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Right constraints? An analysis of Gauthier's Reasoning about Morals*

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1. Introduction: Reason and Morals

The intent of Gauthier's project is to satisfy both the standards of morals and of reason at the same time. His main concern is to validate

'the conception of morality as a set of rational, impartial constraints on the pursuit of individual interest, not to defend any particular moral code' (1986: 6).

In his project reason and morals are reconciled. From the start it is clear that 'morality' is equivalent to 'impartiality', that 'impartiality' is equal with justice, understood as 'a just distribution', that the quintessential meaning of morality, or impartiality or justice is, for Gauthier, 'not taking advantage', and that the general constraint on (inter-)action, the proviso, is defined as 'not taking advantage'. As we proceed I'll show that this conflation of concepts leads to various problems. Gauthier's claim is:

'(...) that in certain situations involving interaction with others, an individual chooses rationally only in so far as he constrains his pursuit of his own interest or advantage to conform to principles expressing the impartiality characteristic of morality' (1986: 4).

And, at an other place, Gauthier remarks that he is 'linking the requirements of reason to the demands of impartiality or morals' (1986: 231).

The core of Gauthier's proviso – the constraint on action, defined as not taking advantage – is a moral *and* a rational requirement. The proviso establishes a structure of rights both rational and impartial. But not only is it a moral (impartial) requirement, it is also a just one:

'We do claim that justice, the disposition not to take advantage of one's fel-

* I am most grateful to John Rawls. Discussions with him have been enormously helpful and have led to many improvements. I would also like to thank G. A. Cohen and Albert Weale for comments on earlier versions of this article.

lows, is the virtue appropriate to co-operation, voluntarily accepted by equally rational persons. Morals arise in and from the rational agreement of equals' (1986: 232).

The norms of justice are, so we see, identical with rational *and* impartial choice:

'Since we suppose the ideal actor to be fully rational and her standpoint impartial, then her choice among principles must express the norms of justice' (1986: 234).

In the following we shall ask: is Gauthier's argumentation indeed impartial? and, if so, is it also just?

One should realize that Gauthier's project is, in fact, a *double* project. He wants to show what is, first, the strategic choice from the perspective of the individual ('*real*') actor. The second part of the project is a moral analysis of choice from the perspective of the *ideal* actor. Or, as Gauthier formulates this double point of view:

'Moral theory offers an Archimedean point analysis of human interaction. The theory of rational choice offers an analysis from the standpoint of each interacting individual' (1986: 266).

The upshot of Gauthier's project is to reconcile, as we have seen, reason and morals. Ultimately it should be the case that the impartial perspective of the ideal actor coheres with the perspective of rational individuals actually engaged in strategic choice.

Now in this project there are – at least – two important steps. That is, first, the description of *the initial bargaining position*, and, second, *the bargaining problem proper*.

2. The initial bargaining position

The initial bargaining position defines what persons bring, so to speak, to the bargaining table.¹ What they will bring with them will, of course, determine the outcome of the bargaining process, Gauthier's principle of the distribution of the co-operative *surplus* 'the principle of maximin relative benefit'. So the description of the initial bargaining position is of the utmost importance. If unfairness exists in the initial position, it is likely to influence the bargaining process, and it will be transmitted by the bargaining process to the outcomes.²

2.1 *The perspective of the strategic choice of the individual actor* – The impor-

tance of a correct or acceptable description of the initial bargaining position becomes clear from the remark of Gauthier that

'(...) fair procedures yield an impartial outcome only from an impartial initial position' (1986: 191).

In this initial bargaining position *rights* provide the basis for agreement (and *not* the object of agreement (1986: 199; note 8). Therefore, Gauthier's theory is not contractarian in the sense that it takes rights as grounded in a contract like, for instance, in the case of the theory Buchanan has developed. (Buchanan, 1975). In Gauthier's theory the primary candidate for justification by contractarian agreement are *constraints*, constraints on the rights persons have and which are necessary if they

'are to co-operate voluntarily and which are necessary if the outcome of such voluntary co-operation is to be divided among the co-operators in a manner to which they would at the outset voluntarily consent' (1982: 442).

The question to be answered now is: what does each person bring to the market or to the bargain underlying co-operative arrangement? First of all, this initial bargain must be, according to Gauthier, non-coercive.³ But it must also be the case that

'(...) each individual's endowment, affording him a base utility not included in the co-operative surplus, must be considered to have been initially acquired by him without taking advantage of any other persons – or, more precisely, of any other co-operator' (1986: 201).

The leading idea here is 'that not taking advantage' is 'a reasonable and fair constraint that natural interaction must satisfy in so far as its outcome provides an initial position for bargaining' (1986: 201). This constraint is based on Gauthier's modification of Nozick's interpretation of Locke's proviso. It is, in fact, contended by Gauthier that Locke's constraint on acquisition is expressed as a proviso,

'that simultaneously licenses and limits the exclusive rights of individuals to objects and powers' (1986: 201).

This gives each person a sphere of exclusive control, partly constrained on the interference of others. The proviso

'prohibits worsening the situation of others except where this is necessary to avoid worsening one's own position' (1986: 203).

Essential is that there is, according to Gauthier, a distinction between worsening someone's situation and failing to better it. *The proviso only prohibits the former, not the latter*. The base point for determining how I af-

fect you, in terms of bettering or worsening your situation, is determined by the outcome that you would expect *in my absence*.⁴ The central formulation Gauthier gives of the proviso is the following one:

'We interpret the Lockean proviso so that it prohibits worsening the situation of an other person, except to avoid worsening one's own through interaction with that person. Or, we may conveniently say, the proviso prohibits bettering one's situation through interaction that worsens the situation of another. This, we claim, expresses *the underlying idea of not taking advantage*' (1986: 205; emphasis added, PBL).

The proviso constrains natural interaction to determine 'an initial position from which a fair and optimal outcome may be attained' (1986: 208). The role played by it is thus basic in Gauthier's theory: it introduces a rudimentary structure of rights into natural interaction. Its primary role

'is to make possible the further structures required for the forms of social interaction, both competitive and co-operative' (1986: 208).

The *justification* of these rights or basic endowments is the following:

'Each person, in the absence of his fellows, may expect to use his own powers but not theirs. This difference is crucial. For it provides the base point against which the proviso may be applied to interaction. Continued use of one's own powers in the presence of others does not in itself better one's situation; use of their powers does better one's own situation. Refraining from the use of one's own powers worsens one's situation; refraining from the use of other powers fails to better one's situation but does not worsen it' (1986: 209).

This provides the justification of the basic endowments each person has. Basic endowments are defined as what one can make use of, and what no one else could make use of in her absence. It comprises his *physical and mental capacities*. Each person identifies with those capacities to which he has direct access,

'and we see that this identification affords each person a normative sense of self, expressed in his right to those capacities' (1986: 210).

The application of the proviso affords, first, each person exclusive right to the use of his body and its powers, his physical and mental capacities. Second, the proviso requires *full compensation*, which leaves a person without any net loss in utility: one worsens the situation of another in *not* giving her full compensation for the effects of one's actions on her. However, it should be stipulated that although the proviso affords a right *in* the fruits of one's labour and so to full compensation, it is 'not a right *to* those fruits and so to market compensation' (1986: 211).

The final step which defines the full endowment of each individual, introduces exclusive rights to land and other goods:

'Exclusive rights of possession may afford benefits to all, because they give individuals the security needed for it to be profitable to themselves to use the resources available to human beings in more efficient and productive ways. They transform a system in which each labours on a commons to meet her own needs into a system in which each labours on her own property and everyone's needs are met through market exchange. Individual self-sufficiency gives way to role specialization. The division of labour opens up a new way of life, with opportunities and satisfaction previously unimagined. Thus the mutually beneficial nature of exclusive rights of possession provides a sufficient basis for their emergence from the condition of common use which is the final form of the state of nature' (1986: 216-217).

The proviso ensures that at every stage in interaction, each person is left as much as she could expect from the previous stage. Advance is thus not taken, but equality is not assumed. Indeed the proviso allows for inequality. This is a consequence of the fact that

'[t]he proviso determines the initial endowments of interacting persons, taking into account the *real* differences among those persons as actors' (1986: 220; emphasis added, PBL).

