

# UNBEARABLE *LIGHTNESS* OF JOHN RAWLS



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## Introduction

John Rawls is a social contract theorist. In his magnum opus, *A Theory of Justice*, he seeks to discover the “just” terms of social cooperation between individuals living in an autarkic nation-state. This nation is not an association because it has a coercive state and lacks exit options; it is not an organization because the citizens have no common purpose; and it need not be a “community” understood as supplying a union based on a comprehensive religious or moral doctrine or worldview. It is united only by a *lex* – a system of law. Issues of international justice are also set aside. The state is assumed less as an enforcer of property rights than as a tool to shove around income and wealth to achieve a proper “distribution” of “resources” – the scare quotes are to indicate that, as we will see, these terms are problematic.

The social contract is hypothetical; the conditions under which the terms of the contract are determined are a philosopher’s plaything. They are, however, ingenious and seem at first glance to have the potential to yield important results. The situation the philosopher puts himself in, his mindset when starting to reason about these matters, is called the original position (OP):

Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like.

I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities.

The principles of justice are chosen behind a veil of ignorance. (*TJ*: 11)

To see the purpose of these devices, recall Thrasymachus in Plato’s *Republic* arguing that justice is the “interest of the stronger.” What does he mean?

Clearly, the “strong” do as they please; particularly, they murder, plunder, and oppress the “weak”; however, slightly bothered by their own depredations, and in order to secure their good reputation and the weak’s esteem, they seek to rehabilitate themselves in public opinion. They do so by lying and hiring propagandists to lie to other people that their deeds, rather

than being wicked and traitorous, are in fact noble and great. They sophistically proclaim their most ignominious actions to be just.

Meanwhile, the weak also do not find value in any independent notion of justice. What they proclaim to be the strong's injustices is just thinly veiled impotent and resentful envy of the strong. If a weak man were suddenly to become strong, then he would instantly renounce his notions of justice and would not only commit injustices freely but in imitation of his fellows insist that his morally dubious behavior is actually the pinnacle of justice.

In short, it's rather like polylogism. A person's social status as either strong or weak allegedly fully determines his intellectual commitments. Mises believed that polylogism was important in understanding Marxism. A capitalist qua owner of capital must for that very reason endorse capitalism as an ideology. A worker is ineluctably driven by his economic role to cheer for socialism. An economist, presumably because of his typically middle-class lifestyle, is merely a "sycophant of the bourgeoisie." In a Marxist critique of Rawls, Milton Fisk argues that "the human nature is in part determined by the classes people belong to," suggesting either that it is meaningless to try to abstract away from one's own "class interest" or that there is no such thing as the common good or universal justice because of the irreconcilable class conflicts within society. (1989: 74) Polylogism is no doubt a repulsive doctrine that destroys the unity of the human race on a fundamental level as rational animals. But there is a grain of truth to it, which is that people *are* influenced by emotions, and the personal can cloud the political.

It is precisely such crazy goings-on that are preventing a detached and objective analysis of the notions of justice and injustice. Let us, therefore, enter the original position and throw a veil of ignorance over ourselves so that we don't *know* whether we are strong or weak. Can the notion of justice be formulated apart from our biases? Now as truth is correspondence of thought to reality, so justice is correspondence of reality to an ideal. The ideal applies to the actual society, but it is arrived at by contemplating abstract perfections. Utilitarians have their impartial observer; virtue theorists have their fully actualized sage; so why not allow contractarianism its own ideal-making tool? The OP then promotes at least two objectives: first, *universality*, i.e., freeing the philosopher from any irrelevant particular attachments;

second, *generality*, in this case preventing him even in this freedom from demanding something like a “first-person dictatorship (Everyone is to serve my – or Pericles’ – interests)” (*TJ*: 114). This is because the philosopher is broken up into multiple parties seeking unanimous agreement, and no such agreement can be reached if *each* party insists on being dictator.

But why contracts? Obviously, because if everyone agrees to some idea of justice, then the question is settled; there is no controversy. They may all be *wrong* in some sense, I suppose, because contractarianism is pure procedural justice: anything whatsoever that is agreed to in a “fair” original position (hence, Rawls’ “justice as fairness”) is designated “just,” but by that very agreement, people will be in considerable harmony and accord with one another, and what more can we ask from of a theory of justice? In other words, it is conceivable that a contract signed under the Rawlsian conditions may produce results contrary to the *objective* “natural law,” if there is such a thing; yet its *intersubjective* agreement is valuable, nonetheless.

An obvious question is, why is the agreement in the OP binding on the actual people? Because, Rawls believes, this is precisely the most sensible way of designing the basic structure of the social order.

Let Eightball argue thus: “I propose the following: Back off, white bread! Don’t get between a dog and his meat.” To which Animal Mother replies, “I respectfully disagree. All fucking niggers must fucking hang!”

Or again, as Tom Lehrer sings,

Oh, the poor folks, hate the rich folks  
And the rich folks, hate the poor folks.  
All of my folks hate all of your folks –  
It’s American as apple pie!

Can such rules be agreed to in the original position? Natural law precludes “hatred” as inhuman, an aspect of corrupted human nature, the very malady that strict adherence to natural law is supposed to cure. In his turn, Rawls assumes mutual disinterestedness and absence of envy among the parties in the original position; no one knows whether he’s black or white, or poor or rich; nor does he know the demographics of his future actual society. It will be senseless to seek legal privileges for any person or group. As we’ll see in

the discussion of liberty, however, it does not follow from this even that absence of gross oppression and internecine strife will be outputted by the OP. That depends on whether to any party the universal and equal freedom to be free from oppression is more valuable than the like freedom to oppress others. Such a choice must be informed by the deliberator's conception of the good which the deliberator forgets upon entering the OP.

Now the traditional definition of justice is the disposition to "live honestly, to injure no one, to assign to each his own." But what sorts of things are to be assigned to people? While being in the original position is good for our ideals, this must be accompanied by a theory of the good. Rawls has one. It's a little lurid. He defines "primary goods" as those that

a rational man wants whatever else he wants. Regardless of what an individual's rational plans are in detail, it is assumed that there are various things which he would prefer more of rather than less.

With more of these goods men can generally be assured of greater success in carrying out their intentions and in advancing their ends, whatever these ends may be.

The primary social goods, to give them in broad categories, are rights, liberties, and opportunities, and income and wealth. (79)

An objection crops up: even if primary goods are all-purpose means for the satisfaction of ends, different ends do not require the same amounts of means. Won't then primary goods have different value for different agents? I answer first, that all people's ends have the same importance: Smith's ends are as important to Smith as Jones' are to Jones. It may be that Smith feels more strongly that Jones and rejoices and sorrows with greater inner emotional intensity than him, but we as political philosophers cannot plausibly measure such things. In other words, interpersonal utility comparisons are not permitted in philosophy, so it is vain to bring up the possibility that some people may value primary goods "more" than others.

Second, human desires are unlimited; humans are by nature insatiable. As soon as one desire is satisfied, another springs up. There cannot be such thing as perfect contentment or happiness. Therefore, we cannot argue that some people "need" more primary goods than others. All people at all times

prefer more of them to fewer of them in their possession and under their control.

Further, the distribution of these goods is affected by social institutions, what Rawls calls the basic structure of society. Rawls' concern then is the "just" form of social cooperation that allocates primary goods, i.e., "determines the division of advantages from social cooperation," to people arrived at by the contractarian method. (As we'll see, he gives little thought to the *production* of such goods, which wounds his system.) There is a problem here. The bargainers in the OP, into which the philosopher is fragmented, Rawls writes,

know the general facts about human society. They understand political affairs and the principles of economic theory; they know the basis of social organization and the laws of human psychology. Indeed, the parties are presumed to know whatever general facts affect the choice of the principles of justice. There are no limitations on general information, that is, on general laws and theories... (199)

But then why can't we know objective ethics, as illuminated by philosophy? For example, if "you shall not kill" is a precept of "natural law" that can be rigorously proven, then why can't we know it and use that deliverance of reason in the OP? Philosophy is no less a rational discipline than physics or economics. If we have such knowledge, then our choices in the OP are restricted by it. We can no more agree to a basic structure marred by an objective injustice than we can agree that justice requires us to fly by flapping our arms about. If we do not, then we have an arbitrary and baffling limitation on our background knowledge. Rawls does not claim that "natural law" or any other kind of objective ethics is hopeless. But if such an ethic can be worked out, of what further use is contractarianism? Rawls calls the interaction of his contract theory and moral judgments otherwise obtained "reflective equilibrium." Contractarianism would seem to be one tool among many.

Generally, however, Rawls takes the philosopher to be omnipotent in the OP; there is no escape from his designs for any future citizen of his *polis* by emigrating, disobedience, or asserting natural rights. People are born into the Leviathan and lead there a "complete life" while governed by the contractarian justice. For example, although capitalism is not ruled out, "a

conception of justice must incorporate an ideal form for the basic structure in the light of which the accumulated results of ongoing social processes are to be limited and adjusted.” (PL: 281) In order for the “adjustments” to happen, people of course will need to be looted. Again, we pay no heed to natural rights. This is fine; we want to deal with Rawls on his own terms.

The Rawlsian contrivance has four levels to it. The first level asks, what is our general ethical framework? And answers, unanimous contractual agreement in the OP; it is the source of justice. This is similar to a utilitarian asserting that justice is whatever maximizes utility. The second asks what the agreement is about – is it about the etiquette of giving flowers, the distribution of fiat paper money, sexual favors, what? And answers, distribution of primary goods. The third asks, what are the main features of the social contract as regards primary goods that will actually be drawn up? And answers, the triad of equal liberties, equality of fair opportunity, and the difference principle, all of which will occupy us later. The fourth would ask for the nitty-gritty details of implementing Rawlsianism in our actual society. Rawls propounds some rather astonishing answers to this one.

Contractarianism on its own generates pure positive law. It abstracts away from any pre-existing morality or natural law. Now natural law theorizing also excludes references to “natural fortune and social circumstances” such that “it is impossible to tailor principles to the circumstances of one’s own case.” It, too, makes no distinctions between wealthy and poor people, for example, countenancing only the *essence* of man. It is not part of human nature that any man shall be rich or poor but an *accident*. What is supposed to be the Rawls’ innovation? It is that his method outputs positive law as a contract or convention, even though the parties behind the veil know many facts delivered by natural and social sciences about how the world works.

The “rational” in Rawls may be taken as what each party in the OP might want; the “reasonable” restricts the rational to what all parties would agree to.

Whereas natural law would generate natural duties which are commands, agreement in the OP generates only incentives which are enforced by threat of punishment. There are no such things as “political obligations”; stability of the legal order is generated not out of any moral obligations but merely out

of ideological support for the state and the state's willingness to punish people for breaking the laws agreed upon. It is strange that Rawls devotes considerable space in *TJ* to the discussion of the stability of his social order, when stability is secured adequately whenever the vast majority (a) abstain from lawbreaking because they are afraid of punishment and (b) agree to enforce punishments of others by supporting the state in its crime-fighting activities.

To illustrate, consider that the US federal government has “power” over me. It can crush me into bloody pulp. What to do? Well, I personally try to abide by its rules and regulations as best I can. I exercise *prudence* by paying my taxes, doing jury duty, etc. However, while the feds elicit from me the requisite formal obeisance, and while they do have the power, they get from me no ideological “might,” as Mises used this term, to help them dominate, because I do not recognize the government as *legitimate*. I do not recognize it as legitimate, because I consider almost all of those rules, regulations, and taxes to be both unjust and uneconomic; in other words, *bad all around*:

... might is the power to direct other people's actions. He who is mighty, owes his might to an ideology. Only ideologies can convey to a man the power to influence other people's choices and conduct.

One can become a leader only if one is supported by an ideology which makes other people tractable and accommodating.

Might is thus not a physical and tangible thing, but a moral and spiritual phenomenon. A king's might rests upon the recognition of the monarchical ideology on the part of his subjects. (*HA*: 188)

If I obey a certain law L because I find it good and socially virtuous, then I *ipso facto* extend consent to be governed by L. If, however, I despise L as harmful and unjust but, recognizing the reality of the government's power, obey solely out of servile fear of getting caught and punished for breaking it, then I thereby *withdraw* consent. The power remains yet might diminishes.

It may be objected: Doesn't this prove too much, namely that consent can be withdrawn even if I have no means of changing the law? If the law is made by an absolute monarch, and I pay the tax purely for prudential reasons, then what is it to the monarch? What does he care how the money comes in?

Well, the problem with fear is that it is unpleasant and presents a conspicuous incentive to those afflicted with this emotion to change the law, even via a revolution. Sufficient discontent among the populace can so undermine the might of the state that the state will lose its power, as well.

Stability then is assured whenever the regime's power rests upon the foundation of might. Public opinion makes or breaks governments.

Again, (A) "agreements or contracts must be kept" is a proposition of natural law, but in the OP we ignore such considerations. We do not know that agreements ought to be kept, still less hypothetical agreements. We may agree to (A), but (A) would then apply to the actual society. When in the real world, Smith contracts to exchange his horse for Jones' cow, then (A) comes to be in force. It's a desirable sort of society in which there exists some definition and enforcement of contract law. But (A) does not apply to the OP itself on pain of infinite regress. This again shows that there is no such thing under contractarianism as political obligations to obey the laws.

In a real sense, *TJ* is misnamed. For a genuine theory of justice presumably answers the question, "What ought I to do?" If I do my duty and pay for my groceries, then I am just; if I shoplift, then I'm unjust. Whether to be just or unjust is 100% within my own control. Rawls is interested in something else entirely: "What basic structure of society and social institutions ought I to support?" Here on the contrary, what I, being one citizen among possibly billions, support or fail to support is almost irrelevant. My vote does not make the slightest dent in the great scheme of things. What Rawls presents then is a theory not of *justice* but of the *best kind of society to live in*. *TJ* is not a treatise on ethics – and therefore on justice – at all. It is an attempt at a derivation of a political ideology. This is how his "social" justice is to be understood: we want to design a great society of which everyone would likely approve and which everyone would gladly inhabit. Rawls may of course, and does, define "justice" as whatever social contract the OP must churn out. But a dog does not become a cat simply by being called one.

## Utilitarianism Rightly Understood

In Chapter 1 Rawls curiously equivocates with respect to the term "good." In fact, I've counted at least four things that according to Rawls deserve this

accolade.

1) Regarding the original position: recall that in in no one knows their “conceptions of the good.” Here, good is the particular pleasures or happiness or whatever pursued by real people in an actual society. Smith likes to scuba dive; Jones likes to garden; and Robinson is an airplane pilot; those are these people’s “conceptions of the good.”

2) The general theories of the good; for example, “teleological” theories: “If it is taken as the realization of human excellence in the various forms of culture, we have what may be called perfectionism. ... If the good is defined as pleasure, we have hedonism; if as happiness, eudemonism, and so on.” (TJ: 22) Rawls’ own contractarianism is set against these as a deontological theory that “prioritizes the right over the good.” We’ll discuss this point momentarily.

3) Good as *goods* produced via social cooperation, i.e., material prosperity, consumer goods and state of capital accumulation, stuff, junk. I will refer to these goods colorfully as “bling.” It is in part these goods, wherever they come from, that Rawls is concerned with “distributing.”

4) The goodness of the conceptions of justice that flow from Rawls’ own theory, such as the lexicographical order of several principles and the “principle of equal liberties” as first among them.

Now there is no a priori reason why contractarianism should not yield utilitarian conclusions. However, utilitarianism has been so gravely misunderstood as to end up a caricature and an absurdity. I will fix it here.

### **Utilitarianism is not a personal morality.**

Classical utilitarianism is a moral doctrine that bids one to act in such a way as to maximize total human happiness if it’s act-utilitarianism, or at least to act according to those rules the recognition of which tends to promote total happiness if it’s rule-utilitarianism. There are at least three problems with utilitarianism as a guide to individual actions: of knowledge, love, and power.

In the first place, act-utilitarianism suffers from the crushing objection that “total happiness” is spread over billions of people for a million years in the future. What do I know of such things?

Evil can come out of good, and good out of evil in a bewildering variety of ways. No man is God, capable of calculating the consequences of his actions perfectly. The Christian doctrine of Last Judgment rendered at the end of the world is distinct from the idea of Immediate Judgment made upon one's own death precisely to permit the tallying up of all the remote consequences of one's actions. For example, the ideas of Rawls will continue to influence the course of human events long after his death; and God will judge him, Christians believe, for everything he'll affect for good or ill until kingdom come. But a mere mortal is utterly incapable of such a feat.

Moreover, at every moment for each person there is presumably a single best thing he can do. Failure to do that one best thing is then immoral. But then individual liberty disappears. There is no such thing as a choice of pleasures, if the best action can be objectively determined (such as by some impartial observer). It's a strange ethic that would destroy human nature thus.

*All* people are to maximize utility; but what I do to that end affects what others must do; and what they do affects what I must do. Coordination of everyone's actions must be explicit which in turn requires perfect knowledge or literal omniscience on the part of everybody. And this is hopeless.

Then there is the difficulty comparing utilities intersubjectively.

Rule-utilitarianism (RU) seems more plausible, but only at first glance. For the rules informing any actual society do not *command* anyone to *do* anything. They do not compel any specific action to be performed.

Natural law commands one *not to do* certain things, such as steal.

Positive law takes the form of *incentives*, such as "if you do X, then you will be punished."

Consider now a society with private property and a free market. Suppose that this society, even if isn't the happiest of all, then at least grows in happiness faster than any other. This society says, for example: "Anyone can become a successful entrepreneur." But it merely provides *incentives* to people to become entrepreneurs! It does not say: "You, Henry Ford, ought to become an entrepreneur." Utilitarianism for a community consists in so structuring property rights and incentives as to make it attractive for people to

contribute to society. Utilitarianism commands not an *entrepreneur* but a *voter* to create a society in which an individual's creative initiative is harmonized with the common good. Then the voter sits back and watches the theater of the world unfold its play. The laws and incentives, having been set up, *await people to be affected by them*. Call this theory "lawgiver utilitarianism" (LU).

Utilitarianism has no advice to give to Henry Ford as to his choice of vocation.

LU then is not a moral doctrine, because a moral doctrine prescribes *duties* to individual human beings, yet the LU-moralist's job is done as soon as the correct *laws* (such as those made with good will and full awareness of economics) are in place; these laws modify the citizens' behavior; who then *yang-act* while affected by the *yin-laws* in most unfathomable ways.

In addition, classical RU seems to hold that maximum total happiness is fixed. If we are good people, then we'll squeeze the most out of the "world resources" or some such thing. This is the neoclassical economic delusion that focuses solely on the equilibrating part of the market process. In fact, under free markets, there prevails constant and quite unpredictable *improvement* in total consumer happiness. It's therefore not overall happiness that we need to maximize but the *rate at which overall happiness increases*. This, however, too, can be attempted only on the level of general laws that foster economic progress without compelling any specific action on anyone's part.

Further, *there are no "resources"* understood objectively; a resource is any material object or creature that participates in a person's definite plan of production. Without this subjective aspect, all material goods are just dirt. Everything around us can be, with the right technology, a resource or capital good to be used in production of consumer goods. Oil, which 300 years ago was a useless thing, unknown and unnoticed, is now a hugely important product. Human ingenuity and entrepreneurial spirit can make a resource out of practically anything. A thing can be a one kind of resource to Smith; another kind to Jones; and 100% irrelevant to Robinson. Progress consists in no small part in finding by each individual new uses for old things.

Utilitarianism then cannot reasonably demand that *entrepreneur Smith* act (either generally or in any specific way) to maximize total happiness; it can

only demand that *congressman Jones* make such laws that Smith and his fellow market actors are gently steered into acting for the sake of society while pursuing their own self-interest. We'll expand on this point shortly.

Second, in order to bring about the greatest good for the greatest number, I must *will* or desire that good. But the good, though maximized overall, is imparted into individuals. I thereby will good to those individuals, which is the definition of love. Thus, utilitarianism requires me to love people; moreover, not any specific person by mankind as a whole. What kind of love is that?

Even the most outgoing person will have only a few "dear friends" whom he loves with a full-bodied love of friendship. Everyone else is a stranger to him, capable of eliciting only general "disinterested benevolence." Again, what is the nature of this love? Consider Mises' understanding of the proper emotions of the economist: Subjectivism, he says

takes the ultimate ends chosen by acting man as data, it is entirely neutral with regard to them, and it refrains from passing any value judgments. ...

If Eudemonism says happiness, if Utilitarianism and economics say utility, we must interpret these terms in a subjectivistic way as that which acting man aims at because it is desirable in his eyes. (*HA*: 21)

In short, an economist and now any utilitarian in regard to an arbitrary stranger proclaim: "I will to you those goods that *you will to yourself*. Whatever it is you want, perhaps as long as it's not criminal or especially vicious, I also desire for you, and I even root for your success from a distance."

But when interpreted so broadly and innocuously, utilitarian love ceases to have any action-guiding clout or imperative. It devolves into "I enjoy watching people *strive* and seek their happiness; I cheer when they find it, and grieve when they, sometimes tragically, fail; but that is all part of the work and way of the world. For each good desired by a person, call him Smith, there is already someone, namely Smith, who is pursuing it single-mindedly. I have nothing to add to this; the greatest good is already being promoted without my assistance. The world works; all is well with it; I am content; though, like all others, I, too, seek my own happiness." If one is content,

then where is the motivation to thrust himself into action to start maximizing overall good?

Suppose now that I *were* for some reason motivated to promote greatest overall good. What exactly am I supposed to do according to utilitarianism? I mean, do I *help* people? To do their jobs, say? Do I approach a random janitor cleaning up in a corporate building after hours and say, “Hey guy, I want to help you vacuum the floor. I don’t actually care about you, but helping you will promote the greatest happiness for the greatest number, and I am commanded to do this.” Isn’t this more than a little absurd?

More plausibly, I might need to do the Catholic works of mercy: feed the hungry, visit the sick, instruct the ignorant, admonish sinners, etc. If utilitarianism demands that these be done unto utter exhaustion, then it is an awfully ambitious doctrine. No Christian saint probably measured up to an ideal that rigorous. The fact then that there are no actual utilitarians in the world should give pause to those who advocate utilitarianism.

Further, regarding “helping,” I cannot forsake my own life and become a tool of others who will use me, quite selfishly, to pursue their own aims. I am a man, not a robot or slave whose purpose it is to serve its owners. I cannot disappear as a person and turn myself into an appendage of other people. Imagine if everybody was this sort of a helper; then everyone would be an instrument for others; and no one would have a life or his own goals or interests. There would be no one whose goals could be furthered by help from others because everyone would be just a helper to others. Utilitarianism refutes itself.

This is the problem of power. All three problems are extremely severe and destroy classical utilitarianism.

### **Essence of lawgiver utilitarianism.**

Thus, utilitarianism is not supposed to apply to individual conduct, as in “you shall act so as to maximize global welfare”; not even rule utilitarianism (“you shall act according to rules following which generally promotes global welfare”).

