THE DISTRIBUTIVE ASPECTS OF SOCIAL JUSTICE

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SUBMITTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE
DEGREE OF

DOCTOR OF PHILOSOPHY

at the

MASSACHUSETTS INSTITUTE OF TECHNOLOGY

JANUARY, 1977

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Department of Linguistics and Philosophy, January 1977

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ACKNOWLEDGEMENTS

I wish to thank my advisors - Professors Barbara Herman, Miles Morgan, Irving Singer and Judith Thomson - for their many helpful suggestions, which improved the dissertation immeasurably, and for the many hours which they devoted to reading the manuscript and discussing it with me. I am much indebted to Professor Hal Varian for clarification of many points relating to economic theory.

I am especially grateful for the help and encouragement I received from Dr. Guy Seymour, and for the excellent typing of Ms. Carole Quarrington and Mrs. Clyda Willeman.
For my father
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Submitted to the Department of Linguistics and Philosophy
in January, 1977 in partial fulfillment of the requirements
for the Degree of Doctor of Philosophy

ABSTRACT


In Chapter One, I argue that Rawls's hypothetical contract argument does not support the Difference Principle (which prescribes maximization of the expectations of the least advantaged group in society). Instead, I argue, the hypothetical contract argument yields a principle prescribing maximization of average expectations subject to the constraint that a satisfactory minimum of expectations be established.

In Chapter Two, I consider the Difference Principle independently of the hypothetical contract argument. In Section One, I criticize the Difference Principle for providing partial redress for inequalities of birth and natural endowment. I argue that, since these inequalities are not unjust, corrective justice does not require any redress for them. In Section Two, I argue that the overall distribution of goods in a society is just if and only if it satisfies
the condition that each person's set of holdings is identical to the set of goods he has a right to have. I then criticize the *prima facie* rule in favor of equality expressed by the Difference Principle by showing that equal distributions may fail to satisfy the foregoing condition. As alternatives to the Difference Principle, principles for the distribution of produced and non-produced goods are discussed in Sections Three and Four respectively. In Section Three I present the Production Principle, a principle of acquisition covering cases of independent as well as joint production; it holds that producers have a right to the products which they make using only what they own or have a right to use. I also present the Exchange Agreements Principle, a principle of transfer governing distribution of income to factors of production who participate in the joint production process; this principle states that factors of production have a right to what they freely agree to accept in exchange for their goods or services. Finally, in Section Four, I criticize Locke's labor theory of acquisition of natural resources and propose that, although individuals do not have initial private property rights in natural resources, they nevertheless have rights to use minimal shares of natural resources enabling them to survive and equal shares of resources remaining after "survival shares" have been distributed.

In Chapter Three, I discuss Rawls's Principle of Fair Equality of Opportunity. In Section One, I show that, contrary to what Rawls maintains, the principle does not constrain the degree of inequality permitted by the Difference Principle. In Section Two I argue that social justice does not require that all people or all equally endowed people have equality of opportunity, and that in fact it does not require that anyone have any level of opportunity. I maintain, nevertheless, that agents ought to contribute their "spare goods" - goods the loss of which does not impose great risk or cost upon the agents - in order to provide minimal opportunity levels for all people.

Name and Title of Thesis Supervisor: Barbara Herman, Assistant Professor, Department of Linguistics and Philosophy
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Theories of justice are typically classified as theories of distribution or theories of compensation. Theories of distributive justice advance principles for distributing social and economic goods in a society, whereas theories of compensatory justice propose principles for compensating, or redressing, injustices that have been committed. In this dissertation I examine one theory of distributive justice which has received wide acclaim and a monumental amount of attention since its publication in 1972--John Rawls's theory, which is articulated and argued for extensively in A Theory of Justice. My critical examination of Rawls's theory led me to formulate, in preliminary fashion, an alternative theory, which is presented in rough outline in this dissertation (primarily in sections three and four of Chapter Two and section two of Chapter Three).

Although Rawls speaks of his theory as a theory of social justice, rather

than as a theory of personal justice, it is more appropriately referred to as a theory of institutional justice, for goods such as income and wealth are distributed not only by social institutions, but also by economic, political, educational, and cultural institutions. Similarly, the theory I adumbrate in this dissertation is properly describable as a theory of institutional justice.

Rawls has divided his theory of justice into two independent parts: (1) the account of the original position and (2) the principles of justice allegedly yielded by the original position. He has acknowledged that "one may accept the first part of the theory...but not the other, and conversely. The concept of the initial contractual situation may seem reasonable although the particular principles proposed are rejected"¹ [or conversely]. In this work I concentrate primarily on the second part of Rawls's theory, ignoring such questions as whether constraints imposed upon parties in the original position are fair and whether the original position is a contract situation yielding principle of justice. However, I address myself exclusively to the second of Rawls's two principles of justice, which states that social and economic inequalities are to be arranged so that they are (1) to everyone's advantage and (2) attached to offices and positions open to all. This second principle is itself composed of two principles—the Difference Principle (1) and the Fair Equality of Opportunity Principle (2), with the second principle

being lexically prior to the first. I do not discuss Rawls's first principle, the Greatest Equal Liberty Principle, which prescribes that everyone is to have the greatest amount of liberty compatible with a similar amount of liberty for all, as the principle itself seems relatively unproblematic, even though the lexical priority which Rawls assigns to it over the second principle is questionable, especially in developing countries.

In Chapter One I simply grant, for the sake of the argument, that the principles chosen by parties in the original position are principles of justice, but show that nevertheless, the Difference Principle would not be chosen, but rather a principle prescribing maximization of average expectations subject to the constraint that a satisfactory minimum of expectations is established. I offer an argument from risk aversion, which is as follows: Parties in the original position have moderate, or normal, risk aversion. The principle they choose will, then, lie somewhere between the extremes represented by principles chosen by parties with no risk aversion and absolute risk aversion. The former are concerned solely to maximize their overall prospects, regardless of the risks involved. Since the overall prospects for a society \( \frac{1}{n} \cdot E_1 + \frac{1}{n} \cdot E_2 \ldots + \frac{1}{n} \cdot E_n \), or \( \sum E_i/n \), where \( E_i \) is the expectation level of the \( i \)th person in the society) are identical to the average expectations of that society \( \sum E_i/n \), parties with no risk aversion will choose a principle prescribing maximization of average expectations. Parties with absolute risk aversion, since they are unwilling to take any risks whatsoever, will choose a principle prescribing maximization
of minimum expectations. Such a choice does not involve risking the best outcome one can be certain of (the maximized minimum) for a greater, but merely possible, outcome. Parties with moderate risk aversion will not choose the principle prescribing maximization of average expectations, for they will not be willing to risk the possibility of having an extremely low expectation level simply for the sake of maximizing overall prospects. On the other hand, since their sole concern is not the expectation level of the worst-off person in society, they will not choose a principle prescribing maximization of minimum expectations. They are willing to take some risks for the sake of somewhat higher overall prospects. They will choose a principle which protects them from having extremely low expectations but at the same time permits overall prospects to be higher than they would be if minimum expectations were maximized. Such a principle is one which prescribes maximization of average expectations subject to the constraint that a satisfactory minimum is achieved. Even though this principle would be chosen in the hypothetical contract situation which Rawls describes, however, the principle may not be a principle of justice if it is not the case that it follows from the fact that a principle is chosen in the original position that it is a principle of justice. If the hypothetical contract argument fails to establish certain principles as principles of justice, the Difference Principle may still be correct. Therefore, in Chapter Two I consider it independently of the hypothetical contract argument.

In the first two sections of Chapter Two I examine two egalitarian claims
which Rawls makes on behalf of the Difference Principle. In section one I discuss Rawls's assertion that one merit of the Difference Principle is that it partially redresses inequalities of birth and natural endowment. I argue that such inequalities are not unjust, and hence that no redress is required for them. The second egalitarian claim, which I examine in section two, is that the Difference Principle offers a *prima facie* rule in favor of equality. In that section I argue that distributive justice is satisfied if and only if each person's set of holdings is identical to the set of goods he has a right to have, and that an equal distribution, *ceteris paribus*, may fail to satisfy this condition. I maintain, as well, that the overriding principle which Rawls includes in his statement of the Difference Principle—that goods are to be distributed unequally if everyone is made better off—may fail to satisfy the same condition.

In section three of Chapter Two I expand my discussion of rights by presenting two principles for the acquisition of produced goods. The first, which is a principle of initial acquisition, states that producers acquire rights to the goods which they produce by producing them using only what they own or have a right to use (the Production Principle). The principle establishes rights of producers to the "fruits of their labor" (since labor is a use of one's body, which one owns). I argue, against those who impose a no-loss requirement on the acquisition of property, that extreme losses to others, whether of actual goods, of competitive equality, or of opportunities to acquire goods, are more appropriately dealt with by overriding the rights of producers.
to the goods they produce in accord with the Production Principle, rather than by circumscribing these rights. The Production Principle applies to joint as well as to independent production. If, for instance, factors of production, such as managers and laborers, transfer to a capitalist ownership of the services they contribute in the joint production process, in exchange for wages, then the capitalist has the right to the final good, for he owns the means of production, as well as the labor of the managers and laborers, with which the good was produced. The second principle of acquisition which I present in this section is the Exchange Agreements Principle, which prescribes that capitalists transfer to the other factors of production the goods which these factors have freely agreed to accept in exchange for their services. Some have maintained that each factor of production is entitled to his marginal value product (the value of what he contributes to the final product) and that any agreement according to which a factor is to receive less than his marginal value product is coercive, and hence not morally binding. I argue, against this view, that if a capitalist has acquired goods in accord with the Production Principle then he owns the goods, and can do with them as he chooses. If he proposes to transfer a certain package of these goods to another factor of production in exchange for services, then he violates no moral requirement on the use of his goods. Hence his proposal is an offer, not a threat, and the resulting agreement is not coercive, but fully voluntary, and hence morally binding.
In section four I continue my discussion of rights by presenting principles for distributing non-produced goods, or natural resources, and by examining Locke's theory of acquisition of natural resources. Locke assumes initial joint ownership of natural resources but advances a labor theory to explain how shares of natural resources may be removed from the common domain and acquired as private property. I criticize his theory on the ground that mixing labor with natural resources does not yield private property rights in these resources unless the joint owners have unanimously agreed that such a process results in individual entitlements. I then argue that since natural resources are not produced by any individual, but are like "manna from heaven", they cannot initially be privately owned, and hence are either jointly owned or unowned. Nevertheless, individuals have rights to use minimum shares of natural resources enabling them to survive and equally valued shares of resources remaining after survival shares have been distributed, unless natural resources are jointly owned and the joint owners have agreed to distribute natural resources in a different manner. Given that individuals have use rights over such shares of natural resources, it follows from the Production Principle that producers have rights to goods which they make from these shares with their own labor.

In Chapter Three I focus on Rawls's Fair Equality of Opportunity Principle. In section one I show that, contrary to what Rawls maintains, it does not operate as a constraint on inequalities permitted by the Difference Principle. Rawls has stated that the Fair Equality of Opportunity Principle
requires merely that all equally endowed and motivated children have equal chances of success. Hence such a principle allows great differences in factors affecting success (income, wealth, education), as children with different degrees of endowment and motivation may have extremely different levels of income, wealth, and education, as long as children with the same degree of endowment and motivation have the same level of these factors. Rawls himself finally concedes that "nothing guarantees that inequalities will not be significant." In section two I maintain that institutional justice does not require that all children, or even all equally endowed and motivated children, have equality of opportunity, in the absence of a voluntary action performed by an institution which creates special rights on the part of these children to equality of opportunity (such as an agreement to transfer goods providing equality of opportunity). In fact, in the absence of such a voluntary action no child has a right to any level of opportunity. Since, however, extremely bad consequences will result if children do not receive at least minimal opportunities, I formulate the Minimally Decent Samaritan Principle, according to which institutions, as well as individuals, ought to contribute whatever goods they can, at little risk or cost to themselves, in order to raise opportunities to the minimal level. I suggest that if it is ever permissible for political institutions to tax citizens, then it is permissible for them to do so for the purpose of doing what they as political institutions ought to do—in this case, for the purpose of raising sub-minimal opportunity levels.

1Ibid., p. 158.
CHAPTER ONE

THE DIFFERENCE PRINCIPLE AND
THE HYPOTHETICAL CONTRACT ARGUMENT

The Difference Principle holds that social and economic inequalities are to be arranged so that they are to the greatest expected benefit of the least advantaged. The following graph illustrates the Difference Principle:

The expectations of the more advantaged representative person are graphed on the x axis and the expectations of the less advantaged representative person on the y axis (for simplicity we assume that society is composed of two classes, each with its own "representative person", whose expectations are the average of the class). The Difference Principle selects point a on the OP curve (the contribution curve), the point at which the expectations of the less advantaged representative person are maximized, as the point which represents the perfectly just distribution. Points between O and a, where a rise in expectations
of the more advantaged representative person corresponds to a rise in expectations of the less advantaged representative person, are just but not perfectly just.

Rawls's principal argument for the Difference Principle is that it would be chosen by parties in the original position. It is a principle that "free and rational persons", situated behind the veil of ignorance and "concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association."

But why would such persons choose the Difference Principle, since it appears not to be concerned with the welfare of individuals, but with the welfare of a certain group, or representative individual? Why would individuals in the original position who are mutually disinterested, be concerned to maximize the expectations of a certain group or class of people? Admittedly such individuals are not interested solely in their own welfare; being family heads, they are also interested in the welfare of their families and their descendants. However, their interest most certainly does not extend to the welfare of an entire group of people.