Here we get to the core of Gauthier's reasoning for the content of the proviso:

'Each human being is an actor with certain preferences and certain physical and mental capacities which, in the absence of her fellows, she naturally directs to the fulfillment of her preferences. This provides a basis, in no way arbitrary, from which we may examine and assess interaction, introducing such conceptions as bettering and worsening. A principle that abstracted from this basis would not relate to human beings as actors. A principle that did not take this basis as normatively fundamental would not relate impartially to human beings as actors' (1986: 221).⁵

We see that individual rights are identified with the factor endowments each individual has. They provide *the starting point* for agreement. They are morally provided in the proviso and assert the moral priority of the individual to society and its institutions. The prospect of mutual advantage brings rights into play, as constraints on each person's behaviour. The proviso reflects the equal rationality of persons who must constrain their natural interaction in order to enter into mutually beneficial social relationship.

'[I]nteraction constrained by the proviso generates a set of rights for each person, which he brings to the bargaining table of society as his initial endow-

ment. He brings a right to his person, a right to the fruits of his labour, and a right to those goods, whose exclusive individual possession is mutually beneficial, that he has acquired either initially or through exchange' (1986: 227).

Let us recapitulate: we have been concerned with a description of the initial bargaining position, examined from the perspective of strategic choice of the individual actor. We have seen that the individual actor brings to the bargaining table a knapsack filled with his natural assets which he eventually will bring to society. Note also that there has been *no* bargaining on the *content* of the knapsack, its 'content' is not a product of agreement. This basis, this difference in natural assets, this *unequal* starting point is, according to Gauthier, so 'normatively fundamental', that without taken this into account one could not speak of 'impartiality' or of 'not taking advantage'.

Quite clearly one need when developing a contractarian argument, some point to begin with. Assumptions about rights are, of course, moral assumptions and can give such a starting point. In Gauthier's analysis it are specific rights that persons have, that are postulated. More precisely, the basis of rights are the natural assets of persons which give the 'normatively fundamental' starting point. Constraints on these rights are justified by contractarian agreement. Gauthier himself insists that

'(...) the idea of morals by agreement may mislead, if it is supposed that rights must be the product or outcome of agreement. (...) [T]he emergence of either co-operative or market interaction, demands an initial definition of the actors in terms of their factor endowments, and we have identified individual rights with these endowments. Rights provide the startingpoint for, and not the outcome of, agreement' (1986: 222).

Still one may wonder if not, when talking about 'morals by agreement' the content of rights *itself* should be the subject of contractarian agreement. Does not this non-contractarian 'initial definition' of rights fit oddly into Gauthier's theory? Should not the content of rights themselves, that frame the market and the co-operative interactions be founded on a prior agreement? Why not develop a 'pre-market' and 'pre-co-operative' agreement to set up market and co-operative interactions? That would result in an agreement upon an *ex ante* distribution of rights.⁶

In fact Gauthier's project would gain in strength if it would have been build on two steps of contractarian agreement. First an agreement on the initial bargaining position, where rights would be defined and, secondly, an agreement in the bargaining situation proper where principles of social co-operation are agreed on, principles that give an answer to the question how the social surplus should be divided. This lack of a contractarian ar-

gumentation for the initial bargaining position is all the more problematic due to the fact that the way the starting point is described permeates the whole theory. In fact all that follows in Gauthier's theory, is just a specification of the proviso and the initial bargaining position.⁷

On of the central aspects of his theory is the role basic endowments or natural talents play. The formulation of the proviso is deeply influenced by Gauthier's view on how to deal with the differences between persons in regard to their talents. This view is, as we will see, illustrated by the way his disagreement with Rawls in this regard is formulated.

2.2 *The Archimedean point: the perspective of the ideal actor* – We now turn to the second perspective, the moral one, characterized by impartiality. This perspective must, as stated before, cohere with the perspective of rational individuals actually engaged in strategic choice for Gauthier's project to be called a success. And, as we will see, basic endowment plays, once again a central role. In this moral point of view we deal with the choice of an ideal actor, aware of her individuality but not of its particular context. The ignorance of the ideal actor extends only to her inability to identify herself as a particular person within society.

'[A]lthough ignorance of one's identity precludes any display of positive partiality in one's choice, this is insufficient to guarantee equal rationality. Impartiality in choice is found, not in the absence of concern for those affected, but in the presence of equal concern. And this is assured by the ideal actor's maximizing aim. Although she may identify with no one, everybody may identify with her. The impartiality of the ideal actor is thus exhibited in the fully representative character of her choice' (1986: 236).

However, some pages further on, we learn how 'equal concern' should be interpreted; it is *not* a predisposition of the actors, but of the choice situation itself:

'In choosing the proviso, the ideal actor exhibits *no* altruistic or even *impartial* concern for her fellows. She has *no* interest in refraining from taking advantage of them, no desire *not* to better her position by worsening theirs, should this prove the most effective way to maximize her own utility. But the conditions of Archimedean choice prevent the ideal actor from choosing principles of interaction that would permit her to indulge her single-minded concern with maximizing her own utility, when this could be achieved only at the expense of others. In choosing to benefit herself through interaction, the ideal actor can only choose mutual benefit' (1986: 259; emphasis added, PBL).

The conditions of choice are such that impartiality is guaranteed:

'[T]he Archimedean point *nullifies* the biasing effects of individuality while

retaining the idea, not merely of individual choice, but of choice by an individual concerned to advance his own interests' (1986: 237).

Remember that the Archimedean point requires total ignorance of identity.

'[T]he individual intents, and the capacities and preferences on which they rest, are excluded from moral consideration, not because they are arbitrary, but because they are partial. The Archimedean point neutralizes their effect' (1986: 256-257).

Now the terms 'nullifies' and 'neutralizes' should not be misunderstood. These terms are meant to mean that no one can tailor principle to his advantage, it does *not* mean that the choice made excludes the *effects* in 'real life' of the differences in natural talents or basic endowments. On the contrary, the choice made should exactly do this. The ideal actor reasons from the conditions common to all individuals. Her answer to the normative question of how as an actor she should choose is that, first she chooses to interact only if she expects to benefit. And so to minimize the occasions on which she must interact whether she will or not, and to maximize the opportunities for beneficial interaction, she chooses a basic freedom of action in relation to her fellows, a freedom to advance her own interests as she sees fit in so far as others remain free to interact with her or not.

'If interaction is to be mutually beneficial, then it must preclude the unilateral imposition of costs by one person on another. (...) Supposing the possibility of mutual benefit, the ideal actor must choose to prohibit the unilateral taking of advantage. No one may better himself through interaction that worsens the position of another, where *the base point in relation to which we determine bettering and worsening is the absence of the other party to the interaction*. And so the ideal actor must choose the proviso as one of the principles of interaction' (1986: 258-259; emphasis added, PBL).

We see that, according to Gauthier, the ideal actor chooses the same proviso as the actor that makes a choice from the perspective of strategic choice. Gauthier uses the same formulation when arguing for the proviso from the Archimedean point of view.

'The proviso is both the weakest constraint on the actions of an individual that is compatible with the requirement that, in so far as possible, interaction be mutually advantageous, and the strongest constraint on the actions of an individual compatible with his freedom to advance his own interests. It defines the initial position from which market competition and co-operation, the forms of social interaction, proceed, as the intersection between individual liberty and mutual benefit' (1986: 259).

With the initial position defined, the ideal actor must now proceed to consider the principles for that interaction. And now not only mutual benefit, but also optimality will be the object of Archimedean choice.

