

## Equality, Fairness and Agreements

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In this paper I will defend an egalitarian account of fair agreements that sheds some light on the moral basis of fairness and the obligation of agreements. I will argue for a democratic interpretation of the ideal of fairness of agreement making and a democratic basis for the obligation of keeping agreements. The democratic interpretation of fairness in agreement making asserts that one of the key moral desiderata in the ideal of agreement making is that persons participate as equals in the formation of the informal social world they live in. Agreements with others are the principal mechanism by which we shape the social world we live in beyond the formal processes of collective decision-making. The ideal of fairness gives persons, I will argue, an equal say in the formation of this world analogous to the equal say that is afforded in the democratic account of collective decision-making. The democratic interpretation of fairness in agreement making also takes the best elements from the other accounts of fairness and leaves behind the counter-intuitive elements of those accounts. With the common law account of fairness, which states that an agreement is fair if it is not coerced or based on deception,<sup>1</sup> it gives each person a voice in how to construct the social world they live in and it leaves to each party how to conceive of what the content of a fair agreement is to be. It respects the pluralism of value that we have come to experience and value in modern societies. With the natural law and Marxist accounts of fairness, which emphasize the importance of equality in the things exchanged, it articulates the structure of agreement making in a way that permits moral criticism of agreements beyond the common law standards of avoidance of force and fraud.<sup>2</sup>

From the democratic interpretation of the fairness of agreements a new and distinctive aspect of the value of equality of opportunity emerges. I contend that equality of opportunity is among the basic procedural elements of fair agreements. The argument presented implies that one basic value behind equality of opportunity is that such equality gives persons something like an equal say in the formation of the social world they live in. Inequality of opportunity condemns those with lesser opportunity to a subordinate role in the formation of the social world they live in. This is an additional and highly intuitive ground for valuing equality of opportunity in addition to the values of self-

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<sup>1</sup> See Rick Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) for an exposition of the classical common law account of contracts and fairness.

<sup>2</sup> See Thomas Aquinas, *On Law, Morality and Politics* ed. Richard J. Regan and William P. Baumgarth (Indianapolis: Hackett, 2003) ST II-II Q. 77, Art 1 for the principle of equality in exchange. And see Karl Marx, from *Capital: A Critique of Political Economy in The History of Economic Thought: A Reader* ed. Steven Medema and Warren Samuels (London: Routledge, 2003), p. 392 for an account of unequal exchange between capitalist and worker based on the labor theory of value.

realization and efficient use of talents.<sup>3</sup> The democratic understanding of the value of equality of opportunity also helps us think through some important problems in the idea of equality of opportunity, such as why different talents may legitimately influence the distribution of jobs. More of these points later.

The democratic conception laid out here does not give us a complete account of fairness in agreement making. First of all the democratic account is not fully specified as is necessary in a paper of this length. Second, there are other elements of fairness that are not included in the distinctively democratic approach assayed here. One important element not discussed is the case of fairness in exchange between two participants in a division of labor, between whom there are significant asymmetries of information and power and in which one holds a temporary monopoly. This is an important type of case in which unfairness can play a large role. The general approach I offer here, according to which agreements are valid and generate obligations to the extent that the underlying practice is strongly morally justified can help us think through these issues but I do not do that here.

I will lay out this idea in a number of stages. First, I will develop a conception of agreements and then a notion of the validity and obligation of agreements. Then I will introduce the idea of the democratic conception of fair agreements. This will have a number of components both normative and structural. I will articulate the ideal of fair agreement making. I will explain in what sense we can speak of agreements as having involved an equal say in their formation. I will do this for the case of an agreement as if it were entirely isolated. Then we will open up the idea to include a sequence of agreements and then the whole social world that is created by all the agreements people enter into. This will allow us to think through the question of the external effects of agreements.

### *Agreements*

Entering into agreements and refusing to enter into agreements are parts of the life-blood of modern societies. Agreements between workers and employers, between individuals for services and consumption goods, between individuals and organizations for financial services and between individuals in the creation of voluntary associations constitute much of the basis of economic and associative activity among persons. These agreements are also a significant part of the basis of the well-being of each person who enters into them. The cumulative effects of the agreements and the activities they require individuals to perform are a significant factor in shaping the social world each person lives in. Though moral and political philosophy have devoted a great deal of time to understanding the nature and basis of collective decision making in society, the fairness of decentralized processes of agreement making and the obligations they create have received significantly less attention from philosophers of late. Here I want to sketch out an account of agreements, when they are morally valid and when they are fair.

The content of an agreement, as I shall understand it here, is a collective plan of action among two or more parties, which each party has intentionally participated in

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<sup>3</sup> See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 84 for the idea that equality of opportunity advances the good of self-realization in each person.

shaping, that effects an artificial arrangement of rights (including all the Hohfeldian elements) and duties among them for whatever purposes the parties have. Agreements are made with the intention of binding the parties to perform their various parts of the plan.

We must distinguish agreements of this sort from agreement in the sense of epistemic accord. And we must also distinguish agreement in this sense from mere coordination or convention that may or may not have come about as the intended product of the parties. Coordination may occur among two or more persons without anyone having decided in favor of the coordination. An agreement involves the parties intending to shape the set of rights and duties they are subjected to together and agreements are the intended product of some kind of negotiation among the parties each having an eye to structuring the overall plan to suit his or her purposes as well as possible.

Each must decide in favor of the arrangement of the rights and duties in order to be party to the agreement. In this sense, the agreement is a kind of collective action among the parties. It must be voluntary for each party otherwise it cannot be an agreement at all.

The purposes that are served by such rearrangements are what we might call the material aspect of the agreement. I agree to buy your car. This involves an arrangement of rights and duties but it is done with the purpose of exchanging money for a car. The purposes need not be self-interested though probably the usual case is one in which the parties engage in the agreement for at least partial reasons.

The paradigm case of an agreement is a contract. The contents of contracts are usually fully spelled out plans for the parties for the purpose of achieving their various aims. I think of promises as having this character as well. Promises only bind when they have been accepted by the promisee. And though promises bind the promisor primarily they usually also bind the promisee to certain actions as well. If I promise to pick you up at the airport and you accept my promise, then you have a duty to be there when I said I would pick you up.<sup>4</sup> Promise and acceptance are made with the intention of binding the parties to their various assigned parts in the plan.