It rather acknowledges a certain division of labor between the lawgivers and

the people. It is a guide not to the individual citizen but to the legislator. It is precisely harmonizing an individual's search for his own profits with the welfare of society at large that maximizes utility, so far as any reasonable calculation showcases. Let the laws be such that, on the one hand, no man is prevented from discovering and traveling to a position in which he can best serve society; and on the other hand, social cooperation serves each individual increasingly better with time. Enacting such a regime is then the task of a shrewd utilitarian. Now it is true that natural law must be wisely discovered, and positive law, prudently made. But the judges and legislators are passive. They make the laws and then just sit there waiting.

The first thing they wait for is for people to refuse, perhaps shortsightedly, to honor the incentives generated thereby, in which case the authorities jump out and pounce on the lawbreaker like a snake on its prey and punish him.

The second, is also for the citizens to respond to the same incentives, but this time properly. This is because the governed, on the contrary, are active. Even so, they are not required to make any utilitarian calculations but are permitted simply to pursue their own self-interest in whatsoever it may consist. This self-interest can explicitly, through charity, include the happiness of others, but it does not have to; all actions guided by good laws tend to redound to the social good and indeed global welfare.

It is only the judges and legislators who should pay heed to utilitarianism. Moreover, they can't predict how the citizens will act. They cannot predict who will be the next Thomas Edison or Henry Ford, or whether. They can at best "provide an environment which does not put insurmountable obstacles in the way of the genius." (*HA*: 155) Whether there will *be* geniuses to whom the road will be open in such an environment is up to God and His genetic random person generators. In defense of Al Gore, he as politician may not have invented the Internet, but he did abstain from ruining it through bad laws.

As a result, we don't need an impartial sympathetic spectator who compares utilities intersubjectively. For in the imaginary world before the law is laid down, there are no citizens yet. The morality of Edison is not being compared with the morality of Ford, such that whoever creates more happiness is ordered to act. No one is ordered to do anything; only

punishments for crimes are specified. Once this is done, people are left in the command of their own counsel, free to pursue whatever pleasures they fancy.

Coordination obtains implicitly through the market process (which we will discuss later), is eminently possible, and in fact occurs as a matter of course.

This humble method turns out to be the most reliable way of creating “the greatest good for the greatest number.”

### **Lawgiver utilitarianism illustrated.**

In a penetrating article, economist Robert Murphy [objects](#) to the adequacy of utilitarianism:

The fundamental problem with utilitarianism is this: Despite a succession of ingenious proponents, its advocates have yet to explain why the *individual* should behave morally. The fact that we are all better off if we all behave morally is utterly true and utterly irrelevant. (Such an argument violates the cherished Austrian precepts of marginalism and individualism.)

The truly difficult moral issues resemble the familiar Prisoner’s Dilemma; regardless of everyone else’s behavior, the individual does better by exploiting others.

It is true that a society suffering from widespread theft would be intolerable, even from a thief’s point of view, but any individual robbery has very little impact on the overall level of crime.

The focus of LU is social. A utilitarian has little to say to any individual on why he should not be a thief. But he does recommend a *social policy* of catching and punishing thieves. The utilitarian idea is to structure the incentives of the legal system to minimize the total amount of violence people (including the state) inflict on one another. Utilitarianism counsels rewarding and encouraging good deeds and discouraging behavior that harms social cooperation. And that’s it! It thus addresses itself to society and state.

LU does not bark, “You must obey the law”; it whispers quietly, “If you disobey the law, then you will suffer punishment,” and that is sufficient for it to be a useful and important moral theory. The threat or disincentive of

punishment for destructive behavior permeates society as a whole and steers individuals into productive occupations. A person is “free” to break the law in the sense that LU does not command him as a natural moral duty would. It merely alerts him to the existence of external sanctions for crimes. “You’re welcome to do the crime,” it says, “but only if you can handle the time.”

Murphy goes on:

Moreover, if everyone *agreed* with Yeager and other utilitarians that it were foolish to sacrifice oneself in these rare instances, an element of doubt would arise in all social interactions.

Although pangs of conscience might be a wonderful evolutionary byproduct, it would be in the interest of everyone to steel himself against such “irrational” feelings (while still behaving in accordance with them under normal circumstances).

One’s very life might one day depend on it.

There is a truth-digging game going on between the passive society and acting individuals. Individual soldiers will want to hide their cowardice and merely pretend to be willing to sacrifice their lives for the cause (thereby getting paid for doing no work), while society has an incentive to detect their cheating and punish them for it or at least refuse to hire them. Utilitarianism thus addresses itself not to the *soldier* contemplating whether to sacrifice himself for the greater good, but to the *general* choosing the soldiers who, in his estimation, are most likely to follow orders even unto death.

It does not say to the soldier: “Sacrifice yourself.” Rather, it says to the general: “Pick self-sacrificing soldiers.” And it is an empirically true statement that people do not always behave selfishly, carefully hiding their egoism until the time comes when they are put to the test, and then to everyone’s consternation they up and do their own thing. Sometimes society wins; other times individuals win (perhaps unjustly and wickedly) at the expense of society. A soldier may indeed be directed to sacrifice himself but not by utilitarianism but by the contract he must have signed with the military before going off to war. He is duty-bound to act as his contract stipulates, including sacrifice himself in certain situations. Further:

Utilitarianism seems to rob the words *good* and *bad* of their specifically ethical character. The utilitarian cannot make a distinction between guilt and simple error.

The person who robs a bank to achieve happiness has made a mistake in *qualitatively* the same sense as a person who overcooks a steak.

Once again, we don't care about whether the robber acted virtuously or not. All that lawgiver (i.e., rightly understood) utilitarianism commands is that the police try to deter and minimize bank robberies as much as possible consistent with other goals. The rule according to which robberies go unpunished results in an unhappy society, despite the benefits to the robbers.

Even individual robbers have an interest in society being tough on crimes. The timid will be deterred and steered into productive occupations, benefiting their fellow men. Especially competent robbers will still get away with their crimes but will enjoy diminished competition and a productive society, so they can actually spend their ill-gotten money. The losers of a regime that efficiently prosecutes robbers will be the stupid criminals who are neither deterred by the law nor evade detection and capture. But their misery is a utilitarian price we pay for a happy society overall.

Now it is true that lawgiver utilitarianism ignores the obvious point that the robber commits an injustice. This is not a *failure* of this theory but merely its *limitation*. Other theories will need to be brought to bear to complement it.

It follows that "we as a society" must calibrate the legal system and other methods of apportioning praise and blame so as to promote general happiness. As to the fate of an individual's immortal soul utilitarianism is silent.

Rawls criticizes utilitarianism for being tightly bound to a real society as it is in its full particularity, to the status quo, and for having nothing to say about the justice of that society's basic structure. It is the actual people's actual happiness that is it to be maximized. And that is true, but only of classical utilitarianism. Lawgiver utilitarianism eludes this objection easily, as just as contractarianism, it purports to design a good (and, as I hope to show, just) society.

LU is also a version of pure procedural justice, since, as soon as the institutions are designed, people are left free to pursue their happiness as they see fit. The institutions are utilitarian; what people living under them will actually do, what ends they pursue, what means they use, how artfully they will execute their plans, whether they succeed or fail, even which goods will be available on the market tomorrow are completely unknown to any non-divine mind and are not within the purview of the utilitarian. Thus, it is false that the LU seeks to maximize happiness, and rules and institutions are means to that end. The design of good institutions is precisely the ultimate end. Anything that happens afterwards is considered just.

For example, even in the best society, a wayward meteorite can at any time strike the earth and wipe out everyone. A utilitarian cannot be blamed for failing to save mankind. Yet the utilitarian will still have done his job if he provides for *laissez-faire* capitalism until the very moment of destruction, even if, had he arranged for a totalitarian state instead, this state would have built a giant rocket (at the expense of general prosperity) intended for war which luckily would be used to blast and divert the meteorite and save the world (if indeed a world of gray grim despotism is worth saving).

We may define “culture” as what people, having fulfilled their moral duties, do with their freedom. A utilitarian lawgiver has no idea what kind of culture will be created under efficient laws, or whether there will be a culture at all. For all he knows, people will choose not to reproduce, and humanity will come to a swift end. Given such radical but unsurprising ignorance, LU is not a personal morality (which fails on numerous grounds in any case as we have seen), only the directing principle to the philosopher-king in the design of the institutions or basic structure of a great society.

I have suggested that a reasonable subordinate principle would be: “make such laws as to harmonize individual creative initiative and pursuit of happiness with the common good.” But there is for the lawgiver no control or choice over who will be pursuing happiness how, or whether. Once the laws are laid down and coercive enforcement of them, set up, the lawgiver may, for all anyone cares, die and be forgotten. Utilitarianism has fulfilled its function. Acting men, in their daily hustle and bustle, need pay no heed to it.

In the course of this eBook, I will prove and maintain that Rawlsian

contractarianism, to the extent that it produces anything at all, produces the same results as lawgiver utilitarianism. Even stronger, when separated from lawgiver utilitarianism, deliberation in the original position is fruitless.

## **Primary Goods: Equal Liberties**

Rawls begins promisingly:

Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. ... the rights secured by justice are not subject to political bargaining or to the calculus of social interests.  
(*TJ*: 3-4)

Another serious problem with classical utilitarianism may be illustrated via a simple dilemma: should a doctor kill 1 innocent patient in order to save the lives of 5 other men in dire need of organ transplants? Without going into details, the situation is actually much more bizarre. For under utilitarianism, the patient *himself* is duty-bound to promote the greatest happiness for the greatest number. Thus, he is morally required to *volunteer* to die and be carved up. Still more astonishingly, the doomed patient must love mankind as himself. As such, he would be positively delighted that the cause of the greater good was served through him. He was in the right place at the right time to ensure his surprising employment in the interest of the whole society. He dies happy, knowing that he has been well-used.

Rawls avoids this rather perverse result by insisting on the priority of liberty over welfare. No man's rights are to be sacrificed on the altar of pleasure or happiness: "whenever the basic liberties can be effectively established, a lesser or an unequal liberty cannot be exchanged for an improvement in economic well-being." (*TJ*: 132) Some human rights cannot be voted away no matter what.

Commendable as this sentiment may be, it suffers from two problems. First, no particular liberty is guaranteed to be agreed to in the original position. Second, the set of liberties Rawls personally likes is entirely arbitrary.

We'll deal with these momentarily; but under what circumstances in a realistic

society might people be tempted to make an exchange of liberty for welfare?

One candidate is the exhortation we often receive to trade our liberty for our security, and greater security can be thought of as an economic benefit. However, the executive branch of the *local* government is not a protector but merely an enforcer of judicial sentences, providing essential deterrence. The way the police department delivers security is not by bodyguarding each citizen but by having the fear of punishment for crimes against person and property imbue society as a whole. On the *federal* level, the state is an institution of murder, destruction, and exploitation with no redeeming qualities whatsoever. There is no such thing as *national* security.

Another example is the Food and Drug Administration. This monopoly consumer protection agency is at the same time too conservative in not allowing beneficial drugs and technologies to reach the market quickly enough (thereby being complicit in the deaths of thousands), and very much remiss in its duties to monitor the well-established companies (which it essentially protects against the newcomers) for outrageous claims. Fully privatized consumer protection would do its job vastly better.

What follows is that liberty and prosperity are intimately tied with one another. E.g., the socialist countries in the 20<sup>th</sup> century traded liberty for prosperity and ended up with neither. Rawls' concern is purely academic.

Now what are the protected liberties, exactly? Says Rawls:

Important among these are political liberty (the right to vote and to hold public office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law. (*TJ*: 53)

At the same time,

Of course, liberties not on the list, for example, the right to own certain kinds of property (e.g., means of production) and freedom of contract as understood by the doctrine of *laissez-faire* are not basic;

and so they are not protected by the priority of the first principle.  
(54)

This is indeed arbitrary. Who cares whether economic liberties are or are not on Rawls' list? What makes his list definitive? One searches in vain for any justification of it. The dismissive "of course," in fact, seems like a nod to the academic socialists of Rawls' time to assure them that Rawls is an egalitarian in good standing. Now it is possible that Rawls thinks that economic freedom is a *means to an end*, the end being prosperity. If this freedom is not necessary for it (and economics is full of controversies), then it should not be included in the list of liberties to be enjoyed equally by all. *Personal* liberties cannot be exchanged for welfare, but "economic" liberties can. If economic liberties are mere means to economic well-being, then surely, abridging or regulating the means precisely for the sake of the end is the height of economic sense. Far from having priority, the means have no value apart from the end they serve and so are at the very bottom of the Rawlsian hierarchy of goods. In the first place, this undercuts our author's priority of liberty: it seems arbitrary that some liberties trump welfare, and other liberties are trumped by welfare. Second, what if it *can* be proven that economic freedom is absolutely essential not only to human welfare (in which case it might still have a lower priority) but to political liberties, as well?

As soon as the economic freedom which the market economy grants to its members is removed, all political liberties and bills of rights become humbug.

Habeas corpus and trial by jury are a sham if, under the pretext of economic expediency, the authority has full power to relegate every citizen it dislikes to the arctic or to a desert and to assign him "hard labor" for life.

Freedom of the press is a mere blind if the authority controls all printing offices and paper plants. And so are all the other rights of men. (*HA*: 287)

Many so-called "political" liberties and "human rights" are in fact economic in nature. As Murray Rothbard notes,

In short, a person does not have a "right to freedom of speech";

what he does have is the right to hire a hall and address the people who enter the premises.

He does not have a “right to freedom of the press”; what he does have is the right to write or publish a pamphlet, and to sell that pamphlet to those who are willing to buy it (or to give it away to those who are willing to accept it).

Thus, what he has in each of these cases is property rights, including the right of free contract and transfer which form a part of such rights of ownership. There is no extra “right of free speech” or free press beyond the property rights that a person may have in any given case. (*EL*: 113)

Even the Rawlsian protections of the “integrity of the person” are best expressed as one’s property rights over one’s own body. The separation between “personal” and “economic” liberties is untenable: all liberties secure the right of the people to seek happiness as they see fit and of their own accord.

At the same time a case can be made that *with* full economic freedom political liberties are almost irrelevant, as there are no longer the trillions of dollars’ worth of loot that the government confiscates in taxes and inflation to be fought over by the populace. The government in a free society administers no regulatory departments, finances no war machine, does not “redistribute” wealth to either the underworld or the overworld, sticks with sound money and enforces honest banking, and in general keeps a very low profile. Who cares, in that case, what the government does otherwise, if under libertarianism most people will have no contact with it throughout their lives?

Thus, “the fair value of the political liberties is required for a just political procedure, and... to insure their fair value it is necessary to prevent those with greater property and wealth, and the greater skills of organization which accompany them, from controlling the electoral process to their advantage,” says Rawls (*PL*: 360). Equalizing wealth and income is a bad idea as it can be achieved only by starving everyone equally. Equalizing “democratic” power can also be accomplished by denying it equally to everyone, but this is both

less utopian and more desirable. Limit the power of the state or destroy it entirely so that it *does not matter* who controls the “electoral process.”

Not only are personal and economic liberties inseparable, but absence of economic liberties suffocates the spirit; it is precisely in business that human ingenuity, creativity, drive, prudence, courage are exercised and find their noblest fulfillment. Being an entrepreneur is one of the highest human callings, and for the state blithely to crush this aspiration is profoundly unjust. Rawls underestimates the extent to which property ownership is “necessary for the development and exercise of the moral powers.” (*PL*: 298)

Rawls maintains that “the choice between a private-property economy and socialism is left open.” “There is no essential tie between the use of free markets and private ownership of the instruments of production.” Why? Because, our author argues, even under socialism there might be a market for consumer goods (“any other procedure for rationing the consumption goods actually produced is administratively cumbersome”) and labor market (“both private-property and socialist systems normally allow for the free choice of occupation and of one’s place of work”). (*TJ*: 228-9) First, to the extent that there are such markets, the system departs from pure socialism; in fact, it makes it more difficult for the central planner to centrally plan. To true socialists these markets are an abomination. Second, these markets are woefully insufficient to produce any alleged free-market socialism.

The phrase “free-market socialism” has three distinct technical meanings. First, it refers to schemes like tradable pollution permits. Within a given country, the total amount of pollution that business firms may lawfully emit into the commons is fixed by the state, but firms are assigned permits which they can trade with each other freely. A company might find that it already pollutes less than its allotted share; it can sell some of its unused pollution rights to another business which would welcome an opportunity to produce (and hence to pollute) a bit more, even at an extra cost. This is supposed to be more “efficient” than a cruder command-and-control system.

Second, it may refer to government-run enterprises like the Post Office or airports that are embedded into a much larger capitalist economy. We may object to the state’s ownership of airports, but at least the airlines are private companies. The damage of this form of socialism, though significant, is

contained.

Finally, Mises relates that other market socialists “want to abolish private control of the means of production, market exchange, market prices, and competition. But at the same time they want to organize the socialist utopia in such a way that people could act *as if* these things were still present. They want people to play market as children play war, railroad, or school.” (*HA*: 706-7) He demolishes this idea as nonsensical in the following pages.

To the extent that Rawls does *not* have in mind any of these things, his “assumption” that “the economy is roughly a free market system, although the means of production may or may not be privately owned” (*TJ*: 57) is on the same level as the assumption of the existence of square circles.

Our author suggests that primary goods ought to enable people to develop and exercise their two “moral powers,” the relevant one of which here is the “capacity for a conception of the good.” In more straightforward terms, it is necessary to empower people to pursue their happiness. I appreciate Rawls’ good intentions, but which liberties are we to secure exactly?

Rawls claims to show how “justice as fairness provides strong arguments for equal liberty,” in his first example, of conscience and “moral, religious, or philosophical interests.” (184) But in fact, he does no such thing despite saying that the case for equal liberty in these things is most forceful. His only attempt is a bald assertion that to gamble that one would, upon exiting the OP, belong to the majority that would restrict other people’s liberties “would show that one did not take one’s religious or moral convictions seriously, or highly value the liberty to examine one’s beliefs.” (181) It seems that precisely the opposite is true. I know even in the OP that I will have some attitude toward religion, and that whatever I believe I will consider to be true. I therefore may welcome a chance to coerce others to convert to my faith. I might consider such a “liberty” to be indispensable even if I *do not* end up in the majority; I might think that in such a case, it will be my sacred duty to seize power and commence my reign of religious terror.

An atheist might argue: there exist some crazy people who believe in an invisible and undetectable being they call “God.” They are even insolent enough to try to justify their self-evidently absurd doctrines with sophistical

and insincere “philosophy”! These people are clearly ignorant, stupid, insane, or wicked; and they harm themselves and their children with such outrageous and irresponsible ideas. Society should not humor them by allowing them to persist in their delusions; they should rather be reeducated and cured, by force if necessary. How could our author object to such a humanitarian attitude?

An *actual* argument in favor of religious freedom might be that this kind of war of all against all will result in a miserable society. “Religious wars are the most terrible wars because they are waged without any prospect of conciliation,” Mises points out (*HA*: 179). Another argument might be that supernatural illumination or grace is not given to all men; but grace builds upon nature; it is unnatural and unjust to use violence against people with whom one disagrees; a fortiori, it is contrary to divine grace, as well. As regards philosophical points of view which are matters of unaided reason, violence and coercion are the wrong means to attaining the truth on these subjects. For moral matters, understood as personal virtues, we may argue that vices are not crimes, and it is against natural law violently to punish men for their character flaws. And so on. Rawls, however, disappoints:

Aquinas justified the death penalty for heretics on the ground that it is a far graver matter to corrupt the faith, which is the life of the soul, than to counterfeit money which sustains life. So if it is just to put to death forgers and other criminals, heretics may a fortiori be similarly dealt with.

But the premises on which Aquinas relies cannot be established by modes of reasoning commonly recognized. It is a matter of dogma... (*TJ*: 189)

Suppose that the majority of people in a certain city are Catholic. It will be “commonly recognized” among them that faith is the life of the soul, etc. Rawls might remain skeptical, but the issue will be settled for *them*. In the OP, one may wonder whether he’ll be incarnated as such a person and value the salvation obtained by means of suppressing heresy.

Again, we may argue against St. Thomas’ opinion thus: faith, along with hope and charity, is a theological virtue that is infused into the soul by an act of

God. It does not come naturally but belongs to grace. We may grant that heretics may be able to corrupt grace. But they leave human nature intact. But government violence can properly be used to punish violators only of *natural* laws. Thus, it may be immoral to make another doubt his faith, but it cannot be illegal. At the same time, an atheist who denies the proofs of God's attributes and existence from natural reason can, and should, be confuted without censorship. Rawls is not interested in such argumentation.

In any case, what is the meaning of “modes of reasoning commonly recognized”? It is true that faith is above natural reason, but Rawls' own specification of the OP does not exclude supernatural knowledge. He nowhere says that the bargainers in the OP cannot know that, for example, Christianity is true if it is in fact true. Rawls may simply be conflating the good with the true. The OP is based on denying the parties in it the knowledge of their conceptions of the good. Fine. But further disallowing appeals to various general knowledge is completely arbitrary.

Rawls would need to amend his concept of the OP to include something like the idea that we as philosophers are interested in matters knowable by natural reason alone, and divine revelation does not impinge on the problems of natural justice. But many people do recognize that divine revelation can be a valid source of truth; why, even as they philosophize in the OP, must they forget what for them is crucial background knowledge? Suppose one says with Hoppe, “There can be no tolerance toward democrats and communists in a libertarian social order. They will have to be physically separated and removed from society.” (2001: 218) Perhaps advocacy of democracy is kind of fighting words, indicating a willingness in the speaker to steal. This controversy between the democrats and libertarians is no longer a “matter of dogma.” Presumably, we can figure out rationally whether democracy is good or bad. If I can remain philosophically libertarian in the OP, and supposing that Hoppe is right, then why can't my alter egos, the bargainers, contract to repress democrats and communists? On the other hand, a democrat may charge that the libertarian is a “hater” who fails to be properly “inclusive” and so is beyond the pale and to be silenced. Again, a communist will deem the libertarian a saboteur whose propaganda endangers the central plan that is supposed to lead the whole society to a blissful future. In general then, if as a philosopher in the OP I uphold some more or less comprehensive doctrine

C, then even if I don't know whether in the actual society I will uphold C, I may think I ought to and hope to be forced to believe in C. And even if in the OP I *don't* believe in C, I realize that in the actual society I might and so seek to protect my potential interest in coercing others to embrace C. The device of the OP offers no help in resolving this mess.

In *Political Liberalism*, Rawls in vain attempts to solve this problem with the idea of "public reason" which is

defined against a background of democratic institutions, and it assumes toleration of different religious, philosophical, and ethical positions. ...

Public reason must rely on principles, values, and methods of reasoning and assessing evidence shared by reasonable doctrines under conditions of a free democratic society. ...

All reasonable doctrines reject slavery and forced servitude and affirm the integrity of human life, freedom of movement, freedom of conscience, and some degree of freedom of association and occupation. (Freeman 2003: 39-40)

Surely, this is circular: Rawls assumes what he is supposed to prove.