2.2.1 *The Archimedean point, Rawls and Gauthier* – As we have stated earlier a core idea in Gauthier's theory is that the proviso determines the basic endowments of people, taking into account the *real* differences between persons. Right of persons, identified with the basic endowments each person has are provided and protected by the proviso. The role and influence of this starting point can be clearly illustrated by contrasting Gauthier's view with that of Rawls. Indeed, Gauthier himself elaborates on Rawls' theory when discussing the Archimedean perspective. We will follow closely Gauthier's arguments. Gauthier states that Rawls argues that

'(...) from the Archimedean point, it is just to maximize the minimum amount of utility, *without distinguishing the portion of it that constitutes the co-operative surplus*' (1986: 247; emphasis added, PBL).⁸

This, of course, runs directly against Gauthier's point of view. He wants to make a distinction between what a person can get *without* co-operation and the – additional – amount that one can get by co-operating.⁹ For Rawls on the other hand, it does not make sense to talk about producing in a situation without co-operation and comparing this situation with one of co-operation. He does not want to determine

'(...) anyone's contribution to society, or how much better off each is than they would have been had they not belonged to it, and then adjusting the social benefits of citizens by reference to these estimates' (1978: 62).

In Gauthier's interpretation of Rawls this is taken to mean that

'(...) no person is entitled to any benefit except as a member of society, and no person is entitled to any benefit as a member of society in virtue of his contribution to the production of goods, whether in market or in co-operative interaction' (1986: 248).

And, as Gauthier continues his interpretation of the Rawlsian theory, it makes clear

'(...) that the more productive are not entitled to a greater share of goods in virtue of their greater contribution. If giving them a greater share increases their contribution, and if this in turn raises the social minimum, then they are to receive that greater share. But their rewards are purely instrumental, means to the goal of maximizing minimum utility, and not a recognition of entitlement based on contribution' (1986: 248).

In general, Gauthier takes it that Rawls rejects the notion of an *individual's* contribution to productivity.

'We must (...) take Rawls to be simply asserting that an individual's contribution does not entitle him to any return from society' (1986: 249).

This, however, is *not* a correct interpretation of Rawls' view of how mutual advantage by co-operating should be seen. There *is* in Rawls' view a recognition of entitlement based on contribution. The criterion that is used for this recognition is the system of public rules that specify the scheme of co-operation. The more productive *are* entitled to a greater share in virtue of their greater contribution, *as long as they use their endowments for the general good*. As Rawls himself formulates it:

'We have a right to our natural abilities and a right to whatever we become entitled to by taking part in a fair social process' (1978: 65).

Be this as it may, Gauthier would still disagree, due to the fact that people would not be *fully* compensated for their basic endowments they bring to society. A closer look at, and comparison of the way the reasoning goes in both theories behind the veil of ignorance, will make this even more clear. Behind the Rawlsian veil of ignorance

'[n]o one knows his situation in society nor his natural assets, and therefore no one is in a position to tailor principles to his advantage' (1971: 139).

And Rawls elaborates:

'If a knowledge of particulars is allowed, then the outcome is biased by arbitrary contingencies. (...) [T]o each according to his threat advantage is not a principle of justice. (...) The arbitrariness of the world must be corrected for by adjusting the circumstances of the initial contractual situation' (1971: 141).

Now compare this with Gauthier's idea of Archimedean choice:

'[A]lthough the ideal actor is not aware of her identity, she is aware that she has an identity. It then seems reasonable that she choose with this in mind, and consider her claim on the fruits of social interaction given that identity. She would then choose a principle to regulate interaction in such a way that the particular, natural characteristics of each person, in so far as they affect what he accomplishes, will enter into the determination of the distribution of benefits. And these particular characteristics constitute the person's natural assets' (1986: 251).

Gauthier continues his argument with the remark that we should expect,

'(...) contrary to Rawls's assertion, that in Archimedean choice natural assets but not social contingencies would be taken as part of one's unknown but real

identity. One brings the former to society; they enter into the formation of one's preferences, and they determine one's social contribution. They do not seem to be morally arbitrary in any sense that would or could exclude them from being taken into account in impartial choice. What the Archimedean point excludes is tailoring principles to favour one's particular assets. But why need or should it exclude tailoring principles to relate the distribution of the social product to the way in which each person's assets are exercised in production?' (1986: 251).

We see now very clearly that, although in *both* theories the purpose is to prevent tailoring principles to one's advantage, or to tailor principle to favour one's particular assets, the crucial distinction lies in the fact how 'taking advantage' is defined and the role basic endowments play in this definition.

This distinction between Rawls' view and that of Gauthier can be clearly illustrated by Gauthier's interpretation of the difference principle, derived in Rawls' theory. 'Justice', Gauthier remarks

'is the disposition not to take advantage of one's fellows, whether as a free-rider or as a parasite. It appears that the (...) difference principle licenses those with lesser natural talents to take advantage of those naturally more fortunate, requiring the latter to use their abilities, not primarily for their own well-being, but to maximize the minimum level of well-being' (1986: 252).

To criticize Rawls in this way the argument given earlier has to be turned around by Gauthier: it must be supposed, contrary to what Rawls' view is, that

'each individual may be defined independently of social interaction, so that he brings his talents and aptitudes, attitudes and preferences, into society as part of a natural endowment. We must suppose that each person's characteristics, in enabling him to make a certain contribution to the social product, also provide him with a claim to *a certain share* of that product' (1986: 252; emphasis added, PBL).

Now Gauthier's claim is that this is exactly what Rawls rejects. Noting that Gauthier had defined justice as the disposition not to take advantage of one's fellow, he now continues to argue that Rawls rejection

'(...) leads him to a very different view of what justice requires. The person who takes advantage of her fellows is not the less talented individual who benefits from the maximin principle, but the more talented individual who uses her talents solely for her own benefit. For she diverts to her exclusive use an undue portion of the total assets of society. She robs her fellows of what rightfully is theirs' (1986: 252).¹⁰

This is, to put it mildly, not a fair or even correct interpretation of the Rawlsian project. First of all we have to remind ourselves that we are talking about choice from the Archimedean point of view. In this prospective view parties make an agreement in good faith, with the intention of honoring it, including the idea that one reasonably can do so. The derivation of principles behind the veil of ignorance is one in which the prospective view of course prevails with the intention that the retrospective view coheres. Secondly, in Rawls' view *no one* is taking advantage, neither the less, nor the more-advantaged. This is due to the fact that, as noted earlier, for Rawls society is a co-operative venture for *mutual advantage*, and in which the difference principle is a principle of *reciprocity*. Finally, also in the Rawlsian system 'each person's characteristics, which enable him to contribute to the social product', provides that person 'with a certain share of that product'.

The main difference between the two views is based on the question what 'a certain share' means. In Gauthier's interpretation *it is based on the 'real' contribution* persons make to the social surplus and each individual should be fully compensated, as the proviso requires and which leaves a person *without any net loss in utility*.¹¹ In Rawls's theory both 'parties', the least and the most advantaged are compensated. The essential element of the difference principle is that it is a principle of *compensating inequalities*. The basic structure should be arranged in such a way that natural contingencies

'(...) work for the good of the least fortunate. Thus we are led to the difference principle if we wish to set up the social system so that no one gains or loses from his arbitrary place in society, without giving or receiving compensating advantages in return' (1971: 102).

We are talking about reciprocal advantages. One needs one another: the point is not that the more and most favoured don't get what they have a right to, 'full compensation' in Gauthier's words, but the point is that both 'parties' are compensated. Their talents, *all* talents, are only effective in social co-operation. In some places Gauthier seems to recognize this point himself:

'The co-operation that justice makes possible, considered both in terms of what it brings about, and in terms of the participatory activity that it involves, is not a second-best way of realizing what could, but for some particular obstacles, better be realized in some other way. *In co-operating we make the most effective use of our powers to attain ends that would otherwise lie beyond our individual capacities*' (1986: 345; emphasis added, PBL).¹²

Once again we have to note however that Gauthier, regardless of his ac-

knowledge – as quoted above – that by co-operating we make effective use of our powers, still would insist that people should be fully compensated for using their powers, as required by the proviso.

Concluding this section we have to make a final remark on the way Gauthier describes the choice-situation of an ideal decision-maker from the Archimedean point of view. Gauthier makes an important caveat which, on closer look, fits rather oddly into his description of the ideal bargaining situation. As we have seen, each person brings his or her natural assets to the bargaining table. As we know these assets are unequally distributed; we are talking about the basic endowments, the physical and mental capacities persons have. At the same time it is required that the process of bargaining

'exhibit procedural equality and maximum competence among the persons who are to agree on the principles of justice' (1985: 257).