Rawls argues that the Difference Principle, despite its reference to a group, or representative individual, does take "everyone's interests ... into account, for ... all individuals have a place in the distribution of income and wealth or in the range of fixed natural characteristics upon which distinctions are based". Of course the Difference Principle is an exceedingly weak means of taking" every-

2 Ibid., p.100.
one's interests ... into account", since it allows the expectations of a single individual from the less advantaged group to be zero, so long as the average expectations of the group are maximized. A starving person living in a hovel and protesting his conditions would be little cheered by the response, "After all, your interests were taken into account. Your expectation level figured in the calculation of the average welfare of your group." Parties in the original position presumably want their interests taken account of in a much stronger way than this.

Yet Rawls claims that one of the reasons parties in the original position will choose the Difference Principle is that the inequalities it permits are to "everyone's advantage"; everyone benefits from the inequalities and therefore it would be irrational not to choose the Difference Principle.

The parties start with a principle establishing equal liberty for all, including equality of opportunity, as well as an equal distribution of income and wealth. But there is no reason why this acknowledgement should be final. If there are inequalities in the basic structure that work to make everyone better off in comparison with the benchmark of initial equality, why not permit them? The immediate gain which a greater equality might allow can be regarded as intelligently invested in view of its future return ... A person in the original position would, therefore, concede the justice of these inequalities. Indeed, it would be shortsighted of him not to do so.¹

If a person in the original position were assured of benefiting from the inequalities, surely it would be irrational for him not to permit them. But with the Difference Principle what assurance does such a person have that inequalities will be to his advantage? Suppose that individual A, a member of the less advantaged group, were to have an expectation level identical to that of the representative persons at point O on the contribution curve (see graph, p15).

¹Ibid., p.151.
Would A be assured of having his expectations rise between O and a? Absolutely not. In fact, his expectations could steadily decline with each increase in expectations of the more advantaged representative person, so long as the average expectations of his group rose. In such a case inequalities would certainly not be to "everyone's advantage"; rather, they would be to A's great disadvantage.

Surely it violates the spirit of Rawls's Difference Principle that as the expectations of the more advantaged group increase, the worst-off member of society could become worse and worse off, finally becoming destitute. To avoid such an outcome, it appears that the parties in the original position would have to choose a principle which, although it did not guarantee that everyone's expectations would rise together (for that is undoubtedly asking too much) at least set some satisfactory minimum below which no individual could fall.

Rawls is correct that, from the point of view of representative persons, the Difference Principle does satisfy the criterion of mutual benefit. But as he points out, in a contract theory all arguments are strictly speaking made from the point of view of the original position. And since it is individuals, not representative persons, who are choosing in the original position, the argument from mutual advantage, which applies only to representative persons, has little force.

Rawls criticizes utilitarianism for not taking seriously the distinction between individuals, for conflating all persons into one. Yet he himself fails to take seriously the distinction between individuals when he conflates the individuals in different groups into "representative persons" and then argues
from the point of view of these "representatives".

Furthermore, some of Rawls's own arguments against utilitarianism can be turned against him. He argues, for example, that the Principle of Utility would not be chosen in the original position because:

it hardly seems likely that persons who view themselves as equals, entitled to press their claims upon one another, would agree to a principle which may require lesser life prospects for some simply for the sake of a greater sum of advantages enjoyed by others. Since each desires to protect his interests, his capacity to advance his conception of the good, no one has a reason to acquiesce in an enduring loss for himself in order to bring about a greater net balance of satisfaction.¹

This argument applies equally well against choice of the Difference Principle by parties in the original position. As was pointed out before, satisfaction of the Difference Principle is compatible with the poorest imaginable social and economic conditions of some individuals. Parties in the original position will not agree to a principle which might require them to endure such deplorable conditions "simply for the sake of a greater sum of advantages" for the least advantaged group. Parties in the original position are concerned to advance their own interests; none of them "has a reason to acquiesce in an enduring loss for himself in order to bring about a greater net balance" of advantages for any group -- whether it be society as a whole or the worst-off group in society.

Rawls might respond to the above criticisms by arguing that since parties in the original position realize that it would be an unmanageable task for major social institutions to keep track of distributions of goods to particular individuals, the parties will, despite the fact that they themselves are individuals, nevertheless

¹Ibid., p.14.
choose principles of justice prescribing distribution of goods to social groups (or to individuals representative of these groups). This argument is unconvincing, however. Being individuals, parties in the original position will, for the reasons outlined above, choose principles of justice which refer solely to individuals, not to groups, although they may recognize that, because of the difficulty of setting up institutions which are able to take account of the positions of many different individuals, institutions will have to be guided by "rules of thumb" prescribing distributions to relevant social groups, and hence the justice of these institutions will be imperfect.

The above considerations militate against choice of the Difference Principle by parties in the original position. What principle would, then, be chosen instead? An examination of the risk aversion of parties in the original position will be helpful in answering this question.

In a recent unpublished paper, Rawls says, "From the standpoint of the original position, the parties will be very considerably risk averse; if we ask how risk averse, we might say not less than that of most any normal person." Upon first inspection this statement seems to represent a substantial change on Rawls's part since publication of A Theory of Justice. There he says:

The essential thing is not to allow the principles chosen to depend on special attitudes toward risk. For this reason the veil of ignorance also rules out the knowledge of these inclinations: the parties do not know whether or not they have a characteristic aversion to taking chances.

As far as possible the choice of a conception of justice should depend on a rational assessment of accepting risks unaffected by peculiar individual preferences for taking chances one way or the other.¹

It is difficult to know whether Rawls's thinking about the risk aversion of the parties in the original position has undergone a revision since this passage was written. It might be maintained, for instance, that the parties have normal risk aversion, but since their knowledge of their inclination toward risk-taking is ruled out by the veil of ignorance, they do not know that they have such risk aversion. However, I do not think that Rawls is meaning to distinguish possession of a certain degree of risk aversion from knowledge of that possession. It is not clear what would motivate his making such a distinction. For if the parties do not know what kind of risk aversion they have, what does it matter what kind they actually have? Why would Rawls even bother to tell us that the parties have considerable risk aversion? It might be argued that the parties' risk aversion affects their choice of principles, even if they do not know, or are not consciously aware, that they have such risk aversion. However, there is no textual evidence that Rawls had anything of this sort in mind. In addition, the motivation for such an assertion seems lacking in Rawls; if risk aversion affects the choice of principles, there is no reason why knowledge of it should be restricted in the original position. Furthermore, he says, "From the standpoint of the original position, the parties will be very considerably risk averse" (italics mine). This suggests that degree of risk aversion is one of the factors which parties in the original position are aware of and a basis

upon which they make their choice of principles.

There seems to me only one way of satisfactorily reconciling the two points of view expressed in the two passages, and that is in the following way: the normal degree of risk aversion possessed by parties in the original position is the result of "a rational assessment of accepting risks unaffected by peculiar individual preferences for taking chances one way or the other." It is not altogether clear how individuals who did not know their own preferences for taking risks could arrive at a "rational" degree of risk aversion just on the basis of the situation alone — for even if a situation involves very great risks, there are obviously many ways of dealing with such risks, and Rawls does not spell out what the proper criterion of rationality is in such a case. Perhaps normal or moderate risk aversion is by definition "a rational assessment of accepting risks unaffected by ... preferences ... one way or the other". In any event, even if Rawls does claim in A Theory of Justice that he is ruling out risk aversion from the original position (and I do not think that he does), he smuggles it in in various places, e.g., "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" and "Having the ready alternative of the two principles of justice which secure a satisfactory minimum, it seems unwise if not irrational for them to take a chance that these outcomes are not realized".  

1 Ibid., p. 154.  
2 Ibid., p. 156.
So it is safe to assume that parties in the original position do possess a fair degree of risk aversion. If we ask how much, perhaps Rawls's own words, though vague, give the best reply: "not less than that of most any normal person".

What sort of principle, then, would be chosen by parties with normal, or moderate, risk aversion? Let us look first at the principles that would be chosen by parties with absolute risk aversion and with no risk aversion. Once we have identified the extremes represented by these principles, we will be in a better position to say what principles would be chosen by parties with moderate risk aversion; presumably it will lie somewhere between these extremes, and will be a compromise between them.

Let us turn first to parties with no risk aversion. Such parties are not risk-plungers; they do not deliberately seek out risk or engage in risk-taking for its own sake. Rather, they are risk-neutral. They are willing to take whatever risks are necessary to maximize their overall prospects. Consider, for instance, the following matrix.

\[
\begin{array}{cc}
C_1 & C_2 \\
D_1 & 4 & 12 \\
D_2 & 6 & 8 \\
\end{array}
\]

D₁ and D₂ are possible decisions. C₁ and C₂ are possible circumstances; which circumstance obtains is independent of the decision made. Assume that C₁ and C₂
are equally likely. A risk-neutral person will make the decision which maximizes his overall prospects or \( \sum_{i=1}^{n} p_i u_i \) where \( p_i \) is the probability of the \( i \)th payoff and \( u_i \) the utility of the \( i \)th payoff. For simplicity we will assume that for the individual making the decision the number of utils, or units of utility, is identical to the number of units of the good he receives.

The expected value of \( D_1 \) is \( \frac{1}{2} \cdot 4 + \frac{1}{2} \cdot 12 = 8 \); the expected value of \( D_2 \) is \( \frac{1}{2} \cdot 6 + \frac{1}{2} \cdot 8 = 7 \). Because his overall prospects are higher with \( D_1 \), the risk-neutral person will make that decision.

With this example in mind, let us return to the question of which principle would be chosen by risk-neutral parties in the original position. Assuming that each of the \( n \) parties behind the veil of ignorance has an equal chance of turning out to be anyone in a society of \( n \) people with utilities \( u_1 \) through \( u_n \), a party’s overall prospects for that society are \( \frac{1}{n} \cdot u_1 + \frac{1}{n} \cdot u_2 + \ldots + \frac{1}{n} \cdot u_n \), or \( \sum u_i/n \).

Since the average utility of a society is the total utility, or \( \sum u_i \), divided by the number of persons, \( n \), the prospects for a given society are identical to the average utility of that society (\( \sum u_i/n \)). It appears, then, that parties in the original position, in order to maximize their prospects, will choose the Principle of Average Utility, for their prospects are highest for that society with the highest average utility.

A single consideration blocks this conclusion, however. The Principle of Average Utility is not an easy principle to apply. The problems of establishing cardinal and interpersonal measures of utility are thorny ones. In "A Theory of
Justice Rawls points out that the difficulties in applying the principle of Average Utility:

are so great and the approximations are so rough that deeply conflicting opinions may seem equally plausible to different persons. Some may claim that the gains of one group outweigh the losses of another, while others may deny it. No one can say what underlying principles account for these differences or how they can be resolved. It is easier for those with the stronger social positions to advance their interests unjustly without being shown to be clearly out of bounds.  

The Principle of Average Utility is not a workable standard of justice since it allows a multitude of injustices to creep into society without being clearly detectable; it is simply quite difficult to say precisely when average utility is being maximized. Rawls's point is that those with greater wealth and power will be able to acquire more, even when average utility is not maximized, because no one will be able to demonstrate clearly that such acquisitions violate the Principle of Average Utility. Hence it seems unlikely that parties in the original position will choose the Principle of Average Utility, since their prospects will not be maximized if they do so.

Besides, there is a ready, and more acceptable, alternative. Rather than define their prospects for a society in terms of utility, they can define them in terms of social primary goods — those things they assume they all want, irrespective of their conceptions of the good. With their prospects redefined in terms of these goods, they would compute their prospects for a society much  

\[1\text{Ibid.}, \ p. \ 321. \]
as before: \( \frac{1}{n} \cdot I_1 + \frac{1}{n} \cdot I_2 \ldots + \frac{1}{n} \cdot I_n \), or \( \sum I_i/n \) where \( I_i \) is the index of social primary goods associated with the \( i \)th position in society. Since the average index of primary goods \( (\sum I_i/n) \) is identical to the prospects for a society, parties choose to maximize the average index of primary goods.\(^1\)

Parties will be satisfied with such a choice. If prospects are defined in terms of primary goods, cardinal and interpersonal measures of utility are avoided altogether; primary goods provide an objective means of determining well-being and making comparisons among persons. Ascertaining whether the average index of primary goods is being maximized will be relatively straightforward, and hence the degree of injustice will be kept at a minimum.

Before we settle upon this choice as final, however, we must deal with the criticism that the computation of prospects for a society depends upon the Principle of Insufficient Reason --- a principle which the parties in the original position will most certainly not use. The Principle of Insufficient Reason states that "if there is no evidence leading us to believe that one of an exhaustive set of mutually exclusive events is more likely to occur than another, then the events should be judged equally probable."\(^2\) The parties in the original position will most certainly not use this principle, as it is not consistent with the preferences of the parties. To address this issue, Rawls proposed a list of principles for the original position, which includes the principle of maximization of the average index of primary goods.

\(^1\)Since the choice of a principle is made from a list of alternatives, the principle calling for the maximization of the average index of primary goods should be added to the list that is presented to parties in the original position (see A Theory of Justice, p. 124). Any other principles which are mentioned in the context of deliberation by parties in the original position but which are not on Rawls's original list should be added to the list.

position do not have any information leading them to believe that it is more probable that they will turn out to be some people rather than others, once the veil of ignorance is lifted. Hence they should, according to the Principle of Insufficient Reason, assume that they have an equal chance \((1/n)\) where there are \(n\) people in the society of turning out to be anyone. Rawls, however, assumes that "judgments of probability, if they are to be grounds of rational decision, must have an objective basis, that is, a basis in knowledge of particular facts (or in reasonable beliefs)."\(^1\) He goes on to say that:

> this evidence need not take the form of reports of relative frequencies but it should provide grounds for estimating the relative strength of the various tendencies that affect the outcome...I shall assume, therefore, to fill out the description of the original position, that the parties discount estimates of likelihoods not supported by a knowledge of particular facts and that derive largely if not solely from the principle of insufficient reason.\(^2\)

In this passage Rawls claims that a decision is not rational if it utilizes probability estimates that are not based upon particular facts. The choice of the Principle of Utility would not, according to Rawls, be rational, for it rests upon the assumption that an individual has an equal chance of turning out to be anyone. Rawls wants to say, however, that the choice of the Difference Principle is a rational one, that it does not depend upon probability estimates which can in no way be supported by particular facts. Yet the reasoning for the Difference Principle is no more independent of probability judgments than the reasoning for the Principle of Utility. Parties who choose the latter

\(^1\) Rawls, op cit., p. 173.

