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Article:

Equality, Responsibility and Talent Slavery

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Introduction

EGALITARIANS MUST ADDRESS TWO QUESTIONS: i. What should there be an equality of, which concerns the currency of the 'equalisandum'; and ii. How should this thing be allocated to achieve the so-called equal distribution? A plausible initial composite answer to these two questions is that *resources* should be allocated in accordance with *choice*, because this way the resulting distribution of the said equalisandum will 'track responsibility' — responsibility will be tracked in the sense that only we will be responsible for the resources that are available to us, since our allocation of resources will be a consequence of our own choices. But the effects of *actual* choices should not be preserved until the prior effects of luck in constitution and circumstance are first eliminated. For instance, people can choose badly because their choice-making capacity was compromised due to a lack of intelligence (i.e. due to constitutional bad luck), or because only bad options were open to them (i.e. due to circumstantial bad luck), and under such conditions we are not responsible for our choices.[1] So perhaps a better

[1] Two important points must be made at this juncture. Firstly, luck can also impact people in a *positive* rather than a negative manner. For instance, people can also choose particularly *well* (rather than badly) because they lucked-out in the genetic lottery and consequently because they turned out to be very intelligent, or they can choose well (again, rather than badly) because they only had good options to choose from, and under such circumstances it is also arguable that we are not fully responsible for our good choices. The second point is that for the duration of this paper I will assume an intuitive understanding of 'being responsible for' which does not distinguish between different conceptions of the term 'responsibility' — i.e. I will assume a conception of responsibility on which being responsible for some outcome entitles us to (or burdens us with) that outcome. On a more sophisticated understanding of responsibility though, such as would arguably be accepted by Scanlon (who distinguishes between 'agency responsibility' and 'substantive responsibility') and Cane (who draws a distinction between 'historic responsibility' and 'prospective responsibility'), being responsible for something in the past need not entail that one should now take responsibility for it by reaping the benefits (or bearing the burdens) of whatever it was that one was responsible for. Thomas M. Scanlon, 'Responsibility', in T. M. Scanlon (ed) *What We Owe to Each Other* (London: Harvard University Press, 1998), p.248. Peter Cane, 'The nature and functions of responsibility', in P.Cane (ed) *Responsibility in Law and Morality* (Portland: Hart Publishing, 2002), p.29. However, since the present paper is primarily intended as a critique of the positive thesis which Markovits develops in the context of discussing Dworkin's argument, I will say nothing further on this topic here, other than to note my underlying scepticism about whether tracking responsibility is really all that good.

[2] They are complementary because from an egalitarian standpoint there would be no value in doing one but not the other. However, the latter aim is also a *pre-condition* of the former aim because in order to ensure that responsibility is tracked, we should only preserve the effects of *legitimate* choices — that is, we should only aim to preserve the effects of those choices that have already been cleansed of the distorting effects of luck in constitution and circumstance.

[3] Henceforth, just 'redistribution'.

composite answer to our two questions (from the perspective of tracking responsibility) might be that resources should be allocated so as to reflect people's choices, but only once those choices have been corrected for the distorting effects of constitutional and circumstantial luck, and on this account *choice preservation* and *luck elimination* are two *complementary* aims of the egalitarian ideal.[2]

Nevertheless, it is one thing to say that luck's effects should be eliminated, but quite another to figure out just how much resource redistribution[3] would be required to achieve this outcome, and so it was precisely for this purpose that in 1981 Ronald Dworkin developed the ingenuous hypothetical insurance market argumentative device

(HIMAD), which he then used in conjunction with the talent slavery (TS) argument, to arrive at an estimate of the amount of redistribution that would be required to reduce the extent of luck's effects.[4] However recently Daniel Markovits has cast doubt over Dworkin's estimates of the amount of redistribution that would be required, by pointing out flaws with his understanding of how the hypothetical insurance market would function. Nevertheless, Markovits patched it up and he used this patched-up version of Dworkin's HIMAD together with his own version of the TS argument to reach his own conservative estimate of how much redistribution there ought to be in an egalitarian society.[5] Notably though, on Markovits' account once the HIMAD is patched-up and properly understood, the TS argument will also allegedly show that the two aims of egalitarianism are not necessarily complementary, but rather that they can actually *compete* with one another. According to his own 'equal-agent' egalitarian theory, the aim of choice preservation is more important than the aim of luck elimination, and so he alleges that when the latter aim comes into conflict with the former aim then the latter will need to be sacrificed to ensure that people are not subordinated to one another as agents.[6]

I believe that Markovits' critique of Dworkin is spot on, but I also think that his own positive thesis — and hence his conclusion about how much redistribution there ought to be in an egalitarian society — is

[4] Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources', *Philosophy & Public Affairs*, vol. 10, no. 4 (1981), p.283.

[5] Daniel Markovits, 'How much redistribution should there be?', *Yale Law Journal*, vol. 112, no. 8 (2003), p.2291.