How is this realized? In the ideal situation, according to Gauthier

'(...) each person is in effect represented at the bargaining table by an ideally rational self, and no question of differential bargaining skills arises' (1984: 118).

So a strange thing happens on the way to the bargaining table. Although persons differ in their mental (and physical) capacities and these differences should be taken to the bargaining table, they are equal in regard to *one* capacity: their bargaining skill. This seems to be a particular ad hoc argument, to save procedural equality, especially since at the same time substantial inequalities in other basic endowments are allowed to play an essential role in the bargaining situation proper.¹³

2.3 *Reasons and morals reconciled?* – Remember that the purpose of developing the two perspectives, the impartial perspective of the ideal actor and the perspective of rational individual actors engaged in strategic choice, is to show that, in final analysis, both lead to the same principles. We have seen that in both perspectives the same proviso is formulated. One may, however, wonder how strong the justifications in both perspectives are. To me it seems that in both cases more a *petitio principii* is given, then a conclusive argumentation. Let's follow, for instance, the argumentation Gauthier has given for the core idea of his theory in his Tanner-lecture:

'No doubt the principles that would result were actual persons to negotiate among themselves would reflect the differing abilities of the persons and the initial advantages or disadvantages that each would bring to the bargaining table. But although moral principles are of course to be applied by actual per-

sons in their real interactions with their fellows, the bargain by which I suppose them selected is not itself actual. We must abstract from the real situation of actual individuals in two important ways. First, since the principles chosen are to be used as a standard for assessing social practices and institutions, they must be chosen from a position *prior* to the existing social structure. Individuals are to be thought of as choosing principles for their interaction *ex ante*, so that they can not bargain from particular advantages or disadvantages that the actual workings of society have conferred upon them. *Each may bring only his or her natural assets to the bargaining table.* And second, (...) each person is in effect represented at the bargaining table by an ideally rational self, and no questions of differential bargaining skills arises. Moral principles are those to which our rational selves would agree, *ex ante*, for the regulation of our cooperative interactions' (1984: 117-118; emphasis added, PBL).

We have already elaborated on Gauthier's remarks that although people differ in their natural talents and those differences should be taken into account in the principles that eventually are to be derived from distributing the social surplus, bargaining skills are supposed to be equal during the bargaining process. At this point we just want to stress Gauthier's lack of doubt about the content of the principles agreed to, a lack of doubt that those principles would, indeed, reflect the differing abilities of the persons. The question is, of course, *how* those principles reflect those inequalities. In the next paragraphs that question will be elaborated on.

3. Gauthier's liberalism and neutrality

3.1 *Liberalism and neutrality* – Modern liberal theories share at least one common fundamental principle: the state and its laws should remain *neutral* with respect to the varying conceptions of the good life held by individuals. This principle is recognized to be the leading liberal principle by theorists with different theoretical positions such as, for instance, Larmore, Rawls and Raz. Some of these authors, for instance Rawls, are staunch defenders of this position of neutrality of the state. Others, such as Raz (in his *The Morality of Freedom*), reject this principle of neutrality.

The liberal notion of the neutrality of the state is a reaction to the variety of conceptions of the good life. There are many ways in which a fulfilled life can be lived, without a perception of hierarchy among them. Pluralism and reasonable disagreement have become for modern thought ineliminable features of the idea of the good life.¹⁴ As a consequence of pluralism and reasonable disagreement political liberalism formulates the

leading idea that the state should be neutral. This neutral concern is a principle of anti-perfectionism. Neutrality is seen as a political ideal, it governs state policies and institutions, the *public* relations between persons and the state, and not the *private* relations between persons and other institutions.

Now the liberal idea of neutrality can be understood in two different ways, as De Marneffe has shown. The first can be called *constitutional neutrality*:

'a system of laws is neutral if, as a whole, it can be justified solely in terms of neutral values' (De Marneffe 1989: 52-53).

The second idea is *legislative neutrality*:

'a system of laws is neutral when there is no law which cannot itself be justified in terms of neutral values (or: for every law, there is a neutral reason which warrants it' (De Marneffe, 53).

Here we are concerned with constitutional neutrality: each citizen has sufficient reason to accept his basic social and political institutions *because* those institutions are neutral between conceptions of the good in the sense that they are acceptable to reasonable citizens who hold different particular conceptions of the good. The consequence of this position of constitutional neutrality is the constraint on the factors that can be invoked to justify political values. Constitutional decision-making can count as neutral only if it can be justified without appealing to the presumed intrinsic superiority of any particular conception of the good life. The justification of constitutional neutrality is based on the wish to show everyone equal concern and respect. Other persons, each person, are due equal respect by virtue of their capacity to work out their own conception of the good life. The consequence of this view on neutrality and equal respect, which denies the state any right to implement any specific conception of the good life, is the emphasis on the equal freedom that all persons should have to pursue their own conception of the good life. As Raz has formulated it:

'The conflict in which the state is supposed to be neutral is about the ability of people to choose and successfully pursue conceptions of the good (...)' (1986: 123).

With this conception of neutrality, the state can be neutral only, according to Raz

'(...) if it creates conditions of equal opportunities for people to choose any conception of the good, with an equal prospect of realizing it' (1986: 124).

Equal freedom of choice and political neutrality go hand in hand. Now

Raz's formulation of 'neutrality' as the *equal* prospect of realizing one's conception of the good is a rather strong one. I do not want to elaborate on this point, but simply will assume that we are talking about a reasonable opportunity for each citizen to realize his or her conception of the good. Or, following Rawls' formulation of this neutrality of aim of the state we will understand it to mean, that the state ensures for all citizens equal opportunity to advance any permissible conception of the good (those conceptions that respect the principles of 'justice as fairness') (1988: 262).

The availability of an adequate range of options citizens have, derives its value from its contribution to and is required by the equal freedom of each person to leading a good life of his own choice. The freedom to choose between alternative conceptions of the good and to pursue those conceptions will be guaranteed if political neutrality is understood in the way it is formulated above.

Recapitulating, we have seen that liberalism is defined as a theory in which one of the main values of the political order – political justice – is defined by the neutrality of the state. The fundamental political principles by which all individuals are to live, must be justified without any appeal to any intrinsic superiority of any conception of the good. Such principles assign to persons rights and duties and define the appropriate distribution of the benefits and burdens of social co-operation: these principles are the principles of social justice. It are liberal principles because of their neutrality with regard to conceptions of the good.

3.2 *Gauthier and neutrality* – How does Gauthier's liberal individual fit into this conception of neutrality? On first sight Gauthier seems to underwrite this conception of neutrality, understood as anti-perfectionism. For instance, he remarks that

'(...) we deny that justice is linked to any substantive conception of what is good, either for the individual or for society. A just society has no aim beyond those given in the preferences of its members. (...) A just society is concerned only to enable each person to realize the greatest amount of her own good, on terms acceptable to all' (1986: 341).¹⁵

A closer look is, however, necessary to see if Gauthier's theory indeed creates conditions which enables each person a reasonable opportunity to do that.

3.2.1. *Liberalism, neutrality and resources* – The liberal idea that one of the main values of the political order is the neutrality of the state has been seen

to mean that government activity is to ensure for all persons a reasonable opportunity to pursue the good of their own choosing.

The fundamental question is, however, how to create *conditions* of equal opportunity for people to choose any – permissible – conception with a reasonable prospect of realizing that conception. What issues then, if the neutrality principle is the principle that defines and unites liberals, divides them? That are, according to Alexander and Schwarzschild, essentially two questions:

1. What resources are up for 'neutral' distribution? More specifically, do those resources include or exclude persons' bodies, labor and talents? (...)
2. What is the proper formula for distributing those resources that are up for distribution?' (Alexander and Schwarzschild 1987: 86).