\(^2\) Ibid.,
principle reason as if there were an equal chance of turning out to be anyone; parties who choose the former principle reason as if there were a probability of 1 of turning out to be a member of the least advantaged group in society. There are no particular facts to indicate that one estimate of probability is any better than the other. Why, then, should the choice of the Difference Principle be regarded as any more "rational" than the choice of the Principle of Utility?

Rawls simply assumes, "to fill out the description of the original position", that parties in the original position would not use the Principle of Insufficient Reason. If this assumption is not to appear arbitrary, it must seem intuitively plausible to include it in the list of conditions that characterize the original position; it cannot be included merely because it yields the desired solution. Unfortunately the assumption lacks such plausibility, and appears to be one that is made solely to block choice of the Principle of Utility.

Next, we must consider what principle would be chosen by parties with absolute risk aversion. E. S. Venttsel, in his Introduction to the Theory of Games, says that "if we want to behave as cautiously as possible (that is, taking no risks), we must adopt the strategy...for which the minimum payoff is at a maximum."\(^1\) A completely risk averse person is willing to take no risks whatsoever; he is not prepared to risk the best payoff he can be certain

of receiving (the maximized minimum) for any greater, but merely possible, payoff. Consider again the matrix on page 23. Presented with such a matrix, an individual with absolute risk aversion will decide so as to maximize minimum utility; he will make decision 2 because with it he is certain of having a utility of 6 — a higher utility than he is assured of with decision 1 (4). With D1 he has the chance of getting a 12, whereas with D2 the best he can do is get an 8; still, he is unwilling to risk the 6 he is assured of with D2 for the mere possibility of getting a 12 with D1. It may seem at first glance, then, that parties in the original position, if they have absolute risk aversion, will choose a principle which maximizes the minimum utility.

However, just as risk-neutral parties rejected the Principle of Average Utility because it was so unworkable, because unjust deviations from it are encouraged by the near impossibility of verifying whether or not the principle is satisfied by any given distribution, parties with absolute risk aversion will reject a principle which calls for maximizing minimum utility. In practice it will be difficult to ascertain whether minimum utility is being maximized. Some may claim that under one distribution minimum utility is higher than under another distribution; others may disagree. If the worst-off individuals under both distributions are the same, it will not be difficult to determine which distribution gives that individual a higher utility; presumably he can at least make ordinal judgments. But problems arise when the worst-off individuals under the two distributions are different; then disagreement can easily arise as to whether
the utility of the worst-off individual under one distribution is higher or lower than that of the worst-off individual under the other distribution. And of course it may be difficult even to identify the worst-off individuals under different distributions, since doing so involves making questionable interpersonal comparisons.

The same argument that was brought to bear against choice of the Principle of Average Utility by risk-neutral parties can now be brought to bear against choice of the principle to maximize minimum utility by completely risk averse parties: Those who have greater power and wealth will be in a position to acquire more without anyone being able to demonstrate that they act unjustly. With the principle to maximize minimum utility, those better off will claim that minimum utility is maximized whenever it is to their advantage to do so; they will maintain that their having even more power and wealth will maximize the utility of the worst-off person, and in many cases it will be exceedingly difficult to show them to be wrong. In short, a principle calling for maximization of the utility of a group or of an individual lends itself quite readily to abuses by those in power or by those with greater wealth. To prevent such abuses parties in the original position will choose a principle prescribing maximization of the minimum index of social primary goods instead of minimum utility. Such a principle will be easy to apply and abuses will be readily detected. One need not make questionable determinations of or comparisons of utility; one need only calculate the amount of primary goods
the worst-off person would have under different distributions and identify
the distribution which gives the highest index of these goods.

While discussing the merits of a theory of primary goods over a theory of
utility, I would like to point out that although Rawls vigorously argues in A Theory
of Justice that his Difference Principle is superior to the Principle of
Utility because it bases expectations on primary goods instead of utility,
it at least appears that in his recent unpublished paper he throws all such
arguments to the wind and bases expectations on utility. He presents the following
graph and gives a brief commentary on it.

The curve OP, he says, "depicts the effects of redistributive measures (for
example, income taxation and transfers) on representative persons' utility
feasibility frontier" (italics mine). The lines mm and uu are indifference
curves of the maximiner and the utilitarian, respectively. For purposes of

drawing the utilitarian indifference curve, the two classes are assumed to be of the same size. The Difference Principle, says Rawls, would select point M; the Principle of Utility, on the other hand, would select U. According to the graph, the Difference Principle selects the point which maximizes the less advantaged representative person's utility, not his index of social primary goods.

Rawls undoubtedly drew the graph in this way, even though it misrepresented the basis of expectations of the Difference Principle (assuming Rawls did not actually change its basis of expectations), because he realized that his presentation of the contribution curve OP in *A Theory of Justice* was plagued by a major difficulty. There Rawls says that the OP curve represents the contribution of the more advantaged representative person's expectations to the expectations of the less advantaged representative person. The problem is that Rawls plots the points selected by the Difference Principle and the Principle of Utility on the same graph, which he cannot do since the Difference Principle bases expectations on indices of social primary goods, whereas the Principle of Utility bases expectations on utility. When Rawls talks about the Difference Principle, he seems to assume that the axes of the graph measure expected indices of primary goods; when he talks about the Principle of Utility, he seems to assume that the axes measure expected utility. He cannot have it both ways.
One might try to maintain that Rawls does not equivocate, that he intends the axes to measure expected indices of primary goods because he thinks that the point at which the sum of the indices of primary goods is maximized (which is what point U would represent if the axes did measure primary goods) is in fact the point which the Principle of Utility would select. Of course, the point would not represent the maximization of total utility, since utility is a function of primary and non-primary goods. But it might represent, for a utilitarian, the correct distribution of primary goods, if one assumes that primary and non-primary goods never "affect" each other in such a way that the utility of a package of primary goods and non-primary goods differs from the sum of the utility of the primary goods by themselves and the utility of the non-primary goods by themselves -- in other words, if it is assumed that the inclusion of non-primary goods in a utility function has the effect of merely adding the utility of the non-primary goods alone to the utility of the primary goods alone. If the two types of goods do not "affect" each other, a necessary condition for the maximization of total utility is maximization of utility from the distribution of primary goods, considered separately from non-primary goods. I shall refer to this utility as P-utility.

However, the point at which the sum of the indices of primary goods is maximized needn't always be the point at which P-utility is maximized.
Consider, for example, the following graph.

The axes of the graph measure the indices of primary goods of individuals 1 and 2 (I have assumed for the sake of simplicity that the more and less advantaged classes have one member each). The indifference curves are those of a person favoring maximization of the sum of the indices of primary goods. The utilities of individuals 1 and 2 are a function of primary and non-primary goods: \[ U_1 = \sqrt{P} + NP/2; U_2 = P + NP/2. \]

The sum of the indices is maximized at point B; at that point, the OP curve is just tangent to the highest indifference curve it touches. P-utility is not, however, maximized at B. From the above utility functions, it is possible to see that Point A has a higher P-utility associated with it (6.24 as compared with 5.65 at point B). A distribution that maximizes the sum of the indices of primary goods will not, then, always be one that maximizes P-utility. Hence Rawls would not be justified in claiming that the point at which the sum of the
indices of primary goods is maximized is the point selected by the Principle of Utility.

I do not believe, however, that Rawls meant the axes of the graph to measure primary goods when he plotted both points on the OP curve, and that he intended the point selected by the Principle of Utility to represent the distribution that maximized P-utility. In *A Theory of Justice* he says that the OP curve represents the contribution of the more advantaged representative person's expectations to the less advantaged representative person's expectations; hence, he apparently intended the axes of the graph to measure "expectations" and believed that the points selected by both principles could be plotted on the graph. The problem is that he failed to take account of the fact that the two principles base expectations on different things (the Difference Principle on social primary goods and the Principle of Utility on utility) and so cannot be compared on the same graph. I suspect that Rawls later realized his mistake and that one of the reasons he changed the graph, appearing to base the expectations of both principles on utility, was so that the graph would no longer suffer from the same difficulties as before.

Let us return now to the question of what principle would be chosen by moderately risk averse parties in the original position. We have seen that parties with no risk aversion would choose a principle prescribing maximization of the average index of primary goods and that parties with absolute risk aversion would choose a principle prescribing maximization of the minimum index of primary goods. We noted before that parties with moderate risk aversion would choose a
principle that represented a compromise between these extremes. Since the parties do have some risk aversion, they will not be content with the "average index" principle, since it allows some individuals to have very few, or no, primary goods; they will want to guard against the possibility that they will meet with such disaster.

On the other hand, since their risk aversion is not extreme, they will not make the welfare of the worst-off individual their sole concern; they will be concerned, as well, with their overall prospects for a society. Given their desire to protect their interests to some degree but to have high overall prospects as well, it appears that the principle that would be most acceptable to them would be one prescribing that the average index of primary goods be maximized subject to the constraint that an acceptable social minimum be satisfied. With this principle everyone's interests are adequately protected, since no individual can fall beneath some acceptable minimum; but at the same time everyone's overall prospects are higher than if the minimum index of primary goods were maximized (unless of course the average index and the minimum index are at a maximum simultaneously, in which case at least overall prospects would not be lowered).

Of course it is very difficult to say exactly where the minimum will be set. Parties will try to assure that every individual has adequate food, housing and medical care. It should be noted, however, that the "average index" principle constrained by a social minimum cannot guarantee that all citizens at all times
will enjoy an adequate standard of living; in times of depression, or when natural catastrophes occur, severe hardships may be imposed upon everyone. All the principle can do is to insure that once an acceptable minimum is attainable, it will be established before the average index of primary goods is maximized.

From the point of view of the strains of commitment involved, the parties will find the average index principle constrained by a social minimum far more acceptable than the Difference Principle. Because the former principle establishes an acceptable minimum, parties will be able to comply with it no matter what their position in society turns out to be. The Difference Principle, on the other hand, is a principle that some individuals may find it exceedingly difficult to comply with, since it permits expectations to drop to the zero level. Rawls himself argues that parties will not "enter into agreements that may have consequences they cannot accept. They will avoid those that they can adhere to only with great difficulty". ¹ He mistakenly thinks, however, that the Difference Principle provides a "satisfactory minimum" and hence that it would be "unwise, if not irrational" ² not to choose it.

In chapter 49 of his book, Rawls considers "a view" similar to the one I have been arguing for -- "the view arising when the Principle of Average Utility constrained by a certain social minimum is substituted for the Difference

²Ibid, p.156.
Principle, everything else remaining unchanged". ¹ I shall examine the arguments he levels against the constrained average utility principle because they are the same ones, I believe, he would level against the constrained average index principle. His first argument is that the difficulty with the principle is "the same as that with intuitionist doctrines generally: how is the social minimum to be selected and adjusted to changing circumstances?"²

Why does Rawls assume that such a principle is an intuitionist one? According to Rawls intuitionism is "the doctrine that there is an irreducible family of first principles which have to be weighed against one another by asking ourselves which balance, in our considered judgment, is the most just"³. He believes, then, that the principle is an intuitionist one because it does not provide a means of weighing the Principle of Average Utility (or the average index principle) against the requirement of a social minimum. One can, for instance, require a high social minimum, even if the average utility (index) is made quite low; or one can set the minimum low in order to achieve a high average utility (index). If there were a conflict between a high average utility (index) and a high social minimum, and no means of adjudicating the conflict were specified we would have to rely on our considered judgments to balance one against the other and achieve a final solution.

The parties in the original position will not, however, be willing to leave

¹Ibid., p. 316.  
²Ibid.  
³Ibid., p. 34.
so much to considered judgments. There is no guarantee that once the veil of ignorance is lifted people's considered judgments will converge upon a single solution to the problem of balancing the average index against a social minimum; there is a strong possibility that people's considered judgments will be influenced by their positions in society, their social status, etc. The parties have much to lose if the social minimum is not set high enough; the situation involves grave risks. Hence they will prefer a solution to the balancing problem before the veil of ignorance is lifted; they will specify the exact level of the minimum, and will in that way be assured of having a minimum that is acceptable to them. The objection that the average index principle constrained by a social minimum has the same difficulty that any intuitionist doctrine has is not decisive; by setting a level for the minimum before the veil of ignorance is lifted, the parties will weed out any intuitionist elements in the principle.

Rawls's second argument against the Principle of Average Utility constrained by a social minimum is that it may in fact be extensionally equivalent to the Difference Principle, depending on the level at which the minimum is set. If we examined the considered judgments of a person using the Difference Principle, he says, we might find them "indistinguishable from those of someone following this mixed conception [the Principle of Average Utility constrained by a social minimum]." Actually, since the latter principle bases expectations on utility and the Difference Principle bases them on social primary goods, Rawls's argument would be even stronger if he were claiming that the Difference Principle

\textsuperscript{1}Ibid., p. 317.
is extensionally equivalent to the average index principle constrained by a social minimum, since both of these principles base expectations on social primary goods. It is the latter argument that I shall consider, since it is, I believe, the one Rawls would make against the constrained average index principle.

