VIVE LA DIFFERENCE? RAWLS’
“DIFFERENCE PRINCIPLE” AND THE FATAL
PREMISE UPON WHICH IT RESTS

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You shall not be partial to the poor or defer to the great. . . .

Leviticus 19: 15 (RSV)

With a few notable exceptions, philosophers have
tended to follow the lead of Socrates in rejecting Thrasymachus’ assertion that
justice is the interest of the stronger. Until John Rawls, however, so far as I
am aware, no philosopher ever explicitly defined it as the interest of the weaker.
This he does in his exposition of the Difference Principle, a key aspect of his
system of political philosophy.

Definitively set forth in his monumental treatise, A Theory of Justice (1971),
and more tentatively in various articles beginning with his well-known essay,
“Justice as Fairness” (1958), this system is an impressive contemporary version
of social contract theory in the Kantian tradition. Buttressed by such sophisti-
cated modern techniques as game theory and marginal analysis, it is full-orbed
political philosophy in the grand manner, welcome indeed after decades in
which ethical and political theory were dominated by linguistic nit-picking.
To this commentator, it is welcome also as a sustained and formidable critique
of Utilitarianism. The scope of Rawls’ argument, and the intricate and subtle
reasoning with which he develops it, cannot fail to command the unbiased
reader’s admiration, if not agreement, and I wish to emphasize that if my
discussion were addressed to several features of the work other than the one
selected, its tone would be far more appreciative than what follows might
suggest.

Having thus indicated my respect for what is unquestionably an achieve-
ment of the first magnitude, I shall attempt to expose what seems to me a
fatal flaw at the very core of Rawls’ position. It is in the Difference Principle
that the implications of this flaw emerge most clearly.

Rawls’ social contract theory does not envisage an actual historical agree-
ment. It is rather an effort to deduce the logical implications of a hypothetical
situation, which he calls the “Original Position.” The principles of justice,
he believes, are those which free and rational persons, concerned to further
their own interests, would accept in an initial posture of equality as defining
the terms of their association. To insure that the choice of principles be fair,
Rawls specifies that it be made behind the “veil of ignorance” (a concept
which elaborates and makes explicit what Rousseau probably intended by his
notion of the General Will). Thus, in the Original Position, although each
party is motivated by self-interest, no one knows the nature of his particular
circumstances—whether he be rich or poor, young or old, intelligent or stupid,
male or female, healthy or sick, white or black, energetic or lazy. Neither
does he know his conception of the good, the particulars of his individual
plan of life, or even the generation in history to which he belongs. The parties
in the Original Position are presumed to understand whatever general facts
affect the choice of the principles of justice—for example, the rules of human
psychology, and the elements of economics—but to have no information that
might enable anyone to tailor the principles for which he opts to the con-
tingencies of his own case. While recognizing that no empirical social order
can be a scheme of cooperation into which men enter voluntarily in a literal
sense, Rawls maintains that a society satisfying the tenets which would be
arrived at under these restrictions, would constitute such a scheme virtually
if not literally. In that it meets the conditions to which free and equal persons
would assent under ground-rules the fairness of which admits of no dispute,
its members would be "autonomous and the obligations they acknowledge
self-imposed." 7

Rawls holds that under such circumstances rational deliberation would be
guided by what he terms the "Maximin Rule": each party would seek to
secure his share in the distribution of social primary goods by adopting that
alternative the worst possible outcome of which is superior to the worst out-
comes of the others. (Social primary goods are those goods wholly or sub-
stantially at the disposal of society, which it is supposed that every rational person
wants whatever else he wants: rights and liberties, opportunities and powers,
income and wealth, and, perhaps most important, self-respect.) Since none
of the parties knows his particular situation, there would be unanimity in the
alternative thus adopted. What would that alternative be?

It would be, says Rawls, a social order governed in the distribution of social
primary goods by the following two fundamental principles, the principles
of justice: The First Principle (the Greatest Equal Liberty Principle) designates
that each person is to have an equal right to the most extensive total system
of equal basic liberties compatible with a similar system of liberty for all. 8 The
Second Principle has two parts; it designates that social and economic inequalities
are to be arranged so that they are (a) to the greatest benefit of the least ad-
thesized (the Difference Principle), and (b) attached to offices and positions
open to all under conditions of fair equality of opportunity (the Fair Equality
of Opportunity Principle). The First and Second principles are related in that
the object of social justice is "to maximize the worth to the least advantaged
of the complete scheme of equal liberty shared by all," 9 the worth of liberty
to persons and groups being considered proportional to their capacity to
advance their aims within the framework the system defines.