If this "most forceful" of Rawls' arguments fails, then a fortiori, so do all the others, if any. For example, as a bargainer in the OP, what would stop me from demanding the equal liberty of not being subject to looking at ugly people's faces? I insist on a right to beauty around me, and unattractive people should either cover up or endure my wrath as I pound them senseless. I do gamble, of course, because I might be the one born ugly, but why is it "unreasonable" for me to take this gamble?

There are further difficulties. Negotiations in the OP will proscribe the liberty to murder and steal: "in limiting liberty by reference to the common interest in public order and security, the government acts on a principle that would be chosen in the original position." (*TJ*: 187) That may be, but on what grounds? If it's because not being murdered is a basic human right, then we've resorted to natural law; if it's because a society in which murderers are punished is decent, then we're invoking utilitarianism. For all I

know, after the veil of is lifted, I'll find myself a gangbanger who appreciates the chance to beat people up for pleasure or profit. No definite *contract* ensues.

Worse, I may be born as Conan and thence seek to crush my enemies, see them driven before me, and hear the lamentations of their women. (I will want to consider these ends especially given the claim that they are “best in life.” This is hardly philosophically outrageous. E.g., if I am a Humean, I will maintain that “it is not contrary to reason to prefer the destruction of the whole world to the scratching of my finger.” Mises held that “there are in this world no ends the attainment of which is gratuitous.” (*HA*: 286)) I may also be born as a non-Conan who would have no interest in being crushed or in lamenting. Natural law would say: Mongol Horde-style mass murder is unjust and ought to be criminalized. Lawgiver utilitarianism would point out that life in a society where Conanism prevails is solitary, poor, nasty, brutish, and short, including ultimately even for the Conans themselves. But I see no definitive way to resolve this dispute on Rawlsian grounds alone.

It is true that if every man in the OP wants to live in a society in which *he* is Conan, then no agreement will be made, since there can be only one such person. I even grant that all agreeing to get an equal one in a million chance to be Conan and so the almost 100% chance to be his prey is implausible (though not ruled out). But the parties in the OP all *have* specific conceptions of the good; they just momentarily lose the *knowledge* of them. The parties are “representatives” of actual individuals. They are duty-bound to protect their own interests, whatever these interests will be revealed as. Again, it is true that the basic structure agreed to will constrain the set of possible interests; thus, there will likely be no Conans at all under libertarian capitalism; or rather would-be conquerors will be efficiently transported to prisons. Yet in the OP, one would say: “I’d like the freedom to pillage and plunder for myself, which is good; but I realize that the same freedom will be extended to everyone, which is bad. Again, I may choose the right to be free from aggression, which is good, but then other people will likewise be free from my own aggression, which is bad.” This choice can be made only in the actual society by considering one’s conceptions of the good. In the OP, one would have to judge that Conan’s desires are somehow outside the pale (dare I say, “unjust”) in order to come to a decision, and this is what Rawls cannot

do.

It may be objected that there is a precise sense in which people ought to be mutually disinterested. When Conan seeks to crush another man, he finds fulfillment in the psychological state of another. He wants him defeated and humiliated. He pays attention to him, though perversely, still as a kind of end in himself. Johnny Cash sings of a character who “shot a man in Reno just to watch him die.” An avenger of blood, like Jefferson Hope in Arthur Conan Doyle’s *A Study in Scarlet*, too, wants his target to suffer. They all acknowledge their victims as distinctly human, though they may treat them atrociously. This is beastly behavior, a sign of sullied human nature. It is *below* nature. On the other hand, a saint who does works of mercy finds pleasure in another’s happiness. This belongs to grace and is *above* nature. A natural though ungraced man Smith whose nature is pure and undefiled will then seek his own happiness only and pay no heed to other humans in these ways, though love for family is not unnatural. “Neither a hater nor a lover be,” will be Smith’s motto. Such a man will further realize that society is the most important and indispensable tool for the satisfaction of his own ends. He will use others as means to these ends, but in exchange will himself consent to be used likewise, in so doing respecting human nature to its utmost. The OP, it will be claimed, models this disinterested outlook. Hence no party in it will ever consider Conan’s valuations or the valuations of a religious fanatic set on coercing others to convert to his faith. This argument fails, because to advise Smith we have assumed him to live in an actual society and invoked natural law. Rawls is helpless here; the parties in the OP have no access to pre-existing ethics and cannot know, e.g., that “You shall not kill.” They do not know that Conan’s violent lifestyle is morally wrong, since it’s precisely morality and justice themselves that are being constructed. Hence, they cannot ignore the possibility that they will be born as Conan’s counterparts with his, Conan’s – or the religious fanatic’s – conception of the good.

Rawls cannot reply that a just society is at the very least peaceful. For there is no peace without justice; some peace is morally vicious; some violence is morally justified. But what is just is precisely at issue here. Nor is it sufficient to observe that “endorsement of egoism would amount to the rejection of any moral principles, including individual rights” (Graham 20016: Ch. 4), since whether there ought to be individual rights, and if so, then what kind of

rights, are up for determination in the OP in the first place.

In other words, to say seemingly innocently, without strengthening the OP with lawgiver utilitarianism, that “I want my rights protected against both the criminals in the underworld and the tyrants in the overworld” is to introduce into the argument impermissibly a definite conception of the good.

Consider further a city’s basic sanitation regulations. Trash, let it be mandated, must be disposed of cleanly. This violates the personal liberty of the people to throw their trash out the window. Is this liberty to be permitted or quashed? Ought the people to have the right to get rid of trash as they see fit, or the right to be free from other people’s trash? Utilizing natural law, we might try to sort out the relevant property rights given such thorny externalities. Under lawgiver utilitarianism, we will ask what policy is best for the city as a whole. If there is competition between cities, we may be able to discern the most appropriate principle of justice by watching people move in and out of the area: if people flee the regime, there is something wrong; if on the contrary they seek to immigrate into it, in so doing bidding up property values, things are looking up. Rawlsianism, unfortunately, is unenlightening.

Violations of a single liberty are allowed for the sake of greater overall *system* of liberty. Conscriptio, Rawls says, “is permissible only if it is demanded for the defense of liberty itself.” (*TJ*: 334) This follows from Rawls’ proclamation that “each person is to have an equal right to the *most extensive* scheme of equal basic liberties compatible with a similar scheme of liberties for others” (53, emphasis added). Unfortunately, this opens a large can of worms. Perhaps slavery is permissible because it fosters *freedom from job insecurity*. Freedom of speech can be abridged for the sake of enhancing *freedom from hate*. Since desires can disappear both by being satisfied and by being extinguished, deliberate dumbing people down at a young age to stunt their imagination and ambition can be a means to *freedom from want*. A fossilized socialist economy can foster hopelessness and through that again “freedom from want,” if people are made to understand that they have no prospects in life and submit passively to their dull gray daily drudgery.<sup>1</sup> Since freedom

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<sup>1</sup> In the Soviet Union, “ordinary Russians have had irreducible rights to relapse into passivity, to choose how little they will work and how often they will escape into blind drunkenness, without being subjected to sanctions and economic costs as a consequence,”

entails the right to pursue happiness, and this pursuit can be either successful or not, eliminating any freedom can be in the name of greater *freedom from failure*. Mass executions of some “impure” group are clearly both for their own and the greater good, since it maximizes their own *freedom from sin* and protects society from being contaminated by sin. I would not want any of these “freedoms,” but what of my representative in the OP? How do we ensure that *he* is “reasonable”? I may be able to *prove* that these are fake freedoms, but I’d need more resources than merely the idea of the OP. Similarly, I could prove that the right to own means of production, the right to contact with whom I please (Rawls refuses to grant that “the rigors of free trade should be allowed to go unchecked” (85)), the right to keep and bear arms (completely ignored by Rawls), and so on are genuine liberties, but again I’d have to resort to something other than contractarianism.

The OP disallows “pointless” general rules. Such “principles, for example, that one is not to look up at the sky on Tuesdays, are rejected as burdensome and irrational constraints.” (417) Let’s say the state creates a new category of crime, “illegal movement of a non-ambulatory animal,” or whatever preposterous regulation the rulers conjure up. Is that a “burdensome and irrational constraint”? From the point of view of natural law, yes, it is, as it clearly violates the property rights of the animal’s owner. From the point of view of lawgiver utilitarianism, it reduces welfare. But from the point of view of a bargainer in the OP, one cannot know that upon incarnating, he will not become someone who will enjoy living under such a rule if it means that everyone else must obey it, too. So, I might end up as the kind of person who is willing not to look at the sky on Tuesdays provided that no one else is allowed to do this, either. E.g., Rawls allows that I might agree to be taxed if it means that everyone else is taxed, too. There is nothing in the OP itself to condemn such exchanges between the bargainers.

Rawls asks incredulously, “what reasons can both satisfy the criterion of reciprocity and justify holding some as slaves, or imposing a property qualification on the right to vote, or denying the right of suffrage to women?” (PL: 447) Let me canvass some possibilities.

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writes Anthony de Jasay (1997: 42).

If some were “natural slaves,” or if slavery were good for those enslaved, then slavery might be justified. Suppose there existed a race of goblins – savage, ugly, semi-intelligent creatures whom to exterminate would be a charity to the Creator’s worthier insects and reptiles which they oppress. But, moved by holy love, people have somewhat civilized the goblins and made them useful to society as slaves performing uncomplicated tasks. Surely, the mercy shown to the goblins would be a positive good and appreciated by the goblins themselves as preferable to their annihilation.

As for voting, in the first place, I deny that this is a basic liberty. One obvious reason is that for a genuine right, one man’s exercise of it is compatible with another’s. Both profit from having their liberties. But if Smith votes in the opposite way to Jones, Jones’ liberty to bring about his preferred policies is to that extent overturned. Granting the franchise to increasingly greater numbers of people is idiotic, as their combined voting will simply cancel itself out. It’s zero-sum game, a war by ballots if not yet by bullets. Rawls suggests that the right to vote may be an “essential institutional means to secure the other basic liberties under the circumstances of a modern state.” (PL: 299). Here I think he is simply being naïve.

Further, the right to vote is hardly the right to self-determination or a sign that one controls his own destiny. It’s rather the power to dominate and coerce others, i.e., the “right” to *prevent others* from controlling their own destinies. There are therefore no “liberties of the ancients,” only political powers of the ancients. These powers to encroach on the true liberties of fellow men ought to be limited, not given to all. The more power the *people* collectively exercise, the less free the *individuals* are.<sup>2</sup> Rawls does not see the “competition” between these, calling it simply “the risk for political justice of all government.” (PL: 416) We may ask: how can it be both that the people ought to agree on just laws and that justice is defined as what people agree on? Rawls would likely answer thus: the people in the actual society must

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<sup>2</sup> This understanding can save Rawls from the following embarrassing question: if basic political liberties are to have equal “worth,” as he wishes, then why not the basic non-political liberties? But of course, the “worth” of a liberty to a person is simply his wealth and income. Equalizing the former means equalizing the latter, and the difference principle goes out the window. When it is realized that political liberties are in fact political powers, it becomes logically possible to combine equal powers with unequal wealth.

prove their justice by adopting the principles agreed to in the original position. But whence specifically democracy? It seems rather that the unanimity belonging to the OP is matched by anarchy in the actual society. The contractarian justice must not be put at the mercy of majority rule. Rawls assumes there must *be* a government, and he favors democracy, but in vain. Unbeknownst to himself, Rawls is Rothbard's brother-in-arms.

Then there is the fact that each voter is one man among possibly a hundred million; and so an individual vote never makes a difference in an election. If Smith votes for Jones, and Jones is elected, then Jones would still be elected even if Smith had not voted. If Smith does not vote, and Robinson is elected, then Smith was powerless to prevent this anyway, even if he had voted. In the meantime, if Smith despises both Jones and Robinson yet picks the lesser of the two evils Jones, he ends up sending a false message not that he protested Robinson but that he approved of Jones who will now brazenly claim the "mandate." To illustrate, suppose I announced: I want to sell my votes. All elections, all available governments. Buy federal, get Ohio state free. Not interested? Well, the fact that *no one* wants to buy my votes, even on some black market, indicates just how worthless one's political franchise really is. The "free and equal" democratic citizens are only equally irrelevant.

The right to vote then does not elevate one from passivity to some active citizenship. It is not a "social base of self-respect." For example, in a free society, there are at the most only local governments which compete with each other for residents. Self-respect is manifested in one's choice of polity, as one decides which city to live and do business in exactly as if the cities' political systems were consumer goods, not necessarily in meddling in any city's politics. One respects himself by championing the kind of society where voting is both superfluous and publicly recognized as tyrannical. In short, self-respect does not come from laying one's hands upon the levers of political power, or if it does, then only in a society of barbarians.

A true patriot, if nominated, will not run; if elected, will not serve; and if given the power to vote to nominate or elect others, will not exercise it.

It may be that an aspect of self-respect is the "capacity for a sense of justice": the right to formulate and advance one's own political ideology, and a theory of justice in particular. But democracy does not follow; for example, each

person may have an equal chance to tutor the prince.

Then, if those who own no property, i.e., those who are not invested into their community, tend to vote viciously, anti-socially, and unjustly (for example, by authorizing the state to loot the bourgeoisie through taxes), then denying them the right to vote benefits society as the whole. It is precisely non-property owners who are the more vulnerable party and who will be greatly harmed by agreeing in the OP to let their fellow shiftless and untrustworthy lumpen-proletarians vote. Irresponsible voting will harm the economy and hence the non-property owners in particular.

If women tend to be irrational and fickle, then they may be unqualified to vote; in fact, a woman might feel (I think rather vainly) that *she* gains from the right to vote, but, it may be argued, she loses from the fact that *all other* women have the right to vote. Even if an occasional woman exhibits some manly virtues, on the whole giving all women suffrage rolls back the social and economic progress in which women have a vested interest. Letting women vote will reliably sabotage justice. A woman in the OP should deny her sisters the right to vote on the grounds that she does not want to live in the kind of society in which women are granted such a right.

Rawls writes, of course, that “the equal political liberties cannot be denied to certain groups on the grounds that their having these liberties may enable them to block policies needed for economic growth and efficiency.” (*JF*: 47) This is an empty demand. Viciously exercised personal liberties make one a “private” criminal and liable for punishment. The criminal’s personal liberties are taken away in prison for the sake of society as a whole. But viciously exercised political powers make one a “political” criminal. These powers ought by right to be taken away if they result in social harm. Now personal liberties are far more important than voting privileges. If the former can be forfeited by evil deeds, then a fortiori, so can the latter.

It may be replied to this argument that for private criminals, not knowing what the law *is*, is no defense; but for political criminals, not knowing what the law *ought to be*, is. According to this opinion, any fool or miscreant has an inalienable right to make laws that govern other people, no matter how atrocious. He is “free and equal,” or something like that. At the very least, no one has the authority to punish a voter for voting badly, since punishment

requires lawbreaking, and it is precisely laws that are being made in the process. Then if all laws come from one's arbitrary will, then condemning a voter for unwise choices makes as much sense as condemning him for preferring chocolate ice cream over vanilla. But this is contrary to Rawls' own understanding. Natural moral law and economic law are objective; Rawlsian law arises out of unanimous agreement in the OP and so is intersubjective. But we can call it objective, too, insofar as it is the philosopher who indulges in this exercise of reason, and feelings scarcely enter into it. Rawls' claim then cannot be that voters have the power to make unjust laws; but must be taken as an affirmation of his priority rule of liberties over welfare. I persist in denying that wielding coercive power is a basic liberty or even a liberty at all.

Regarding freedom of speech, Rawls is a typically wishy-washy modern liberal: "Some kinds of speech are not specially protected and others may even be offenses, for example, libel and defamation of individuals, ... even political speech when it becomes incitement to the imminent and lawless use of force." (*PL*: 336) He provides no rigorous criteria for distinguishing between protected and non-protected speech. (Rothbard, for example, does, but he connects speech with natural rights to private property, a tool decidedly unavailable to Rawls.) The issue is not what Rawls personally likes and dislikes, but what would be chosen in the original position. Lawgiver utilitarianism may perhaps repair his system to yield determinate results.

Why wouldn't an OP bargainer have an interest in protecting others from themselves? Liberty of conscience entails the right to "fall into error and to make mistakes," Rawls admits. Yet the consequent is often doubted. It might be one thing if we were all "affirming our way of life in accordance with the full, deliberate, and reasoned exercise of our intellectual and moral powers." (*PL*: 313) What of those who do not (or do not appear to be)? Many people feel that those who use certain drugs forfeit their humanity and must be punished, often with severity greater than that reserved for the penalties for robbery and murder. Others, that certain artworks must be censored or destroyed for being "racist." Still others, that certain lifestyles corrupt the soul and hence ought to be outlawed, or that vices can be crimes. How does the OP restrain the parties in it from worrying about their future paternalistic interests?

In the OP, do I heed the whisperings of a law-abiding citizen eager to see crime punished or of a criminal who'd like to escape punishment? I might, after all, end up as either. Natural law theorists might insist on proportional retribution. Lawgiver utilitarians will want so to calibrate the system that the marginal benefit to society of an extra beating or month in prison from greater deterrence effects is just outweighed by the marginal cost to the criminal (since criminals remain members of society whose welfare counts toward the total). As regards abortion laws, similarly, while in the OP, I realize that I have a chance in the actual world to be instantiated both as an abortion-seeking woman and as an unborn child who is being threatened with being aborted. Whose interests am I to favor? How do I choose between "abortions for all" and "no abortions for anyone"? These questions are unsolvable within the contractarian mechanism on its own.

Rawls has another idea, but it's even less successful. If there is a plurality of views, and no agreement, he suggests that "citizens must simply vote on the question." But the voting is to take place in the *actual society*. If the case from "public reason" for or against the right to abortion is inconclusive, then presumably it is to be decided by sentiment alone, by reference to controversial metaphysics, or by revelation. "Catholics may reject a decision to grant a right to abortion. ... They can recognize the right as belonging to legitimate law and therefore do not resist it with force. To do that would be unreasonable...: it would mean their attempting to impose their own comprehensive doctrine, which a majority of other citizens who follow public reason do not accept." (PL: 480) But these cannot be our guide *in the original position*, where all identifying individual characteristics are erased. If I don't know whether I'll be incarnated as a Catholic or whatever, then I cannot possibly know what I will "prefer" or to which school of philosophy or faith I will subscribe. Again, whether this right to abortion is to be included on the Rawlsian "list" cannot be determined in the OP.

Finally, that liberty ought to prevail is supposed to be a conclusion of Rawlsian contractarianism, not its premise. If doctrinal plurality is a brute fact and is taken as given by "political justice" which ignores deep disagreements and seeks instead an "overlapping consensus" on the basic structure of society, then of course freedom of conscience, religion, even speech is vacuously justified. But what justice concerns itself with and what it

generously lets off the hook again is arbitrary in Rawls who does not bother to define the scope of the political. Is it so wide as to question whether there ought to be a plurality of comprehensive doctrines in the first place? Is it so narrow as to demand, say, complete freedom from taxation?<sup>3</sup> For example, the existence of a single anarchist in society will prevent any social contract that permits the imposition of taxes from being made. Rawls might condemn such a person as “unreasonable,” but that would simply beg the question. If “political liberalism neither accepts nor rejects any particular comprehensive doctrine, moral or religious” (*JF*: 28), and anarchism is part of my own such system, then liberalism’s politics cannot contradict it. If my system is wickedly unreasonable, then perhaps so are others, now ripe for the repressing. Of course, unreasonable terms are simply those that would be rejected in the OP which remains my focus in this book.

Rawls’ acknowledgement of the diversity of “comprehensive doctrines” is thus a badly concealed sham. Unreasonable persons do not deserve any “respect” and can be silenced or even persecuted. “Public reason” then is, far from being public, in fact simply Rawls’ own reason. It is apparently some sort of civil wrong so much as to argue in ways or from premises our author does not approve of. All citizens must agree with Rawls’ philosophical pronouncements, and all political discussion is to take place in the terms of the theory of justice he has come up with. In other words, the point of limiting oneself to public reason is to justify one’s political choices to all citizens. Fortunately, that’s very easy, because Rawls labels all those who do not accept his justifications “unreasonable” and casts them into outer darkness. Rawls may reply that he simply assumes this theory to be both *true* and *complete*, a shining crystalline system, a beautiful reflection of the divine in politics. Those who fail to pay obeisance to this holy relic or even worship it are wicked heretics for whom there can be no toleration in a “well-ordered society.” The argument is: (1) if X is true, the all must submit to X; (2) X is true; therefore, (3) all are to hold it. First, the major is trivial; of course, truth must be known and loved. Second, I question the merits of the minor.

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<sup>3</sup> Contrast it with the Rothbard’s definition which is both crystal clear and fruitful: “political philosophy... is concerned solely with matters of right, and of the proper or improper exercise of physical violence in human relations.” (*EL*: 42)

Rawls' interpreters have more definitional tricks. Conservatism is liberal, says Burton Dreben, and so is socialism. But libertarianism is not liberal. Case closed, I suppose; I've been defined out of the discussion as unreasonable:

What Rawls is saying is that there is in a constitutional liberal democracy a tradition of thought which it is our job to explore and see whether it can be made coherent and consistent. ... We are not arguing for such a society. We take for granted that today only a fool would not want to live in such a society.

... sometimes I am asked, when I go around speaking for Rawls, What do you say to an Adolf Hitler? The answer is [nothing.] You shoot him. (2003: 328-34)

So, he's got his preferences – he likes “liberal democracy,” and he vomits them out onto us. He's also prepared a gun with which to shoot those who disagree with him. I'm sure this is oodles of fun for him, but how is it philosophy? Amazingly, Dreben admits that Rawls is reasoning in a circle, but says: “it is a big circle. So that makes it very good philosophy.” (338)

Perhaps Rawls' theory can be construed as a form of argumentation ethics: the parties in the OP are “free and equal”; therefore, they remain free and equal in the actual society. This is a striking non-sequitur. First, there are no “parties” in the “original position”; the OP is a mental experiment conducted by the philosopher. Second, the parties are “free” to propose any principles of justice and “equal” in their capacity to accept or reject any such proposals. But these are too thin and insubstantial notions to carry any weight. Third, it remains open to the parties in the OP to agree to principles that deny various forms of freedom and equality in the actual society. It is in indeed futile to philosophize without freedom of conscience and speech; that does not mean that one's philosophy must countenance these freedoms in the real world.

In short, the true natural rights of men stand undefended under Rawlsian contractarianism; the false rights are not ruled out by it. Compare this lamentable sterility with what lawgiver utilitarianism sanctions.

We need to ask the right question which is: given that in the original position I personally do not know who *I* will be in the actual world, what kind of *society* do I want to be enveloped by? An obvious answer regarding our

present subject is, one in which *other people's* liberties work to *my own* advantage. It would be pointless to seek to maximize my own liberties, since some of those liberties may turn out to be anti-social, and I'd have to suffer other people's also exercising them. LU, as I've said, mainly involves an attempt to make individual freedom compatible with the common good. A party in the OP represents the common good, as if a passive beneficiary of a free society; all other parties represent the "rugged individuals" whose strivings enrich their fellow men. I ask, in essence: How can I help them help me? The OP ensures that I cannot be king; LU ensures that I don't want others to be slaves. I neatly dragoon everyone into my service without privileging myself. Of course, LU would have it both that the way to one's own happiness is by contributing to the common good and that it's the *only* such way. Therefore, I will want the same liberties I grant to others also for myself.