The considered judgments of someone using the Difference Principle would be indistinguishable from those of someone using the constrained average index principle only in those cases in which the distribution that maximizes the expectations of the least advantaged representative person also maximizes the average index of primary goods (after satisfying whatever minimum is chosen). However, if the minimum is set above zero, the Difference Principle and the constrained average index principle can diverge in their consequences (since the Difference Principle allows expectations of individuals to drop to zero as long as the least advantaged representative person's expectations are maximized); and when such divergences occur, the considered judgments of persons using the different principles can easily be distinguished. It is true, then, that the considered judgments of a person using the Difference Principle "might be indistinguishable" (italics mine) from those of someone following the constrained average index principle -- depending upon which distributions are considered. But of course it does not follow from this that a particular "level assigned to the required minimum that constrains the principle ... leads to precisely the

\[1\text{Ibid.}, \text{p. 317.}\]
same consequences"¹ as the Difference Principle in all cases that might
be considered.

The average index principle constrained by a social minimum does, then,
provide a real alternative to the Difference Principle; and an examination of the
two principles has indicated that the former would be preferred to the latter by
parties in the original position.

¹Ibid., b. 317.
CHAPTER TWO
EQUALITY, RIGHTS, AND DISTRIBUTION

Section One
The Difference Principle and the Principle of Redress

In this section I shall consider one egalitarian feature of the Difference Principle—that it serves to partially redress inequalities of birth and natural endowment. Rawls asserts that the principle gives some weight to the considerations singled out by the principle of redress. This is the principle that undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are to be somehow compensated for. Thus the principle holds that in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into less favorable social positions. This idea is to redress the bias of contingencies in the direction of equality.¹

Rawls goes on to say that the Difference Principle, although it is not the Principle of Redress, does "achieve some of the intent of the latter principle."² Why does the Difference Principle accomplish only part of the aim of the Principle of Redress? Rawls is not entirely clear on this matter. He does say that the Difference Principle "does not require society to try to even out handicaps as if all were expected to compete on a fair basis in the same race."³ I take it, then, that what Rawls is claiming is that although

¹Ibid., p. 100–101.
²Ibid., p. 101.
³Ibid.
the Difference Principle does not prescribe equal starting places in the race for social primary goods, it does at least provide partial compensation for the group that is most handicapped (in terms of natural assets, social position born into, etc.) by maximizing its expectations.

But should a principle of justice attempt to provide compensation (even if only partial) for inequalities of birth and natural endowment? The argument Rawls offers to establish that redress is required for such inequalities is:

1. All undeserved inequalities call for redress. (Principle of Redress)
2. All inequalities of birth and natural endowment are undeserved.
3. All inequalities of birth and natural endowment call for redress.

Before examining this argument we should consider what differences among people are to count as inequalities of birth and natural endowment.

Are all differences in natural endowment to count as inequalities of natural endowment? For instance, I am blue-eyed and Mary is brown-eyed. Is our difference in eye color to be regarded as an inequality of natural endowment? This question is difficult to answer. One is tempted to say that typically such a difference does not count as an inequality of natural endowment, but that in certain circumstances it might. Suppose that in a certain society people with blue eyes are discriminated against; they are barred from high social
positions and are made to work instead at menial, low-paying jobs. We would, I think, be willing to agree that in such a society differences in eye color do count as inequalities of natural endowment. This example suggests the following formulation: Differences in natural endowment are inequalities of natural endowment if and only if they result in differential access to social primary goods.

What differences are to count as inequalities of birth? Rawls mentions differences in social position born into, presumably because of the differential effect they have upon access to social primary goods, but there are other environmental differences which have such an effect as well, notably differences in quality of family born into and quality of education received. It may seem odd to include differences in quality of education among those differences classified as inequalities of birth; but since these differences, along with differences in social position and quality of family, result in differential access to social primary goods, I think their inclusion is justified (although it might be preferable to refer to all such differences as inequalities of background rather than inequalities of birth).

Let us now return to Rawls's argument. We can, I think, safely agree to premise 2—that all inequalities of birth and natural endowment are undeserved. For example, no one deserves his better looks, which operate as an advantage in the quest for social primary goods, or his inferior social background, which

1Of course, since class lines in many societies are fluid, thereby permitting persons to cross class lines through change of employment, etc., what is frequently more important than the class one is born into is the mean social level of one's family during one's childhood.
operates as a disadvantage. People are simply born with certain advantages and disadvantages, or receive them through no doing of their own; they do not deserve them.

So let us turn our attention to premise 1—that all undeserved inequalities call for redress (the Principle of Redress).

Rawls intends to employ the principle as a prima facie principle only: "Now the principle of redress has not to my knowledge been proposed as the sole criterion of justice, as the single aim of the social order. It is plausible as most such principles are only as a prima facie principle, one that is to be weighed in the balance with others."¹ For the principle to apply to inequalities of birth and natural endowment, then, it must be the case that no rights to these goods are present. Since this is not the case with inequalities of birth and natural endowment, the principle does not apply to them. Felicities and infelicities of birth—goods such as wealth, income, and child care—are goods which individuals have rights over. And natural assets are owned by individuals, even if they cannot be said to deserve them. Since people own such goods and assets, their distribution is not unjust, and hence, contrary to the conclusion of Rawls's argument, no redress is called for.

Some people may want to maintain, however, that even though inequalities of birth and natural endowment are not themselves unjust, they nevertheless call for redress because they lead to inequalities of goods, which are unjust. In redressing inequalities of birth and natural endowment by providing equal

¹Ibid., p. 101.
starting places in society, inequalities of goods would be eliminated; each person, being neither advantaged nor disadvantaged in the race for goods, would be able to win an equal share for himself. However, if inequalities of birth and natural endowment are not themselves unjust, but only lead to inequalities of goods, which are unjust, then surely it is not the inequalities of birth that call for redress, but rather the inequalities of goods. Rawls concludes his discussion of redress by saying:

We see then that the difference principle represents, in effect, an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be. Those who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out. The naturally advantaged are not to gain merely because they are more gifted, but only to cover the costs of training and education and for using their endowments in ways that help the less fortunate as well.¹

What does Rawls mean by the somewhat vague statement that the Difference Principle "represents, in effect, an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be"?

By "common asset" I take Rawls to mean 'common property' or 'jointly owned property.'¹ This interpretation is corroborated by another passage in which Rawls alleges that "the two principles are equivalent...to an undertaking to regard the distribution of natural abilities as a collective asset."²

¹Ibid., pp. 101-102.
²Ibid., p. 179. Italics are mine.
Although Rawls speaks of an agreement to **regard** natural talents as a common asset, he does not seem to be maintaining that justice **requires** that natural assets be commonly owned. Elsewhere he says: "I have assumed so far that the distribution of natural assets is a fact of nature and that no attempt is made to change it, or even to take it into account"\(^1\) In this passage he seems to be claiming that the distribution of natural assets, since it is a "fact of nature", is not unjust. Natural facts, he has asserted, are "neither just nor unjust... what is just and unjust is the way that institutions deal with these facts."\(^2\)

Nor is Rawls maintaining that parties in the original position have made any such agreement. Although knowledge of the distribution of natural assets is ruled out of the choice situation by the veil of ignorance, nevertheless parties in the original position do not agree to view natural assets as common property. They simply do not take into consideration the distribution of natural assets, or any rights over them, in choosing a principle to distribute wealth and income.

What, then, is Rawls maintaining in this passage? He seems to be arguing that if people agree to view natural assets as commonly owned and if they also agree to distribute the benefits of these assets so that they are to every (representative) person's advantage, then the resulting principle of distribution (that the benefits produced by natural assets are to be distributed in such a way that every representative person is advantaged) is extensionally equivalent to, or

\(^1\)Ibid., p. 107.
\(^2\)Ibid., p. 102.
is "in effect", the Difference Principle as it applies to natural assets. Rawls has already advanced a hypothetical contract argument in favor of the Difference Principle—that parties in the original position will choose the Difference Principle. Now he is offering another principle of distribution which he claims is equivalent to the Difference Principle applied to natural assets, and an actual, rather than a hypothetical, contract argument in support of it.

Of course if an agreement to view natural assets as commonly owned and to share in the benefits is not made, then Rawls's actual contract argument does not establish that justice prescribes that the benefits be distributed in a way that is to everyone's advantage; whereas the hypothetical contract argument allegedly establishes that justice requires distribution in accord with the Difference Principle, irrespective of any actual agreement. Perhaps Rawls finds something ethically appealing about everyone agreeing to regard natural assets as commonly owned and to share in the benefits produced by them; but he has certainly not produced an argument to show that everyone has a duty or obligation to do so or even that they ought to do so. Besides, even if everyone did have a duty or obligation to make such an agreement, but did not, justice would not require that the benefits be shared, despite the lack of agreement, just as justice does not require that Y give $5 to Z merely because Y promised X that he would make a promise to Z to give him the money.

But even if everyone does agree to regard natural assets as common property and to share in the benefits produced by them, does it follow, as Rawls seems
to think it does, that justice requires such a distribution of the benefits? Perhaps Rawls holds that natural assets are privately owned by the individuals who are born with them but that in making "an agreement to regard the distribution of natural talents as a common asset" the individuals are transferring the rights over their natural assets to the collective. The argument, then, would be as follows:

(I) People transfer their private property rights in their natural assets to the collective.

(2) Natural assets become jointly owned.

(3) The joint owners of property jointly own the benefits produced by the property.

(4) The joint owners of natural assets jointly own the benefits produced by these assets.

(5) If the joint owners of property agree to distribute the property in a certain way, then the property is to be distributed in that way (justice requires such a distribution).

(6) The joint owners of benefits produced by natural assets agree to distribute these benefits in such a way that every representative person is advantaged.

(7) The benefits produced by natural assets are to be distributed in such a way that every representative person is advantaged (justice requires this distribution).

However, Rawls has previously asserted that the distribution of natural assets is "neither just nor unjust". Hence it does not seem plausible to maintain that he believes individuals have rights over their natural assets and, in agreeing to regard natural assets as commonly owned, transfer these rights to the

\[1\] Ibid., p. 102.
collective. For if individuals did have rights over their natural assets, then presumably the distribution of natural assets would be a matter of justice. If X acquired the natural assets of Y, without Y transferring to him these assets, then the resulting distribution would be unjust.

It might appropriately be questioned whether natural assets are the sort of good which it is logically possible to redistribute. Perhaps natural assets are goods like love or friendship, which are not logically redistributable. Is it possible, for instance, to acquire someone else's ability to play the violin, or his high IQ? If people cannot acquire other people's natural assets, then the claim that the distribution of natural assets resulting from X acquiring the natural assets of Y is unjust cannot be taken as an objection to Rawls's statement that the distribution of natural assets is neither just nor unjust.

The answer to the question regarding the logical redistributability of natural assets depends, of course, upon what sort(s) of thing(s) natural assets are. If, for instance, A's ability to play the violin is identical to a set of brain cells, then B can acquire A's ability to play the violin simply by receiving a transplant of the set of A's brain cells which are identical to his violin-playing ability. If, however, A's ability is identical, not to a set of brain cells, but to a function of the entire brain, then it appears that A's ability could not logically be distributed to B, for if B received a transplant of A's brain, he would lose his personal identity as B (assuming that having the same brain is a necessary and sufficient condition of retaining personal identity). But even if natural assets themselves
are not redistributable, management rights over them are. A may not be able to use B's natural assets himself, but can nevertheless decide how and when B uses his own natural assets. If A acquires the management right over B's natural assets, it is a violation of A's right for B to use his own natural assets without A's consent. Management rights over natural assets can logically be transferred to other individuals, or to the collective, in which case the consent of everyone is required for anyone to use his natural assets.

In any event, Rawls seems to hold that natural assets are natural resources which come into the world without any claims upon them; for if individuals did have claims upon their own natural assets, then the distribution according to which each person had his own natural assets would be just. Let us, then, revise premise 1 in accord with Rawls's view of natural assets as unowned resources:

\[(1')\text{ People agree to regard natural assets, which are unowned, as jointly owned.}\]

But now it is obvious that the argument does not go through, as (2) does not follow from (1'). Simply agreeing to regard an X, which is not a Y, as a Y, most certainly does not entail that X is a Y. It does not follow from the fact that people agree to regard zebras as giraffes that they are so.

I would like to suggest a behaviorist analysis of 'agreeing to regard an X as a Y' as 'agreeing to act as if X were a Y.' On this analysis, agreeing to regard X as a Y is compatible, not only with X not being a Y, but also
with believing that X is not a Y. In agreeing to regard natural assets as jointly owned, then, people would be agreeing to observe all rights which would exist if natural assets were jointly owned (e.g., the joint right to the capital), even if they believed that natural assets were not in fact jointly owned and that such rights did not exist.

Of course if natural assets were unowned resources, it might nevertheless be possible for people to acquire joint ownership rights in them; however, merely agreeing to regard such resources as jointly owned is not sufficient to yield a joint entitlement. If, however, 'agreeing to regard natural assets as jointly owned' were taken to mean 'commonly consenting to joint ownership', then (2) would follow from (1'), and unowned resources would become jointly owned.

But leaving aside the argument in favor of (7), is (7) equivalent to the Difference Principle? Even though Rawls speaks of the benefits produced by natural assets, it is apparent that he is referring to a specific class of goods, which he refers to as social primary goods, which is to be distributed by social institutions. This set, which is composed of wealth, income, and power, is a subset of all benefits produced by natural assets. Suppose that the offers to dance which one receives at a party are a benefit produced by natural assets (e.g., attractiveness). Rawls would certainly not hold that such benefits are to be distributed so that they are to every representative person’s advantage. We should, then, in accord with this consideration,
modify (7) to read:

(7') The social primary goods produced by natural assets are to be distributed in such a way that every representative person is advantaged.

To insure that (7') follows from the premises, (6) would have to be changed to:

(6') The joint owners of benefits produced by natural assets agree to distribute benefits in the form of social primary goods in such a way that every representative person is advantaged.

