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*Refuting John Rawls, the Apostle of
Social Democracy*

Dmitry Chernikov

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Apostle of Social Democracy*

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Two lovers locked in the arms of the dance,
Freedom begins with a game of chance.

– Blackmore’s Night, “Spanish Nights”

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Introduction

John Rawls has been hailed as one of the most important philosophers of the 20th century. His magnum opus, *A Theory of Justice*, reinvigorated political philosophy and generated quite a furor when it was published in 1971. For example, Robert Fullinwider's "Bibliography" lists 200 or so books and papers on Rawls until 1977 alone. Even today his influence is considerable. Rawls develops a novel social contract theory. 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 to be less an enforcer of property rights than a tool to push around income and wealth to achieve a proper "distribution" of resources – the scare quotes are to indicate that there are irksome flies in this ointment.

The social contract is hypothetical; the conditions under which the terms of the contract are hammered out are a philosopher's plaything. They are, however, ingenious and seem at first glance to have the potential to yield valuable insights. The situation the philosopher puts himself in, his state of mind 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" in many various ways; 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 sophisticatedly proclaim their most ignominious actions to be just.

Meanwhile, the weak do not find value in any independent notion of justice either. Their grumbling about the strong's injustices is only thinly veiled impotent and resentful envy of the strong. If a weak man were suddenly to become strong, then he would instantly renounce his ideas of justice and would not only commit injustices freely but in imitation of his fellows insist that his unscrupulous 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 played a key role in 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 (though this impertinently assumes that socialism is in the interest of the workers). 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 (1989) 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. (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. The personal can affect the political, sin clouds the intellect, etc.

It is precisely such loopy 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 concept 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). The philosopher, in this thought experiment, is broken up into multiple parties seeking unanimous agreement, and no such agreement can be reached if *each* party insists on being dictator. In the actual world one cannot prejudice what two people

will agree to, but in this hypothetical contract, the contracting parties are simply the philosopher's alter egos. Thus, justice and prudence or rational self-interest *would* coincide in the actual world if only people were not swayed by awareness of their special situation; blank out such awareness by means of a device such as the OP, and what's just is what's prudent. We may put it this way: in the OP it is just to be prudent; in the actual world, insofar as being just is a crucial part one's own good, it is prudent to be just. The key question is whether in the OP there is room for exercise of prudence.

But why contracts? The idea is that man is free and bound only by his own will. He has no obligations beyond those he imposes upon himself. *All* duties are contractual; if there are to be any laws, they must be consented to voluntarily by everyone. Contracting as a specifically moral phenomenon follows from the idea of man as an end in himself. Each individual's purpose, final cause, which is his own happiness, is within him; he is not merely a pawn of others, a cog in the machine. Smith will not cooperate with Jones, and vice versa, unless both benefit as a result. There must be a meeting of the minds, with each mind ultimately serving *its own* will. Now noncooperation or individual autarky translates into a war of all against all and is so abhorrent that *any* cooperative scheme including, say, slavery is superior to it. To make progress, we can try to approach the contract from some position of equality of each party. The veil of ignorance wants to simulate that. And there is a further reason. 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 is designated "just" (hence, Rawls' "justice as fairness"), but by that very agreement, people will be in considerable harmony and accord with one another, and what more can we ask for from 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* true morality, if there is such a thing; yet its *intersubjective* agreement is valuable, nonetheless.

Rawls tells us that "the idea of the original position is to set up a fair procedure so that any principles agreed to will be just. ... Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage." (TJ: 118) But men *ought* to exploit social and natural circumstances to their own advantage! That's just the essence of life. It is precisely starting *from* this process of exploitation, or taking it as data, that justice, or rules that regulate this process, arises. The circumstances ought not to be exploited unjustly but ought to be exploited justly. We can if we want to in the OP forget *what* the circumstances are; we should not forget *that* they

have to be exploited in the actual world. As we'll see, Rawls does not fully distinguish between these two perspectives.

We can ask, why is the agreement in the OP, this hypothetical contract between amnesiac wraiths, binding on the actual people? I ought to obey not because I agreed to the rules, either actually or even hypothetically, and thereby, by this action, bound myself, but because the rules agreed to (by everyone) are by definition just, and I ought to practice justice. The rules are just because *unanimously* agreed to; the fact that *I* voted for them is not a ground for my obligation to abide by them. It follows that the OP is contractarian only if one already believes that what it delivers is justice, and there is room for doubt here. (See Cohen 2008: 337-43.) So, because people ought to be just, and the OP contract describes just institutions (as universally willed and applied), everyone ought to pay attention to it. The OP, Rawls believes, is the most sensible way of designing the basic structure of the social order. It functions as the best "initial situation" or state of nature, specifically its "philosophically most favored" version, and best matches his own considered judgments. In particular, Rawls wants to buttress his egalitarianism. However, the natural state of man is the social state, and the social state of conscious cooperation of any complexity features differentiation and inequality. Rawls conceives of the parties in the OP as "free and equal"; they are free in the sense of pursuing their own happiness and not bound to serve or sacrifice for anyone else; and equal in the sense that their agreement is necessary to exit the OP. But in the actual world, far from being free and equal, men are bound by economic law and unequal at their very conception. Rawls confuses these.

Tom Lehrer's song "National Brotherhood Week" goes like this:

Oh, the white folks, hate the black folks
 And the black folks, hate the white folks
 To hate all but the right folks
 Is an old established rule.

Lehrer goes on to mention the enmity between the rich and the poor, between Catholics and Protestants, and so on. Can such relations be ratified by the OP? Rawls assumes mutual disinterestedness and absence of envy among the parties there. At first glance both conditions seem reasonable. Disinterestedness is the natural relation between strangers, neither subhuman hatred nor superhuman charity. Envy (a species of hatred defined as sorrow for neighbor's good) is a sin and as such an illegitimate, indeed unjust, desire. If you feel it, you have a moral duty to repent and destroy it, to burn it out of your soul. In Rawls' terms, entertainment, still less satisfaction, of envy is not a conception of the good you may lawfully pursue. The trouble here is that these justifications are my own, and they cannot be

Rawls' since he recognizes no justice apart from that constructed within his own system. These judgments are themselves deliverances of morality arrived at by other means, not mostly arbitrary assumptions before we deduce any morality. Such assumptions are permissible in *economic* models, not in moral ones, precisely because in economics we can deal with already holy desires purified of moral corruption or ill will. It's Ok to ask how to maximize the payoff in a game, for example, if the desire thus satisfied is innocent; entirely misguided if it is wicked, since if it is wicked, it must be purged not satisfied. An escape route for Rawls might to be declare "envy is wrong" to be one of his own "considered judgments" and, as such, a building block of the OP. But he does not do so in *TJ*, so the critique stands. Rawls' further thesis is that no one knows whether he is black or white, or poor or rich; nor does he know the demographics of his future actual society. It would, in such a situation, be senseless to seek legal privileges for any person or group. As we'll see in the discussion of liberty in Chapter 2, 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 *every* party the universal and equal freedom to be free from oppression is more valuable than the like freedom to oppress others. In the absence of natural rights, 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. (*TJ*: 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? First, all people whose ends these are have the same importance, and 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 any such thing as perfect contentment. 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. Even a man who pursues a dominant end still has numerous other ends; he just sacrifices them for the sake of what he most values. He refuses to spend time and effort to satisfy his lower-ranked desires. If, however, he could costlessly do so, then he would be happier. Third, distributive justice, generously assuming there is such a thing, must concern itself with *distributable things*. And for most reformers that basically meant money. That’s what everybody wants, isn’t it? So there is a noteworthy practical benefit: if the goal is some sort of equality, then dividing up money equally is easier than equalizing “welfare” (warm fuzzies?) or “capabilities.” Then there is the problem of expensive tastes: equality of welfare may require that some people who can only find happiness in champagne and caviar receive more resources than others who are amused with beer and peanuts. Rawls replies that people are responsible for their own ends or value scales, so he lays down the commandment that people adjust their desires to their share of primary goods, which *I think* involves repressing those expensive tastes.

Being lazy or creative is an accident of man; it is not so clear that it is an accident of *me*. Insofar as the parties in the OP forget even their traits, they are not *persons*. All they have is the idea of primary goods and primal cunning such that each seeks to contrive to maximize his share of those.

It’s not true that Rawls wants to formulate principles of justice without any idea what constitutes human good. What we know about good human lives, says Rawls, is that they (1) require primary goods and (2) are constricted by the demands of justice. (2) is priority of the right, e.g., violating another’s rights is not a legitimate good (i.e., it is an evil). Since (a) right for Rawls is not maximization of the good (especially a single rational good like welfare), and (b) it is good to do what is right, good is not defined independently of the right. Primary goods are the thin theory of the good; primary goods + justice is the full theory. We need to be careful of an equivocation here: *rights* (or liberties) are for Rawls certain kinds of primary *goods* which are in turn means to the execution of the various life plans. Using the OP, instead of maximizing these goods, Rawls adopts his two principles of justice and privileges liberty over welfare. These are what make his theory deontological.

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.

The distribution of primary 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 these 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. 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... (TJ: 199)

For Rawls, “general facts” are the verdicts of consensus science. But social sciences especially are controversial. Who is right, Marx or Mises, Keynes or Hayek? A lot, including the contract made in the OP, depends on the answer to this and like questions. Each philosopher entering the OP must pick his own “general facts.” I’ll make my own appraisals of such things in the pages below.

Philosophy is queen of the sciences, and she has all her handmaidens available to her. But then why can’t we know objective ethics, as illuminated by philosophy itself? For example, if the right not to be murdered is a natural right that can be rigorously deduced, then why can’t we know it and use this 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. If such an objective ethic (which need not be any more controversial or esoteric than Rawls’ own ethic and therefore would not entail any disrespect toward other citizens using “public reason”) 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.” So if you say that envy is rotten and design the OP with that in mind, why can’t I likewise say that taxation is theft and go from there? The more other moral claims we are allowed to have recourse to, the less work there is for the OP

to do. The fewer such claims, the less guidance we have as to the design of the OP. The OP then is not some pristine crystalline construction, “sub specie aeternitatis” as Rawls brags, but is infected with Rawls’ own peculiar moral fancies. These fancies will be refuted in due time.

An extreme rejection of natural rights is found in Nagel (2002). Indeed, the authors’ message is, “You have no rights.” This is “perfectly obvious” and you’re an idiot if you think otherwise. Nagel is like a villain in Blizzard games saying, with blinding hatred, things like “Your lives are worthless,” “Surrender to despair,” “You have already lost,” “All shall submit,” or even, insofar as Nagel is an atheist, “There is no God.” This is ironic: libertarians say that natural rights are granted to us *by* God; Nagel says that artificial privileges are granted to us by the state. What is this latter view if not deification of the state? The state is a *deus ex machina* that takes care of everything. (Of course, the state is simply Nagel himself.) It’s even worse than this since Nagel’s theory throws us back into a war or all against all where “property” is unhelpfully defined as “what you can defend” including, and especially, from government. Rawls affirms some pre-political (I wouldn’t call them “natural”) rights as contrasted with conventional rights or government privileges. He does disavow traditional natural rights, such as to property. He does so, however, by a strange route, viz. by denying that there is such a thing as natural *desert*. Nothing whatsoever any man has achieved is deserved by him; in owning anything he has simply been *lucky*. Rawls is Two-Face in the movie *Batman Forever* yelling profundities like “One man is born a hero, his brother a coward. Babies starve, politicians grow fat. Holy men are martyred, and junkies grow legion. Why? ... Luck! Blind, stupid, simple, doo-dah, clueless luck!” Man, on this understanding, does not choose between good and evil, he tosses a coin. (Perhaps Rawls has some inkling to distinguish between *ends* which are part of the “person” and which one *chooses* and *means* to those ends which are part of one’s “circumstances” and depend on the *luck of the draw*, à la Ronald Dworkin. The means comprehend everything that serves the will; they are both physical including the body and spiritual including character. But the distinction is hardly tenable: ends and means influence each other. E.g., ends are adjusted to both means and circumstances, and one conceives of ends to increase the means or alter the circumstances.) This idea has two consequences for Rawls. First, whatever the proper demands of distributive justice, they cannot be distribution according to luck. Therefore, it makes sense in the OP to deny the contractors knowledge of the existing luck-generated property titles. Second, no one rightfully owns anything. Hence there are no property rights, anyway. As a result, all goods, now a “collective asset,” can be justly expropriated and redistributed at the will of the philo-

sopher, equally.¹ I reply to this view in Chapter 3.

So generally, 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 solely by the contractarian justice. For example, although capitalism is not ruled out, within the basic structure “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. In Chapters 4 and 5 we likewise pay no heed to natural rights and deal with Rawls on his own terms.

The Rawlsian brainchild 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 blabbering that justice is whatever maximizes utility. The second asks what the agreement is about – is it about the etiquette of giving flowers, 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. These are the two principles: (1) equal rights and (2) equal income and wealth unless inequalities can benefit the least advantaged members of society. The fourth would ask for the nitty-gritty details of implementing Rawlsianism in our actual society. Rawls dispenses some rather astonishing answers to this one.

One meaning of natural law is law independent of actual legislation by any actual government. Utilitarian law can be objective but is, on the contrary, positive as requiring a lawgiver possessed of a single overarching purpose: to make law that is maximally profitable to the community. But natural law can also be taken to mean law deduced from contemplation of the nature of man and the world, as done by Rothbard (*EL*), for example. Rawls indeed grants the parties in the OP all general knowledge of man and the world. But all such considered judgments are merely to play a role in giving shape to the OP which reigns as supreme authority. In this sense contractarianism, especially of the contrived Rawlsian kind, is its own species of lawmaking. Now natural law theorizing also excludes references to “natural fortune and social circumstances” such that it is “impossible to

¹ Later Rawls “explained” that “what is regarded as a common asset is the distribution of native endowments and not our native endowments per se” (*JF*: 35). I don’t find this meaningful: distribution is an abstract mathematical pattern, there is no sense in which it can be owned. We all *benefit* from the division of labor and the market, but it sounds bizarre to claim that we collectively *own* these things. “Society” does not own itself.

tailor principles to the circumstances of one's own case" (*TJ*: 16). 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 Rawls' innovation? Natural law asks, "How ought a man to live?" It focuses on the individual. Positive law asks: "What's the best way of ordering a society from the outside?" Contractarianism seeks to order society from the *inside*, by means of a unanimous agreement by all citizens. Like natural law, it is pre-political; like positive law, it is social.

Natural law is deduced bottom-up; positive law is imposed top-down; but they usually coincide. Thus, natural rights tend to form a utilitarian system, and conversely a perfect utilitarian would recreate natural rights. When used together, they complement and, in some situations, compete with and correct each other.

We may also think of it thus: natural law, positive law, and Rawlsian contractarianism all involve unanimous agreement. Natural law generates such an agreement because it is the right or true answer which must be acknowledged as independently right; positive law because it is in the actual long-run "rightly understood" interests of all actual people in all their particularity to agree to it; contractarianism, hypothetically in some such condition as the OP. Natural law specifies human rights and is in this sense impartial and isolated from human ends; e.g., you ought not to steal even, and especially, if you want to steal. Positive law is fully partial and seeks to accommodate actual ends. Rawls attempts to combine the two distinct approaches, natural law and positive law, into a single design. As will be made clear, it turns out to be a chimera, neither fish nor fowl. In particular, his contract theory does not produce anything definite, or if it does, then only by imitating these two lawmaking tools. Rawls wants to spin an elaborate theory *ex nihilo*, and this cannot work.

Rawls does make one contribution. The fusion of natural and positive law methodologies means that Rawls wants to design society as a whole *a priori*. Now *a priori* reasoning, such as in economics, has a place in positive lawmaking, as this book will show. For example, if the lawgiver adopts utilitarianism as his value, the law he cooks up will not be arbitrary. There are things he must heed in order to make society prosperous and progressive. The trouble is that utilitarianism itself remains an apparently subjective and arbitrary value judgment. Why should the lawgiver try to achieve the greatest good for the greatest number as opposed to pursuing some other end like maximizing the number of his concubines? How can *this* value be *a priori*? Well, the OP can be used to derive this ultimate lawmaking principle. Rawls has his own; I have mine (see Chapter 1); I intend to demonstrate that it will be mine that will be chosen in the OP.

For Rawls, duties are owed not to flesh-and-blood fellow men as in natural law, nor to the sovereign who shapes society by means of a coherent system of positive law, but to reason itself making up the OP contract. Being moral is an aspect of being “purely” rational. If only it were that simple.

The OP features humans stripped down to wills united with intellects; they lose their bodies, personalities, developed virtues, and selves understood as authentic integrated systems of ends. I think the motivation here is to get to the essence of human dignity in the form of “autonomous rational will” with nothing “morally arbitrary” attached to it. I agree that there is dignity here, though not of man but of angels. First, unlike these dubious qualitatively identical bare selves, angels are self-sufficient, fully defined, and different from each other. *If* angels needed something “distributed” to them, the distribution would not be equal. Second, angels do not have bodies, physical needs, or material possessions. They are not served by distributive justice. Things begin to look differently if man has dignity by virtue of being an agent with power over the physical world, ruler of earth, crafter of tools, and builder of cities. Rawls goes too far and obliterates all basis for a discussion of justice.

In a sense, common ownership of all material goods including bodies, of all the earth is natural under such an initial situation. The “angels” or, a little better, souls in heaven prior to incarnation gaze down and say to each other, “This is the world we’ll all be living in. Let’s see how we can carve it up and exploit it for ourselves.” But nothing is gained by the addition of this elaborate contractarian scaffold which reduces into either natural law or utilitarian theorizing. In fact, it only confuses things: in natural law, individuals are *self-owners*, and the rest of the world is *unowned*, not owned in common; for utilitarianism, common ownership is disastrous for the welfare of the community. At the very least the souls can realize these things and sign the social contract that rejects common ownership of the actual world by actual humans.

Natural law generates natural duties which are commands. Thus, Rawls demands that “we are to comply with and to do our share in just institutions when they exist and apply to us.” Positive law generates only incentives which are enforced by the threat of punishment. Rawls bids us to “assist in the establishment of just arrangements when they do not exist, at least when this can be done with little cost to ourselves” (*TJ*: 293-4). These two correspond to the two sources of stability in the system: the great majority (1) obeys the law willingly out of love for justice and (2) supports punishing the small minority who disobey, such as by financing the state in its crime-fighting activities.

As for (1), people do respect justice for its own sake, indeed we know they do because mere disincentives of punishment would not be

enough to keep society functioning. A large economy consisting of people without a sense of justice and concomitant trust for each other would fall apart: there are just too many daily opportunities for people to cheat and steal and get away with it. The state itself and the police (who by their nature must do everything “by the book”) could not even be chartered without reverence for justice. It is important that in the system being designed it is easy to be righteous.

As for (2), consider that the U.S. federal government has “power” over us. It can crush us 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 agree to be governed this way. And I do not agree to be governed this way 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 for L to be operative. If, however, I despise L as harmful and unjust but, registering 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, people do not normally enjoy living in fear and will seek remedies, 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.

Rawls' contract theory is closer to positive law than to natural law in the sense that individual desert for him is fully dependent on just arrangements in his system. For example, it is only if private property is acknowledged in the OP that it is reasonable to posit the rule "You shall not steal."

(A) "agreements 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 apple for Jones' orange, 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 suggests that contractarianism generates incentives rather than duties.

In a real sense, then, *TJ* is misnamed. For a genuine theory of justice presumably answers the question, "What ought I to do?" On one such conception, justice is not a design of basic structure but respect for natural rights. We then try to prove that, for example, I am just when I pay for my groceries and unjust when I shoplift. Whether to be just or unjust is 100% under 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 draft a great society of which everyone would likely approve and which everyone would gladly inhabit.² It is a theory, a very general one, of public policy. 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. Suppose that I and six roommates of mine unanimously agree on a dishwashing rule: each person is to wash the dishes on his own day of the week. The content of the agreement is a principle of dishwashing, not a principle of justice. Likewise, what the OP produces is what Gerald Cohen dubs rules of regulation, the principles that order and

² Consider, for illustration, the presumptive duty of mutual assistance: I can say in the OP, a society where such assistance is practiced is better than a society where it is not, so let me vote for this principle of right. Then in the actual world I can say, I ought to uphold the institution of mutual assistance and help this guy. But I cannot say in the OP, mutual assistance is a natural moral duty, or in the actual world, I owe it to this guy to help him out.

govern our common life; they are not (really) principles of justice. It may be said that Rawls gives us *just rules of regulation* which are just by virtue of being unanimously voted for under special circumstances. In one sense justice does not apply to law, in another sense it does. A *man* is just to the extent that he adheres to *natural* law; rules of regulations or *positive* law are *efficient* (or not), they are means to the lawgiver's ends, be they "general welfare" or something else. There is simply no such thing as *just positive law* regardless of the method of passing it. E.g., Rawls wants to "even out the ownership of property" and intrigues to tax people variously for that purpose. (*PL*: 268) The tax scheme might be called "just" if it served justice. Instead, it is only efficient at supplying and distributing primary goods in a manner that is pleasing to one John Rawls.

But in the second sense any legal order, regardless of whether it was instituted naturally or positively, can be just or unjust. We will see that the justice of a regime depends on how well it promotes harmony and progress in human affairs. Such is the remarkable and curious virtue partially adumbrated by Plato and discussed ever since. Our conclusion will be simply this: Rawls does not know what justice is and is groping blindly in the dark.

1. Utilitarianism Rightly Understood

In Chapter 1 of *TJ* Rawls 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 it no one knows their “conceptions of the good.” Here, good is the particular pleasures or activities engaged in by real people in an actual society. Smith likes to scuba dive; Jones is into gardening; and Robinson is an airplane pilot; those are, at least when not unjust, these people’s diverse “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) We’ll discuss one such theory momentarily. Rawls’ own contractarianism is set against these as a deontological theory that “prioritizes the right over the good.”

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

4) The goodness of justice itself, specifically 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.

1.1. 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 (AU) 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 and mysterious variety of ways. No man is God, capable of calculating the consequences of his actions and distilling utility from them 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 have impacted for good or ill once all is accomplished. But a mere mortal is *now* utterly incapable of such a feat.³

Utilitarianism may possibly circumvent the knowledge problem if conjoined with Christian faith, though even in that case it will be far in the background. Call the utilitarian requirement for any act to produce the best consequences for all humans who live now and will live in the future until the end of time, the "till kingdom come" requirement or TKC. Logically, there are four possibilities for any human action: one does (1) good (i.e., what appears to be morally good), and good (i.e., maximal happiness) will come out in TKC; (2) good, and evil will come out; (3) evil, and good will come out; (4) evil, and evil will come out.

Clearly, (4) is wrong on any moral theory whatsoever. But so is (3) from the actor's point of view: if one does evil, yet good comes out of it in TKC, then it is shame to him and glory to God. God has cleverly turned his evil designs to society's ultimate profit. But, one shall reason, "God already has enough glory, and I, very little; surely, it will not diminish God's greatness if I take a little of it for myself even at His expense." It follows that it is only rational to do good. But one is powerless to ensure or even know in this life that (1) will come to pass as opposed to (2). But the only way to inner peace is through holding that there is such a thing as divine *providence* that will machinate that doing what seems good immediately will also produce good in TKC. Otherwise, man is not only a tragic figure who acts blindly without knowledge or prudence but a contemptible one. For example, how can the doing of good be rewarded if it yields evil on the whole in TKC? Such a thing may be *forgiven*, but it cannot be praised or glorified. If God loves His children, then He has to, lest those children suffer ignominy and be branded worthless fools, harmonize plausible *basic*

³ A 1988 parody of trolley problems by an anonymous writer illustrates the helplessness: "On the right side of the track there is a single railroad worker, Jones, who will definitely be killed if the brain steers the trolley to the right. If the railman on the right lives, he will go on to kill five men for the sake of killing them, but in doing so will inadvertently save the lives of thirty orphans (one of the five men he will kill is planning to destroy a bridge that the orphan's bus will be crossing later that night). One of the orphans that will be killed would have grown up to become a tyrant who would make good utilitarian men do bad things. Another of the orphans would grow up to become G.E.M. Anscombe, while a third would invent the pop-top can," etc. No one could either foresee such happenings or weigh them against each other.

calculations of commonsense morality and *remote* consequences of following it all the way up to TKC. Atheism and even deism which deny providence then sabotage the utilitarian enterprise, as deists lack any confidence that their doing good is of any value in TKC. Deists then may be “good people” who do not kick dogs, but they can never be sure that abstaining from kicking a particular dog is not a terrible mistake. In any case, providence or not, utilitarianism is of no practical use even to a Christian.

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.