[6] Put another way, if some choice preservation were foregone to eliminate some of luck's effects, then on Markovits' account this would subordinate those agents whose choices had not been respected for the sake of those whose bad luck would have been eliminated, and since subordinating agents to one another is supposed to be a bad thing — not unlike slavery — Markovits therefore believes that we should forego such cases of luck elimination if this is what would be required to preserve choices. Markovits thus presents his 'equal-agent' egalitarian theory as an alternative to the more commonly encountered 'responsibility-tracking' egalitarian theories, such as for instance the theory developed and expounded by Ronald Dworkin.

flawed. Hence, this paper will begin in Section I by explaining how Dworkin uses the HIMAD and his TS argument to estimate the amount of redistribution that there ought to be in an egalitarian society — this section will be largely expository in content. Markovits' critique of Dworkin will then be outlined in Section II, as will be his own positive thesis. My critique of Markovits, and my own positive thesis, will then make a fleeting appearance in Section III. Finally, I will conclude by rejecting both Dworkin's and Markovits' estimates of the amount of redistribution that there ought to be in an egalitarian society, and by reaffirming the responsibility-tracking egalitarian claim that choice preservation and luck elimination are complementary and not competing egalitarian aims.

I. Dworkin's HIMAD and the TS argument

People have different talents, and talents fetch different incomes — typically, the talented fetch better incomes than the untalented. But income is a resource, and talents are at least partly a matter of luck, and so to the extent that our talents are a matter of luck, in determining our talents and hence our incomes luck can determine our resource allocation and thus create an uneven (i.e. an inegalitarian) playing field. To establish a more egalitarian playing field which is not so contaminated by the effects of brute luck, some resources could of course be taken from the fortunate (the talented) and given to the unfortunate (the untalented) — i.e. it is conceivable that some degree of resource redistribution could level this initially uneven playing field.[7]

[7] Will Kymlicka considers this suggestion, but he rejects it for two reasons. Firstly, since some undeserved disadvantages are uncompensable — for instance, '[n]o amount of money can enable the severely disadvantaged person to lead as good a life as other people' — Kymlicka argues that it would therefore be futile to even attempt to 'genuinely equalise' every part of people's circumstances. Secondly, since the attempt to put certain individuals (e.g. those with severe handicaps) in a position of genuine equality with the rest of society could conceivably erode away all of society's resources, Kymlicka also argues that if '[o]ur [initial] concern for people's circumstances [was] a concern to promote their ability to pursue their ends[, then] in trying to equalize the means we [should not] prevent anyone from achieving their ends, [because] then we [would] have failed' to promote that very aim which we had originally set out to promote. Nevertheless, given that

But exactly *how much* redistribution would be required to achieve this outcome?

On Dworkin's account, a plausible answer to this question is suggested when we consider how much insurance would be purchased by people behind something like Rawls' veil of ignorance, to protect themselves against the possibility that when the veil of ignorance is lifted they may turn out to be untalented and poor; however before moving on, it might perhaps be helpful to briefly explain how veils of ignorance and insurance policies are supposed to be relevant to the present discussion. The significance of the veil of ignorance in the present context is that within political philosophy the choices of those behind the veil of ignorance are often thought to be binding on everyone across the board — even on those who protest that they did not actually make those choices.[8] Hence, if people behind the veil of ignorance would indeed have made certain insurance purchase choices, then allegedly we too should endorse those choices. On the other hand, the significance of insurance in this context is twofold. Firstly, insurers collect premiums from relatively large groups of people, but only a few (the unlucky ones) ever collect anything from the insurer, and so insurance functions as a redistributive device which takes resources from the fortunate and gives them to the unfortunate. Secondly, when a loss materialises from a risk for which we chose to not insure against, since that loss' uncompensated burden to us will have been a consequence of our choice to not insure against it and not a consequence of brute unadulterated bad luck, that loss' burden will therefore not need to be rectified through egalitarian redistribution; its uncompensated burden will have been a consequence of *our choice to not insure against it* — an option that was open to us but which we chose to ignore — and so in

Dworkin's solution does not attempt to eliminate *all* sources of inequality, but rather that (as Kymlicka puts it) he 'provides [a] middle ground between ignoring unequal natural assets and trying in vain to equalize circumstances' — i.e. he only attempts to *reduce* but not to eliminate inequalities — I will henceforth ignore these objections since they do not undermine Dworkin's position. Will Kymlicka, *Contemporary Political Philosophy – An Introduction* (Oxford: Oxford University Press, 1990), pp.78-9.

[8] Please refer to the first half of Section II of the present paper for an elaboration of this point.

this manner insurance turns 'brute luck' into 'option luck', or simply it turns luck into choice.[9] Thus, the significance of insurance in this context is that it functions as a voluntary redistributive device,[10] and so however much redistribution would have occurred as a consequence of the insurance purchase choices of those behind the veil of ignorance, would also be the amount of redistribution that an egalitarian society could engage in while still respecting their choices. When the significance of insurance is combined with the prior claim that the choices of people behind the veil of ignorance apply to everyone across the board (including us), the outcome is that *whatever amount of redistribution would occur as a consequence of insurance purchase choices of those behind the veil of ignorance, is also how much redistribution everyone (including us) should be prepared to endorse.*

To see how Dworkin's methodology for estimating the amount of redistribution there ought to be might work in practice, imagine that we are all indeed behind a veil of ignorance. But unlike Rawls' veil of ignorance, we retain knowledge of our talents and of the distribution of incomes in society, though we still know nothing about how much our talents will fetch.[11] Now also suppose that behind this veil of ignorance insurance is offered to us — insurance, that is, against the possibility of it turning out that our talents will not fetch as high an income as we would have liked them to fetch. So, for instance, if while behind this veil of ignorance I insured myself for a $15,000 annual income, then in the event of it turning out that my actual income was lower once the curtains of the veil of ignorance were lifted, the insurance provider would make up the shortfall. On the other hand, if my income turned out to be equal

[9] Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources', *Philosophy & Public Affairs*, vol. 10, no. 4 (1981), pp 292-3.