Although I have interpreted Rawls to be asserting the extensional equivalence of (7') and the Difference Principle, where the domain of goods is composed of social primary goods which are produced by natural assets, another interpretation is that Rawls was asserting the equivalence of the Difference Principle per se and a principle prescribing a distribution, which is to every representative person's advantage, of social primary goods produced by, not only natural assets, but also by other factors causally related to the production of these goods, such as social position, quality of family, and quality of education. The latter interpretation is supported by Rawls's statement that the Difference Principle itself "represents, in effect, an agreement...." The former interpretation, however, seems more plausible, given that Rawls refers exclusively to natural assets as causally relevant factors in the production of benefits to be distributed. I shall not attempt to decide between these two interpretations, but shall be content merely to point them out to the reader.
In explicating the Difference Principle Rawls states that it "is a strongly egalitarian conception in the sense that unless there is a distribution that makes both persons better off (limiting ourselves to the two-person case for simplicity) an equal distribution is to be preferred". The Difference Principle, then, offers a *prima facie* rule in favor of equality. It holds that social and economic goods are to be distributed equally unless there is an overriding factor (everyone's position can be improved). The Difference Principle is not a single principle, but rather two lexically ordered principles:

1. Social and economic goods are to be distributed so that everyone is better off (and in particular, so that the least advantaged person is as well off as possible) than if the goods were distributed equally. (I shall refer to this principle as the Common Benefit Principle.)

2. Social and economic goods are to be distributed equally.

The first principle, which prescribes a distribution which makes everyone better off than if goods were distributed equally, is lexically prior to the second principle which prescribes an equal distribution. Even though the principles are lexically ordered, we can safely assume, I think, that Rawls

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1 Ibid., p. 76.
did not intend a residual claim of some sort (e.g. to compensation) to be left if the second principle is overridden by the first. We can interpret him to mean, by ordering the principles in this way, that the second principle is nullified if the first principle is satisfied.

In this chapter, I shall consider whether either of the above two principles is a principle of justice. It may be questioned whether Rawls actually intended both principles to be principles of justice, or whether he intended the second to be a principle of justice and the first a principle overriding the second on grounds of the common good. Of course "common good" cannot be understood here to require the maximization of utility or even the maximization of social primary goods, but rather the improvement of everyone's position in terms of social primary goods (and in particular, the improvement of the position of the least advantaged group, whose position must be maximized). Because a great benefit -- one for the "common good", so understood -- could be obtained, an equal, or just, distribution would be overridden.

Rawls has on occasion referred orally to the Greatest Equal Liberty Principle and the Difference Principle as "first principles governing society" rather than as principles of justice. So perhaps Rawls does not have a large stake in affirming that both principles, or all of their constituent principles, are principles of justice, but would be willing to admit that they are a complete set of moral principles for society, lexically ordered, taking all moral considerations, including those of justice, into account.
However, since Rawls does, in *A Theory of Justice*, refer to the Difference Principle as a principle of justice, we must consider whether either of its constituent principles, the Common Benefit Principle or the Principle of Equality, is a principle of justice.

It has long been acknowledged that the concept of justice is tied analytically to the concept of a personal right. In *Utilitarianism* Mill presents various principles of justice and attempts to determine what is common to all of them. He concludes: "In our survey of the various popular acceptations of justice, the term appeared generally to involve the idea of a personal right -- a claim on the part of one or more individuals ... Justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right." 1 Mill summarizes what is commonly held about justice -- that it consists in rendering to persons their due, or what they have a right to have.

Rawls does not deny that individuals ever have rights. In fact, in "Fairness to Goodness" Rawls explicitly states that parties in the original position, although they do not have a right to any particular level in the social strata, nevertheless have a right to fair treatment -- to "equal respect and consideration in the design of their common institutions." 2 The conditions of the original position insure that parties are treated fairly in the choice

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of principles to regulate society. But even though Rawls conceives of parties in the original position as moral individuals with rights to fair treatment, he nevertheless holds that they will choose principles for institutions before choosing principles for individuals because many of the latter presuppose the former. The rights which individuals have against each other are frequently defined by the principles for institutions. For instance, the principle of fairness gives individuals rights against others that they do their part as defined by the rules of an institution only if the institution is just. Rawls's approach to justice is fundamentally different from that of people who claim that principles for institutions are derived from the rights of individuals.

But even though Rawls admits that principles for individuals assign rights to individuals, the question nevertheless remains whether principles for institutions, as well, assign rights to individuals. Principles for institutions can be logically prior to principles for individuals, even if the rights against institutions are those of individuals. Since the concept of justice logically entails that of individual rights, the rights assigned by principles for institutions, if they are principles of justice, must be those of individuals.

If the Common Benefit Principle and the Principle of Equality are principles of justice, they are thus translatable into principles about rights. However, since the principles prescribe distributions of social primary goods to certain groups, or representative individuals, the rights in question cannot
be those of individuals, but of groups. The principles, when translated into rights terms, state that the more and less advantaged groups (I assume the two-group case for simplicity) have rights under certain conditions:

1. If it is possible to make both groups better off than they would be under an equal distribution (condition C), each group has a right to greater expectations than it would have if goods were divided equally. Specifically, the less advantaged group has a right to maximized expectations, and the more advantaged group has a right to expectations which maximize the expectations of the less advantaged group.

2. If condition C does not hold, each group has a right to equal expectations.

There are two interpretations of 'possible' in the first principle. The first is that an unequal distribution which makes both groups better off is "institutionally possible", in the sense that incentives are provided by the institutions which, if individuals took advantage of, would result in such a distribution. In the case where individuals do not freely choose to make use of such incentives, but such a distribution could be brought about by institutional coercion, then I assume that on this interpretation the unequal distribution is the just one.
The second interpretation is that inequality which benefits both groups is "possible in terms of people's free choices." On this interpretation, if institutional incentives are provided but not freely taken advantage of, the equal distribution is the just one. Fewer goods are produced than might have been otherwise, but the distribution is nonetheless just.

Since Rawls nowhere mentions institutional coercion to bring about an increase in the quantity of goods to be distributed, I presume he is relying on the second interpretation.

Let us consider first whether the Common Benefit Principle (CBP) is a principle of justice. Suppose there is a society composed of two groups -- the industrious and the sloths. The industrious work steadily away producing valuable goods, while the sloths repose everyday under shade trees and drink lemonade. Suppose further that condition C is satisfied; allowing the industrious to have greater expectations than the sloths serves as an incentive, causing them to produce more goods, some of which can be transferred to the sloths, thus raising their expectations above the level they would have been if expectations had been equal initially. According to the CBP, the industrious are allowed to keep the minimal amount of goods necessary to maximize the expectations of the sloths. In other words, the industrious are permitted to keep an amount such that if any more of it were given to the sloths, the expectations of the sloths would be decreased. The sole consideration in deciding whether to allow the industrious to keep certain goods is whether the expectations of the sloths will increase, despite the fact that they
produce nothing! The expectations of the sloths are increased not through so-called "trickle down effects" (such as increased employment) but through outright gifts from the industrious.

It is preposterous to think that the sloths, who contribute nothing to the economy, have a right to a maximum level of expectations, that they have a legitimate claim to a substantial portion of goods, all of which are produced by the industrious. If the sloths do not have a right to a maximization of their expectations, the Common Benefit Principle is clearly not a principle of justice.

Relying on this same case, we can, I think, see that the second principle, the Principle of Equality, is not a principle of justice either. If the sloths produce nothing, they have no claim whatsoever on the goods of those who do. They do not have a right to equal expectations or, in fact, to any level of expectations.

A major problem with Rawls's principles, when translated into rights principles, is that they prescribe certain distributions of goods to groups, or representative individuals, when it has been acknowledged that the concept of justice is tied analytically to the concept of a personal, not a group, right. Rawls claims that the domain of social justice is exhausted by the distribution of social primary goods by major social institutions to social

1 I am assuming that the sloths quite literally contribute nothing to production; they are not even lazy capitalists, who own the means of production.
groups. He says:

The situation where someone is considering how to allocate certain commodities to needy persons who are known to him is not within the scope of the principles. They are meant to regulate basic institutional arrangements. We must not assume that there is much similarity from the standpoint of justice between an administrative allotment of goods to specific persons and the appropriate design of society.\(^1\)

He adds later:

It is a mistake to focus attention on the varying relative positions of individuals and to require that every change, considered as a single transaction viewed in isolation, be itself just. It is the arrangement of the basic structure which is to be judged, and judged from a general point of view. Unless we are prepared to criticize it from the standpoint of a relevant representative man in some particular position, we have no complaint against it.\(^2\)

In these passages Rawls concerns himself with two sorts of distributions -- by the institutional structure to social groups, or representative persons (macro level), and by individuals to other individuals (micro level). I agree with Rawls that the distribution of goods by individuals to other individuals is not properly the subject of social justice, rather what we might call personal justice. But there is a third type of distribution, which Rawls does not seriously consider -- by the institutional structure to individuals (what we might refer to as the intermediate level). Why should distributions of this sort be ruled out as constitutive of the domain of social justice? Why does Rawls assume that social justice operates on the macro level, and not

\(^1\) Rawls, op. cit. p. 64.
\(^2\) Ibid, pp. 87-88.
Rawls might hold that one of the formal constraints on principles of justice is that they be stated in macro-level terms. However, he does not list this constraint as one of the five constraints he places on ethical principles in section 23 of Chapter III. The only constraint he places on the formulation of principles is that they contain no "proper names or rigged definite descriptions". But certainly the latter constraint is not violated by stating the principles in intermediate level terms, for although they are stated in terms of individuals, no particular individuals are referred to. Furthermore, such a constraint would not be justified by the concept of the right, since the concept of justice, as I have mentioned before, is linked analytically to that of individual rights.

But the principal reason for Rawls assuming that social justice is a macro level matter is that he believes it would be impractical to take account of the distribution of social primary goods to every individual in society. He claims that "the great practical advantage of his principles of social justice is that it is no longer necessary in meeting the demands of justice to keep track of the endless variety of circumstances and the changing relative positions of particular persons. One avoids the problem of defining principles to cope with the enormous complexities which would arise if such details were relevant".

1 Ibid., p. 31.
2 Ibid., p. 87.
But on neither level (the macro or the intermediate) would all claims be perfectly satisfied. Institutions will be only roughly perfect, as they will be employing general rules and will not have perfect knowledge about the expectation levels of those persons, actual or representative, to whom goods are distributed. The imperfection of institutions is a problem for Rawls as well, especially since in order to know the expectation level of a group, it is necessary to know the expectation level of every member of the group anyway!

Rawls maintains that his hypothetical contract argument yields a principle stated in macro level terms. Parties in the original position will, he seems to think, choose a principle prescribing distribution of goods by the basic structure to representative individuals because they recognize the difficulty of implementing a principle prescribing distributions to particular individuals, rather than groups. As I have argued in Chapter One, however, parties in the original position will want to protect their own interests by choosing a principle prescribing certain distributions to individuals. They will realize that justice will be only imperfectly administered, no matter what principles are chosen and that their interests will be better protected if they choose principles stated in intermediate rather than macro level terms.
Perhaps Rawls holds an eliminability thesis -- that intermediate level principles are eliminable from a theory of justice because they are derivable from macro level principles. Because satisfaction of the correct set of macro principles would insure satisfaction of the correct set of intermediate level principles, it would be possible to eliminate the latter in favor of the former. We could safely employ a macro level vocabulary in the statement of the principles, referring only to distributions to groups rather than to individuals, being assured that no injustice was being done, that each individual was receiving the goods he had a right to have.

However, satisfaction of so-called "group rights" to social primary goods does not guarantee satisfaction of individual rights to these goods. Rawls means, by saying that a group has a right to a certain index of social primary goods, that it has a right to a certain mean index of these goods. This being the case, it is manifestly evident that individual rights to goods are not protected by group principles, for it is consistent with the satisfaction of a group right to a certain index of goods that an individual member of that group have any index of goods within a certain range, the minimum of which is 0 and the maximum of which is the index of the total goods distributed to the group. If macro level principles are satisfied, then, we cannot be certain that any individual will receive the social primary goods which he has a right to have. Hence macro level principles do not entail intermediate level principles, and it is not possible to eliminate the latter from a theory of
justice. Principles must be stated in an intermediate level vocabulary.

But there is a further problem with such principles about group rights. Let us distinguish aggregate groups from groups proper in the following manner. A group proper is an organization (such as a club), whereas an aggregate group is not an organization of any kind, but is a set of individuals who satisfy some criterion, such as that of falling below the mean income level. If the members of the group proper change, then the group still persists. But aggregate groups change as their members change, and hence it is not clear that it is even intelligible to speak about the rights of such groups, apart from the rights of the individuals who compose them.

Since the groups which Rawls refers to in his principles are aggregates, it is not clear that such groups possess rights at all. It seems more plausible to assert that individuals who belong to these aggregate groups have rights in virtue of satisfying the criterion which qualifies them for membership in the group.

Let us, then, in hope of salvaging Rawls's principles, state them in intermediate level terms:¹

Common Benefit Principle:

(l) Social and economic goods are to be distributed so that every individual is better off (and in particular, so that the least advantaged

¹ I am not claiming that Rawls himself would actually affirm these principles, as they are not extensionally equivalent to his original principles.
individual is as well off as possible) than if goods were distributed equally among individuals.

Principle of Equality:

(2) Social and economic goods are to be distributed equally among individuals.

Translated into rights terms, these principles would read:

(1)' If it is possible to make every individual better off than he would be under an equal distribution (condition C'), each individual has a right to greater expectations than he would have if goods were divided equally. Specifically, the least advantaged individual, LI, has a right to maximized expectations, and everyone else has a right to expectations which maximize the expectations of LI.

(2)' If condition C' does not hold, each individual has a right to equal expectations.

There is a certain ambiguity in the statement of principle (1)' . It is not precisely clear which individuals have entitlements to what levels of expectations. The term ' least advantaged individual' refers not to a specific individual across time, such as Mary Smith, but to different individuals at different times, since the worst off position can be occupied by different people at different times. The least advantaged individual has a right to maximal expectations as long as he remains in the worst off position; as soon as someone else moves into that position, he loses that right. But it is not
even clear which individual the term refers to at a given point in time.