Rule utilitarianism (RU) seems more credible, 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 largely *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.” It will be seen that a utilitarian system of positive laws is one that efficiently promotes social cooperation. Such a system is simply a force to be reckoned with, much like criminals in a bad neighborhood. It is ultimately, as some legal positivists believe, a set of predictions of how judges will decide particular cases. RU, on the other hand, would have it that if the rule of taking vitamins daily or of steering trolleys wisely or of donating to charities maximizes utility, then one must obey it. There is no escape from AU given the RU’s avalanche of rules.

Consider now a society with private property and a free market. Suppose that this society, even if isn’t the happiest of all, 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 individual citizens’ creative initiatives are harmonized with the common good. Then the voter sits back and watches the theater of the world unfold its play. The laws, having been set up, *await people to be swayed by them*. Utilitarianism has no advice to give to Henry Ford as to his choice of vocation. Call this theory “lawgiver utilitarianism” (LU).

LU then is not a moral doctrine, because a moral doctrine prescribes *duties* to individual human beings, yet the utilitarian’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 *act* while affected by the *passive 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 unfortunate economic delusion that countenances solely the equilibrating part of the market process. In fact, under free markets, there prevails constant and quite unpredictable *improvement* in total consumer happiness. Each next generation is supposed to be happier than the one before. We are not living in a permanent unchanging utopia like some land of Cockaigne. It is therefore not overall happiness that we need to maximize but the *rate at which overall happiness increases* over time. This, however, too can be attempted only on the level of general laws that foster economic progress without browbeating anyone into doing anything specific.

Further, *there are no "resources"* construed objectively; a resource is any real or ideal 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 the manufacture 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 one kind of resource to Smith; another kind to Jones; and completely 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 instruct *congressman Jones* to 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 caused by love. Thus, utilitarianism requires me to love people, moreover not any specific person but mankind as a whole. What sort of love is that?

Even the most outgoing person will have only a few "dear friends" toward whom he feels 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, as it were, 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 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 mind my own business." If one is content, then where is the motivation to thrust himself into action to set about maximizing overall good?

Utilitarians may try to deny the distinction between personal and impersonal love. But in vain. Utilitarianism purports to be a natural morality, that is, derivable by reason alone not in addition by faith. But by nature man loves only himself and possibly his immediate family. The requirement that one love *everyone in the world* not only as himself but *as much as* himself goes far beyond the demands of even the most rigorous Christian teachings and is entirely implausible. One's union with oneself is not only much stronger but different in kind than one's union with others. Human souls are finite and cannot contain the immense amount of charity (as holy light in the heart) that would presumably be needed to equalize the two. One man to another is not as God the Father to God the Son. Why love? Christianity answers: "Love others *in order to* save your own soul." But utilitarianism cannot appeal to any such argument. It thus gives no individual any persuasive *reason* to sacrifice for the greater good.

Further, just what exactly am I supposed to *do* according to utilitarianism? I mean, do I *help* people? To do their jobs, say? For free? 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 reasonably, I might need to do the Catholic works of mercy: feed the hungry, visit the sick, instruct the ignorant, admonish sinners, etc. Perhaps I am simply required to work at my job as long as the marginal cost to me of work is less than the marginal benefit to *at least one other person* in the world to whom the money I earn will be “redistributed,” producing equality on the margin or even in total. The upshot will surely be doing these things unto utter exhaustion. Utilitarianism is an awfully ambitious doctrine. No Christian saint probably measured up to an ideal that stringent. The fact then that there can be no actual utilitarians in the world should give pause to those who advocate utilitarianism.

The question of what specific actions utilitarianism enjoins one to do is troubling. 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). For example, if I am eating a sandwich, it is not because I freely chose it and am enjoying it but because morality requires it. I *have to* be eating the stupid thing. There is, utilitarianism mandates, no rest for the righteous. On the one hand, *no* action is intrinsically wrong since it would be required if it happened to maximize utility; on the other hand, *every* action that fails to maximize utility in TKC is by that fact morally wrong. And that is grotesque. A utilitarian may object that utility is best maximized by not directly aiming at it, or even when most people consider utilitarianism to be false (in which case utilitarianism would be a sort of esoteric doctrine known only to some elite). This won't do. It is not enough to instruct the “common” people *not* to be guided by the duty to maximize utility; one has to lay down a definite (apparently) non-utilitarian moral code. But any *personal* morality lays duties upon men. If utilitarianism is subsumed into this substitute, then it will cease to generate its fundamental imperative for each individual to sacrifice his lesser happiness for society's greater happiness at *any* opportunity.

Utilitarianism at first glance demands that everyone consider not only himself but also all others to be *ends*. This seems superhumanly noble. In practice, however, everyone will be a mere *means* to total happiness. In relation to society, an individual will be a drop in the ocean, and he will dissolve there. Regarding “helping,” one will be obliged to forsake his own life. He will disappear as a person and turn himself into an appendage of other people. He will live *only* to serve. Of course, he will be served by others, but his happiness will not depend in the slightest on what *he* does; there is total disconnect between action and consequence; there is no such thing as personal success. Utilitarian life is no longer striving for one's own ends;

it's mechanical execution of moral duty. No one is any kind of end at all. No one helps *himself*.

“Helping” may be useful for the cultivation of charity; normally, however, no one can help anybody with utilitarian results. Utility is promoted when each person uses *his own* strength to do his own thing. (It cannot be replied to this that utilitarianism perhaps entails “do as you will” because such a thing is not a morality but absence of it.) This is the problem of power. In short, I do not know, I do not care, and I can't do anything anyway. All three problems are extremely severe and destroy classical utilitarianism.

1.2. RULE OF LAW

Thus, utilitarianism is not supposed to apply to individual conduct, as in “you shall 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, freely discovering and traveling to a position in which one can best serve society is amply rewarded; 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 ultimately 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 fear of punishment for breaking the law under LU is simply one of the totality of the incentives and disincentives that serve as inputs to people in their daily lives and personal undertakings. The people's calculations are tractable because prudential as to *their own* good, their own future expected utility, indeed taking possible sanctions into account, not as to any chimerical utilitarian overall happiness of the entire world for the next 10,000 years.

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 interests 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 in the long run.

RU posits a moral duty to follow those laws the general obedience to which will maximize happiness and perhaps which are actually in any given case being generally obeyed. (Maybe if one such law is not actually being generally obeyed, you do not have to obey it either.) The charge of rule worship can be disarmed by pointing out that while there may be occasions when bending a law is utilitarian, we are almost never in a position actually to identify such occasions reliably, and hence are impelled to defer to the law at all times. Certainly LU also assumes that the government will be able to enforce the laws it laid down with reasonable efficiency. If 90% of the population choose to disregard a given law, we can't imprison all of them. However, the plausibility of RU depends on two things. First, on the actual substance of the rules. If it piles up rules upon rules and regiments individual conduct ever more precisely in the service of utility, then it inches toward act utilitarianism with all its absurdities. If, on the other hand, it contents itself with basic injunctions against murder and theft and suchlike, then it ceases to have anything specifically utilitarian about it. By contrast, LU simply affirms whatever legal structure is "efficient" or most conducive to economic progress. LU's purpose is "good government" – which usually translates into little or no government. Second, on whether it is in fact a citizen's moral duty to promote general happiness, and I have never seen an actual proof of a proposition so ambitious. Conversely, again LU, unlike RU, not only grants the citizen a massive amount of individual freedom but does not even postulate any moral duty on his part to obey the laws it favors. I mean that exactly: LU does not *deny* that a man has a moral duty to obey any positive law that is not at the same time a codification of a natural law. It does not recommend any form of amoralism ("whatever feels good, do it") or nihilism, such as that one should adopt a merely prudential attitude: he should obey if the disutility of punishment for breaking the law multiplied by the probability of getting caught outweighs the utility of profiting for breaking it multiplied by the probability of getting away scot-free. LU does not opine on what anyone "should" do; it proposes neither that there is a duty to obey positive laws nor that there is no such duty. It staunchly refuses to get into personal morality. In personal life one never has to think, "What's the utilitarian thing to do?" though he may of course be guided by other moral theories.

Another issue with classical AU and RU is their exclusive focus on consequences. This is doubly problematic. In the first place, an action is morally wrong when it is against the law or is a dereliction of duty. The

badness of consequences does not affect the *wrongness* of action, something that even RU is forced to deny. Consider the proposition, “The chair I am sitting on now is *mine* and therefore *ought not to be stolen*.” It would be grotesque to ask for a proof of this rather obvious argument by showing the presumably negative effects of someone stealing the chair on total happiness. Yet this is precisely what AU is required to do. LU of course cannot prove it either, but it lacks any ambition to do so, instead contenting itself with endorsing the institution of private property and recommending a public policy of deterring thefts. In other words, classical utilitarianism does not countenance the idea of right. There is no such thing as property, no one *owns* anything since any momentary distribution of goods can be overridden if another distribution seems to generate more utility. LU, on the other hand, frankly considers private property to be an indispensable condition for civilization and wholeheartedly approves of it. A further difficulty is that AU is impelled to consider the satisfaction of all desires whatever they may be to be equally conducive to happiness. Smith’s desire to murder Jones must be earnestly weighed against Jones’ desire to live. If gratifying Smith is superior to pleasing Jones, then murder away. In fact, on utilitarianism, the more Smith enjoys the murder, the better the overall state of affairs, when in reality rejoicing in evil done intensifies the guilt and makes things worse. LU on the contrary quite plausibly permits the state to punish murderers in the service of the greater good. Second, the *degree* to which an action is wrong is derived from the confluence of three factors: consequences, intention, and circumstances surrounding the act (which may be aggravating or extenuating). Lying in court under oath is wrong regardless of whether the jury is ultimately deceived but is more culpable if it results in an incorrect verdict. Classical utilitarianism is an impoverished moral doctrine insofar as it is forced to neglect intentions and circumstances in evaluating events. For example, St. Thomas (1937) makes the following argument: “Some writers think that Pilate had Our Lord scourged that the Jews might be moved to pity and so, once He was scourged, they would let him go. ... Did Pilate’s intention excuse him from the guilt of scourging Our Lord? By no means, for no action which is bad in itself can be made wholly good by the good intention with which it is done. But to inflict injury on one who is innocent, and especially on the Son of God, is of all things the one most evil in itself. No intention could possibly excuse it.” (44-5) On the other hand, an intentional killing may be worse than a merely negligent one despite identical consequences (namely, a death suffered). Erring conscience, where a man does something wrong while thinking it right, is an extenuating circumstance; on the other hand, if an arsonist starts a fire that burns down one house and that could have spread onto other houses but didn’t because it was swiftly and competently put out by firemen, his

guilt is aggravated through depraved indifference despite the fact that some bad consequences of his action did not occur. LU of course does not fall victim to this objection since it does not pretend to be a personal morality at all.

Again, AU is notorious for the ease with which it lends itself to moral dilemmas; for example, it may enslave us to evil men. "Unless you do something evil, I will do something even more evil." A certain military strongman has kidnapped 11 people. He tells you that he will execute all of them unless you personally murder 1 in which case he will let the other 10 go. (I borrow this idea from Foot 2002: 25.) It's true of course that there is no happy solution to this dilemma on *any* moral theory; it's damned if you do and damned if you don't. But that's no defense of AU. There is no objectively right choice, but the way out of a dilemma is for each person facing it somehow to minimize his own felt guilt for choosing an evil, though it seems to him the lesser of the two. AU gets itself in a pickle by not respecting this personal take; in our case it seems to command you unequivocally to kill as the strongman laughs at you with contempt. As for LU, this situation is completely above its pay grade.

Classical utilitarianism flounders on the problem of future generations and population in general. Does the future utility of the yet uncounted count? *How* do we count it? If we're maximizing total utility, must we breed uncontrollably? If average utility, are we prepared to sanction liquidating everyone except a single very happy person? LU, on the contrary, points out that future people will benefit from the exact same good laws that present people enjoy. The same laws will wisely order the affairs of a large nation just as those of a small nation. To the extent that population size matters, utilitarian law can connive that population grows in such a way that *both* total and average welfare increase with time: there are both more people and those people benefit each other, such as through more minute division of labor, more.

Suppose Dad in *Calvin and Hobbes* bids Calvin to go shovel the walk on the grounds that it "builds character." Suppose it does build character, but Calvin is miserable. Clearly, there is a good being acquired that is distinct from and in conflict with utility (even if it is argued that good character promotes utility in some long run). LU is likewise unconcerned with virtue, but unlike classical utilitarianism, it is neither a morality nor a panacea. LU leaves virtue to private life and rightly so insofar as it is vain to expect the mere public law to inculcate good habits. The law is a crude instrument; it may at best teach people that some of the things that are *malum prohibitum* are also *malum in se*, but it cannot impart courage or social graces. Or consider a simpler version of Nozick's experience machine (1974: 42-5) which "stimulates your brain" to produce utility. First, though it proffers happi-

ness, it extinguishes the struggle for it, the *pursuit* of happiness. This pursuit is also distinct from pleasure but seems valuable, a good, nonetheless. Second, desire/satisfaction is not a standalone phenomenon. Desire is joined with a plan and its execution, and pleasure is joined with, to use St. Thomas' terms, vision (mental grasp of the good attained) and comprehension (secure possession of it). The experience machine grants only pleasure not the other two components of happiness. Again there are goods other than utility. Third, the machine grants pleasure without the object that is loved being present. Fourth, it is impossible to achieve happiness without other real humans, and the machine can only simulate fictional non-player characters. So utility alone is insufficient for true happiness.

Utilitarianism rightly understood belongs properly not to *ethics* but to *politics*. It is only legislators and perhaps judges who should pay heed to it. 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 generator. In defense of Al Gore, he as a politician may not have invented the internet, but he did abstain from ruining it through bad laws. We do not *command* Edisons and Fords to make the world a better place for mankind. Instead, shepherded by smart general rules, people are left in the hands of their own counsel, free to walk whatever path they find congenial. Under classical utilitarianism, as we've seen, it is your *duty* to serve, entirely thanklessly. Under LU, you are given an *incentive* to serve such that doing good is just how you profit.

Kymlicka (1989) argues as follows: "Morality in our everyday view at least, is a matter of interpersonal obligations – the obligations we owe to each other. But to whom do we owe the duty of maximizing utility? Surely not to the impersonal ideal spectator... for he doesn't exist. Nor to the maximally valuable state of affairs itself, for states of affairs don't have moral claims." (28-9) It may be replied that each individual owes this duty to mankind as a whole. The fact, however, is that no one is *in charge* of mankind; no one is tasked, by whatever cosmic force, with making the human race as ecstatic as possible. LU dodges this problem by arguing that the lawgiver (who *is* in charge) owes this duty to the people to whom he gives the law.

LU of course is not "Government House" utilitarianism in which some political elite pursues utility maximization but keeps this end secret from the masses on the grounds that utility is best maximized when people do not aim at it directly. LU has no secrets; all the laws are out in the open, as are the arguments for and against them, as is the coercive pressure of

their enforcement; everyone can in his public capacity judge and propose improvements to the laws; everyone equally can as a private citizen heed or (at his own risk) refuse to heed the laws (including those he approves of).

As a result, we don't need an impartial sympathetic spectator who compares utilities intersubjectively. This is further why LU does not, as classical utilitarianism seems perversely to do, bestow impunity upon "utility monsters." This problem is different from one of utilitarian injustice and posits a kind of unfairness in distributing, of things to which no beneficiary has a right, everything to the monster and nothing to everyone else in the name of utility maximization. For LU, in the imaginary world before the law comes to suffuse it, there are no citizens yet. The lawgiver is to structure social cooperation in general; he cannot reasonably discriminate in favor of a person who 100 years hence will be born a utility monster. Kymlicka (1989) writes that classical utilitarians (on some interpretations) "treat society as though it were an individual, as a single organism with its own interests, so that trade-offs between one person and another appear as legitimate trade-offs within the social organism" (24). Utilitarian law does no such thing since it does not ration utility among actual individuals at all. LU conceives of society not as an organism with its own utility but as a *process*, of growth and development, which should be made efficient. The key to that goal is a well-designed legal system.

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."

Hoping to avoid some of these objections to classical utilitarianism, David Brink (1989) defends something he calls "objective utilitarianism" (Ch. 8). Now right off the bat, this is an oxymoron: "utility" is subjective by its very nature, hence there can be no such thing as "objective" utilitarianism. Brink means that "good" is to be maximized, where by good he means some definite goods in a definite hierarchy. This, however, is not utilitarianism at all in which the aggregate of whatever the people find desirable in their own eyes is maximized, but rather Brinkarianism or deification of one Mr. Brink in which whatever he, Brink, finds "good" shall be maximized (or else, presumably). I think Brinkarianism can be safely dismissed as scandalous nonsense.

It might seem that LU will sanction laws that allegedly succor the majority by depriving the minority of obvious natural rights. Now usually justice of laws and efficiency of laws are in harmony. Individually just laws tend to form efficient systems. But in some rare cases they might diverge. In such situations people will need to make a choice whether they favor

justice or utility. LU argues not that utility should prevail but that it should be taken into account. On this understanding, the “right” and the “good” deserve equal respect.

1.3. PASSIVE PRINCIPLE

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... 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 regarding 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 addresses itself to society and the 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 political theory. The threat or disincentive of punishment for destructive conduct permeates society as a whole and steers individuals into productive lines of work. 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, according to commonsense morality, 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 ordains 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 relief to the robbers.

Even individual robbers have an interest in society being tough on crimes. The timid will be deterred and hopefully choose to enter productive occupations, benefiting their fellow men. Especially competent robbers will still get away with their crimes but will enjoy diminished competition and an affluent society, so they can actually spend their ill-gotten money. The losers of a regime that efficiently prosecutes robbers will be the stupid crim-

inals who are neither dissuaded 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 lambastes 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 it purports to be an overarching organizing principle for a good (and, as I hope to show, just) society. In other words, LU seeks the best possible social order and, in order to achieve it, is prepared to discard any and all existing institutions. That does not mean that a lawgiver should not look at the present and historical arrangements for insights, still less that he is somehow infallible. He cannot throw away whatever exists without understanding why it exists or what purpose it’s claimed to serve. It is implausible, for example, that the existing American common law is without merit. An individual utilitarian lawgiver’s task is so formidable that the best he can hope for may be to tinker with and improve some small parts of the legal system. But on the other hand he is certainly not limited to proposing only Pareto-superior changes, i.e., changes that in the here and now benefit at least some and harm no one. LU is at heart a radical approach which, just as Rothbard wrote of natural law, “holds the existing status quo... up to the unsparing and unyielding light of reason” (*EL*: 17), though not as to its *justice* but as to its *efficiency* and indeed utility.

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’ll be after, what means they’ll 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 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. In the episode “Chronophasia” of the TV show *Aeon Flux*, there is a scene where

Trevor is explaining the plot to Aeon who may have been exposed to a virus that causes insanity. “But,” he says, “we believe that one time, before the dawn of history, a form of this virus existed in every human brain; in fact, it was an essential component of human consciousness. What it produced *then* was not a madness but a sense of connection, of being in and of the world. But somehow we developed an immunity. *That* was the Fall, Aeon. Ever since we’ve been missing a part of ourselves. . . . Hard to say where the mutation occurred, in the virus or in the human mind, but if we could reverse the process. . . . My project is not universal *madness*, it’s universal *happiness!*” To which Aeon replies, matter-of-factly, “Who, was it, you said was insane?” Thus, Sidgwick (1901), for example, produces astonishing statements like “Reason shows me that if my happiness is desirable and a good, the equal happiness of any other person must be equally desirable.” He means desirable “from the point of view of the Universe.” But the “universe” does not care about total happiness and in fact tries rather hard to frustrate it. Sidgwick simply objectifies his own personal subjective preferences (however admirable) or perhaps is pretending to read the mind of God or to see the full extent of the divine providence. And further: “But Universal Happiness, desirable consciousness or feeling for the innumerable multitude of sentient beings, present and to come, seems an End that satisfies our imagination by its vastness, and sustains our resolution by its comparative security.” (403-4) Aeon’s rejoinder would be equally apt here. What is “Universal Happiness” and what do I know of it? The answers are “a chimera, a preposterous daydream” and “nothing whatsoever.” (E.g., is universal happiness everyone living in a state of perpetual orgasm?) LU does not seek any such inconceivable and apparently immutable Garden of Eden; it wishes to chart social institutions to enable most prompt and snappy long-run social and economic progress – toward whatever, as yet unknown, people themselves consider faster, higher, stronger.

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 censured 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 the apocalypse, 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 grim gray despotism is worth saving). The utilitarian thing to do is to launch the utility-maximizing process and then sit back and hope for the best.

It is *impossible* for anyone (or for “society”) to impart happiness to people. At most we can grant to each the *right to pursue* happiness, indeed neither happiness itself nor the push, motivation, or power to pursue it well.

Life is tragic. No legal system can directly save anyone from turning transgender, getting hooked on fentanyl, or joining a Satanic cult. But it is unreasonable to require such things of it.

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 philosophizing in the design of the institutions or, in Rawls’ terms, basic structure of a great society.

With the LU tack we do not of course deify the state. We do not even posit that there is a state. (The best way to *enforce* the law is, on LU, itself a utilitarian issue, e.g., if such enforcement happened to be best supplied by the Rothbardian “private protection agencies,” then that’s what we’d want.) And we certainly do not claim that the state brings about the “greatest good for the greatest number” (and must therefore be revered). The legal system does not *produce* anything, it’s not a farm or business firm. It safeguards social cooperation, but it is not social cooperation. The lawgiver is not a god but merely another useful member of society doing his part.

I have suggested that a reasonable subordinate precept would be: “make such laws as to harmonize individual creative initiative and pursuit of happiness with the common good.” (This can be done. In a society of egoists each member best promotes his own welfare by cooperating under *laissez faire*; the overall process will in addition satisfy the utilitarian in the long run.) 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. LU furnishes a criterion for judging systems of positive law (e.g., contract law, tort law, economic regulations like antitrust law, etc.), nothing more. Such systems are evaluated teleologically, based on their effect on social cooperation and ultimately on human happiness (insofar as it is within human power to discern such connections); while individual actions are evaluated morally deontologically, based on how well they conform to law. And LU refuses to tackle the question, “How to be just?” Rawls seems to suggest that LU “is so complex that no definite theory at all can be worked out” (*TJ*: 129). I don’t agree. All science is complex, but that is no reason to give up.

Véronique Munoz-Dardé (2005) considers it an “appealing idea”

that “morality... requires that we choose the action or social policy which, of those available to us, delivers the best state of affairs” (262). In this chapter I sought to reveal the unbridgeable gulf between utilitarian “action” and “social policy” or legal system, between active and passive utilitarianism. Only the latter is appealing.

Lawgiver utilitarianism is a *political* contract where the parties set aside their private interests to secure the common good. The OP yields an *economic* contract where each party sets aside (i.e., forgets) his own private interests but still seeks to maximize his own welfare (in terms of primary goods). In the course of this book, it will become evident that Rawlsian contractarianism, to the extent that it produces anything at all, produces the same results as LU. In fact, deliberation in the OP is simply a roundabout method of invoking LU.

For Rawls we vote our self-interest; for LU we vote out ideology. Plainly they are birds of a feather. For in the OP I cannot hope by means of my vote to, say, steer into my pockets money from the public treasury. Indeed, even in real life in an actual election this is impossible. Instead, my self-interest consists, as Mises puts it, in “the smooth working of social cooperation and the progressive intensification of mutual social relations” (*HA*: 153). I profit personally from voting according to my ideology.

Suppose we grant Rawls what we questioned in the Introduction, that the output of the OP results in a *just* basic structure. Utilitarian lawgiving then gives us an *efficient* basic structure. These two can be seen as alternatives to each other which coincide. Negotiations in the OP which according to Rawls produce just legislation will prioritize efficiency, and on the other hand LU efficiency will be signed off on by all (in the actual world) and hence be just in the contractarian sense – nobody can be in favor of a sick economy. It’s true that LU is logically compatible with serfdom and slavery. But not in actual fact. The latter is important given that the parties in the OP know economics, social theory, etc. There is another contrast *within* the OP which is between classical utilitarianism which wants to maximize total or average welfare and maximin which wants to maximize the welfare of the worst-off class. Insofar as these are concerned with allocating a given amount of goods or utility and brush aside the idea of economic progress, the contrast is of limited interest. If progress secured by LU is admitted, then either they come to the same thing, or, when they don’t, maximin is a cockamamy principle – e.g., I do not understand why the economy should (or how it can) be working for a small collection of no-good lowlifes rather than the great majority of all workers. The utilitarianism that Rawls attacks in *TJ* is thus revealed as a straw man.

2. 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)

Picking up from the previous chapter, another serious challenge to 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 will 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 (“utilized”).

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 the greater pleasure: “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 vainly 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 boon. However, the executive branch of the *local* government is not a protector but merely an enforcer of judicial sentences, providing essential general 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. Even if the police

must be tax-financed, their entire point is to *secure liberty* not to increase one at the expense of the other. On the *federal* level (in the United States), the state is an institution of endless war, destruction, and exploitation with no redeeming qualities whatsoever. There is no such thing as *national* security. *Both* liberty and security can best be attained by restraining or even eliminating the state.