The carrying out of the plans we agree to is the way in which we shape the world we live in to suit our purposes. We can only carry out these plans with the cooperation of others who participate in creating the plan and we depend on the assurances of others that they will do their part in the carrying out of the plan just as they depend on our assurances to them.<sup>5</sup>

One way to conceive of agreements is as ways of merging plans among persons. Each person lives by constructing plans for how to proceed and partially living up to

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<sup>4</sup> See Margaret Gilbert, "Three Dogmas about Promising," in *Promises and Agreements: Philosophical Essays* ed. Hanoch Scheinman, for the importance of thinking of promises and agreements as plans for collective action and for the importance of the duty of the promisee to do her part in realizing the plan of the promise.

<sup>5</sup> See T. M. Scanlon, *What We Owe to Each Other* (Cambridge: Harvard University Press, 1998) chap. 7 for the importance of assurance in the making of agreements. Part of the point of agreements is to give assurance, though I do not agree that the obligation of agreements is grounded in assurance. The notoriously unreliable promiser fails to assure us (try as he might) but is still bound.

them. These plans can be for different durations. I can plan to raise a child, and this is a pretty long-term plan. I can plan on hiking in the mountains for the afternoon or getting to work on the bus instead of a bicycle today.

Most important plans depend on other people in various ways, so that I am unable to do nearly anything I want to do without the cooperation of others. In the previous examples, my work depends on others, my riding a bus depends on others, my riding a bicycle depends on others. My raising a child usually depends on others as in the case of a marriage. And it depends on schools, daycare, babysitting, doctors etc.

Sometimes I depend on others just by having settled expectations about how they will act and basing my action on those expectations. I stop by my friend's office for a chat merely basing my action on the expectation that he will be there. I depend on others stopping at a stoplight or stop sign whenever I go through the green light. But at other times, I don't merely depend on how I think others will act, I make an agreement with others that assures me that they will act in a certain way and that assures others that they will act in a certain way. Here the idea is not merely that I depend on the other person's plan. I want to say that what happens here is that our plans temporarily merge. These mergings can be of longer or shorter duration. A marriage is meant to be a merged pair of plans for a very long time, an agreement to pay off a loan can be a very short duration plan. And the significance of merging one's plan with another will vary quite a bit. For most people, marriage involves a very significant merging of plans that has an effect on most of the other major plans a person has.

The difference between merely depending on another person's action so that I can carry out my plan and merging our plans into a single collective plan is that when we create a collective plan together we each deliberately have a say in the construction of each other's plans through the collective plan, which is a kind of subplan in each person's own plans. If someone has merely depended on my acting in a certain way in a certain context, neither of us has had a say in each other's plans. She has simply used the expectation of my action, which is a mere given, as a kind of parameter or causal node for elaborating her plans. And I have had no say in her plan either. But if we form a collective plan, we negotiate with each other and insinuate ourselves into each other's lives. Each of us has some kind of a say in the other's life and accepts that the other has a say in our life. There are transaction costs when we form a collective plan. Even the agreement over a loan gives the other person a say over me since the interest (if any), the time of repayment and the amount of the loan make differences to my plans.

I give over to the other person not only a say in some aspect of my life, I also let that person into my life to some extent. And I thereby come to depend on that person in a particularly intimate way. In effect, each becomes partly responsible for some part of the other's fate first through having a say in that other person's life and second by being a willing participant in that person's plan. If I merely expect on good grounds that someone will do something and design my plan around this, that person has no responsibility for whether my plan succeeds or not (beyond the general duties they have towards me). That is because my plan that includes an expectation that someone else will do something is not that other person's plan. When we merge plans, the other person participates in my plan and thus has some responsibility for the part of the plan in which he participates.

To be sure, there are intermediate cases, such as when a person knowingly or intentionally leads me to rely on some action of hers without engaging in explicit agreement making. And if, in addition, I know this to be the case and she knows that I know, then we have an even closer case to the case of explicit agreement. These can be the bases of obligations as well in some cases.

### *The Morality of Agreements*

There are three basic aspects of the morality of agreements. First there is the fairness of the circumstances under which the agreements arise. Second, there is the moral validity and the consequent binding character of the agreement. Third there are the moral limits on what agreements can be binding. My main concern is with the first of the moral aspects of agreements but I will sketch an account of the second here, partly because I think all the issues are related.

### *The Basis of the Morality of Agreements*

#### The Basic Idea

What is the basis for saying that I am obligated to perform my part of an agreement? In the terms articulated above, why is it that when I “sign on” to a plan or elaborate a joint plan with another person I am bound to perform? I want to articulate a two-stage view of how the obligation to perform arises and how it arises that the obligation is directed towards the person I have made the plan with.

The first stage of the account is that the activities of agreement making and the consequent effects of the agreement for creating rights in each party to the agreement are very strongly morally justified modes of social organization.<sup>6</sup> There is a strong moral justification for having an artificial scheme of powers, duties and rights in which persons have the powers to negotiate and enter agreements with others and consequently to enter into obligations to perform that are partly under the control of those to whom they are obligated.

Saying that there is a very strong moral justification for this scheme is to say that there are very urgent moral goods that are advanced or protected by this scheme. The very urgent moral goods I have in mind here are fundamental human interests and the principle of equality, but I will have much more to say about these in what follows.

What is the strong moral justification for the practice of agreement making? Though the parties may not make the agreements in order to advance their interests, they have interests in being able to make such arrangements and on being able to carry out the arrangements as specified by the agreed upon plan, that is in possessing a moral power to shape binding arrangements and holding others to those agreements. In addition, a principle of public equality, which says that one may not treat others publicly as inferiors, must come in to shape the practice of agreement making.

The interests that are central to the possession of each person’s moral power to participate in making morally binding collective plans are the interests each has in

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<sup>6</sup> I borrow this formulation from L. W. Sumner, *The Moral Foundations of Rights* (Oxford: Oxford University Press, 1987). The basic conception of promises derives from David Hume, *A Treatise of Human Nature* 2<sup>nd</sup> edition ed. L. A. Selby-Bigby and p. H. Nidditch (Oxford: Oxford University Press, 1978) BK III, Part II, chap. 5.

shaping the world that each lives in, in accordance with his or her purposes. In many ways the interests here are similar to those that characterize the interests in the participation in democratic collective decision-making. I have described the interests at length elsewhere but here I will sketch them out just a bit.