Suppose the following two distributions by the basic structure are possible at time $t_1$:

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<tbody>
<tr>
<td>Distribution 1</td>
<td>3</td>
<td>10</td>
<td>2</td>
</tr>
<tr>
<td>Distribution 2</td>
<td>5</td>
<td>4</td>
<td>8</td>
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Although it might appear that, given the possibility of both distributions, C is the least advantaged individual, since he has the lowest possible expectation level under either of the two distributions (2), in fact B is the least advantaged individual, since what is meant by saying that the least advantaged individual has a right to maximized expectations is that the individual with the highest minimal expectations has a right to those expectations. When we compare the minimal expectations of A (3), B (4), and C (2), we see that B has the highest minimal expectation level (4) and hence has a right to that expectation level. Distribution 2 is thus the just distribution, as it provides the least advantaged with what he has a right to have.

It is also unclear precisely what rights other individuals have as well.

Suppose the following distribution is also possible at time $t_1$:

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<tr>
<td>Distribution 2</td>
<td>8</td>
<td>4</td>
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</table>
Distribution 3 is now also a just distribution, since the minimal expectation level is maximized; however, under it, A and C have different expectation levels than they have under distribution 2. When different distributions of goods to individuals are equally successful at maximizing the expectations of LI, it appears that "the right to expectations which maximize the expectations of LI" is a disjunctive right. Both A and C have a right to an expectation level of 8 or 5. If alternative distributions maximize the expectations of the LI and the basic structure, whenever possible, provides blacks with the lowest expectation levels they have a disjunctive right to, and whites with the highest expectation level, then it appears that the distributive structure is systematically racist and hence unjust. A similar problem exists with respect to the first principle, when stated in macro level terms. Rawls would, I believe, have to add a condition to the first principle (whether stated in intermediate level or macro level terms) stipulating that whenever alternative distributions maximize the expectation level of the least advantaged group (individual), a fair or random method must be used for choosing between distributions.

The first rights principle, whether stated in macro or intermediate level terms, is subject to another objection. Suppose the following two distributions are possible:
According to Rawls, distribution 2 is the just distribution, but it seems unfair to make B and C forego the much greater expectation levels they might have, under distribution 1, just because, under distribution 2, A has a slightly higher expectation level.

Relying on an example similar to the one brought to bear against Rawls's original principles, we can show that both of these principles are incorrect as well. Suppose there is a desert island with only two inhabitants — Robinson Crusoe and Friday. Robinson Crusoe does all the work; he clears the jungle, plants yams, tends the banana trees, fishes, collects wood for fuel, and gathers bamboo cane for building purposes. Suppose further that if Robinson Crusoe is allowed to keep $50 + n\%$ of the goods he produces (the remainder being given to Friday), he will produce more goods than if he is allowed to keep $50\%$, and it will be possible to make both him and Friday better off than if the goods are divided equally; in fact, it will be impossible to make Friday any better off by any other distribution of goods. Does Friday, under these conditions, have a right not only to the goods he would receive under an equal distribution, but also to an additional portion of goods made possible by Robinson Crusoe's extra work? Is it the case, as the
CBP holds, that Friday has a right to the greatest possible share of goods under a scheme of unequal distribution between him and Robinson Crusoe? Does justice require that Robinson Crusoe be allowed to keep no more goods than those necessary to maximize Friday's position, despite the fact that he produces all the goods himself, with no assistance from Friday? The answer to these questions is an unequivocal no. If Friday produces nothing, he does not have a right to a maximal share of goods. If he chooses to daydream on the beach or count flying fish, rather than even help Robinson Crusoe with his work, he has no legitimate claim on any of the goods Robinson Crusoe produces. Contrary to the Principle of Equality, then, he does not even have a right to an equal share of goods when it is not possible to make both him and Robinson Crusoe better off by dividing goods unequally. The fact that he would be made worse off under an unequal distribution than an equal one, considered independently of the goods he produces, is irrelevant to the just distribution of goods. Certain incapacitating features that Friday might have (such as being blind) would not be irrelevant to whether he ought to have certain goods, only to whether he has a right to them.

I am assuming also that Robinson Crusoe has not promised Friday any of his goods or has not given him rights to them in any other way.
Section Three

Distribution of Produced Goods:
The Production Principle and the Exchange Agreements

Principle

In section 2 of this chapter I argued, against Rawls's Common Benefit Principle and Principle of Equality (whether stated in macro level or intermediate level terms) that producers have rights to the goods they produce (to the so-called "fruits of their labor"), using as an example the right of Robinson Crusoe to the goods he produces. I have not yet discussed, however, exactly how producers acquire such rights. I propose the following principle: Producers acquire rights to goods which they produce by producing them using only what they own or have a right to use. I shall refer to this principle as the Production Principle (PP). The PP is a principle of justice in acquisition,¹ as it states conditions under which initial property rights in produced goods may justly arise — property rights in goods which no one has previously had a property right in. (No one could have had a previous property right in a produced good, as it did not exist prior to its production.) In this section I am not formulating a principle for the initial acquisition of all goods. The principle of acquisition I propose covers only produced goods; in section 4 I discuss the initial acquisition of non-produced goods.

¹Principles of transfer, on the other hand, prescribe how property rights may justly be transferred from one individual to another (voluntary exchanges, gifts, and bequests are all examples of just mechanisms of transfer).
I present this principle with a caveat — that, in the absence of an argument in its favor, it can at best be taken as intuitively plausible. The principle itself, or one like it, is frequently advanced as a principle of justice, but without the weight of an argument behind it. Nozick, for instance, alleges that "whoever makes something, having bought or contracted for all other held resources used in the process (transferring some of his holdings for these cooperating factors), is entitled to it. The situation is not one of something's getting made, and there being an open question of who is to get it. Things come into the world already attached to people having entitlements over them."¹ Nozick is relying on the intuitive idea that some variation of the principle "to each according to what he makes for himself"² is a principle of justice. Until I am able to develop a convincing argument for my Production Principle, I shall have to do the same.

The PP can serve as a premise in a labor argument establishing the rights of producers to the fruits of their labor:

1. If a producer makes a product, using only what he owns or has a right to use, he has a right to that product. (Production Principle)

2. Producer X makes product Y, with his own labor and means of production which he owns or has a right to use.

3. Producer X owns his own body.

4. His labor is a use of his body.

Therefore 5. His labor is a use of what he owns.

And hence 6. Producer X makes product Y, using only what he owns or has a right to use.

7. Producer X has a right to Y (to the fruit of his labor).

²Ibid.
Becker, in an unpublished manuscript on property rights, confesses that he has not found most labor arguments very satisfying. "One is left," he says, "with nothing but the persistence of the root idea [that people are entitled to what they produce with their labor] — and the vehemence of its advocates. The explanation is not to be found in any logical connection between labor and ownership; at least I can find no such connection which makes sense of the conclusion that people 'deserve' the fruits of their labor."¹ My argument does, however, clarify the connection between labor and property rights by stating that producers are entitled to what they produce, using only what they own or have a right to use (the Production Principle), and by pointing out that labor is a use of what one owns, namely one's body.

We can now return to the Robinson Crusoe case, which we discussed in the previous section, and understand how Robinson Crusoe could acquire rights to the goods he produced. If he labored to produce these goods and used means of production (in this case, the natural resources on the desert island) which he owned or which he had a right to use, then he acquired property rights in these goods. In section 4 of this chapter I argue that natural resources cannot be privately owned without common consent, but that individuals have rights to use shares of natural resources enabling them to survive and equal shares of resources remaining after "survival shares" have been distributed. As long as Robinson Crusoe used only such

¹Becker, unpublished manuscript, p. 60.
shares in producing his goods, he acquired rights to the goods he produced — to the yams he grew, the shelter he built, the clothing he made, etc. — and hence Friday had no legitimate claim to them at all.

We can see more clearly now that the Difference Principle is not a principle of justice, as it allows violation of individual rights. It might turn out that a member of the more advantaged group in society would be required to part with some of his goods in order to maximize the expectations of the less advantaged group, even if he had produced those goods solely with his own labor and means of production which he either owned or had a right to use. Excluding such an individual from the fruits of his labor would be a clear violation of his rights, and hence contrary to the principle of distributive justice, which prescribes that every individual's holdings be identical to those goods which he has a right to have.

II

In the Principles of Political Economy Mill offers a justification of property rights in produced goods: "It is no hardship to anyone to be excluded from what others have produced: they were not bound to produce it for his use, and he loses nothing by not sharing in what otherwise would not have existed at all."¹ I take him to be asserting three necessary and jointly sufficient conditions for a producer X to have a property right in

a good Y, which he produced:

1. X was not morally required to produce Y for anyone else.
2. Y would not have existed if X did not produce it.
3. No one loses anything by being excluded from Y.

Becker, in the manuscript referred to above, discusses these three conditions. Of the first condition he says: "Morality not only requires the fulfillment of obligations, but the exemplification of moral character traits and at least occasional concessions to the principle of maximizing goods. Morality encourages and permits much else, but it requires that much — at least in the sense that not to do it makes one liable for reprobation."²

²Becker, op. cit., p. 54
Becker does.

Condition 1 is taken account of by my argument, for I am assuming that, *ceteris paribus* (e.g., X has not promised Y to anyone), if X uses only what he owns or may permissibly use in producing Y, he is not morally required to give Y to anyone else, but has a right to it himself.

Mill's second condition is certainly not a necessary condition for X's having a property right in Y. Even if someone else would have produced Y if X hadn't, or if Y would have popped magically into existence, it is plain that X would still have a property right in Y.

Mill's third condition imposes a "no-loss requirement" on the acquisition of property. The exclusion of others from the goods acquired must not constitute a "loss" to them. Mill seems to be distinguishing between produced and natural goods, and claiming that acquisition of the latter does result in a loss to others, whereas acquisition of the former does not: "It is some hardship to be born into the world and to find all nature's gifts previously engrossed, and no place left for the newcomer."¹ No quantity of moveable goods which a person can acquire by his labor, prevents others from acquiring the like by the same means; but from the very nature of the case, whoever owns land, keeps others out of the enjoyment of it."²

Mill may be right that a person born into a world where all natural resources are already owned is put at a disadvantage; but that is not to say,

²Ibid., p. 235.
of course, that he undergoes any sort of loss — for he never had any of these goods in the first place. A person who owns land may or may not "keep others out of the enjoyment of it"; he may, for instance, make it into a park open to the public. But even supposing he does prevent others from enjoying it, it doesn't follow that he causes them any loss, for they may not have been deriving any pleasure from it previously; they may not have even known of the land's existence! Acquisition of natural resources does not, then, always constitute a loss to others.

Nor does acquisition by producers of the goods they produce exclude the possibility of loss to others. Mill points out that others are free to produce similar goods themselves, but of course they may not be able to, if their natural endowments are inferior in the relevant respects; they may not be strong enough to build a bridge, or intelligent enough to write a mathematics textbook. And the possession by some of such goods might cause a loss to others — of competitive equality, or even of actual goods (as, for example, when people are put out of business and forced to declare bankruptcy because they can no longer compete).

But even if a loss of goods or of competitive equality is suffered, such a loss in no way diminishes the rights of producers to the goods which they produce. Mill's no-loss requirement on the acquisition of property simply does not hold. Producing a good in accord with the PP yields a property right over that good. If the loss will cause great harm to someone (e.g. loss of life or a serious illness), then the property right may be
overridden on utilitarian grounds, but it will not be defeated.

Some might persevere with the argument that property rights in produced goods are circumscribed by utilitarian considerations, such as severe losses to others — that producers have rights to the goods they produce only if no one else suffers great harm. On such a view utilitarian considerations become part of the theory of property itself, serving to limit the initial acquisition of property rather than operating as overriding factors. However, if A and B produce goods according to the same procedures — both using their labor and goods which they already own — it is not the case that A has a property right in the good he produced and that B does not, merely because the acquisition by B of his good resulted in a loss to someone, whereas the acquisition by A did not. If both followed the same procedures, both acquired similar property rights, regardless of the effects on others; such effects are more appropriately dealt with by overriding property rights.

The circumscription view, furthermore, is inadequate because it does not account for the fact that producers whose goods are excluded from them to prevent harm to others are owed some compensation for the loss of these goods, in which their labor and materials which they own are invested. Even though it is permissible to deprive producers of goods which they produce in order to prevent harm, nevertheless the producers are dealt with unjustly. Some moral considerations are simply more important than justice; nevertheless the producers are entitled to compensation for the unjust treatment they receive. How much compensation they are owed, by whom, and what
kind, is, however, unclear. They certainly are not owed full compensation in kind for the loss of their goods, for in this case the burden of preventing harm would merely be shifted to someone else. They would certainly be owed an acknowledgement of the unjust way in which they were treated. What they are entitled to beyond this I leave as an open question, to be explored by others.

The major point, however, is this: Excluding producers from goods which they produce in accord with the PP leaves a moral trace or residue entitling them to compensation of some sort. The overriding view takes account of this fact, whereas the circumscription view does not; for according to the latter view producers do not even have rights over the goods they produce if their acquisition results in a significant loss to others, and hence the exclusion of producers from these goods is not unjust, and leaves no moral residue.

Some have argued that the acquisition by producers of the goods they produce, even if it does not constitute a loss of actual goods or of competitive equality, nevertheless may represent a loss to others in the sense that others lose the opportunity to acquire the goods themselves. Others have not lost any actual goods they previously had, but have nonetheless lost the opportunity to acquire the goods that have been acquired. The no-loss requirement in the opportunity sense prohibits people from acquiring goods or, if they do acquire them, requires them to compensate others for their loss by giving them benefits from the goods that are acquired (the transferring of benefits
could be accomplished through a system of taxation).