Another example is the Food and Drug Administration. This agency claims to protect the consumers. In fact, the FDA 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 many), and very much remiss in its duties to monitor the well-established companies (which it essentially protects against 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 20th century traded liberty for prosperity and ended up with neither. Rawls' worry is purely academic. The "lexical" priority of liberty then is not offensive because individual liberty does not diminish but on the contrary enhances wealth and income in the long run. If there was a trade-off such that a small loss of liberty could yield a great measure of prosperity, then we'd have a problem, but I argue here that there isn't. Of course, that's not *Rawls'* reason for hyping the priority of liberty. Rawls faces the conundrum of how to aggregate his various primary goods into a single scale, and, being a self-proclaimed liberal, this is how he solves it.

The plausibility of the priority of liberty may stem from the idea of natural rights. You can't violate people's rights for any amount of money, e.g., if there is a duty not to murder, then you can't murder your aunt no matter how much inheritance you will get if you do. More generally, a society that fails to enshrine such rights in law is unjust. But Rawls does not countenance natural rights in his theory. For him, liberty is just another primary good to be bargained over in the OP. It is purely instrumental – a means to people's rational plans of life. What then justifies its priority? We can argue that the greater the general prosperity, the greater the total *worth* of liberties, and so the liberties themselves which allow people to revel in their wealth will come to be regarded as increasingly more precious. For example, in a rude economy it makes little difference in terms of your standard of living whether you are free or a slave. But freedom becomes extremely valuable in an affluent society.

So, economic liberty *creates* wealth, and personal liberty *lets you enjoy* it. There is then less *priority* of liberty over welfare than *harmony* between them. Rawls is willing to abandon the priority in a primitive economy. But it's precisely liberty that enables economic progress, so even, and especially,

at low levels of development liberty need never be sacrificed for prosperity. I cannot easily see how religious freedom, for example, can be traded for material welfare; surely Rawls does not have Judas in mind who betrayed Christ for thirty pieces of silver, for what has that to do with the basic structure of society?

This general harmony of liberty and welfare is how the interests of an individual and society are reconciled. Here Rawls' solution is superfluous. In rare specific cases of conflict, a choice must be made, often indeed by "intuition" or simply preference. Here his solution is dogmatic.

It seems that unless liberties are actually protected, their priority is a dead letter. But how much money must be spent on this? For threats from private criminals, how many cops to have on the force is each town's decision. It may be reached by comparing the benefits of the marginal crime deterred with the help of an extra officer with the marginal cost to the taxpayers. This is a utilitarian calculation, and it's unclear how the priority is compatible with it. Threats from the government are easier. The cost is in fact negative: the best way to shield rights from infringement by officeholders is to defund the state. The smaller the government, the fewer the opportunities for mischief.

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)

This is basically a partial rendition of the U.S. Constitution. By endorsing it, Rawls wants to claim for himself the title "liberal." (How generous of him to give us the right not to be torn limb from limb by the state.) 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 arbitrary. Who cares whether economic liberties are or are not on Rawls' list? What makes his list definitive? The Rawlsian liberties are supposed to let people choose their religion, morals, and politics. But making such choices is simply another conception of the good, specifically Rawls'.

This conception is not universal. There are other conceptions that people will have. It is impermissible for the parties under the veil of ignorance to concern themselves exclusively with enabling them to tickle their taste for “democratic” bickering. 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.⁴ Rawls feels that the choice between capitalism and socialism is a historical or sociological not economic or philosophical problem, and he excuses himself from solving it.

At this point Rawls can deny that economic liberties are a primary good at all, or he can grant that they are a primary good but insist on their low priority. The first move is an abuse of language, and Rawls could hardly dismiss the Cold War raging around him as based solely on a semantic confusion. The second move requires justification: why is it that some liberties trump welfare, and other liberties are trumped by welfare? I submit that economic freedom *is* absolutely essential not only to material abundance (in which case it might still have a lower priority) but to the Rawlsian liberties, as well. Mises contends:

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. (*HA*: 287)

If church buildings and even things like communion wine are owned by the state, and bureaucrats decide which church activities are to be funded, what

⁴ Buchanan (1976) argues that Rawls would have objected to many government invasions of liberty (such as minimum wage or licensing or trade barriers). But Rawls did not consider any economic liberties to be basic, and he was an eager interventionist such as with his government “branches.” His focus was on what they call “civil” liberties.

meaning can be attached to freedom of religion? If they decide to convert all churches into military barracks and melt bells into weapons of war, on what grounds can this policy be objected to? In a private property regime, an advocate for social change can look for private patrons. Under socialism, what happens if the state opts not to support a dissenter? Many so-called “political” liberties and “human rights” are in fact economic in nature. As 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. All the socialist famines occurred because the victims had no economic rights. But surely the right not to be coercively starved by the state is basic. It does not work to deprive people of the right to produce and trade and expect “liberty” to prevail.

The state always hates creative geniuses who compete with the rulers for the love and attention of the people. Without private property, creativity, a fragile gift, gets easily stifled by the powers that be. If private property is so circumscribed that in order for an artist or inventor to succeed, he must solicit the permission of the bureaucrats, very few improvements and novelties will ever get off the ground. The liberty to pioneer new ways of living and doing business requires full capitalistic property rights. Indeed, every regime in history, no matter how repressive and brutal, has permitted its subjects to hold *personal* property. Even prisoners are allowed *that*. This is hardly a heroic requirement that separates liberalism from its rivals. (What would life without personal property be like? If I’m chewing a turnip, are you allowed to stick your hand into my mouth and scoop out the food for yourself? Rawls hardly merits glory for preventing this sort of thing.) And even this right is qualified by Rawls who exalts taxation as an instrument of justice. It’s hard to imagine not only how liberty can exist without secure property rights (including self-ownership) but even how it can be meaningful when deprived of its basis in property. Liberty is what the *ethics* of liberty

permits. If the Rawlsian liberties are non-moralized, then his principle is absurd insofar as maximum liberty can be achieved by abolishing all laws and tearing free from all moral bonds. Let every man simply do as he pleases. If they are moralized, then in order to be able to say that your liberty to swing your fists ends where my nose begins, we need a theory of property including in oneself, of violence, aggression, fraud. Rawls declines to provide any.⁵ The right to put heretics to death may be considered to be an apparent part of religious freedom. But it conflicts with the heretic's liberty of conscience and right to life. There is a solution to this puzzle in Rothbard but not in Rawls. Grounded in property, the separation between "personal" and "economic" liberties becomes 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 this 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 owner-

⁵ Haksar (1973) argues: "When the poor man cannot pay exorbitant prices, the State is, in effect, forcing him to refrain from taking the goods that he may want and need." (494) Such is the morass one sinks into when discussing liberty in separation from property.

ship is “necessary for the development and exercise of the moral powers” (*PL*: 298).⁶

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, who ideally has total control, to centrally plan. To true socialists these markets are an abomination. Second, these markets alone 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 apply to government-run enterprises like the Post Office or airports that are embedded into a much larger capitalist economy. We may object to state 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*:

⁶ See Tomasi 2012 for a book-length defense of this point.

57) is on the same level as the assumption of the existence of square circles. “Market socialism” is as much an oxymoron as “totalitarian democracy,” “benevolent empire,” or “peaceful nationalist autarky.” People who, like Rawls, countenance socialism should have the decency not to call themselves liberals. Rawls favors wide dispersal of ownership of capital, and he envisions the citizens of a socialist society as sort of permanent stockholders, one man, one (nontransferable) share of a single monopolistic state firm which controls all means of production. This analogy is unconvincing because the point of owning stock is to receive interest income or profit, and no dividends are ever distributed to the people under socialism (if such a thing is at all meaningful). The fact is that the state owns everything, and the people, nothing. Rawls seeks socialism “with a human face,” but there is no such thing. As John Gray (1989) testifies, “There is not a single historical example of a socialist or, in general, a noncapitalist society in which these basic liberties are respected.” (105)

The problem of specifying the liberties to be secured is crucial. Tomasi (2012) argues: “It is the commitment to the equal importance of each of [the citizens’] lives that leads liberals to the principle of legitimacy. By insisting that the use of political force be justifiable in principle to all, every person is accounted for as a morally valued member. . . . basic rights are requirements of democratic legitimacy.” (75-6) One way to interpret this is that the government should *explain* its reasons for using coercion to the masses. But that’s easy because there are reasons for almost everything. We tax you because we aim to steal from you. We bomb folks because we’re fighting communists. We expropriate property because kulaks are enemies of the people. Are we making ourselves clear? To explain is not the same as to justify. Another way is that the government should seek unanimous consent. But in that case the existence of a single anarchist in society will prevent the government from forming in the first place, and surely such anarchists have existed in the past and do now. Even those who plump for the state disagree on its proper size, reach, functions, etc. There has never been any such thing as freely given unanimous consent. Another possibility is to claim that no government that rules over a stupid and ignorant populace is truly legitimate. Only an enlightened and informed electorate can produce legitimate governments, and some Rawlsian liberties are basic because they help voters make good decisions and thereby secure legitimacy. This is not a bad argument, and it can be used in the defense of freedom of speech, as well as perhaps of various political rights like to assemble, to form opposition parties, etc. If it is denied that democratic power is absolute in all *other* respects, we can equally contend that no government that violates *laissez faire* is legitimate. This does not get us very far.

Rawls purports to show how “justice as fairness provides strong

arguments for equal liberty,” in his first example of conscience and “moral, religious, or philosophical interests” (*TJ*: 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 being reembodied after his sojourn in 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). In the first place, if that’s the case, then he simply has a different conception of the good. Second, it seems that precisely the opposite is true. I know even in the OP that I will have some stance 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 cultists 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?

Arguably, Zeus does not exist. Therefore, in the OP, knowing this “general fact,” I have an unmistakable interest in, in the actual world, *not* worshipping Zeus. Do I vote for a society that outlaws paganism?

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 asserts (*HA*: 179). Another contention might be that supernatural illumination or grace is not allotted to all men; but grace builds upon and perfects nature; it is unnatural and unjust to initiate 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 issues belonging to personal morality, we may argue that vices are not crimes, and it is against natural law violently to punish individuals for their character flaws. And so on. Rawls, however, disappoints:

Aquinas justified the death penalty for heretics on the gro-

und 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, and may even be true, 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 procured by means of suppressing heresy.

Again, we may remonstrate with St. Thomas’ as follows: 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 is a form of 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 transgressors 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. We should reject the idea that, in Mises’ exposition, “in order to carry on, truth needs to be backed by violent action on the part of the police or other armed troops. In this view, the criterion of a doctrine’s truth is the fact that its supporters succeeded in defeating by force of arms the champions of dissenting views.” (*HA*: 879) Again, a Christian argument is this: religion binds us together, specifically with love for each other and God. The only way for us, as the army of the Lord, to win decisively the spiritual war that is this life is to cultivate charity. Those outside the Church are essentially traitors who are allied with the demons and can therefore be justly repressed. Well, the response is that it doesn’t work this way. We cannot foster charity, indeed we ruin it, by means of government violence. Universal tolerance is a pivotal step to eventual victory. But 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 design 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 (2001), “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.” (218) Perhaps advocacy of democracy is a 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 usher 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*. Now these mental somersaults may seem a little far-fetched. But the OP as depicted by Rawls ought to stand on its own two feet and deliver substantive conclusions. Unfortunately, it offers little help in resolving this mess.

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 clamoring for the equal liberty of not being subject to looking at ugly people’s faces? I insist on the right to beauty around me, and unattractive people should either cover up or endure my wrath as I pound them senseless with a baseball bat. 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 is lifted, I will 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 indicate 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 their *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 to be. Again, it is true that the basic structure agreed to will constrain the set of possible lifestyles; 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. Further, 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 world by querying one’s conceptions of the good. In the OP, one instead would have to judge that Conan’s desires are somehow outside the pale (dare I say, “unjust” or evil) in order to come to a decision, and that 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 sets out 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 humanity. It is *below* nature. On the other hand, a saint who does works of mercy finds pleasure in another’s felicity. This belongs to divine grace and is *above* nature. In the middle, any Smith whose nature is pure and undefiled but who is ungraced 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. The problem with this is that to advise Smith we have assumed him to inhabit an actual society and invoked natural law. Rawls is helpless here; the parties in the OP have no access to any preexisting ethics and cannot know, e.g., that “You shall not kill.” They do not know that Conan’s truculent antics are morally wrong since it is precisely morality and justice themselves that are being constructed. Hence they cannot make light of the possibility that they will be born as Conan’s counterparts with his, Conan’s – or the religious fanatic’s – conception of the good. Hence the argument fails.

Rawls cannot reply that a just society is at the very least peaceful. For there is no peace without justice; some peace is morally obscene; 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 2016: Ch. 4), since whether there ought to be individual rights, and if so, then what kind of rights, is 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. Indeed, we do not even know at this stage what a crime or tyrannical imposition *is*. We might be tempted to argue as follows. All members of society in Rawls’ system participate in social cooperation which means that they are all *producers*, though we need not prejudge whether they work under capitalism or socialism. But since the point of production is consumption, they are also consumers. But as consumers, they must have property rights

over the various consumer goods (like toothbrushes). Even if people are required to eat from a communal trough like pigs, once one takes the swill into his mouth, it becomes his property. Hence it makes sense to grant everyone the right to hold personal property. “Crime” would then mean at least a violation of such property rights. On this view only actual producers enter the original position, and they will unanimously agree to repress crime. It seems to me, however, that this argument still presupposes a value judgment that production is just and parasitism (including from Conans) is unjust, and we cannot make this judgment within the OP.

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 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 descry 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. (Note that if reasonable trash disposal rules are promulgated, people will be precisely exchanging a lesser liberty for greater economic advantages.) Rawlsianism, unfortunately, is unenlightening.

Do I have the right to play loud music, or does my neighbor have the right to be free from noise? Can I sacrifice animals as part of my religious rituals, or are others allowed to outlaw it? And if one of us is going to be reined in, how can any liberty be affirmed a priori? I’m not saying it can’t be done, but the OP is no help. I might be willing to live in a society in which I’m not allowed to sacrifice animals provided that no one else is allowed to do this, either. E.g., for Rawls, I might consent to be taxed (such as to finance public goods) if it means that everyone else is taxed, too. There is nothing in the OP itself to condemn such exchanges between the bargainers.

These examples illustrate the general point made by Barry (1973): “If there are going to be private cars, it is rational to want one; if there is going to be freedom for every man to... worship the God of his choice, it is rational to want such freedom for oneself. But looking at matters from the original position, the question to be asked is whether you prefer a society with private cars, or private Gods, or whether you prefer one without.” (149) Or as Hart (1973) puts it: “Any scheme providing for the general distribution in society of liberty of action necessarily does two things: first,

it confers on individuals the advantage of that liberty, but secondly, it exposes them to whatever disadvantages the practices of that liberty by others may entail for them.” (550) A man will vote for any given liberty only if its advantage outweighs the disadvantage in this sense. This (1) must be done in the actual society not the OP, and (2) cannot require something so stringent as unanimous agreement. At the end of this chapter, we’ll see a partial way out of this dilemma.

Violations of a single liberty are allowed for the sake of a 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). I don’t find this sort of “utilitarianism of rights” (or of liberties), to use Nozick’s term, immediately offensive, provided that we trade off between genuine liberties. Otherwise, we get in trouble. Perhaps slavery is just lovely because it fosters *freedom from job insecurity*. Freedom of speech can be abridged for the sake of enhancing *freedom from hate*. (God forbid you criticize the “oppressed” crowd.) The natural rights to contract and association are to be curtailed to bring about *freedom from discrimination*. 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*.⁷ A fossilized socialist economy can engender 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.⁸ Since freedom 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. If freedom of speech is a true liberty, then freedom from hate is not. But if freedom of speech is only a possible part of a *system* of

⁷ Gutmann (1980), in an attempt to “reconcile” liberty with equality, uses this propaganda term “freedom *from* want... to pursue one’s own ends” (9). But if, having been freed from want, you still have ends, don’t you still want things?

⁸ 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,” writes Anthony de Jasay (1997: 42).

liberty, we have no such assurances. Similarly, I could prove that the right to own means of production, the right to contract 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 bona fide liberties, but again I’d have to resort to something other than contractarianism.

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’s canvass some possibilities. If some were “natural slaves” who are more productive bound than free, or if slavery were good for those enslaved, then slavery might be Ok. Suppose there existed a race of goblins – savage, ugly, dim-witted 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, 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 prove their justice by adopting the principles agreed to in the original position. But whence specifically democracy? We saw in the Introduction that *like* Rothbard, Rawls discovers pre-political law that cannot be changed. *Unlike* Rothbard, Rawls is a statist. So where Rothbard favors anarchy in which no government can overwrite natural law, Rawls must logically favor tyranny where the government is totally immune from democratic influences over his contractarian justice. It is surely paradoxical to suggest that the right to vote is an “essential institutional means to secure the other basic liberties under the circumstances of a modern state” (*PL*: 299). Even if so, such as because the basic liberties have been popular up until now, the “modern state” cannot simply be assumed.

So in the first place, I deny that voting 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, then Jones’ liberty to bring about his preferred policies is to that extent overturned. Granting the franchise to increasingly greater numbers of people in the name of “fairness” is idiotic, as their combined voting will simply cancel itself out. It’s a zero-sum game, a war by ballots if not yet by bullets. Authentic human rights are then harmonious, not so for voting. Your power to vote is not something that touches you only. It has a fateful, game-changing externality. You can infect the body

politic, of which I am a part, with bad or unjust laws and thereby harm me. If “equality” is the main justification for democracy, then democracy is not well defended: the sick are not equal to the healthy, nor the wise voters to the foolish.

Further, the right to vote is hardly the right to self-determination or a sign that one controls his own destiny. It is 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. Rawls does not see the “competition” between these, calling it simply “the risk for political justice of all government” (PL: 416).

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 avert this anyway, even if he had voted. In the meantime, if Smith detests 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 (i.e., power) 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. The only condition under which I’d agree to be President is if I could abolish the government and immediately after that, resign. (It is permissible to vote, and even run, in self-defense. Pacifism is not morally re-

quired when one is thrust against his will into a war by ballots.) The “political competence of the average citizen” (*TJ*: 205) should be so high that the citizen will look at the temptation of power and reject it outright.

It may be that a dimension 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.

Further, if those who own no property, i.e., those who are not invested into their community, tend to vote viciously, antisocially, and unjustly (for example, by authorizing the state to loot the bourgeoisie through taxes), then denying them the right to vote benefits society as a 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 lumpenproletarians vote. Irresponsible voting will harm the economy and hence the non-property owners (say, as consumers) in particular.

Then there is the following argument: “Representative democracy cannot subsist if a great part of the voters are on the government payroll. If the members of parliament no longer consider themselves mandatories of the taxpayers but deputies of those receiving salaries, wages, subsidies, doles, and other benefits from the treasury, democracy is done for.” (Mises 1946: 81) This is a reason to limit the franchise at least to taxpayers.

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, on such a view, will reliably sabotage justice. A woman in the OP should wash her hands of 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, among other things, society as a whole. But viciously exercised political powers make one a “political” criminal (such as Hoppe’s democrats and communists). These powers ought by right to be taken away if they result in social harm. Now personal liberties are far more precious than voting privileges. If the former

can be forfeited by foul 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 stupid voters ought to have the power to make stupid 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 brings to bear 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.) Again, what Rawls gives with one hand, he takes away with the other: “liberty of conscience is to be limited only when there is a reasonable expectation that not doing so will damage the public order which the government should maintain” (*TJ*: 187). Presumably it is the government that will be determining what is “reasonable.” The issue is not what Rawls personally likes and dislikes, but what would be chosen in the original position. It may be that nothing definite will be chosen. But this only condemns Rawls’ method.

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 may 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 torn down for being “racist.” Still others, that certain lifestyles are so degrading that they 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 from 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 (assuming he’s a “person” and counts). Whose interests am I to favor? How do I choose between “abortions for all” and “no abortions for anyone”? These puzzles 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 implores that “citizens must simply vote on the question.” But the kind of voting he has in mind 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) Well, *anything* can be “voted on.” 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 the abortion liberty is to be scribbled onto 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 gene-

rously lets off the hook again are 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? For example, the existence of a single anarchist in society will prevent any social contract that permits the levying 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 naughtily unreasonable, then perhaps so are others, now ripe for repressing. Of course, unreasonable terms are 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, far from being public, is 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 easy, because Rawls labels all those who do not accept his justifications “unreasonable” and casts them into the outer darkness. Rawls of course is entitled to consider his own theory to be *true*, just as I may cling to my libertarianism. I, too, might argue that the proponents of minimum wage, say, are unreasonable or unjust. Why not, however, just come out and say it up front?

Rawls’ interpreters have more definitional tricks. Conservatism is liberal, says Burton Dreben (2003), and so is socialism. But libertarianism is not liberal. (It *used* to be liberal until social democrats stole that word.) In this sense libertarians are relevantly like “Hitler.” Because why draw distinctions between a genocidal national socialist who started a world war and people who advocate peace, freedom, and private property? Having closed the case and defined his opponents out of the discussion as unreasonable, the slanderer goes on:

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. (328)

Dreben admits that Rawls is reasoning in a circle but says: “it is a big circle. So that makes it very good philosophy.” (338) Sorry, it doesn’t work that way.

Perhaps Rawls’ theory can be construed as a form of argumentation ethics: the parties in the OP are “free and equal”; therefore, they stick around as 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 proposal. 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 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. But all is not lost. We can reason with the inspiration of lawgiver utilitarianism.

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 endeavor to maximize my own liberties since some of those liberties may turn out to be antisocial, and I’d have to suffer other people also exercising them. Without a conception of the good, stripped from me in the OP, I could not trade off such things, and even if I could, no universal agreement on them would be reached. Since the liberties everyone enjoys are the same and equal for all, LU has no natural competitors like maximin; the utilitarian set of liberties serves me best. LU, as I’ve said, mainly involves a stab at making 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? On the one hand, I cannot be king; on the other hand, it is not in my interest to keep others as slaves. I neatly dragoon everyone into my service without privileging myself. Of course, such harmony implies 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 extend to others also for myself.

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

salvation. Though faith is hardly a consumer good, nevertheless competition between religions can be healthy: it can prevent abuse, sharpen doctrine including both rational proofs and revelations, inflame zeal and devotion among the faithful. These liberties, then, when granted to all, help *me* to find the best religion. Of course, freedom of religion is a natural right (insofar as I own myself and have full custody of my own soul). Unless I am a warlock who uses sorcery to bring plague or bad weather or to ruin crops, I do not see how any religious repression can be just. But it is also an efficient positive right.

Further, economic policies do not privilege established businesses, in so doing restricting the freedom of new entrepreneurs to challenge 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. (In the OP I don’t know what consumer goods I covet, but I know that I am a consumer, so no *specific* conception of the good is assumed.) 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 broad 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 boast personal freedoms because everyone needs to see other people’s “experiments in living” for his own edification, and because prohibitionism fails on every level.

So, if there is a conflict between a given liberty to me and welfare to others from having to put up with my exercise of that liberty, then the OP can yield a definite answer as to the right policy *only if* it adopts LU which does not require unanimous agreement, merely best result on the whole, as an intermediate step. If there is no conflict, then both LU and OP directly will approbate it by almost identical reasoning. On the one hand, the OP, since it rejects natural rights, is sterile. On the other hand, it is utilitarian or something very close to it. The parties in the OP will do well to consecrate LU as the top-level rule of regulation.

In short, for the right to free speech, I want it, and I want others to have it, too. The solution is obvious in both contract theory and LU. For the right to steal, I want to enjoy that but don’t want others to. The solution depends on figuring out which society, with stealing or without, is best. There are a couple of things we can do at this point. One is for the parties in the OP to enshrine LU, exit, and then let the lawgiver spin utilitarian law in the actual world. There he will have information about actual preferences, and a posteriori, it is clear that every, or almost every, community that has ever existed took steps to repress violent crime. Two is to think what kind of law would be chosen in the OP *given* LU. Here again there is little doubt a priori that such repression is a necessity, lest civilization be “exposed to the mercy of every individual” (*HA*: 149), and my prospects, as I see them in the OP, are maximized if I am born into a society like that. In both cases theft is proscribed.

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 looks askance at democratic omnipotence. But so does Rawls’ own system. Rawls worries that the rich might end up influencing politics unbecomingly. But such influence would typically 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” (*JF*: 144), hence empire-building is likewise precluded at the outset.

