality and quantity of health providers can make patients feeling more secure they are on receiving good treatment.

Many states accept non-inclusion of others on various grounds like the lack of skills, even though, from a democratic point of view, discrimination on race, gender, sex, religion or sexual inclination is not accepted. From an economic and social point of view this is a good step, a protectionist one that follows the country's interests. A skilled and talented person can work all over the world, she can land excellent jobs, but a mediocre person does not have the same chances. It is true the effort is very important, but an arbitrary talent gained from birth may surpass all type of effort. Cohen argues that individuals may pursue their personal interest to a

certain extent, but at the same time respecting the commitment to equality.³⁹⁷ He continues with the idea that if talented people respect and embrace the difference principle “would not need incentives if they were themselves unambivalently committed to the principle”³⁹⁸, because according to Rawls, even if the difference principle allows talented people to exercise their talents, they are conditioned by the necessity of redistributing a part of their resources to the worst-off:

“the difference principle includes an idea of reciprocity: the better endowed (who have a more fortunate place in the distribution of native endowments they do not morally deserve) are encouraged to acquire still further benefits- they are already benefited by their fortunate place in that distribution- on condition that they train their native endowments and use them in ways that contribute to the good of the less endowed (whose fortunate place in the distribution they also do not morally deserve)”³⁹⁹.

Shiffrin believes that citizens of a Rawlsian society may not demand incentives to exercise their talents in productive ways because these demands are inconsistent with the moral arbitrariness of talents which justifies the difference principle.⁴⁰⁰ Douglas MacKay rejects her argument and favors the idea that citizens “can publicly accept the claim that talent is morally arbitrary *and* accept incentives to employ their talents productively without inconsistency.”⁴⁰¹

Another negative effect of brain drain is that, because of countries that are creating policies which foster only high-skilled workers, the inequalities between individuals and states are increasing. So, there is a sort of structural injustice that takes place, as Lisa Eckenwiler observes: “In all, the migration of care workers both reflects and perpetuates structural injustice. Structural injustice occurs where social and economic norms and processes serve systematically to undermine or constrain some people’s abilities to develop their capacities, to determine their actions and the conditions of their actions and threaten their equality while at the same time enhancing and expanding others’ prospects.”⁴⁰² Structural injustice can also be seen when people are coerced by the society and economy to prepare in fields they do not actually want. For

³⁹⁷ G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008), 61.

³⁹⁸ G. A. Cohen, *Rescuing Justice and Equality*, p. 32.

³⁹⁹ John Rawls, *Justice as Fairness: A Restatement*, edited by E. Kelly (Cambridge: Harvard University Press, 2001), 76-77.

⁴⁰⁰ S. V. Shiffrin, “Incentives, Motives, and Talents,” *Philosophy and Public Affairs* 38, no. 2 (2010): 121-122.

⁴⁰¹ Douglas MacKay, “Incentive Inequalities and Talents: A Reply to Shiffrin,” *Philosophia* 41, no. 2 (2013): 521.

⁴⁰² Lisa A. Eckenwiler, “Care Worker Migration and Transnational Justice,” *Public Health Ethics* 2, no. 2 (2009): 176.

example, countries might need to train more and more health specialists because of the continuous need for health care, and this way maybe people who would have liked to have another career, turn out to be doctors because they do not have any other prospects on the market. Maybe a better organization of the health care system could prevent this to happen.

Accepting only the skilled workers could lead to the collapse of poor and developing countries which will need more and more help from outside. They will be unable to progress without constant help. Also, a very negativist possible deduction is that poor and developing countries will be left without any trained and specialized professionals to teach the future generations. Until we get there, I am optimistic we will find appropriate solutions so that will not happen.

The most probable impact from brain drain of medical personnel is on patients from their country of origin and education. The problem arises when there are not sufficient doctors, midwives or nurses and patients have to endure an incomplete treatment. Often, patients from poor rural areas or cities do not have resources to get private medical care, and in many cases public medical care is not enough. Maybe if there were sufficient medical personnel, the internal discrepancies between rural and urban areas would not be of such high impact.

IV.2.2. Positive effects

There are also positive aspects of MP's migration, but these are well seen only in case of their returning to the country of origin. In case they will not return and will settle down in another country with their family, patients and community that MP left behind, will not have any advantages, only disadvantages. In case of returning, patients and community could benefit from their knowledge: prospective healthcare professionals could learn how to be better when exercising their job, patients could be provided with better treatment. When it comes to the community of healthcare professionals from the receiving country, I believe they can benefit from having colleagues with other background. They are likely to develop a winning situation on both sides, where curing patients is the common ground. In case MP leave, the positive aspect for the patients from the country of origin is that maybe they will have the opportunity to contribute to developed research and find better cures for illness. It is very possible that in poor and developing countries, research is not that developed because of lack of funds.

One of the arguments used against the acceptance of immigrants and refugees in many countries, especially those that are not traditional countries of immigration, is that the arrival of large numbers of people who do not share a common history and culture will weaken the emotional identification of citizens with one another.⁴⁰³ But to say something like this is almost like saying that if you love your sister and your parents adopt another child, this will ruin the relationship and love between you and your sister and parents. You take into consideration only the negative side, and consider the other one an intruder. What you do not take into account is the fact that this ‘intruder’ can actually become a full member of your family or that he can actually bond with the other members, not diminish their love. It is true though, that citizens do not share that kind of relation with one another, and even if one can gain the citizenship of another country there are different traditions and culture, national identity that separate people in a way, but it also enriches them by access to diversity.

There is also a push factor from developing and poor countries towards emigration. The return of migrants to their home countries could lead to a number of benefits including: the reversion of some of the adverse brain-drain effects associated with the emigration of highly skilled workers; the transfer of knowledge and skills acquired by migrants abroad; and the creation of local businesses by migrants based on savings generated during employment abroad.

Moreover, migrants who intend to return-especially those with families in their home countries-can be expected to remit more of their wages than migrants who intend (and are permitted) to reside abroad on a permanent basis. There are positive aspects like bigger income, remittances, high tech training and better specialization. There are doctors that return to the country of origin and try to apply what they learn, maybe open new private clinics etc.

Although the empirical evidence on this issue is mixed, there is some evidence that remittances initially increase but eventually decrease with a migrant’s duration of stay in the host country, reflecting the counteracting forces of wage increases (which increase remittances) on the one

⁴⁰³ See Joseph Carens, “Aliens and Citizens: The Case for Open Borders,” in *Theorizing Citizenship*, edited by Ronald Beiner (Albany, NY: State University of New York Press, 1995), 229-253.

hand and increased detachment from the home country and family reunification (lowering remittances) over time.⁴⁰⁴

IV.3. A Moral Analysis of the Brain Drain of Healthcare Professionals from Cosmopolitan and Communitarian Perspectives

When we analyze the brain drain of healthcare personnel, one main aspect is the idea of migration - moving freely on earth. In order to better understand what brain drain of medical personnel implies in terms of migration I will examine the main moral concerns in the field. This step will help us understand the problems that arise once healthcare professionals decide to leave their country of birth. When talking about migration, we assume the right to free movement, embraced more by cosmopolitan thinkers than by communitarians. In what follows, we should see the main differences between those main paths of thinking.

IV.3.1. Communitarianism

The term communitarian was first used in 1841 by John Goodwyn Barmby, one of the leaders of British Chartist, who used it to refer to utopian socialists and other people that have chosen to experience a communal lifestyle. Between late 1970' and 1980's, the term became known due to authors like Charles Taylor, Michael Sandel, Alisdair MacIntyre, Michael Walzer, William Galston, and later by Sheila Benhabib and others, by the importance shown to common good in opposition with liberal and libertarians.⁴⁰⁵

The preponderant reaction came to the work of John Rawls, *A Theory of Justice*. Communitarians considered that theories of justice should take into account the importance of every community, the cultural and social differences between them. They refuted the universalization of the theory of justice as fairness and argued that we cannot apply to each community the same theory since we can find so many differences when it comes to human

⁴⁰⁴ For these ideas see Martin Ruhs, "Economic Research and Labour Immigration Policy," *Oxford Review of Economic Policy* 24, no 3 (2008): 403-426; Jorgen Carling, "The Determinants of Migrant Remittances," *Oxford Review of Economic Policy* 24, no 3 (2008): 582-599.

⁴⁰⁵ Encyclopaedia Britannica, <http://www.britannica.com/EBchecked/topic/1366457/communitarianism>, (accessed July 21, 2012).

beliefs, institutions, practice.⁴⁰⁶ Michael Walzer developed the argument that criticism should be made only when we consider special context in times and space and that a universal theory of justice would be almost impossible to put into practice when it comes to real distribution: “any such set would have to be considered in terms so abstract that they would be of little use in thinking about particular distributions”.⁴⁰⁷

Following the critics and willing to reshape his theory, John Rawls embraces in his later works the idea that justice is possible in a society where people are able to agree, to form a consensus, because every individual enters the society with a set of comprehensive doctrines. Political stability is achieved only when there is a partial consensus on these comprehensive doctrines, and this step presupposes tolerance and openness.⁴⁰⁸

The importance of cultural, social or national bounds is strengthened by Alasdair MacIntyre in *After Virtue*. His Aristotelian ideas emphasize the importance of people working together for the common good of society, where every person has her specific role and shared goals.⁴⁰⁹ Together with Charles Taylor, MacIntyre considers that all individuals have a connection in virtue of their living in the same society and we cannot think at their identity other way. If we want to understand the individual, we have to see it connected to the community’s good and to their peers from two main reasons. First, we have Taylor’s idea that we have the capacity to have moral intuitions that create evaluative frameworks. The attachment to the community shapes our moral intuitions and implicitly our evaluative frameworks.⁴¹⁰ What if a person is not attached with the community, or if she hates it and wants to search for another more suitable for her beliefs? We can take the example of a gay person who was born and lives in a homophobic community that disregards and is disgusted by gays. Is she entitled to leave, even if she is a distinguished doctor that saves lives, indispensable for the community she lives in? If she stands up in public and speaks about her being gay, then maybe the community will kick her out after counterbalancing the two qualities: being an exceptional doctor and being gay. It depends how the community perceives and calculates the possible harms and what is more acceptable for it. In

⁴⁰⁶ See Charles Taylor, *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press, 1985); MacIntyre, Alisdair, *Against the Self-Images of the Age*, (Notre Dame: University of Notre Dame Press, 1978).