A few explanatory remarks about the Second Principle may be in order.
To begin with, the term, "least advantaged," does not, in Rawls' use, apply
to the specific individual who is literally the worst off, but rather to the re-
presentative member of the least favored population grouping. (He admits
that a certain degree of arbitrariness may be unavoidable in making this
determination, but does not regard a more exact definition as essential to the
end in view.) Secondly, the Difference Principle is not formulated in terms
merely of the expectations of the least advantaged at any given point in time,
but is instead geared to prospects extending over future generations. This is
to make sure that each generation not only refrain from depleting nature to
the detriment of its successors, but also preserve the gains of civilization,
maintain just institutions intact, and put aside a suitable amount of capital
accumulation as an equivalent for that received from its predecessors and as
part of its duty to help bring about a setting of material well-being sufficient to favor the viability of a free society. Finally, the Fair Equality of Opportunity Principle is not interpreted by Rawls to mean the absolute equalization of "relevant social positions," i.e., involuntary social starting places in the distributive order. He would not abolish the family, or do away entirely with inheritance. His interpretation of the principle only requires that there be roughly equal prospects of culture and achievement for persons with similar endowments and similar motivations, and this, he feels, would be adequately effectuated by providing educational opportunity which is substantively and not just formally equal, and by preventing monopolies and "excessive" accumulations of wealth. Beyond this, equalization is brought into play only if justified by the Difference Principle, which is lexically subordinate to the Fair Equality of Opportunity Principle except under circumstances shortly to be described.

Rawls holds that optimally these principles are to be ranked in serial order with the First Principle prior to the Second, and the Fair Equality of Opportunity Principle prior to the Difference Principle. Where this ordering obtains, that is, within what he denominates the "Special Conception" of Justice, neither freedom nor equality of opportunity are to be bartered for an increase in social and economic welfare, as would be permitted, he contends, by a Utilitarian ethic.

However, Rawls argues that it is only after material conditions have reached a certain point that basic liberties can be effectively exercised, for up to that point, for important segments of the body politic, the marginal significance of social and economic advantages will be so much greater relative to liberty as to threaten the stability of free institutions. The Special Conception can only be realized, therefore, after a general level of material well-being has been brought into existence. Up to then, since social conditions do not allow the effective establishment of equal rights to liberty, the restriction of such rights may be conceded insofar as might be necessary to prepare the way for a stage in which the equal freedoms can be enjoyed by all. (The same argument attaches to the relationship between the two parts of the Second Principle.) Under such circumstances, the serial order is reversed, and the "General Conception" of justice prevails. The General Conception is simply the Difference Principle applied to all social primary goods, and not constrained by the priority of the other principles.

Now, Rawls admits that natural inequalities do not require justification, nor does the occurrence that persons are born into society in some particular position. These are simply facts—accidents of nature and social circumstance—and, as such, morally neutral. But he insists that rational persons in the Original Position would be guided by the Maximin Rule, and would consequently undertake to deal with these facts in such a way as to treat the contingencies of nature and social circumstance as a collective asset, so that the more fortunate benefit only in ways that help those who have lost out.

With this it is possible to quarrel. In a critical study of some of Rawls' earlier works, Dan W. Brock questions whether the Maximin Rule is indeed the most rational criterion to follow for persons in the Original Position. Since persons in the Original Position do not know that they will occupy the least advantaged place in society, it would be excessively conservative for them to make their choice on this assumption. A more rational approach might be for them to insist upon certain minimum guarantees, and then agree to take their chances in the hope of a larger share in the distribution of social
primary goods, choosing a societal arrangement which accounts for expectations in all positions, not merely the least favored. In his Theory of Justice, Rawls attempts to deal with this type of objection, but he does so by introducing into his characterization of the Original Position the notion that each party 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 be sure of by following the Maximin Rule. In addition to being quite arbitrary, this feature is inconsistent with Rawls' stipulation, several times repeated, that no person in the Original Position knows his conception of the good.

For the sake of discussion, however, I am willing to concede the rationality of the Maximin Rule in the Original Position. A far more serious objection, to my mind, yet remains. Let us assume that agreement to accept the Difference Principle were truly the most rational decision open to the hypothetical contracting parties. The question still arises: Is it always one's duty to accept the most rational alternative? I claim that it is not. It is my contention that a person is under no moral liability to accede to even the fairest and most reasonable bargain, provided that his refusal to do so does not positively interfere with the freedom of anybody else. King Ahab offered Naboth a good deal for his vineyard—cash, or, if he preferred, a better piece of land in trade. To have accepted this fair proposal would have been the rational thing to do, but Naboth had a right to be irrational.

Rawls, in one place, refers to his system as a "scheme of mutual benefit." What he has done, I submit, is to have constructed a model for a mutual insurance plan, and mistaken it for justice. It is, indubitably, a highly prudential arrangement, and one into which a cautious, security-minded academic like myself might be readily disposed to enter. Fair it may be, but just it is not (at least not in Rawls' view of it as something to be coercively imposed), for justice (to paraphrase Mill in his On Liberty) eschews the argument that compulsion is permissible simply because its end is reasonable and conduces to the good of him to whom it is applied.