The entire *point* of influencing politics is to bite off economic benefits illegitimately, i.e., outside the normal course of capitalist affairs. That’s why libertarians distinguish between economic means to wealth, i.e., peace-

ful production and exchange of goods, and political means of violent expropriation and spoliation exercised via the state. In the United States, for example, congressmen are continuously being bribed by private interests and blackmailed by the executive branch. This is how one profits through these political means. It is simply a crime committed “legally,” through 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 who play it “professionally,” politics is a means to pecuniary gain. It is senseless to cavil about capitalism on the grounds that it licenses inequalities that may enable some people to conspire to subvert it via politics – unless the contention 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.

Rawls then fears that large accumulations of private wealth can corrupt his precious democratic solidarity, but the corruption would take the form precisely of pursuit of extra-market income or profits, i.e., cronyism, legal plunder, which is something that *laissez-faire* capitalism disallows as part of its *nature*, not merely *contingently* with dubious hopes as Rawls’ civic republicanism does. Moreover, political corruption is not all bad; often it is the only way for the better off to ward 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). If we are to suffer socialists, let them at least be sellouts – take the bribe and leave us alone; two wrongs can make a right. It may be that the “property-owning democracy” of Rawls’ fantasy is immune from the influence of moneyed interests in politics.⁹ 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.

Unlike libertarian government (if any), Rawlsian government is pretty powerful. There are ways to abuse power other than for personal profit through special interest dealings. In starving the Ukrainians in 1932, Stalin did not seek to enrich himself. Economic equality is not necessary for absence of corruption, and neither is it sufficient since the Soviet regime

⁹ By property-owning democracy Rawls on some interpretations meant an economy of “democratic” worker-owned cooperatives. Under capitalism, this system is inefficient and self-liquidating; under socialism it makes central planning unfeasible. So, it’s nonsense.

practiced just that.

The free market is not a hideous utopia, it is not contrary to human nature, it is plainly and indisputably feasible, and in fact all civilizational success we can boast of is due to it. There is no analogy here to the argument “if everyone believed in socialism, then socialism could be built.” Will Durant (1939) puts it this way: “Forced to choose, the poor, like the rich, love money more than political liberty; and the only political freedom capable of enduring is one that is so pruned as to keep the rich from denuding the poor by ability or subtlety and the poor from robbing the rich by violence or votes.” (122) If the great majority adhered to libertarianism, such freedom would be by that fact secured. There is no need to beat people over the head with the Rawlsian club.

Egalitarianism purports to embody “equal respect and concern for all citizens.” When Dworkin says that “the interests of the members of the community matter, and matter equally,” he means to the government which is tasked with serving those interests (1983: 24). Specifically, “no government is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance” (2000: 1). The state for Dworkin is a universal caretaker.¹⁰ Now government, as Mises (1988) describes it, is “the opposite of liberty. It is beating, imprisoning, hanging.” (33) It is an acid that dissolves social bonds. It is, when sufficiently empowered, a criminal gang. It is a serious blunder to entrust this agency of coercion and destruction with the task of “respecting” people. But let’s admit Dworkin’s proviso for the sake of argument. According to it, if a government shows *equally no* concern for anyone, it is still legitimate. Government under *laissez-faire* capitalism does just that. And just as the state has almost no power, neither do the “people.” A free society secures the fair value of basic political liberties by setting this value to zero for all, and you can’t get more equal than that!

In short, individual liberties under *laissez faire* are not only equal but very extensive and jealously guarded, and should be on Rawls’ own device. The liberties on Rawls’ list are designed to enable people to *develop* their conceptions of the good; they pertain for the most part to the contemplative life. The liberties on *my* list allow people not only to develop such conceptions but also to pursue them and hence are superior.

¹⁰ Dworkin describes an anti-egalitarian attitude as follows, holding it “implausible”: “You might say that though it matters to you whether your own life is a good life, and to everyone else whether his life is a good one, it does not matter objectively, and therefore from the standpoint of politics, whether anyone’s life is good.” (1983: 32) It’s the “therefore” that I have a problem with. Government may be able to satisfy our interest in having crime repressed, just as a maker of chocolate can satisfy our interest in sweet things, though both unequally. But are good lives *in general* promoted by politics? Dworkin is such a statist.

3. 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.

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

Table 1. Rawls’ system (*TJ*: 57).

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).

As regards “equality,” normally, leveling up is difficult or impossible; leveling down is much easier. It might seem at first glance that 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) This impression is premature.

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 assertion 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, indeed the OP itself is a reflection of this fundamental fallacy.

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 unflinching execution of *which moral duty*? Perhaps 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, will deny that there should be a state at all. A libertarian will rule out that the state ought to be distributing anything. Rawls is thereby simply begging the question.

Rawls protests that one doesn't "deserve" 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" (*TJ*: 89). This suggests that he thinks there is complete determinism, and there is no room for personal responsibility (with the very capacity for exercising "responsibility" itself being a random blessing ultimately assigned at birth), with every ounce of success being morally arbitrary. 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 also the lower 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. It cannot be said that those favored by circumstances of fortune are by that fact alone the "better off."

Rawls might declare that determinism is paired with randomness, so that some people's greater talents and inborn potential 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 physical law and perhaps random "quantum" noise alone, as if rocks careening recklessly through space toward 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*.

We can see that Rawls is not a “luck egalitarian,” for two reasons. First, the entirety of success in life is for him due to “luck” and none to “ambition” because the strength and quality of one’s “ambition” are themselves due to luck. He rejects the distinction between “ambition-sensitive” and “endowment-insensitive” distribution, the idea that everyone’s circumstances must be continuously equalized, but that inequalities due to choices made are tolerated. This explains why he insists, with the help of the OP, on perfect equality. Second, Rawls does not make the “principle of redress” part of his theory of justice, so he does not seek to *compensate* “those with fewer native assets and... those born into the less favorable social positions” (*TJ*: 86). He goes with the difference principle instead. Both Rawls and luck egalitarians begin with initial equality (for different reasons), but the luckists allow inequalities from different “ambitions,” while Rawls allows them in the case when they benefit the least well off.

“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 would have given me that, and I would have no cause for complaint.

Why is the *de dicto* rendering true? Certainly God does not give anyone his gifts based on any preexisting 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)

The talents here are taken to be those that are socially useful, unlike the gift

for counting blades of grass that Rawls mentions. In this case, mutually beneficial cooperation is possible between men even if one is inferior to another in all gifts, as per the law of comparative advantage. This point is obscured by Rawls' treating the least well-off as sort of permanent dependents.

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 these things, and whatever Rawls deigns to give 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 to imply "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." In other words, I *deserve* whatever God gives me taken de dicto; and because of that I *am entitled* to (i.e., own) whatever God gives me taken de re.

The same reasoning works for the family and country I am born into. I must logically be born into *some* family and country. To Rawls' toying with the idea of erasing the family I reply that if your conclusion is as repugnant as this, might it not be worthwhile to reconsider the premises? In his saner moments Rawls writes that (alleged) absence of desert for one's uniquely valuable possessions is "no reason to ignore, much less to eliminate these distinctions" (*TJ*: 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 potential and making use of whatever advantages I find in my environment.

It also follows that "luck egalitarianism" is implausible: these inequalities are not "unjust" because God (or nature) does not owe anybody anything in particular taken de re. Howling gigantic curses at God seems counterproductive. The less gifted are not unjustly victimized by the more gifted. Even if in the future with progress in genetic engineering *parents* will be able to choose their child's traits, it is not the case that they will be morally obligated to give their child any specific talent, still less make him equal to anyone else. In the 2009 movie *Monsters vs. Aliens*, the villain Gallaxhar makes an army of clones of himself with which to conquer Earth. If the

clones are an embodiment of luck egalitarian justice, count me out of the mothership. In Jn 9, Jesus is asked about a blind man, “Who sinned, he or his parents?” Jesus answers that the reason this particular man was born blind is so that He, Jesus, could heal him right here right now. He does not answer the general question why some people are born sick, i.e., He does not solve the theological problem of evil for us, “Why do bad things happen to good people, and how is the goodness of God compatible with this phenomenon?” The alleged “intuition” of injustice of inequality is simply a de-based and rather stupid version of the same problem. The evil for the blind man consists in disability not in inequality. It is not an evil to be unequal to someone else, including due to “luck.” Even if in some society some people have legal privileges and others are denied basic rights, the offense is not *unequal* rights but absence of some rights that ought to be had and presence of privileges that are wrongfully enjoyed. The resulting *equality* of rights is merely a side effect, not to be aimed at directly, just as equality in eyesight would be a side effect of curing the blind. It’s one thing to have an arbitrary aesthetic fondness for equality, quite another falsely to consider it an “ultimate value” supposedly held by “every plausible political theory” (Kymlicka 2002: 3). An even more extreme “intuition” is that “people should not be disadvantaged or penalized by factors outside their control or factors that are otherwise arbitrary from a moral point of view” (Chambers 2006: 84). It is impossible to grant this wish. The author confuses humans with the almighty and impassible God. Man got to deal with randomness in the same sense in which fish got to swim. We cannot even say that *poverty* is an evil because prosperity is not something that ought to be; poverty is not an identifiable defect as blindness is. No man has any right to any predefined income or wealth; abject poverty is the natural condition of man unless counteracted by strenuous effort at economic development over decades and centuries. Likewise, neither being talentless nor being less talented than another is an evil, certainly not the kind that requires that the talented be looted and the cash be used for “compensations.” It is “undeserved” by either of us that there is sunshine at my location and rain at yours, but it hardly follows that I owe you money on that account. “The shrewd ought to give their money to the suckers as redress” is an even crazier philosophy than “the shrewd ought to cheat the suckers out of their money”; how about everyone just keeps what he has instead? Luckists got excited by a bad idea from Rawls and took it to absurdity. The idea of luck egalitarianism is not entirely bankrupt since it is achieved every day without any worries about “justice” or coercive government leveling by means of (private) insurance. But I think that’s really the extent of it.

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 evolve 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 rational and empowered will. 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 to bring about what is good. It is the very power and purpose of the divine spark within to actualize its potential, 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. In the process of doing so, the spark builds its character and discovers its self. It is morally relevant whether, *whatever* life gives you, you still make lemonade. It should not be controversial that if I make a sandwich, I deserve to enjoy eating it; if I start a successful business, I deserve the profits that I make; if I work out my salvation with fear and trembling, I deserve my treasure in heaven or beatitude.

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 if everyone is free to despoil me, then this nature is not just unrealized but defiled and corrupted.

Rawls makes a mistake similar perhaps to one that Darwinists make: that unaided by intelligence nature plus randomness can generate specified complexity. To notice this, 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.” (*TJ*: 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 and, by spotting and taking advantage of their unique opportunities, to use them energetically and profitably both for themselves and society. Having more ingredients or potency at birth is not owning consumable wealth, still less self-actualization or happiness. Contra Marx, “capital” does not “beget profit,” nor, contra Rawls, talents, success. Entrepreneurship within the market is mini life:

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 nontrivial task of developing and using their “natural and social contingencies” admirably are penalized by *suffering* which is greater in proportion to the prospects squandered or misused. The better endowed one is, the harder he has to work, and the more formidable the obstacles to happiness he has to overcome. Hence to offer consideration to the “more fortunate” in Rawls’ sense is not to privilege them unsuitably. The bigger picture evinces something similar. We are arguably in the middle of a ferocious spiritual war between good angels and men on the one side and demons on the other. And just as God loves more the better things, so the devil *hates* more the better things, specifically the better off more than the worse off. As a result, the trials and tribulations through which the better off go are more dangerous and grueling than those experienced by the worse off. The former face greater temptations, more devious snares, more harrowing ordeals than the latter. They do not deserve the blithe dismissal à la Rawls. 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.”¹¹ We can thus say that a person

¹¹ 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

who lawfully profited from his gifts and environment deserved them in retrospect, and a person who wasted them did not. For the latter kind, scarily, “who has not, even what he has will be taken away.”

There seem to be a number of plausible “desert bases”; e.g., people who are “worthy of happiness” may deserve actual happiness; wise people deserve to be heard; an accused man deserves his day in court; a grieving mother deserves sympathy as fitting the occasion or “due” to her; a skilled worker in a sense deserves a job again as a fitting match; we can even say that a man deserves a woman; etc. For our purposes, what makes you deserve whatever you honestly acquire is simply the effort you make or, more generally, costs paid and sacrifices made. (Of course, you don’t deserve a good if you *stole* it, or if you *failed to attain* it.) The intuitive idea is that you deserve to get your money’s worth, you ought to get what you pay for, a kind of labor theory of desert if you will. We might say that Smith worked *really* hard, and so *really* deserves his reward such that it would be an especially egregious waste if he did not get it. (Obstacles surmounted seem to matter more for things like pride and glory than desert.) It does not matter by what means you make the effort. Whether or not you were blessed with “fortunate family and social circumstances” that helped you to develop “the superior character that enabled you to make the effort” (*TJ*: 89), it is the effort itself, the fact that *you* did it, that is morally relevant. Nor is it meaningful to say that “we cannot determine what part of conscientious effort is a result of autonomous choice and what part is a result of factors for which we are not responsible” (Moriarty 2002: 141). For *entitlement* (i.e., ownership), to use Locke, mixing your labor with land makes you own both the fruits of your labor and the land itself. Likewise for *desert*, mixing your “conscientious effort” with your natural and social endowments makes you deserve both your success *and* those endowments themselves.

A difference is that you come to deserve your gifts *after* you’ve proven yourself, but you come to own the land *before* you’ve cultivated it simply by intending to work on it. So, assume that you own your gifts (e.g., the original 5 talents); this permits you to try to accomplish things; if you do so justly and succeed, you deserve your accomplishments (the 5 talents made); if so, you also own them; this shows in turn that you deserve your gifts; this explains *why* you own them. This argument can be used to establish self-ownership.

As Nozick (1974: 225) and others (e.g., Zuckert (1981: 477)) have argued, the bases of desert, in order to fulfill their function, need not themselves be deserved. E.g., Mills (2004) makes the point that “that I was born

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.

lazy is certainly not my fault, but *being* lazy is a fault, and if I have it, it is *my* fault” (268n13). Reversing this, being born with the drive to work hard is not my merit, but being a hard worker is a virtue, and if I have it, it is my virtue, and it serves as an adequate desert base for whatever I achieve by hard work. The argument here is that *even the bases* come to be deserved retroactively.

Likewise, in the business world, an entrepreneur deserves to have been invested into at t_1 upon a show of profits later at t_2 .

If I grow an apple tree and gather apples from it, then because this involved work and sacrifice, I deserve the apples; if I then exchange some apples for some oranges, if the exchange was easy or even costless, do I deserve the oranges? Yes, because both initial labor and the apples were costly *means* to the oranges. The sacrifice as a desert base is still present.

An entrepreneur who wins monetary profit in the market does not labor, but he has another desert base for entitlement, notably called by Israel Kirzner (1974) “finders, keepers.” Alternatively, we can argue as follows. In the first place, entrepreneurs, in securing profits, display the virtues of prudence and courage. Since these virtues are displayed by both winners and losers, it is the relative supremacy of the victor revealed in battle that is a desert base. Further, unlike workers who perform routine tasks, entrepreneurs are creators of new things. The worker deserves through sacrifice; the entrepreneur, in a kind of *imitatio Dei*, through an outpouring of creative power. These are not mutually exclusive: an artist who makes a sculpture would seem to deserve it in his capacity both as a worker and as an entrepreneur. Thus, goods obtained via any voluntary exchange are deserved.

A further Rawlsian argument is that “because those who are better situated do not deserve their place in the distribution of traits, their position within the natural distribution does not generate a right to the establishment of institutional structures that give persons who possess those traits special advantages” (Greenblum 2010: 171). But what does this mean exactly? If that no Jones deserves to live in the kind of society where he, Jones, benefits the most (such as where Jones is king and everyone serves his interests), that’s true. But nothing important follows from this. A second interpretation is that no one deserves to live in the kind of society where he is paid according to his contributions to the welfare of his fellow men. This, however, is hardly self-evident. The free market, at least in the state of equilibrium, grants to each worker his (discounted) marginal value product. This seems to comport with commonsense justice according to which people should get all the fruits of their labors. (Of course, capitalists get a cut too in the form of interest, but that is due to a quasi-contractual, voluntary, mutually beneficial, and hence just, agreement between them and workers.) We could then essay to defend the justice of the market. The first interpre-

tation is true but irrelevant; the second may well be false. In any case, what enters into the determination of a just social order is not the traits of any Jones but the fact of natural inequality among men. It is this inequality that Rawls' OP perversely conceals.

Suppose it's true that you deserve all your gifts if you make good use of them, justly, and in a just economy. This still does not tell us what kind of economy is just. No, but what it does tell us is that a just economy, whatever it will turn out to be, will *not* feature equal distribution of bling. It may be objected that a just economy is perhaps a commune where everybody must contribute to the common storehouse from which goods will be doled out to the citizens equally. This is tantamount to claiming that people cannot benefit unequally from their unequal traits at all. Then my argument fails insofar as it is impossible to "make good use" of anything. One evident reply is that it is unjust to treat unequal individuals equally, hence the commune cannot be just. But another is that this certainly isn't Rawls' view. What, for example, would be the point of liberty if not to promote human flourishing? The difference principle also bears this out. Indeed, if people are *not* allowed to seek their fortune in life entrepreneurially, then the difference principle fails to go through. If distributive shares ought not to be "improperly influenced" by not-so-morally arbitrary factors, then the difference principle which is designed to take advantage of precisely such factors cannot even be considered. And if they *are* allowed to do so, then equality is ill-motivated. Rawls' egalitarianism is based on hiding inequalities in the OP, not on repressing them in the actual world. In the OP, the bargainers forget *how* they are unequal indeed for the sake of "fairness"; they know acutely *that* they are unequal. In this case even in the OP, and contra Rawls, the parties will not insist on equality.

So on the one hand, once you zoom all the way in, all you see are initial appropriations of unowned goods and voluntary exchanges of goods and services, including labor services, and those are just. Taxation is a coercive not voluntary "exchange" and hence is unjust insofar as private violence like mafia extortion is also unjust. (Of course, justice is not the only value, and taxation may be permissible on other grounds.) And on the other hand, from far above the market operates on the principle "to each according to his contribution" to the welfare of other people. Each tends to get in proportion to what he gives. This too is quintessentially just. These key conclusions reinforce each other. Gutmann (1980) objects as follows: "Perhaps the Wilt Chamberlains of our society will be well taken care of in Nozick's utopia, but will the Fouriers and Einsteins and those public-spirited or private, law-abiding citizens whose talents are not so marketable?" (161) Yes for private law-abiding citizens insofar as everyone gets what he contributes to society. If your skills are not marketable and as a result you

contribute little, then you get paid little too, and this is Ok. (Consider learning more valuable skills.) I don't know about Einsteins under libertarianism (this depends on how intellectual property is handled), but in *Gutmann's* "liberal egalitarian" world *none* of the above will be justly treated.

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 mosaic of contingent facts begets social cooperation 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)

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 economy *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?

Another interpretation of Rawls is that no one deserves to be "better than" anyone else. This does not fly either. At conception (or birth) one as yet deserves neither his gifts nor his superiority over others. He comes to deserve those gifts later after he has *succeeded* (a relation between him and a goal), and he comes to deserve his dominance after he has *won* (a relation between him and other people). Champions deserve to have no time for losers. Of course, a winner may be advised not to stomp on the loser's soul with contempt. Those with power save those without, and one is called to serve mankind rather than scorn it.¹² But in any case, desert is present in both situations.

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

¹² The state of grace is the state of servitude: the greater your gifts in nature, the lower you are in grace (though the higher, as a result, you are in glory). Hence "if anyone wishes to be first, he shall be the last of all and the servant of all" (Mk 9:35). From this Christian vantage point, again the better off, far from being privileged, are in fact bound to serve the worse off.

their situation:

After all, 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 apparently more just. But of course, under R , the better off are injured, and their happiness is sacrificed for the sake of 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 to favor R 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 Howard in his novels. All men, both the worse off and the better off, are equally endowed with life and imperative to fight the forces of death and decay and indeed vulnerability to succumb to them. The better off would lose self-respect (a key primary good) in a society in which their struggles are despised.

Hayek (1960) asks "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..." (41). This progress and the dangers attendant on it are part of everyone's life, and regarding them everyone is positioned symmetrically.

Nagel (1991) worries that some people's "basic needs for food, shelter, health, and minimal self-respect are not met" (Ch. 7). Ok, why aren't these people meeting their own "basic needs"? And why are unspecified others ("society") responsible for taking care of them? It does not occur to Nagel even to ask these questions. The egalitarian project views people as wards of the state from cradle to grave. People do not fight for their prosperity, their interests with every ounce of their strength; they are passive recipients of government dole. Nagel's ideology has not progressed beyond the nursery.

It is true that some of the 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 by necessity be matched with downward mobility. A rigid caste society may well do away with both, but Rawls rejects it as illiberal, anyway. Capitalism disavows 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 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 worst 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" (*TJ*: 156) owned or at least disposed of by "society" (i.e., the state, i.e., Rawls). If this extraordinary 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) Thus, I did not unjustly harm the worse off; why am I being forcibly conscripted to serve them?

It makes sense that bling should not be allocated according to moral virtue. Moral virtue is generally not something you can *sell*, in fact for virtues like liberality and magnificence, you have to *spend* lavishly, and so it's hard to see how money can be allocated according to that. But if that were all that Rawls meant, what would be the point of the argument that no one deserved anything due to moral arbitrariness of things? It is to deny the idea of natural rights and shore up the OP and its veil of ignorance. We have

seen that Rawls accepts that people can exploit their natural and social endowments for their own ends. He does not, in the end, endorse slavery or communism. In such a case desert can be established and through that, self-ownership and the inevitable unequal ownership of produced property even before deducing the just economic regime. If there are such natural rights, then it is illegitimate to conceal from the parties in the OP the knowledge of their particulars. If I deserve, and own, this specific house, then by stripping me of my knowledge of this fact, you essentially dispossess me, which is unjust. If I have a natural right to sell this house, then it can no longer be said that I can do so only if equality is not disturbed. Rawls wants to dismiss natural rights, and natural deserts, in order to prepare a way for collectivization and equal distribution of all property.¹³ (When is a communist not a communist? When he is Rawls.) This will be dealt with in the next chapter. For now it is clear that this dismissal, i.e., Rawls' attempt to destroy justice so that he could save it with the OP, fails.

Note finally that even if Rawls were right that by nature nobody *deserves* anything, this would not by itself entail that no one *owns* anything, that there are no natural *rights*. Rights need not be grounded in desert. E.g., as Flew (1989) puts it, property may be “not-deserved to cover what is neither, meritoriously, deserved nor, scandalously, undeserved” (and thus requires “redress”) (150). Even if one does not deserve himself (whatever that means), that one owns himself, the flow of labor services emanating therefrom, and resulting fruits of one's labors is almost self-evident or at least very plausible. E.g., we can argue that man is act, and nature is potency, and act rightfully conquers and dominates potency to which it is superior and shapes it according to its will. It is only natural for this kind of active principle to own the passive principle.

Rawls is “troubled by the influence of either social contingencies or natural chance on the determination of distributive shares” (*TJ*: 64). He should put his cares away: there is nothing wrong and everything right about such influence. Indeed, it is implausible that a man in the OP will want to restrict his liberty to use his gifts and milieu to his own advantage. Or is he to demand a government that will put random obstacles in his path, or a system where he must ask permission and bribe bureaucrats to get anything done?

Rawls' main practical recommendation for equalizing “opportuni-

¹³ If natural talents and bodily organs *were* redistributable, it would follow on Rawls' understanding that they would have to be distributed equally. Of course, talents are not in fact redistributable, and Rawls is not in favor of coercively extracting eyes from the sighted and implanting them into the blind and avoids this conclusion with the postulated freedom from “physical assault and dismemberment.” Well, how convenient. These are mere make-shifts used to cover up the fact that his doctrine entails seriously vicious consequences.

ty” is that “greater resources might be spent on the education of the less rather than the more intelligent” (*TJ*: 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. For children already in those schools, as James Coleman (1983) argues, “if the State could be successful in fully counterbalancing differential private resources by reversely differential public resources, this would create an extreme disincentive to parents in supplying the private resources that they currently supply unequally. This would undoubtedly reduce the overall level of resources and thus the overall level of opportunity available to the young.” (195-6) 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^a1-10) 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 insists,

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*: 154-5)

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

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 entre-

preneurs. 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. (*HA*: 314)

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 suggests 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. (*HA*: 283)

Second, reality is the exact opposite of Daniels’ fiction. It is precisely because capitalism encourages all entrepreneurs to hire “according to the actual talents and skills” and because the various “victim groups” are incompetent and unable to compete in the market that anti-discrimination legislation was passed and the less talented and skilled were vested with 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. In general, forced association disrupts harmony between human beings and is to that extent unjust.

These points raise another fundamental issue, viz., that entrepreneurial opportunities are different from both liberties and wealth. It is both impossible and undesirable to equalize them. An opportunity retains its es-

sence 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,” then the equilibration occurs instantly, and the opportunity evaporates posthaste for all.