In the following I will elaborate on the different answers given to the problem of resources, or what to do with differences in talents, or mental and physical capacities (and the fruits thereof) before returning to Gauthier's theory and comparing it with these answers. The question then is how to achieve equality of conditions, the equal ability of each in realizing one's life plan without abandoning *liberal* principles. We will follow for this purpose a distinction made by Cohen:

'Consider three types of entity over which a person might claim sovereignty or (what is here equivalent to it) exclusive private property: the resources of the external world; his own person and powers; and other people. Liberalism, to idealize one of its traditional senses, may be defined as the thesis that each person has full private property in himself (and, consequently, no private property in anyone else). He may do what he likes with himself provided that he does not harm others. Right-wing liberalism, of which Nozick is an exponent, adds (...) that self-owning persons can acquire equally strong moral rights in unequal amounts of external resources. Left-wing liberalism is, by contrast, egalitarian with respect to raw external resources. (...) Hillel Steiner illustrate[s] this position' (1986b: 79).¹⁶

Both Nozick and Rawls are unwilling, according to Cohen, to distinguish as sharply as might be thought apt between the moral status of ownership of persons, though they assimilate the two in opposite directions.

'Nozick endows rightful private ownership of external resources with the moral quality that belongs, more plausibly, to people's ownership of themselves, and Rawls and Dworkin, treat people's personal powers as subject, albeit with important qualifications, to the same egalitarian principles of distribution that they apply, less controversially, to external wherewithal' (1986a: 113).

In what follows we will analyze where Gauthier stands with regard to self-ownership, internal – and external resources. As we have already seen in our discussion of Gauthier's initial bargaining position which is, as remarked earlier, a modification of Nozick's interpretation of Locke's proviso, it is the proviso that affords each person exclusive right to use his body and its powers, his physical and mental capacities and a right in the effects of one's labour. It determines the initial endowments of interacting persons, taking into account the real differences between persons as actors.¹⁷ In regard to both internal and external resources Gauthier seems in agreement with Nozick's position in this respect. We will first elaborate on Gauthier's ideas about *internal* resources, the natural capacities of persons.

3.2.2 *Gauthier and internal resources* – The inequalities allowed for by the proviso are, in Gauthier's view, not an indication of partiality. Remember that the proviso is supposed to be an impartial constraint on interaction. Remember also that for Gauthier, just like for Rawls, society is a 'co-operative venture for mutual advantage'. But especially with regard to the question how to treat (the distribution of) natural talents, Gauthier and Rawls part company. Rawls' discussion on 'talents' is used by Gauthier as a specific example of his general view on how capacities of persons should be regarded by society and how they should be dealt with.

As is well known talents play an important role in Rawls' theory of justice. He is of the opinion that

[t]here is no more reason to permit the distribution of income and wealth to be settled by the distribution of natural assets than by historical and social fortune' (1971: 74).

In fact, the difference principle represents in Rawls theory

'(...) an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be. Those who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out. (...) No one deserves his greater natural capacity nor merits a more favorable starting place in society (1971: 101–102).

Gauthier's interpretation of Rawls' view on natural capacities is that it means that, for Rawls,

'morality demands the giving of free rides; no other interpretation can be put on the insistence that talents be treated as a common asset' (1986: 220).

And Gauthier continues:

'We may agree with Rawls that no one deserves her natural capacities. Being the person one is, is not a matter of desert. But what follows from this? One's natural capacities determine what one gets, given one's circumstances, in a condition of solitude. One's natural capacities are what one brings to society, to market and co-operative interaction. Why should they not determine, or contribute to determining, what one gets in society? How could a principle determine impartially how persons are to benefit in interaction, except by taking into account how they would or could benefit apart from their interaction?' (1986: 220).¹⁸

The essential question for Gauthier is, as we have noted before, how to distribute the co-operative surplus. According to Gauthier one should make a distinction between the share of values that would be obtained without social co-operation and the share through co-operation. Each person seeks to maximize his gain over the outcome of non-co-operation, and so is concerned with his share of the co-operative produced values. However, even if each were to receive some portion of the co-operative surplus, each could not expect to benefit in the same way as his fellows.

In contrast, Rawls is of the opinion that talking about 'a condition of solitude' does not make any sense. One is born into society which is an ongoing scheme of fair co-operation over time without any specified beginning or end taken as relevant for political justice. The question is how social institutions work now or should work now. Gauthier's idea about what one could have gotten in state of nature and, then, comparing what one should get in society, deliberating on the question how to divide the co-operative surplus, plays no rule in 'justice as fairness'. For Rawls, this state of nature situation is unknowable, or of no significance.¹⁹

Rawls' idea about the role the distribution of natural talents should play, as quoted above, is interpreted by Gauthier, (as well as, one might add, by for instance Nozick and Cohen²⁰) to mean a denial of self-ownership in regard to talents and natural endowments. Different kinds of objections are raised against the idea of 'talent pooling'.

Kronman, in a discussion of the problems of talent pooling has analyzed some of these objections and rejected them. The first objection he analyses is one developed by Nozick and which is originally derived from Locke's theory of property rights. In this objection the argument is that talent pooling necessarily violates people's entitlement by forcibly depriving them of the right they have to their own natural capacities. In Nozick's view, and one should add, also in Gauthier's view, basic endowments come into the social world, tied to particular individuals. These individuals then have a right to what follows from these endowments. As Kronman remarks this

'(...) is a conclusory argument, however, that assumes what is in question – whether individuals do in fact have the right to exclude others from the enjoyment of their own natural gifts. The appeal of the argument derives from our tendency to conflate possession and ownership. (...) Although a person obviously possesses his own attributes, it does not necessarily follow that he is also their owner, with the right to exploit them, within limits, for his own benefit' (1981: 64–65).²¹

One should also add, that Rawls strongly rejects the idea that talent pooling violates person's entitlement by forcibly depriving them of their right to use them in their own way. As he remarks:

'(...) greater natural talents are not a collective asset in the sense that society should compel those who have them to put them to work for the less favoured' (1974: 145).

A second objection that Kronman summarily dismisses is the one that argues that it is impossible to actual redistribute natural capacities. Now the object of pooling is *not*, as Kronman quite rightly points out,

'to achieve an equal distribution of attributes but rather to equalize the advantages and disadvantages that result from the natural endowments different individuals happen to have' (1981: 65).

The quotation given from Rawls on talents as a common asset should be interpreted in this way. Rawls never says that personal talents are to be regarded as collective property. What he, in fact, is saying is that the distribution of native endowments, that is the differences among persons, are to be regarded as a common asset.²² The differences in talent consist not only in the *variation of talents* of the same kind but also in the *variety of talents* of different kinds. This variety can be regarded as a common asset. The difference principle is formulated as an acceptable principle for *all* members of society, and it uses the distribution of endowments as a common asset in the sense mentioned above. The Rawlsian argument for talent pooling is then, as summarized by Kronman

'(...) to equalize the share of each individual in the fund of resources represented by the sum of everyone's natural endowment' (1981: 61).

This argument is also based on Rawls' view that only in society it makes sense to talk about entitlements to a certain amount of the social product.

Concluding this analysis of views on internal resources and self-ownership, one has to say that Gauthier has not convincingly shown that the idea of talents as a common asset actually runs afoul to self-ownership. The question is how institutions deal with the effects of the natural distri-

bution. There is no sense, as Waldron has noted, to the idea 'that talents can simply be *exercised* by those who own them apart from any social framework whatsoever'.²³ So, in fact what we are talking about is a distribution problem. Gauthier underestimates in this regard the following problem, accurately formulated by Coleman:

'Co-operation is necessary to *produce* the surplus, which is in turn contingent upon agreement on the *division* of those gains. No agreement upon relative shares, no surplus' (1988: 314).

It is, of course the Rawlsian difference principle that tries to find this optimal point of equilibrium between producing and dividing the social product.

One can make a final remark about the differences between Gauthier's 'morals by agreement' and 'justice as fairness'. One of the reasons 'justice as fairness' takes the basic-structure as the primary subject is due to the fact that basic institutions have a profound influence on the life-prospects of persons. The inequalities in life-prospects are – according to Rawls – affected by three kinds of contingencies:

- a. the social *class of origin* into which citizens are born;
- b. the *natural endowments* and opportunities to develop those endowments citizens have;
- c. the *good or ill fortune*, over the course of life of citizens.