[10] Voluntary, because it is driven by people's *choices*; redistributive, because this is a *function* of insurance.

[11] Will Kymlicka suggests that Dworkin's veil of ignorance goes a long way to overcoming the sorts of problems that Rawls' veil of ignorance faced — especially, because Dworkin's decision procedure better approximates the ideals of 'ambition-sensitivity' and 'endowment-insensitivity.' Kymlicka's general comments suggest that he approves of Dworkin's position. Will Kymlicka, *Contemporary Political Philosophy – An Introduction* (Oxford: Oxford University Press, 1990), pp.76-85.

to or greater than this, then I would forfeit any premiums that I had paid and I would collect nothing from the insurer — this is after all how the insurer acquires the funds to make up the unlucky people's income shortfalls. Two final details concerning how the hypothetical insurance market would function are firstly, that everyone's insurance premiums would be paid for out of their actual (i.e. post veil of ignorance) earnings, and secondly, that premium levels would be calculated based on each person's *potential* (or maximum) earning capacity in the real (i.e. post veil of ignorance) world, and not on their actual earnings. Given this set-up, the question that is now posed is just how much insurance we would purchase and why we would purchase that much insurance?[12]

Presumably, agents behind Dworkin's veil of ignorance would purchase some insurance. But might some people, for instance, purchase enough insurance to cover themselves against the possibility of turning out to be less than millionaires? If so then, Dworkin admits, the HIMAD would entail that 'radical' amounts of redistribution would be required to create a level egalitarian playing field.[13] Dworkin ponders this question, but on reflection he argues that no one would actually choose to purchase that much insurance because this would expose them to the risk of TS — a fate much worse than having a more modest income. Dworkin argues that:

> [s]ince (unlike lottery tickets generally) the chances of 'winning' are extremely high — very few [people] will turn out to have that maximum earning power — the cost of the premium will be extremely high as well. It will approach the value of the projected return if the risk eventuates. So someone who buys this insurance faces an extremely high chance of gaining very little. Suppose he loses, however; suppose he is one of those who does have the maximum earning power. He is now in a much worse position than if he had never insured, because he must now work at close to his top earning capacity just to pay the high premium for his insurance on which he collected nothing — just, that is, to break even. He will be a slave to his maximum earning power.[14]

Thus, on Dworkin's account, the untalented would stand to gain very little if anything from insuring at such a high income level, and the talented would be enslaved by their superior talents.[15] Insuring at such a

[12] Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources', *Philosophy & Public Affairs*, vol. 10, no. 4 (1981), pp.314-23. Also see note 25 below, which works through some concrete examples to demonstrate what various insurance purchase choices might entail for the insurer.

[13] Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources', *Philosophy & Public Affairs*, vol. 10, no. 4 (1981), pp.319.

[14] Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources', *Philosophy & Public Affairs*, vol. 10, no. 4 (1981), pp.319-20.

[15] Dworkin's argument is confusing at this point in at least three ways. Firstly, it is puzzling why Dworkin appears to think that *only the talented* would be enslaved in this scenario. On his own account, talent slavery is meant to be a consequence of insuring oneself against the possibility that one may turn out to be less than wealthy, and the reason why this insurance purchase choice is meant to lead to talent slavery is because anyone who insured themselves at such a high income level would end up paying exorbitant insurance premiums which would then force one to have to work doggedly hard all the time just to afford those premiums. Now admittedly, the untalented would pay lower premiums than the talented since their earning capacity would after all be lower than the talented's earning capacity. However, given that the untalented would also earn lower incomes than the talented, their premiums, despite being lower, would still be just as unaffordable to them as the talented's premiums would be to the talented. Consequently, it would seem more appropriate to say that *both* the talented and the untalented would be equally enslaved by such an insurance purchase choice (Kymlicka's interpretation of Dworkin on this point seems to be the same as my own interpretation — see note 32 below). Secondly, on one reading of Dworkin's quoted passage, 'radical' amounts of redistribution are presented as a cause of talent slavery. However, the only way that I can see in which radical amounts of redistribution could lead to talent slavery, would be if (as Kymlicka suggests in note 7 above) caring for the severely disabled and the terribly misfortunate indeed created a huge drain on society's resources — a drain that would be disproportionately paid for by the talented. However this is a completely separate point, and so it should not be conflated (as Dworkin appears to have done) with the present point about the source of talent slavery. Finally, as Markovits rightfully points out (see his comments on this matter half way through section II of the present paper), Dworkin's argument is also deeply problematic because his assumption that any insurer could even *offer* to insure people for more than an average or mean income presumes what is essentially an actuarial impossibility. However, given that this objection to Dworkin will be discussed in the following two sections, and at length in note 25 below, I will say nothing more about it here.