“Opportunities” take up unto 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. The economy is in ceaseless flux; people continuously take advantage of opportunities to improve their well-being. Such novel actions alter the environment in which they all mingle, erasing old opportunities and spawning new ones. Everyone’s position is one of a kind and changes unpredictably as the market evolves.

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 steadily amplify 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. This, too, serves consumers. Equality of opportunity is a chimera because people constantly take *present* opportunities to enhance their set of *future* opportunities. Even if they all begin their journey equal, they will not end this way.

Each poker game is different because of randomly generated hands. *A*, *B*, *C*, and *D* are different from each other. *A* has an opportunity to interact with, and be affected by, *B*; and *C*, with *D*. Likewise for their locations: *A* lives in the city, *C* lives in the country (or a different city). Clearly these opportunities are not equal, whatever else may be equal about the two situations.

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 pass laws protecting him from competition from future and as yet unknown entrepreneurs destined to improve upon and supplant him. To use the terms

in Thomas (2020), *dominium* (private power) pales in comparison with *imperium* (public power). What's more, the use of *dominium* is in harmony with the common good; the use of *imperium*, beyond the minimal state consistent with libertarianism, is not.

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 (1997):

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. ... [It] is both moral and efficient. (13)

The consumers include the "least fortunate." Inheritance of wealth is a gift like any other such as inheritance of IQ. The heir can be, and often is, brought up in such a way as to use both well. Hence the taxes and restrictions would contravene Rawls' own difference principle. Inheritance taxes are not only anti-capitalist by checking intergenerational accumulation of productive wealth and promoting "die broke" lifestyles but anti-family too: they reduce the incentives to the parents to invest into their children and to the children to honor their parents. I do not see how any of this is good for the worse off. Like any other advantage or disadvantage, as I have argued, inheritance does not guarantee success, nor lack of inheritance, failure; thus, the unsurprising adage mentioned by Schumpeter, "three generations from overalls to overalls." A more general criticism of taxing bequests and gifts is that those are transactions motivated by love. A trade is self-interested on both sides, a gift is a form of charity. By taxing love-transactions, the government defiles, through unjust violence, this holiest and most fragile of all things. It's a sin against the Holy Spirit and is unforgivable. Even the evil state should fear divine retribution.

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 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. Nor,

contra some luck egalitarians, is it possible to disentangle “skill” (or “ambition”) and “luck” because success consists precisely in skillful exploitation of luck. As Nagel (1991) observes, “effort is expended through the exercise of talent, and talent develops into a valuable ability only through effort” (Ch. 10). It is an important aspect of charitable giving to distinguish between worthy and unworthy poor. (This does not involve either “disrespectful pity” or “paternalistic hectoring” (Kymlicka 2002: 94).) Are you a good man temporarily down on his luck, or are you an unsavory good-for-nothing loafer? The latter should note that it is a serious sin, indeed fraud, to beg when one can work. But as regards “social justice,” one wins the game of life, as it were, by playing well good cards (and as we have seen, the better the cards, the better you must play them). If he loses, it cannot *generally* be known whether he played poorly or was dealt a lousy hand or both. Such discrimination is possible for charity which is ultimately a subtle personal relationship; it is not possible for justice which is a rule-bound bureaucratic machine.

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 economic “efficiency” angle, it is wonderful when a lot of people vie for jobs. The market performs more fluently 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 standpoint 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) makes sense only when it is 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 company’s 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 recruited by a corporation entails that Jones is passed over, despite their “equal opportunity” to be considered. The benefits of *everyone* 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 person tries to exceed and outdo his peers at how well he performs his job. For example, the argument against nepotism is not that it ruins equality but that it is inefficient. There is something disreputable, though it need not be illegal, in filling important posts with family members who may be less competent than outsiders. (We've seen that inheritance does not suffer from this objection.)

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 benefiting others as he amasses his own 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." In addition, just as for the capitalist liberties, such equality, when granted to *others*, benefits *me*. But "fairness" in this realm faces, as we have seen, major difficulties.

In sum, (1) government policies intended to foster 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. Hence EFO is (1') undesirable, (2') impossible, and (3') in any case unmotivated and absurd. For all these reasons, the OP would output equality of formal and not "fair" opportunity, precisely as careers legally open to talents.

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

4. 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 is obsessed with distribution of wealth, yet now wealth is apparently for the sake of justice. Once some minimal standard of living that would get justice going is achieved, society is presumably to stagnate; no further amelioration of 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. (*TJ*: 257-8)

I doubt very much that this is "what men want." Men want a huge variety of things, infinitely more than mere exercise of ethical and political agency permitted by Rawls. That "democratic" participation is the be-all and end-all of life is an obscene fantasy. Rawls blithely imposes on people *his own*, and eccentric, conception of the good. Mises (1985) counters to the effect that

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. (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 only one thing, 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. (192-3)

We'll learn that Rawls concerns himself greatly with the welfare of the "worst off," i.e., the least capable contributors to society. But even – and especially, because their unsatisfied cravings are the most urgent – 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 benefit 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 contentedly rotate. On the contrary, the basic structure is a means to the attainment 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 tackling the second.

The third pillar of Rawls' system stipulates that "social and economic inequalities are to be arranged so that they are reasonably expected to be to everyone's advantage" (*TJ*: 53). Who could 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. (*TJ*: 130)

Astonishing! More than that, "this principle is so obvious given the symmetry of the parties that it would occur to everyone immediately." A fake "contract" between identical deindividualized phantoms who own every-

thing (a random assortment of goods? the entire planet?) in common is supposed to shed light on the human economy! What kind of a sick prank is Rawls pulling on us? If “justice” is so trivial, then why hadn’t anyone figured it out long before Rawls?

Distributing goods is a vastly different kettle of fish from distributing liberties, since liberties as abstractions are neither scarce nor rivalrous, and goods are. Liberties do not need to be arduously produced in factories. 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 soon 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?¹⁴

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 (1990) 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. (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.

¹⁴ Rawls is rigorous: you get the same amount of gruel every day as everyone else, and whether you’re happy with it or not is none of his concern. You must “take responsibility” for the pleasure you derive from the handout, whatever that means. Cohen (2011) takes exception to this reply, but this internal dispute between egalitarian zealots need not detain us.

The equally obvious rejoinder to this is, where is the wealth that is to be distributed among the disembodied ghosts behind the veil of ignorance supposed to come from? Are we talking about Rome c. 400 AD 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. (HA: 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 rabble. There is no *distributor*; it is senseless to accuse the market process of injustice, as though it

were a human criminal. We can even say that in the market, there are no “basic social institutions” to be designed at all; there are only individuals producing and exchanging goods. There is no alien grafted-on “government” randomly intervening in this process. For example, Bernard Williams (1973) opines that it is a truth of logic that health care should be distributed according to ill-health and that distributing it according to market supply and demand is “irrational” (240-1). This is breathtakingly unhelpful. First, we can equally well argue that food should be distributed according to hunger. And that might be true if we were pigs being fattened up by the farmer. Second, the problem of the *production* of health care is not addressed. Third, it won’t do to assert, as Gutmann (1980) does, that “the urgency of basic needs will outweigh the utility of allocating scarce resources through the market, once human equality is given its due weight” (105). It is precisely because some “needs” are urgent that we want the *market* to produce goods and services for their satisfaction. If the state were in charge of producing and “allocating” yachts, it would be stupid but not cause a great deal of damage to society. But the state producing food, housing, and health care would be a disaster. But fourth, the whole issue can be vacated simply by arguing that justice is served when patients, doctors, and insurance companies are able to strike whatever bargains they feel like. Whether we take health care or any other good, “distribution” is a red herring. (See Nozick 1974: 233-5)

Rawls denies that human rights should depend on the “calculus of social interests.” He means utilitarian calculus. But Rawls does the utilitarians one better. Here individual rights to property are abrogated for the sake of a “distribution” preferred by Rawls. *He* is the one “calculating” to please *himself*. But in the market economy, distribution is effected not by Rawls but by the consumers.

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 elementary as that production must precede “distribution”? Then it is not at all obvious that all goods ought to be equally distributed. Rawls writes as if “appropriate distribution of the benefits and burdens of social cooperation” were arbitrary and depended on human will alone. Society, Rawls tells us, is a “cooperative venture for mutual advantage.” If by “venture” Rawls means something like “corporation” or “business firm,” then clearly a non-communist society is not a venture. But I think that’s just what Rawls hallucinates: society is a government-run en-

terprise like the Post Office, with the boss, the Postmaster General, distributing things. Matters were that simple for Lenin, and apparently for Rawls, too. 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 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 prejudicially invalidates one highly plausible compact 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 taken up and debated 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 preexisting moral view, that equality of bling is a virtue of institutions. But his own device precludes any such contamination.

Rawls admits that "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). This is a pro forma concession. Rawls does not like the market distribution and seeks to enforce his own. It's true that given the rules of the game agreed on in the OP, the final distribution, whatever it turns out to be, is just – that follows from the idea of pure procedural justice. But the rules themselves are designed to weave a pattern of distribution favored by Rawls. So contrary to his own assertion, Rawls does aim to distribute the bling as he personally feels right, in this case equally. Rawls tries to hedge himself by denying that "the difference principle enjoins continuous corrections of particular distributions and capricious interference with private transactions" (*PL*: 283). But it is unclear whether even the most convoluted tax and repressive prohibition regime can achieve the Rawlsian desideratum. The state *will* have to conduct "fiscal raids as occasion arises" (Kukathas 1990: 89). Lawgiver utilitarianism does, and act utilitarianism does not, achieve its ends. Here

“lawgiver equality” fails, and comprehensive act equality is Rawls’ only hope. The distinction between government rule thievery and act thievery is in any case idle: equality of distribution as the first part of the difference principle (tempered only by its second part which mercifully allows some inequalities) as the fundamental principle of justice trumps all other concerns, certainly including the concern that thievery should be predictable. If distribution *could* be improved with fiscal raids, then such raids would be part of social justice. Perhaps we need another “branch” in Rawlsian government: the raiding branch.

Now if the market can be shown to be to the benefit of everyone in the OP, then its bling distribution at any particular place and time is simply irrelevant. I endeavor to demonstrate the concomitant minor premise 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 entire difference principle. It is true that equality is preposterous, but, coupled with the rest of 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.¹⁵

4.1. 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 apples for Jones’ oranges, the marginal utility to Smith of oranges decreases, while the marginal cost of apples rises, with each trade, and *mutatis mutandis* for Jones. While both are willing to exchange, the economy is disequilibrated; 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 (ERE) is a much more evocative notion, in that it presupposes a large economy in which the equilibrium is fully a monetary phenomenon (where each firm’s revenues and costs balance so as to yield profit equal to the rate of interest); there is an intricate supply

¹⁵ I’ve taken the liberty to quote some of the passages below from my book *Summa Against the Keynesians*.

chain; time is countenanced as a factor production within a round; and finally fabricated 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 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 the delusion that there is no more progress to be made.

Enter an entrepreneur. He is a disequilibrater at the core. 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 the 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 undermined beyond repair, 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 take place even in an ERE. It is not an inanimate picture, nor even a machine, but a quasi-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 ephemeral equilibria and bring creative advance to the market. The market process is an interaction of disequilibrating entrepreneurship and equilibrating economizing. It’s a symphony of fire and ice, a dance of creativity and imitation, simultaneous multiple exertions of tension and frenetic activity and resolution and restoration of calm, disequilibration that stirs up profits and equilibration that dissipates 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. The two dualities of *state* and *process* combine into a quadriformity.

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 manufacture a commodity 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, far from a market failure, are 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 climb. He reverse engineers current 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 (discounted) value of their labor.

There is, as a result, no such thing as "surplus value" that entrepreneurs maliciously steal from workers. Innovators destined to succeed do profit, but on their heels come imitators eager to help themselves to their lucre. In arbitraging them away, they lower prices, raise wages, and drag the economy nearer to an evenly rotating state. Both 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 rewarding. It marginally upgrades 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 thrashing about is ultimately in vain. The imitators first and other innovators later will inevitably supplant him.

Both processes are prosocial, as they twist and writhe and balance each other, passionately loving and hating each other at the same time. Yin and yang, in joining together, produce fruit, in this case, economic progress. Just as 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.

4.2. 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?

In a pure exchange economy (our still life) efficiency means the old *Pareto* kind. Given an initial endowment, a series of Pareto-superior moves produces a Pareto-optimal equilibrium in which no one can be made better off without someone else being made worse off. In the simplest economy with Smith and Jones exchanging apples for oranges, each such move increases utility. In partial equilibrium, the number of exchanges made, and hence utility from them, is maximized at the equilibrium price. In general equilibrium the entire system is likewise morphed until no more voluntary exchanges are forthcoming.

In a real economy not all disequilibria are made equal. Some, like profits, are “good”; others, like wrong prices or business losses, are “bad.” The market is efficient in one sense by equilibrating bad disequilibria. This form of efficiency *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. An ERE (our machine) also features harmony insofar as all *current* plans in it are coordinated, and no entrepreneur, such as he is, is losing money.

When the market equilibrates good disequilibria, it *optimizes*. This process, though undeniably beneficial, is bounded and finite.

A fourth 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*.

These distinctions have 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 precipitate of entrepreneurial competition. Entrepreneurs are recruited into the service of society through the cunning of the economists. They have 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 that 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” action. 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, barring espionage, impenetrable to them. Smith’s injection of novelty into the market is a genuine surprise to his competitor Jones. From Jones’ point of view, Smith’s actions were “spontaneous.”

4.3. 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 leverage 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 a certain beauty to the construction of the perfectly coordinated evenly rotating economy, this beauty is deceptive, because something still better can always take its place. Beauty is a real if subjective property, unless one does not want to treat such imperfect-knowledge equilibria 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 reckoning 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.

4.4. GROWTH AND DECAY

The setting in motion of any novel plan within the free-market economy begins 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 unload 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 demand the competing goods less in order to have the funds to buy my stuff. Once again disequilibrium is reinforced.

A helpful 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 obliterating 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 snatch some of his windfall?" Jones decides to offer Smith's workers \$110 / day to craft 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 goes ballistic. How dare Jones outshine him in such an uncreative way! Smith resolves 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 earn 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 dwindle and at long last settle down to the rate of interest. In the end, there is “justice” or full employment with each worker getting the full discounted 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 literally move from Smith to Jones many times as described; further, Jones will usually peddle 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 protective 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 disassemble and analyze Smith’s wares, 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” of the disequilibrating “light” and equilibrating “dark” tendencies in the economy which is most conducive to economic development. (That’s not to say that *Star Wars* is of much use for understanding archetypes or ideals.)

Finally, new entrepreneurs enter the market and by the exact same procedure just outlined turn Smith’s now profitless even rotation into losses. Smith’s business starts out with a bang, then grows old, and finally dies with a whimper, superseded by firms producing superior goods.

4.5. JUSTICE DEFINED

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 pondering this machine may wonder

why he could not forcibly keep everyone doing the exact same thing but equalize the wages and the bling the philosopher will allocate to every worker.



Figure 1. The ascent of man. Note the combination of the contemplative circle signifying harmony and active arrow signifying progress.

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 spirited pluck to gain an edge over the presumably duller competitors that generates profits and sometimes losses. A yang-entrepreneur propels creative advance chiefly by utilizing new technologies and building new products. His profits come at the expense of incomes to factors including labor, but it is in no sense “exploitation” because as soon as these profits in the first round of production materialize, everyone will see how to get rich quickly. (Of course, he also has a *right* to his earnings.) The profits are easy pickings for yin-entrepreneurs who are sure to imitate the pioneer. All profits are short-term and liable to melt away in due time. We just saw that 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 hemorrhage money from other future yang-entrepreneurs. In the meantime, both types of entrepreneurship are virtuous, persistently conveying resources to their ever more highly valued uses.

The upward-going spiral depicted in Figure 1 is unceasing; there is no escape for any producer from the endless interplay between the yin and the yang. And it is this dynamic that drives all economic progress. Isn’t it amazing? Men would rip each other to shreds skirmishing for meager scarce resources. Yet instead they are bound till death do they part 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” (Mises 1990: 50). 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, who continues to *become*. It is this process that the utilitarian law discussed in Chapter 1 in part aims to unleash and safeguard.

We’ve seen that LU by itself leaves people free from constraints by moral duties. But our endeavors are miraculously coordinated at no real cost. Individuals, simply by doing what they want, assuming most are sufficiently deterred from criminal activities, each day contribute their share and nudge the global state of affairs toward greater perfection. Human actions become intelligent and prudent in both egoistic and utilitarian senses.

In the Introduction I argued that the justice of an individual in conforming to natural law is paired with the efficiency of a system of positive law. But justice has a second meaning that applies to law as such. Plato correctly identified justice with *harmony*; in his system this virtue made sure that the *rest* of the city functioned smoothly, with each part in its proper place doing its proper thing, such that all the forces of life within the whole are balanced, flow freely, and sustain each other. Plato did *not* discern the second aspect of justice which is *progress* because in his time the notion of progress was unknown and unentertained. The city also needs to grow optimally; it belongs to justice to nurture the continual flowering of civilization. It is only with the inauguration of capitalism that people came to look forward to perpetual improvement. These two dimensions of justice must themselves fit together. But now a just basic structure is one that, as justice in general does, promotes harmony and progress. To the extent that LU does that, it can be called “social” justice. “Individual” justice too serves these two ends. Individual rights, especially property rights, carve out spheres of action for each person that are protected and do not clash. Here everyone is equal in rank, there is no oppression. This is harmony. But with these rights people become free to fill the earth and subdue it. Initial appropriation of unowned land, production, and exchange benefit everyone, indeed each exchange is a Pareto improvement. This is progress. Whether

on the macro level as with the market process or on the micro level as with Smith exchanging his apple for Jones' orange, justice is done. Rawls' understanding of justice is outlandish bunkum and is strikingly unhelpful; at the most, his social contract will affirm the value of these two principles of justice.

Rawls admits the need for "incentives" to improve "efficiency." But an "incentive" is something like a credit card company imposing a late fee. Rawls allows "incentives" as a reluctant concession to reality, as if the state, facing the problem of eliciting greater efforts from its dejected drones, decided to pay these dogs a little extra for greater productivity. It somewhat spoils the precious "equality," but what the hell. Let a couple of flowers bloom. (The blooming flowers thus identified will be executed later.) But entrepreneurial freedom is not an "incentive," it's what human action as such is constituted by; it's a general economic condition and the essence of capitalism.

4.6. IMPOSSIBILITY OF SOCIALISM

Socialism breaks up 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. This is one important reason why socialism is *absurd*, the things people do under it make no sense.

Take a look now at Cuba. In the Soviet Union, people were interminably pestered with ludicrous 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 flee the hellish paradise en masse.) It looks in the 2020s 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 com-

pletely *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.

4.7. 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 their employees 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 the marketeers 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 his marginal product reflected in the widget’s price. Equilibration occurs by human action that aims to profit as much as disequilibration, not by human performance 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," declares Mises (*HA*: 333). Each good competes with every other good. The entire market is not "imperfect"; it is the totality of production and consumption ceaselessly 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 could 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 coexist with state ownership of capital. The "quasi-market" that some socialists have proposed in an attempt to redeem their system "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.” (*TJ*: 241) By the allocative function Rawls apparently means the determination of the proper purpose and extent of use of factors of production. 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. The more a factor is paid, the more it is valued by the consumers, and we want to allocate factors in such a way as to serve the consumers best. “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. Interest income is trickier since the market interest rate is the offspring of competition between many capitalists and many workers. Under socialism there is only one producer, the state, which by the nature of socialism or by socialist “law” is required to continue producing. The gargantuan state firm has no option to exhibit any time preferences of its own as capitalists do. Additionally, the Soviet economy, for example, had no mechanism for consumer borrowing. With neither of the two time markets operational, there can be no interest. Without private entrepreneurs there can be no such thing as profit, either. In any case, it is precisely the “allocative” function of prices that will be smashed to pieces.

Micro theory in economics “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.” Rawls demurs. Each of these commonsense injunctions is “subordinate” and cannot “be plausibly raised to a first principle.” (Really? But these are *my* “considered judgments” in *my* reflective equilibrium.) 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;¹⁶ it does not serve as a precept of wages at all. To assess

¹⁶ Rawls does not tell us what he means by “need,” but I would guess it has something to

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.” (TJ: 269-71) 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 “chain-connection” and “close-knitness” within the economy are voodoo economics. 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. As David Schaefer (2007: 138) suggests, it’s the opposite relation that makes more sense: policies that benefit everyone else tend also to uplift the worst off. It is unlikely that Rawls had in mind the *long run* in which, taking into account unbroken sustainable economic progress, the interests of *all* members of society, including indeed both more and less advantaged, are harmonious; if he had, it would have rendered the difference principle irrelevant. 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 issue until Chapter 6.

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 a 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

do with coerced and usually misdirected charity (an oxymoron). “Need” is a forbidden term in economics; there are no *needs*, only more and less urgent *wants*. See David Friedman 1989: 49-52.

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 relevant economic question is, which system handles waste management most efficiently (and keeps getting better at it with growth in civilization as time goes on), and we should 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 end up getting worse for everyone, including the people whom the intervention was supposed to help.

Third, real-world interventions often degenerate into regulatory capture as private interests get to write their own regulations. Statists think that government regulation hurts the rapacious businessmen and benefits the common good. In fact, the opposite is true: regulation benefits the businessmen such as by protecting them from competition by cartelizing industries and hurts the common good by harming consumers and dampening economic growth. Regulation is how Big Business and Big Government conspire to take the public for a ride. (Of course, that most *actual* regulation is antisocial does not entail that no beneficial regulation is *possible*. But I also affirm the stronger claim that consumers are adequate regulators of every industry.)

Fourth, interventions are by their essence piecemeal. Therefore, when we scrutinize 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. (1946: 85)

Finally, interventions tend to be cumulative and serve as 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 repeatedly creating and destroying industries, firms, and jobs, outruns the statists whose red tape may temporarily fail to constrict its newly developed parts. The race is thus on between what Rothbard called the “social power” of the market and the destructive and parasitic on it “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, 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 debaucheries the fault of “unfettered capitalism.”¹⁷

In fact, capitalism to interventionism to socialism is as health to sickness to death. Progressives inflict upon the people 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 ultimate collapse. 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 rubbish; there *is* no third way, and the choice between capitalism and socialism must be made. And it’s a choice between rational progress on the one hand and Cuban mindless routine or Soviet comical frenzy on the other.

For Rawls the economic system is apparently a kind of preference

¹⁷ E.g., Gutmann (1980) says that “the economic failure of regulated capitalism would be a reason to consider public investment in and ownership of industry” (148).

which “depends in large part upon the traditions, institutions, and social forces of each country, and its particular historical circumstances” (*TJ*: 242). That is a complete misapprehension. Economics does take subjective preferences or *ends* as given. But the *means*, specifically as regards social cooperation, to those ends are not subjective at all. The economy objectively works as in capitalism, or doesn’t as in socialism. It objectively flows smoothly as in capitalism, or sputters irregularly and erratically under interventionism. If socialism is impossible tout court, and interventionism is senseless and contrary to purpose, then the breezy lack of commitment à la Rawls here is untenable.

4.8. CONCLUSION

Once we see the matter this way, inequalities become essential to production and not merely an intellectual exercise. For each man seeks to surpass his brethren 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 merely absence of profits *now*; it is also losses and ruin 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 even be *a starting point* of building a philosophical system. It is not the case that equality is the default position with a presumption of innocence, and inequality stands accused. 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.

5. Wealth: Just Inequalities

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 economic conditions, 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 at a faster pace, and so on. ... something of this kind must be argued if these inequalities are to satisfy by the difference principle. (*TJ*: 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 jettison in part in order to increase prosperity, because egalitarian measures diminish productivity and so on. To hell with equality, Rawls can be understood as saying, if inequalities, however extensive, can improve the welfare of the worst off. Before Rawls considered all bling including people’s bodies, talents, social environment to be a “common asset.” Now, under the weight of the difference principle, he is compelled to reintroduce private property insofar as allowing people to profit from “morally arbitrary” factors increases the total dividend and aids the least advantaged. In the previous chapter we saw that equality of distribution of bling cannot serve as a point of departure for reasoning in the OP. If such equality entails that the amount to be distributed is nil, i.e., if the “common assets” are empty, then the difference principle loses much of its bite: no inequality whatsoever can possibly harm the worst off who are receiving precisely nothing. (We might identify equal dis-

tribution with “primitive communism,” in which case any “higher” economic system including feudal serfdom will be superior to it.) The comparisons must be made between systems *with* inequality.