These interests are particularly important against the background of conflicts of interests among persons, disagreement, fallibility and cognitive bias. The first such interest is in being at home in the world. I have an interest in being able to shape the world I live in because this is a way to make that world make sense to me. It is a way to avoid alienation from the world I live in. My power to participate in forming friendships, associations, and making contracts are all ways of making the world I live in more of my own and more of a world that makes sense to me. And this power is particularly important given the decentralized character of making agreements. A world in which I have little or no power to make agreements is one that is shaped by others' agreements and decisions and not at all by me. It is likely to be a world in which I am alienated and not at home. I am not able to shape it in accordance with my interests or my understanding of how it should be organized. This is connected to the second basic interest I have in participating in shaping my world. To the extent that peoples' interests differ significantly and to the extent that people's judgments about how to organize their worlds are cognitively biased towards their own distinctive interests and backgrounds, persons have interests in having the power to participate in shaping their own world in accordance with their own judgments about their interests and how those interests fit with the interests of others. One way to characterize that interest is as an interest in correcting for cognitive bias. If others determine the circumstances under which I live, then because they are cognitively biased, even if they attempt to consider my interests, they are likely not to advance them. I must participate in shaping that world if I am to correct for the cognitive biases of others.

These two interests are distinctively political interests in the sense that they are interests that arise in a world created by people and that is crowded with other people. These are interests in my having a say over this world. They are fundamental interests because in a world that is constructed by human beings each person can advance their interests only to the extent that these interests are protected.

These fundamental interests explain why the provision of basic liberal rights are essential to each person's well-being and why the inclusion of such rights are strongly morally justified aspects of social organization.<sup>7</sup> What we need to observe in addition is that since social cooperation and coordination are normally necessary for the pursuit of those interests, strongly morally justified social organization must also include powers that enable people to merge their plans with others in such a way that they are bound to perform their parts in those merged plans and they can hold others to their parts of the merged plans. And the idea is that they must be able to do this freely and to be able to say no to proposed arrangements freely, that is, through the exercise of their liberal rights. The interests in being at home in the world and in correcting for cognitive bias

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<sup>7</sup> I argue in some detail for this account of the ground of basic liberal rights in *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford: Oxford University Press, 2008) chap. 4.

are fundamental to the explanation of the moral importance of each person having the power to shape their cooperative relations with others in these ways.

To be sure, social cooperation and coordination are achieved at society wide levels through democratic processes in a just society. They can also be achieved in a decentralized way to some extent through processes that fall short of agreement making. We sometimes are able to coordinate with others merely by becoming aware of others' plans and by mutual awareness of these facts. Hence, we can sometimes advance the fundamental interests in cooperation without agreements.<sup>8</sup> Yet it would be a mistake to infer that "our interest in social coordination can be adequately served without ... a practice of *promising*."<sup>9</sup> The interests in social coordination are greatly advanced by agreement making because this latter method of social coordination is essential to creating fine-grained plans that are clear and precise. The function of promising and agreement making is to nail down clear and precise terms where mere mutual coordination cannot do this at least in the short term. To the extent that complex practices such as language are clear and precise, it is because they develop over long periods of time, sometimes generations. But we very often need to cooperate on clear and precise terms that are not available in this way. Thus we artificially create clear and precise terms in drawing up an agreement. Indeed we create agreements that leave some things vague and others clear and precise in order to serve our purposes. Mutual coordination cannot do this in the time frame in which we need it. How do we coordinate on paying ten dollars exactly for a compact disc? Coordination and even the norms of reciprocity are normally incapable of giving us this kind of exactitude. And this kind of exactitude is essential to our interests in shaping the social world around us to suit our purposes. Hence, agreement making plays a distinctive and essential role in the process of shaping social cooperation and coordination and thus serves in a distinctive way the interests in shaping these activities.

In this respect we see an analogy between legislation and agreements. Often the point of legislation is to make clear and precise what was vague and uncertain in order better to coordinate the activities of citizens.

It is here that we need to introduce some other moral notions and another fundamental interest. I want to assert here that the interests of persons ought so far as possible be advanced equally in a publicly clear way. The equality of importance of interests and the requirement that these interests be equally advanced is a fundamental assumption of my argument, which I cannot defend here.<sup>10</sup> Furthermore, I want to argue that the conditions under which the world in which I live is constructed ought to be conditions that publicly treat the interests of each person as worthy of equal advancement. This means that the conditions must be such that they advance each person's interests equally in a way that everyone who is conscientious and rational can see that they are advanced equally in the light of the facts of disagreement, cognitive bias, fallibility and conflict of interest. What this means for an egalitarian, I think, is that there

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<sup>8</sup> As David Owens observes in "The Problem of Promising," in *Promises and Agreements: Philosophical Essays*, ed. Hanoch Sheinman (Oxford: Oxford University Press, 2011), p. 75.

<sup>9</sup> Ibid.

<sup>10</sup> See my *The Constitution of Equality* chap. 1 for an argument for equality.

must be certain institutional arrangements that frame the pursuit of interests and even the pursuits of common good and justice. These institutional arrangements publicly realize equality among persons because they treat persons equally in way that all can see that they are being treated as equals even while they disagree about how to pursue equality and the common good in more detail. I have argued that democracy serves this role and that basic liberal rights serve this role. The rights to participate as equals in collective decision making and the rights to pursue one's more particular aims are public realizations of the equality among persons against the background of the disagreements, conflicts of interests, fallibility and cognitive bias of persons.

In this paper I want to extend the argument for basic liberal rights and democracy into some of the main processes by which liberal rights are exercised. I want to argue here that the processes of agreement making and compliance can also realize equality in a public way or fail to realize it. These too are among the framing institutions of modern societies by means of which persons pursue their aims in constructing the world they live in. We have seen that the interests in correcting for cognitive bias and being at home in the world are importantly at stake in the processes of agreement making. Now I want to argue that the interest in being recognized and affirmed as an equal is also in play. To the extent that the other interests are at stake and to the extent that they can be set back by processes of agreement making that seem to leave some with little say over the processes, we have reason to think that the interests of those persons are not being treated with equal significance as others. Hence, we have reason to think that such processes fail to treat those persons as equals. Indeed, to the extent that these institutions are framing institutions, we have reason to think that those persons are being publicly treated as inferiors.