high income level 'would be a very poor wager indeed', which is why Dworkin concludes that people behind his veil of ignorance would in fact choose to insure themselves at a much lower income level.[16]

So, in summary, the HIMAD is a model for reasoning about how much redistribution there ought to be in a society in order to create a level egalitarian playing field, and the threat of TS is one of the reasons that is plugged into this model to bid down conclusions regarding the precise amount of such redistribution that we would voluntarily endorse. On Dworkin's account, the amount of redistribution that is required to get a level egalitarian playing field is the same as the amount of redistribution that would occur as a consequence of the insurance purchase choices made by those behind the veil of ignorance, because that is the amount of redistribution that everyone — i.e. both the talented and the untalented — would have endorsed if they had been contracting with one another from a position of equality,[17] and any other amount of redistribution (either more or less) would violate rather than preserve our choices regarding protection from the effects of brute luck.[18] Hence, if Dworkin is right that people behind his veil of ignorance would only purchase sufficient insurance to reduce but not to completely eliminate the effects of luck, then the effects of any residue uninsured-against luck could be left unrectified without casting into doubt the sincerity of that society's commitment to egalitarian ideals.

II. Markovits' critique of Dworkin and his own positive arguments

Rawls believed that whatever choices would be made by people behind a veil of ignorance, concerning the principles of justice for the governance

[16] Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources', *Philosophy & Public Affairs*, vol. 10, no. 4 (1981), p.319 & 322.

[17] The first half of the following section of this paper, and especially the last sentence of the third paragraph of that section, elaborates on this point.

[18] Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources', *Philosophy & Public Affairs*, vol. 10, no. 4 (1981), pp.293-304. Will Kymlicka, *Contemporary Political Philosophy – An Introduction* (Oxford: Oxford University Press, 1990), pp.79-80.

of our society's institutions, would also be binding on the rest of us. Kymlicka explains Rawls' reasoning here by arguing that Rawls' veil of ignorance is designed to:

> embody ... a certain conception of equality, and a way of extracting the consequences of that conception for the just regulation of social institutions. By removing sources of bias and requiring unanimity, Rawls hopes to find a solution that is acceptable to everyone from a position of equality — i.e. [a solution] that respects each person's claim to be treated as a free and equal being.[19]

However, in removing the differences that normally distinguish people from one another, everyone behind Rawls' veil of ignorance becomes just another rational 'cookie-cutter' agent. Every person behind Rawls' veil of ignorance would make the very same choices as every other person regarding the subject matter to which the thought experiment pertains, precisely because their memory has been intentionally clouded to ensure that knowledge of their contingent circumstances and constitution would not bias their choices as regards that subject matter. Rawls suggests that such temporary amnesia 'ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances'[20], however this amnesia *also* ensures that whatever choices are made by just one such cookie-cutter person regarding the respective subject matter will also be applicable to them all and allegedly to us as well, because those will be the choices that anyone would have made for themselves had they been in the same epistemic and cognitive position — i.e. had they been in a position of equality.

Although I will not labour this point here, people behind Dworkin's veil of ignorance are not really that different from people behind Rawls' veil of ignorance in this regard. Admittedly, Dworkin's cookie-cutter people retain knowledge of their talents and of the distribution of incomes in society, however this knowledge is only intended to give them a sense of their individuality so that they can formulate their own projects, preferences and ambitions, but it is certainly not something that

[19] Will Kymlicka, *Contemporary Political Philosophy – An Introduction* (Oxford: Oxford University Press, 1990), p.63.

[20] John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1973), p.12.

can give them any biased insight into whether their talents will be prized and rewarded by society in the form of a higher income.[21] So the reason why each one of Dworkin's cookie-cutter people would also make the same insurance purchase choices as the rest of them is because, as Markovits points out, their choices would be based on considerations:

> that [are] equally accessible to all from the *ex ante* point of view — a point of view adopted before people know [the benefits that will accrue from] their own [actual] talents and [hence a point of view] that the talented and untalented can ... share.[22]

None of them will have any special reason to suppose that their talents will be more valuable in the market place than others' talents, and so income-related knowledge will never be a reason for someone's choice to develop one talent over another. Consequently, Dworkin's cookie-cutter people will all have very similar reasons for fearing that their own talents might not fetch sufficient income in the market place to enable them to successfully realise their ambitions, and so they should also all have very similar reasons for insuring themselves at the same income level.

But then, Markovits also points out that since insurance is just a redistributive device,[23] the *most* insurance that our rational cookie-cutter people could ever really expect to purchase given that they would all

[21] Since Dworkin wanted the decisions of his cookie-cutter people to be 'ambition sensitive' but 'endowment insensitive' (see note 11 above), it had better be the case that in allowing them some knowledge of their talents they would not also find out just how much income those talents would fetch in the market place, since that could bias their decisions by making them sensitive to their endowment after all.