⁴⁰⁷ Michael Walzer, *Spheres of Justice*, (Oxford: Blackwell, 1983), 8.

⁴⁰⁸ See the earlier discussion on John Rawls’ Political Liberalism.

⁴⁰⁹ Alasdair MacIntyre, *After Virtue*, (Notre Dame University of Notre Dame Press, second edition, 1984).

⁴¹⁰ Charles Taylor, *Sources of the Self: The Making of Modern Identity*, (Cambridge, MA: Harvard University Press, 1989), 34.

case the person does not confess her inclination and wants to leave the community, maybe the society will condemn her and will suffer more. But this idea does not stand today, if we embrace democratic way of thinking, where discrimination is not accepted.

Second, MacIntyre argues that human actions are intelligible only in certain paradigm, setting. We can better understand actions if we know the contextual history, what caused them, their role or the intention of the agent. The scholar believes that we must analyze all aspects in narrative style, like the life of agents are ongoing stories. If the actions are intelligible, then the agent can be accountable, responsible for her actions.⁴¹¹ The problem is that it is very difficult to have all necessary resources of time, material or information to analyze all intentions, actions and attitudes. And if we consider doing this from a certain perspective, how do we know what is the truth? But maybe more important is fairness, not the truth since we live in a society where there are various sets of beliefs, laws, rules that gives an important degree of relativity to what counts as truth. Also, it is possible to agree upon what truth and fairness are if we analyze the problem from certain paradigm, as communitarians believe we should. Nowadays we have the difficulty of finding truth and fairness when people from certain communities migrate to others. The migrant is judged by the laws and rules of the community she enters, but some aspects like religion, beliefs or culture are most of the time taken into consideration and respected. It appears that global migration imposes on people and states to be more tolerant and respectful when it comes to other cultures, even if at the same time there is a wave of opposition against migrants or immigrants.

The communitarian argument for migration is described by Michael Walzer. The philosopher considers states have a broad right to control their borders. Governments are entitled to regulate immigration according to the national necessities.⁴¹² Walzer argues that citizens or nationals of each country have the right to choose who can come in their country and who is prevented from it. He correlates this with the idea that people have the right to protect their community, their liberty, rights or culture, even if it means the exclusion of others. This way the good of the community is maintained. For Walzer, liberal societies are like clubs that can have only the members they accept by certain decision rules. Relatives, or people of same nationality are also accepted as part of community, even if they are coming from outside. This may apply to religion

⁴¹¹ MacIntyre, *After Virtue*, pp. 206-208.

⁴¹² See Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1984).

or ethnicity. There is a moral dimension that community members embrace when it comes to accepting these groups.⁴¹³ We may consider for example the case of Jews who are embraced by Israel no matter the country they were born into or the Roma community which is known to be very unified no matter the country they live in. Walzer considers liberal democratic societies like families that support each other “for it is a feature of families that their members are morally connected to people they have not chosen, who live outside the household”⁴¹⁴ There is another principle that Walzer puts forward: the principle of collective mutual aid. This principle states that aid can be given to foreigners but only if they are in a very bad or urgent condition and if the help is not costly for the benefactors. Positive assistance may be given to strangers, only if ‘is needed or urgently needed’ by the receivers and ‘the risks and costs of giving it are relatively low’ for the donors.⁴¹⁵ There are also cases when even the majority from a country wants to accept immigrants, governments decide not to do that because of certain aspects, mostly based on economics or security issues. Even if these are the most important dimensions which lead to immigration restrictions and non-acceptance of migrants, there are cases when a small part of the community wants to accept them. In this case, we can see that some opinions and desires are left aside, enforcing the rule that governs the community.

In a realistic and non-ideal society, there is not the case that everyone is satisfied with the decisions taken inside the community. People who have other vision when it comes to the good of the community they live, can be listened, but when it comes to applying the rules and taking action, it is unlikely that an opinion opposed to the majority will win. The minority can be considered when the rules are made, so that the community finds a consensus and stability, like laws for gay people etc., even if usually in societies, the majority outlines the main lines of rules that coordinate the community. We can notice this when voting the president in a liberal democratic society for example. A candidate wins if she has the majority, even if the percentage that voted for the other candidate is significantly high, very close to the winner’s. The majority has sometimes more power, but everyone counts as important, because the community is formed of different people.

⁴¹³ Michael Walzer, *Spheres of Justice*, p. 41.

⁴¹⁴ *Ibidem*.

⁴¹⁵ Walzer, *Spheres of Justice*, p. 33.

Communitarians take into consideration the welfare of the minority. The good of the entire community cannot be achieved if some people are very worse off, because they ‘drag down’ the quality of the place and of lifestyle within that community. On the other hand, utilitarians tend to achieve as much quantity as good as there can be, they focus on the greatest good for the greatest number. In this case, some people are left behind, without considering their will if it is inconsistent with the utilitarian goals. In both cases, the question is how it is possible to acquire the good of a community or society if we are unable to realistically and not idealistically consider everyone’s opinion, to consider each person as a serious entity?

IV.3.2. Cosmopolitanism

Contrary to the above position, there are authors who see the whole world as a unified community, where there are no outsiders, only citizens of the world. Kant develops a theory of moral cosmopolitanism where people use their reason to live in a global community. Beside the characteristics individuals share, like freedom, independence and equality, they also share the same laws and morality created by reason.⁴¹⁶ In *Perpetual Peace*, Kant argues that world peace is possible only when people are organized by appeal to reason, internally and externally for the sake of conserving peace, and respect the human rights of all, including foreigners.⁴¹⁷

Liberal egalitarians thinkers like Joseph Carens, try to develop arguments against the conventional view on immigration embraced by Walzer. They consider states have a duty to keep borders open. Carens considers that the main theoretical approaches to liberalism-libertarianism, utilitarianism and liberal egalitarianism- defend the idea of open borders.⁴¹⁸ His first argument is related to Rawls’ liberalism borrowing the idea of the veil of ignorance where parties should think the rules that govern society under a global perspective, not on a national level.⁴¹⁹ Carens’ thought is that liberty of free movement is an important aspect which has to be mentioned when parties design the global structure. The philosopher concludes that since there is

⁴¹⁶ Kleingeld, Pauline and Brown, Eric, "Cosmopolitanism", *The Stanford Encyclopedia of Philosophy (Spring 2011 Edition)*, Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/spr2011/entries/cosmopolitanism/>>.

⁴¹⁷ See Immanuel Kant, *Perpetual Peace*, Swann Sonnenschein & CO, LIM, London, 1903(1795).

⁴¹⁸ Joseph Carens, “Aliens and Citizens: The Case for Open Borders,” in *Theorizing Citizenship*, edited by Ronald Beiner (Albany, NY: State University of New York Press, 1995 (1985)), 229-253.

⁴¹⁹ See also Thomas Pogge, *Realizing Rawls*, (New York: Cornell University Press, 1989).

a basic right to free movement, then states should let their borders opened in order not to infringe on people's right.⁴²⁰ In *Migration and Morality*, Carens designs another argument when comparing national and international liberty to free movement.⁴²¹ He argues that when it comes to free movement, the same rules that apply at national level can be applied on international level. This is because people who want to move inside the limits of a certain country have similar reasons to move at international level: "one might want a job; one might fall in love with someone from another country; one might belong to a religion that has few adherents in one's native state and many in another; one may wish to pursue cultural opportunities that are only available in another land"⁴²².

There is another argument for open borders in liberal theory based on principles like equality of opportunity and moral equality of persons. In a fair world, people should have equal opportunity to access open positions, depending on their qualities and capacities not merely to arbitrary characteristics like sex, race or the place one is born. Citizenship is not an appropriate criterion to distinguish between people and we cannot attribute rights on that basis.⁴²³ This affirmation about citizenship is rejected by Michael Blake. He argues that citizenship different moral status compared to race, sex or social position people are born. This is because citizenship has to do with state authority. The state has a special kind of authority over its citizens that does not have over the foreigners.⁴²⁴ Another line of thinking comes from Arash Abizadeh who relies on the principle of democratic legitimacy assessing that the coercive power can be legitimate only when "it is actually *justified by and to* the very people over whom it is exercised."⁴²⁵ It implies that a state policies regarding border control concerns not only citizens, but also noncitizens, and there

⁴²⁰ Joseph Carens, "Aliens and Citizens: The Case for Open Borders," pp. 229-253.

⁴²¹ The principle of free movement of workers was established in 1957 by the Treaty of Rome. The right to free movement for every person, no matter if she is an employee or self-employee or does not work, was legitimated by the Maastrich Treaty in 1992. We can find it in article 13 of the Universal Declaration of Human Rights.