For example, given freedom of religion and speech, those smarter than I can work out various theological points and subtleties and present their findings for my consideration. With this wisdom, I have a greater chance of salvation.

Further, everyone is equal before the law, and economic policies do not privilege established businesses, in so doing restricting the freedom of new entrepreneurs to compete with them:

The rich, the owners of the already operating plants, have no particular class interest in the maintenance of free competition. They are opposed to confiscation and expropriation of their fortunes, but their vested interests are rather in favor of measures preventing newcomers from challenging their position.

Those fighting for free enterprise and free competition do not defend the interests of those rich today.

They want a free hand left to unknown men who will be the entrepreneurs of tomorrow and whose ingenuity will make the life of coming generations more agreeable. They want the way left open to further economic improvements. (*HA*: 83)

The "economic" liberties of these unknown men benefit me as a consumer. They unleash the social creative advance, which redounds to my gain.

Similarly, no employee is favored over his competitors. Everyone is free to seek his fortune in the market and try to supply the consumers with better or cheaper goods. There is no protectionism, nor subsidies to any firm or industry, nor government-run enterprises. There are no coercive intrusions into capital or labor markets. Individuals enjoy full private property rights in natural resources. There is no taxation on any level of government above local, and the vast numbers of localities (such as the 3,000 counties and 20,000 cities in the United States) ensure vigorous competition among their legal systems for citizens and businesses. (There is a Hayekian point here that the problem of which liberties are to be secured, how, to what extent, etc. can be solved by means of entrepreneurial competition between “private” cities reasonably open to migration, and not only by philosophical reflection. This device is unavailable to Rawls by design, since his society is explicitly “closed,” with each individual being permanently born into it, living a “complete life,” and dying in it.) These freedoms granted to other people are in my own interest, regardless of who I personally turn out to be. I will therefore demand them for all in the original position.

There is no interference with consumption, whether of risky entertainments or of “controlled substances,” and the citizens’ personal freedoms are secure, because everyone needs to see other people’s “experiments in living” for his own edification, and because prohibitionism fails on every level.

Rawls claims that laissez-faire capitalism “rejects... the fair value of the equal political liberties.” (*JF*: 137) It is true that, by insisting on respect for property rights, it rejects democratic omnipotence. But so does Rawls’ own system. Rawls’ concern is that the rich might end up influencing politics unbecomingly. But such influence would generally aim at rent (i.e., loot and privilege) seeking which by definition cannot succeed under laissez faire. Nor can capitalist freedom endure at home when the elites “hunger for power and military glory”; hence empire-building is likewise precluded at the outset.

The entire *point* of influencing politics is to secure economic benefits illegitimately, i.e., outside the normal course of capitalist affairs. That’s why libertarians distinguish between economic means to wealth, i.e., peaceful production and exchange of goods, and political means of violent expropriation and spoliation exercised via the state. One bribes congressmen,

etc. precisely in order to profit through these political means. It is simply a crime committed “legally,” by taking control over the machinery of state. It may be that politics can corrupt so much that some person will decide that, in Orwell’s terms, “the object of persecution is persecution; the object of torture is torture; the object of power is power.” But for most people, politics is a means to pecuniary gain. It is senseless to object to capitalism on the grounds that it permits inequalities that may enable some people to conspire to subvert it via politics – unless the argument is that somehow capitalism contains in itself the seeds of its own destruction. Even if so, that would only be an argument for anarchism, i.e., capitalism without the state, or perhaps for some Jeffersonian eternal vigilance among the populace.

Moreover, political corruption is not all bad; often it is the only way for the better off to protect themselves against democratic expropriation. “But for the inefficiency of the lawgivers and the laxity, carelessness, and corruption of many of the functionaries, the last vestiges of the market economy would have long since disappeared,” argues Mises (*HA*: 859). I personally prefer my politicians precisely less socialistic and more corrupt.

It may be that the “property-owning democracy” of Rawls’ fantasy is immune from the influence of moneyed interests in politics. However, that’s only because it scarcely has an economy: there is nothing to be subverted there in the first place. The more is produced by the free economy, the more wealth there is for the state to steal. Rawls dispenses with the stealing, but at the expense of production: his medicine kills the patient.

In short, individual liberties under *laissez faire* are not only equal but very extensive and jealously guarded.

## **Primary Goods: Equal Fair Opportunity**

Equality of fair opportunity and the difference principle combine to make up the rest of the basic structure of society that Rawls believes the OP would output. His big picture is shown in Table 1.

What is equality of fair opportunity (EFO)? It’s a state of affairs in which “positions are not only open in a formal sense, but all have a fair chance to attain them. ... those with similar abilities and skills should have similar life

chances; ... those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system.” (TJ: 63)

|   | “Everyone’s advantage”         |                             |
|---|--------------------------------|-----------------------------|
| “Equally open”                                  | <b>Principle of efficiency</b> | <b>Difference principle</b> |
| <b>Equality as careers open to talents</b>      | System of Natural Liberty      | Natural Aristocracy         |
| <b>Equality as equality of fair opportunity</b> | Liberal Equality               | Democratic Equality         |

Table 1. Rawls’ system.

As regards “equality,” normally, leveling up is difficult or impossible; leveling down is much easier. Rawls is *not* such a leveler: “the more advantaged have a right to their natural assets, as does everyone else; this right is covered by the first principle under the basic liberty protecting the integrity of the person.” (89) Further, “it is not in general to the advantage of the less fortunate to propose policies which reduce the talents of others.” (92) Again, “the natural distribution is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts. What is just and unjust is the way that institutions deal with these facts.” (87)

The purpose of EFO is to mitigate the “moral arbitrariness” of this natural distribution. Rawls mentions eugenics to equalize *nature* but refuses to discuss it. Therefore, EFO might mean either that (1) *nurture* should be the same or (2) that *luck in life* should be the same for all. The claim that one’s inheritance, including genes, family, country, and suchlike is morally arbitrary is an important feature of Rawlsian philosophy and must be confronted head on.

Now morality prescribes duties independent of desires. If something is morally arbitrary, it means presumably that it does not affect the duty one is to fulfill. For example, one’s fortune is arbitrary and irrelevant to the duty of not stealing. No X, whether himself rich or poor, can steal from any Y, again

whether rich or poor. The duty exists and has authority over X even if X wants to steal, even if X is poor and Y is rich, and even if X can get away with stealing. Rawls claims that the natural and social circumstances of one's life are morally irrelevant. But they are irrelevant to the unfailing execution of *which moral duty*? I can only imagine to the duty of the state to distribute the bling (recall that this is my term for "resources" or consumer goods or wealth and income). But why grant the assumption, that the "state" has any such duty? An anarchist, for example, would deny that there should be a state at all. A libertarian will disagree that the state ought to be distributing anything. Rawls is thereby simply begging the question.

Rawls denies that one "deserves" even his "superior character," for "such character depends in good part upon fortunate family and social circumstances in early life for which we can claim no credit." (89) This suggests that he thinks there is complete determinism, and there is no room for personal responsibility (with the very capacity of exercising "responsibility" itself being a random blessing ultimately assigned at birth), with every ounce of success being morally arbitrary. But in that case, it would follow that greater initial endowments *guarantee* greater future happiness. But this is obviously false. "The smarter you are, the more you can suffer," writes Thomas Morris with refreshing bluntness (1999: 342). Talents confer upon the talented person the grave responsibility to develop them and use them for good. The greater one is, the higher he can soar, but the lower also he can fall. The talented are thus not already compensated simply by virtue of their greater potential. A talented person can crash and burn far more painfully than a dullard. Hence Rawls' premise that those favored by circumstances of fortune are by that fact alone the "better off" is undone.

Rawls might declare that determinism is paired with randomness, so that some people's greater talents are thwarted by bad luck which again has nothing to do with individual merit. This seems like a perverse view of human nature and human agency. These things that pass for humans driven by nature, nurture, and perhaps random "quantum" noise alone, as if rocks careening recklessly through space to their ultimate doom, with no will of their own, why bother with theories of justice for them? Again, Rawls goes so far as to call undeserved not just "greater natural endowments" but also the "superior character that has made their development possible." Even in

this formulation, Rawls uses the word “possible”; he can’t fully embrace the absurdity he pushes by announcing that one’s character, presumably ineluctably and predictably, makes their development *actual*.

“The Lord said to him: Who gives one person speech? Who makes another mute or deaf, seeing or blind? Is it not I, the Lord?” (Ex 4:11) The proposition “I deserve my natural gifts” can be read either *de dicto* or *de re*. The *de dicto* version, “Whatever gifts God has given me, I deserve,” as a *proposition* is true. The *de re* version, “The thing that God gave me, which in my case happens to be aptitude for philosophy (let’s say), I deserve” is false: in cumbersome terms so beloved by some philosophers but which in this case are illustrative, my aptitude for philosophy (*thing*) does not have the property of “being deserved by me.” This is because I don’t deserve any *particular* gift; if God had wanted me with a talent for blacksmithing, He’d have given me that, and I’d have no cause for complaint.

Why is the *de dicto* rendering true? Certainly God does not give anyone his gifts based on any pre-existing merits. There are two reasons.

First, because human nature requires that each man have some talents. A gift-free man would be someone entirely comatose. St. Thomas puts it this way:

It is also due to a created thing that it should possess what is ordered to it; thus it is due to man to have hands, and that other animals should serve him.

Thus also God exercises justice, when He gives to each thing what is due to it by its nature and condition. (*ST*: I, 21, 1, reply 3)

Moreover, mutually beneficial cooperation is possible between men even if one is inferior to another in all gifts, as per the law of comparative advantage.

Second, more particularly within Rawls’ own system which deals with justice within social cooperation. While sometimes nature or God does deny babies hands and even makes babies whose bodies are defective and who die in the womb, Rawls is more precise. People are assumed to act for mutual advantage; no one is a parasite receiving free money for doing nothing useful to society; we are unconcerned with either the disabled or the bums.

Therefore, it is entailed that all must of necessity have some talents; hence this time it is Rawls rather than God who distributes bling, and whatever Rawls gives to each man, that man by the requirements of logic ought to accept (or cease to be part of his society) and thus ought to have.

Indeed, “X deserves y” can be understood simply as “X ought to have y.” Whatever God (or Rawls) gives to a man, he ought not only to have or accept but develop and make profitable use of. As Odysseus says in the movie *Troy*, “You have your swords. I have my tricks. We play with the toys the gods give us.”

The same reasoning works for the family and country I am born into. I must logically be born into *some* family and country – while Rawls toys with the idea of erasing the family, in his saner moments, he writes that (alleged) absence of desert for one’s uniquely valuable capacities is “no reason to ignore, much less to eliminate these distinctions.” (87)

But if I deserve in these senses my initial endowments, family, country, and all the rest, then I surely deserve the fruits of actualizing my potentials and making use of whatever advantages I find in my environment.

Man, like all creatures, is a combination of potency and act. Natural and social advantages of each man are precisely potency; they are matter, raw materials to be used in his self-construction. Let’s first distinguish between potency and evil: both are absences of act or some good, but evil is absence of a good that *ought by right to be there*, while potency need not be vicious. A small child may be gifted and have considerable potential, but it’s not the case that his lack of self-actualization is an evil; it would, however, be evil in an adult who was supposed to develop his faculties but failed to do so.

Potency cannot reduce itself into an act; raw materials do not miraculously combine into complex-and-specified forms even with the help of random variation. There is therefore in man some primal act deep within. “In every living being there works an inexplicable and nonanalyzable *Id*,” writes Mises. “This *Id* is the impulsion of all impulses, the force that drives man into life and action, the original and ineradicable craving for a fuller and happier existence.” (*HA*: 882) It could be described as a divine spark by a religiously minded person, or as the combination and union of will, intellect, and power.

This act is not an accident, as a potency-gift is, but the very essence of man. Further, “responsibility” in the most general sense is the power to foresee good and bad consequences of one’s own and other people’s actions and choose and bring about what is good. It is the very power and purpose of the divine spark within to actualize one’s potentials, to clothe itself with a fine garb of personality and achievements. But we have seen that what belongs to the essence of man is deserved by each individual man. But if the responsibility-power is deserved, then so is every fruit it produces, including the conversion of potency – natural and social contingencies – into act which is ultimately happiness. Even character is built by the self.

Thus, man *is* the union of his act and potency, and when one builds himself up using whatever resources are available, whatever God and nature place, perhaps randomly, at his disposal in life, the fruits of the labor and striving and aspiring of the pure act or life-force or *Id* or divine spark within are deserved, as well. I deserve whatever happiness I catch in my pursuit of it, since it is my nature indeed to pursue it, and it is just as a matter of logical necessity that I have what my nature supplies me with so that I may exist.

Rawls makes the mistake similar perhaps to one that Darwinists make: that unaided by intelligence nature plus randomness can generate specified complexity. To assure ourselves that Rawls does make this error it is enough to see him write that in a society with only two groups, “one noticeably more fortunate than the other,” to maximize “some weighted mean of the two expectations” would be unjust, since “if we give any weight to the more fortunate, we are valuing for their own sake the gains to those already more favored by natural and social contingencies. No one had an antecedent claim to be benefited in this way, and so to maximize a weighted mean is, so to speak, to favor the more fortunate twice over.” (88)

In fact, however, the “more fortunate,” far from being “more favored,” are rather more *burdened* with the heaviest human duty – to develop their natural talents, to spot and take advantage of their unique opportunities, and to use them energetically and profitably. Having more raw materials or potency at birth is not owning consumable wealth, still less happiness. Entrepreneurship within the market is mini-life, and as Mises points out,

Ownership of the means of production is not a privilege, but a social

liability. Capitalists and landowners are compelled to employ their property for the best possible satisfaction of the consumers.

If they are slow and inept in the performance of their duties, they are penalized by losses. (*HA*: 311)

More generally, individuals who fail at the extremely non-trivial task of developing and using their “natural and social contingencies” well are penalized by *suffering* which is the greater in proportion to the potential squandered or misused. Hence to offer consideration to the “more fortunate” in Rawls’ sense is not to count them twice over. Rawls must have forgotten his Bible: the parable of the talents in Mt 25 illustrates the point. Even the least well-favored servant was not allowed merely to bury his 1 talent in the ground. He did so because he was afraid of losing it. But how much greater was the fear of the one who received 5 talents! Yet he triumphed despite the gravity of his responsibility. It is this victory that counts, and it counts for exactly one for all men, not “twice over.”<sup>4</sup>

Lastly, *on what else* other than natural endowments and social circumstances is the division of labor to be based? It’s precisely nature’s random person / locale generator that makes this division possible. The unity-in-variety of contingent facts is what makes social cooperation a reality and as such is distinctly *not* arbitrary from the moral point of view. E.g., Mises lists two “natural facts”:

First: the innate inequality of men with regard to their ability to perform various kinds of labor.

Second: the unequal distribution of the nature-given, nonhuman opportunities of production on the surface of the earth.

One may as well consider these two facts as one and the same fact, namely, the manifoldness of nature which makes the universe a complex of infinite varieties. (*HA*: 158)

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<sup>4</sup> This passage is telling also because both the servant who received 5 talents and made 5 more and the one who received 2 and made 2 more were praised in identical terms. It seems that what matters for “the master’s joy” is not the starting point, but the distance travelled from it, even relative distance, in this case the doubling of the capital.

Rawls takes the perspective precisely of the universe, aiming to discern how the fruits of social cooperation ought to be distributed. But if I am a part P that makes the whole W work and that is for that reason valued and even loved by the whole, how can W (i.e., Rawls) justly claim that I don't deserve the very qualities that enable me to contribute to its very life?

It is true that no Smith deserves to be *in a relation of being better* than any Jones. This is especially obvious considering that Smith may self-destruct, and Jones may by hard work lift himself up admirably. There but for the grace of God goes Smith. So, Smith may have no moral right to revel in his talents and abilities as he stomps on Jones' soul with contempt. Those with power save those without, and Smith is called to serve mankind rather than despise it. But Smith still deserves the *qualities* that enable him to be better than Jones.

The *de re* reading applies to the original position; the *de dicto* reading, to the actual society. In the OP, the bargainers forget *how* they are specialized indeed for the sake of "fairness"; they know acutely *that* they are specialized. The former ensures that no one can demand that accountants whose last name begins with the letter "B" shall rule all; the latter argues that best possible use be found for the inevitable natural and social inequality.

This understanding allows us to refute an argument for Rawlsianism from "stability." A social order is stable if all citizens morally approve of the design of its institutions, and this approval is public knowledge. Such transparency imbues the citizens with zeal to abide by justice. But in a society U not ruled by the difference principle, the worse off would resent their situation:

... their well-being and interests are being sacrificed for the greater good of those more fortunate, and it is too much to expect of human nature that people should freely acquiesce in and embrace such terms of cooperation.

The principles of justice, by contrast, are designed to advance reciprocally everyone's position in society, and those who are better off do not achieve their gains at the expense of the less advantaged. (Freeman 2003: 22)

As a result, the Rawlsian system R is more stable than U and to that extent perhaps more just. But of course, under R, the better off are injured, and

their happiness is sacrificed for the sake the worse off. Why should they favor R rather than insist on U? If no one deserves anything, then it is unclear why the worse off deserve to be coddled. They no more deserve to live in R than the better off deserve to live in U. The only reason is to hold that the better off are already compensated by virtue of their greater natural and social endowments. As we have seen, this is a vicious view. Greater talents as raw potential do not of themselves constitute happiness but must be transformed into it by blood, sweat, and tears. Conan's god Crom "is grim and loveless, but at birth he breathes power to strive and slay into a man's soul," writes Robert E. Howard in his novels. All men, both the worse off and the better off, are equally endowed with life and strength to fight the forces of death and decay or indeed to succumb to them. The better off would lose self-respect in a society in which their struggles are despised.

Hayek asks the question "whether, if we had to stop at our present stage of development, we would in any significant sense be better off or happier than if we had stopped a hundred or a thousand years ago." And answers: "It is not in the fruits of past success but the living in and for the future in which human intelligence proves itself. Progress is movement for movement's sake..." (1960: 41) This progress and the dangers attendant on it are part of everyone's life, and regarding them, everyone is positioned symmetrically.

It is true that some worst off under laissez-faire capitalism may be resentful if they've been proven to be permanent losers. But the source of this resentment is not their poverty per se, still less their awareness of some hypothetical R in which they might be richer, but their fundamental social worthlessness revealed for all to see. The upward mobility enshrined into law by capitalism must be matched with downward mobility. A rigid caste society may well do away with both, but Rawls rejects it as illiberal, anyway. Capitalism abhors private profits and socialized losses; subjecting all members of society to the possibility of crushing defeat is its indispensable feature. The confirmed worst off were tried and found wanting; that their failure stings is on some level unfortunate but absolutely unavoidable.

Rawls takes the difference principle to be a principle of justice, but it may be that he is ambivalent about it. True justice is in fact a perfect equality in the distribution of wealth and income. Deviations from equality are only

unfortunate concessions to the facts of human nature and economic laws; they do violence to justice but are permitted reluctantly to accommodate “economic efficiency and the requirements of organization and technology” (TJ: 130). Those who receive more than the minimum allotted to the worst off in a sense have gratuitously, taking unfair advantage of Rawls’ kindly indulgence, grabbed for themselves something that does not really belong to them. There is therefore no injustice in forcing them to contend with a smaller share if the worse off, to whom all would be equal anyway if not for some minor irritating practical concerns, are thereby benefited. This view may depend on the idea that natural and social contingencies of people’s lives are *literally* a “collective asset” (156) owned or at least disposed of by society or the state. If this implausible opinion is rejected, the better off might reply as Moses did: “Why are you so displeased with me that you burden me with all this people? Was it I who conceived all this people? or was it I who gave them birth, that you tell me to carry them at my breast, like a nurse carrying an infant. . . I cannot carry all this people by myself, for they are too heavy for me. If this is the way you will deal with me, then please do me the favor of killing me at once, so that I need no longer face my distress.” (Num 11:10-15)

Rawls’ main practical recommendation for equalizing “opportunity” is that “greater resources might be spent on the education of the less rather than the more intelligent” (86); and again that “resources for education are not to be allotted solely or necessarily mainly according to their return as estimated in productive trained abilities, but also according to their worth in enriching the personal and social life of citizens, including here the less favored.” (92) Again, leveling up is hopeless – and if it were not, then we’d simply want to help people *up* as much as possible without *leveling* them, anyway; and in practice he will end up doing something much easier and leveling down. For example, schooling will have to be nationalized, private and home schools outlawed, and so on. Equality will be bought at the unseemly cost of the dramatic fall in the general level of moral and intellectual virtues in children. The wretched inefficiency of government schools is legendary, and so is their propensity for indulging in worthless propaganda and for corrupting the morals of the young. Raising children communally will not make the adults love all kids equally; as Aristotle points out, “each citizen will have a thousand sons who will not be his sons individually, but anybody will be

equally the son of anybody, and will therefore be neglected by all alike. ... how much better is it to be the real cousin of somebody than to be a son after Plato's fashion!" (1262<sup>a</sup>1-10) In fact, if our goal is not equality but simply to *make knowledge and culture available to all*, then there is no better means to that end than a regime of private property (including in schools) and free enterprise. As Mises eloquently argues,

The liberals do not... share the naive opinion that any system of social organization can directly succeed in encouraging philosophical or scientific thinking, in producing masterpieces of art and literature and in rendering the masses more enlightened. ...

In their opinion the foremost social means of making man more human is to fight poverty. Wisdom and science and the arts thrive better in a world of affluence than among needy peoples. (*HA*: 155)

Education is not a panacea, either; sometimes it can be a hindrance. Mises explains:

In order to succeed in business a man does not need a degree from a school of business administration. These schools train the subalterns for routine jobs. They certainly do not train entrepreneurs. An entrepreneur cannot be trained.

A man becomes an entrepreneur in seizing an opportunity and filling the gap. No special education is required for such a display of keen judgment, foresight, and energy.

The most successful businessmen were often uneducated when measured by the scholastic standards of the teaching profession. But they were equal to their social function of adjusting production to the most urgent demand. Because of these merits the consumers chose them for business leadership. (*HA*: 314-5)

It may be possible to interpret Rawls as some proto-modern social justice warrior: "When careers are open to talents, we judge people for jobs and offices according to the actual talents and skills they display, not irrelevant traits such as their class background, race, gender, sexual orientation, or family connections. This idea is the core of antidiscrimination legislation."

(Daniels 2003: 249) Now first, Mises points out that such legislation is superfluous:

The market does not directly prevent anybody from arbitrarily inflicting harm on his fellow citizens; it only puts a penalty upon such conduct.