[22] Daniel Markovits, 'How much redistribution should there be?', *Yale Law Journal*, vol. 112, no. 8 (2003), p.2328.

[23] I briefly comment on this function of insurance in the second paragraph of the previous section of the present paper. The first two examples presented in note 25 below also demonstrate how various insurance purchase choices would result in different levels of redistribution.

purchase the same amount of insurance,[24] would be to cover themselves against the risk of falling below an average or mean income, because the most that can come out of an insurance fund is how much was originally put into it by those purchasing the premiums.[25] Markovits points out that

[24] Though of course they would *not* all pay the same premiums for this same level of insurance, since as I stated earlier, insurance premiums depend in part on one's actual earning capacity (as well as on the level at which one wants to insure oneself), and this would of course differ from person to person.

[25] An example may help elucidate this point. Imagine that five cookie-cutter people — call them *A*, *B*, *C*, *D* and *E* — are behind Dworkin's veil of ignorance, and each earns the following respective annual income in the real world (i.e. beyond the veil of ignorance, though naturally nobody knows their actual income, since they are after all currently behind the veil): *A* earns $5,000, *B* earns $10,000, *C* earns $15,000, *D* earns $20,000 and *E* earns $25,000. If our cookie-cutter people chose to insure themselves for an average income, given the goal of leaving everyone at the average annual income level — i.e. in the present example this happens to be *C*'s income level — the insurer would have to compensate *A* for $10,000 and *B* for $5,000, which means that they would have to raise at least $15,000 of compensation funds. Since it would be self-defeating to attempt to raise these funds by taking anything away from A, B or C (it would only have to be refunded to them later on, to get them back up again to the mean income level), and taking anything more than $5,000 from *D* and $10,000 from *E* would reduce their income below the mean income level, the only way of achieving this goal would be to collect precisely $5,000 from *D* and $10,000 from *E*. This strategy would involve engaging in what Dworkin previously referred to as 'radical' redistribution, and so the result of radical redistribution is that everyone would end up receiving an average or mean annual income — in this case everyone would get $15,000 per annum. On the other hand, (this is the second example) if our cookie-cutter people had instead chosen to insure themselves for an income of $10,000 per annum, then the total amount that the insurer would now need to raise would be $5,000 (to compensate *A*), and this could be raised in a variety of ways from *B*, *C*, *D* and *E* (the precise details of how much each of them should contribute in order to satisfy egalitarian requirements are currently not important). The crucial question though is whether the insurer could have raised sufficient funds to meet their obligations if our cookie-cutter people had instead chosen (here comes the third example) to insure themselves for an annual income of $20,000, and the present point is simply that the insurer could not *offer* this level of cover, because to ensure that everyone ended up having an annual income of at least $20,000, they would have to raise $30,000 of compensation funds ($15,000 for *A*, $10,000 for *B* and $5,000 for *C*). But since it would be self-defeating to attempt to raise any of these funds by taking anything from *A*, *B*, *C*, or *D* (since this would only have to be refunded to them

'insurance against falling below the mean talent level is the very most insurance [that] anyone could ever ... buy', and he observes that:

> Dworkin's emphasis on the several reasons for which policies securing those above-average incomes would not be *bought* [— e.g. the specter of TS being one such reason —] obscures the more fundamental fact that they could not possibly be *offered* by any insurer.[26]

Hence, it would appear that Dworkin was wrong to suppose that the starting position from which our cookie-cutter people would subsequently be bid downwards (in their insurance purchase choices) by such considerations as the threat of talent slavery would be a wealthy person's income, and this in turn also casts Dworkin's subsequent conclusions regarding how much redistribution there ought to be into doubt.[27]

later on, to get them back up again to this income level), and the most that E can provide is $5,000, the insurer would therefore be unable to raise sufficient funds to meet their obligations if they offered this level of cover. The insurer could not in fact even *offer* to insure people for anything higher than the average or mean income level, which is precisely why towards the end of note 15 above I said that Dworkin's HIMAD presumes what is essentially an actuarial impossibility.

[26] Daniel Markovits, 'How much redistribution should there be?', *Yale Law Journal*, vol. 112, no. 8 (2003), p.2307, note 43. Also see the previous and following notes.

[27] Now, as a matter of fact, the situation for the insurer is even more grim than what I've made out in the simple calculations above in note 25, since those calculations presume that the insurer would have no operational costs of their own (which is obviously false, since insurers also need an income to support themselves). But since operational costs would act as a tax on the total amount of funds that are available to compensate those who fall below the insured level of income, the highest level of cover that the insurer could actually offer to anyone would in fact be somewhat lower than the average or mean income level. However this last point is largely a side issue, since Markovits' main point at this juncture is simply that our cookie-cutter people could not expect to insure themselves for anything higher than the average or mean income, and so to whatever extent Dworkin's estimates (of the amount of redistribution that would be endorsed by people behind his veil of ignorance) were founded on the assumption that it would even be possible to purchase insurance above the mean income level, to that extent his estimates should be re-assessed.