⁴²² Joseph Carens, "Migration and Morality: A Liberal Egalitarian Perspective," in *Free Movement: Ethical Issues in the Transnational Migration of People and of Money*, edited by Brian Barry and Robert E. Goodin (University Park, PA: Pennsylvania State University Press, 1992), 28.

⁴²³ Joseph Carens, "Migration and Morality: A Liberal Egalitarian Perspective," pp. 28-34.

⁴²⁴ Michael Blake, "Immigration," in *A Companion to Applied Ethics*, edited by R.G. Frey and Christopher Heath Wellman (Malden, MA: Blackwell, 2005), 224-237.

⁴²⁵ Arash Abizadeh, "Democratic Theory and Border Coercion. No Right to Unilaterally Control Your Own Borders," *Political Theory* 36, no. 1 (2008): 41.

must be a justification for both parties: “the justification for a particular regime of border control is owed not just to those whom the boundary marks as members, but to nonmembers as well”.⁴²⁶ It is not morally right in a democratic world to exercise coercion on a category of persons, without even hear what they have to say, or try to create the state policies in such matter that the harm produced on them to be minimal. As a response to this criticism, David Miller argues that policies on borders control are rather preventive than coercive.⁴²⁷ He further employs the argument that if people are able to move freely over the globe, only skilled persons and the ones with resources could have the real opportunity to travel or migrate: “But before jumping to the conclusion that the way to respond to global injustice is to encourage people whose lives are less than decent to migrate to elsewhere, we should consider the fact that this policy will do little to help the very poor, who are unlikely to have the resources to move to a richer country. Indeed, a policy of open immigration may make such people worse off still, if it allows doctors, engineers, and other professionals to move from economically underdeveloped societies in search of higher incomes, thereby depriving their countries of origin vital skills”⁴²⁸.

What Miller emphasizes is that it seems that by providing same or equal opportunity to all people, we are likely to create a selective migration and the opportunity for brain drain.

But I believe it is better having the right to free movement, than not having it at all, even if it may create some discrepancies between people. If a poor person does not have the real opportunity to travel or migrate at a certain moment, does not mean that she cannot have this possibility. Maybe in the future she will have the necessary skills or resources to do that or maybe her children will fully enjoy the right to free movement. The right to free movement it is like every right: some have the possibility to fully exercise it and some have only a formal opportunity, but at least they have something to hope for and may contribute to their total amount of freedom. The restriction of free movement will have the opposite effect on people. They will feel less free and more coerced to stay in their country even if they do not feel good there and they do not have the opportunity to fully achieve their personal flourishing. There

⁴²⁶ Abizadeh, *idem*, p. 45.

⁴²⁷ David Miller, “Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh,” *Political Theory* 38, (2010): 111-120.

⁴²⁸ Miller, David. “Immigration: The Case for Limits,” in *Contemporary Debates in Applied Ethics*, edited by A. I. Cohen and C. H. Wellman (Oxford: Blackwell, 2005), 198.

could be the case that when people are forced to stay in the country of origin, they are removed from conquering their flourishing. Also, rich people from poor or developing countries most likely feel comfortable in their country of residence because they have the desired social status and for the time being, they can travel and visit any country, without willing to establish there. People who want to exit their country are predominant poor or medium income, most likely unskilled. These people are the ones who rich countries are trying to forbid entrance.

Miller argues that when it comes to vital or basic interests, things are changing. He considers we can have the right to demand entering a state when we are in a situation where our basic interests are violated in the state we were born. Personal interests which are connected to individual desires do not legitimate the right to free movement. States have the duty and responsibility to protect its citizens, to maintain a level of basic interests or needs. When individuals or the states are incapable to accomplish the bare minimum level, then people have the right to have a demand on open borders as 'remedial right': "But here the right to move serves only as 'remedial right': its existence depends on the fact that the person's vital interests cannot be secured in the country where she currently resides. In a world of decent states, states that were able to secure their citizens basic rights to security, food, work medical care, and so forth- the right to move across borders could not be justified in this way."⁴²⁹

Miller defines the nation state as a state which has a common past and cultural structure, special laws and institutions and social justice has to be understood only in this context. In terms of global justice, we have to protect the basic human rights of people from other countries.

He also makes the distinction between basic interests and bare interests. Basic interests are vital and must be protected by rights. On the other hand, bare interests are legitimate interests but not so important as to be protected by rights. He emphasizes that even if we have the freedom to move, there is not a right to freely move. States do not have the obligation to let their borders open for all people. Only because we recognize the right to freely move, states do not have the obligation to let anyone enter their territory. If there is a desire or need for an individual to do something, there is not sufficient force to impose on others to make them fulfill it, especially if it is a bare interest: "Of course there is always some value in people having more options to choose between, in this case options as to where to live, but we usually draw the line between basic freedoms that people should have as a matter of right and what we call bare freedoms that do not

⁴²⁹ David Miller, "Immigration: the Case for Limits," p. 196.

warrant that kind of protection. It would be good from my point of view to buy an Aston Martin tomorrow, but this is not going to count as a morally significant freedom-my desire is not one that imposes any kind of obligation on others to meet it.”⁴³⁰

When it comes to make a clear distinction between these two specific interests, some people might find it complicated. Some people have certain type of basic interests or needs like food, shelter or urgent healthcare others may think that maybe activities like smoking, drinking alcohol or doing drugs are basic interests. The same author considers that we can distinguish between basic interests and bare interests only relative to a certain community or state because they can differ in time and space.⁴³¹ The difficulty is that individuals who are not prototypes of a certain community are barely or at all taken into consideration when constituting a theory of justice on these grounds.

Furthermore, the scholar argues that even if people have the right to exit a state, does not mean that other states have a duty to accept them on their territory. To clarify things, the author compares the right to exit with the right to marry, where people have the right to marry some person, but they do not have the right to marry a specific person: “But suppose states are generally willing to consider entry applications from people who want to migrate, and that most people would get offers from at least one such state: then the position as far as the right of exit goes is pretty much the same as with the right to marry, where by no means everyone is able to wed the partner they would like to have, but most have the opportunity to marry someone”.⁴³²

But the right to marry and the right to move are not the same. When a person lives in a country, she may have or may have not chosen or consent to this. People may be forced to live in certain countries and cannot do anything to stop coercion. When it comes to being born in a certain country, there is not any choice or consent involved. On the other hand, when it comes to marriage, people have the opportunity to choose and consent to whom they marry. They are not born married, even if there are cases in certain cultures where this phenomenon is seen in rich or poor families or mostly very traditional and conservative, where people are promised to marriage since they are born. It is unlikely for this to happen within the values of liberal democratic society, but there might be isolated communities inside democratic countries which choose this

⁴³⁰ David Miller, “Immigration: The Case for Limits,” p. 194.

⁴³¹ David Miller, *Principles of Social Justice* (Cambridge, Mass.: Harvard University Press, 1999).

⁴³² David Miller, “Immigration: the Case for Limits,” p. 197.

practice. There is also the argument that marriage and citizenship are not on the same level of importance, when it comes to the social importance and impact. In this sense, it is more important for a person to be a citizen than to be married, because citizenship brings more basic advantages, like being under the protection of a certain state, have the same rights and duties as other citizens, have some benefits as a recognized member of society etc. It is true that marriage implies social aspects and at the same time, for some people, marriage can be more important than being a citizen. At the same time, we can argue that citizenship is more important than marriage, if we think at the consequences involved when a person is deprived of marriage or of citizenship. A stateless person can be left without protection and maybe without help from states when it comes to some basic rights, like healthcare or social protection, while an unmarried person can still have her lover beside, even if not married.⁴³³

But citizenship of a certain state is not that important when we think of people like citizens of the world. In this respect, cosmopolitan thinkers argue that there is not a pure culture shared only by one community, because people and cultures are mixed. It is improbable to encounter on earth a person that is a pure race or has a culture that was not influenced by other cultures along history. K. Anthony Appiah believes that cosmopolitanism can allow better diversity than political liberalism, because it does not fall into the trap of moral relativism. The challenge of cosmopolitanism is to respect all cultures and embrace diversity of all types, as political liberalism and avoid relativism.

For Appiah, cosmopolitanism embodies two core values: 'respect for legitimate difference' and 'universal concern' for all people, above family and nation.⁴³⁴ There is also the need to find the balance between universalism and individualistic and self-interested nationalism and realize that there is too much accent put on cultural identity. The scholar considers that it does not exist a powerful conflict between different values or cultures, as when considering different opinions on one value or culture. Big conflicts may happen when considering various meanings over the same values. Furthermore, another challenge of cosmopolitanism is to develop conversation

⁴³³ For an extensive analysis on Miller's rejection to open immigration *see* Kristopher Gibson, *An Analysis of David Miller's Rejection of Free Movement as a Reason for Open Immigration*, <http://www.phil.gu.se/cdpf/KGibsonCuppsats.pdf>

⁴³⁴ Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (New York: Norton, 2007), 15.

between all types of communities, people and cultures, “conversation in its older meaning, of living together, association”⁴³⁵.

But maybe we have to see cosmopolitanism as a way of life, a guide for people, and not necessarily as cultural or political, sustained by institutions.