Rawls seeks an economy which does not sacrifice the interests of the worse off for the sake of the better off relative to the initial state of equality. “This state of affairs provides a benchmark for judging improvements.” (TJ: 55) For example, a utilitarian distribution may raise average utility but push the worst off below the level they would enjoy under equality. But if the initial state distributes zero to all such that they starve as in communist famines or almost zero as in some African tribe, this condition is trivially fulfilled. As a result, when arbitrating between inequality-permitting systems, we are no longer bound by “reciprocity” to privilege the worse off. They cannot complain if we treat everyone’s interests as equally weighty.

MacKenzie (1974) contends that the OP contract will be equal distribution coupled with what we may call “market efficiency” since “this would be the best outcome” (789). Presumably, everyone would be doing the same thing they were doing under *laissez faire* but send 100% of their income to the IRS. He then compares the better off to criminals who, once the “incentives” are withdrawn, work less “efficiently” and deprive the worse off of their rightful (equal) share. How irritating. It seems plain that the agreement MacKenzie touts is as impossible to keep as the agreement to abolish gravity and hence is ruled out. As the latter is a physical impossibility, so the former is a teleological impossibility, i.e., a disconnect between means and ends, in this case use of means for no discernible end, basically irrational behavior. In his society, *everyone is guaranteed* to be a “criminal.” The Rawlsian tenet is simply equal distribution. It does not specify any absolute level of welfare. It says nothing about whether one should work, where, how hard, how efficiently, etc. The better off do not have a moral duty to work, they are not enslaved to the worse off. As we’ve just seen, *this* agreement is possible, but it’s a suicide pact.

Rawls wants the social contract to be fair, and to that end he strips from the parties all knowledge of their particulars until they are bare selves unclothed with bodies, personalities, virtues, ends, or property. He finds that this condition “obviously” mandates equal distribution. Coming back to earth, he realizes that such a distribution entails bleak and inhuman communism which is vicious. A far superior bargain can be struck by legislating something less boneheaded than communism and assenting to inequalities.

Equality of income entails that no one may differentially profit by utilizing their unique circumstances to their advantage. First, precisely for that reason equality is unsatisfactory for lack of distribuend. Second, the consequent is false including for Rawls – if it were true, then the difference

principle would be unjust. Hence inequality is the order of the day.¹⁸

We can with Rawls call 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 out by examining 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? For Rawls, “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 mechanics 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 winners and losers 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. One chooses the design of society as if “his enemy is to assign him his place” in it. How does that make sense when one’s place is *not* in fact assigned by any enemy? Rawls proposes three reasons for “this unusual rule”:

¹⁸ Rawls bills himself as an “egalitarian liberal.” One way to try to reconcile these is for Rawls to distribute the bling equally and then leave people alone to do as they please. This is what Dworkin (1981) calls the “starting gate” theory, equal initial distribution and then laissez faire. I agree with Dworkin that this theory is unmotivated and senseless from any point of view.

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. (*TJ*: 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 anxious to deny.

Regarding the first reason, there is another way to grapple 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 human labor improves at the fastest speed.” Whether after leaving the OP 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 smoothly functioning economy than from a struggling one. Now perhaps a less efficient system will *subsidize* Jones at the expense of Smith, procuring for Jones a larger overall share of the now smaller pie (because the looting will inevitably decrease productivity). We’ll deal with this situation later. Regardless, reason (1) allegedly supporting maximin does not hold: whoever I become after instantiation, I’ll appreciate the outer society’s efficiency. No probabilities are needed, and no calculations are made. There is then no reason to fixate on the worst off when a design of institutions is possible that propitiates *everyone*, worse off and better off alike.

It follows that it is not the case that “it is much more difficult to know [which policies] maximize average utility” (Rawls 1974: 143) as com-

pared to maximin; whatever economy grows the fastest does the job. Support for such an economy is a “public principle” and is easy to “commit” to (144).

The worst off have a “veto” over any agreement reached in the OP, says Rawls. This means that they will not sign any contract that puts them below the level of bling they would enjoy under equal distribution. As we have seen, this is hardly consequential. The parties behind the veil of ignorance do not know who they are in the actual society; 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., freedom of religion means that one can choose his religion poorly and suffer as a result. The freedom to pursue happiness entails the possibility of failing in this pursuit. “The development of capitalism is scarcely thinkable in the absence of high-risk attitudes in the face of uncertainty.” (Barber 1975: 665) Frankel (1974) quips that maximin may lead to a “society organized like a hospital – good hygiene, sound food, respectful voices, and the quiet of the grave” (37). It’s hard to reconcile the absolute priority of liberty and its proud defiance of the odds with the conservatism of maximin for welfare. The argument seems hopeless in any case since one’s attitudes toward risk are part of his personality which he sloughs off upon entering the OP.

Perhaps what Rawls has in mind here is that the contract is made under conditions not of *risk* where, for example, every contractor in the OP has a known chance to be incarnated either as a worse off or as a better off, but of *uncertainty* where no probabilities are given. Now a key feature of uncertainty is that it is a source of fear. This fear paralyzes the body and dulls the mind. The contractors then are not sober dignified citizens but terrified panicking passengers on board a sinking ship. All they can see is the worst possible outcome, their deaths, and they’ll go to any lengths to avoid it. Rawls stokes this fear with statements like “there is no second chance,” there is the “serious nature of the possible consequences,” “we must be able to honor [the agreement] even should the worst possibilities prove to be the case” (*TJ*: 153). In the first place, just as risk is handled by individual prudence, so fear, by courage. If the veil of ignorance conceals the latter virtue as much as the former, then we have no way of estimating the parties’ response, and maximin does not follow. Second, if the fear is overpowering, then it’s hard to see how the original position inhabited by such compromised characters is supposed to yield justice that is binding in the actual world. (Some “rational choice” these guys are making!) The stringent veil of ignorance in Rawls is thus exploded.

But is there even uncertainty? In the OP we retain the knowledge

of the facts about society, one of which is that distributions of IQ, talents, income tend to follow a bell curve. The probabilities are therefore no mystery. The great majority cluster around the average. Hence it makes sense in the OP to vote for the economy that is devoted to their welfare, not exclusively to the welfare of the fat, lazy, and stupid ne'er-do-wells at the far left of the curve.

The second condition is bad psychology: ask anyone whether he'll be content with a minimum wage. The pleasures money can buy in 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 crafted 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 (indeed that's *all* they care about since they forget their actual ends). As Schaefer (2007) perceives, this also violates the "motivational assumption underlying the difference principle that the prospect of earning larger gains will cause people to work harder, thus benefiting the less advantaged as well" (69). And if the parties in the OP really care "little, if anything" about getting more than the minimum (allotted to them by Rawls), then it is unclear why we should *maximize* the minimum. Why give the pigs the best rather than merely adequate swill?

The minimum "guaranteeable level" of the least advantaged is "quite satisfactory," Rawls thunders *ex cathedra*. (*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 principal 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. Tomasi (2012) writes that poor people "become dependent on the charity of others and so become unable to participate in the united will needed to authorize public law." I fail to see how. Voting today is free of charge and occurs at most once every couple of years. Even homeless bums can easily afford *that* (especially because, unlike the productive classes, they have nothing better to do). This alleged problem generates no case whatsoever for a "tax-funded safety net" (98).¹⁹

¹⁹ It's also unclear how, e.g., charging the state with "setting monetary policy" or "control-

I reject the assumption that the minimum is singularly valuable. It is irrational for the parties in the OP to be obsessed with not starving to death when an economic model that promises unparalleled, and growing, prosperity for all, specifically capitalism, is readily available.

Rawls' only reply is that his system focuses by and large on 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 snub the great majority in order 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, Rawls maintains, 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 soothed. 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 integral goal of social cooperation, viz., capitalism.

Gardner (1975) interprets this bizarre condition as follows: "it is so important to the parties to avoid the degradation of having to live without a satisfactory minimum, that the utility of [any] additional... annual income... is negligible *by comparison*" (264). This is ridiculous, it doesn't work that way! No man's value scales are like that. There is nothing special about the goods obtained by means of the minimum that makes them *infinitely* more valuable than the additional (or different) goods purchased with more money. Not even the desire to prolong one's life has infinite value, and in any case we're assuming, as Rawls does, that the minimum is well above that necessary not to starve, and if the minimum *were* set that low, there would not be a problem of justice since the really worst off could make this much money just by begging.

The third provision is bad economics. In the first place, as Hare (1973) points out, this justifies maximizing average utility with a minimum

ling poisons" (108-9) contributes to exercises of citizenship. Most of the interventions Tomasi endorses seem like his own arbitrary, and unargued for, preferences.

floor, i.e., an insurance strategy, not maximin. The parties in the OP might agree on a utilitarian distribution that will produce an average of \$100 / week income on the extra condition that if anyone in the actual society falls below \$25 /week (an outcome one can “hardly accept” for Rawls), the rest will chip in to bring him up to that value. More important, 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 . $R = \{\$60, \$100, \dots, \$100, \$800\}$ is far more plausible. It must matter *how many* people belong to the lowest class; if capitalism expertly converts the “proletarians” into “bourgeois,” such that the confirmed losers are few in number, then it deserves credit precisely for elevating *most* of the worst off.

Reasons two and three illicitly pierce the veil of ignorance anyway. 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 bummed out in *any* society, no matter how wealthy, in which they are not explicitly subsidized. Regardless of where we place them, the worst off will acquiesce in low wages attached to entry-level jobs. 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. (“Common good” for Rawls perversely means the welfare not of everyone but only of the worst off.) 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 form and hone future human capital: knowledge of and experience with various technologies and compatibility with complex capital goods. Bush (2000) 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” (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 résumé! 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, as of course all do, 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 (or in prison)? At least the discipline of

the market might cure him of his flaws; welfarism will certainly encourage them.

It is true that a 16-year-old kid who works for a pittance at a fast-food joint cannot afford many pleasures or support a family regardless of the state of general prosperity. But if he is (temporarily) beyond any help in any economic dispensation, why focus on him rather than on adults or households?

What Rawls means when talking about how the worst off are to receive “wages plus transfers” is that the stealing from the better off in the name of justice is to proceed until overall productivity is harmed so much that the real income to the worst off begins to decline. “An analogy to this situation would be cutting larger shares of a shrinking pie. The optimal inequality would occur when a further increase in the share of the pie that is given to those favored by the state leads to a decrease in the absolute amount of pie they receive.” (Wagner 1983: 300) We’ll see shortly why this sort of optimization is a poor strategy. For now note that one reason to pamper the worst off is supposed to be that if *they* are satisfied with the social order, then so is everyone else (which fosters the stability of society). But this is just false. “Everyone else” may be offended because their welfare is neglected, indeed disparaged, as compared with a different system. In the OP they will not vote for a covenant that they will be unwilling to keep in the actual world because it harms their own vital interests regardless of its effect on the worst off. To quote Rawls, this will “exceed the capacity of human nature” (*TJ*: 154). It may be that the worst off will refuse to cooperate unless their income is boosted. The better off can respond in two ways. They can say good riddance in which case the worst off lose. Or they can themselves threaten to go on strike. In this standoff there is no clear winner. “Since everyone’s good is affirmed, all acquire inclinations to uphold the scheme.” (*TJ*: 155) Everyone’s good may in some sense be affirmed, but not nearly to the maximum possible extent. Thus, in Chapter 1 I argued that classical utilitarianism was untenable. But there are worse things than utilitarianism, and Rawls’ system is one such atrocity.

Let’s consider the “stability” argument a little further. How do you justify any social order, including one based on the difference principle, to any actual person if in a different order he would expect to fare better? If I am one of the worst off, what does it matter to me that the worst off are as well-off as possible when in a different society I would not be worst off at all? A similar question can be asked by any member of society. “Let’s *churn* things, and if we churn enough, maybe I’ll wind up on top.” Now of course few people are willing to specialize as professional revolutionaries who aspire to raise their own status by overturning the entire established order. Nevertheless, stability is safeguarded best by lawgiver utilitarianism because

it is in fact the case that the vast majority of people would be worse off in any other regime. Capitalism, in particular, ought to enjoy popular support and for that reason be stable.

Classical utilitarianism encourages private enjoyments. (Lawgiver utilitarianism neither encourages nor discourages them but leaves people free.) I am permitted to plant a garden next to my house or sing in the shower even if I am the only person who benefits from it. Such things are not only utilitarian but also Pareto-superior. (Not quite. As we saw in Chapter 1, classical utilitarianism does not *permit* anything, it only *requires*, specifically whatever action will yield best results in TKC.) Rawls, however, has no use for either. Are these to be banned because they raise my welfare yet fail to gratify the worst off, thus creating an unjust inequality? Such a policy is of course too insane to be casually attributed to our eminent philosopher. But another defense is that Rawls is concerned solely with the basic structure that distributes real income. This move, however, invites a different objection. Suppose a certain company makes private airplanes. It thus caters to the rich. Is this business to be banned on the grounds that it disappoints the worst off? A reply is that if it, and like companies, are banned, and the rich cannot buy private planes or other luxury goods, then there is no advantage to being rich. But then people will not strive to become rich in the first place, and the inequalities that boost the worst off will not be realized. Note that this argument treats the better off solely as means to the pleasure of the worst off. Under utilitarianism, the rich and the private airplane maker who serves them are a legitimate part of the economy. They matter at least in terms of utility; for Rawls they do not matter at all. Such is Rawls' savage upside-down disdain for everyone *not* at the bottom.

Barry (1989) makes this plain: "Those who are better off than the worst-off group have no moral standing for any complaint on the ground that they might under alternative arrangements be even better off. For the only reason for their being permitted to be better off than some others at all is that this is necessary in order to benefit the worst off." (233) First, if I am one of the talented, then I don't care whether I am *better off than* someone else (except for some positional goods); I care about my absolute prosperity; *that's* what's being ruined for me. Second, Barry tells the better off: "I don't care what *you* think. You are only a means to an end." The contractors in the OP would never allow themselves to be treated so execrably. Barry then suggests the following reason for maximin. Inequalities are allowed to grow as long as they benefit everyone. As soon as someone, especially the worst off, is hurt by any further increase in inequality, we no longer care about benefits and harms but want to promote equality. But this mixes things up goofily. The incomes accrue to the people, but equality accrues merely to the philosopher who *values* it, and these are incommensurable.

When it comes to the consequences of such an attitude, Rawls hesitates. Wouldn't it be irrational to deprive the better off of a million dollars for the sake of protecting the worse off from forfeiting a penny? Rawls claims that this scenario is unrealistic under his scheme because "great disparities [of wealth] will not long persist." I am arguing that the difference principle will not be chosen in the OP. But even if it were, it would demand capitalism, as we will see. So serious inequalities will indeed persist. 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, created around-the-clock, 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 unabatedly 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 income and happiness will. Rawls admits considerations of this sort, in fact depends on and explicitly invokes them in his own attempt at a 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." (*TJ*: 137) And concerning (2), Rawls can't keep the great majority beholden to the whims of the tiny minority of the worst off.

Rawls discloses that the difference principle "*relies* on the idea that in a competitive economy (with or without private ownership) with an open class system excessive inequalities will not be the rule" (*TJ*: 137, emphasis added). The word "*relies*" suggests that Rawls is not simply trying to placate the more radical egalitarians. He is clear that if "excessive" inequalities arose, he would abandon the difference principle. Well, here is his chance. But what would he substitute? Some congenial to him, Rawls, balance between equality and welfare of the worst off? He rejects this sort of "intuitionism." I say, damn the equality; the worst off can get bent; it's (lawgiver) utilitarianism all the way.

In the first place, we can ask just how exactly the difference principle is supposed to work. Scanlon (1973), for example, interprets it as follows: "First maximize the income, wealth, etc. of the worst-off representative person, then seek to minimize the number of people in his position (by moving them upwards); then proceed to do the same for the next worst-

off social position, then the next and so on, finally seeking to maximize the benefits of those in the best-off position (as long as this does not affect the others).” (1061) What’s the mechanism according to which this fabulous process is put into motion? The economy does not work this way; nobody has ever worked out this pattern of economic growth. This idea is less realistic than even the Soviet five-year plans. Rawls may counter that he’s dealing with “ideal theory.” But that’s like saying that under socialism everyone will comply with the directive “from each according to his ability, to each according to his need.” What if that’s impossible? Rawls himself worries about the “strains of commitment” and insists that the parties in the OP “are rational in that they will not enter into agreements they know they cannot keep, or can do so only with great difficulty” (*TJ*: 126). The difference principle, no less than the initial equality which it’s supposed to rehabilitate (refuted in Chapter 4), is a utopian pipe dream.

In an unhampered market, Rawls tells us, “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). Let’s refute this word salad.

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.” (*TJ*: 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” (*HA*: 117). Everybody pitches in to further 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 nation, 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 dis-

gust and tedium. (*HA*: 590-1)

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

Once again, the quandary before us is not how to divide manna from heaven among the Israelites, but how to determine which economic system will cultivate the greatest satisfaction of individual desires over the long run and for everyone in the world. The issue at stake is not how to distribute the swag from a successful raid but how to organize the system of economic affairs in order to inaugurate constant, steady, and maximum possible improvement in the standard of living of everyone year after year and decade after decade. The problem can be illustrated by exploring Rawls' discussion of justice between generations. This is a nontrivial issue from any point of view, and Rawls' take on it is obscure, but he most likely means two things: first, accumulation is mandated until all the "just institutions" (such as protections of liberty and equal opportunity) have been established; and second, 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 in this regard.²⁰ I suppose this is consistent. Yet it misses the point by a long shot. Mises argues as follows:

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)

This is truer today than in Mises' time and will be truer still 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. (*HA*: 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

²⁰ Rawls misunderstands the notion of time preference (§46). We do not say that people care about the less distant future more than about the more distant because the former is somehow more real to them or more compelling to their minds than the latter. In economics time preference means that people apodictically prefer to have any desire satisfied sooner rather than later; and that if I am to postpone the satisfaction of a desire, then it had better be for a purpose such as future prosperity greater than it would be if I had instead consumed earlier.

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. (*HA*: 171)

These are the achievements of capitalistic efficiency that Rawls so loathes. Without it, there is no problem of justice between generations; there is no possibility to babble exasperating and sinister platitudes about “just savings” (who are you, Rawls, to tell me how much to save?) because there are almost no future people at all, and those who will exist will live as hunter-gatherers (this abject poverty would not prevent them, in their little tribes, from voting and worshiping their idols, so this level of development would satisfy Rawls). A single natural disaster could wipe out all of mankind, and probably would sooner or later, at which point all problems of “justice” would cease to exist in any case.²¹

As far as Rawls is concerned, we can aim either for the biggest pie (utilitarianism) or for the biggest piece to the worst off (difference principle). This is an ill-conceived problem and a dilemma we don’t need to face. Our task instead 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 1,000th future generation. The market is a process that flows, and the mission of the economist-philosopher is to let it do so as smoothly and expeditiously as possible.

Economic maximization can occur in two ways: in the short run where some consumer goods, wherever they came from, are distributed among a given number of people, and in the long run where we optimize production to make the supply grow at the fastest rate over time and where population can grow too in sync with the burgeoning economy. For example, classical utilitarianism is a short-run doctrine while lawgiver utilitarianism is long-run, and they are incompatible. Any attempt to maximize in the short run such as by distributing goods until everyone’s marginal utilities are equal will, by virtue of entailing massive theft in the present and threat of like theft in the future, annihilate the economy and impoverish everyone in the long run. (Even in personal life, maximizing solely in the short run will kill you.)

Though of course Rawls does not advocate maximizing in the short

²¹ Perhaps Rawls would command “society” as a whole to save a certain amount, where by society he means the state. This is hopeless; as Mises observes, “history does not provide any example of capital accumulation brought about by a government” (*HA*: 851).

run, he slurs over the long run in his own way. He thinks the problem is something like this: choose between economy *A* which distributes \$100 to 10 people with payoffs ranging between \$5 and \$30 and economy *B* which distributes \$80 to 10 people where the range is \$7 - \$15. Now I think that even in this case the “utilitarian” *A* will be preferred to the “difference principle” *B*. But the problem is transformed if the distribuend can grow with time. If *A* grows at 10% / year, and *B* only at 2% / year, and it is *this* fact that makes *A* utilitarian, the choice will be different even for Rawls. Such imprudence, failure to provide for continuous economic development starting from spears and loincloths all the way up to a galactic empire (or, if we wish to curtsy to Rothbard, galactic anarchy), is a bane of many an egalitarian vision.

LU does not require that people *sacrifice* for the greater good as Rawls fears they'd have to do. Or rather if there is a sacrifice, then only in the short run, and only of the satisfaction of dubious (criminal) urges; each individual profits from social cooperation in the long run to a far greater extent. LU is not an impersonal moral theory that bids individuals to renounce their own ends for some extravagant nebulous goal. (No man was put on this earth for the purpose of maximizing total utility.) On the contrary, it orders society such that as many as possible of these ends can be harmoniously attained by individuals acting for their own sake on their own behalf under liberty. The cold-blooded and careless classical utilitarianism never stops weighing utilities and lives. No one is safe from being sacrificed in the name of the greater good if the mastermind manipulator feels like it. LU to the contrary is applied only once and for all. Its aim is to streamline and make efficient the process of economic development in the long run. Consider society *A* with free trade and society *B* without. It is likely that *transitioning* from *B* to *A* in actual practice may hurt some vested interests in *B*. There is *some* manipulation. But if we can prove that *A* is more efficient, and hence more utilitarian, than *B*, then *A*, once legislated, need never be disturbed. LU then is objective, it takes the long view, it outputs general rules and therefore countenances rights, it leaves citizens free and unburdened by duty, and it's “set it and forget it.”

Egalitarianism takes its inspiration from the world of matter and energy: all energy is conserved and hot bodies “give of themselves” selflessly and transfer their heat to cold bodies until equilibrium where every object's temperature is equal. Matter is supremely egalitarian. (Even in this case, there is no material “government” that somehow forces the transfer, nor any Cohenian egalitarian ethos. The equalization is not aimed at directly but is a side effect of “voluntary charity,” itself part of a kind of thermal energy utilitarianism: it's as if the hot object “feels” that it will lose less “marginal utility” from giving away heat than the cold object will gain.) But

humans are not merely material objects. The equivalent of energy for them, happiness, is not fixed or conserved, it can grow. The crucial undertaking is to maximize this rate of growth. Even if some short-run transfers are called for, they are best left to private charity. The view of human affairs as a zero-sum game, such that if one person or group ascends, another must descend, allows us to understand the call for equality: it seems “fair,” and it defuses human conflict. Men oppress women, whites oppress blacks, businessmen oppress workers and customers, man oppresses the “environment,” all “unjustly,” and the state must step in to equalize each group’s “power.” Egalitarians see no natural harmony in either the economy or life as a whole, no sacred unions, static or dynamic. Instead of a love affair between order and creative chaos, all they see is destructive chaos, endless bloody mayhem. There is no sense, for example, that social cooperation under capitalism and freedom benefits everyone, that antagonisms vanish in the long run, and often in the short run, too. Yet this is exactly the case.

Nagel (1991) effuses: “A prosperous society could guarantee everyone medical care, education, decent housing, unemployment insurance, child care allowances, retirement benefits, and even a minimum income.” (Ch. 9) But a society is prosperous only because it does *not* “guarantee” any of these things. The guarantees are a sure way of *destroying* prosperity, both future and even present. Some philosophers advocate the “welfare state,” e.g., some sort of “basic minimum.” In so doing they seek to substitute government violence for Christian charity. But at least they realize that the minimum is supposed to help only the cripples who cannot provide for themselves. They understand that even though “society” does not “guarantee” all the things Nagel likes, the market still produces them in abundance, and constantly improves them, for the overwhelming majority of the population. Under capitalism the “guarantees” are superfluous and counterproductive; under socialism they are futile. Nagel might not be impressed by this argument because he values equality for its own sake: “What capitalism produces is wonderful, but one cannot be content that the only incentives capable of such variety and efficiency of production also generate large and inheritable inequalities in the conditions of life...” Let him squirm as he tries to reconcile the irreconcilable. In fact, egalitarianism is not an innocent preference but a perversion contravening liberty, harmony, progress, even mental health (if people come to believe that exploiting superior talents is “tainted”), and Nagel and his ilk are in thrall to a serious intellectual vice.

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” whom the much luckier counterfactual present generation would sneer at with contempt for our, compared to theirs, dis-

mal poverty. Economic growth compounds over time; a growth rate difference that seems (at first glance) trivial one year after another becomes hugely consequential over 50 years or more. It is this unimaginable opulence that Rawls would deny to us and to our posterity with his half-baked 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.

Rawls apparently, deceived by Keynes, thinks that people are poor not because they spend too much but because they save too much. But saving is a self-interested choice, a sacrifice of immediate pleasures for the sake of a future gain. It's true that some of this gain accrues to future generations. That does not make the choice to save any less sagacious on the part of the parents. Even if in some cynical sense children "exploit" the parents who save, they do not do so unjustly.