Having shed Dworkin's estimates about how much redistribution would be required to establish a level egalitarian playing field into doubt, and with his new improved understanding of how the hypothetical insurance market would really function, Markovits then goes on to argue that:

> insurance up to the mean wage level [will be] affordable only if the policy holder always works up to her maximum earning potential [because this is after all the income level that insurance premium calculations would be based on,] and always pays any earnings above the mean to the insurance company as a premium. But someone in this condition is, as Dworkin observes, a slave to her talents. [T]o maintain the mean wage level while also paying the premiums on her insurance policy (which depend on her earnings *potential* rather than her *actual* earnings), she must always work flat out and only at that job which, given her talents, pays most. ... And, as Dworkin points out, no reasonable person would accept the risk of such slavery in exchange for insurance up to the mean wage level when insurance up to a lower wage level can be obtained without risking talent slavery. Buying insurance up to the mean ... exchanges a large chance of a moderate gain ... for a large chance of a great loss ... which is a bad exchange on any accounting.[28]

Since premiums would be paid for out of post veil of ignorance earnings, and both earnings and premiums would co-vary with talent level,[29] Markovits therefore believes that even the choice to purchase average-income insurance would commit those who turn out to be talented to being enslaved by huge and terribly burdensome insurance premium debts. Since the most talented's premiums would be higher than anyone else's premiums (because actual premiums co-vary with one's potential earning capacity and not with one's actual earnings), by insuring themselves for an average income those who turn out to be talented would have committed themselves to forever paying these terribly high premiums, and hence they would be forced to work doggedly hard just to afford those premiums, and should they ever slack off or take a break

[28] Daniel Markovits, 'How much redistribution should there be?', *Yale Law Journal*, vol. 112, no. 8 (2003), p.2308-9 (emphasis added).

[29] This is originally stipulated in the last two sentences of the third paragraph in Section I above.

then this would reduce their take-home wages to below the average income. So, in summary, Markovits concludes that:

> the decision to not insure more heavily ... that leaves involuntary disadvantage in place ... may be naturally recast in terms of [the] more general intuition ... that the additional redistribution needed to *eliminate* involuntary disadvantage [rather than just reducing it] would encroach on the integrity of those who had to pay for it. The additional redistribution [that elimination entails] would require the advantaged to place not only their good fortunes but also their very selves ... at the disposal of the community. And this is a step people are unwilling to take, not even in the name of correcting for morally arbitrary disadvantage.[30]

This is how Markovits uses the TS argument to bid down the cookie-cutter people in how much insurance they would purchase, and hence in how much egalitarian redistribution they would endorse. Markovits therefore concludes that the aim of luck elimination can indeed be sacrificed whenever it conflicts with the aim of choice preservation, because on his account this is required to ensure that we do not subordinate people to one another as agents.

III. My own critique of Markovits and related positive arguments

Let me begin my critique of Markovits' positive thesis[31] by noting a crucial difference between his own and Dworkin's version of the TS argument. In a nutshell, the difference is that while *only the talented* would allegedly be enslaved by TS on Dworkin's account,[32] on

[30] Daniel Markovits, 'How much redistribution should there be?', *Yale Law Journal*, vol. 112, no. 8 (2003), p.2323 (emphasis added).

[31] Since I agree with Markovits' critique of Dworkin, my own critique of Markovits (which is presented in this section of the present paper) will therefore be directed at the positive claims which he makes in his paper.

[32] Kymlicka's interpretation concurs with my own understanding of who would be subject to the threat of TS on Dworkin's account. Will Kymlicka, *Contemporary Political Philosophy – An Introduction* (Oxford: Oxford University Press, 1990), pp.80-1.

Markovits' account *both the talented and the untalented* would suffer this fate. Markovits does not explicitly commit himself to this position,[33] but this is what the most charitable interpretation of his position would seem to suggest. If premiums would be calculated on the basis of people's *potential earning capacity* and not on the basis of (e.g.) their actual earnings, then since the untalented must surely also have some potential earning capacity (this is reached when they put in a maximum amount of effort into their work), their premiums would therefore also be calculated with reference to it, and working to capacity to meet the repayments on their premiums would surely be no less taxing for the untalented than it would be for the talented. So the reason why everyone would be enslaved by TS on Markovits' account is because if insurance premiums were indeed calculated on the basis of people's potential or maximum earning capacity, then it would be equally burdensome for both the talented and the untalented to always have to work at their maximum level of effort to pay off their hefty insurance premium debts.[34]

But given that everyone would be enslaved by their talents on Markovits' account, I am now tempted to ask what reasons Markovits might have had for insisting that people's insurance premiums should be calculated on the basis of their potential or *maximum* earning capacity rather than (e.g.) on the basis of their *actual* earnings? Is it perhaps that an average income could not be assured by the insurer unless everyone worked to full capacity? This suggestion seems so patently false that it hardly even seems worth being taken seriously — whatever level of effort everyone puts in, as long as they do all work at that level of effort,

[33] And indeed, his preoccupation with explaining why the talented would be enslaved if they chose to insure themselves even at the average income level, may misleadingly suggest that he would endorse the same position as Dworkin does.