Critics of cosmopolitanism consider that if we leave the special connection with our close ones and have the same attitude towards all persons, then we will lack special emotions. But the argument does not apply if we consider the moderate cosmopolitanism against the strong version. In this case, people need to have same positive feelings as they would have had towards their families directed to all human beings. The moderate position leaves room for interpretation, it leaves open the possibility of having special positive feelings towards the close ones, and keep the friendly open attitude towards other people.

There is also the idea that the relation between citizens and states is similar to the relation with our family, then people have obligations and responsibilities towards the state, as long as we recognize them in family.⁴³⁶ Another critique against the cosmopolitanism affirms that it is almost impossible to have a civil society in the global state or in a specific state if people do not feel special ties or are not connected. Here I might add that nowadays developments regarding social networking overpass the national domain, acting globally. Also, if we adopt the Kantian believes, people can be connected by sharing the same moral values rooted in reason. Nevertheless, things are not that simple. If we see the problem from a point of view anchored in reality, we can observe people do not guide their actions only by reason or morality. Humans are more complex, they also act violently, start revolutions, wars and all sorts of conflicts leading to murder or mass killings. Unfortunately, the Kantian assumption of rational and moral persons is still utopian and so it is the perpetual peace.

Even if not all people guide their actions by Kantian morality, we are able to adopt the idea of reciprocity. Critics of cosmopolitanism consider that people have a duty of responsibility towards people from the same community, an idea not taken seriously by the cosmopolitans. During their lives, people enter into contact and receive wanted or unwanted benefits. For example, a person that builds a great house or a VIP that becomes member of community, rises

⁴³⁵ Anthony Appiah, *op. cit.*, p. 19.

⁴³⁶ See David Miller, *On Nationality* (New York: Oxford University Press, 1995).

the value of the houses in the area. Even though there is not any direct intention for the new owners to do beneficial acts, most likely they will only follow their interest, people from community benefit from their actions. This example shows that there are also unintended consequences that may benefit others. If this is the case, do we have a duty of reciprocity towards people that we benefit from? What we have here are wanted actions that may have intended and unintended consequences. Why should a person be responsible for the unintended consequences, even if the result of their action gives satisfaction to others? There is also the possibility that the person who built the great house or the VIP to have negative thoughts or desires regarding the unintended benefits they produce to others. If we take account only of the actions, some may go further and consider properly for the neighbors to give thanks or offer something in return and apply the reciprocity condition.

But the reciprocity condition could be satisfied other way, by offering benefits or do good deeds in other circumstances. We can see reciprocity extended to a global level, applied to all human beings, not only to the ones that directly helped us. If we simply do good things to other people⁴³⁷, regardless of their nationality or connection to us, we have the reciprocity of action. If we do this, we could become more tolerant and create a greater respect for equality. We can do good, act from beneficence, towards all people equally, no matter the race, sex, culture, religion etc. All this could be possible, if we emphasize the actions and humanity, not the specific individuals. But actions can be good or bad for certain people or groups, and sometimes our intention to do good, is not transformed in a good action without taking account of the person or group it is intended for. We should also be aware of the fact that there are in the world groups or persons that need same actions. For example, Romanian patients need cure for different diseases and so are the Spanish ones. Since illness exist almost everywhere, healthcare personnel is needed everywhere diseases appear.

Maybe this is not enough, and in order to establish just democratic states, people need to take a commitment when it comes to the community they want to live. The difficulty is to find a bridge between this communitarian account and the cosmopolitan perspective.

A way to diminish the discrepancy between cosmopolitan and nation focused theories is Daniels's minimalist cosmopolitan conception. The philosopher defines this idea as one that offers more credit to negative duties than to positive duties. He believes that people are more

⁴³⁷ I could go further and extend to animals, but there can be a long discussion and I will not develop the subject here

likely to agree to duties that imply not to harm people even if they disagree with positive duties to aid.⁴³⁸

Daniels does not agree prohibiting migration in order to remedy the situation from developing countries left without sufficient health care workers.⁴³⁹ This is because migration is protected by various human rights (ex. the right to free movement). But even if Daniels supports the idea that medical personnel is free to migrate, he also believes that we have negative duties or in his terms “obligations of justice to avoid harming health”.⁴⁴⁰

The answer that I give is that we should embrace the idea of common sense and try to share our responsibilities and benefits in the global community and at the same time in the domestic one. Also, we have to try to incorporate both communitarian and cosmopolitan ethos, trying to see the good and common parts, not only the differences. Having common sense, responsibility for our actions and people around us, can bring us to the point where both of these dimensions collide. Where this collision would create new possibilities for the future, new perspectives and way of thinking and reveal the good part of humanity and try to deal in a positive manner with the negative one. Maybe all this sounds too optimistic, utopic or ideal for the reality we live in, but we need positive thinking to create positive action that could take us further towards human flourishing and not only survival.

The duty to assistance can be fulfilled in every country to any patient that needs it and should not be restricted or prioritized to co-nationals. The only case in which this restriction is morally permissible is when there is an agreement between the parties, when both of them are responsible and aware of the implications. We cannot just pretend responsibility without making parties aware of the repercussions. I refer to awareness here in the sense of properly inform people so that they can fully consent to what they agree. If all these are justly done, we can pretend responsibility from parties.

But if we owe nothing to our country, if there is not any agreement of the type previously stated, we can trade ourselves to the country that offers us conditions to fulfill our well-being. It is true that the workers are free to move and choose their own good, whatever they consider appropriate for their welfare, but should not they somehow compensate the help from the society they were

⁴³⁸ Daniels, JH-MHNF, p. 337.

⁴³⁹ JH-MHNF, p. 339.

⁴⁴⁰ JH-MHNF, p. 340.

born into? If society is a system of cooperation, as Rawls argues, then the worker has a moral duty to help the society he lives in. If not then he does not have this obligation – his work is the result of the actions of his body, and his body is private property.

In addition, people were not asked if they want to be born in a certain country, or where they wanted to live. But even so, while staying in the country, they are citizens and fulfill their duty, contributing to society they live in. So, as Nozick argues, why after they no longer want to collaborate with people from that society, they should still have a sort of duty or responsibility towards them? Maybe while being part of that community, that person was a hero, saved 100 lives, so she did her duty. Things change if people that are not good in their society migrate. For example, if Gipsy people migrate to other countries, nobody wants them back in their country. This is because they have a reputation of being villains and other negative traits, so this leads them to be cast away from different countries. It is possible though that a Gipsy becomes hero, saving 1000 from death. But this will not change people's opinion and the general view regarding some communities, even if this is wrong or unjust.

Furthermore, it is quite difficult to calculate what a person gets and offers inside a community. How could we count these aspects? Maybe we can see who has to gain from collaboration between two people, when they make a pact when all the details and information are fully accepted and known. But when we speak of large communities, whole countries, it is difficult to establish all the details and to make people responsible for all actions.

In the case of the brain drain of healthcare personnel, the receiving countries should preserve a minimum level of access to healthcare for patients from the sending country. This implies that a person should have access to a doctor or other health personnel when she is in pain or suffers from a disease. I do not mean by basic access that the right to health care should be entirely accomplished by other states using positive action or that is the responsibility of other states to do this. If citizens of a certain country agree upon the existence of this right and the citizens are informed that this acceptance implies their positive action, it is a fair contract based on their agreement. But if a certain state cannot provide resources to assist the fulfillment of the right to health care, it should not be the other states' duty to help them.

Rich countries should help poor countries because it is not moral to tolerate the sufferance of others or participate to its creation, even indirectly. This kind of action could show the lack of humanity in us. But we have to do this by considering the right to property of each individual

upon his mind, body or work and at the same time, this has to be accompanied by a sense of humanity, altruism, tolerance. Without all these features, there is a danger for the right to property to be perceived as a cold right that lacks the basic valuable moral ingredients. This piece of idealism is vital in order for people to respect the right to property.

IV.4. Possible Solutions for the Brain Drain of Healthcare Professionals

IV.4.1. Contracts and Free Movement of Healthcare Professionals

My main concern is not to establish which have to be prioritized - contracts or the right to free movement- but rather to argue that when talking about justice or creating such theory, we should incorporate both dimensions.

On one hand, when speaking about duties between people, what we owe to each other, maybe we should not base ourselves so much on the written contracts and somehow develop a moral ethos between people. This will create a greater liberty, because we will not feel the burden of contracts. For example we can change our opinion about the terms of the contract we signed years ago, maybe we are not the same people as at the time we signed the contract, or maybe when we signed the contract, we were somehow enforced to signed it, constraint by circumstances: students that want to become doctors sign those contracts with the state for 6 years and 6 more of practice, 12 years per total, but maybe at that time they do not have any other option to choose from. After a while, they realize their huge effort in becoming a doctor, the hours of labor they had to commit to, the chances they might have in the future if they go to other countries.

Social contract alone lacks to add responsibility on each member of the community, because individuals are not fully aware of their duties, they lack information. There are opposite theories, like Rawls' and Nozick's which accept or refute the existence of social contract. I believe that having a reliable theory on social contract is not enough if we do not inform people what are its main lines of argument, giving them the opportunity to choose between accepting it or not.