The intuitionism adverted to above then 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. Taxes levied for "egalitarian" purposes of "redistribution" will certainly encumber the creative advance to everyone's detriment in the long run. Socialism is even worse. We discussed the Cuban model in Section 4.6 which consisted in the government taking over an evenly rotating economy and banning under penalty of death all further entrepreneur-actuated updates. Even this is problematic insofar as capitalists as owners of business firms to be expropriated are self-interested actors who abstain from present consumption for the sake of interest income, and what sense is there in having the socialist central planners receive interest? But in any case in an ERE all resources including workers get their marginal value product, and that is unequal. In order to equalize the incomes of workers, one would have to break, and in so doing discoordinate, the ERE. The resulting chaos is unfixable. So the economy will not only stagnate as it would in its evenly rotating state but deteriorate with endless shortages and surpluses in its broken state. The "pie" will keep *shrinking* with time.

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 egalitarian. Society *B* is less productive and grows slower but is marked by greater equality. It is true that after a long time, say, 50 years, *A* will outperform *B* so much that the masses in *A* will have a standard of living higher than even the elites in *B*. But at least in the meantime *B* will sport greater

equality. Is there any reason why we should not prefer B to A ? The answer is, we may well *already* be at 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 50 years ago. We may be reaping the consequences of past egalitarian devilries right now, and we would have to admit that our ancestors made a nasty mistake. If we are now in society Z and are mulling over two sets of policies, one of which will result in A , and the other in B 50 years from now, then picking the freedom that yields A brings on precisely 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. 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 draw upon the most effective means to fulfilling the difference principle. Rawls goes so far as to "not rule out Mill's idea of a society in a just stationary state where (real) capital accumulation may cease" (*JF*: 63-4). Suppose that a given free economy is suddenly frozen, Cuban-style, into an evenly rotating state for all time. Since this economy was growing up until the freeze, it must be superior, including for the worse off, to any economy that came before it. And in its frozen state it can no longer be fiddled around with, including by any further redistribution. So in this, and any, ERE the difference principle is satisfied trivially. It's hardly possible to divorce the difference principle from the idea of progress.

It is not in my interest as a citizen to champion "wide dispersal of property" favored by Rawls. I want productive property to be owned at any moment by those people most capable of satisfying my desires as a consumer. If that means allowing and even celebrating the billionaire class, then I'm all for it. Nevertheless, if by dispersal we mean not equality but something like perpetual flux, the roiling of income and wealth, then under *laissez-faire* capitalism the rich are in constant danger. Means of production become owned, and can only be kept, by the most gifted entrepreneurs. The sharpest of them may indeed get very rich (and may God be with them). But it is the vast middle class that thrives in such a society. Socialists argued that under capitalism workers toiled thanklessly for the benefit of their capitalist overlords. In fact, they work for *each other*; they both produce and consume. Income from wages dwarfs income from all other sources like rent, interest, and profit, and of course many workers save and invest and receive the latter kind of income also. ("[Sources](#) of Personal Income,

Tax Year 2019,” The Tax Foundation) Business revenues in the end resolve into income to factors of production plus profit, if any. There is no “subordination of worker to capitalist.” In the first place, the relation is contractual and mutually beneficial. But secondly, even if a man is ruled by the entrepreneur as a worker, he rules, or is sovereign over, the entrepreneur as a consumer. It serves no purpose, for example, for workers to try to “democratically” control their workplaces because not even capitalists do so: the consumers ultimately do. The workers already have all the “autonomy” they could ever want. The anti-capitalist counterrevolution has sought to strip the workers of this economic power. Taxes, regulations, prohibitions, trade barriers all have this in common: they transfer sovereignty away from the workers / consumers and toward the state. The working classes collectively own the great 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 gain 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 clue on 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 the pursuit of economic prosperity? Does Rawls want to arbitrarily repress human aspirations, hopes, and dreams? 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. If the better off view the worse off as a heavy burden on them, such that they would gain if the worse off vanished into thin air and quit slowing them down, then a serious disharmony is introduced into society. But in fact no such disharmony prevails under capitalism which makes good on the difference principle. Rawls thinks that in many circumstances the more advantaged can profit by ripping off the less advantaged. This is an error, at least under libertarian law, and there is no reason to restrain or weaken talented and daring go-getters.

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 satisfying consumers, the vast majority of whom are not rich. The "poorer strata" in their capacity as consumers are energetically *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 succeed in the "personal quest for influence and social position" by creating value for others, precisely as the difference principle prescribes. In the un-

hampered 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 waiting on the 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; bumbler 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 has everything upside down. Contra his opinion quoted above, the invisible hand works adequately; the particular “configurations” of different industries arise to facilitate best service to the consumers. It is not unjust that people who thus serve better earn more. Again, capitalism “permits a small class to have a near monopoly of the means of production” (*JF*: 139). Was Rawls not aware of the stock market open to all comers? Of entrepreneurial freedom to start new enterprises? Of the fact that capital is bid on and reallocated every day by businessmen? It is on the contrary socialism that confers upon the (very) small class of central planners a (total) monopoly of the means of production. “Freedom is slavery” is not a good argument.

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 seems 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 harness them for the sake of the world 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, bless 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 the people of European descent 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.

We can see that there is no such thing as a “welfare state”; it’s an oxymoron. The state does not promote welfare but retards it. It hinders capital accumulation; it slows down economic growth or stops it entirely; it cripples industry. There are, on the contrary, welfare freedom and welfare capitalism.

A consequence of all this is that the “worst off” who by Rawls’ grace receive “wages plus transfers” would be wise to reject the “transfers” and insist on wages only because this is how their *long-run* interests are

served.

To summarize our position: In static terms, where given amounts are allocated, the OP favors classical utilitarianism over the difference principle. In dynamic terms, where the amounts grow with time, it favors law-giver utilitarianism over the difference principle. Even if, contrary to fact, the difference principle were selected, the policy result would be, as with LU, laissez-faire capitalism.

Libertarians do not care about “distribution” of goods in the sense of prescribing that Smith ought to have this amount of money compared with Jones who ought to have some other amount. The full extent of libertarian concern with this problem consists in arguing that, roughly, capitalism promotes *general* prosperity, and almost everyone ends up partaking of the fruits of social cooperation. As Mises puts it, “there was one fact which [the reactionaries] would not be able to deny; namely, that capitalism provided for a rapidly increasing population a steadily improving standard of living.” Marx, he goes on to say, did deny this, holding instead that “capitalism results in a progressive pauperization of the working masses” (*HA*: 865). Marx was proven wrong. Accordingly, there is an egalitarian aspect to capitalism, it spreads its bounty far and wide. If there were such things as utility monsters, capitalism would in fact neglect them and thereby forsake some of its utilitarianism for greater equality. If this fact can help to convert left-liberals fussing over “social justice” to libertarianism, I have no objections.

Because economic progress steadfastly benefits all members of society, LU, when recognized as a cause of it, should be extremely stable, much more so than the contrived and weird difference principle.

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. The riches of some are the cause not of the poverty but precisely of the prosperity of others.

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.

5.1. 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 forgoes 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 of both scientific and 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. (*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. (*HA*: 845)

Rawls vaguely acknowledges 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.” (*TJ*: 458) Society and social cooperation are means to the realization of each individual’s private plans and dreams. Suppose it were argued: criminals are cancerous cells within the social body, and the police are the immune system that keeps these cells in check. This is not a terrible analogy, but it is misleading. All the cells and organs within the human body are ordered to the well-being of the whole organism. They have no value apart from their participation in this greater good and are irrelevant and disposable once they’ve outlived their usefulness. But the “cells,” i.e., individual humans, within society cooperate entirely for their own private profit. There is no overarching purpose which they are bound to pursue. Each individual looks solely after himself and serves others only for his own

sake. Yet the system works. 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, with rendering ideological support for law enforcement, or even with attending to political issues conscientiously.

When reading §79, I at first thought that by "social union" Rawls simply meant division of labor. Complementary factors of production are united within the economy. Or we might say that workers are united into firms, and firms in turn into the entire economy, thus the "social union of social unions." This was shown incorrect by his noting that this union is in fact how division of labor was to be "overcome." Somehow the habit of "justice" is to unite us into a seamless whole. Now who can gainsay that righteousness and wisdom bring peace on earth and good will toward men? It is perfectly legitimate to take pride in a well-designed legal system and uncorrupt machinery of state. "Good government" is an important goal, e.g., God will most certainly *not* bless America in her current state but will leave her to her sins. Moreover, an unjust society corrupts the individuals in it. For example, in the Soviet Union the life of a thief was considered by many to be romantic because even criminal freedom was better than the dreary grind of a law-abiding socialist peon. But still the basic structure, even when it is tuned to promote harmony and progress (see Section 4.5), is just that, a structure or framework not the substance. It is individuals who are united by justice for each other's sake.

Another interpretation is that there is a special communion between people who *agree* with each other on what is just and unjust. If *A* does something that he considers just and *B* considers unjust, then either *B* is outraged, or *B* punishes *A* and then *A* is outraged. Hostilities are inevitable. So this *intellectual* union is valuable. I argued in the Introduction that the Rawlsian system puts forward a political ideology. I could likewise argue that if everyone agreed with *my* ideology, things would be just peachy. We could have a party, invite everyone, pop champagne, and celebrate the triumph of justice. I suppose that's one of the reasons why both of us have written our respective books.

Perhaps in the private society "men become estranged and isolated in their smaller associations" (*TJ*: 206). But the remedy for this is knowledge of economics, not political engagement. 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. (*HA*: 144)

The compatibility of liberalism / libertarianism and “reasonable pluralism” or conflicting “comprehensive doctrines” is attained through 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 types, 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.

R. George Wright and Lawrence Crocker believe that Rawls’ egalitarianism does not go far enough. Wright (1977) proposes that a “community” is marked by “a continual state of reciprocal conscious awareness between persons” which “involves greater sensitivity to the needs, feelings, and interests of those with whom we have community” with “empathetic awareness and concern for our fellows” (77). Clearly Wright is talking about *love* in so doing confusing the family (and perhaps Christian sainthood) with the larger society. In his turn, Crocker (1977) posits the value of “solidarity” which applies to “situations in which there are strong feelings of cooperation, mutual identification, and similarity of status and position. People like the feeling of being part of a team where all members sink or rise together and equally.” (263) *He* confuses a group of employees within a business firm working under a manager on some project with the larger society. This latter can be described as “private.”

In short, the laissez-faire market economy raises everyone’s standard of living – the better off and the worse off alike – with alacrity. 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. Each party in the OP, even if he did attach special significance to the possibility of being born into initial poverty, with low IQ, etc., would dive headlong into laissez-faire capitalism as the economic system that will most efficiently quell his esurient cravings for primary goods including real income. We must conclude that

Rawls is badly mistaken about the implications of his own intellectual toy.

6. Taxes and Self-Respect

Ideologically, Rawls is a looter, but since he is not an intuitionist and specifically 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 even nefarious, 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 (UBI) under "welfare-state capitalism." Rawls adduces 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 types 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* opt 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 queries, "those who live on welfare and surf all day off Malibu?" He does not answer: "Yes, but the rise of the parasitic class is a price I am willing to pay

for a just society.” 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 restore their powers of cooperation to be another vital function of the state. But welfarism does the opposite: it cuts people off society, giving them an incentive to leech 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 deems 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... self-respect depends upon and is encouraged by certain public features of basic social institutions... (*PL*: 318-9)

He thus identifies a further flaw in 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 getting wiped out. 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 pol-

iticians 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. Nor is there any “reciprocity” between the tax-eaters and taxpayers, only unjust exploitation.

Colin Macleod (2014) 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” (172-8). It does not occur to him that equality and excellence are 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. It should not be controversial what the cause of *justice* would lean toward.

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 propounds the maxim 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” (*JF*: 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 presumption 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 echo 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, as in Nozick’s famous story, 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 idea is that Chamberlain is free to alter his behavior in response to the taxation laws. In what can serve as a 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? (*EL*: 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 pillaged, whether by emigration or by switching to a different job. To imitate Mises, the only way left to the individual out of tax serfdom in the name 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. We saw that lawgiver utilitarianism can be implemented by means of laissez-faire capitalism, but the difference principle, to the extent that it diverges from utilitarianism, cannot be realized by any distinct and hitherto elaborated form of economic organization. But it may still be possible to use the tax system to seize and "redistribute" some cash. It's clear that it is this sort of legalized theft that Rawls is celebrating when he casually describes the income of the worst off as consisting of "wages plus transfers." "Blessed," he intones, "are those who hunger and thirst for other people's property, for they will be filled." Under *his* lunatic dispensation, you *shall* covet your neighbor's goods.

Now who are the worst off? In a review of Michael Shellenberger's *San Fransicko*, Alexander Riley [writes](#): "The most basic progressive idea... is that society should be organized around the needs of its most downtrodden: in other words, the *lumpenproletariat*. All must be shaped to accommodate the criminals, addicts, and mentally ill who exist at the margins of normal society. ... It is shocking to reflect on how widespread such ideas have become in contemporary America." ("The Progressive Worldview Destroys Cities." *Chronicles*. October 1, 2022) This view is as plausible as any. Thanks, Rawls.

Suppose the worst off are identified with the unskilled workers. If the unskilled are not drug-addicted schizos, then perhaps they are for the most part simply young adults. To feed them taxes is to discourage the acquisition of skills. It's just as absurd as giving underperforming children high grades in school to make them feel better. Society cannot work this way.

Another idea by Rawls is that the worst off are "all persons with less than half of the median" income. Well, that's a quarter of the population. The injunction to maximize their welfare is somewhat utilitarian, and we can ask what the better off 75% did to deserve to suffer ignominy at Rawls' hands. (I know, they were scandalously "lucky.") Why privilege the wife while mistreating the husband and the two kids? In any case, 25% of all households cannot reasonably be on welfare, that'll wreck the economy.

The worst off may be those least gifted who are in addition born into poverty, such as because their parents are least gifted too. The difference principle appears to command everyone else to slave away for them. In America today this would entail in particular government welfare for blacks. This too seems counterproductive. Don't we have enough racial strife as it is?

Perhaps the worst off are immigrants. For the U.S., it used to be that they chose to enter the country in search of "opportunity" and to enjoy the blessings of liberty. They were eager to work hard and in so doing not only lift themselves up but also profit the natives. In a sick inversion, Rawls would encourage them to come here to prey on Americans by getting on welfare.

Again, maybe the worst off are those nitwits who invest into the stock market badly and lose their life savings. Yet again subsidizing them is problematic given Herbert Spencer's dictum that "the ultimate result of shielding men from the effects of folly is to fill the world with fools."

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" (*TJ*: 90). But while voluntary exchange benefits both parties, taxation shatters the harmony of human interests: there arise the class of taxpayers and the parasitic on it class of tax-consumers. When the better off as tax serfs are manhandled by the state so that the worse off as tax lords can be appeased, the former would wish that the latter *drop dead* and free them from the burden of feeding their appetites. The worse off, like the welfarite surfer, 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 are vampires who suck the life force out of the productive classes.

It may be that the market can flourish only if the state is empowered to punish criminals. This is a reason to submit to taxation to pay the police. It may also be that some public goods like roads are important. Presumably, most drivers find it worth their while to pay the gas tax levied to finance road building. (We don't know that for sure, but assume taxation is the only feasible solution.) In this case the tax money is used for a *public* purpose.²²

²² A crucial problem with government provision of public goods is that the market process is disabled there, so there is no relentless creative advance of improvement for them. E.g., the market produces and improves cars much faster and more efficiently than the government produces and improves roads. We let the state own the roads *reluctantly*. It makes sense to privatize public goods whenever it becomes possible such as through technolog-

But aid to the “poor” is straightforwardly theft. It is indistinguishable from a poor man burglarizing a middle-class family at night. The better off lose, the worse off profit. The tax money is used for *private* enrichment of some citizens at the expense of others with no pretext that any utilitarian end is served in the process. To add insult to injury, the government is calling this kind of unjust violent act “charity,” pretending to have good intentions.

It may be that a certain city is infested with bums begging on the streets. One way of dealing with this curse is to round up all the beggars and buy them a one-way plane ticket to Siberia. But that’s like hiring an exterminator to drive all the vermin next door: even the Chukchi might object. Sending them to prison may cost more taxpayer money than putting them on welfare. The latter may be a practical, if unjust and last-resort, solution.

Fraternity or brotherhood of men can be realized through the Church (which adds to it Fatherhood of God) or through various private mutual aid organizations. If some people are too hard-hearted to donate, that’s fine too, and their “selfishness” is not a sufficient reason for others to violate their property rights.

Taxes decimate not only fraternity but also self-respect. Rothbard makes it clear:

parasitic predation and robbery violate *not only* the nature of the victim whose self and product are violated, but also the nature of the aggressor himself, who abandons the natural way of production – of using his mind to transform nature and exchange with other producers – for the way of parasitic expropriation of the work and product of others. In the deepest sense, the aggressor injures himself as well as his unfortunate victim. (*EL*: 50)

If tax-devouring parasitism is a sinful, contemptible lifestyle, then it can hardly be a way toward self-respect on the part of any social group.

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 tiny minority. It seems irrational to worry about being instantiated as one of them after the veil is lifted. It is supremely rational, however, to be concerned with how productive human labor will be in the society being constructed. Insofar as the welfare state hinders economic growth, it suffers from the same defect as all anti-utilitarian systems: in a long enough run the worst off under the system recommended by lawgiver utilitarianism will end

up in a better shape than under Rawlsian harebrained “property-owning democracy.”

If there are universal human rights (I think so, though these rights must be correctly derived), then living in a society which denies you these rights harms your self-respect: you’re treated as less than human. So some respect you are entitled to simply by virtue of being human. The rest is all earned; you respect yourself when you succeed and despise yourself when you fail. Liberty grants you the first kind of respect but not the second. For the second you get not success but the right to succeed with the right to fail inevitably attached to it.

“The basis for self-respect in a just society is not then one’s income share but the publicly affirmed distribution of fundamental rights and liberties,” says Rawls (*TJ*: 477). Clearly, it can be both. Mises (1994), for example, does not mince words: under capitalism, he argues, every man “reads in the eyes of his wife and his children the silent reproach: ‘Why have you not been smarter?’ He sees how people admire those who have been more successful than he and look with contempt or with pity on his failure.” (10) There cannot therefore be any such thing as equal distribution of self-respect, or “bases” thereof.

Liberty pays homage to the fact that there is a diversity of good, specifically of good lives, so perfectionism taken too strictly may rashly close off some legitimate paths. This promotes healthy development of personality. But it at the same time exposes us to the diversity of evil. This can retard healthy development. It’s a bargain, but I think in the end one worth making.

7. Two Ledgerdemains

7.1. 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 antidemocratic, favoring those restrictions on majority rule which he believes will be endorsed in the OP. Can this constitution presumably with its bill of rights be changed? If not, then it is merely the deliverances of the original position set in stone eternally and is not democratic essentially. If it can be changed, then it differs from parliamentary democracy only in degree, such as by calling for a supermajority to authorize an amendment where a democracy would require a simple majority, and hence is philosophically uninteresting. Democracy seems less like a means than obstacle to Rawlsian justice. It will not work to reconcile the two 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.

So on the one hand Rawls is being pragmatic and treats democracy as a means to an end. I agree that it *is* merely such a means, though I disagree with Rawls about the end it is supposed to serve. On the other hand, he justifies democracy as an aspect of equality, and I do not buy this argument.

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 un-

der the veil of ignorance then miraculously reaffirms their democracy in the actual society. The OP is only a philosophical gizmo. It is true that the parties in the OP have 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* 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. Democracy is not necessary for “government by discussion”: people can discuss things and influence rulers under other regime types. Nor is it sufficient for it insofar as democracy, like all politics, is a way to capture power and impose your will upon your enemies.

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.

Common law is a discovery of the judicial aristocracy. It would be grotesque to demand “democratic science”; surely, judges have a role to play in lawmaking.

Even if “equality” is a feeble reed to hang democracy on, we have not been altogether hamstrung. For example, there is a utilitarian rationale: since the laws are a public good, at least they will please the majority. Taxation in particular must clearly be subject to democratic control. That taxes are approved by the majority does not render them any less unjust, but at least if justice is traded off for welfare, there is greater assurance under democracy that welfare is in fact increased. Every step in the production and sale of private goods is Pareto-superior: every exchange benefits both par-

ties while harming no one. The production of most public goods financed by taxes is not like that because it is impossible to ensure that everyone pays less than what the good is worth to him. At best, public goods are utilitarian such that on the whole the benefits outweigh the costs even if some people are thrown into the meat grinder. You can't, on this view, make an omelet without breaking a few eggs. This "democratic" public goods utilitarianism can augment lawgiver utilitarianism as a supplement. But other laws are not arbitrary; they are not physical goods like candy. They are objectively efficient or inefficient, just or unjust.

It may be that *political* sovereignty of the people is necessary for the preservation of their *consumer* sovereignty. It safeguards capitalism and arrests the slide back to more primitive systems. Milton Friedman (1979) argues this way:

Industrial progress, mechanical improvement, all of the great wonders of the modern era have meant relatively little to the wealthy. The rich in ancient Greece would have benefited hardly at all from modern plumbing: running servants replaced running water. Television and radio – the patricians of Rome could enjoy the leading musicians and actors in their home, could have the leading artists as domestic retainers. Ready-to-wear clothing, supermarkets – all these and many other modern developments would have added little to their life. ... the great achievements of Western capitalism have redounded primarily to the benefit of the ordinary person. These achievements have made available to the masses conveniences and amenities that were previously the exclusive prerogative of the rich and powerful. (147)

Without political power, ordinary people would be at the mercy of a small clique of elites who would not have their best interests at heart.

Likewise, democracy might dampen wars. Under nondemocratic regimes, the rulers get all the benefits of war (if they win), while the people suffer all the costs. Such externalization turns the world into a powder keg. The Congress in the United States has the exclusive authority to declare war. It may be that it thinks the benefits of a war outweigh the costs. But at least, when the people are empowered, the costs and benefits are compared by the same group.

The utility of a popularly elected legislature consists also in the self-preservation of the people. Without it, the monarch, say, may convert to hard-core environmentalism and decide to liquidate half the country to "save the planet." This is easier today than it was in ancient Rome under Caligula who famously wished that all the Romans had just one neck so that he might decapitate them with a single strike. Under democracy, such an

atrocities seem less likely. The monarch is a single point of failure, whereas the sane among the voters can usually be expected to outnumber the out-right crazies.

Mises considered democracy to be a means to a definite and not especially glorious end. Every government, he believed, in the long run conforms to the wishes of the majority of the governed. A popular government is an inevitability, and it can be brought about either peacefully or violently. Democracy allows the transition to happen peacefully, which is an advantage.

Another argument is that “with power comes responsibility.” Democracy, by vesting power in the average Joe, encourages him to take responsibility for the common good. It raises him from the slime of dull obedience to authority into the dignity of a self-governor. This evokes the image of a noble, strong, wise, proud citizen fiercely telling the government, “Don’t tread on me.” Of course, the power to vote is minuscule, and so is the responsibility it brings forth. And “self-government” is an oxymoron; by definition political government involves some people governing others, not a “self” governing “itself.” But if democracy elicits such virtues, then I am in favor of it.

A thorn in its side is that even if democracy as a concept has merit, it is impossible to govern large states justly and efficiently regardless of the method of appointing rulers. We are better served by decentralization and privatization instead. Democracy can work tolerably well on the local level, though less so in big cities. It can even make a difference on the state level. But only because state governments are already limited regarding the damage they can do: they can’t go to war, they can’t print money, they can’t erect trade barriers, they can’t overtax or overregulate as much because they face competition for residents and businesses from other states. Democracy on the federal level is a joke. Thus, that democracy is in some cases better than other forms of government does not mean that it is better than complete *absence* of government.

Rawls is not interested in these sorts of arguments. As a result, given that voters can approve of both equality and inequality, his invocation of democracy for the sake of putting a gloss on his egalitarianism is disingenuous.

“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?²³

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.

7.2. AUTONOMY

“Acting autonomously,” Rawls tells us, “is acting from principles that we would consent to as free and equal rational beings.” (*TJ*: 453) I fear this is vacuous. Rawls means something to the effect that you are autonomous when even your constraints are willed by you. But why will any constraints at all? Well, because then other people will be likewise unconstrained which may hurt you. So you want to maximize the sum of the advantages of (1) your own freedom and (2) other people’s law-abidingness, given that you have to follow the same laws that everyone else also follows. And this is fine, but we saw in Chapter 2 that the OP is not too helpful in solving this optimization problem.

“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,

²³ Sen (2009) absurdly attributes the disappearance of famines to democracy rather than to capitalism.

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 (and philosophical arguments) up to date.

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

Thus, having contemplated the truth, intellectually *autonomous* agents will choose to create a *free* actual society.