The shopkeeper is free to be rude to his customers provided he is ready to bear the consequences. The consumers are free to boycott a purveyor provided they are ready to pay the costs.

What impels every man to the utmost exertion in the service of his fellow men and curbs innate tendencies toward arbitrariness and malice is, in the market, not compulsion and coercion on the part of gendarmes, hangmen, and penal courts; it is self-interest.

The member of a contractual society is free because he serves others only in serving himself. (*HLA*: 283)

Second, the reality is the exact opposite of Daniels' understanding. It is precisely because capitalism encourages all entrepreneurs to hire "according to the actual talents and skills" and because various "victim groups" are incompetent and unable to compete in the market that antidiscrimination legislation was passed and the less talented and skilled were given political privileges. The aim was always to destroy capitalism, not perfect it; to demoralize and humiliate the "better off," not uplift the worse off.

Third, such legislation harms not only production as a whole but the "victims" themselves, as people of the "protected" races, genders, etc. become walking lawsuits. For example, it used to be that employers would tell applicants why they were rejected. This information was useful for future interviews. Not anymore, as any true reason for rejection might turn out to be un-PC and, if revealed, result in ruinous litigation.

These points raise another fundamental issue, viz., that entrepreneurial opportunities are different from both liberties and wealth. It's both impossible and undesirable to equalize them. An opportunity retains its essence only when noticed and acted upon by one man while all others are still ignorant of it. If everyone is equally aware of an "opportunity," the

equilibration is instant, and the opportunity disappears posthaste for all.

“Opportunities” combine in themselves unique objective and subjective aspects which vary in different situations. If an opportunity is set aside by Smith at 10:24 am, it need not be expected that a different entrepreneur Jones may notice and act on it at 11:06 am. Opportunities not only do not knock twice; they knock only in a given place at a given time to a given person.

In the market, there is no such thing as “fair” competition, in which everyone starts out in the same conditions. The purpose of market competition is to improve consumer welfare, and this purpose is served even if entrepreneurs have varying amounts of starting capital, and even if the prices of the nearby factors of production differ for them. Further, real-world competition is marked by the rivals’ attempts not only to win under “fair” conditions but precisely to position themselves better relative to others even at the onset of any productive endeavor. That, too, serves consumers.

Rawls further wants to “impose a number of inheritance and gift taxes, and set restrictions on the rights of bequest. The purpose of these levies and regulations is not to raise revenue (release resources to government) but gradually and continually to correct the distribution of wealth and to prevent concentrations of power detrimental to the fair value of political liberty and fair equality of opportunity.” (*TJ*: 245) In the first place, inequalities of wealth do not under freedom, secured by the libertarian ideology, affect “political life itself,” including “indirectly” (xv). The owner of Amazon cannot, for all his wealth, force me to shop on Amazon, nor bribe congressmen to pass laws protecting him from competition from future and as yet unknown entrepreneurs destined to improve upon and supplant him.

Second, Rawls continues: “Thus inheritance is permissible provided that the resulting inequalities are to the advantage of the least fortunate and compatible with liberty and fair equality of opportunity.” This rider lets us dispose of the argument along the lines suggested by Alex Tabarrok:

Those who are able to bequeath a material inheritance are also often able to bequeath a sound moral and educational inheritance. Along with pecuniary and physical capital the founding generation

bequeaths human capital.

In a capitalist society, therefore, the institution of inheritance is more than a moral institution, it is part of the process whereby wealth is transferred to those who can best use it to serve the wishes of consumers. (1997: 13)

The consumers include the “least fortunate.” Hence the taxes and restrictions would violate Rawls’ own difference principle.

Luck is obviously impossible to equalize. In fact, the element of luck in receiving one’s natural endowments is like the good fortune enjoyed by one over the course of his life. But here no one can say how good fortune is distributed. Someone who is rich may be objectively unlucky and would have received his full discounted marginal value product had he been more fortunate (either at birth or later in life). (That is, he became rich *despite* life’s misfortunes.) Someone who is poor may be objectively lucky in life but would have been even poorer if his fortune had been only average.

This brings us to the final point. If everyone “has a fair chance to attain” positions suitable to him, then there is intense competition for these positions. Moreover, the labor market is laissez-faire and precludes minimum wages, labor union pressures, labor regulations entangling hiring and firing decisions in red tape, and so on. This means first, that for any job, one person may be hired, and five other applicants, rejected. So, the *chance* to compete for a job, “fair” or not, does not entail *victory* in the competition. There will still be failures and losers, and plenty of them. Crucially, from the “efficiency” standpoint, it is wonderful when a lot of people vie for jobs. The economy becomes more efficient to the extent that all reasonably qualified people are trying to excel relative to each other; this way, no talent is left imprudently from the social point of view un- or underutilized.

Second, this sort of free market makes for considerable social mobility, both up and down. But the churning of the social hierarchy generated by means of competitive profit-seeking on the part of all members of society (including in their capacity as workers) has sense only when it’s in the interest of the common good. If Smith and Jones are applying for the same job, then from the point of view of “justice” it is irrelevant whether Smith wins and Jones by

that very fact loses or Jones wins and Smith loses. But not from the point of view of efficiency. If the hiring manager is good at his job, he'll pick the most suitable candidate, thereby adding his own profit to that of Smith or Jones.

EFO then is again subordinated to utilitarian concerns. "Opportunity" is too individualistic a notion to be of use here. Again, Smith's being hired by a company entails that Jones is passed over, despite their "equal opportunity" to be considered. The benefits of *everyone's* being well-born, well-educated, well-connected, as demanded by EFO, accrue not to any individual (because this state of affairs merely intensifies the competition between all) but to society as a whole, as its efficiency and productivity shoot up, as each man tries to exceed and outdo his fellows in how well he performs his job.

Smith's opportunity to advance has a negative externality: in rising to the top, Smith displaces some previously well-positioned Jones who by that fact falls to the bottom. Justice is indifferent as to who's boss; but Smith expends effort on social climbing. This process would be an intolerable negative-sum game, as people got ahead over the dead bodies of their fellows, if it were not the case that competition promoted general happiness. Under capitalism, Smith cannot help benefitting others as he builds his fortune.

It is plausible that the OP will spit out formal equality of opportunity, since each party might reasonably ask, "Why should *my* aspirations be repressed?" "I at least want to try; I want a chance to make it big; I don't want to vegetate in life because all the roads are closed to me." I appreciate the attitude, but "fairness" in this realm faces, as we have seen, major difficulties.

In sum, (1) government policies intended to promote EFO will only level down and hurt both the better off and the worse off; (2) opportunities are naturally unique and resist equalizing; (3) to the extent that EFO is embedded within laissez-faire capitalism, it has value only when it is good for the economy. For all these reasons, the OP would output formal and not "fair" equality of opportunity, precisely as careers legally open to talents.

Liberal equality in Table 1, when rightly understood, is identical to natural liberty.

## **Primary Goods: Wealth: Initial Equality**

Rawls' attitude toward prosperity is curious. "The objective of the accumulation process [is] a state of society with a material base sufficient to establish effective just institutions within which the basic liberties can all be realized." (*TJ*: 256) I'd have thought that the object of wealth accumulation was human happiness; not so for Rawls. His take is particularly strange, since his version of justice concerns itself with distribution of wealth; yet now wealth is apparently for the sake of justice. Once some minimal standard of living that would promote justice is achieved, society is presumably to stagnate; no further improvement in economic conditions is of any value:

What men want is meaningful work in free association with others, these associations regulating their relations to one another within a framework of just basic institutions. To achieve this state of things great wealth is not necessary. In fact, beyond some point it is more likely to be a positive hindrance, a meaningless distraction at best if not a temptation to indulgence and emptiness. (257-8)

I doubt very much that this is "what men want." Mises counters this as follows:

It is true that all this straining and struggling to increase their standard of living does not make men any happier. Nevertheless, it is in the nature of man continually to strive for an improvement in his material condition. If he is forbidden the satisfaction of this aspiration, he becomes dull and brutish.

The masses will not listen to exhortations to be moderate and contented; it may be that the philosophers who preach such admonitions are laboring under a serious self-delusion. If one tells people that their fathers had it much worse, they answer that they do not know why they should not have it still better. (1985: 190)

Before we can explore the idea of justice within social cooperation, we need to know what the purpose of social cooperation is. Mises answers this question as follows:

This goal, at which all men aim, is the best possible satisfaction of human wants; it is prosperity and abundance. Of course, this is not all that men aspire to, but it is all that they can expect to attain by resort

to external means and by way of social cooperation.

The idea is presumably to

give men the peaceful, undisturbed development of material well-being for all, in order thereby to shield them from the external causes of pain and suffering as far as it lies within the power of social institutions to do so at all. (1985: 192-3)

We'll see that Rawls concerns himself greatly with the welfare of the "worst off," i.e., the least capable contributors to society. But even – and especially – the worst off seek happiness. It seems incumbent upon the philosopher to ask how that happiness is best promoted. As we have seen, Rawls is right to reject classical utilitarianism, but in so doing he throws the baby out with the bathwater. I agree that social cooperation ought to profit all those who cooperate. Even those destined to incarnate as the worst off need to approve of the basic structure of society. But the basic structure serves a purpose. It's not a mechanical clock in which the human cogs mindlessly yet happily rotate. On the contrary, the basic structure is a means to the satisfaction of the ends of the individuals enmeshed into it. The ultimate reason for any man to enter society and cooperate peacefully within it is to be more successful than otherwise. Society is the greatest and most essential means to the satisfaction of individual desires, and humans form a society through their actions for that very sake. Moreover, greater success is always preferred to lesser success. The economic order should not just profit *all*; it should profit all *as much as it's humanly possible*. Rawls' greatest failure is focusing on the first problem without also considering the second.

The third pillar of Rawls' system looks as follows: "social and economic inequalities are to be arranged so that they are reasonably expected to be to everyone's advantage." (*TJ*: 53) Who could possibly object to something so innocuous? Yet in Rawls' hands, this difference principle acquires sinister undertones:

Since it is not reasonable [for a person in the original position] to expect more than an equal share in the division of social primary goods, and since it is not rational for him to agree to less, the sensible thing is to acknowledge as the first step a principle of justice

requiring an equal distribution. ... Thus the parties start with a principle requiring equal basic liberties for all, as well as fair equality of opportunity and equal division of income and wealth. (130)

Astonishing! More than that, “this principle is so obvious given the symmetry of the parties that it would occur to everyone immediately.” If “justice” is so trivial, then why hasn’t anyone figured it out long before Rawls?

It should be obvious that distributing goods is a very different problem from distributing liberties, since liberties as abstractions are not scarce, and goods are. One can eat a liberty and have it, too; not so for a cake. The same liberty can be given to both Smith and Jones; but the same cake cannot be. Equality in material goods then hardly follows from equality of liberties.

Consider a scenario in which a group of men with nothing but the clothes on their backs is parachuted onto a desert island where they quickly discover a pool filled with homogenous gruel. I suppose there is a sense in which it would be “just” for them to distribute the gruel “equally”; say, each man gets one bowl per day until the supply is exhausted. But does this scenario bear any relation to any real-world economic or political problem?

The reason to call Rawls’ theory “democratic” equality may have something to do with the idea of one man, one vote, except for Rawls it takes the form of one man, one bowl of gruel per day, forever, to be “distributed” to all by the state. What are the details of this design of society? Rothbard writes:

In contrast to the various groups of utopian socialists, and in common with religious messianists, Karl Marx did not sketch the features of his future communism in any detail. It was not for Marx, for example, to spell out the number of people in his utopia, the shape and location of their houses, the pattern of their cities.

In the first place, there is a quintessentially crackpotty air to utopias that are mapped by their creators in precise detail.

But of equal importance, spelling out the details of one’s ideal society removes the crucial element of awe and mystery from the allegedly inevitable world of the future. (1990: 124)

Rawls is following a similar clever strategy. He makes no attempt to explain

where the gruel comes from, who cooks it, according to what recipe, whether the gruel's quality can ever improve or its quantity enlarged and by what means, or anything else. "Justice" for him means never having to say you're sorry.

The equally obvious rejoinder to this is, where does the wealth that is to be distributed among the disembodied ghosts behind the veil of ignorance come from? Are we talking about Rome c. AD 400 after it had been sacked by the barbarians, Germany after World War I paying reparations to the Allies, present-day America? Rawls might say, *whatever* is produced by whatever means must be distributed equally. But that dodges the issue. Apart from some very small religious communities, it is never the case that goods come into being collectively owned. Mises drives the point home:

The antagonism between capitalism and socialism is not a dispute about the distribution of booty. It is a controversy about which two schemes for society's economic organization, capitalism or socialism, is conducive to the better attainment of those ends which all people consider as the ultimate aim of activities commonly called economic, viz., the best possible supply of useful commodities and services. ...

The antagonism does not refer to the mode of distributing a fixed amount of amenities. It refers to the mode of producing all those goods which people want to enjoy. (2018: 5)

But under capitalism, there is no such thing as "distribution":

Now in the market economy this alleged dualism of two independent processes, that of production and that of distribution, does not exist.

There is only one process going on. Goods are not first produced and then distributed. There is no such thing as an appropriation of portions out of a stock of ownerless goods.

The products come into existence as somebody's property. If one wants to distribute them, one must first confiscate them.

Adds Mises:

It is certainly very easy for the governmental apparatus of

compulsion and coercion to embark upon confiscation and expropriation.

But this does not prove that a durable system of economic affairs can be built upon such confiscation and expropriation. (*HLA*: 804)

The market then “distributes” the bling according to its own logic. This logic is *impersonal*: no particular human being, least of all some philosopher-king like Rawls, pushes around wealth and income or with majestic charity spreads largess or bread and circuses to the populace. It is senseless to accuse the market process of “injustice,” as though it were a human criminal.

It follows that in the very process of discussing “distribution,” Rawls is willy-nilly committed to rejecting laissez-faire capitalism, as in that system the issue of distribution does not arise at all. This belies his claim that his theory of justice, and the difference principle in particular, applies to any economic system.

Recall that the parties in the OP “understand political affairs and the principles of economic theory.” Why then can’t we at least know something as self-evident as that production must precede “distribution”? Then it is not at all obvious that all goods ought to be equally distributed. Let bargaining in the OP be called level-1 procedure. The bargainers are considering the market process as a level-2 procedure of production and distribution of bling. If the institutions of laissez-faire capitalism are indeed picked, then they are just, as per Rawls. This is pure procedural justice level 1. The market then proceeds to produce and indeed distribute the bling according to its own impersonal workings. The resulting distribution (such as that Smith here and now, or there and then, has \$10k net worth, and Jones has \$50k), too, is just, and that is pure procedural justice level 2.

Rawls does not countenance these levels. He says that goods ought (by default and without bringing in additional considerations) to be distributed equally. But this instantly condemns the institution of the market process to *prima facie* injustice, because inequality is its unavoidable feature. This is an illegitimate move on Rawls’ part, because he prejudiciously invalidates one highly plausible agreement between the folks in the OP. Rawls says: the market’s pure procedural level-2 distribution of bling is unjust (because

unequal); therefore, the OP bargainers' pure procedural level-1 choice of just institutions cannot possibly be the market. But the level-1 choice is precisely the subject to be debated and considered without any references to the levels below it.

If these levels are not acknowledged, then Rawls has simply defined the free market to be unjust by his own fiat. But this regal proclamation is empty. He has imported into the minds of the OP bargainers his own and highly dubious pre-existing moral view, that equality of bling is a virtue of institutions. But his own device precludes any such contamination.

If the market can be shown to be to everyone's benefit, then its bling distribution at any particular place and time is simply irrelevant. (Rawls says as much himself: "the problem of social justice is not that of allocating *ad libitum* various amounts of something, whether it be money, or property, or whatever, among given individuals." (*TJ*: 136)) Proving the concomitant minor premise will be our important concern in what follows.

Rawls might reply to this argument by saying that the initial condition of perfect equality is but an artifice, an imaginary construction used in order to set the stage for and demonstrate the workings of the difference principle. It is true that perfect equality is preposterous, but, coupled with the difference principle, i.e., the idea that inequalities are permitted as long as they benefit the worst-off members of society, the system becomes very realistic and in fact describes how a society should actually work. Now this is certainly a fortuitous if unintended development. Yet I do not grant that equality can even be a starting point of contemplation. I will prove this next.

### **Essence of the market process.**

The market process is a vision; one must come to see it for himself. Now the state of equilibrium in economics is a situation to which prior *disequilibrium* tends. If Smith is exchanging his cows for Jones' horses, the marginal utility to Smith of horses decreases, while the marginal cost of cows rises, with each trade, and *mutatis mutandis* for Jones. While both are willing to exchange, the economy is disequibrated; at some point the marginal cost for at least one of the parties will exceed the marginal benefit; exchanges will cease; and equilibrium will prevail. Our tiniest possible Smith-Jones economy is *as if* at

rest; by stipulation, neither individual is striving to improve his well-being anymore. Though unrealistic, this is useful. The evenly rotating economy is a much more evocative notion, in that it presupposes a large economy in which the equilibrium is fully a monetary phenomenon; there is production arranged in multiple stages; time is permitted as a factor production within a round; and finally produced goods depreciate and are replaced in future rounds, even though all rounds of production look identical to each other.

As a result, a state of equilibrium is a snapshot or still life; an ERE is rather a machine in motion. Exchanges continue to be made as time goes on within rounds. There continues to be *psychic* profit from exchanges, as compared to the state of affairs where an exchange is forbidden on pain of punishment, or in which there is no division of labor at all. When Smith wakes up and goes to work, he prefers working for money to not working, etc., even though his week will be by the logic of the ERE repeat unchanged forever.

Every equilibrium, however, is local. The people in it are “happy” only as far as the economist allows them to be. They are not “perfectly” happy, nor can they ever be, as it is the essence of the human condition perpetually to improve. The economist has made his wards so satisfied that no more exchanges are seemingly possible. The economist has swept into their pockets all the cash on the table that he has been able to detect. But he has fallen victim to a delusion that there is no more progress to be had.

Enter an entrepreneur. He is a disequilibrater by his essence. He is the hero (or villain), the source of chaos who shatters the economist’s cherished pure crystalline order of the ERE. (Again, equilibration, too, yields profits, but even an economist, i.e., idiot savant, can predict it.) The order, i.e., the economic status quo and its structure of production and price system are never fully undermined, however; this order cradles the novel goods and ways of doing business introduced by the chaotic entrepreneurs and keeps them contained and rational, i.e., focused on global improvement.

The free market rightly understood is not a place (as in marketplace), nor is it characterized by voluntary exchanges, since such exchanges occur even in an ERE. It is not an inanimate picture, nor even a machine, but an organism growing according to its own distinct process of life.

In an ERE then there is no *monetary* profit. There are no entrepreneurs who explode local equilibria and bring creative advance to the market. The market process is an interaction of disequilibrating entrepreneurship and equilibrating economizing. It's a dance of creativity and imitation, a symphony of fire and ice, simultaneous multiple exertions of tension and frenetic activity and resolution and restoration of calm, disequilibration that creates profits and equilibration that destroys them, an endless entrepreneurial chase that has a structure to it but is fluid and unpredictable, realized in individual actions. It's change-amidst-permanence, but not for its own sake. It's not mindless "evolution" but *improvement*. For the economy is a unity-in-variety, and the market process perpetually deepens the complexity of the economy and enhances its unity, in its two aspects.

An innovator is a disruptor. He butchers the deer-in-the-headlights even rotators, the old vested interests who pathetically imagined that they could persist in their set ways forever. He lures their factors away from them and figures out how to create a product that is worth more than it cost him. Then he watches as the flow of consumer demand is redirected away from those old firms' boring old stuff onto his novelty. Temporary monopoly prices are, far from a market failure, an essential part of the market process.

An imitator is a ruthless warrior who raids the previous innovators and plunders their revenues and raises their costs. Symmetrically, as profits decline, wages rise. He reverse-engineers existing products and finds out how to create the same things cheaper. Prices fall, and workers get closer to – but never quite reach – getting the full value of their labor.

There is no such thing as "surplus value" that entrepreneurs maliciously steal from the workers. Innovators destined to succeed do profit, but on their heels come imitators eager to help themselves to their profits. In arbitraging them away, they lower prices, raise wages, and bring the economy closer to an evenly rotating state. Both the profit creators and destroyers are willy-nilly conscripted into serving society and perfecting the economy.

Workers toil away blindly. Entrepreneurs blessedly *see* what is going on and, with that intellectual vision, as if rising from the slime of labor, drive the market.

If there is too much yang, imitation becomes especially lucrative. It marginally improves existing products and transmutes profits into higher *money* wages and lower prices.

If the economy is placid, on the other hand, a bold innovator can garner considerable profits by converting underpriced factors of production into initially expensive lower-order goods, contributing to the rise of *real* wages. But only for a short time. His struggles are ultimately in vain. The imitators first and other innovators later will inevitably supplant him.

Both processes are pro-social, as they twist and writhe and balance each other, passionately hating and loving each other at the same time. Yin and yang, in joining together, produce fruit, in this case, economic progress. Just like in a relationship, neither the yang nor the yin is ever supposed to “win.” If you permanently win, you lose. Neither the male nor the female has a use for a defeated and destroyed partner, nor can they bear fruit thereby on their own.

### **Efficiency.**

Consider that neoclassical economics assumes that firms maximize profits. What can possibly be meant by this, when this school is preoccupied with the state of equilibrium, in which there are no profits?

Again the distinction between psychic and monetary profit is relevant. With the exchanges of cows for horses described above, every cow and horse are put to their most valued uses, as subjectively determined by the parties to the exchange. This is one sense of efficiency: it *harmonizes*. For example, if the price of a good is below equilibrium, and there is a shortage, then both Smith and Jones are competing for the same item. Whichever man ends up getting it depends on luck or brute strength to shove aside the weaker fellow or personal connection to the producer. Each buyer would prefer it that the other guy drop dead. There is vicious competition as people find themselves in each other’s way. In equilibrium this kind of strife is absent.

Another sense is evoked by a barroom brawl: in a free-for-all “anarchic production,” the objective is to inflict maximum damage on others while receiving minimum damage oneself. That person is efficient who knocks out the most teeth or more pertinently, makes the most money, perhaps at the

expense of others. Fighters, too, can be more or less efficient; this form of efficiency *wins*.

This dichotomy has often been misinterpreted (1) in the business world as that there is a limited “pie,” over which people fight to the death. It is true that the money supply (under *laissez faire*) is highly inelastic, and one man’s profit in terms of *money* entails another man’s loss. However, that does not mean that the “pie” in terms of consumer and capital *goods* per capita and therefore general welfare do not increase precisely as a consequence of entrepreneurial competition. Entrepreneurs are recruited into service to society through the cunning of the (Austrian) economists.

It has been misinterpreted (2) in economic science as the purpose of economics: to shove resources to where they appear *to the economist* to be most wanted. This neglects the fact that people constantly find new and better uses for things, uses which surely stupefy our generic economist.

Economists find themselves perpetually flabbergasted by the fact that entrepreneurs escape the straitjacket of boring equilibrating economizing.