The most obvious case of this kind of treatment is when agreements are coerced. Here the coercer is publicly treating the coerced as a kind of inferior at least in normal circumstances. Or when a person defrauds another in the making of the agreement, they are once again failing to treat the other as an equal in a publicly clear way. What the coercer or the defrauder is doing is publicly setting back the fundamental interests of person who is coerced or defrauded. The coercer or the defrauder is acting in a way that treats the person's own conception of their interests and purposes as dispensable and substitutes them largely with their own concerns. The whole point of fraud is to stop someone from acting in the light of their own conception of their interests and concerns in the context at hand. I defraud them by presenting a picture of the situation that is false and that gets them to act in a way that does not accord with how they would act were they to have a proper picture of the situation. I am in effect short-circuiting the deliberative process of the other so that they do not act in the situation at hand in a way that accords with how they would if they were not deceived. Hence I show that I am not concerned with their interests in acting by their own lights.

The point of eliciting an agreement by coercion is to stop a person from acting on their own conception of what they should do in the circumstances. I invent and threaten a penalty for the person if he does so and the penalty depends on my carrying out the threat. Sometimes this is justified such as when I threaten a person with negative consequences if they will harm me or violate some right of mine. But when the threat is not present to avert some harm or violation, it is merely present to alter the person's plan from what it might otherwise be by means of threatening a setback to the person's



interests. The point of the coercive threat is to stop a person from advancing fundamental interests in shaping the social world they live in and to get the person to advance the interests of another. And it does this by either instilling fear in someone or by threatening to set back some other interest of theirs that is not set back in the circumstances but for the threat if they fail to act as one wants them to. If the threat succeeds in changing the plan of the coerced person, her interest in shaping her social world is set back. If the coercer carries out the threat, the coerced person's interests are set back in a different way. Either way, the coercer is setting back the interest of the coerced. Coercion in this context clearly involves treating a person's interests as of inferior importance and thus involves treating the person publicly as an inferior.

Even if the coercion or fraud are motivated by a concern for the interests of the coerced or defrauded person, to the extent that we acknowledge the basic facts of disagreement, conflict of interests, fallibility and cognitive bias, we can see that the person who is coerced or defrauded is having the interests in correcting for cognitive bias and being at home in the world set back.

It is worth seeing how this account is superior here to other accounts of how coercion and fraud defeat the validity of agreements. Sometimes coercion is thought to defeat the creation of agreements on the grounds that coercion undermines the voluntariness of the agreement for the coerced party. But this is quite unclear. If we look at the will of the coerced party in abstraction from the coercer, all we see is a will that must choose an alternative in circumstances in which the failure to choose the alternative is very costly to the coerced party. But choosing in circumstances in which the alternatives are very costly does not always undermine the making of a valid agreement. A situation in which both parties are in dire circumstances and which requires that they make an agreement to get out of that situation does not defeat the validity of the agreement. Hence if we look at the quality of the will alone in assessing the validity of an agreement entered into, we do not find sufficient grounds for validity or invalidity. It is the relationship between the wrongful coercer and the coerced that undermines the validity of the agreement. The same can be said of fraud. It is not the lack of information and the consequent state of the will by itself that undermines the validity of the agreement. A person may fail to know what the terms of the agreement are through some fault of his own. Or a person may be making an agreement in a very uncertain environment. Often these will not undermine the validity of the agreement even though the quality of the will of the party is no better informed about the agreement than under circumstances of fraud. It is the relationship between the deceiver and the defrauded party that undermines the validity of the agreement. It is the fact that the person is being wrongfully coerced or defrauded by another person that undermines the validity of the agreement.

I think the relationship that is at issue must involve some inequality as an essential part of the invalidity creating circumstances. One attempt to avoid this might be the idea that one treats another as a mere means when one defrauds them or coerces them. The trouble with this is that it is unclear what treatment as a mere means involves. One can certainly defraud someone or coerce someone while taking their interests into account or even while trying to advance their interests. So there is at least one intuitive sense in which one can treat someone not as a mere means but still wrong them in these ways. The mainstream interpretation of this phrase involves one's treating a person without their

willing consent. But this too is an interpretation that does not cover all the important cases of invalid agreements. The case of wrongful exploitation of a person who is in dire circumstances does involve their consent but, at least in the most egregious cases, it does not generate a valid agreement. I will try to vindicate this idea in the rest of the paper. But for the moment the idea is that one treats another publicly as an inferior when one defrauds them, coerces them into an agreement or when one exploits them in a particularly unconscionable way.<sup>11</sup> And this is what explains the invalidity of agreements under these circumstances. The validity of an agreement depends on one's public treatment of a person as an equal.

So far the idea is that the process of agreement making is a kind of social institution that is strongly morally justified. It is strongly morally justified because it is essential to advancing the interests in shaping the social world people live in and it is essential to the public treatment of persons as equals in the process of agreement making.

### Moral Obligation

The thought is that once a person has made a valid agreement with another, the social institution creates institutional duties to comply and rights to compliance as well as to alter some of the terms of the agreement. The moral obligation to comply arises from two different but related sources. One the obligation arises from the fact that the institution is strongly morally justified and that therefore one has a duty to comply with its rules and thereby to support and maintain that institution. Clear compliance with the rules is the most important way one can do this. Two the obligation takes on a directed character by virtue of the fact that in failing to comply with the institution, one does not merely fail to do one's part in maintaining a strongly morally justified institution, one sets back the interest of a particular person in shaping their social world, an interest for which one has assumed some responsibility in creating the agreement.