The right to such benefits would be neither special nor general — not special because the benefits would not be owed in virtue of any voluntary transaction between the owners of the goods and those who had lost opportunities, and not general because the right to benefits would not be against everyone, but only against those who had caused the loss of opportunity.

Let us consider, then, whether it is the case that when a producer acquires a good which he produces, everyone else loses the opportunity to acquire it. We must first clarify what an opportunity to acquire a good is, before we can determine whether anyone loses such an opportunity.

There are two types of opportunities: formal and socio-economic. A person has a formal opportunity to do X if the rules of the institution governing the performance of actions of that type permit him to do X. A person has a socio-economic opportunity to do X if his socio-economic status does not prevent him from doing X; in other words, a person has such an opportunity if all empirically necessary conditions of doing X which have to do with his social and economic status are satisfied. One might say that in the former case it is formally possible for a person to do X, whereas in the latter case it is materially possible for him to do X.

For instance, if a person is a member of a professional organization, then it is formally possible for him to attend the convention of that organization. If the rule of the organization is that all and only members of the organization may attend its conventions, then a member of the organization
has a formal opportunity to attend its convention, whereas a non-member does not have such an opportunity. If, however, the conventions are held at quite a distance from one of the members, and he cannot afford the cost of transportation to the convention, then although it is formally possible for him to attend the convention, it is not materially possible for him to do so. His income/wealth level prevents him from attending the convention, and hence he does not have an economic opportunity to attend it.

Another case in which it is possible to distinguish formal from social and economic opportunities is that of becoming President of the United States. The Constitution specifies that any U.S. citizen over the age of 35 may run for the office of President. All U.S. citizens over the age of 35, then, have a formal opportunity to become President; aliens, for instance, do not have this opportunity. However, if a person who qualifies for the Presidency in the formal sense lacks the money necessary to conduct a campaign, then although he has a formal opportunity to become President, he does not have an economic opportunity to do so. His economic status makes it possible for him to become President. Or if he is black, in what is a predominantly racist society, his social status prevents him from becoming President; he lacks an opportunity, in a social sense, which white citizens have.

Having an opportunity to do X, in a formal or socio-economic sense, or both, obviously does not entail doing X. Someone may, for instance, have the formal opportunity to attend a convention, and even have enough money for transportation and expenses, but choose not to go because he
wishes to be with his family instead. Nor does having an opportunity to do X, in either or both senses, entail being able to do X. The person who has both the formal and economic opportunity to attend a convention may not be able to do so because he broke his back and is in the hospital in traction. In the first case the person has the opportunity to attend the convention but chooses not to take advantage of it; in the latter case the person has the opportunity but cannot take advantage of it.

Armed with the distinction between formal and socio-economic opportunities, let us return to the original question concerning whether people lose the opportunity to acquire a produced good if the producer acquires it. Those who assert that people lose the opportunity to acquire the good under this condition are not, presumably, asserting that people lose the socio-economic opportunity to acquire it — that before the acquisition everyone had the social and economic means to acquire the good, but after the acquisition everyone lacked these means; for, the producer who acquires the good which he produces may have the lowest socio-economic status in his society, and in this case, if everyone else loses the opportunity to acquire the good, it is surely not because their social and economic conditions prevent them from acquiring it.

It seems more plausible, then, to interpret the claim that everyone loses the opportunity to acquire a good when someone else acquires it as a claim that everyone loses the formal opportunity to acquire the good. But in fact no one loses such an opportunity, for no one had it in the first place.
One of the rules of the moral institution of private property, I have argued, is that producers are entitled to the goods which they produce, using only what they own or have a right to use (the Production Principle). It follows from this rule that, ceteris paribus, it is impermissible for anyone to acquire a good produced by another under the conditions described. If no one had the formal opportunity to acquire such a good, then no one lost the formal opportunity to acquire such a good, and hence no compensation is due for such a loss.  

1 (If the institution in question is the legal, rather than the moral, institution of private property, then the rules are the statutes and judicial decisions regarding private property, regardless of their moral justifiability.) Other sorts of opportunities may, however, be lost by producers acquiring the goods which they produce — for instance, the economic opportunity to form a business in an area in which supply already exceeds demand.

Still, if acquisition by producers of the goods they produce in accord with the PP results in a loss of opportunity of some sort, then, as we argued before, with respect to loss of competitive equality or of actual goods, such a loss, although it does not defeat the claim of producers to property rights in these goods, nevertheless may serve as an overriding factor.

1 Of course, in a society which did not follow the Production Principle, but some other principle, such as a first come, first served principle for the acquisition of goods produced in accord with the PP, it would follow that everyone else did lose the formal opportunity to acquire such a good when its producer acquired it.
III

The Production Principle covers cases of independent as well as joint production. If a producer works by himself and produces a good using only what he owns or has a right to use (such as his own labor and machinery which he owns), then he has a right to that good. The PP holds, for instance, that a carpenter who cuts down trees on property he has a right to use and carves them into objects (chairs, tables, cabinets) has rights over those objects; and that a shoemaker who buys leather and works it into shoes has rights over those shoes.

Similarly, if a capitalist and other factors of production (managers, laborers) cooperate to produce a good, the capitalist has a right to the final product, as he is using only goods and services which he owns; the other factors of production have transferred to the capitalist ownership of the services which they provide, in exchange for goods (such as wages). Even though production is joint, the capitalist is the only member of the production team who uses only what he owns or has a right to use in the production process (he owns the means of production as well as the labor of managers and workers), and hence he is the only producer who has a right to the good produced. He acquires this right by producing in accord with the Production Principle, not, as some have argued, by taking risks.

The capitalist is the owner of the corporation. A capitalist can be an individual or a group of shareholders, who have purchased stock in the corporation.
(providing capital and paying the other factors fixed amounts without certainty about the demand for the product).

The question arises, however, what goods managers and laborers have rights to as a result of participating in the joint production process. In addressing myself to this question I shall use labor as an example.

Laborers are hired by capitalists; they agree to exchange their labor for wages. Laborers transfer rights over certain uses of their bodies to the capitalists, and are thereby obligated to labor in the manner specified by the terms of the wage agreement. In return, capitalists transfer rights over income to laborers, and are obligated to pay laborers wages of the level specified in the agreement. Whatever wage level is agreed to in a specific instance is just, as long as the agreement is voluntary (I shall consider shortly whether the existence of certain market conditions, which preclude laborers from receiving wages higher than they would have under different market conditions, renders the agreement involuntary); laborers have a right to, and capitalists are obligated to pay, the exact level of wages settled upon in the agreement.

Some economists have not made voluntary agreement the criterion of a just wage. Clark, for instance, claimed that justice required that factors of production be paid in proportion to their marginal products:

If each productive function is paid according to the amount of its product, then each man gets what he himself produces. If he works, he gets what he creates by working; if he also provides capital, he gets what his capital produces; and if, further, he renders service by coordinating labor and capital, he
gets the product that can be separately traced to that function.\footnote{John Bates Clark, \textit{The Distribution of Wealth} (Sentry Press, N.Y., N.Y.: 1965), p. 7.}

Such a principle of income distribution is a highly attractive one. It prescribes that the different factors of production be rewarded on the basis of their actual contributions to the final product, as determined by their marginal products. The marginal product of a factor is what one unit of that factor contributes to output. It is arrived at by holding all other factors constant and increasing that factor by one unit. The additional output that results from an extra unit of the factor is the marginal product of that factor. According to Clark, the income which a factor receives should be in accord with its marginal product. For instance, the wage rate (income per unit time) of a laborer should equal the income from the output produced per unit time \times the marginal product of the laborer (measured in the same unit of time); in other words, the laborer's wage rate should equal his marginal value product (MVP).

The Marginal Productivity Principle (MPP) has deep intuitive appeal, as it holds that each person has a right to the value of what he himself produces, working in conjunction with others.

The MPP is defective, however, as it fails to take account of agreements that are reached between capitalists and the other factors of production in advance of the production process. If, for instance, a voluntary transaction occurs between a capitalist and a worker, wherein rights over goods or services are exchanged, then justice consists in each party receiving what he had a right to receive according to the exchange agreement. The
worker would have a right to the wages agreed upon in the contract, and the capitalist would have the right to services which the worker agreed to perform.

The advocate of the MPP might try to argue that conditions under which workers agree to receive less than their MVP are in some way coercive, so that the agreements reached are not fully voluntary, and hence not morally binding. Let us examine, then, the conditions under which the result of exchange agreements between capitalists and workers is that the workers receive their MVP, and consider whether a departure from these conditions places coercive constraints on the agreements reached.

Marginal productivity theory holds that under conditions of perfect competition in the labor market workers will receive their MVP. Capitalists, operating in the profit-maximizing mode, are willing to hire workers as long as they add at least as much to revenue as to costs, in other words, as long as the value they contribute to the product is at least as great as the wages they are paid. Competition among capitalists bids up the price of labor to the maximum capitalists are willing to pay — namely the MVP of labor. If there is imperfect competition for labor among capitalists, however, which occurs when the supply of labor exceeds demand, then wages will decline, and workers will not be paid their MVP.

During the depression, for instance, when jobs were in short supply, and there was a surplus of labor, wages fell to extremely low levels. Dress manufacturers, having a large labor pool available to them, were able to
hire women to work for them for three to four dollars per week. Under such conditions, when supply and demand in the labor market are not in equilibrium, and capitalists are able to hire workers at less than their MVP, are workers being forced to accept, or are they voluntarily agreeing to, wages less than their MVP?

A necessary condition for a capitalist C forcing, or coercing, worker W to agree to wage level L in exchange for performing service S is that C employ a threat against W; C threatens not to pay W anything unless W agrees to perform S for L. The threat situation just described can, however, also be described as an offer situation: C offers to pay L to W if and only if W agrees to perform S. Is the situation in fact a threat situation or an offer situation?

In his paper "Coercion"\(^1\) Robert Nozick suggests a way of distinguishing threats from offers:

> Let us say that whether someone makes a threat against Q's doing an action or an offer to Q to do the action depends on how the consequence he says he will bring about changes the consequences of Q's action from what they would have been in the normal or natural or expected course of events. If it makes the consequences of Q's action worse than they would have been in the normal and expected course of events, it is a threat; if it makes the consequences better, it is an offer. The term "expected" is meant to shift between or straddle predicted and morally required.\(^2\)

Nozick describes a case where a drug-dealer normally supplies a person with drugs for money, but one day declares that he will continue to supply the


\(^2\)Ibid., p. 447.
drugs if and only if the person beats up someone. Here the criteria of usualness and moral requirement diverge. In the normal course of events, the person is given drugs for money. Now, suddenly, he is faced with losing his drugs if he doesn't beat up someone. He prefers the former course of events (receiving drugs for money) to the new course (receiving them for beating someone up), and so it would appear that the situation is a threat situation. According to the moral requirement criterion, however, the situation is an offer situation, as the morally required course of events (we are to suppose) is that the drug dealer not supply the person with drugs at all, and the person prefers beating someone up and receiving the drugs to receiving no drugs at all.

Nozick claims that in this case the usualness criterion takes precedence over the moral requirement criterion, so that the situation is predominantly one of a threat. In other cases, however, the moral requirement criterion will dominate. The difference in cases, Nozick alleges, is provided by the preference of the person himself. If he prefers the normal course of events to the morally required one, he is being threatened, but if he prefers the morally required course of events to the normal one, he is receiving an offer.

The problem with Nozick's criterion is that it does not account for less attractive offers, in cases where an agent prefers the normal course of events to the new course of events, as well as to the morally required course of events. Suppose, for instance, that a lonely old rich man gives
$n every week to a morally corrupt organization (such as the KKK in days when it lynched blacks) in return for a friendly letter from the organization. One week the old man, feeling especially lonely, announces that he will give the organization the $n if and only if they write two friendly letters. According to Nozick, the new proposal is a threat, for the organization prefers the normal course of events (in which it receives $n every week for writing a friendly letter) to the morally required course of events (in which it receives no money), and it is made worse off in the new course of events than in the normal course of events (because now it has to write two friendly letters instead of one).

But it is evident that the man is making the organization an offer, even if it is a less attractive offer than the previous ones ($n for one letter). For he can say to them, if they complain about the new condition: "Look, I don't have to give you the $n; it's mine to do with as I choose. You should be glad that I'm proposing to give you the money at all, under any conditions." The reply which is available to him bears out the fact that it is the moral requirement criterion which determines whether a proposal is a threat or an offer. What is morally required provides the baseline for assessing whether a proposal is an offer or a threat, regardless of what the normal course of events was and whether the agent preferred it to the morally required course of events.

Consider, for instance, a modification of the drug case which Nozick presents. Suppose a person has been supplying a drug addict with drugs,
completely at expense to himself. Now he finds himself in bad financial straits and tells the addict that he will continue to supply him with drugs if and only if he defrays part of the cost himself. The drug supplier is certainly not threatening the addict, but rather is making him an offer. He is not required to supply the addict with drugs (in fact he is morally required not to, as they are harmful); he has been doing the addict a favor by giving him the drugs, at a financial loss to himself. In asking the addict to offset part of that loss, he is still doing him a favor, since he is under no obligation to supply him with drugs. It makes no difference that the addict prefers the normal course of events (receiving drugs free) to the morally required course of events (not receiving them at all) and that he is made worse off in the new course (receiving them for some money) than in the normal course.

The moral requirement criterion, spelled out more fully, is: If X is morally required not to do act A for Y, or is not morally required to do A for Y, but says he will do A if Y performs B, and Y prefers not doing B to doing B, ceteris paribus, but prefers doing B to X's not performing A, then X is making Y an offer; whereas if X is morally required to do A for Y, but says he will not do A unless Y performs act B, and Y prefers not doing B to doing B, ceteris paribus, but prefers doing B to X's not performing A, then X is threatening Y.