[34] It seems more accurate to speak of insurance premium *debts*, rather than just of insurance premiums, because it is really the debt to the insurer that later enslaves one to having to work doggedly hard all of the time. After all, although insurance contracts are signed while one is still behind the veil of ignorance, one does not begin to pay one's insurance premiums until after one comes out from behind the veil. Also note that if my charitable interpretation of Markovits is incorrect, then this will only make his position less coherent — his position will become as confused as Dworkin's position (note 15, above, explains why I think that Dworkin's position is confused).

there will still surely be *something* that can be referred to as 'the average income', and so everyone need not work to full capacity just to ensure that people can insure themselves at *an* average income level. In fact, even if everyone did not put in the same level of effort, there would still continue to be such a thing as an average income, just as right now there is still something that can be referred to as an average income in our own society. Admittedly, if everyone received the same income despite differences in how much effort each person put in, then this would subordinate the hard workers to the slackers since only the former's efforts would drive everyone's incomes upwards. However this is not an objection to my critique of Markovits because my present point is simply that this — i.e. the possibility that there might be no average income unless everyone constantly works at their *maximum* level of effort — can not be the reason why Markovits insists that insurance premiums should be calculated on the basis of people's potential or maximum earning capacity.

To be fair, there are indeed a number of good practical reasons to expect everyone to put in at least a baseline level of effort if they wish to qualify for receipt of an average income. For instance, as I just hinted in the previous paragraph, we do not want the presence of insurance to create a 'moral hazard' — to encourage some people to slack off and to be parasitic on others' hard work — and so we may indeed set *some* level of effort as the norm which everyone who wants to get at least an average income is expected to satisfy. Furthermore, it might even be reasonable to set this norm slightly higher than what many people would otherwise have preferred, if we think that the following (or perhaps some other) aims would justify us doing this: i. to encourage a healthy work ethic; ii. to build a prosperous and enriched community; or even, iii. to build up savings in the state's coffers for a rainy day. So admittedly, lots of potentially good practical reasons do indeed exist for setting premiums at a slightly higher level — i.e. at a level commensurate with everyone putting in a slightly higher level of effort than what they might otherwise have preferred — however none of these is a reason to set the insurance premiums quite as high as Markovits would have us do!

Whatever reasons Markovits may have had for supposing that insurance premiums should be calculated on the basis of people's *maximum* earning capacity, those reasons are certainly not evident to me.

Markovits cites Dworkin twice[35] in apparent belief that *he* will explain why this should be the case, however Dworkin for his part says very little about this topic.[36] Furthermore, given the significant differences between Dworkin's and Markovits' positions — i.e. for Dworkin TS was a consequence of people insuring themselves at a high income level and it was only supposed to affect those who turned out to indeed be that talented, whereas for Markovits TS was a consequence of everyone insuring themselves at an average or mean income level and it was supposed to affect everyone and not just the talented — it is surely reasonable to expect Markovits to have provided his own reasons to support this strange supposition. But perhaps most importantly, given that the cookie-cutter people behind Dworkin's veil of ignorance are supposed to be rational, it is surprising that Markovits did not think that they would also have realised that it was surely better for them to use some *other* level of effort as the baseline for calculating insurance premium debts, rather than mutually consigning themselves to a life of slavery by expecting everyone to pay insurance premiums commensurate with everyone expending the maximum amount of effort in their jobs. Hence, in the absence of any obvious (or even semi-obvious) reasons for supposing that insurance premium debts should be calculated on the basis of people's *maximum* earning capacity — and in fact, given the several reasons mentioned above for supposing that the basis of such calculations should be an income commensurate with everyone expending a significantly lower level of effort — I will conclude that this is an unwarranted assumption.

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[35] In the first of Markovits' two passages which are quoted in the previous section.

[36] That is, apart from his general comments about the already mentioned pragmatic concerns, however on Dworkin's account these were not meant to explain why this effort level should be used as the basis for calculating insurance premiums debts, but rather they were intended as *independent* considerations. Admittedly, Dworkin also raises the topic of people being compelled to work to full capacity at an earlier stage in his paper. Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources', *Philosophy & Public Affairs*, vol. 10, no. 4 (1981), pp.311-2. However, it is probably just as well that Markovits did not cite Dworkin on that occasion because the threat of TS was raised there in the context of discussing a completely different argument — an argument which concerned the *auctioning* of talents to the highest bidder rather than the topic of *insurance* — and in any case Dworkin subsequently dismissed that line of argument.