The obligation of agreements relies on the same fundamental principle of public equality. In making an agreement with someone by making use of the social conventions of agreement making you have created a joint plan with that person. The creation of the joint plan is by convention. But since this process of creating joint plans is so strongly morally justified, it has created a moral obligation in you and you are bound to the terms of the plan as is the other person. It has become a plan in which you both participate. The other person's interests in shaping the social world she lives in via the creation of plans are now at stake in this plan to which you are bound. This gives you some responsibility for the interests of the other person to the extent that they are at stake in the agreement. It is not merely that you might affect the other person's pursuit of her interests; you have now made yourself responsible in part for the advancing and protection of those particular interests (again, to the extent that they are involved in the joint plan). You have inserted yourself in this other person's life through the creation of the joint plan to which you are bound. You are now part of that other person's plan just as she is part of yours. What I want to say is that by virtue of having bound yourself to the plan of this other person, you have thereby assumed partial responsibility for that other person's interests just as you have responsibility for the pursuit of your own

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<sup>11</sup> Some forms of exploitation merely diminish the validity of an agreement without extinguishing it altogether.

interests. You have made that other person's interests your own, at least those interests that are involved with the plan. But this makes for a change in the normative situation with regard to interests. Normally we think that persons may place their own interests first when they exercise their liberal rights. But once you insert yourself into someone else's life plan in the way that agreements do this, you have now committed to putting a small subset of that person's interests in shaping her social world on a par with your own.

By failing to do your part in the plan, you act in such a way as to show that you do not take the other person's interests in shaping her social world seriously. You committed to putting the other person's interest on a par with your own and now you show contempt for that person's interests by failing to do your part in a plan that has made you partly responsible for those interests. The only thing that this action can express publicly is that that person's interests don't matter as much as yours, period. It is that person's interests that are being set back and it is that person who is being treated as an inferior in the case at hand. Hence it is that person's interests and publicly equal status that are at stake in your keeping of the agreement and so in that sense you wrong that person by failing to keep the agreement. This is what accounts for the directedness of the obligation to keep an agreement. To put it simply, I owe it to each person not to treat him or her publicly as an inferior. This is a general duty that I have. But in the context of having created a joint plan with another person, which creation is assured by the use of the convention of agreement making, I do treat her as an inferior by not doing my part in the plan. Hence, I come to owe it to her to do my part in the plan.<sup>12</sup>

To say that I have assumed some responsibility for the interests of the other person in making an agreement with her, I do not mean to say that I have assumed responsibility for all the interests that are connected with the plan. The person may have misplaced hopes that the plan will advance certain interests but I have not assumed responsibility for these interests. If I agree to sell my car for a certain amount of money to someone, I assume a certain responsibility for her interest in the car being in her possession. But I also assume a certain responsibility for her interest in shaping the social world she lives in. On the other hand I do not assume responsibility for her partner liking the car (unless I gave my word that her partner did like the car). The way to describe this is to say that each party to the agreement assumes some responsibility for the immediate interests associated directly with the plan and the part of the general interests each has in shaping the social world he lives in. These are the interests in being at home in the world and for correcting for cognitive bias as well as the interest in being recognized and affirmed as an equal. We have good reason to think that in addition to immediate interests associated with a plan being set back by a failure to comply with an agreement the fundamental and general interests above are to some extent also set back. These interests are set back by someone who is bound to advance them and so displays in a publicly clear way the treatment of another person as a kind of inferior.

### *The Ideal of Fair Agreements*

Here I want to discuss the idea of fairness in the making of agreements. In essence, fairness is the basic characteristic of the procedure of a strongly morally justified practice

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<sup>12</sup> My two stage account is inspired by Niko Kolodny and R. J. Wallace, "Promises and Practices Revisited," *Philosophy and Public Affairs* (Spring 2003), pp. 119-154.

of agreement making. The fundamental standard for evaluating the practice of agreement making, on my view, is the standard of public equality. A publicly egalitarian practice of agreement making is a practice that publicly advances the interests of all citizens in an egalitarian way. Such a practice advances the interests of the participants, in particular the interests in shaping the social world people live in. And it advances these interests in a publicly egalitarian way, which is a way that people can see to be treating them as equals. It is in virtue of the practice realizing public equality, or in other words advancing fundamental interests in a way that people can see is treating them as equals that the practice acquires a strong moral justification. And it is the degree to which the practice lives up to this standard that determines how strong the moral justification is. The ideal that I articulate below would confer the fullest strength of moral justification on the practice that realizes it. But practices that advance the fundamental interests at least quite widely in the society, even if they are not fully egalitarian can still have significant moral justification and thus generate morally valid agreements with attendant moral obligations, albeit weaker ones than those generated by the practice satisfying the ideal.

The practice of agreement making enables persons to make joint plans that extend their particular individual plans. These are designed to shape the social world in which they live, which each person has fundamental interests in doing. A natural question will be, what are the fair conditions for this activity of shaping the social world? And given the view that I have developed in the previous section, the question is, what are the conditions under which persons shape the social world they live in that fully enable persons to treat each other publicly as equals? Coercion and fraud are among the most extreme forms of unfairness. They are normally thought to undermine the validity of agreements, though they do not do so in all cases. What I want to do here is articulate a general account of fairness in the procedure of agreement making. The idea is that the conception of fairness can partly account for why coercion and fraud undermine the validity of agreements and in addition shed light on the nature and basis of unfair advantage taking and its effect on the validity of an agreement.

I begin by articulating a conception of the ideal of fair agreements in primarily procedural terms. I argue for a kind of analogy between this kind of fairness and the fairness of democratic processes. In this part I hope to give an account of the fairness of agreement making that sheds light on its normative character.

### The democratic conception

In this section, I continue to lay out what I call the “democratic” conception of fair agreements. So far the analogy with democracy has included a conception of the purpose of agreement making, which is to shape the social world we live in by creating with others mutually clarified and appropriately precise artificial rules for the guidance of actions. The analogy also includes a similarity of the normative grounds of agreements, which are the basic interests in shaping the social world we live in and the idea that the underlying principle that justifies the practice of agreement making and underwrites the obligation to comply with agreements is the principle of public equality. Here I want to lay out the idea that there is also analogy with democracy in the fact that the basic standards of fair agreements are in significant part procedural standards that ensure something like an “equal say” in the process of making of agreements.

The analogy with democracy is limited but I think it is illuminating and may help us to solve some longstanding puzzles about fairness in agreements and the basis of the obligation to comply with our agreements. I do not think that agreements are anything like voting or that this account requires democracy in the majoritarian sense in private organizations. Instead, equal voting and other aspects of equal participation in collective decision-making are similar in crucial ways to a kind of equal participation in the making of agreements. The similarities can be appreciated when we see that a person's participation in fair agreement making is an exercise of an equal say over the agreement.