Social contract must be reinforced by formal contracts, because people need the clarity of written contracts. And if justice is to serve people, it also needs a clarity that surpasses the idealistic values and rules. Ideal theory is of great help in pointing the way we should follow, but we need it to be feasible to the continuous changes our world encounters through time. We need these

theories to guide us and provide equilibrium in social and private life. In the spirit of Ayn Rand, I also believe that people need contracts to underline the path indicated by theories:

*“Man gains enormous values from dealing with other men; living in a human society is his proper way of life—but only on certain conditions. Man is not a lone wolf and he is not a social animal. He is a contractual animal. He has to plan his life long-range, make his own choices, and deal with other men by voluntary agreement (and he has to be able to rely on their observance of the agreements they entered).”*⁴⁴¹

In practice, we need voluntarily, freely chosen formal and informal contracts between people, so that everyone is aware of their responsibilities. The formal written contract between institutions and the HP is not enough, because it could be the case that it is signed by very limited free choice, by coercion of the circumstances and situation. Moreover, there could be the case that personal identity changes over years and the options HP have increase. In this sense, ambiguity of contract is sometimes desirable.

We cannot blame healthcare professionals that are leaving their country of birth and their peer citizens as long as they were not informed about their responsibilities or do not have any contracts signed voluntarily, without significant degree of coercion. And when you do not have many choices and you are forced to choose between two not so agreeable options, we cannot say that we have made an autonomous decision.

Parties engaged in signing contracts need to be independent people, able to keep their promises without the help of others or extern coercion. But in real world, not all individuals are like this, maybe not even half of them. Philosophers like Allen Buchanan⁴⁴², Eva Kittay⁴⁴³ or Martha Nussbaum have outlined the necessity of incorporating women, children or people with disabilities into the equation of social contract. So we need more than a hypothetical social contract and virtual duties to deal with daily problems of justice. We need formal contracts that incorporate duties and responsibilities we want and acknowledge.

So, my answer to the question ‘Are health care professionals bond by rules of contract and cooperation that govern society?’ is affirmative only in case we consider the rules of formal contract, but being aware of the circumstances under which the contracts are signed, and

⁴⁴¹ Ayn Rand, “A Nation’s Unity-Part II,” *The Ayn Rand Letter* 2, no.2 (1972): 125-128.

⁴⁴² Allan Buchannan, “The Morality of Inclusion,” *Social Philosophy and Policy* 10, no 2 (1993): 233–257.

⁴⁴³ Eva Kittay, *Love's Labor* (New York: Routledge, 1999).

negative in case considering the social contract framework, because conditions, obligations or duties have to be clearly specified, so that every individual knows what to expect. We can also ask ourselves if we can keep doctors in the country by creating specific protectionist laws. I believe that it is against their rights, as long as these protectionist laws only take into consideration the needs of the society and do not incorporate the liberties of MP. If we want to embrace individuality, diversity of comprehensive doctrines we have to have a basic realistic line of what is right, and we can get that clarity by embracing contracts made under just terms. And what just is, it depends of the society we live in, and it is also extended globally where various global actors provide guidance by different Treaties signed between countries. Signing a formal contract between MP and the government is a possible solution that some countries have recently adopted, but we must ask ourselves if these contracts are 100% morally justifiable. I believe it is not that clear if they are fully justifiable and we have several reasons for this.

First, the contracts are signed under some coercive circumstances, where future MP have not got many options to choose from. So we can argue that even if both parties agree to sign the contract, the so called free choice to sign the contract implies some sort of coercion. On one hand we have the formal contracts whose validity has to be questioned when you have limited options to choose from and coercion is involved. Second, people do not have a clear view or perspective of their future, and they cannot predict exactly what will happen in the future and this may lead them to change their mind. On the long run their identity may change or suffer transformations that they cannot predict at the time of signing the contract. Thirdly, while MP are proceeding with their studies, they also add a lot of personal effort and talent to their work, so the skills they acquire are a mixture between their personal performance and the education the public system provides. These arguments should give a greater bargain power to the MP, so that they can add some specific causes to the contract.

There is a problem also with the measurable information on the contract in the sense that ambiguity of it will bring greater liberty but at the same time insecurity. Informal contracts are also insecure because of the possibility the other will not keep their promise. We also have a plurality of views that may conflict and lead to misunderstandings and at the same time lack of information. But imperfect knowledge it is a problem for formal contracts too, not only for informal ones.

Medical personnel can freely move on earth and at the same time a just distribution of health can be kept. It is not necessary for the movement of medical personal to affect the distribution of health care. This happens under almost perfect conditions, where there are enough healthcare resources left, even if medical personnel leave their country of birth and education. But it may also happen if we find appropriate policies and strategies to create a balance that leads to avoidance of harm.

As John Stuart Mill argues: “The acts of an individual may be hurtful to others, or wanting in due consideration for their welfare, without going to the length of violating any of their constituted rights. The offender may then be justly punished by opinion, though not by law.”⁴⁴⁴ This means that the healthcare personnel do not need to be punished in any legal way, but it can be under the public opprobrium. The only problem here is if their actions affect the total amount of utility. And is it the amount of utility in a certain community or at the global level?

I believe that it is desirable and also necessary for people to have choices, responsibility. Society is not a fully controllable system, where only governments and institutions are in control, individuals can change things. But at the same time this is not enough, we have to consider the social circumstances, the ethos of the society we live in. As Cohen argues: “If we care about social justice, we have to look at four things: the coercive structure, other structures, the social ethos, and the choices of individuals, and judgment on the last of those must be informed by awareness of the power of the others”.⁴⁴⁵ But the choices of individuals should not be hold tight under the social framework, like he argues. Individuals have to be stronger than the social framework they are born, they have to have the power to get out of their society if they do not approve all its formal or informal rules.

Just contract has to be designed so that it does not exclude individual freedoms such as the right to free movement. In order to have complete equality of opportunity justice has to imply the right to free movement. This is because the country of birth of each person is arbitrary, like sex, gender etc., so if equality of opportunity already implies those dimensions, why should not imply the possibility to leave our country and search for our well-being? Some may say that if we include the right to free movement in the equation of opportunity, then what stops us to appeal to other rights, like the right to education or healthcare? I think that education and healthcare have

⁴⁴⁴ J. S. Mill, *On Liberty and Utilitarianism* (Oxford: Oxford University Press, 1969 (1992), 72.

⁴⁴⁵ G. A. Cohen, “Where the Action is: On the Site of Distributive Justice,” *Philosophy and Public Affairs* 26, no. 1(1997): 3-30.

a lot to do with our personal effort, even if there are some exceptions as being born with an incurable illness or without the possibility or capacity to attend school. However, in these cases, governments and other type of organizations offer support like social aid or affirmative action.

Moreover, we have to separate between the political attitude which is expressed towards our fellow citizens, and also connected with social and political institutions, namely the basic structure, and moral obligations between individuals.

Some may argue that there is a sort of civic friendship between citizens, grounded on respect for the same laws, living in the same community or sharing the same culture and nationality. I argue that all these are arbitrary things which make citizenship a characteristic that should be neutral on how we should act towards others on moral grounds. It is true though that the political level is intended to create special duties towards our peers.

Civic friendship requires more than indifference or cold respect, requires that individuals care about each other's well-being. Respect implies recognition of duties but not that a person is affected in any way by another person's well-being or ill-being.⁴⁴⁶ Daniel Brudney argues that in order for citizens to feel connected, recent writings seem to plead for the existence of a social ethos "that involves the widespread attitude of concern" and an institutional design that supports this social ethos. For this step to be achieved, Brudney argues the need for a more egalitarian society where differences like being very poor or very rich do not exist. Moreover, he argues that a society guided by pure market transactions where wealth and fortune are contributing to the self-esteem, do not seem compatible with the existence of a social ethos of the type he imagines, where every citizen is concerned about his peers.⁴⁴⁷ If we apply this framework when thinking about the brain drain of MP, then one conclusion it might be drawn is that MP in their quality as citizens who care and are concerned for their peers' well-being, do not have to migrate. On the other hand, if others would care about the MP's well-being, maybe they will choose to abandon their claim on them and just think that MP's well-being will be achieved in more developed countries. I believe that it is difficult to draw a line on how much should we care about the other's well-being so that our personal freedom is not at stake. As in other theories, the problem between individual and social or equality and liberty remains under question.

⁴⁴⁶ Daniel Brudney, "Two Types of Civic Friendship," *Ethical Theory and Moral Practice* 16, no. 4 (2013):729-743.

⁴⁴⁷ Daniel Brudney, op. cit., p. 742.

From people's cooperation, some turn out to be doctors and some patients and they require different benefits. Prospective doctors need resources to exercise their job at high standard and to enhance their well-being as private people, whilst citizens who pay for their health care need proper care and treatment, and in order for these to happen, the healthcare system has to have the sufficient amount of healthcare personnel.

Another issue that could be pointed out here is if we can counterbalance the resources desired by patients and the necessity of each citizen to receive good health care, with the resources necessary for healthcare personnel so they can accomplish their private and public goals. I argue that even if healthcare personnel exists only to treat patients, so we can see they play an instrumental role in society, we have to be careful not to forget that they are also citizens, individuals who have the same right as others to pursue their well-being while respecting the right to freedom. Even if Hart talks only of freedoms when he describes the fairness principle, we have to be aware that sometimes we have to restrict freedoms and sometime we have to restrict opportunities to get a comparable result. In case of doctors, if we restrict their freedom to movement on basis of cooperation that implies mutual restrictions, then patients from the developing county will receive more benefits than HP. If HP knew that their benefits from the cooperation were much lower than expected, they would not sign any contract that could lead them to this position. According to Hart's thesis, cooperators have to have the same benefits from the cooperation scheme as beneficiaries.⁴⁴⁸ Both patients and MP can be seen as cooperators (citizens pay for the services and lead to their creation when they need health care and MP – for their acquired skills and their status, diploma) and also as beneficiaries. But some may benefit more and some less, and if we seek to balance both parties' outcomes, then patients should pay more for the health care so that MP decides not to leave the developed country. This is problematic though, since the GDP is not that high and neither the average salary and correlatively, the level of living. Which disadvantage is morally right under the scheme of cooperation? Since we speak of disadvantage, we cannot speak of it as being morally right, only is we have no other option and the only option is to leave one party disadvantaged.