We can now define the notion of “spontaneous” actions. Such an action within the market is not *purposeless* action but *generally unpredictable by other actors*. Entrepreneurs try to predict future *consumer* preferences, but they cannot normally predict *each other’s* moves; or rather they make plans to ready production a year hence, say, without taking into account any innovations others might come up with during this period of production. The inner workings of competing firms are impenetrable to them. Smith’s introduction of novelty into the market is a genuine surprise to his competitor Jones. From Jones’ point of view, Smith’s actions were “spontaneous.”

### **Understanding coordination.**

Disequilibrating entrepreneurship banks on global ignorance not on human error. To be unaware of opportunities is something other than to err. Being blind is not the same as seeing illusions. For example, having a blank canvas rather than a beautiful painting is not an evil. The painting is under no necessity to exist; it is not something that *ought to be*; therefore, its absence cannot be called evil. But creating a painting does improve the global state of affairs and is, therefore, good. Similarly, it is not the case that various types of

market knowledge ought to be had by men; therefore, ignorance is not an evil as error is an evil; though, again, discovery of truth is good.

Saying that entrepreneurial profits are made possible by errors in human actions condemns our entire civilization to be a gigantic mistake, because things can always be better. But that I am enjoying a cup of coffee does not seem to me to be a lamentable sin for which I should scold myself and resolve never to do likewise, just because in a decade, the quality of coffee will improve.

At the same time, though there is no doubt certain beauty to the construction of the perfectly coordinated evenly rotating economy, this beauty is deceptive, because something still better can always be created. Beauty is a real if subjective property, unless one does not want to treat such imperfect knowledge equilibriums as containing an aspect of perfection.

A true final equilibrium, then, would be a “heavenly” society, where there cannot in principle be any improvement. It is next to impossible to imagine such a thing, but that is exactly the implication of Israel Kirzner’s strange artifice of treating even an ERE as still discoordinated, because it can develop further. This is paradoxical, for an inventor’s action could be coordinative in Kirzner’s sense with regard to a previous state of affairs but discoordinative with regard to some succeeding state. As a result, the term “coordination” comes to mean “closeness to absolute perfection” which is unhelpful.

While an ERE then is indeed pleasantly coordinated, discoordination, far from being inefficient, is in fact an essential component of the market process.

### **Balance and progress.**

Any introduction of a novel plan into the free market economy starts with an act of *saving money* with the goal of purchasing capital goods. When I save, I lower my demand for existing goods. Their producer, surprised by my behavior, may have to sell his existing inventory below costs, thereby incurring a loss. He will likely restore equilibrium in the next round of production. A smaller quantity will be produced and sold at a lower price. Some of his factors of production are released into the wild.

Meanwhile, once I have accumulated some cash, I buy my own means of production. Unless I specifically ordered a custom-made good, and even then, there is an increase in the demand for these factors. There is now a temporary shortage of them, again remedied in the next round of their production. A greater quantity will come into existence at a higher price.

The opportunity I am taking is as yet hidden to all other men. If I am right, and I've indeed hit on a great idea, then upon combining the factors and creating the final product, I will be able to sell it at a profit. This means that the consumers will lower their demand for existing goods in order to have the funds to buy my stuff. Once again disequilibrium is reinforced.

A useful mnemonic is that workers labor but do not produce; entrepreneurs produce but, by their essence, do not labor. Now my goods and my revenues are public. Every potential entrepreneur can observe me profiting without exerting myself. This is too fun and lucrative an opportunity for them to pass up. They help themselves to my profits by imitating my production process. In so doing they bid on the same factors, raising both my and their costs, and try to compete with me on price, lowering their prices. The costs and revenues converge, eventually eliminating all my profits.

Suppose entrepreneur Smith is paying his factors \$100 / day and receiving \$200 / day from the sale of the product. Jones, upon beholding this state of affairs, exclaims excitedly: "Smith is making money by not working! Why shouldn't I help myself to his profits?" Jones decides to offer Smith's workers \$110 / day to produce the same thing and to sell the product at \$190 / day. This way, he lures both Smith's workers and Smith's customers to him. Of course, Smith himself is outraged. How dare Jones outdo him in such an uncreative way! Smith decides to pay his workers \$120 / day and charge his clients \$180 / day. Jones, in his turn, will respond to *that*, and on the competition will go, with the ultimate effect being that in each new arrangement, workers receive higher wages, consumers enjoy lower prices (and of course, the workers are the preeminent consumers in the market, i.e., the workers and the consumers are the same people), and profits to both Smith and Jones diminish and eventually disappear. In the end, there is "justice," or full employment with each worker getting the full marginal product of his labor.

This process of arbitrage and elimination of profit is one meaning of the term “equilibration.” The process becomes faster the more people are bent on imitating Smith. Of course, the actual thing is more complex than I’ve made it appear: for one, workers do not actually move from Smith to Jones many times as described; further, Jones will usually offer not an exact replica of Smith’s output but one with a small improvement to it; and so on.

Why isn’t equilibration – the boring destructive yin aspect of the market process’ creative advance – instant? It comes down to two factors: (1) that the work of the new imitative production method takes time in and of itself to bear fruit, and (2) what may be called the transaction costs of imitating: the time it will take for Jones to reverse-engineer Smith’s product, to divine his trade secrets, to hire factors of production, to raise awareness of the cheaper good by advertising, to generate the requisite goodwill, and so on.

As a result, profits for an innovative product can always be had, but not for “too” long, and there is a rough balance to the “Force” or the disequilibrating “light” and equilibrating “dark” tendencies in the economy which is most conducive to economic development.

Finally, new entrepreneurs enter the market and by the exact same process just described turn my now profit-less even rotation into losses. My business starts out with a bang, then grows old, and finally dies with a whimper, supplanted with firms producing superior goods.

### **No equality within the market economy.**

Rawls *is* perversely imagining the economy as if in a state of equilibrium with no entrepreneurs, no change, and no improvement. There is indeed inequality even in an evenly rotating economy. The inequality is due to complementarity in the division of labor. Thus, different kinds of workers receive different wages. But an ERE is not a human society; it’s a machine, a clockwork toy. A philosopher looking at this machine may wonder why he could not keep everyone doing the exact same thing but equalize the wages and the bling the philosopher will allocate to every worker.

A real economy features an *additional* kind of complementarity: between the innovating yang-entrepreneurs and imitating yin-entrepreneurs. The structure of production, the manner and extent of use of capital goods, who does what

work, the incomes earned by different members of society, the amount of consumer goods per capita, etc. are continuously rearranged and updated by profit-seekers. It is this perpetual drive to gain an edge over the presumably duller competitors that generates profits and sometimes losses. A yang-entrepreneur aims to discover factors of production that are in his view underpriced yet such that no one else has as yet realized this fact. He buys them from their hapless owners, combines them into a new product, and sells it at a profit. His profit comes at the expense of income to factors, including labor, but it is in no sense “exploitation,” because as soon as these profits in the first round of production are obtained, everyone sees where the easy money is. The profits are cash on the table to be quickly seized by yin-entrepreneurs who are sure to imitate the pioneer. All profits are short-term and liable to be destroyed in due time. If a one-time yang-entrepreneur becomes lazy and conservative, not only will his profits be brought to zero in the next few rounds of production by yin-entrepreneurs, but he will begin to suffer losses from other future yang-entrepreneurs.



Figure 1. World without end.

The upward-going spiral is everlasting; there is no escape for any producer from the perpetual chase between the yang and the yin. And it is this dynamic that drives all economic progress. Isn't it amazing? Men would rip each other into shreds fighting for meager scarce resources. Yet instead they are bound forever to serve and render mutual aid to one another in perpetually new and exciting ways in this beautiful global romance.

The market process is an economic aspect of the cosmic harmony that to an extent, but not fully, prevails and cosmic becoming – in Joseph Salerno's [words](#), “humanity's uniquely teleological contribution to the universe.” (1990) Rothbard loved justice, as do I, but interestingly, as far as the

libertarian movement was concerned, he disputed the power of economic reasoning to motivate people: “how many people will man the barricades and endure the many sacrifices that a consistent devotion to liberty entails, merely so that umpteen percent more people will have better bathtubs?” (2000: 240) But the complement on the part of the *good* to justice as *right* is hardly the unworthy bathtubs; rather it’s the realization of man’s nature, through the market, as an everlastingly striving and progressing being, a creature who will forever pursue novel experiences, thrills, and pleasures.

### **Impossibility of socialism.**

Socialism destroys the entrepreneurial complementarity. Proving rigorously that socialism is hopeless would get us too far afield; suffice it to say that there are two kinds of socialism, one of the Cuban pattern representing pure order or yin, the other of the Soviet pattern representing pure chaos or yang.

Socialism results inevitably in either chaos or stagnation.

The chaos of the Soviet economy arose precisely because its central planners had the ambition to imitate the market and *change* things. They tried to improve their economy. When they did, the coordination between its parts broke down completely. A factory needed small nails for a new project; there were no small nails, only large ones. A collective farm needed a part to repair a tractor; the part was nowhere to be found; though by bribing some officials, a different and useless part *could* after a time be procured. Nothing connected; nothing worked. Production ground to a halt.

Take a look now at Cuba. In the Soviet Union, people were perpetually pestered with futile slogans like “Catch up with and overtake America in the production of milk and meat!” Cuba would have none of that. What a “happy” country it is. People in it just sort of exist, like plants. (Not that they *like* it, mind you. Cuba is a tropical island without boats, where boats are outlawed, because if people could get their hands on them, they’d leave en masse.) It looks the same as it did in the 1950s. Since socialism was established in it, Cuba has contributed nothing to the development of civilization. It hasn’t died out from famines, which many socialist countries *have* experienced, but it’s a completely *arrested* economy. Cuba ought by right to be seen for what it is: a bizarre ancient decrepit museum.

Of course, both of these “systems” presuppose prior capitalism which they replaced. In order for something either to be destroyed or to stagnate, it must have been created first, and it would have been created precisely by a free economy.

### **Absurdity of interventionism.**

Unfortunately, as regards his occasional forays into economics, Rawls has learned garbage from whoever his teachers are and outputs garbage.

Case in point. Rawls presents some “precepts of justice,” including which jobs “deserve” to be paid how much. But the market does not obey any “precepts,” like “to each according to his effort” or anything else.

Entrepreneurs pay workers not out of a sense of duty to comply with the commands of “justice” but out of self-interest to attract and retain qualified workers. Similarly, workers do not labor because they must, lest they be found “unjust,” but to earn wages. Every contract between agents in the market is entered into because it is mutually beneficial. People make deals with one another in order hopefully to profit from them, not to fulfill any moral duties.

It’s true that in equilibrium, a worker’s wage equals his marginal productivity. But that’s not because market agents have read Rawls! It’s not because the capitalist *must* get what he spends, and the worker *must* spend what he gets. It’s not because there is a divine / Rawlsian command that the worker receive as much in wage per widget as the marginal widget sells for. Equilibration occurs by human action that aims to profit as much as disequilibration, not by human fulfillment of moral duties.

Rawls continues: “When markets are truly competitive, firms do not engage in price wars or other contests for market power” (*TJ*: 241). But perfect competition is not an ideal of any kind; and in real-world competition, the pursuit of “market power” is (1) socially virtuous and (2) a solecism in any case:

This terminology [“market power”] is misleading when applied to the conditions of the market. ...

All market phenomena are ultimately determined by the choices of

the consumers. If one wants to apply the notion of power to phenomena of the market, one ought to say: in the market all power is vested in the consumers. ...

It is very inexpedient to employ the same term “power” in dealing with a firm’s ability to supply the consumers with automobiles, shoes, or margarine better than others do and in referring to the strength of a government’s armed forces to crush any resistance. (*HA*: 649)

And, of course, “price wars” give the benefit of low prices to the consumers.

In “imperfect and oligopolistic markets... , consumers are usually unable to distinguish between the products of firms except by rather superficial and unimportant properties”; advertising then is “socially wasteful,” and the state ought to intervene. (*PL*: 364-5) This, too, is nonsense: there are no “markets” but a single market and process thereof which is “coherent and indivisible. It is an indissoluble intertwinement of actions and reactions, of moves and countermoves,” points out Mises (*HA*: 333). Each good competes with every other good. The entire market is not “imperfect”; it is the totality of production and consumption perpetually striving to get better. It’s true that “persuading” (perhaps as opposed to informing) advertising has sometimes been derided as an arms race in which a great deal of resources is spent but with no social benefit to it. Even if the relative positions of the firms advertising their wares change a little, this does not justify the sheer amount of budgets devoted to this industry. But persuading advertising aims primarily at kindling desires for existing products. The products do not change, but consumer receptiveness to them does. The consumer “melts” upon being exposed to well-made commercials, and

things that are frozen are closely bound together, so as to be hard to pierce. But it belongs to love that the appetite is fitted to receive the good which is loved ...

Consequently, ... melting denotes a softening of the heart, whereby the heart shows itself to be ready for the entrance of the beloved. (*ST*: II-I, 28, 5)

The “race” excites the consumer, enlivens him, and prepares him for hearty enjoyment of life and prosperity. What is not for an economist to like?

Rawls might perhaps reply thus: If advertising *were* socially wasteful, though it is actually not, then interventions would be justified, and therefore the liberty to advertise, though perhaps useful, is not basic. However, in the OP, we know how the world works. The list of basic liberties is contingent on the facts not on counterfactuals. This argument also proves too much from Rawls' own point of view. For we can ask, if democratic procedures *failed* to yield just legislation, then presumably voting rights would have to be nixed. Yet Rawls fanatically insists that these rights are basic.

We've already discussed Rawls' claim that free market can co-exist with state ownership of capital. The "quasi-market" that some socialists have proposed in an attempt to save their system from objections "does not compute."

Again, Rawls argues: "In noting the consistency of market arrangements with socialist institutions, it is essential to distinguish between the allocative and the distributive function of prices. The former is connected with their use to achieve economic efficiency, the latter with their determining the income to be received by individuals in return to what they contribute." (241) By the allocative function Rawls apparently means the pricing of the factors of production, so as to determine the proper purpose and extent of their use. By the distributive function, he means interest, wages, and rent. Of course, these are one and the same thing. For it is the expectation of the income that a resource would receive that determines its allocation. The twin sides of the phenomenon of where a resource will go and how much it will be remunerated cannot be separated, as the latter suggests the former. "It does not follow, however," Rawls continues, "that there need be private persons who as owners of these assets receive the monetary equivalents of these evaluations." It is certainly true that if all land is in the hands of the state, then the state will receive rent on it; and if only the state is allowed to invest into productive activities, then it alone will earn interest on the time market. But it is precisely the "allocative" function of prices that will be destroyed.

Rawls understands that in equilibrium, the market grants to each worker income equal to his marginal productivity. "This fact explains and gives weight to the precept to each according to his contribution... In this sense, a worker is paid the full value of the results of his labor, no more and no less. Offhand this strikes us as fair. It appeals to a traditional idea of the natural

right of property in the fruits of our labor. Therefore to some writers the precept of contribution has seemed satisfactory as a principle of justice.” (*TJ*: 269-71)

Rawls demurs. Each of these common sense injunctions is “subordinate” and cannot “be plausibly raised to a first principle.” In practice, they will be given “different weight” by different systems. “The overall weighting of the many precepts is done by the whole system. Thus the precept of need is left to the transfer branch<sup>5</sup>; it does not serve as a precept of wages at all. To assess the justice of distributive shares, we must note the total working of the background arrangements, the proportion of income and wealth deriving from each branch.”

The “branches” are part of Rawls’ fantastic and incredible design of government: they are given names like the allocation branch, the stabilization branch, and so on, making up an at least 5-horned chimera. Now this is gibberish; Rawls has no idea what he is talking about. It’s a garbled mishmash of poorly grasped Economics 101, neoclassical “market failure” theorizing, Keynesianism, command-and-control socialism, and “justice as legal plunder” philosophy.

Rawls’ ideas of “close-knittedness” and “chain-connection” within the economy are voodoo or magical economics in the truest sense. The idea is that “when the contributions of the more favored positions spread generally throughout society..., if the least advantaged benefit so do others in between.” To preview an argument still to be made, since no real economy caters to the worst off but instead to the great masses of non-utterly miserable wretches, there is no way to test his claim empirically. It thus remains an empty assertion. However, Rawls believes that his “difference principle is not contingent on these relations being satisfied.” (*TJ*: 71)

Lastly, Rawls is in love with taxes, but we’ll postpone consideration of this

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<sup>5</sup> Rawls does not tell us what exactly he means by “need,” but I would guess it has something to do with government handouts to the parasitic class. He probably just likes the welfare state. Remember, however, that Rawls’ interest lies in finding the just distribution of fruits of social cooperation *between the cooperators*. Welfarites, not participating in the economy by definition, fall outside Rawls’ own project. “Need,” whatever it may be, is irrelevant to his own aims.

issue until later.

More generally, interventionism is an attempt to find a “third way” of organizing production that is as far away from socialism as it is from capitalism. However, the “third way” is a mockery of Aristotle’s doctrine of the mean. It may be political reality today, but it cannot be an ideal of any sort.

In the first place, every intervention is a restrictionist measure: it lowers overall output. Consider, for example, pollution control. Now pollution is a problem of physics and technology as much as of economics and political philosophy. Our world is marked by the phenomenon of entropy and the fact that our machines are not 100% efficient. There will always be industrial and consumer waste and trash. Pollution is not a corollary or consequence of capitalism; it marks any world in which there is any production going on at all. If we do not want to drown in trash, and violate our neighbors’ property rights in addition, we need to dispose of it properly. The only economic question is, which system handles waste management most efficiently (and increases this efficiency with growth in civilization, as time goes on), and we know the answer to that which is precisely capitalism.

It may be that a politician runs for office promising to “curb pollution.” But the politician cannot claim to have found a wonderful new technology to produce more while at the same time polluting less. Less pollution must at any given time be purchased with less production. It may be that some particular anti-pollution law is in fact justified, such as when our politician actually gets elected. But such things cannot of themselves constitute the economy.

Second, most if not all interventions are plagued with unintended consequences. Every regulation, while taking away some market freedom, also preserves some. This means that the affected entrepreneurs can still *react* to the laws in somewhat surprising ways. As a result, the original intention (such as to benefit the workers at the expense of the business owners) behind the intervention is undone, and things ends up getting worse for everyone, including the people whom the intervention was supposed to help.

Interventions are by their essence piecemeal. Therefore, when we look at the

entire system of interventions, we are unable to make any sense of it: different regulations will clash with each other. Mises writes, for example:

For under government interference with business the unity of government policies has long since disintegrated into badly coordinated parts. Gone are the days when it was still possible to speak of a government's policy.

Today in most countries each department follows its own course, working against the endeavors of the other departments.

The department of labor aims at higher wage rates and at lower living costs. But the same administration's department of agriculture aims at higher food prices, and the department of commerce tries to raise domestic commodity prices by tariffs.

One department fights against monopoly, but other departments are eager to bring about – by tariffs, patents, and other means – the conditions required for the building of monopolistic restraint. (1946: 85)

Finally, interventions tend to be cumulative and are means to a step-by-step transition to socialism. The masses applaud the bureaucrats for their “benevolent” acts; when the perverse consequences of any given intervention come to the fore, capitalism is predictably blamed and more interventions to “fix” the new problems, lined up. Eventually, the market will be almost fully paralyzed, at which point “capitalism” will be declared to “have failed,” with socialism being our only salvation. The market's only internal defense against this devious strategy consists in its ongoing advance. Its process, by continually creating and destroying industries, firms, and jobs, outruns the statist's whose red tape may fail temporarily to apply to the its newly developed parts. The race is thus on between what Rothbard called the “social power” of the market and the destructive and parasitic “state power.”

Progressivism therefore has two flavors: the dumb and the smart. Dumb progressives view “social legislation” as an end in itself, failing to realize that it always makes things worse. A dumb progressive does evil with “good intentions.” He just sort of walks around the world wreaking havoc, destruction, misery, and death all around him, yet his heart is bleeding with

love for fellow men. Smarter progressives are prey to no such self-delusions. They share with the socialists the same end: the complete destruction of the market economy, but they seek to realize this end not by a revolution but by subterfuge and sabotage, undermining the economy by a thousand cuts and falsely calling interventionist horrors the fault of “unfettered capitalism.”

In fact, capitalism to interventionism to socialism is as health to sickness to death. Progressives inflict upon the people the painful diseases in order to make suicide seem attractive. It’s true, for example, that there are no depressions under socialism, but only because there is no economy left to be tortured with the government’s fiat money and dishonest banking, either.

The “third way” therefore is unstable, both intellectually and in the longer run politically, culminating in social decay and destruction of society. But it can endure for a time, just as a man who is getting progressively sicker every day can linger between life and death for years. In short, economic interventionism is nonsense; there *is* no third way, and the choice between capitalism and socialism must be made. Yet here,

Socialism cannot be realized because it is beyond human power to establish it as a social system. The choice is between capitalism and chaos.

A man who chooses between drinking a glass of milk and a glass of a solution of potassium cyanide does not choose between two beverages; he chooses between life and death. A society that chooses between capitalism and socialism does not choose between two social systems; it chooses between social cooperation and the disintegration of society.

Socialism is not an alternative to capitalism; it is an alternative to any system under which men can live as *human* beings. (*HA*: 680)

Socialism is impossible theoretically *tout court*, and interventionism is impossible in practice. Both systems liquidate themselves.

### **Back to Rawls.**

Once we see the matter this way, inequalities become essential to production and not merely an intellectual exercise. For each man seeks to outdo his

fellows in supplying the consumers with better and cheaper goods. By the very nature of the market process, people strive *not* to be equal to each other. Equality is not mere absence of profits *now*; it is also death and decay a bit later.

This is true even for workers in their capacity as owners of their human capital and as entrepreneurs investing into their own future training and education.

Rawls' initial equality therefore cannot be *even a starting point* of building a philosophical system. For equality and the market are incompatible, but so are production and absence of the market. The goods to be distributed equally in the OP must have come from previous production, which entails the free market, which entails radical, purposive, aggressive, driven inequality, differentiation, competition on the part of men.

In other words, Rawls assumes that in the OP there exist *goods* to be distributed *equally*. I reject this assumption: if there are goods, then they must needs be unequally distributed; if Rawls insists on equal distribution, then he must concede that there are no goods at all. QED.

## **Primary Goods: Wealth: Difference Principle**

Rawls lists the conception of justice that would require one to “balance total utility against the principle of equal distribution” according to one’s own inscrutable aesthetic preferences, which he calls a version of “intuitionism,” as an *alternative* to his own conception. (*TJ*: 107) He does not say, “I recognize the need for continuous improvements in production, but I also like equality; since one can be had only at the expense of the other, let me proclaim the glories of a more or less extensive welfare and tax state.”

The difference principle cannot therefore be interpreted as a way of trading equality for utility, though Rawls’ own view has superficial similarities to it:

Supposedly, given the rider in the second principle concerning open positions, and the principle of liberty generally, the greater expectations allowed to entrepreneurs encourages them to do things which raise the prospects of laboring class. Their better prospects act as incentives so that the economic process is more efficient,

innovation proceeds as a faster pace, and so on.