I want to show that the idea that in fair agreement making one exercises an equal say over the agreement that is like the democratic idea of an equal say despite the fact that the way in which an equal say is exercised is quite different in the two cases. Let us note the differences first. The central difference is in the status of the group that makes the decisions. In democratic collective decision-making, membership in the group is essentially taken as given and then individuals participate as equals within the context of that group. This is why the boundary problem is such an interesting problem when thinking about the foundations of democratic decision-making. In the case of agreement making, the formation of the group is part of what is chosen. I choose not only what terms of agreement to make with a particular person or group of persons, I also choose what person or group to make the agreement with. And these choices are combined in the process of making the agreement. This is why another key difference is present. Democratic collective decision-making tends to be majoritarian in character, with each person having an equal vote. Agreements require unanimity among the participants in the agreement; each member determines his or her membership in the group (though of course once the group is formed other decision rules may be chosen or even justified.) This is why the mechanisms by which people have a say or even an equal say are different in the case of collective decision-making from in the case of agreements. Moreover, democratic collective decision-making necessarily imposes external effects on the participants in the process. In contrast agreement making tends to internalize the effects of the agreement for the parties because of the unanimity requirement. Still, agreements usually impose external effects on non-participants. Good solutions to the boundary problem are in part meant to minimize the external effects on non-participants in a democracy. There is no such mechanism in the case of agreements except those chosen by democratic legislatures. Finally, the contents of democratic collective decision-making are usually explicitly justified by the participants at least in part by reference to standards of fairness and justice. In contrast, in making agreements, persons are normally expected to be pursuing their own partial ends.<sup>13</sup> These pursuits can have an impact on justice but it is usually the role of the democratic collective decision-making process to try to figure out how to secure justice given the conflicting and complex effects of individual decisions and agreements. Sometimes democratic societies attempt

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<sup>13</sup> I do not mean here to assert a hard and fast distinction between institutions and individual actions that implies that institutions are subjects of justice while individual action in the economy are not. I just mean here to say that normally we think that justice is better handled at the institutional level for reasons of coordination and cooperation. Also, there is one context in which the contents of agreements are often justified by considerations of justice and that is the one of international agreements.

to introduce fairness into the processes of agreement making by regulating the process by law as in the case of the eight hour day, protection of unions, minimum wages, occupational safety and health regulations and so on. Despite these important differences, I think we will see some important procedural similarities between the two kinds of decision-making, which similarities provide support for the last part of what I am calling the “democratic” interpretation of agreement making.

#### Principles pertaining to the ideal conditions of fair agreements

So how are we to understand the ideal of having an equal say in the making of the social world we live in? I will start by proposing an ideal of agreements and thus the ideal of having an equal say in the making of the social world. This will define the idea of fully fair agreements. Then I will characterize the notion of unfair advantage taking. Let us start with the concept of a fair agreement.

It is because each of the parties must intend to rearrange the set of rights and duties they are subjected to and because they do this together, that I think it makes sense to say that each of the parties have a kind of say in the rearrangement of the rights and duties. But since the intentional shaping of the agreement does involve two or more parties each playing a role in determining whether there will be an agreement and defining the character of the agreement, each person can be said to have a say in the agreement, that is, in whether it is made or not and in what its terms are. And to the extent that the agreement rearranges the social world in which people live, each party can be said to have a say in the formation of the social world they live in when they enter agreements.

The extent to which a person has a say in the making of an agreement to which he is party depends on two things: the abilities of the party to articulate the kind of agreement they would like to have in a way that advances their interests and/or their moral purposes and the opportunities of parties for alternative arrangements.

By abilities, I mean the cognitive skills and basic knowledge that enables one to understand and deliberate on the consequences and complexities of agreements, particularly in terms of their effects on one’s interests and other concerns. This includes cognitive abilities as well as information relevant to the making of good decisions (or at least the knowledge of how to go about seeking the relevant information). Someone who is utterly uninformed about what the agreement is about, through no fault of his own or someone who is not capable of deliberating in a fruitful way about the agreements he enters into cannot be said to have a say in the making of the agreement. In this respect not having a say at all is equivalent to not participating voluntarily in the making of the agreement. Someone who is faultlessly ignorant about many of the implications of the agreement for his interests or concerns can be said to have a diminished say in the making of the agreement.

The opportunity part of the conception of a say in agreements is specific to the context of making agreements. A party who has no alternative or no acceptable alternative to the making of an agreement, cannot be said to have a significant say in the making of the agreement. The idea here is that a person has the ability to shape an agreement to suit his or her concerns to the extent that the person has alternative options.

For example, in the standard rescue cases (in which e.g. a person is rescued from a terrible storm by a passing tow truck or a ship is rescued from the storm by a salvage

operation) the agreement may be voluntary but the say is quite minimal. The option that is alternative to the agreement in the rescue case is facing risk of severe harm or death. When a person is in such a situation, he is frequently said to be at the mercy of the other. What this means is that the other can vary the terms as he sees fit while the vulnerable person must accept those terms whatever they are. The vulnerable person may still turn down the terms and face the horrible risk but normally he has little ability to shape the terms beyond entering the agreement. In this sense, he has little say in the making of the agreement. By contrast the person who is in the non-vulnerable position has a great deal of discretion in defining the terms of agreement. He can have what he wants, at least before we introduce moral considerations. We might also apply this analysis to the cases of sweatshop labor in developing countries. Here the employer has numerous opportunities while the employees are confronted with a very small set of opportunities.<sup>14</sup>

In this way a person's say in making the agreements he enters into depends on the opportunities for exit or refusal. The more valuable and numerous one's opportunities for exit or refusal are, at least those that are relevant to the interests and concerns behind the making of the agreement, the greater the say one has in the making of the agreement one enters into. In this way the idea of a say in the making of an agreement tracks in part the idea of bargaining power, which is normally thought to depend on the alternatives to agreement and most particularly the best alternatives to agreement. In the rescue case, the vulnerable person has little bargaining power and the rescuer may have a great deal of bargaining power. We will see in what follows that the idea of a say can be helpfully understood to some extent with the idea of bargaining power but there may be some important qualifications to this relationship.