As the reader may now suspect, my own solution to the TS problem is very simple. To avoid TS, our rational cookie-cutter people must simply agree to use something that might be referred to as a 'fair dinkum effort average income', and the commensurate fair dinkum level of effort, as the basis for calculating insurance premium debts. That income could be had by all those people who put in a fair dinkum effort at whatever talent level they happened to find themselves at, and TS would not come about in this scenario since no one would be expected to put in more than a fair dinkum effort into their jobs. Perhaps if our cookie-cutter people were all work-shy, then they could even agree to calculate insurance premium debts by reference to a 'slack effort average income', which would be received by all those who would be prepared to put in only a slack effort. Responsibility could be effectively tracked in either of these scenarios since those who put in a greater (or a lesser) level of effort could still be entitled to a proportionately greater (or lesser) level of income. But most importantly, TS would not occur since nobody would ever be expected to work any harder than at the agreed level of effort.[37]

We *can* insure ourselves for an average income without enslaving ourselves to our talents, but to do so we must refrain from calculating

[37]The solution to the TS problem that I endorse here is not dissimilar to Roemer's effort-based responsibility-tracking egalitarianism. John E. Roemer, 'Three Egalitarian Views and American Law', *Law and Philosophy*, vol. 20 (2001), p.433. However, Hurley has criticized Roemer's account on grounds that in order to determine what someone is entitled to, we need to consider a lot more than just the level of effort which that agent has expended — specifically, she argues that facts about agents' responsibility (where my responsibility for an outcome is seen as being determined by the level of effort which I expended while trying to achieve that outcome) can not in themselves justify treating people equally, because implicit in our choice to treat people equally will also be judgements concerning the substantive value of the ends pursued by different actors. Susan Hurley, 'Roemer on Responsibility and Equality', *Law and Philosophy*, vol. 21, no. 1 (2002), p.39. A much more basic objection to my proposed solution might be that it is not clear precisely how one might measure the amount of effort that is expended by somebody else. Hence, if my own solution to the TS problem were to be fully developed — and putting aside my previously-stated reservations (at note 1 above) about whether tracking responsibility is even a worthy cause — it would therefore have to find a way of accommodating these criticisms.

premium debts by reference to maximum potential earning capacity.[38] Instead, premium debts should be calculated by reference to an average income that only requires a reasonable level of effort to be put in by everyone. Whatever level of effort we use to calculate our premiums, as long as everyone works at that level of effort then there will be such a thing as an average income. To avoid TS we must not set the level of effort too high, because when this is done it should come as no surprise that TS will ensue, since that is after all what we would have chosen — i.e. to work hard and to be rewarded with hard-workers' average incomes. This means that we can safely reject Markovits' claim that TS would be a consequence of insuring ourselves for even an average income, because this would only occur if we made the terribly silly mutual pact with one another to have such unreasonably high expectations of each other.

Markovits believed that his argument showed that we would have to sacrifice at least some part of the aim of luck elimination to ensure that the aim of choice preservation was fully achieved. In failing to establish that TS would result from insuring ourselves at an average income level, Markovits failed to demonstrate that we would after all choose to leave some involuntary disadvantage — some brute luck — in place, and hence his claim that the aim of luck elimination can be sacrificed to get more choice preservation can also be rejected. As I said at the start of this paper, choice preservation and luck elimination are not competing but complementary aims, and the latter should never be sacrificed for the sake of the former because the only effects of choice which are worthy of being preserved are those where the choices were not contaminated by the effects of brute luck.

Conclusion

Three conclusions can be taken away from this brief discussion of Dworkin's and Markovits' papers. Firstly, Dworkin's estimates of how much redistribution there ought to be to establish a level egalitarian playing field are not warranted, because his argument rested on an

[38]Because this only forces society to offer high-effort average incomes and to then finance them by levying high-effort premium debts onto everyone.

actuarial impossibility.[39] But secondly, Markovits' own estimates should also be scrutinised (if not rejected) because they rest upon the false assumption that the threat of TS persists even under the patched-up version of the HIMAD, when people would only choose to insure themselves for an average income. Finally, since TS would not necessarily ensue if we aimed to provide everyone with a fair dinkum effort average income, Markovits has therefore failed to establish that the dual egalitarian aims of luck eradication and choice preservation compete with one another, and so he is not justified in claiming that Dworkin's (and others') responsibility-tracking egalitarian theories should be abandoned in preference for his own equal-agent egalitarian theory.

But where does this leave me? Do I believe that slavery (as opposed to TS) could ever come about in a society that engaged in egalitarian redistribution aimed at eliminating the effects of luck and preserving the effects of choice? Yes, I think it is conceivable that slavery of the able-bodied could still result if (e.g.) caring for the unfortunate blighted souls in our society drained a huge proportion of our society's resources.[40] If the burden that caring for the grossly untalented and the grossly misfortunate were sufficiently high, then that could indeed result in some slavery. However we — the ones who are not grossly untalented or grossly misfortunate — could have no legitimate grounds for complaint about this if this were the outcome of our own rational choice to purchase average income insurance, and hence to engage in maximal or radical resource redistribution. More importantly though, the slavery would not have been merely a consequence (as Markovits claims) of insuring ourselves at an average income level, but rather it would have been a result of the fact that the grossly untalented and the grossly misfortunate in our society turned out to be particularly badly off. In any case, although it is indeed conceivable that slavery might still result,

[39] Note though that I do not thereby also commit myself to the claim that Dworkin's conclusions are incorrect — for all I know they might indeed be correct, however my point is simply that Dworkin's arguments do not establish that this is so.

[40] In other words, TS could still come about as a consequence of the sorts of considerations that Kymlicka spells out above at note 7.

given how prosperous our society really is, as long as everyone contributes their share I suspect that caring for the very needy and for the terribly unfortunate will not enslave us to any real extent.

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