At the same time, the claim-right of patients may conflict with the one of MP, because the mass migration of MP that leads to insufficient health care is incompatible with the patients' need for

⁴⁴⁸ Dong-il Kim, "Right, Equality, and the Fairness Obligation," *Philosophia* 41, no.3 (March, 2013): 1-13.

treatments and care. If MP do comply to the patients' demands from the country of origins and to the social requirements, their disadvantage is actually created by their compliance. Contrary to this solution, Dong-il Kim argues that "cooperators do rightly have a claim-right to beneficiaries' compliance *that is morally right*. The disadvantage that cooperators may experience is something that should be avoided even at the sacrifice of beneficiaries."⁴⁴⁹ He argues for a duty to do one's share in return for one's benefit. So, MP have a duty to do their share in return for the citizens' benefit.

In case of implicit contracts, the problem is that one cannot get out of it by pretending she has never entered it. A lot of our implicit and explicit contracts are not made only to agree on specific decisions or outcomes, but on procedures. Many times, we agree on procedures, on how we should treat different issues, in order to secure a fair outcome. Or sometimes, we just implicitly agree on fair procedures, no matter the outcome. For example, when a citizen pays his taxes for the healthcare sector, he implicitly agrees for a procedure that will provide the desired outcome, to be treated when he needs and wants it. But when the government does not respect its share of agreement, or when decisions made in the healthcare system that we initially agreed, turn to have worse consequences, we have the right to change our opinion. If fair procedures gave unwanted indirect outcomes that surpass the wanted direct outcomes, we have to readjust the procedures.

I believe, alongside with John Stuart Mill that "enforcing contracts is not regulating the affairs of individuals at the pleasure of government but giving effect to their own expressed desire"⁴⁵⁰ What we want to receive in exchange for our money are services like proper care, and a mixture between services and goods in case of treatments. When people transfer their property in form of taxes to the government, they expect certain services in return, in this case, the ones mentioned above. People transfer their right to use their resources to the state, so that the state transfers it to the students preparing to be the future HP. This way, they have the possibility to increment their skills which can lead them to acquire goods in the future. The fact that HP leave can cause indeed some negative effects on some, but these are unintended consequences and it is not their

⁴⁴⁹ Dong-il Kim, op. cit., 1-13.

⁴⁵⁰ John Stuart Mill, "Principles of Political Economy: With Some of Their Applications to Social Philosophy," in *Collected Works* (vol. II, III), edited by J. M. Robson (Canada: University of Toronto Press, 1965), 801.

fault. The government together with the policies they make for the healthcare sector and other factors like the pull policies from other countries, the increase for medical care and the lack of educated people in this field etc.

The skills that a doctor can offer are not exclusive in most of the cases. It may be the case that there is only one surgeon in a country or in the world, who can do a surgery of a certain type, but these cases are rare. Medical care can be achieved by anyone with the right amount of resources, and in some cases, by the ones who do not have disposal of such type but are helped by the community in form of private associations or universal coverage. The point I want to make is that medical care can be at the disposal of anyone with the right strategies and policies, it does not depend entirely of the HP. The HP can be perceived as a tool to be used by the healthcare system.

IV.4.2. Institutional Changes

There are several possible solutions to avoid the brain drain of healthcare personnel and there is need for bilateral contracts between states. An option embraced by some countries is changing or reform the education system, to institute a formal contract between:

1. The state and the taxpayers regarding citizens' desire towards healthcare (for example, how much of their income should be transferred to healthcare and how much to other domains. Having this in mind, people should get the results of what they paid for).
2. The state and the future doctors, so that at the end of their studies, if their studies are paid from the public sector, they must stay in the country to work in the healthcare system. This kind of contract is also made in the private sectors between the employer and the employee, where there is a contract regarding training.

There is also the argument that open borders make private investments in education more attractive. In their analysis, Poutvaara and Kanninen try to prove that the gain from the positive incentive effect can dominate the negative effect from brain drain, and thus increase human capital in the home country. Another possible solution is a redistributive tax scheme to be used for education subsidies. This could help communities support the creation of new medical personnel, or other skilled workers. Poutvaara and Kanninen show that social contracts of financing higher education on a national level break down when skilled workers emigrate. But

even if social contracts may break down, reinforcing the agreements by other type of contracts which provide sufficient information to the parties and also the possibility to choose, might be a solution.⁴⁵¹

People that pay for their education should be allowed to do whatever they want with their acquired skills. They have earned their freedom through work. If individuals pay for their training and education, then there is not any obligation of repayment on their behalf. People will loose from brain drain only if the educational system is a public one, paid by the contributors, from taxes. The solution is choosing between the elimination of taxation in the case of education or an obligation to give back, imposed by the state to the people who receive public education. I prefer the first solution and founding the education by private donation or investment. We should also encourage training in developed countries and returning in the mother country to contribute to its progress. Rich countries should help the poor ones by providing access for immigrants to education and shaping their skills. Medical professionals can be helped with various incentives to return home for some years, to work for their country. To create a more coherent idea of possible solution, I add here Martin Ruhs' thoughts on how developed countries should help the developing ones:

“How a high-income country should regulate the number, selection, and rights of migrant workers is an inherently normative question that critically depends on the policy objectives. The potential objectives include a wide range of economic and other goals such as: maximizing overall economic benefits and minimizing distributional costs for the pre-existing population; maintaining social cohesion and national security; complying with international human rights treaties and/or maintaining a certain minimum level of rights for all residents in the receiving country; and maximizing the benefits of migrants' remittances and minimizing the costs arising from the loss of skilled workers ('brain drain') for sending countries.”⁴⁵²

⁴⁵¹ Panu Poutvaara and Vesa Kanninen, “Why Invest in Your Neighbor? Social Contract on Educational Investment,” *International Tax and Public Finance* 7, no. 4 (August, 2000): 547-562.

⁴⁵² Martin Ruhs, “Economic Research and Labour Immigration Policy,” *Oxford Review of Economic Policy* 24, no 3 (2008): 403–426.

Developed countries should support circular and temporary migration which helps MP to return to their home country for teaching or training, to improve the quality of healthcare system in their mother country. There is also need for ethical guidance in recruitment.⁴⁵³

If we take Locke's idea that when a person mixes her labor with something previously un-owned object, it becomes hers, then maybe we could argue that healthcare professionals have the right to their achievements:

“Though the Earth and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labor of his Body, and the Work of his Hands, we may say, is properly his. Whatsoever them he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labor with, and joined to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, hath by this labor something annexed to it, that excludes the common right of other Men. For this Labor being the unquestionable Property of the Laborer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others”⁴⁵⁴

A doctor educated in Romania can be said to have a duty to compensate for his education, but not for becoming a doctor. In order to become a doctor one needs more than education in the medical field. She has to put into it a lot of personal effort and talent, lots of hours of work and maybe sacrifice. So, beside education, which is a key aspect, there is plenty of personal effort, work to be accomplished in order to become a doctor. This is the same for all other occupations. And if education is something previously un-owned and the effort one allocates to becoming a doctor is considered work, mixing those two elements may lead to fair appropriation and ownership of resources. In this case, being a doctor is transformed in a personal merit, even if public education or the help of others contributed to this status. Under this framework, medical personnel has the liberty to use their work however they see fit or appropriate, they have the liberty to migrate to any country they want.

Moreover, at national level, countries could call into questions assumptions about shortage and also think about ways to promote policies that foster health. There is also the possibility of

⁴⁵³ Mary Robinson and Peggy Clark, “Forging Solutions to Health Worker Migration,” *The Lancet* 371, no. 9613 (2008): 691.

⁴⁵⁴ John Locke, *Two Treatises of Government*, edited by Peter Laslett (Cambridge, 1960), II, sect. 27.

training more health care workers and introducing a temporary migration scheme, so that they are coerced to return to the donor country.⁴⁵⁵

Another solution is to set limits about medical care consumption, which I do not agree for the private system, only for the public one. People usually go to the doctor when they have a health problem, or periodically, for the routine medical check-up. I have not seen people going every day to the doctor and using public services in excess, the system does not allow that. If people want more medical care than public system can offer, they usually reach for private healthcare. The private healthcare system offers all types of insurance, depending on one's needs and desire. If a person wants to go every day to check her health, she can do that if she has the necessary resources.

I argue that one way the problem could be fixed is by changing the institutional framework. Denying the access of any individual, skilled or unskilled, to free movement and ownership of their own body, work and skills is very unjust if we respect the principles of a free society. It is our duty to find pull factors to incorporate in policies and could somehow create incentives and at the same time opportunities for skilled workers to stay in their country. But there should not be any restriction from outside, any regulation regarding free movement and the use of their skills.

In *Migration and the Globalisation of Health Care, The Health Worker Exodus*, John Connell argued that the main factor influencing migration is the major inequalities in economic sector and social development in international countries. It is very important to have adequate financial support to assure the appropriate wages and working conditions in healthcare system, since economic and social development influence the retention of health workers.⁴⁵⁶

When we do not have enough doctors or nurses in the public system, we have the possibility to go to private hospitals or clinics, in case we have enough resources. Another option is to accede to medical tourism, to be a global patient that can move in different places and be attended by qualified personnel. Again, this happens when we have sufficient resources to be able to go to high quality clinics or hospitals in any country we desire, where we might find highly trained medical personnel.