...something of this kind must be argued if these inequalities are to satisfy by the difference principle. (68)

Indeed, equality (as regards the lower-priority income and wealth as opposed to higher-priority rights and liberties) for Rawls has no value other than as the initial stage in the deliberation of persons in the original position. Anything, including a very unequal society, can be justified with further discussion, for all Rawls knows, via the difference principle. Equality is not some fundamental value that we reluctantly sacrifice in part in order to increase prosperity, because egalitarian measures diminish productivity and so on. To hell with equality, Rawls must be understood as saying, if inequalities, however extensive, can improve the welfare of the worst off.

In the previous section, we have seen that equality of distribution of bling cannot serve as a point of departure for reasoning in the OP. Here, to discuss the difference principle, I will grant this assumption to Rawls for the sake of argument.

In an unhampered market, Rawls writes, “the invisible hand guides things in the wrong direction and favors an oligopolistic configuration of accumulations that succeeds in maintaining unjustified inequalities and restrictions on fair opportunity.” (*PL*: 267) Rawls should not be dismissed as a tyrant or fanatic who wants to stamp out what he according to his own personal whims considers “unjustified,” for he is referring to inequalities that would violate the principles of justice agreed to in the OP.

We can call with Rawls the difference principle “maximin,” in this case maximizing the welfare of the minimally happy class in society. The philosopher, of course, cannot personally be taking care of anybody; he can only pick that basic structure of society under which the most miserable people, whoever they turn out to be, are best off. *Who* these pathetic sons of bitches will be we can only find that out by examining an actual society. For example, let’s have a laissez-faire free market operate in some country for a long period of time, say, one hundred years. At some point we take a snapshot of the economy. We locate the rich people and call them the “better off” and the poor people and call them the “worse off.” Question:

does it make sense at that precise moment immediately to invest the government with massive new powers to begin expropriating, confiscating, and transferring wealth and incomes from the better off to the worse off?

Obviously, “distributive justice” must occur on the level of social institutions. A poor man who robs a rich man on the street at gunpoint does not by this criminal act demonstrate the workings of the difference principle. Neither do paroxysms of theft by government seem to have the requisite permanence and generality. The just tax regime must always exist; it can’t be turned on and off like a spigot to deliver “justice” to the populace.

No *objective* determination can be made of who “won” and who “lost” in the “natural lottery.” A person who is poor in a free-market system might have been richer under socialism working, say, as a powerful bureaucrat. A poor and stagnant society ruled by a hereditary class of warriors would have to be compared with a free, wealthy, and peaceful industrious nation with consumer sovereignty in which the warriors end up at the bottom of the social hierarchy. The people who win and lose will only be revealed once we exit the original position and watch them, empirically, in action, hustling and fighting, scratching and biting. The choice of the principles of justice changes who will be high and who, lowly. Nevertheless, we can take the worst-off person or group in society A and compare it with the worst-off person or group in society B; if the worst off in A are better off than the worst off in B, then A is to be preferred. Rawls proposes three reasons for “this unusual rule”:

First, since the rule takes no account of the likelihoods of the possible circumstances, there must be some reason for sharply discounting estimates of these probabilities. ... Thus it must be, for example, that the situation is one in which a knowledge of likelihoods is impossible, or at best extremely insecure.

Second..., the person choosing has a conception of the good such that he cares very little, if anything, for what he might gain above the minimum stipend that he can, in fact, be sure of by following the maximin rule. It is not worthwhile for him to take a chance for the sake of a further advantage, especially when it may turn out that he loses much that is important to him.

[Lastly,] the rejected alternatives have outcomes that one can hardly accept. The situation involves grave risks. (134)

Rawls of course, and rightly, does not care about the worse off, if by “care” we mean “desire to make happy.” The worse off are not some sacred cows around whom the economy allegedly rotates, or ought to, and to whom excessive consideration is due. The focus on the worse off is not for the sake of their welfare but solely as a requirement or principle of justice, such as “reciprocity at the deepest level.” Why is it such a requirement? Because it would be chosen in the OP. It is this claim that I am concerned to deny.

Regarding the first reason, there is another way to deal with the veil of ignorance. As a ghost in the original position, I (and therefore everyone else) can say: “I want to live in a society in which the productivity of the human labor improves at the fastest speed.” Whether after leaving the original position I’ll find myself rich or poor, healthy or sick, smart or stupid, I will benefit from the efficient economy around me. A quickly growing economy is the common factor for and shared by all its future members. If it renders superior service to rich Smith, it will still render the best in class service to poorer Jones. Jones, like Smith, will benefit more from a more efficient society than from a less efficient one. Now perhaps a less efficient society will *subsidize* Jones at the expense of Smith, procuring for Jones an overall larger share of the now smaller pie. We’ll deal with this situation later. Regardless, reason (1) allegedly supporting maximin does not hold: whoever I become after instantiation, I’ll benefit from the outer society’s productivity. No probabilities are needed, and no calculations are made.

The worst off have a “veto” over any agreement reached in the OP, says Rawls. But of course, the parties behind the veil of ignorance do not know who they are (or will be) in the actual society; and a fortiori, they don’t know if they are the worst off. Why should any of them veto any agreement that might relatively disadvantage the worst off other than out of an excessive aversion to risk, a dubious and inessential to contractarianism value judgment? Liberty by its nature involves great risks; e.g., the freedom of religion means that one can choose one’s religion poorly and suffer as a result. The freedom to pursue happiness entails the real possibility of failing in this pursuit. It’s hard to reconcile the absolute priority of liberty and its

proud defiance of the odds with the conservatism of maximin as regards welfare.

The second condition is bad psychology: ask anyone whether he'll be content with a minimum wage. The pleasures money can buy in the modern society are both enticing and innumerable. "Our contemporaries are driven by a fanatical zeal to get more amenities and by an unrestrained appetite to enjoy life," argues Mises. (*HA*: 318) Rawls has apparently designed his system for ascetics and those who have taken the vow of poverty. The vast majority of people are not described by the second feature of maximin.

Casting still greater doubt on this condition is the fact that each deliberator in the OP is by design explicitly trying to grab the greatest amount of primary goods for himself. He is limited only by the need for unanimous agreement between all deliberators. He is not interested in bare survival. According to Rawls' own specification, people do very much care about the bling.

The minimum "guaranteeable level" of the least advantaged is "quite satisfactory," Rawls implausibly insists. (*JF*: 98) Even this claim can be made only now and in first-world countries, where past economic progress has generated considerable wealth. As we have seen, the chief end of material abundance for Rawls is to enable "free and equal" citizenship, basically political debate and voting. These things indeed can be performed even by very poor people. Talk is cheap literally, except in its opportunity cost of getting actual work done. I reject the assumption that the minimum is uniquely valuable. It is irrational for the parties in the OP to be obsessed with not starving to death, when an economic system that promises unparalleled prosperity for all, specifically capitalism, is readily available.

Rawls' only reply is that his system is concerned with the "fundamental" interests which must be secured at all costs. As I have said, first, rights, liberties, and opportunities are easy to protect; second, there is no such thing as an "adequate share" of real wealth and income, as the latter are supposed always to increase with time. Even prisoners may find modern technology useful. There are no costs to capitalism; only benefits. We are never in a position where we have to sacrifice the welfare of the great majority in order to not to unjustly deprive some small marginalized minority of means of sustenance.

There are two Rawlsian “moral powers” or capacities: one is for a sense of justice; the other is for a conception of the good. It is necessary to “guarantee equally for all citizens the social conditions essential for the adequate development and the full and informed exercise” of these powers (JF: 112). Now presumably, an aspect of the second power is desires to be satisfied. It is good to enjoy things. But human capacity for novel pleasures is unlimited. The pursuit of happiness is everlasting; no man actually evenly rotates. To force even rotation upon a person is an unconscionable injustice; it would be to destroy his very nature as an acting individual. Therefore, it belongs to the “social conditions” to facilitate uninterrupted economic development as an essential goal of social cooperation, viz., capitalism.

The third provision is bad economics. Rawls must be envisioning a choice similar to between  $P = \{70, \dots\}$  and  $Q = \{20, \dots, 20, 1 \text{ million}\}$ . But that is unrealistic. A laissez-faire capitalist economy does not look like either P or Q.  $R = \{60, 100, \dots, 100, 200\}$  is far more plausible. It must matter *how many* people belong to the lowest class; if capitalism efficiently converts the “proletarians” into “bourgeois,” such that the confirmed losers are few in number, then it deserves credit precisely for lifting up *most* of the worst off.

As a result, the maximin rule that buttresses the difference principle stands undefended.

Undermining maximin entirely is the simple fact that the worst off are pretty miserable in *any* society, no matter how wealthy, in which they are not explicitly subsidized. Regardless of where we place them, the worst off will receive  $\$0 + \alpha$ , where  $\alpha$  is some sort of trivial minimum possible wage. It is not the welfare of the *worst off* that differentiates societies; it is the welfare of the *common man*, the masses, the general public. But if we are to compare *their* welfare, then we are squarely back to utilitarianism. Rawls then posits a kind of “No Worker Left Behind” idea. In the first place, capitalism features upward mobility, and an unskilled worker has potent reasons to learn and improve. The theoretical inefficiency of slave labor lies precisely in the lack of incentives to the slave to improve his skills and accumulate future human capital: knowledge and experience with various technologies and compatibility with complex capital goods. Bush writes that “slaves had their own devices for remedying the gross imbalance of advantage created by the

slave-master relationship, notably feigned stupidity, working within limits and only to order, abiding by custom, malingering, petty theft, and so on.” (2000: 17) A free man is far more likely to “feign intelligence” than stupidity in order to convince an employer to hire him, as is obvious from every self-glorifying resume! Journeys from rags to riches are common; journeys from rags to middle-class respectability occur all the time. The same person’s wealth and income can vary enormously in different periods of his life: one will start out unskilled as a young man yet may succeed marvelously later on. Workers can be trusted *not to leave themselves behind*. Second, what can possibly be done to uplift a naturally unproductive – because lazy, vicious, or stupid – person other than to put him on welfare? At least the discipline of the market might cure him of his flaws; welfarism will certainly encourage them.

Let again there be an initial society X of 12 people each receiving 50 utils of welfare. Societies  $Y = \{70, \dots\}$  and  $Z = \{60, 100, \dots, 100, 200\}$  are both preferable to X. (Assuming we live under capitalism, Z is eminently plausible and realistic.) At the same time, utilitarianism picks Z over Y, while the difference principle picks Y instead. Which is bad news for Rawls, because Z is obviously superior. The masses of Z, 83% of the population, are veritable hostages to the Z’s worst-off person (Smith) who is receiving 60 utils. What’s more, if the better-off of Z agree each to donate 1 util to Smith, then we obtain society  $Z+$  with the distribution  $\{71, 99, \dots, 99, 199\}$  which is an improvement over Y even according to the difference principle. Introducing theoretical *compensations*, even if they are hard or even absurd to try to implement in practice, fully subsumes Rawls’ criteria under utilitarianism.

Rawls is aware of an argument along these lines:

This objection is analogous to the following familiar difficulty with the maximin rule. Consider the sequence of gain-and-loss tables:

|       |   |
|-------|---|
| 0     | n |
| $1/n$ | 1 |

for all natural numbers n.

Even if for some smallish number it is reasonable to select the

second row, surely there is another point later in the sequence when it is irrational not to choose the first row contrary to the rule. (136)

Rawls claims that this scenario is unrealistic under his scheme, because “great disparities [of wealth] will not long persist.” Oh yes, they certainly will under capitalism, the only reasonable system of economic organization. In particular:

(1) In regard to the differences between the minority of the rich and majority of the non-rich, it is true of course that capitalism features mass production for the masses, such that new luxuries for the rich, perpetually created, trickle down quickly enough to become necessities for the common men. Moreover, the differences in the real standard of living of the rich and non-rich continuously diminish, as these luxuries become increasingly more “far-out.” But it is precisely the possibility of earning (and transmitting through generations) vast fortunes that makes the capitalistic economy so productive.

This is less important for our purposes than the next distinction:

(2) In regard to the differences between the majority of the bourgeoisie and the minority of the unskilled workers, on the contrary, the money wealth and income will not diverge greatly, but real wealth and income will.

Rawls admits considerations of this sort, in fact depends on and explicitly invokes them in his own attempt at defense of maximin: “there is no objection to resting the choice of first principles upon the general facts of economics and psychology. As we have seen, the parties in the original position are assumed to know the general facts about human society.” (137)

And concerning (2), Rawls can't keep the great majority beholden to the whims of the tiny minority of the worst off.

The game is now set. It's time to finish Rawls off.

Our author writes: “Looking at the question from the standpoint of the original position, the parties would reject the principle of utility and adopt the more realistic idea of designing the social order on a principle of reciprocal advantage.” (155) But what is the free market *but* a principle of reciprocal advantage? In the market economy the “function of competition is to assign to every member of a social system that position in which he can

best serve the whole of society and all its members.” (HLA: 117) Everybody contributes to the material well-being of others in his capacity as a worker, a landowner, a capitalist, or an entrepreneur. Moreover, when Smith trades with Jones, both benefit from every voluntary exchange. What is this but a description of how the difference principle is *actually* supposed to operate?

Rawls may have believed that “reciprocity” contributed to the stability of the social order, given how it tended to nurture individual moral development. In fact, reciprocity is fully embedded into the capitalist economy; and it is precisely the *enemies* of the market who wound the workers’ self-image:

This anticapitalist propaganda is a systematic scheme for the substitution of tedium for the joy of labor. ...

The worker rejoices in his place in society and his active cooperation in its productive effort.

If one disparages this ideology and replaces it by another which represents the wage earner as the distressed victim of ruthless exploiters, one turns the joy of labor into a feeling of disgust and tedium. (HLA: 590-1)

For Rawls, of course, the wage earner is a victim of ruthless *utilitarians*. He is not helping.

Once again, the problem before us is not how to divide manna from heaven among the Israelites, but how to determine which economic system will provide the greatest possible satisfaction of individual desires over the long run and for everyone in the world. The issue at stake is not how to distribute the booty from a successful raid but *how to organize the system of economic affairs in order to permit constant, steady, and maximum possible improvement of the standard of living of everyone* year after year and decade after decade.

The problem can be illustrated by looking at Rawls’ discussion of justice between generations. This is a non-trivial issue, and Rawls’ take on it is obscure, but he most likely means that in any generation N, the citizens of N cannot choose the policy of saving so little that the worst off citizens of the next generation N + 1 are even worse off than the worst off in N.

Presumably, if people want to save more than this minimum, they can, but

“justice” provides no guidance as regards that. I suppose this is consistent. Yet it misses the point entirely. Mises argues:

In the countries that have not yet entirely abandoned the capitalistic system the common man enjoys today a standard of living for which the princes and nabobs of ages gone by would have envied him.  
(*HA*: 859)

How much truer is this today than even when Mises wrote these words! Truer still it will be tomorrow. Again,

He who disdains the fall in infant mortality and the gradual disappearance of famines and plagues may cast the first stone upon the materialism of the economists. (193)

Civilization has enabled man to hold his own in the struggle against all other living beings, both the big beasts of prey and the even more pernicious microbes; it has multiplied man’s means of sustenance; it has made the average man taller, more agile, and more versatile and it has stretched his average length of life; it has given man the uncontested mastery of the earth; it has multiplied population figures and raised the standard of living to a level never dreamed of by the crude cave dwellers of prehistoric ages. (171)

These are the achievement of capitalistic efficiency that Rawls so despises. Without it, there is no problem of justice between generations; there is no possibility to babble exasperating platitudes about “just savings,” because there are almost no future people at all, and those who will exist will never be wealthier than their ancestors. A single natural disaster could wipe out the all of mankind, and probably would sooner or later, at which point all problems of “justice” would cease to exist in any case.

As far as Rawls is concerned, the problem is how to distribute a fixed stock of existing goods, and this can be then done according to either utilitarianism or the difference principle. In fact, however, our task is to nurture the institutions that make for the speediest rate of economic progress over years, decades, and centuries – in Rawls’ terms, the fastest improvement in the quality, quantity, and prices of primary goods from now until the 1,000<sup>th</sup> future generation. The market is a process that flows, and the task of the

economist-philosopher is to let it do so as smoothly and fast as possible.

If the people 1,000 years ago had adopted capitalism, then we all in the hypothetical society of today would as far exceed the amenities we actually enjoy as we today exceed the subsistence farmers 1,000 years ago. We are the pathetic “nabobs” to whom the much luckier counterfactual present generation would look at with contempt for our, compared to theirs, miserable poverty. It is this unimaginable prosperity that Rawls would deny to us and to our posterity with his ill-conceived difference principle.

To imitate Henry Hazlitt, today is already the tomorrow which the bad philosopher yesterday urged us to ignore. If we don't want our children to curse our names, let us make them as rich as the laissez-faire economy permits.

There is even more to it; recall the intuitionism discussed above. It is wrong on the most fundamental level. The idea that the size of the “pie” can be balanced with equal distribution of the pie is completely mistaken.

What ends up being traded off for equality is not the size of the pie at any given time, but rather the momentary *speed at which the pie grows* over months and years of future economic improvement.

The limiting case of perfect equality in consumption through socialism in production is akin to an evenly rotating economy in which, though the size of its pie is non-zero, nothing ever changes.

Let us therefore consider two societies, A and B, initially identical in regard to their wealth. Society A pursues a laissez-faire policy and is inegalitarian. Society B is less productive and grows slower but is marked by greater equality. It is true that after a long time, say, fifty years, A will outperform B so much that the masses in A will have a standard of living better than even the elites in B. But at least in the meantime B will enjoy greater equality. Is there any reason why we should not prefer B to A?

The answer is, we may well *already* be in the stage at which our society's better off are poorer than the worse off of a freer and more capitalistic society that *could have been* but *was not* chosen fifty years ago. We may be reaping the consequences of past egalitarian policies right now, and we would

have to admit that our ancestors made a nasty mistake.

If we are now in society Z and are contemplating two sets of policies, one of which will result in A, and the other in B fifty years from now, then picking the freedom that yields A results precisely in the maximization of the welfare of the worst off in it as compared with the counterfactual B. *Even the difference principle* literally adhered to will favor the ever-improving capitalism.

Rawls mumbles something about how requiring such economic growth is not a “reasonable” conception of justice, since it entails that people would be forced to exhaust themselves in work. (*JF*: 63-4) But as we have seen, lawgiver utilitarianism is not a personal morality and does not regulate individual conduct. No one is forced to do anything. But experience suggests that economic improvement over generations is very likely. Surely, we ought to use the most efficient means to fulfilling the difference principle.

Laissez-faire capitalism provides the dispersal of ownership favored by Rawls. Means of production become owned by those most capable of satisfying consumer desires. The especially gifted entrepreneurs may indeed get very rich. But it is vast middle class that thrives in such a society. They command the economy; they make poor men rich and rich men poor merely by buying and refusing to buy; they determine ultimately what will be produced, in what quantity, of what quality, and for how long. The consumers rule, or are sovereign over, the market. The middle class collectively owns the vast majority of consumable, i.e., pleasure-giving, wealth:

There is, in present-day America, not a single branch of big business that would not cater to the needs of the masses. The very principle of capitalist entrepreneurship is to provide for the common man. In his capacity as consumer the common man is the sovereign whose buying or abstention from buying decides the fate of entrepreneurial activities. There is in the market economy no other means of acquiring and preserving wealth than by supplying the masses in the best and cheapest way with all the goods they ask for. (*HA*: 621)

Rawls objects that there can be “many efficient arrangements of the basic structure”: “it may be that under certain conditions serfdom cannot be

significantly reformed without lowering the expectations of some other representative man, say that of landowners, in which case serfdom is efficient.” (TJ: 61) Efficiency for him means equilibrating Pareto-efficiency which as we have seen is an astonishingly narrow-minded view. Efficiency of the economy in fact describes the speed (and acceleration, jerk, etc.) of future economic improvement, combining both equilibrating and disequilibrating aspects:

We attack involuntary servitude, not in spite of the fact that it is advantageous to the “masters,” but because we are convinced that, in the last analysis, it hurts the interests of all members of human society, including the “masters.”

If mankind had adhered to the practice of keeping the whole or even a part of the labor force in bondage, the magnificent economic developments of the last hundred and fifty years would not have been possible. (Mises 1985: 22)

In the somewhat longer run, the “masters” indeed benefit from the general abolition of serfdom as an institution.

In the free market, all efforts of the entrepreneurs are directed toward satisfying consumer wants. Rawls has no understanding of how the market operates. He writes, for example:

[The meritocratic] form of social order follows the principle of careers open to talents and uses equality of opportunity as a way of releasing men’s energies in the pursuit of economic prosperity and political dominion.

There exists a marked disparity between the upper and lower classes in... means to life...

The culture of the poorer strata is impoverished while that of the governing and technocratic elite is securely based on the service of the national ends of power and wealth.

Equality of opportunity means an equal chance to leave the less fortunate behind in the personal quest for influence and social position. (TJ: 91)

Ignoring the quest for “political dominion” which in my view is pathological, let us concentrate on economics. First, what is wrong with pursuit of economic prosperity? Does Rawls want to arbitrarily prohibit people from seeking their own happiness? Is *that* what “justice” comes to in his view? In any case, the difference principle permits any X to leave any Y behind, even far behind, in the case when fulfilling X’s ambitions raises Y’s standard of living more than it would be if X were on the contrary coerced into a dull humdrum routine. That is how capitalism fulfills the difference principle.

Second, it is impossible actually to identify the “upper” and “lower” classes, as there is a smooth continuum of the amounts of personal wealth in people’s hands.

Third, on the free market one can only acquire wealth by serving consumers, the vast majority of whom are not rich. The “poorer strata” in their capacity as consumers are continuously *served* by the ever-shifting elite. One can only leave other people behind in terms of influence and status by creating products and services for them to buy. In short, one can only fulfill the “personal quest for influence and social position” by creating value for others, precisely as the difference principle commands.

In the unhampered market economy, the “superior men,” the better off are *drawn into service of the common man*. Personal wealth in a free society is thus a consequence of previous success in serving consumers.

For example, Rawls believes that “those starting out as members of the entrepreneurial class in property-owning democracy, say, have a better prospect than those who begin in the class of unskilled laborers.” (*TJ*: 67) But in a free society, there *is* no entrepreneurial class: any man, including an “unskilled laborer,” is free to become or cease to be an entrepreneur. Successful entrepreneurs earn profits and have the options of continuing to produce; failures who lose money, regardless of their initial capital, must forfeit their position and become laborers, perhaps even unskilled, since entrepreneurship requires very different types of abilities than laboring:

Equality under the law gives you the power to challenge every millionaire. It is – in a market not sabotaged by government-imposed restrictions – exclusively your fault if you do not outstrip the

chocolate king, the movie star and the boxing champion. (Mises 1994: 8)

Rawls may be thinking thus: in a just society, everyone, no matter how poorly endowed, contributes something to social cooperation, and these contributions, being a collective asset, are appreciated and cherished. Hence everyone has the self-respect of knowing that he is a valued member of society. But lawgiver utilitarianism, realized in the free enterprise system, also harmonizes individual pursuit of happiness and the common good. People know that their work, whether as employees, capitalists, landowners, or whatever, benefits society; and the greater their skill at “exploitation of the contingencies of nature and social circumstances,” precisely the more society benefits.