In a well-ordered society the prospects over life are affected by those social, natural and accidental contingencies and especially by the way the basic structure uses those contingencies to meet the requirements of 'justice as fairness'. The important question is how institutions deal with the effects of *all* of these different kinds of contingencies. In Gauthier's theory only *specific social* contingencies that are determined by a specific social structure should be taken care of by social institutions. For instance social contingencies that are determined by a social structure in which males are encouraged to actualize capacities that are repressed in females, should be considered unfair contingencies because they reflect an unfair structure

'(...) because it fails to relate benefits to the contribution each person would have made had each enjoyed similar opportunities and received similar encouragement' (1986: 263).

3.2.3 *Gauthier and external resources* – Remembering that right-wing liberalism defends strong moral rights in external resources and left-wing liberalism is egalitarian with respect to raw external resources, we now turn to Gauthier's point of view on how the proviso and external resources hang together.

Gauthier illustrates his ideas with the example of the appropriation of land. Again, as with the argument about internal resources the essential question is if appropriation of land by someone worsens the situation of another. And, elaborating on that, what exactly is to count as 'worsening'? Gauthier argues

'(...) that an individual might rightfully appropriate land or other goods previously in common use for her own exclusive use, provided the effect of such appropriation was to leave other persons at least as well off as before. The appropriator betters herself without worsening the situation of others' (1986: 277-278).²⁴

Is this, indeed, the case? Is the situation of others *not* worsened by the appropriation of land? Gauthier gives the following answer:

'In making the best appropriation open to one, one does not take advantage of others simply because they now lack the opportunity that one was the first to seize' (1986: 278).

Again one has to ask: is this really the case? Earlier it was noted that Gauthier's proviso is a modification of Nozick's interpretation of Locke's proviso. In his discussion of the appropriation of land Nozick formulates the proviso in the following way:

'(...) the crucial point is whether an appropriation of an unowned object worsens the situation of others' (1974: 175).

In a critical analysis of Nozick's argument on appropriation and the related question of what should here count as worsening, Cohen argues that the Nozickian proviso

'(...) requires of an appropriation of an object O, which was unowned and available to all, that its withdrawal from general use does not make anyone's prospects worse than they would have been *had O remained in general use*. If no one's position is in any way made worse than it would have been had O remained unowned, then, of course, the proviso is satisfied' (1986a: 123).

Appropriation that is satisfying Nozick's proviso could not, it seems, generate a grievance. However Cohen continues his argument by noting that people

'(...) can be made seriously worse off than they might have been, even when it is fulfilled. That is because of the phrase (...): '*had O remained in general use*'. It has the upshot that, as Nozick intends his proviso, *the only counterfactual situation relevant to assessing the justice of an appropriation is one in which O would have continued to be accessible to all*' (1986a: 125).

The conclusion of Cohen's argumentation is that appropriation of land

'(...) is justified only if (if and only if) we should not regard the land as *jointly owned* at the outset. When land is owned in common, each can use it on his own initiative, provided that he does not interfere with similar use by others: under common ownership of the land no one owns any of it. Under joint ownership, by contrast, the land *is* owned, by all together, and what each may do with it is subject to collective decision' (1986a: 129).

So it all boils down to the question: is the land owned in common so that no one owns any of it, or is there joint ownership? In the first situation appropriation does not run afoul to the proviso. Cohen concludes this part of his argumentation with remarking that

'(...) Nozick must suppose that the world's resources are, morally speaking, nothing like jointly owned, but very much up for grabs, yet, far from establishing that premise, he does not even bother to state it, or show any awareness that he needs it' (1986a: 130).

Now we are in our discussion of course mainly interested in Gauthier's defense of the appropriation of land and his argumentation that the proviso is not violated by it. The main point to note is that his line of reasoning, as well as his formulation of the proviso is essentially the same as that of Nozick. Remember that Gauthier's example has to do with the appropriation of land *that is in common use* and that his conclusion is that in making the best appropriation open to one, one does not take advantage of others simply because they now lack the opportunity that one was first to seize. Following Cohen's argumentation, one might conclude that, indeed, Gauthier is right and that appropriation is not worsening the situation of others, be it that it seems to be Gauthier's understanding that, like in Nozick's case external resources 'are up for grabs'.

However, Gauthier himself seems to be aware, contrary to Nozick, that external resources are *not* up for grabs.

'Where the world such as the Dobu have been said to conceive it, so that all goods were in *fixed supply*, then the proviso would indeed limit appropriation by the requirement that as good an opportunity be left for others, so that one should take only an *equal* share of land or of other goods' (1986: 278; emphasis added, PBL).

Now remember that Gauthier himself, in his defense that appropriation does not worsen the situation of others is, in fact, talking about the appropriation of land. And of land there is, generally speaking, only a *fixed* supply. Following the logic of his own reasoning Gauthier should have taken on this point a left-wing liberal position, instead of a right-wing stand. Formulated in an other way: the logical position Gauthier should

have taken is one in which self-ownership is combined with private ownership of *initially equal parts* of the world resources.

This left-wing liberal position is defended for example by Hillel Steiner. In the so-called 'Steiner-constitution' each individual has a right to an equal share of the basic non-human means of production.²⁵ Unlike joint ownership which forbids a Nozickian (or Gauthierian) formation of unequal private property by placing all resources under collective control, the important thing about the Steiner-constitution is that it institutes private property from the start, but it forbids the inegalitarian scramble by privatizing resources in an initially equal division.²⁶ This 'starting gate theory' can, of course, lead to inequality and it probably will. The true foundation of this theory is, as Cohen has noted

'(...) the contrast between persons and worldly resources as possible objects of rights and egalitarian dispensation' (1986b: 94).

Recapitulating: there is no reason why Gauthier, following his own argumentation on the appropriation of land, should not have taken the position in which, as in the Steiner-constitution, self-ownership is united with egalitarianism in raw external resources. He takes himself, as we have seen, however an other position when defending that appropriation does not take advantage of others. He illustrates this defense in the following way:

'The winner of a race does not take advantage of the other runners, at least if participation in the race is itself advantageous. The runners all prefer a situation in which benefit is unequal, so that there are winners and losers, to one in which all benefit equally, but these are no races' (1986: 278).

Now this example is rather inapt, it seems to me, to illustrate the point we are discussing: the appropriation of external resources. In 'real life' this race is not between the Ovetts, Coes and Crams. It is not even a race between Ovett, Chamberlain and Gretzky. It is a race between the Coe's and the Stompies.

If one thinks races are an adequate analogy to the problem we are discussing, the division of external resources, or rather the *effects* of this distribution, than the 'starting gate theory' more actually describes the race Gauthier is talking about.²⁷ In this starting gate theory the (track) race is conceived as one in which initial equality (in external resources) is combined with subsequent unequalizing competition, a competition based on the – arbitrary – role (differences in) skill play. But even if this example is more apt to illustrate the race Gauthier wants to describe, the essential question remains the same: why should there be in 'real life' losers at all?

To conclude this discussion of the central idea of liberalism, self-ownership: we have argued that it is useful to make a distinction between internal and external resources. Then one can see that, firstly, distributing the *effects* of differences in basic endowment may not violate self-ownership and that, secondly, there should be at least an (initial) equal share of raw external resources.

3.3 *Liberalism, neutrality and impartiality* – In this paragraph our central question is in how far Gauthier's theory is neutral, where neutrality of aim of the state has been taken to mean the ability of persons to choose and successfully pursue conceptions of the good. Conditions should prevail in which each has an equal opportunity to choose any permissible conception of the good with, as stated before, a reasonable opportunity of realizing it.

Now does Gauthier's theory realize this? One can have serious doubts about this. Let us elaborate. The main problem with Gauthier's conception of neutrality is that it is, in fact a *procedural* conception of neutrality. A neutral procedure is justified by an appeal to neutral values, that is, values such as *impartiality*, equal opportunity for contending parties to present their case, etc. It is a value that regulates fair procedures for adjusting between conflicting claims. So, although Gauthier thinks his theory to be neutral in *aim* it is, in fact, only neutral in *procedure*. But is it really?