⁴⁵⁵ Richard Record and Abdu Mohiddin, "An Economic Perspective on Malawi's Medical "Brain Drain"," *Global Health* 2, no. 1(2006): 1-8.

⁴⁵⁶ John Connell, *Migration and the Globalisation of Health Care, The Health Worker Exodus* (Edward Elgar Publishing Limited, 2010), 94.

There is need for stability and most people do not want to leave their country as Eyck shows by the example of a Polish nurse: “Even though I see the many problems here (I also earn low wages), I try to look for other solutions instead of thinking about migrating. What influences this decision strongly is the family situation, family stability, the need to stay where I am living, the need to stay beside my family, my parents, my closest family. Really, if I have decent wages, and I have the possibility to support myself, if I have a house or an apartment, there’s no need for me to migrate. I’m connected with this country, I’m closely connected with my family. However, if the situation is too difficult, I might have to leave.”⁴⁵⁷

One correlative question is if we should have any duty towards future generation when it comes to medical care. Children that are born in developing countries deserve to have access to medical care and so are the future adults. I believe it is our duty to preserve the nature and all species, to contribute to human flourishing and development on all areas. We cannot just crawl throughout life without trying to make any contribution to the good of humanity and environment. We must not be reduced to simple animals without any purpose except personal survival. As a response to this type of objections, there are authors who offer the solution that receiving states should compensate the donor states.⁴⁵⁸

IV.4.3. The Public-Private Partnership in Healthcare

Neoliberal thinkers believe that healthcare systems should provide very basic free care for patients and some believe that no care should be provided if the patient does not pay for it. The rest should be seen from an economic point of view, where patients are consumers and healthcare professionals and their clinics the providers of services. There are three main arguments that plead for the economic importance of medical tourism, arguments that are considered ‘optimistic ideals’ by critics of neoliberal ideas.⁴⁵⁹ First, there are important resources going into the country that offers medical services. This exchange will increase the national

⁴⁵⁷ Kim Van Eyck, *Women and International Migration in the Health Sector* (Ferney-Voltaire, France: PSI, 2001), 17.

⁴⁵⁸ David Wright and others, “The Brain Drain of Physicians: Historical Antecedents to an Ethical Debate, c. 1960-79,” *Philosophy, Ethics and Humanities in Medicine* 3, no. 1 (2008): 3-24.

⁴⁵⁹ Kristen Smith, “The Problem of Medical Tourism: a Critique of Neoliberalism,” *Developing World Bioethics* 12, no 1 (2012): 3.

economy and lower the fiscal deficit.⁴⁶⁰ Second argument is based on the idea that developed medical technologies and the growth in the number of healthcare professionals together with greater level of expertise in the field, will generate higher quality into the public healthcare sector and the private one because of competitive prices.⁴⁶¹ The last line of argument tries to convince that if the national healthcare income grows and there is competition between healthcare providers there will be more equity because more people will have access to private healthcare.⁴⁶²

The idea of efficiency is very used in contemporary days. The World Bank report from 2011, sustain the Public-Private Partnership (PPP) in healthcare, in order to reduce public spending, especially in a time of economic crisis. But we can condemn the neoliberal capitalist aspects of medical tourism that sees medical tourism like a business, if some patients are totally excluded because the lack of financial resources. Seen this way, the dark side of these actions is the conservation of inequality between patients, instead of alleviating it. A possible solution to this problem could be to offer some basic care for disadvantaged patients. Healthcare practitioners can offer their services few hours a week or per month to public or private clinics. Or there could be a free clinic that offers basic services for each private hospital. Solutions could be found but what concerns us most here is their legitimacy. The World Bank considers Public-Private Partnership a solution to have a more equitable distribution of healthcare services. They consider that by this collaboration, the idea that private care is only for rich people and public care for poor people will disappear.⁴⁶³

Furthermore, if private practitioners do not have patients that can pay high standard healthcare, they will not invest and develop these practices. On the other hand, middle class from developed countries can turn to high standard medical service from developing countries. The cost for the same quality service they would have had in the country of origin is cheaper in developing

⁴⁶⁰ V. P. Crooks and others, "What is Known About the Patient's Experience of Medical Tourism? A Scoping Review," *BMC Health Services Research* 10, (2010): 266, note 6.

⁴⁶¹ M. Z. Bookman & K. R. Bookman, *Medical Tourism in Developing Countries* (New York: Palgrave Macmillan, 2007).

⁴⁶² L. Turner, "First World Health Care at Third World Prices: Globalization, Bioethics and Medical Tourism," *Bio Societies* 2, (2007): 303–325.

⁴⁶³ World Bank Report October 2011:

http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2011/10/10/000386194_20111010051613/Rendered/PDF/648060WP0Hands00Box361545B00PUBLIC0.pdf (accessed July 20, 2012).

countries because there are not so many costs involved.⁴⁶⁴ In this case, doctors and nurses have the necessary patients to treat, to make more profit and be paid more. These incentives may cause the return of healthcare personnel that has already migrated, thus reversing the brain drain. These actions could stop the brain drain but at the same time could cause the migration of healthcare personnel from the public sector to the private one, an internal brain drain. It is likely that his consequence have bad effect on poor patients that can only turn to public healthcare system and promote inequalities between people. To give an example, let us imagine two patients affiliated to the same national healthcare system and have the same health problem. They will be on the same waiting list, but if one of them has more resources and can access cross-border healthcare, then she will not be waiting that much for the cure. Some may think that this fact brings upon the violation of equity between patients.⁴⁶⁵ I believe that this is untrue, and accepting this argument and wishing that both have the same status contributes to leveling down. And this is a very high price to pay in order to keep this sort of equality. It implies that under scarcity, both patients should wait for the treatment even though one could be cured more rapidly, without worsening the other's position. Moreover, it could be the case the alleged worse-off patient's position could be improved by others patients' mobility. Maybe the list will become shorter and she can treatment faster than if the circumstances were different and we would plead for strict equality.

Another effect of cross-border free movement is that the healthcare personnel move to more developed cities inside the country, where the medical tourism market is developed, leaving the smaller cities and rural areas without sufficient human resource to provide healthcare.

On the other hand, there is also a concern from countries with developed healthcare system that the system will weaken because the 'patient drain'. If patients from these countries are leaving to developing ones for treatment, and some of them choose not to have health insurance -maybe because of the high costs or because they simply choose not to- the public and private healthcare sector will suffer.

At a first glance, when we analyze the brain drain, we see the rich countries the bad actors, the ones that attract the medical professionals, leaving the developing countries in a worse situation.

⁴⁶⁴ The rent for the clinic is in many cases lower, the salaries for the staff and the logistics are cheaper, the cost of living etc.

⁴⁶⁵ Danielle da Costa Leite Borges, *Health Care Analysis* 19, no. 4 (2011): 365-387.

Instead, when we talk of patient drain we observe the shifting: from being the bad actor, the rich countries become the deprived ones. The developing countries have now the negative role, of 'stealing' patients.

Rich countries have the resources to better cope with the situation of patients drain than if it may be for developing ones to have this problem. It does not mean that there is not an important issue for the economic development of healthcare systems in developed countries. Can we oppose the damage caused by brain drain in developing countries to the damage caused by patients drain in developed countries? We should not see the problem from this perspective, because in any case some countries are losing something. But some consider that rich countries can better handle shortages in some sectors, because they have the resources to maintain certain equilibrium. On the opposite side we have the developing countries which do not have resources to solve the problem of shortages. If healthcare system cannot be brought to a certain reasonable stage in order to provide at least sufficient care for patients, it can produce more harm and a series of negative effects that I already mentioned: a sick person cannot work properly, also can worsen others health condition, cannot have a life within the standards of normality.

From the utilitarian point of view, maybe if we measure the outcomes of developed and developing countries, we can draw a conclusion in favor of developing countries. The amount of happiness that patients drain produces is bigger than the amount of happiness that brain drain produces at least for two reasons: the fact that rich countries have financial resources to counter the lack of patients, so the impact cannot cause that much harm, and the second motive is given by the harm that brain drain is causing for developing countries. This conclusion is both compatible with the utilitarian view and the capabilities approach.

IV.4.3.1. Medical Tourism

In this section I want to question if medical tourism is a viable solution to the brain drain of healthcare personnel. Medical tourism is still in his early stage of development, so we do not have many data in the field. This activity involves patients who travel between borders in order to receive treatment. According to Patients Beyond Borders, the worldwide medical market is growing with 25%-35%. Cuba was one of the first countries that started the 1990's an officially campaign to promote medical tourism. The government promoted a health package that included dental care, spa and cosmetic treatment, cardiac surgery and organ transplants. These are

desirable and scarce resources, especially when it comes to organ transplant, when the hospital can also provide the necessary organs for the patient.⁴⁶⁶ The subsequent years there were interchangeability in terms like cross-border care, health tourism and medical tourism.⁴⁶⁷ Nowadays, medical tourism occurs between developing countries and developed ones and also inside each category and is motivated by certain elements such as: quality of services, cost of treatment, length of waiting time, legality or illegality of procedures, availability of complementary and alternative medicine.⁴⁶⁸ All categories of patients have now the possibility to access health care services from other countries although at first this right was intended to provide free movement of workers.⁴⁶⁹

There are certain aspects that increase the medical tourism rate. The ageing population is one of the important aspects. People need more and more medical care and some systems cannot provide them or cover the existing necessities. Other significant aspects are the great report between cost and quality. In this sense, we can find quality medical services in developing countries that are cheaper than in developed countries. There are also patients from rich countries that do not want to cover the expensive medical care assurance and choose to go to other countries for treatment.