In the Original Position rational men operating under a veil of ignorance might perhaps logically be expected to agree out of self-interest to bear one another's burdens to the extent of mitigating as far as possible inequalities which might deprive some of social primary goods. One who declined to thus insure himself could doubtless be faulted as foolhardy. Yet he could not be called unjust, as could one who refused to agree to mutual non-aggression. The latter, too, would be foolhardy (since he could not know that he might not turn out to be the weakest party) but he would also be unjust, for he would be imposing a risk not merely upon himself but also upon others.

Although Rawls' theory falls within the contractualist tradition, he recognizes, of course, that there are properly enforceable moral requirements which are antecedent to consent. Obligations arise from voluntary acts, such as promises or accepting benefits, and their content is defined by an institution or practice the rules of which specify what it is that one is required to do. Natural duties, on the other hand, do not arise from voluntary acts; they apply unconditionally and to persons generally, not only to those combining together in a particular social arrangement. "... A promise not to kill, for example, is normally ludicrously redundant, and the suggestion that it establishes a moral requirement where none already existed is mistaken." The principles of natural duty do not presuppose consent, express or tacit, in order to be binding; they are grounded in the fact that they would be acknowledged in the Original Position.
Natural duties are divided into two categories, positive and negative. Positive duties, such as mutual aid, require us to do something good for another (although not all benevolent acts are duties). Negative duties, such as non-aggression, require us to refrain from doing something that is bad. Rawls, however, puts no stress upon this distinction, saying only that it is plausible to hold, when it is clear, that negative duties have more weight than do positive ones. Furthermore, he omits to relate the distinction to the crucial problem of when it is legitimate to use compulsion.

Since Rawls is frequently at pains to show that his arguments explicate or are in harmony with intuitive ideas, I trust that I may be permitted to suggest that we sense intuitively that an important relationship here does exist—that there is a certain propriety in the use of compulsion to enforce negative duties which does not obtain with respect to positive ones. (I am not, of course, speaking here of negative and positive obligations, since both are freely accepted, and hence equally render their violators subject to coercive sanctions.) This propriety with respect to negative duties is not, I think, to be explained simply on the ground that they have more weight than do positive ones, for, in fact, this is not always so. There are cases, for instance, when refusal to come to another's aid might be a far more serious violation of natural duty than would a blow struck in anger. Yet this does not alter our perception that the latter violation is rightly subject to countermeasures involving direct physical force; whereas, the former is not. It is a difference in kind, not in degree, with which we are here confronted. I suspect that Rawls' failure to recognize this is what has led him, in my opinion, to gravely compromise his assertion of the priority of liberty.

When I speak of his compromising his assertion of the priority of liberty, I am not thinking primarily of Rawls' General Conception of justice, in which the lexical ordering of his two principles is reversed. Even so, a couple of comments on the General Conception should be made.

There is something to be said for the claim that since the viability of free institutions is relative to a minimum standard of social and economic well-being, liberty may need to be restricted until in order that that standard be attained. Nevertheless, the fact cannot be ignored that such a claim harbors an inherent danger, namely, that it lends itself all too easily to abuse as a rationalization for the indefinite postponement of the time when the Special Conception of justice becomes operative. This danger need not be geared to the existence of a self-perpetuating oligarchy. Despite what Rawls urges about the increasing marginal utility of freedom, there is little historical precedent for assuming that the general public will ever call for the abandonment of these restrictions so long as they continue to be effective in securing welfare. When large segments of a populace turn against the welfare state, it is seldom for the sake of freedom as such, but rather because, by generating an intolerable level of taxation and/or inflation, the welfare state has become economically counter-productive.

In contravention to the General Conception one might further argue that that conception becomes unnecessary if the Greatest Equal Liberty Principle be interpreted (as I think it must) to preclude the preemption of natural opportunity—i.e., land, as the term is used in political economy. Freedom itself would guarantee the material conditions for its own sustentation. There is really no need for the complicated and problematical procedure of lexically ordering three separate criteria of justice, with one precedence arrangement within another. Equal liberty, rightly understood, is an idea broad
enough to serve as a single unifying criterion. Unfortunately, I cannot develop this thesis here, but commend the writings of Henry George to those who wish to learn what it entails.