Once we have the idea that an agreement involves the various parties having a say in it, we can ask whether the parties have an equal say or not. What I want to say here is that the idea of an equal say in the formation of an agreement is given by two components that correspond to the ability and opportunity elements to having a say: a principle of equal resources for thinking about and shaping agreements and a principle of equal opportunity for exiting or refusing entrance into an agreement.

It is important to note that this principle of equal opportunity does not merely imply that persons are not to be discriminated against by others on the basis of arbitrary characteristics. This principle asserts the importance of others having genuine alternatives to agreement and the ideal asserts that alternative option sets are to be equalized among persons (subject to a qualification I shall describe below).

### *Equality of Opportunity in Life as a Whole*

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<sup>14</sup> Elsewhere, I argue that this notion of fairness can shed light on the nature of some kinds of wrongful exploitation. Fairness, as I am understanding it here, is a condition of the circumstances under which agreements take place. Unfair advantage taking consists in a person's action that takes advantage of the unfair circumstances in violation of a duty to the person who is unfairly situated. Usually the potential exploiter does not have a duty fully to rectify the unfair situation but he has a duty to do his fair share of rectifying the situation. Unrestrained advantage taking would violate that duty. See my "What is Wrongful Exploitation?" unpublished ms.

I have been discussing agreements as if there were only one for each person. In that case the principles of equality of opportunity and equal cognitive resources are fairly straightforward in application. Things become somewhat less straightforward when we think of the fact that a person's life involves many agreements and many situations in which they can make agreements. Furthermore, we must take account of the fact that the decisions a person makes in one part of his life may have significant effects on the opportunities he faces in some other part of his life. Here I want to follow the common view among egalitarians that a person may legitimately face unequal opportunities later in life as a result of deliberate decisions made earlier in life.<sup>15</sup> Or a person may face a situation in which an agreement is to be decided on without as much information as would be ideal. In many cases, there may be no defect here, as long as the person has diminished ability as a result of his own deliberate choice. In these kinds of circumstances, there is a sense in which the person faces the other person with unequal opportunities, but there is a more relevant sense in which the person faces the other against a background of equal opportunity.

Once a person has global equality of opportunity, there may be a number of reasons for which he may face local inequalities of opportunity. One reason is that the person has by some set of deliberate decisions restricted his opportunities in subsequent periods. He may, for example, have decided to pursue a certain kind of education with an understanding that this would rule out certain valuable options in the future. He may have pursued graduate studies in the humanities knowing that job prospects were not as high as in the law and so find himself with more limited opportunities later on. Or he may pursue education in some technical school knowing that this would set him up for jobs of a certain sort but would make access to other jobs quite difficult. Someone who has had these more expansive opportunities at the start but decided on a course of action that limited in some way, as long as he did them with an understanding of the consequences does not have a complaint of fairness when he confronts another person with different opportunities at some later point.

Another way in which one might limit local opportunities might be because one does not have a lot at stake in a certain issue area. Another way might be through some kind of irresponsibility.

The global equality of opportunity and cognitive resources principle are the central principles for evaluating the fairness of particular agreements. When agreements are made in circumstances that result from previous decisions made under global equality of opportunity, then those agreements are fair with some exceptions.

One case in which they are not fair is the case of the rescue case. Even if one finds oneself in need of rescue as a consequence of one's own actions, it is not legitimate for a rescuer to press his advantage to the full. To be sure fair terms will vary somewhat if one is responsible for putting oneself in the unfavorable position, but pressing for full advantage will remain foreclosed. I think this is because most of us will accept some kind of principle of sufficiency as a supplement for the principle of equality for many cases of serious need.

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<sup>15</sup> See, for example, Richard Arneson, "Equality and Equal Opportunity for Welfare," *Philosophical Studies* 56 (1) 1989: pp. 77-93.



It is the global equality opportunity principle that realizes the democratic ideal of having an equal say over the social world in which one finds oneself. One has a say in the making of the social world around one through the sequence of agreements one enters into in one's life. It is the combination of one's choice of friends, partners, jobs, housing, place to live, and other things that determines how one's life goes as a whole. And it is over this entire complex that it is important to have a say. One picks and chooses those parts of this complex one wants to have the most say over and those parts one is less concerned to have a say over. One can create this whole with more or less wisdom and more or less success.

### *Equality of Opportunity and Talent*

So far I have been speaking generally of a principle of equality of opportunity as a principle that affirms that persons ought to have equal opportunities to exit arrangements. This has implied that they have equal opportunities to enter arrangements as well. And these opportunities are to be understood as real options for persons. So the principle is a fairly demanding principle as it stands. But we need to discuss a dilemma that arises for us on this principle. The dilemma is whether we ought to go for unqualified equality of opportunity or whether we ought to go for something like what Rawls calls fair equality of opportunity.<sup>16</sup> The two principles differ in that the first assures everyone completely equal opportunities in the sense of roughly equally valuable option sets while the second allows that those who have more native talent may have greater opportunities than those who have less.

Just to give a bit of background here. The ideal of equality of opportunity as I understand it is meant in part to assure that persons have the same opportunities despite differences in social background. This, to be sure, is an ideal that cannot be fully achieved.<sup>17</sup> But it says that persons' opportunities ought not to be less than others because of the social circumstances into which they were born. This may imply a number of different kinds of social structural features in the society. It will suggest that there be significant transfers of income and wealth from wealthy to poor in order to diminish the extent to which some inherit a very strong set of opportunities just by being born into a certain family. The inheritance tax is then ideally transferred to those whose parents are worse off so as to enhance the opportunities of their children. It implies a strongly egalitarian system of schooling, whether publicly run or publicly funded, in which children receive good schooling as well as preschool backgrounds.

On the democratic interpretation, we can see that these requirements are based on the idea that each person has a right to an equal say in the formation of the social world in which they live. To permit some children to have an inferior education and inferior opportunities as a result of the poverty of their parents is, in effect, to permit those

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<sup>16</sup> See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 73.