In Gauthier's theory each next step in the argument is defined by impartiality. The first one, the one in which *the proviso* is defined as being equivalent to 'not taking advantage', or 'not worsening the position of someone' has as its core impartiality. The second step, *the initial bargaining position*, being constrained by the proviso is also impartial. In it the differences in basic endowments are neutralized (but not their eventual effects). In *the bargaining situation proper*, procedural equality, or impartiality is guaranteed by the equal bargaining skills which, once again prevent taking advantage. The outcome, the principles to distribute the social surplus are then principles that do 'not take advantage', are impartial and are, for that matter, just principles.

Now on first sight this may look as a completely procedural, impartial theory, about *formal* constraints. Or, formulated in an other way, a theory about formal justice and not about substantive justice. In the steps taken by Gauthier to develop his argument there is, however, one fundamental substantive step, and that is the first one. The definition of the proviso is a substantive definition, it is 'normatively fundamental', as Gauthier himself claims. In it 'not taking advantage', 'not worsening the position of someone' is given a substantive meaning. And the proviso is an *impartial constraint* on interaction, according to Gauthier.

In fact, however the proviso looks very much like the familiar Pareto-principle. Remember the core of its definition given by Gauthier:

'the proviso prohibits bettering one's situation through interaction that worsens the situation of another. This, we claim, expresses the underlying idea of not taking advantage' (1986: 205; emphasis added, PBL).²⁸

Compare this with a standard definition of Pareto optimality as, for instance, to be found in Rawls' book:

'The [Pareto-] principle holds that a configuration is efficient [or: optimal] whenever it is impossible to change it so as to make some persons (at least one) better off without at the same time making other persons (at least one) worse off' (1971: 67).

There is in itself of course nothing wrong with a definition of the proviso that is, in fact, analogue to the Pareto-principle. The point is that the Pareto-principle is itself a *normative* principle, something that should be brought clearly out into the open. If the proviso is indeed equivalent to the Pareto-principle and if it underlies the object of Archimedean choice (where this choice is not only one of mutual benefit but also one of optimality;²⁹) then the question is: is the proviso a *just* proviso? And, moreover, does it realize in the end a *just* distribution? The usual multiplicity of optimal outcomes, which is recognized by Gauthier himself, makes him to suggest that the attainment of optimality is not a sufficient, but a necessary condition in interaction.³⁰ The specific optimal outcome one is looking for, is determined by the principle of minimal relative concession. And it is at this point that, in Gauthier's theory, justice comes in. The principle of minimal relative concession is not only the basis for rational co-operation, it is also the ground for impartial constraint on each persons behavior which is, as will be remembered, equivalent with justice.³¹ To abide by this constraint or the disposition not to take advantage *is* justice.

Now, once again, one should ask if Gauthier's focus on Pareto-improvement from an initial state of *inequality* is really a focus on just distribution. Is it not simply about the importance of *some* initial starting point, *some* distribution of rights from which the interaction of persons is evaluated? And then the question again is: is this initial bargaining position from which morality from rationality is derived, a fair one? Are the factors that are considered to be relevant by Gauthier to assign rights to persons and to differentiate between those rights persons have not, in fact, obstacles to realizing the equal freedom of choice? Is the availability of an adequate range of options to persons, required by the principle of political neutrality not hindered if this range is determined by the differences in basic en-

dowments people have? Are the principles of justice which regulate cooperation in Gauthier's theory fulfilling the goal of neutrality: to give each person an equal opportunity to realize his conception of the good? Is *that* value of choice in the context of distributive justice really achieved?³²

The proviso has been defined as 'not worsening someone's position' or as 'not taking advantage'. It has become clear from the foregoing discussion that 'not taking advantage' in Gauthier's theory means not taking advantage of *other* persons advantages. Now whatever one may think of advantages other persons have, it clearly means that oneself is *disadvantaged*: if there are persons with advantages, there must also be persons with disadvantages. The question then clearly is how to evaluate those advantages and disadvantages. In Gauthier's theory it are evidently from a rational *and* moral point of view differences that are *relevant*. A closer look at these advantages (and the corollary: the disadvantages) may give reason to doubt the relevance of *those* differences between persons.

The only possibility for redistribution or for violation of the leading idea of full compensation in Gauthier's theory is charity. In the context of the difference between charity and justice Cohen has analyzed the reason that could be given for equal access to advantages.³³

'On my understanding of egalitarianism, it does not enjoin redress of or compensation for disadvantage as such. It attends, rather, to involuntary disadvantage, which is the sort that does not reflect the subject's choice. People's advantages are unjustly unequal (or unjustly equal) when the inequality (or equality) reflects unequal access to advantage, as opposed to patterns of choice against a background of equality of access. (...) When deciding whether or not justice (as opposed to charity) requires redistribution, the egalitarian asks if someone with a disadvantage could have avoided it or could now overcome it. If he could have avoided it, he has no claim to compensation, from an egalitarian point of view' (1989a: 920).

This discussion of 'involuntary' disadvantage and responsibility captures the problem we are dealing with. The differences between persons that, according to Gauthier should play such an essential role in the initial bargaining situation *are* involuntary differences, based on brute luck. Those differences run contrary to a situation in which one can speak of 'real' choice. Following Cohen's argument this should give the disadvantaged a claim to compensation.³⁴ Due to the effects those disadvantages have in the final outcome of the bargaining proces proper, we suggest that, contrary to Gauthier, no one can claim full compensation. A way to redress the effects of the disadvantages in the initial bargaining position – if one is reluctant to create a real condition of equality in that position – is to turn to the outcome of the bargain situation proper and to deal with the social

product in a Rawlsian way. To compensate *each* individual, but not in full, according to, for instance, the difference principle.

In Rawls' view the well-ordered society is, as we have seen, a correction on the arbitrariness of natural, social and accidental contingencies. In Gauthier's view the social order should mirror the partiality of the natural order. The inequalities in basic endowment should be transmitted to the social order when talking about just benefits. Differences in talents *should* make a difference.

To conclude: In his Tanner-lecture Gauthier has made the remark that, trying to understand the conflict between reasons of self-interest and overriding reason, he has discovered that he was, in fact, talking about the Prisoners' Dilemma:

'And I looked, and it was as if scales fell from my eyes and I received sight' (1984: 94).

One may wonder, however, if Gauthier has not been blinded by too much light the Prisoners' Dilemma has given him and has become unable to see what justice really is all about.

Notes

1. Gauthier (1984: 118).

2. See Coleman (1988: 315).

3. This is the main reason why Gauthier parts company with Buchanan (1975), especially in regard to Buchanan's idea of the initial bargaining position, as the starting point for rational co-operation. In Buchanan's theory this position is identified with the natural distribution, or non-co-operative outcome. The natural distribution which Buchanan uses as the starting point represents, according to Gauthier, 'the effects of power' (1986: 198).

4. The paradigmatic example which Gauthier uses to illustrate worsening someone's situation and failing to better it, is one 'beloved of philosophers': the question how the outcome came about that you are drowning while I am passing.

'First, you fall in the water. I come along, hear your cries for help, but ignore them and continue on my way. Second, you are standing on the bank. I come along, push you into the water, and, ignoring your cries for help, continue on my way. In the first case, although certainly I fail to better your unhappy situation, I do not worsen it. In the second case, although the outcome is the same, I clearly do worsen your situation' (1986: 204).

5. A. C. Baier remarks in regard to this quotation:

'It is not arbitrariness, but obscurity, that I am here complaining of in the crucial concept of presence and absence, and in the related concept of interaction' (1988: 321).

6. See for instance Coleman for a discussion of 'pre-market' agreement to set up the market and to agree on (property)rights; Coleman (1985: esp. 92-101).

7. See for an argument in defence of Gauthier for not taking those two steps, Narveson. For him, like for Gauthier, ownership of one's

'(...) natural endowment is implicit in any fully social agreement, for it is impossible not to want those things respected if one wants anything at all' (1989: 265).