There are also cases where people that pay less in the country of birth can travel to a developed country and have the facilities of an expensive medical system. This can be the case inside the European Union, where every citizen that pays his taxes is entitled to have European Health Insurance Card (EHIC). Every person who travels between the EU borders, including Iceland, Norway, Lichtenstein and Switzerland is entitle to the same medical services that citizens of that country have, and sometimes for free. But the EHIC does not cover the costs if a patient travels for the express purpose of obtaining medical treatment.⁴⁷⁰

The question is if medical tourism can provide a possibility to reverse the brain drain of healthcare personnel. The facilities provided by medical tourism can provide a good solution for

⁴⁶⁶ S. Eckstein, *Back from the future: Cuba under Castro* (New York: Routledge, 2003).

⁴⁶⁷ L. Hopkins and others. "Medical Tourism Today: What is the State of Existing Knowledge?" *Public Health Policy* 31, no.2 (2010): 185–198.

⁴⁶⁸ See M. Z. Bookman and K. R. Bookman, *op. cit.*

⁴⁶⁹ Danielle da Costa Leite Borges, *op. cit.*, pp. 365-387

⁴⁷⁰ See The European Commission website <http://ec.europa.eu/social/main.jsp?catId=509&langId=en> (accessed March 21, 2013).

those in search of quality services. The medical personnel have the opportunity to go abroad and follow their goal and patients also have the possibility to free movement. They can search for high quality medical services in other countries. This step is sometimes more profitable for the patients, both in terms of resources, quality of treatments and results.

But this is a real formal and substantive opportunity only for those patients who have the possibility and resources to access quality healthcare. The opportunity is given by all laws, rules and rights, but unless the patient has the resources to act in order to fulfill this opportunity, this remains only a formal. A rich person from a developed country can choose to go to another country where maybe the quality of a certain procedure is greater than in his country. Resources allow a patient to be cured better and faster. For these patients a disease may not be such difficult to treat as long as it is not un-curable. On the other hand, when it comes to poor patients, they do not have the necessary resources of time, money or information. If this is the case, they cannot travel to another country even if they have the formal opportunity to do so. The governments try to help by providing less or more resources for patients, even if they do not have assurance. For example, in USA, when the recession had been installed (2008) the number of uninsured had risen to 49.9 million by 2010, at the uninsured rate of 16.3%.⁴⁷¹ Indeed, the health insurance is very expensive for a lot of Americans, and chose not to have it. The budgets allocated to healthcare systems decreased during the economic crisis. In Greece, one of the countries most affected, the health budget decreased by 1.4 billion euros in 2011. The same year and also in 2010 and 2012, Ireland confronted a 6.6% cut for the Health Service Executive, meaning 746 million euros per year.⁴⁷²

On the other hand, EU has a more egalitarian healthcare system, and most European countries agree that access to good healthcare is a basic need. A significant proof is the resources allocated by most European countries to healthcare sector. The total current healthcare expenditure varies between states. According to Eurostat Report, the share of expenditure is higher than 10% of gross domestic product (GDP) in Germany and France. This represents twice the rate from Romania, Cyprus or Estonia (2007 data). When comparing the level of healthcare spending per inhabitant, the differences were greater and varied from PPS 635 in Romania to more than 4280 in

⁴⁷¹ CENSUS statistics <http://www.census.gov/hhes/www/hlthins/data/incpovhlth/2010/fig07.pdf> (accessed July 16, 2012).

⁴⁷² Eurohealth report 2011, http://www.euro.who.int/data/assets/pdf_file/0005/162959/Eurohealth_Vol-18_No-1_web.pdf (accessed July 16, 2012).

Luxembourg. The comparisons indicate that those living in rich countries, spend more on healthcare.⁴⁷³

This is the main reason why private clinics from developing countries do their best to attract patients from developed countries and it is an important aspect that tends to support the relieving of brain drain by medical tourism. Treating a foreign patient is more profitable than treating a domestic patient because of the revenues that enter the country. If a patient from a developed country comes for treatment in a developing country, she is able to pay more for medical service than a domestic patient. Not many patients from developing countries have the financial resources to allocate for medical treatment. Patients in this position usually appeal to public healthcare that may have less quality than the private one in developing countries. And the most relevant cause is the lack of public budget for the healthcare sector. To this we can add the tendency of the clinics that provide healthcare services to attract patients who can afford high quality services and implicitly exclude the ones unable to pay. There is an industry of medical services that promotes high quality healthcare where we can encounter clinics and hospitals presented like five stars hotels that offer all the facilities for the patients, as Kristen Smith argues: “Hospital websites advertise their international patient administrators as ‘concierges’ and promote hotel style accommodation provided for international patients, some even replete with kitchenettes, adjoining bedrooms, gymnasiums, swimming pools and wall mounted, wide-screen televisions. These commercial, touristic elements are aggressively promoted by many hospitals participating in the trade.”⁴⁷⁴

Overall, I believe medical tourism is not very relevant as a viable solution to counterbalance the negative effects of the brain drain of healthcare professionals. Poor people who actually suffer most because of these effects, cannot travel to other countries to get quality treatment, they cannot get it properly in their own country. But medical tourism can be a solution for wealthy or medium income patients to get treatment in other countries. Maybe in time, this could lead to a decrease of demand of healthcare professionals in rich countries which will slow the brain

⁴⁷³ Eurostat Yearbook 2011, p. 173, http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-CD-11-001/EN/KS-CD-11-001-EN.PDF, (accessed July 21, 2012).

⁴⁷⁴ Kristen Smith, “The Problem of Medical Tourism: a Critique of Neoliberalism,” *Developing World Bioethics* 12, no. 1 (2012):3.

drain. It could work only if medium income people travel to get cheaper medical services at high quality.

Conclusion

There are some solutions for the brain drain of healthcare professionals, but there are still a lot of questions left without a suitable answer, so that they fit into nowadays political framework. The continuous debate between scholars and policy makers, regardless of its benefits it also has negative aspects, meaning that the best solution is hard to be achieved. My answer is that we should take the best principles from both egalitarians and libertarians and reach a more balanced conclusion when it comes to policies which aim to minimize the negative effects of brain drain of healthcare professionals.

CONCLUSION

Originality

The conclusion of my research is that there are not enough and satisfying moral arguments to keep the healthcare professionals in their country of birth and education. I arrived to this conclusion, based on the discussion of both John Rawls and Robert Nozick's arguments regarding the social contract, the way they understand liberty – as liberty for citizens and liberty for individuals- and the duties which one person might have towards her peers. I took the imperfect Kantian duty to be the guide of my work, together with social contract elements depicted from both the aforementioned authors.

The originality of this work consists in discussing the brain drain of healthcare professionals by assessing the social contract framework with special focus on the Rawls – Nozick debate together with the idea of imperfect duty. This is basically addressing a pressing problem of today's society by using classic arguments as a framework and at the same time trying to modify the old arguments to fit emerging problems from our society.

I have demonstrated that considering only strong arguments from libertarian can bring more harm to people than is intended while egalitarian ones can have the same effect. The solution is a more balanced theory which can overcome the limits of Rawlsian and Nozickian theory, one that addresses the problem of the healthcare professionals in more moderate terms. If we try to find solutions and enable theories of justice only for the institutional devices as Rawls does, duties among individuals, inter-relational aspects will be left behind and the problem will be only partially resolved. On the other hand, emphasizing the individual liberty without thinking at the repercussions regarding their relation with others or on institutional justice has the same effect.

My solution does not imply construing a new theory of justice for both institutions and inter-relational connections between people. I have only offered what I consider the best way to think at the brain drain of healthcare professionals in terms of moral justice.

Limitations

Research on this subject is not only of philosophical concern. The brain drain of healthcare professionals is of interdisciplinary concern and is investigated by various fields of study such as

Political Science, Economics, Sociology, Philosophy, Medicine, Law etc. If policy makers aim to create practical solutions only by considering the evidence from a certain field of study, it will lead to incomplete and poor policies. In order to resolve the brain drain of healthcare professionals, we have to incorporate all the results from different fields of study which treat the problem. My research aims to clarify and argue by taking account of the philosophical aspects, not being able to provide all the relevant aspects. This is one of the limitations of this work. In order to arrive to convincing conclusions, I had to limit the universe of research. But this was necessary, if I wanted to analyze in a complex manner the moral aspects of the brain drain of healthcare professionals.

I concluded that justice in healthcare should be balanced by justice for individuals and respect for their freedoms. We should see the whole problem in a more holistic way, both from justice for institutions and justice concerning the relations between people, what they owe to one another in terms of duties and responsibilities. HP have an imperfect Kantian duty to help all people/patients no matter the country of residence or education.

There are also new directions which could be explored starting from this research. One way could be answering the question “Do developed countries that welcome only highly skilled health professionals have a moral duty to compensate the countries that contributed in this way to their development?” The acceptance of a duty could be a necessary step from a moral point of view if by accepting and using these resources (skilled workers) developed countries widen the inequalities between countries and worsen the status of undeveloped countries and their citizens. This question implies many complex aspects, and could make the subject of another research.

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