Conclusion

Rawls' tool of the original position (and complementary concepts) is his main, and I would say only, innovation in philosophy. In this book I take the OP seriously. It must not be forgotten, however, that in Rawls' hands it is simply a slick attempt to rationalize his own intuitions. Seen from this perspective, the OP is as fake as Rawls' comical hatred of "luck." Precisely for that reason turning his own contraption against him is of polemical use.

Everything else Rawls has written is tedious and obscurantist baggage. His many disciples parrot his empty verbiage as gospel. For example, with respect to Rawls' obsession with "democratic" solidarity, I say two things. First, I mock his value system. (Not all of it. I affirm some of Rawls' liberties, though not his justification for them.) Second, this value system does not follow from, nor must be presupposed before, the deliberation in the OP. I have argued that such deliberation will in fact yield a libertarian polity.

C.1. LIBERTY

Those liberties will be voted for in the OP by each party that, when granted to *all others*, will maximize that party's own profit in the long run, his felicity from the pursuit of his own conception of the good in the actual world. These liberties will safeguard any such conception including those that go far beyond mere exercise of ethical and political self-determination. (Not everybody enjoys squabbling on social media. Rawls was a philosopher, and he thought the only substantive liberty worth having was the liberty to do philosophy. He conceded that occupational choice might be a basic liberty only because he personally did not feel like being forced to work in the mines instead.) Each party will want to live in a society in which men are free to create wealth for each other. The economic rights of man are thus enshrined as basic. The contractarian method plots to maximize each party's profit in the original position with the lawgiver utilitarian consequence that total profit (taken loosely as argued in Chapter 1) is maximized in the actual world.

A common man may well find economic liberty useless to him personally. Green with envy, he reviles the successful businessmen. But, in stark hypocrisy, he also rushes to spend his money on the products made by them. He, without realizing it, gains enormously from the liberty granted to the more enterprising, industrious, audacious, creative individuals. He is not to be blamed because renowned philosophers do not realize it either.

The choice of LU as the highest principle of justice in the OP is

plausible insofar as each party, deprived of knowledge of himself as an *individual*, wants to know how to construct the best *society*. As a result, we're also permitted in the OP to deny to others the liberty to "steal" because such a liberty will undermine social cooperation and harm every party in the OP. Voting this way will respect the conceptions of the good (or evil as the case may be) even of common beggars and thieves. They too benefit from a progressing economy emancipated by *generally* secure property rights.

C.2. OPPORTUNITY

The ancient and medieval conception of distributive justice was understood as giving everyone his due (specifically political offices, honor, praise, gratitude) according to his moral merit. On the other hand, as regards property, modern economics has shown that the market distributes the bling according to its own logic completely independently of any moral merit: income does not accrue to the wisest or holiest or most courageous.²⁴ Rawls rejects both insights. Nobody merits anything, he claims; every human achievement, every glory, as well as every failure and disgrace, is ultimately due to luck. Nor is the market distribution acceptable. Thus freed from the shackles of traditional morality and economic law, Rawls fantasizes about shoving around money.

Hark back to the parable of the talents referred to in Chapter 3. God is a "hard man" who harvests where He has not sown and gathers where He has not scattered seed. This is because God sows not directly but through the mediation of nature and randomness. In particular, God shares His creative power with humans in reproduction and influence. God is an entrepreneur who takes advantage of opportunities, such as to bestow grace, which He Himself did not directly originate. So in this sense, we are a random arrangement of the amino acids (though of course not *merely* that), and do not *at the beginning* deserve to be a beneficiary of any particular such arrangement. That does not mean that we do not own our gifts, or that the state does instead (the most extreme version of communism, eliding even self-ownership, ever proposed), or that the more gifted by that very fact owe "compensation" to the less gifted (a freakish idea), or that what we *do* with our gifts is "morally arbitrary." The economy of animal nature is survival of the fittest; the human economy is survival of the most productive; the divine economy is survival of the saintliest; but in all of these, those who survive and inherit the world (wilderness, wealth, kingdom of heaven) *deserve* both their reward and the goods that made attaining it possible.

²⁴ Though superior economic contributors can be taken to have "civic" virtue (Gourevitch 1975: 507). Billionaires are proper objects of admiration at least in this respect.

Recall the two methods of political philosophy: top-down positive law especially our lawgiver utilitarianism, and bottom-up natural law. In positive law, desert depends on justice: you deserve a *good* (in contrast with evil like a vice) that you *lawfully* obtained in an *efficient* society. (We can say that such a society realizes social justice.) Rawls has a similar notion he calls “legitimate expectations.” Whatever the institutions of his system allow you to claim you should be able to enjoy in peace. In natural law, on the contrary, justice depends on desert. The worker deserves his wages, and the entrepreneur his profits which can be shown independently, and justice consists in respecting such claims. In particular, the worker has a *contractual* right to the wage agreed to and *natural* right to have the contract honored. He thus deserves both not to be deceived and not to have his rights violated. Rawls feels the need to gainsay these obvious facts, but no fancy rhetoric can obscure them.

It may be objected that you deserve what you earn on the free market, but you don’t earn it because you deserve it. And that’s true. This may well be the difference between retributive and distributive justice. If Smith punched Jones in the nose wrongfully, then, according to the doctrine of proportionality in punishment, Smith himself may deserve to be punched in the nose. Here justice is supposed to give you what you deserve. But no one deserves any particular income which depends on the complex market process. Here what you deserve is what a just economic system gives you, or lets you have. (See Scheffler 2000.) Of course, the market tends to reward people in a meritocratic fashion in proportion to the value (expressed in willingness to pay) other people attach to their offerings. But you cannot up and announce to the world, “I deserve to get the full fruits of my labor, and you’d better give them to me.” You do get them, but indirectly. However, Rawls’ denial of desert does not take this form. As we have seen, his aim is to defend (1) the setup of the OP and (2) equal distribution of income and wealth in it. I have argued that this does not work.

Rawls does not like envy (though he thinks some of it is “excusable”), but the claim about moral arbitrariness of any and all success fosters envy, given especially the idea that no one deserves even his good character and disposition to justice. If my failure is not my own fault, and I view myself as an impotent victim of bad luck, why shouldn’t I help myself to your property (if there is such a thing) that likewise you have only because of your own better luck? A society based on such a corrupt foundation will never be stable. And what if criminals argue that they don’t deserve punishment either?

Unlike formal equality of opportunity realized in the free market within the system of private ownership, “fair” equality is neither possible nor desirable. It is not possible because the market morphs in real time.

Opportunities for profit are will-o'-the-wisps, constantly flaring up and evanescent after being taken advantage of. It is not desirable because life is not an athletic race in which everyone starts out equal. Enforcing such equality would nuke the incentives for people to struggle to *enhance* their own and their children's opportunities, essentially dumbing everyone down and blunting the edge of human action. Formal equality already promotes the common good by invigorating the competition between people, by strengthening their ambition and drive to win, and thereby raising productivity. "Fairness" adds nothing to this project.

Egalitarianism, Rothbard maintained, was a revolt against nature. Luck egalitarianism, concocted in an attempt to outdo the older socialists, is a revolt against randomness. It promises to all freedom from bad luck, at the expense of the lucky. As we have seen, the opinion that inequalities due to "brute" luck must be evened out is a misbegotten atheized attempt at a theodicy, i.e., defense of the *state's* goodness and omnipotence in view of the existence of "evil." Now mere *inequality* in luck is not an evil that humans need to remedy. It is irrational to hate differences because they are differences. No luckist has ever proven that anyone deserves to be *given* good luck. The lucky do not unjustly oppress the unlucky and hence do not deserve to have their good fortune *annulled*. Some bad luck can be insured against; other times it's a metaphysical evil, i.e., an inescapable constraint on all human endeavors imposed by the universe; in both cases it is not a problem of justice at all. Luck rewards the prepared and the skillful, and trying to equalize it will discourage preparation and picking up skills. Human stiving makes life in part unpredictably chaotic which unremittingly generates and destroys profit opportunities. There is no sense in which this kind of fortune can be equalized or compensated for. Random variation is just what makes division of labor possible and hence is a blessing. In short, luckism is a major retrogression in political philosophy.²⁵

C.3. EQUALITY

Libertarianism has been ably defended by its proponents from the point of view of deontological natural law and from the (lawgiver) utilitarian perspective. It is also egalitarian in three senses. First, the free economy revolves around the consumers, and wages constitute the bulk of incomes that enable consumption. The fruits of economic progress are continuously distributed to the regular folks. The goods available only to the rich become, with time, more and more exotic, and they, too, eventually get mass produced and trickle down. Second, no customer is spurned; everyone is served; everyone's money is equally green. Commercial culture deters arbi-

²⁵ See Chernikov 2021 for further refutation of luck egalitarianism.

trary “discrimination.” Third, though I do not believe that equality is a “sovereign virtue” as Dworkin supposed, it grants to all people the same rights to life, liberty, and property such that everyone is equal before the libertarian law.

Instead of equality, there is rather universalizability. The latter is useful as a reality check, but it is not an independent value or virtue but a corollary. For example, physical natural law describes the behavior of hydrogen atoms. It follows that if it applies to one atom, it applies to all of them. Similarly, the Rothbardian natural law, because it deals with *human* nature that is shared by all men, *prescribes* rights and duties to everyone alike. Classical utilitarians want to maximize utility, and it seems that the utility of one man is as valuable as the utility of any other. Therefore, each enters equally into the utilitarian calculus. The human soul has a definite structure as described by the chakra model. The virtues, such as the four cardinal virtues, each maps onto its own chakra and represents its healthy condition. But every man’s soul looks and works like this. Therefore, all are advised to cultivate the same set of virtues. Universalizability then can be proven on different grounds for different ethical theories.

Formal equality before the law secures individual liberty equally for all, in so doing, more important, *maximizing* “total” liberty. People who advocate such equality are therefore justified in calling themselves liberals (i.e., libertarians). But equality of material possessions destroys liberty for all. People who advocate *this* are not liberals and call themselves such typically in a deceptive attempt to mask their true intentions. It is probable that Rawls was himself deceived. The fact remains that his liberalism is attenuated and self-contradictory. “Liberal egalitarianism” is an oxymoron; if you are attracted to both values, you can commit to one or the other but not both.

Take occupational choice which Rawls elevates into a basic liberty. If such freedom is allowed, then the communist state cannot pay all workers the same hourly wage. Under equal wages workers will be choosing careers randomly based on such things as what they enjoy doing, without any concern for what society needs the most, as both the information and incentives necessary for the latter will be absent. It will fall to the central planner to determine one’s occupation, train him, and assign him to a particular job. Hence income equality is incompatible with freedom of occupational choice.

Likewise, what is the point of equality of opportunity under equal distribution of bling? There is equal opportunity to do what? If to strive to improve one’s lot in life, then this is forbidden because such striving will result in inequalities. If all jobs are such that they pretend to pay us, and we pretend to work, of what value are the opportunities to compete for posi-

tions? Both liberty and opportunity for Rawls have priority over the principles of distribution of bling. If then these two ideals are incompatible with equal such distribution, then this lowest-priority equality is a nonstarter and cannot be entertained by a philosopher even as a first step in reasoning.

“[I]t is persons themselves who own their endowments,” Rawls admits (*JF*: 75), without seeing the far-reaching inegalitarian implications of this concession.

People are not equal, certainly not in the economic sense; at their best, they are complementary, like the numerous pieces of a jigsaw puzzle uniting in diversity to make a beautiful whole, a great society. Every piece plays *some* part and is valuable, but pieces are unequal in both function and importance. The market process sketched in Chapter 4 likewise features yin-yang complementarity, continuously making the unity more whole and the diversity deeper.

A marketing email I once received summed up this point: “Truth #1 – You are valuable as a person, intrinsically. Happiness is your birthright. You are worthy of love and belonging no matter how much you fail, how few skills you have, or anything else. Truth #2 – When it comes to your value in the market, Truth #1 doesn’t really matter. What matters is what value you can create for others. You are not valuable in the market just because you are valuable as a human.” Now every man is an *objective* good who ought to be loved, by nature as a fellow, and by grace as a son of God. There is equality in the good willed: “true” happiness. In this sense love is *unconditional*. But we can love some people more than others. Since saints merit more happiness than sinners, we wish greater good to them and to that extent love them more. We ought to love those closer to us such as kin or countrymen with greater intensity and for more reasons than strangers (due to the greater natural union between lover and beloved). Externally, we can also benefit others differently (e.g., we may show greater love to a sinner by leading him to repentance), etc. (*ST*: II-II, 26) In the market, we are all *subjective* goods to each other, and love is definitely *conditional* on what we can do for each other. There is no equality in our subjective value in terms of how much our contributions are worth to other people. This inequality naturally generates the inequality in our earning power. It is unjust to propose to crush the second type of differences in the presence of the first type. If the market loves Smith more than Jones, it is fitting that Smith should receive more tokens of friendship from it (i.e., money from the consumers).

Differences in incomes are due to two factors. First is differences in the marginal productivity of different workers. Star football players earn more than ordinary teachers, and you can see any price theory text for explanation why. Second is differences in entrepreneurial gumption, seizing

profit opportunities. In taking an opportunity an entrepreneur instantly denies it to all others. On these two inequalities the capitalist economy is built. Without them there is no production, and without production there is nothing to distribute. Hence the initial equality that underpins the difference principle cannot be sustained.

It follows that if inequalities in natural and social assets are important for production, and production is important for distribution, and the distribution is a moral matter, then inequalities cannot be “arbitrary from a moral point of view.”

C.4. DIFFERENCE PRINCIPLE

Rawls’ argument is that the social order governed by the difference principle is particularly stable because it is supported even by its poorest members who realize that in any other economy their positions would be even worse. It’s true that the support of the worst off is thereby secured. These people have been bought off. But not the support of *everyone else* whose interests are on the contrary deliberately slighted as they are told that they cannot have more fun because the least competent and worthy classes object to it. When this is understood, the difference principle loses much of its plausibility as a part of social justice. The “strains of commitment” on the part of the better off are too great, and they cannot be expected to bear them.

Even if we accept the difference principle, we saw that there is no way to view “distribution” apart from not only production but also economic progress. But given such progress, all men are brothers because the economic interests of all, their interests in their growing prosperity in terms of primary goods, the more and less gifted alike, are harmonious in the long run. There is no need to single out the worst off for special treatment or to give them any veto powers. Chambers (2006) asks us to weigh “concern for each and every individual and how they fare in the system” and a “race that rewards those who make the most meaningful and significant contribution” (87). In fact, there is no such opposition. Almost every individual ultimately fares best in just the system which “rewards” contributions. The original position’s egoistic economic contract and the lawgiver utilitarian political contract become indistinguishable because the same basic structure that profits each will profit all and vice versa.

The ancients did not have the ideas of economic freedom and progress. Modern distributive justice theorists ignore them too, though they should know better. Social mobility means that anyone can rise out of poverty. Fleischacker (2004) remarks that Adam Smith’s “predecessors regarded ‘the poverty problem’ as the problem, primarily, of how to cope with the vice and criminality of the lower classes” (64). The trouble was that

they considered *all* poor to be scum. Smith's sympathetic portrayal of the poor as having dignity was a notable ideological breakthrough. E.g., "to those who complain that the poor are naturally indolent, Smith declares that, on the contrary, they are 'very apt to overwork themselves'" (65). In fact, both indolence and ambition are found among the poor, but the indolent are poor permanently, while the ambitious are poor only temporarily. (Likewise, and unsurprisingly, the indolent *rich* are rich temporarily.) So the problem has come full circle. Under capitalism, the lumpenproletariat – criminals, drug addicts, the insane, the shiftless – is the only remaining class that's irredeemably poor, and the solution is to repress and control it, not coddle and subsidize it. These people's failure is their own fault, and they richly deserve their poverty, no pun intended.

There is then no identifiable stratum of the worst off, other than the lumpens, whom the Rawlsian theory urges us to uplift. The economy is in constant flux, with some people and families ascending and others descending in unpredictable ways. At every moment fortunes are being made and lost. Rawls sidesteps the fact of social mobility by stressing that "the least advantaged are, by definition, those who are born into and who remain in that group throughout their life" (*CP*: 364). (What about those highbom who sink into the lower class?) For him, it's not true that you win some and lose some; winners will always be winners, and losers will always be losers. But in that case, in the short run *no* social system can benefit the losers, and in the long run *only* capitalism can benefit them insofar as even the losers remain consumers.

I agree with Rawls that liberties and opportunities, rightly understood, should be equal. Unlike Rawls, I hold they are equal, and maximized, under *laissez-faire* capitalism, not under the mythical "property-owning democracy." Capitalism also abides by the difference principle as regards income and wealth. Hence there is no conflict between "liberalism of happiness" and "liberalism of freedom"; the same *classical* liberalism will achieve both ideals.

C.5. TAXES

Initial equality is an end-state and patterned ("to each equally") distribution, to use Nozick's terms, indeed to the extreme. The system incorporating just inequalities may be much less so. But the degree to which it is end-state or patterned depends on its exact details. Rawls rejects welfare-state capitalism, but many commentators do not, thinking that it would consummate the difference principle. (These intellectuals are very excited by their power to tax.) In such a case, this system, being essentially capitalist, is mostly historical and unpatterned, e.g., no predictions about distribution can be made within it. But to some extent the philosopher's explicit *design*

will substitute for the free market's unplanned spontaneous order brought about by human *action* only. Of course, any system that enshrines some nonmarket distribution as just will be end-state or patterned in this sense. But is the welfare state Rawlsian? You cannot achieve equality with progressive income taxation, but you can reduce social mobility and thereby entrench inequalities, devitalize entrepreneurship, and hobble capital accumulation. These things are not in the interests of the least advantaged. Consider the case of the famous investor Warren Buffett.

Buffett (2011) suggests that taxes be raised on the "mega-rich." One unsurprising explanation is simply that that's where the money is. It does not make sense to rob the poor, does it? But why stop there? Who else has lots of money? How about banks? And investment funds like, say, Vanguard S&P 500? The government could raid all of those to raise money. And why should the government even condescend to pay for its purchases with money? It should be able to conscript anyone, including the mega-rich, and put them to work, e.g., as cannon fodder or peasants on collective farms.

Here is the real reason why Buffett seems so keen on opening his wallet. It is that the super-rich are rich because of their *net worth* on which all taxes have already been paid! He does not disappoint: "I would raise rates immediately on taxable income in excess of \$1 million." Wealth is not the same as income. A tax like this will make it harder for the poor to *rise to the rank of the rich*, i.e., to acquire the wealth *they do not yet have*. It will handicap poor yet eager and tenacious entrepreneurs in their bids to challenge and possibly dethrone Buffett.

Again, Buffett is set for life. He does not have to lift a finger anymore to provide for himself. Other people who have brilliant ideas and want to become entrepreneurs, on the other hand, have yet to prove themselves. If taxes prevent them from ascending into the upper class, then they will remain poor and fail at the same time to create wealth for the rest of us. Buffett aims to halt that process. He may be likened to a political party that won elections and announced an end to democracy: "We have the power, and we'll have it forever." It came to power by legitimate means but decided to abolish elections from then on. Even if Buffett became rich honestly, he now wants, by using the government, to prevent other people from getting rich. Such people would in the market process enrich not only themselves but society, as well.

We may even postulate a class struggle between high-*wealth* individuals and high-*income* individuals who are still building up their fortunes. Ideally, membership in any elite, including that of the industrial magnates, is open to all who qualify. Sometimes, however, existing members seek artificially to bar newcomers from entering the club. This is seriously antisocial.

The confusion between wealth and income may be the basis of a fallacious argument for progressive taxation from utility analysis. It is argued that a rich man benefits less from a marginal dollar than a poor man. To rob the former of \$1,000 would be harming him less than so to rob the latter. Now the argument is unscientific for two reasons: first, it depends on interpersonal comparisons of utility; second, it neglects the utility to people of money. We might argue that a rich person is rich precisely because he attaches higher utility to money and has devoted more effort to obtaining it. Even if we let these slide, however, the argument works for wealth, i.e., if we expropriate and distribute existing fortunes. It leads to the opposite conclusion, namely, regressive taxation, in the case of income. For a rich man presumably benefits “little” from an extra \$1,000 of money income added to his net worth, and a poor man benefits “a lot.” Surely, a panhandler on the street will glow with joy upon receiving one grand; the same amount will leave a modern-day Croesus unperturbed. In order to equalize these marginal utilities, we would need to take away most of the poor man’s wage and leave most of the rich man’s in his hands. Progressive income taxation does not equalize *total* utilities because “net worth” and “rate of increase of net worth via an income stream” are completely different variables; and it does not equalize *marginal* utilities for the reasons just stated. Hence, it is an inappropriate means to “equality.”

In mathematical terms, just as speed is the first derivative of position, so income is not net worth but instead a first derivative of it. For example, Smith’s net worth might be described by the function $w(t) = 10k + 5k * t$, where t is time measured in years. At first Smith’s parents give their son \$10k to get started at adult life. Smith gets a job where he makes \$30k / year. For several years, he spends \$25k and saves \$5k. His relevant income is $w'(t) = 5k$, meaning that his net worth increases at a constant rate. If a person receives raises at his job every year, then these raises constitute “acceleration” and are as though the second derivative. Confusing net worth (w) with income (w') is like confusing income (w') with periodic raises (w''). Taxing income in order to soak the rich is as absurd and counterproductive as forbidding raises in order to equalize incomes. High-income people would love that: a no-raises policy would keep low-income workers in their place and unable to increase their wages. Similarly, the rich love high income taxes: even if they fail to get richer, they are more than compensated for this disadvantage with the fact that the poor fail to get richer as well. The social mobility described above that Rawls makes part of his equality of fair opportunity is diminished; the rich become a protected caste, safe from challenges from the talented and motivated poor.

There are similarities between the policy of confiscation and expropriation of wealth and the policy of punitive income taxation. The latter

causes businessmen to be dissuaded from investing because the reward is made to appear to them too small compared with the risk. The former deters them because they boast no security of property rights and are afraid of future outbursts of theft by government decree. Either way, no creative advance takes place. Buffett is a good entrepreneur but bad economist. He fails to understand that any incentive has an effect *on the margin*. Not everyone will be dissuaded from investing. But some people will be. Buffett argues that “I have yet to see anyone... shy away from a sensible investment because of the tax rate on the potential gain.” But this is only because opportunities uninvested into and unpursued are not part of the sample. The investments realized are indeed *seen*, but those that are passed over are *not seen*. And Buffett does not consider what is not seen.

If one makes \$1 million, then he pays a tax so that his total income is, say, \$500k. If one *loses* \$1M, then the government does not pay him a “negative tax” or subsidy to soften the blow. Thus, with taxes the reward is made smaller, but the risk is preserved. How can this possibly not have a marginal effect? People do not shy away from sensible investments indeed, but taxes affect which investments are going to *seem* sensible. In other words, taxes *convert* sensible investments into foolish ones. Here is a simple example. Smith can invest \$1M into a business venture. He will either lose this money or make another million. He estimates that the probability of success, taking all things into account, is 0.7. With the tax equal to 50%, he invests; if the tax is raised to 60%, he does not. If he does not, then *nobody but Smith will ever know about this decision*. If precise probabilities are objectionable, an alternative situation would invoke an investor with a diversified portfolio. Taxes on income or capital gains can make it so that the gains in the portfolio are so negligible, taking risk into account, that the investor finds it in his interest to consume the funds in the first place. The net result is that the investor pulls his entire savings out of the stock market to society’s detriment. Taxes make entrepreneurial competition less intense such that fewer people try their skills and luck at investing. The rich and the poor alike end up investing more cautiously; the rich lose money less often; the poor gain money less quickly; the upshot is lower social mobility.

Finally, taxation inhibits capital formation. As Mises explains the matter, it brings about the situation in which a small businessman

cannot accumulate capital; he cannot expand his own business; he will never become big business and a match for the vested interests. The old firms do not need to fear his competition; they are sheltered by the tax collector. They may with impunity indulge in routine, they may defy the wishes of the public and become conservative.

It is true, the income tax prevents them, too, from accumulating new capital. But what is more important for them is that it prevents the dangerous newcomer from accumulating any capital. They are virtually privileged by the tax system. In this sense progressive taxation checks economic progress and makes for rigidity. (*HLA*: 808-9)

We have seen that every member of society, however well advantaged, benefits from a rapidly growing economy. If the “welfare state” harms welfare, including of the least well off, then it can muster no support from Rawls’ theory of justice.

In sum, Rawls is willy-nilly compelled to endorse laissez-faire capitalism by the demands of his own apparatus of the original position. This will be a bitter pill to swallow for the modern “liberals.” But just as they admitted that their former god, socialism, had failed, so too their current deity, social democracy, has been tried and found wanting. The quest for an “egalitarian social ideal” that is “compatible with capitalism” (Nagel 2002: 188) is another dead end, and the means to that chimera can only be unjust. The Bolsheviks have bitten the dust; let the Mensheviks join them in infamy.

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