<sup>17</sup> See Andrew Mason, *Leveling the Playing Field: The Ideal of Equal Opportunity and Its Place in Egalitarian Thought* (Oxford: Oxford University Press, 2006) for a discussion of some of the limits of society's ability legitimately to achieve equality of opportunity, for example, it may not be possible fully to implement the principle without excessive intrusion into family life.

children to be subordinate, when they grow up, to those who are born into more fortunate circumstances and who are afforded a better education. It is in some ways very much like a system in which some have significantly less political power than others, say because of difference in voting power or other political opportunities. Just as the latter undemocratic system is to be condemned because it publicly subordinates the lives of some to others, so is a system of significantly unequal opportunities to be condemned because it subordinates the interests of some to those of others in a fairly clear and public way.

But now the question arises of how we should think of inequality of talent supposing that there are significant differences in natural talent among persons. This is a difficult question for the idea that I have been advancing so far. On its face persons having unequal opportunities because they have different amounts of talent is an undemocratic idea. On the interpretation I have offered so far this would seem to imply that the talented have a greater say in the formation of the social world than the relatively less talented. But we have to look at this question from another angle. If we think of natural talent as the natural capacity of a person to advance people's preferences, and we think that the reason why the more talented have more opportunities is because more people want to make use of their abilities, then we have a genuine dilemma. It is because people see that the "talented" persons can advance their concerns that they want to interact with the talented. And they want to interact with the talented more than with the less talented; thus the talented have more opportunities. Hence, to equalize opportunities in an unqualified way in this context would mean to diminish the ability of everyone or the great majority of people to advance their interests. It is a kind of problematic leveling down that I believe is incompatible with the principle of equality.<sup>18</sup> To the extent that the democratic interpretation implies that it is important for persons to have an equal say in the formation of their social world, it also inherently implies the importance of persons having a say. And thus it does not permit leveling down for the sake of equality, though it does recognize that there is something to regret in the inequality. The idea is that though inequality is unjust, an equality in which everyone is worse off than under some egalitarian arrangement is less just than the inequality.

So I want to argue that fair equality of opportunity, which permits that the more talented have more opportunities than the less talented, is a better interpretation of the idea that that people ought to have an equal say in the making of the social world they inhabit together. I do not want to say that nothing is lost in this but I want to say that a correct appreciation of the nature of a principle of equality favors this notion over the unqualified principle of equality of opportunity.<sup>19</sup>

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<sup>18</sup> See Thomas Christiano and Will Braynen, "Inequality, Injustice and Levelling Down," *Ratio* (December, 2008) for the argument that the best understanding of the principle of egalitarian distribution opposes leveling down for the sake of equality.

<sup>19</sup> As Rawls does, I am thinking of the principle of equality of opportunity as primarily concerned with the distribution of jobs in society. I do not think that the fact that a distribution of income has come about through fair equality of opportunity is sufficient to make that distribution just. Other more demanding distributive norms must come into play here.

*External Effects*

To be sure, when individuals rearrange parts of their social world through agreements, they don't merely rearrange those parts for themselves, others are also expected to respect the new distribution of rights and duties that the parties have created. This latter set of external effects of agreements on others seems distinctly non-democratic in character since those who are so affected do not have a say in this arrangement. This aspect of agreements is not often commented upon but it is of some importance. It is worth noting here that we distinguish between different external effects here: those that impose effects that we do not try to regulate and those that we at least think it legitimate to regulate. If I buy a car from you and I am a dangerous driver while you are a safe driver, our agreement has changed the social environment many people live in. And it has changed it in a way that imposes possible costs that we deem it reasonable to regulate. Hence, we regulate driving in various ways to try to make it safer. But if I am just an ostentatious person who will use my new car to show off, this too will have a significant effect on others. We do not generally seek to regulate that behavior, though we do to some extent in zoning and public nuisance restrictions. It may be worth figuring out why we make this distinction or how it is made. It may be that we make a distinction between external effects that have an impact as a result of the idiosyncratic features of the effected parties. Or it may be that we think that these effects are ones for which we can hold the effected parties somewhat responsible. Maybe there is a kind of limited form of say in this. I have a say over something in this attenuated sense when I can refuse to take it seriously. I don't have a say when something happens to me where I don't have discretion over how it affects me. I can insulate myself against some effects, I cannot insulate myself against others.

There may still be an analogue to the democratic idea in the case of agreement making under conditions of global equality of opportunity. The analogue is that each person has a kind of equal say over the social world generally. The social world one lives in is, in significant part, the cumulative effect of the many agreements individuals enter into. To the extent that we are affected by others, we may not have a say that will get us everything that we want but we do have the capacity to shape other parts of the social world to our liking. If each person has an equal say over the agreements they enter into, at least as a whole, then perhaps each has an equal say in the formation of the complete social world in which they live. Such an equal say may or may not lead to equal outcomes, however we specify that kind of equality.

All of this so far is not unlike the equal say in democratic decision-making in political societies. For having an equal say in those societies by no means ensures that we get everything we want or that we are part of the coalition that got what it wanted. In fact it nearly guarantees that we don't since some kind of majoritarian decision-making will be required by equality under conditions of disagreement. In political societies, for any individual, many decisions are taken that he or she disagrees with. This is not incompatible with an equal say. We win some, we lose some. Of course the way this happens in political associations is different from the way it happens in the social world that is not directed by political association. The decision-making in political association is centralized. We can participate in all of the decisions but we are in the winning coalition some of the time and not some of the rest of the time. The decision-making when it comes to agreements is decentralized and produces a kind of patchwork. We

don't participate in all of the decisions, but we are not in the minority when we do participate in decisions.

### *Conclusion*

In this paper, I have defended an account of the fairness of agreements that is broadly procedural like standard common law views of fair agreements but that allows us to take a critical stance on agreements even when they are not based on force or fraud. I have made use of an analogy between the fairness of democratic decision-making and the fairness of agreement making and have provided another way of looking at the value of equality of opportunity. The view attempts to accommodate the pluralism and diversity of societies in which agreements are key elements in the formation of the social world while at the same time allowing us to see how criticism of agreements can take place. As I mentioned at the outset, this account of the democratic conception of fair agreements is only one part of a larger part of an overall conception. We must introduce a conception of the ethics of the division of labor in order to spell out a fuller account of fair agreements, since many agreements are rendered unfair by the fact that they were arrived at as a result of temporary monopolies in the division of labor. Once these are filled out we may have a more complete account of fairness in agreements.