In regard to Narveson's position one could, in addition, note that he has changed his view on Gauthier's theory:

'I had previously been a convinced utilitarian (summed up in my *Morality and Utility*); but the work of David Gauthier in particular (now come to fruition in his great work, *Morals by Agreement*) as well as Nozick's, persuaded me that utilitarianism was an unsatisfactory theory' (1988: XI).

8. For the sake of argument I leave aside that Rawls is, in fact, not talking about 'utility', but about 'primary goods'. At one point Gauthier recognizes that Rawls discusses his principles in terms of primary goods and not in terms of utility (1986: 246). He adds that Rawls 'himself does not consider the problem of interpersonal comparisons' (1986: 246). This clearly is a misunderstanding of the idea that lies behind the concept of primary goods. Whatever one might think of it, primary goods are introduced by Rawls to solve the problem of interpersonal comparisons.

9. Reacting on an earlier publication of Gauthier (1974b), Barry points out that Gauthier makes no attempt to discuss what the non-agreement payoff for each person would be. Barry adds that this

'is no doubt prudent since I do not think that there is the faintest chance of establishing (...) [this payoff]. How could we conceivably hope to find out how each person would fare in the absence of any social co-operation?' (Barry 1989: 252).

And in discussing the same point from the perspective of Rawls' *A Theory of Justice* Barry notes that there

'is simply no need to refer to what people could obtain independently. To see the irrelevance of this, we have only to think of a society in which there were no 'gains from co-operation', in the sense that no more was produced by working together than by working separately' (Barry 1989: 238).

And, once again:

'In *A Theory of Justice*, Rawls does not bother to say much about the non-co-operative baseline. The reason for this perfunctory treatment of the non-agreement point is, of course, that Rawls maintains that it plays no part in the determination of the principles of justice. People cannot, he says, make any legitimate claim to preserve the relative advantages they would have had under conditions of non-co-operation' (Barry 1989: 298).

10. Note the resemblance in Gauthier's wording and that of Nozick, for instance Nozick's remark that '[t]axation of earnings from labour is on a par with forced labour' (1974: 169).

11. Cohen has remarked in a comment on this passage and in line with his dis-

discussion of Gauthier on rent (1989b), that 'the first criterion underlined would generate much greater income for the talented than the second. In the state of isolated-people nature, no one watches Gretzky, who, like untalented me, lives by picking fruit, and we have, we can assume, the same utility. Thus by the second underlined criterion he gets *no* more than I by virtue of his (admittedly) greater contribution in society. But by the first he *does* get much more.'

12. See also Gauthier's remark in one of his earlier publications:

'(...) in particular each must benefit from the presence of every other co-operator. (...) [A]ll benefit from the inclusion of all in social arrangements' (1982: 437).

13. In a personal discussion on this point David Gauthier has pointed out that he wants to make a distinction between basic endowments that are of a productive nature and skills, like bargain-skills. The unequal distribution of the former is taken into account in the bargaining situation proper and has an essential effect on the outcome of the bargaining process. Be this as it may, the distinction and the use made of it still makes, it seem to me, for a rather ad hoc argument.

14. Larmore (1987: 23).

15. And, in addition on the same page Gauthier remarks:

'(...) the neutrality of justice, with respect to individual aims and preferences, enables the defender of essential justice to escape the charge that society provides a straitjacket which individuals must be tailored to fit' (1986: 341).

And, also:

'(...) the neutrality of the essential just society, with respect to the aims of its members, is shown in its adaptation to whatever their aims may be, bringing their fulfillment into optimal relative equality' (1986: 340-341).

16. See also: Cohen (1986a: 114-115). In regard to Rawls and Dworkin Cohen remarks that they must be called

'(...) social democrats, for they are not liberals in the traditional sense just defined, since they deny self-ownership in one important way. They say that, because it is a matter of brute luck that people have the talents they do, their talents do not, morally speaking, belong to them, but are, properly regarded, resources over which society as a whole may legitimately dispose' (1986a: 114; 1986b: 79).

One should add that Cohen has used this statement in a specific context. It is *one* of the senses in which the term 'liberalism' has traditionally borne. Recently Cohen has remarked that he has

'(...) been persuaded that it makes for confusion so to use 'liberal' that John Rawls and Ronald Dworkin, who are widely and rightly called liberals, come out emphatically anti-liberal' (1989b: 43, footnote 1). See also note 20.

17. Gauthier (1986: 220).

18. And in an earlier publication Gauthier has remarked in this regard that

'(...) it is surely mistaken to hold that natural inequalities are undeserved. They are not deserved, they do not accord with desert, but equally they are not undeserved, they are not contrary to desert' (1974b: 15-16).

19. See also note 9.

20. Nozick writes that, according to his interpretation, Rawls regards 'natural talents as a common asset (...) as a collective resource' (1974: 225-226; 228-229). For Cohen see note 16. See for a critique of the interpretation by Nozick and Cohen of Rawls' ideas on talents also: Waldron (1988: 402-403). Cohen himself, one should note, 'wholeheartedly' agrees with the Dworkin/Rawls restriction of selfownership' (1989b: 2-3).

21. Gauthier seems to be aware of this point, if one reads his following remark closely:

'Thus the proviso affords a right *in* the fruits of one's labour and so to full compensation, not a right *to* those fruits and to market compensation' (1986: 211).

However, a person may not have a right *to* those fruits, in Gauthier's view he still has a right to full compensation.

22. See for this interpretation also: Waldron (1988: 403).

23. Waldron (1988: 404).

24. Also: Gauthier (1986: 216).

25. Steiner (1977).

26. As Cohen remarks in the context of his analysis of Nozickian appropriation (1986b: 88).

27. See Cohen for the link between the starting gate theory and a track race (1986b: 95). The thing to note is, however, that Cohen is, in fact, discussing the interpretation of Dworkin of Locke's theory of acquisition and we are discussing Gauthier's remarks on the appropriation of external resources.

28. The interpretation of the Lockean proviso given by Gauthier is, in fact, not quite equivalent with the Pareto-principle because the quotation given starts with the following remark by Gauthier:

'We interpret the Lockean proviso so that it prohibits worsening the situation of another person, except to avoid worsening one's own through interaction with that person' (1986: 205).

29. Gauthier (1986: 261).

30. Gauthier (1986: 77).

31. Gauthier (1986: 150).

32. See on the significance of choice and justice: Scanlon (1988: 185-190).

33. The term 'equal access to advantage' is formulated and defended by Cohen in his discussion of Dworkin's principle of 'equality of resources'; Cohen (1989a: 916).

34. Cohen (1989a: 920).

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Political Parties Going Dutch: Party Finance In The Netherlands

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1. Introduction

Ever since its birth, the system of parliamentary democracy has had an uneasy relationship with the realm of money. Uncontrolled and uneven flows of money may hamper the democratic functioning of the system. And yet, without money the system will not function at all. The proper conduct of free elections is unconceivable without money being spent by parties, candidates or both. The dependence of parties and candidates on people or organizations willing and able to furnish money, therefore, is a natural feature of every democratic system. But the eternal question in this respect is: how far can we go? What type and what degree of dependence is acceptable? How to prevent that a Maecenas turns into a Mammon?

There are no simple answers to these questions, not only because normative questions usually lead to different replies inspired by distinct ideological orientations. The lack of sufficient reliable data also frustrates the attempts to draw clear demarcation lines between what is acceptable and what is not. But this must be considered an impetus for further systematic research, rather than a reason to abandon this scientific field altogether.

A first goal of this article, therefore, is to provide – in a comparative way – some recent data concerning the finances of the three major Dutch parties: the Christian Democratic Appeal (CDA), the Labour Party (PvdA) and the Liberal Party (VVD). It will do so after having given an assessment of what is meant by 'party finance'. Furthermore, special attention will be attributed to the desirability of direct allocation of public funds to political parties, since this form of state subvention to parties might be introduced in the near future. Finally, Dutch party finance will be compared globally with the 'costs of democracy' in some other countries.