What Mises writes about ownership of the means of production, again, that it is not a privilege but a social liability, applies equally well to human capital, including natural endowments, inborn talents, potentialities, virtues, and skills. Consider, for example, the allegedly burning issue of “white privilege.” It is probably true that white people are blessed by *nature* to be born smarter and with greater potential and nurseries of virtues than many non-white races such as blacks. Moreover, these greater IQ and natural endowments have resulted – by being present in their parents, too – in their being born into good families and good countries that improve their *nurture*, as well.

However, these greater abilities, powers, capacities about them are “privileges” only if whites fail to use them for the sake of society and the greater good or, worse, turn them into crime. (Thus, a white criminal will be far more sophisticated than a black one.) If, on the contrary, white people contribute to society to the full extent their natural talents permit, then their being compensated accordingly is in no wise a privilege.

Instead, the superiority of the white race is a social asset that belongs to all members of society including blacks. Good genes and functional families are not something whose benefits accrue to their possessor only but rather are held in trust by society and, through the working out of the market process, benefit humanity as a whole. A privilege is underserved; if white people earn their money and status honestly, such as especially under *laissez faire*, then the fruits of their labors, though indeed unequal with the fruits of labor of

black people, benefit society at large *including blacks* and are to that extent inoffensive. Thus, blacks have profited tremendously from the civilization created by white people around whom these very blacks congregate.

How preposterous that today's demagogues took the white man's *burden* – “from everyone who has been given much, much will be demanded; and from the one who has been entrusted with much, much more will be asked” (Lk 12:48) – and turned it into a “privilege”!

Again, as a corollary, ownership not only of physical capital is a liability but of human capital (including IQ, skills, education, etc.), as well. Other people's high IQ in a free market economy works to my advantage, even if I personally am irredeemably stupid. Natural talents *are* (figuratively) a collective asset, in the sense that the better off must use their powers to produce goods for other people, including the worse off, to enjoy.

What follows is that in the market economy the principle of efficiency and the difference principle under “equality as careers open to talents” yield the same outcome. Natural liberty and natural aristocracy in Table 1 are the same, with the entrepreneurs most successful at any given moment at filling the needs of the consumers *becoming part* of the fluid natural aristocracy.

In sum, (1) in the short run, the worst off cannot be helped; (2) in the medium run, in the course of their own lives, the worst off under the libertarian system will usually help themselves; and (3) in the long run, capitalism helps all people including – and especially – the worst off.

### **The “private society.”**

Rawls is worried that “allegiance to the social system may demand that some, particularly the less favored, should forgo advantages for the sake of the greater good of the whole.” (*TJ*: 155) In the free market this is precisely what does *not* happen:

For what the individual must sacrifice for the sake of society he is amply compensated by greater advantages.

His sacrifice is only apparent and temporary; he foregoes a smaller gain in order to reap a greater one later. (*HA*: 146)

Criticizing utilitarianism, Rawls writes: “The best that the ideal legislator can do is to design social arrangements so that from self- or group-interested motives citizens are persuaded to act in ways that maximize the sum of well-being. In this conception the identification of interests that results is truly artificial: it rests upon the artifice of reason, and individuals comply with the institutional scheme solely as a means to their separate concerns.” (*TJ*: 399)

How astute. For Mises, this fact is both of scientific and of practical importance:

Law and legality, the moral code and social institutions are no longer revered as unfathomable decrees of Heaven. ... The utilitarian economist... does not ask a man to renounce his well-being for the benefit of society. He advises him to recognize what his rightly understood interests are. In his eyes God’s magnificence does not manifest itself in busy interference with sundry affairs of princes and politicians, but in endowing his creatures with reason and the urge toward the pursuit of happiness. (*HA*: 147)

What makes the existence and the evolution of society possible is precisely the fact that peaceful cooperation under the social division of labor in the long run best serves the selfish concerns of all individuals. The eminence of the market society is that its whole functioning and operation is the consummation of this principle. (845)

Rawls vaguely recognizes this perspective, calling it a “private society”: “Private society is not held together by a public conviction that its basic arrangements are just and good in themselves, but by the calculations of everyone, or of sufficiently many to maintain the scheme, that any practicable changes would reduce the stock of means whereby they pursue their personal ends.” (458) Society and social cooperation are means to the realization of each individual private plans and dreams. Rawls’ objections to this are obscure; he writes that “the successful carrying out of just institutions is the shared final end of all the members of society, and these institutional forms are prized as good in themselves. ... Everyone’s more private life is so to speak a plan within a plan, this superordinate plan being realized in the public institutions of society. ... the collective activity of justice is the preeminent

form of human flourishing.” (*TJ*: 462-3) Odd. Elsewhere Rawls denies that personal is political. And human flourishing has little to do with being just and abstaining from murder and theft, from rendering ideological support for law enforcement, or even with attending to political issues conscientiously.

Perhaps in the private society “men become estranged and isolated in their smaller associations.” (206) But the remedy for this is knowledge of economics, not the right to vote. It is this that can make all men brothers:

We may call consciousness of kind, sense of community, or sense of belonging together the acknowledgment of the fact that all other human beings are potential collaborators in the struggle for survival because they are capable of recognizing the mutual benefits of cooperation, while the animals lack this faculty. (*HLA*: 144)

The compatibility of liberalism / libertarianism and “reasonable pluralism” or conflicting “comprehensive doctrines” is attained via economic understanding. The deliverances of economics, when apprehended by the majority, are both necessary and sufficient to end not just the war of all against all, but also slavery, serfdom, government privileges of all kinds, unnatural subjection of women, cruel and unusual punishments, and suchlike.

The stability of a society organized under lawgiver utilitarianism is achieved via the universal interest in the efficiency of the economy and the rate of increase in the productivity of labor. Each man is intensely concerned with harnessing society to serve his own interests. He will support both just institutions and the infliction of punishments on unjust individuals by the state out of the selfish desire to squeeze the most from social cooperation.

To conclude, the laissez-faire market economy raises everyone’s standard of living – the better off and the worse off alike – in the fastest and most obvious way. It’s a rising tide that lifts all boats, day after day, year after year, generation after generation. This is what lawgiver utilitarianism recommends, and this is what would be chosen in the original position.

The OP by itself, when detached from both natural law (as background knowledge) and lawgiver utilitarianism (as the aim to be secured by a political

ideology), produces no definite social contract whatsoever. Rawls is badly mistaken about the implications of his own intellectual toy.

## **Taxes and Primary Goods: Self-Respect**

Ideologically, Rawls is a looter, but since he is not an intuitionist and in particular does not value equality of wealth and income for its own sake, not a fanatical one. His discussion of taxation is sparse, so we'll be brief.

Rawls countenances three reasons for taxation. *First* is to promote “liberty,” in particular to “adjust the long-run trend of economic forces so as to prevent excessive concentrations of property and wealth, especially those likely to lead to political domination.” (*JF*: 44) As we have seen, however, political “liberties” (i.e., people’s power to plunder their fellow men) are irrelevant, and personal and economic liberties are fully protected, under unhampered capitalism. There is no need for coercive leveling. This form of taxation is expressly unusual and offensive, since its purpose is to hurt its victims even without bestowing any benefits on the tax receivers.

*Second*, insofar as “a social minimum providing for the basic needs of all citizens” is a “constitutional essential.” (*PL*: 228) He means a form of universal basic income under “welfare-state capitalism.” Rawls gives one argument for why this would be chosen in the OP. “A minimum must be included, for the parties will always insist on some insurance of that kind.” (*JF*: 120) I understand that insurance can be useful, but why charge the state with insuring people? The free market provides numerous kinds of insurance by different firms at different prices which cater to discriminating consumers. Why the coercive one-size-fits-all government “safety net”?

The problems involved go beyond the scope of this book, but let me say this.

First, the people who receive the UBI but do not work are bums and do not take part in social cooperation. Hence from the point of view of the OP, they are irrelevant and do not count as citizens. They make little use of liberties; they take no opportunities to improve their own or other people’s well-being; they produce no wealth to be distributed. The costs to the actual cooperators in the form of taxes they pay to subsidize these bums disappear into nowhere, as if in some insatiable maw, and are offset by no benefits. The

bums *may* choose to spend this money educating themselves on the virtues of citizenship, but they probably won't, and even if they did, they – by the nature of their disgrace and as the OP would have it – are not citizens at all.

Rawls is aware of this problem. “Are the least advantaged,” he asks, “those who live on welfare and surf all day off Malibu?” He answers no: “Surfers must somehow support themselves.” (*JF*: 179) But on what grounds? It does not belong to any government to monitor how a citizen spends his constitutionally essential income allegedly due to him by the demands of justice itself. We'll see in a moment that Rawls considers curing the sick to make them fully cooperating members of society to be an equally important function of the state. But welfarism does the opposite: it cuts people off society, giving them an incentive to leach off the public treasury without contributing anything to it. It's hard to see how a philosopher can maintain both the value of health care and the value of the welfare state at the same time.

Rawls consider self-respect, or the “social bases” of it, to be another primary good:

The importance of self-respect is that it provides a secure sense of our own value, a firm conviction that our determinate conception of the good is worth carrying out. Without self-respect nothing may seem worth doing, and if some things have value for us, we lack the will to pursue them. Thus, the parties give great weight to how well principles of justice support self-respect, otherwise these principles cannot effectively advance the determinate conceptions of the good of those the parties represent. (*PL*: 318-9)

He thus identifies a further problem with the welfare state: “there may develop a discouraged and depressed underclass many of whose members are chronically dependent on welfare.” The looters would seem to lack self-respect. Yet he adds without any irony: “This underclass feels left out and does not participate in the public political culture.” Imagine if it did participate – it would only vote more welfare to itself! Rawls proposes to fix this “not by the redistribution of income to those with less at the end of each period, so to speak, but rather by ensuring the widespread ownership of productive assets and human capital (that is, education and trained skills) at

the beginning of each period.” (JF: 140) Now from his own point of view, ownership of capital is not a basic liberty. It is therefore hard to see why it needs to “widespread.” Moreover, owners of means of production are inescapably bound to risk them in competing with other entrepreneurs. All are under the perpetual threat of losing their money. It is unclear why Rawls insists that the vast majority be forced to bear this risk. Would it not make more sense to let each individual *choose* whether to be a worker and hold cold hard cash or entrepreneur and hold volatile assets? Again the issue comes down for Rawls to the fear that the rich will corrupt the political process. We have seen that laissez-faire capitalism made stable by the common ideology nips this problem in the bud: attempts by capitalists to obtain subsidies or anti-competitive privileges will not succeed, as public opinion will ruin the politicians on the take. As for human capital, the free enterprise system is quite capable of producing education; and most serious vocational training is done on the job, anyway. Yet instead of recognizing these as reasons to roll back the welfare state, Rawls is piling it on: “the difference principle specifies a social minimum derived from an idea of reciprocity. This covers at least the basic needs essential to a decent life, and presumably more.” (JF: 130) But more *for what purpose?* No answer is forthcoming, but if Rawls means to give “fair” value to liberties, then religious worship, political debate, and voting are very cheap and hardly require large handouts.

Colin Macleod declares in a kind of manifesto that the Rawlsian system demands equal and “uniformly excellent” education. It is of course Macleod himself who knows exactly what’s “excellent” and is prepared to give it to us good and hard. He will forbid other people to seek their own excellences; parents must be “prevented from purchasing advantage-conferring private education for their children.” (2014: 172-8) It does not occur to him that equality and excellence and incompatible. The only choice is between capitalism that produces unequal but indeed excellent and continually improving education and socialism that will produce equal but terrible and continually worsening education. Only an unjust man would insist on the latter.

Furthermore, “provision for medical care, as with primary goods generally, is to meet the needs and requirements of citizens as free and equal. Such care falls under the general means necessary to underwrite fair equality of

opportunity and our capacity to take advantage of our basic rights and liberties, and thus to be normal and fully cooperating members of society over a complete life.” (*JF*: 174) Let’s assume for the sake of argument that if recovery from disability that cuts one off from productive life is possible, then it is a human right. Rawls assumes that “if a regime does not aim at certain political values, and has no arrangements intended to provide for them, then those values will not be realized.” (137) The design of laissez-faire capitalism does not explicitly aim at providing health care (as opposed to other goods consumers may value); therefore, there is no health care under capitalism. We can see the absurdity of this assumption right away. Capitalism excels at healing people, just as it excels at everything else.

“Institutionally, democratic equality will require universal access, without financial barriers, to a system of public health, preventive, acute, and chronic care services. In general, this requires a universal, mandatory national insurance system...,” writes Norman Daniels (2003: 258). Against this rather dogmatic opinion we may as well imitate Frederic Bastiat: We disapprove of state health care. Then the socialists say that we are opposed to any health care. “It is as if the socialists were to accuse us of not wanting persons to eat because we do not want the state to raise grain.” Daniels doesn’t even bother to arrogate to himself the dumb-progressive “good intentions” of trying to improve our health; he wishes only to make us all equally sick.

Now it seems permissible for a million basketball fans to pay a quarter each to see Wilt Chamberlain play. Each such transaction is a capitalist act between consenting adults. How can taxation – i.e., forced labor – of both Chamberlain and his fans be justified? Perhaps a series of individually just acts may as a whole be unjust. The reason again is alleged “concentrations of power” under laissez faire. We’ve dealt with this above. The other idea is that taxes are “foreseeable. Since the effects of those rules are foreseen, they are taken into account when citizens draw up their plans in the first place. Citizens understand that when they take part in social cooperation, their property and wealth, and their share of what they help to produce, are subject to the taxes, say, which background institutions are known to impose.” (*JF*: 51-2) The point is that Chamberlain is free to alter his behavior in response to the taxation laws. In reply, Rothbard quotes Ronald Harnow:

According to the logical structure of this argument, “threatening coercion” is not a coercive act. Thus, if I know in advance that I will be attacked by hoodlums if I enter a certain neighborhood, and if I can avoid that neighborhood, then I need never be coerced by the hoodlums... Hence, one could regard the hoodlum-infested neighborhood... in the same way as a plague-infested swamp, both avoidable obstacles, neither personally aimed at me. (*EL*: 227)

Rothbard goes on:

There are all sorts of situations on the market where prospective victims may be able to maneuver so as to minimize the harm to themselves of institutionalized theft. The theft is no more moral or legitimate because of such praiseworthy maneuvering. ...

Instead of deploring crime against storekeepers in certain sections of a city, we might then argue (as utilitarian economists) as follows: after all, the storekeepers knew what they were doing in advance. Before they opened the store, they knew of the higher crime rate at that location and were therefore able to adjust their insurance and their business practices accordingly. Should we say, therefore, that robbery of storekeepers is not to be deplored or even outlawed? (144-5)

Thus, those who are unprepared to admit that taxation is theft are by that fact led into a more controversial stance that thievery is merely a tax.

The problem is made more acute by Rawls’ own stipulation that his society is closed: one enters it by birth and leaves only by death. Moreover, taxes presumably apply to income from all sources. Hence there is no escape for any citizen from being looted, whether by emigration or by switching to a different job. To imitate Mises, the only way left to the individual out of tax serfdom for the sake of “justice,” because it cannot be denied to him, is by suicide.

The *third* reason for taxation is to subsidize the worst off to fulfill the difference principle. Assume that the worst off still work. Now Rawls links the difference principle with fraternity: (1) “a certain equality of social esteem manifest in various public conventions and in the absence of manners of deference and servility”; (2) “the idea of not wanting to have greater

advantages unless this is to the benefit of others who are less well off.” But while voluntary exchange benefits both parties, taxation destroys the harmony of human interests: there arises the class of tax-payers and the parasitic on it class of tax-consumers. When the better off as tax serfs are brutalized by the state so that the worse off as tax lords can be gratified, the former would prefer it that the latter *drop dead* and free them from the burden of feeding their appetites. The worse off leech at the expense of the better off; there is a conflict of interests, animosity, even hatred between the two classes, rather than fraternity and mutual appreciation of each other’s contributions. The worse off harass the better off and eat out their substance. They suck the life force out of the genuinely productive classes.

Rawls’ system begins to look distinctly like kakistocracy – rule by the worst, or the worst off, as the case may be, whom all non-pathetic members of society must bow to and sacrifice their own interests for.

In addition, as we have seen, under *laissez faire* the worst off are a very small minority. It seems irrational to worry about being instantiated as one of them after the veil is lifted. It seems supremely rational, however, to be concerned with the how productive human labor will be in the society being constructed. Insofar as the welfare state lowers overall productivity, it suffers from the same problem as all anti-utilitarian systems: in a long enough term, the worst off under the system recommended by lawgiver utilitarianism will end up in a better shape than under Rawlsian “property-owning democracy.”

## Final Considerations

### Democracy.

Rawls calls his preferred system “democratic equality.” What does democracy have to do with contractarianism? Rawls assumes that “some form of majority rule is justified as the best available way of insuring just and effective legislation. ... Although in given circumstances it is justified that the majority (suitably defined and circumscribed) has the constitutional right to make law, this does not imply that the laws enacted are just.” (*TJ*: 313) There seems to be a clearly better way from Rawls’ own point of view: let the parties in the OP agree that whoever in the actual world is instantiated as one John Rawls shall rule them all as philosopher-king and Bringer of Justice.

E.g., when Rawls discusses the “constitution” or court decisions, he is being anti-democratic, favoring those restrictions on majority rule which he believes will be endorsed in the OP. He does not see the contradiction in wondering in one sentence, “which principles are most appropriate for a democratic society,” and “whether a constitutional regime is to be preferred to majoritarian democracy” in the next.<sup>6</sup> (*JF*: 39) The problem is obviously not solved by redefining democracy from majority rule to “equal political liberties,” because in a constitutional regime, bureaucrats, judges, and even representatives hold vastly more power than an average voter.

Rawls’ fetish may be explained as follows: let the “people” earnestly, civilly, and in good faith discuss political justice and “democratically” decide the shape of the basic structure of society. But that means that the will of as many as 49% of the population will be despised, many more if there is an ideological plurality. Among those rejected by the mob may be the views of some of the best thinkers. A Rawlsian philosopher might try to come to the rescue but in vain, since in the OP, *unanimous* agreement is required. Or would Rawls insist that the “people,” as one, up and agree with him?

It’s not as if “free and equal” citizens of an actual democratic society send their “representatives” into the original position whose bargaining under the veil of ignorance then miraculously reaffirms their democracy in the actual society. The OP is only a tool of philosophical reasoning. It is true that the parties in the OP have the equal freedom to propose, consider, and accept or reject various principles of justice. But this fact neither entails nor is entailed by democracy in the real world, equal voting rights, or anything of that sort.

It is also true that *every* man can, and perhaps should, philosophize and come up with his own political ideology, in our case, the idea of what kind of society he wants to live in. Every man then is a “free”-thinker and “equally” a potential lawgiver. That does not mean that he suddenly acquires the political power to command others to join him in his vision or die. These *contemplative*

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<sup>6</sup> If the Rawlsian constitution cannot be changed, then it is merely the deliverances of the original position set in stone forever and is not democratic essentially.

If it can be changed, then it differs from parliamentary democracy only in degree, such as by requiring a super-majority to authorize a change where a democracy would require a simple majority, and hence is philosophically uninteresting.

freedom and equality obviously need not translate into any *political* terms.

“The fair value of the political liberties ensures that citizens similarly gifted and motivated have roughly an equal chance of influencing the government’s policy,” announces Rawls (*JF*: 46). First, of what value is a mere “chance” of influencing government as opposed to the concrete power of writing laws? Second, does he mean the equal chance of zero in any actual democracy? Is democracy a gambling game in which one is almost certainly doomed to lose? Even abstracting from the real-world worthlessness of an individual vote, there is no such thing as equal political liberties (i.e., powers) – some people, viz., those who are arbitrarily lucky to belong to the majority, are “more equal than others” who are in the minority.

The fact of a plurality of comprehensive religious, philosophical, and moral doctrines is a basic feature not of democracy but of individual liberty. This plurality can exist under any type of government including non-democratic; it can also be suppressed by any type of government including democratic.

Nowhere does Rawls attempt to *prove* that democracy is the best form of government, e.g., as compared with aristocracy, monarchy, anarchy, etc., or some combination of these. Democracy is far less important than liberty and capitalism: I’d rather live in a free country ruled by a king than under socialism in which the “central plan” was democratically voted on. E.g., democracy is a pale and withered imitation of the free market:

In the political democracy only the votes cast for the majority candidate or the majority plan are effective in shaping the course of affairs. The votes polled by the minority do not directly influence policies. But on the market no vote is cast in vain. Every penny spent has the power to work upon the production processes. (*HA*: 271)

“Democratic socialism” may be described as follows: there are only two types of bread the state is promising to the people: Republican bread, say, white; and Democrat bread, say, whole wheat. Voting occurs. The Republicans win, and white bread – and only it – gets baked and shoved down everyone’s throat, so stale you can pound nails with it. No other kind of bread is permitted. And when, under socialism, the state executes you for political dissent or economic “speculation,” is it really of great significance

whether the firing squad was democratically elected or bureaucratically appointed?

Heaven forbid that someone might think that Rawlsian “equality” will be – as it must – totalitarian rather than as he prefers to call it, “democratic.” A satirical article in the Babylon Bee, titled “Nazis Clarify They’re Only Calling For ‘Democratic Nazism’” [has it right](#):

Scoggins was questioned about the use of the word “democratic” and how democratic Nazism was any different from plain-old Nazism.

“The main difference is we add the word ‘democratic’ on there because people like that word a lot more than just plain ‘Nazi,’” Scoggins said.

“We’ve added the word to all of our unpopular practices. Democratic racism, democratic beat-downs, democratic censorship, democratic genocide. All of those things poll much higher if we call them democratic.”

I suspect that “democratic” could be replaced with “holy,” “pleasant,” “healthy,” or whatever indeed “polls best” to the exact same dishonest effect. In other words, it’s just a meaningless slogan. Pay no attention to it in Rawls.

### **Autonomy.**

“Autonomy” is best understood as having an expert learned opinion about a subject, as ability to evaluate different points of view and make up one’s own mind. It’s a property of a trained intellect and pertains to contemplation.

In active life, autonomy does not exist and approaches zero with the growth of civilization: division of labor ensures that one cannot survive, let alone flourish, on one’s own. We are all profoundly dependent on each other; Renaissance men, too, are for the most part a thing of the past. We must defer to each other on everything other than one’s own narrow specialization, and even there, there is constant progress made by other people that requires that one keep his knowledge and skills up to date.

The corresponding term in the active life is precisely freedom, understood as the right not to be violently or coercively interfered with in one’s pursuits.

Thus, in the original position, intellectually *autonomous* agents will choose to create a *free* society.

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