In any case, Rawls' preferred conception of justice, the Special Conception, in which the priority of greatest equal liberty presumably prevails, is actually replete with contradiction.¹¹ For if really subordinated to the Greatest Equal Liberty Principle, the Difference Principle would not obtain at all as a rule to be enforced by law. Yet Rawls' model contains all sorts of institutional provisions for its enforcement—most notably, what he calls the "transfer branch" of government, the function of which is to set the social minimum, and to arrange an income floor by the compulsory transfer of wealth from the more to the less productive members of society. In addition, he provides for an "allocation branch," to correct, "say, by suitable taxes and subsidies and by changes in the definition of property rights, the more obvious departures from efficiency caused by the failure of prices to measure accurately social benefits and costs"; a "stabilization branch," to assure full employment; and a "distribution branch," not just to raise revenue but to encourage the wide dispersal of property through the taxation of inheritance and income at progressive rates.¹²

That such a structure would necessitate a complex and cumbersome bureaucracy is obvious, and it would be easy to criticize it from that standpoint. Yet such criticism would not be definitive; after all, although bureaucracy does have built-in weaknesses and perils, sometimes extensive public agencies are required to prevent people from using their freedom to interfere with that of others. There is a deeper objection to be advanced against Rawls' model: it rests upon a misconception of the nature of justice.

The fact that natural and social endowments may be unmerited does not establish any claim against their possessors on the part of others, for their unmerited character does not argue that they were acquired at the expense of others. As David Lewis Schaefer incisively remarks, "From the Kantian principle that 'no one deserves his natural assets,' it does not follow that other men 'deserve' the fruits of these assets more than he does."¹³ Justice demands that the greatest equal liberty be accorded every man, not that the worth of liberty to every man be maximized by maximizing his capacity to attain his aims. While the latter is a perfectly laudable goal, its political execution cannot but infringe upon the former, and Rawls has not made a convincing case for such infringement.

The favored man, he says, has no grounds for complaint about being forced to share with the less favored, because (a) the well-being of each depends upon a scheme of social cooperation without which no one could have a satisfactory life, and (b) the Difference Principle is a fair basis on which he could expect others to collaborate with him when some workable arrangement is "a necessary condition of the good of all."¹⁴ To the first point, one might reply that the Difference Principle violates the concept of reciprocal freedom, which is the sine qua non of social cooperation. Against the second point, one might urge that to accord the less favored equal freedom is to refrain to that extent from taking advantage of their weakness, and that this would seem a basis for collaboration in which the gain is all on their side. They have nothing to exchange for anything further, and even for this, their quid pro quo would be comparable to a mouse's contract not to chase a cat. Rawls recognizes, though, that the points upon which I have just commented are not, strictly, arguments, but what he calls "intuitive considerations," and to this I can
only remark that his intuition evidently works differently than mine. His real argument is the one based upon the Maximin Rule—that the Difference Principle would be asssented to by intelligence unswayed by special interest.

The temper of Rawls’ work is that of the Enlightenment—liberal, tolerant and urbane. He insists upon liberty of conscience, imagining that it is possible to preserve intellectual and spiritual freedoms while curtailing economic ones. Yet his system is grounded upon a premise fraught with sinister implications for freedoms of every kind. He would make certain actions and omissions subject to legal interdiction and compulsion, not, in the last analysis, because they transgress rights or violate authentic claims of value, but solely because, in his view, they are in error—i.e., contrary to the decisions which would be made by rational persons in the Original Position. We have heard it affirmed before that “error has not the same rights as truth,” and know all too well the outcome to which this line of thought can lead.

NOTES


2Ibid., p. 60. Beginning with “each person,” this sentence reproduces Rawls’ phrasing. However, in previous expositions of his theory, his formulation of the principle was stated in more general terms: “[Everyone] has an equal right to the most extensive liberty compatible with a like liberty for all.” (“Justice as Fairness,” The Philosophical Review, April, 1958, p. 133) This difference in language is emphasized by H. L. A. Hart, who thinks that Rawls’ First Principle may now have reference only to certain roughly specified liberties, rather than to liberty in general. But he admits that “there are difficulties with this interpretation which suggest that Rawls has not eliminated altogether the earlier general doctrine of liberty . . . .” (“Liberty and Its Priority,” University of Chicago Law Review, Spring, 1973, p. 541.)

3A Theory of Justice, p. 204.


5A Theory of Justice, pp. 153-156.

6Ibid., pp. 12, 18, 137.

7Ibid., p. 179.

8Ibid., p. 115.

9Ibid., p. 114.

10Cf. Barry, op. cit. Whereas I argue that Rawls is too willing to compromise his doctrine of the priority of liberty, Barry’s book is the most elaborate and clever attack to date upon the doctrine itself as a relic of 19th century individualism.

11See Note 2. According to Hart’s qualified interpretation of the First Principle, only certain liberties would have priority in the Special Conception. These are listed on p. 61 of A Theory of Justice.

12A Theory of Justice, pp. 276ff.


14A Theory of Justice, p. 103.