Let us now return to the original drug case described by Nozick and apply the above criterion to it. If the possessor of a drug, A, is morally
required not to give the drug to B, who desires it, (because the drug is harmful to B), but agrees to give it to him on the condition that he beat up someone, then A is making B an offer. Or if A is not morally required to give B the drug (it is a beneficial drug but A owns it) but agrees to give it to him on the condition that he beat someone up, he is also making B an offer, agreeing to give him something he isn't required to give him, regardless of what the customary condition was in the past, and whether B preferred it to the new condition.

But if A is morally required to give B the drug (it is a beneficial drug and he has promised to give it to him once a week) and then reneges and refuses to give it to him unless B beats up someone or performs some other act(s), then A is threatening B — again, regardless of what A's behavior has typically been in the past. If, for example, A has, every week, refused to give B the drug unless he paid for it, despite his promise, then A has been threatening B all along, and continues to do so when he requires that B beat someone up in order to receive the drug, as he is withholding from B, on a conditional basis, something which he is morally required to give him.

Let us return to our original case, which had to do with wage agreements between capitalists and workers, and apply our new criterion to it. If capitalist C owns the money which he pays out to workers as wages (he has acquired it in accord with the PP), he is not morally required to pay any specific wage. If the money is his, he can do with it as he chooses.
He can exchange $N$ for one, two, or three units of labor, or he can decide not to exchange it at all. Since he is not morally constrained to exchange any specific amount as wages, then a proposal he makes to exchange $X$ for a unit of labor is an offer, not a threat. As a result, if worker $W$ agrees to accept the $X$ for a unit of his labor, he has not been coerced to do so, for $C$ has not threatened him; rather, $C$ has made him an offer, which he has freely, or voluntarily, accepted, even if $X$ is less than his MVP, because of a surplus of labor, and his only alternative was starvation.

Similarly, since $W$ owns his own labor, he can do with it as he wishes; he can exchange a unit of it for $M$, $N$, or $Q$, or he can refuse to exchange it altogether. If he proposes to $C$ to exchange his labor for a price, he is making an offer, not a threat.

C. B. Macpherson, in Democratic Theory: Essays in Retrieval, criticizes an account of a voluntary wage agreement such as the one I have given on the ground that what is necessary to make an agreement voluntary is not the freedom not to enter into any particular agreement, but rather the freedom not to enter into any agreement at all. His claim is that because in a capitalist society capital is separated from labor, and laborers do not have their own capital to work with, they have no choice about whether to sell their labor to capitalists. They may have a choice about which agreement to enter into with a capitalist, but they do not have a choice about whether to enter into an agreement at all with a capitalist.

However, on my account, a laborer does have such a choice, even if
his only alternative is to starve. The fact that a laborer has no capital is not sufficient to make his agreement non-voluntary. If a capitalist owns capital, and a laborer does not, then since the capitalist is not required to make his capital available to the laborer to work with, or to pay him any specific wage, his proposal to make the capital available to the laborer and to pay him a wage in exchange is an offer, not a threat, and hence the agreement between the capitalist and the laborer is non-coercive.

It might be argued, however, that even though a particular capitalist did not coerce a laborer to agree to a certain wage, nevertheless social institutions did, as they were required to provide laborers with an adequate income, or to make sufficient capital (machinery, tools, etc.) available to laborers to enable them to be independent producers. In neither case would laborers have to enter into any agreements at all with capitalists in order to have a decent standard of living. But, lacking such goods, which social institutions are required to provide, laborers are not free, in the positive sense of freedom. Macpherson argues such a position when he says that "positive liberty, in its basic sense of ability to form and follow one's own conscious purposes, requires even more clearly than negative liberty that there be no indirect domination by withholding the means of life and labor." ¹

In reply to this argument I refer the reader to section 2 of Chapter III, where I argue that institutions do not, in the absence of voluntary

transactions, have obligations to provide such goods to anyone. However, if the only alternatives of a laborer are to starve or to accept below-subsistence-level wages, then I would argue that political institutions ought to provide him with such goods by taxing citizens (again, see Chapter III, section 2, for the details of this argument). I should point out in this context that in the next section of this chapter I argue that individuals have rights to use minimal shares of natural resources sufficient for them to survive, and equal shares of the resources remaining after "survival shares" have been distributed. If this is the case, positive liberty, as Macpherson describes it, will actually exist. Everyone, by having use of such shares of natural resources, will have "the means of life and labor." He will be able to be an independent producer, producing goods which he is entitled to in virtue of the PP. The effects of separation of capital and labor will be mitigated, for no laborer will have to enter into an agreement with a capitalist in order to survive.

We may conclude, then, that since neither C nor W is morally required to exchange goods they own, an exchange agreement between them is made freely and hence is morally binding. Each party has a right to the goods specified in the agreement. Justice is done if each party gives to the other what he has a right to have. And in the case of W, that may be a wage less than his MVP. The Marginal Productivity Principle is not, then, a principle of justice, as it requires that workers receive their MVP, regardless of the terms of freely struck exchange agreements between workers and
capitalists.

What has been asserted about the entitlements of workers to goods which capitalists agree to give them may be asserted about the entitlements of managers as well. Both factors of production are entitled to what they freely agree to accept in exchange for their goods or services. I shall refer to this principle as the Exchange Agreements Principle (EAP). The EAP is a principle of justice in transfer, as it prescribes what goods capitalists are required to transfer to the other factors of production who participate in the production process.
Section Four

Distribution of Natural Resources:
Locke's Labor Theory and an Alternative Theory

In the last section I presented a principle of justice in acquisition of produced goods — the Production Principle (PP), which states that producers have rights to the products which they make using only what they own or have a right to use. In this section I should like to turn my attention to principles of acquisition of non-produced goods, or natural resources — goods such as water, land, and air. None of these goods can be acquired in accord with the PP, which applies only to produced goods. Individuals cannot, then, acquire natural resources in virtue of having produced them, using only what they own or have a right to use. Is there, then, some other relation, besides that of having produced an object, in which individuals can stand to natural resources, which gives them initial property rights in the resources? It seems to me that there is not — that unless a person has produced a good, in accord with the conditions set out in the PP, he cannot have an initial property right in it. If he has not produced a particular good, then he has no greater claim to it than anyone else. Non-produced goods, or natural resources, are simply
"manna from heaven", which no person has any greater claim to than any other.

If producing a good in accord with the PP is a necessary condition of acquiring an initial property right in a good, then since natural resources have not been produced by anyone, but are like manna from heaven, it follows that no one, not even mankind in common, has any ownership rights over them.

(I shall refer to this argument as the production argument.)

On the other hand, many theological sources have held that the earth and other natural resources are the joint property of all mankind. They argue that God created the world and then gave it to all mankind, to be used by them.

Locke advances a Biblical interpretation according to which the world's resources are jointly owned by mankind:

...it is very clear that God, as King David says (Psalm cxv. 16), 'has given the earth to the children of men', given it to mankind in common.

...the fruits it [the earth] naturally produces and beasts it feeds belong to mankind in common, as they are produced by the spontaneous hand of nature; and nobody has originally a private dominion exclusive of the rest of mankind in any of them, as they are thus in their natural state.¹

However, even if one does grant that God exists and that He created the world, one has also to accept the further, and unsupported, claim that God transferred property rights in the world to mankind jointly. The production argument

is more plausible, but it seems less clear that production in accord with the PP is a necessary condition of initial ownership than that it is a sufficient condition. Since neither the production argument nor the theological argument is convincing, and no other striking considerations militate in favor of one position or the other, I shall avoid assuming either common ownership or non-ownership of natural resources. Nothing I say in the remainder of this section will depend upon either assumption.

After giving his theological argument in favor of common ownership, Locke goes on to argue that despite the initial common ownership of natural resources, individuals may remove shares of these resources from their common state and gain property rights over them. He says:

Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has any right to but himself. The labor of his body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature has placed it in, it has by this labor something annexed to it that excludes the common right of other men. For this labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others.1

A summary of Locke's argument is as follows:

1. All natural resources are initially jointly owned.

2. If someone mixes something he has property rights in with a share of natural resources, he gains property rights in that share, as long as he leaves enough and as good for others.

1 Ibid., p. 17.
3. Everyone has property rights in his own body.

And therefore 4. Everyone has property rights in the labor of his own body.

\[\therefore 5. \text{ If someone mixes his labor with a share of natural resources, he gains property rights in that share of natural resources, as long as he leaves enough and as good for others.}\]

This is Locke's famous labor argument, which has been extensively discussed and criticized. I do not wish to restate in any detail any of the familiar criticisms of it, but I would like to make a few brief comments about it.

Locke does not seem to realize that acquisition of shares of natural resources by individuals who have mixed their labor with these shares would violate the rights of the joint owners over these resources.¹ His position seems to be that as individuals acquire property rights over shares of natural resources, the shares are removed from the domain of common property and the rights of the joint owners over these shares of the resources simply vanish. But this position does not take account of the rights entailed by joint ownership: "When a thing is jointly owned in the full liberal sense, for example, any disposition of the thing by one person without the consent of the others is a violation of their rights of ownership -- even if one has taken no more than one's share. Joint ownership means joint management and more fundamentally, joint right to the capital."²

Joint right to the capital is, according to Becker, the joint right

¹ Hereafter, when I mention joint ownership of natural resources in the context of the discussion of Locke's argument, I will be referring to Locke's assumption of joint ownership. I am assuming neither joint ownership nor non-ownership.

² Lawrence Becker, unpublished manuscript on property rights, p. 31.
to "alienate the thing" (to transfer it or give it up) and to "consume, waste, modify, or destroy it."¹ Thus if an individual expropriates a share of the jointly owned resources without the unanimous consent of the owners, he has violated their right to the capital. Only with the unanimous consent of the joint owners (or unanimous consent to decision procedures) may property rights in natural resources be transferred to individuals. The joint owners may decide to transfer the property rights to individuals in any number of ways. They may distribute property rights in equal shares to all individuals, or in unequal shares, in a Rawlsian manner (giving more to those who will utilize them in such a way as to increase the expectations of everyone); or they may distribute property rights to a few individuals only, leaving the rest of mankind with no property rights in natural resources at all. But in any event, the unanimous consent of the owners is required before any individual can gain a property right in a share of natural resources.

I should point out that I am relying on a particular conception of joint ownership -- what Mavrodes, in his article "Property" refers to as collective ownership. Mavrodes distinguishes this sense of joint ownership from what he calls distributive ownership. In the collective sense of joint ownership no single individual has a property right in any part of the collectively owned property. Mavrodes gives the example of a forest, which is

¹ Ibid., p. 22.
collectively owned; in such a case, no individual has a property right in any tree or any part of any tree. To acquire such a right, Mavrodes alleges, he would first have had to purchase a tree, or some part of it, from the collective (he ignores the case where the collective might simply give him the right).

In the distributive sense of joint ownership, individuals do have property rights. Mavrodes distinguishes between two types of distributive ownership. According to the first, every individual has a property right in every part of the jointly owned property. But Mavrodes dismisses this type as "theoretically absurd." For as he correctly points out, if every individual had a property right in a tree in a forest, two (or more) individuals might have conflicting claims concerning the disposition of the tree and "it cannot be the case that both of these persons have the right to make the corresponding dispositions of the tree". According to the second type of distributive ownership every individual owns a "part interest... perhaps a separable part interest" in the jointly owned property. Mavrodes is suggesting, I take it, that every individual might have a property right in a well-defined share of the jointly owned property. How these shares are to be distributed is left unclear, however. Using the tree example, Mavrodes asserts that every individual might own a part interest in the tree.

Of course it would follow from this that no individual would have a right to cut down the whole tree, as he would be violating the part interests of the other joint owners. Of course one need not opt, under the "separable part interest" interpretation, as Mavrodes seems to do, for the view that every individual has a part interest in every object that is jointly owned, for in that case no individual could make a disposition of any object without the consent of the other part owners. Well-defined shares, which individuals would have property rights in might consist of entire objects which the individuals could dispose of as they wished. Perhaps Mavrodes did not consider this particular construal because it did not strike him as consistent with the concept of joint ownership. Admittedly there is a certain implausibility to this construal, for, if each individual has his own share of property, and all property is owned, it looks as if all property is privately owned, and none of it is jointly owned.

To return to Locke's argument about joint ownership, which I am interpreting in the collective sense, Locke acknowledges the problem his argument has in moving from common ownership of natural resources to private ownership, without the consent of the joint owners: "God...has given it [the earth] to mankind in common. But this being supposed, it seems to some a very great difficulty how any one should ever come to have
a property in anything''.  

Nevertheless, he resolves "to show how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners."  

His labor argument is in part an attempt to do this, but, as we have shown, an unsuccessful attempt, for if natural resources are owned by all mankind, mixing labor with them does not give any individual an entitlement to them. If X already owns P, then Y cannot acquire a property right in P by mixing his labor with it. If, for instance, I own a statue, then even if a famous sculptor chisels away at it and improves it (making it much more to my liking), he has not acquired a property right in it. The sculptor, who mixed his labor with the statue, has not gained an entitlement to it, but has merely lost his labor. If X is a group, which jointly owns P, then even if Y is a member of that group, Y does not acquire a property right in P by mixing his labor with it. As I have stated above, if P is jointly owned by everyone, no individual has a property right in it, unless, of course, the joint owners transfer a property right in (part of) P to him. Locke's argument fails, then, because its second premise, alleging that individuals gain property rights in natural resources by mixing their property with them, is false. If Y mixes Q, which he owns, with P, which X owns, then not only does Y not acquire a property right in P, he

1 Locke, op. cit., p. 16.
2 Ibid., p. 17.
even loses his property right in Q.

This principle applies only in cases where Q is a physical object. One cannot, for instance, lose a property right in labor which is mixed with P, for a property right in labor is not a right in a physical object, but rather a right to use one's body as one chooses. Further, Y's labor cannot even be removed from P; it is inconceivable for it, once invested in P, to be removed from P (although it might be possible to remove a product created by P and Y's labor). Mixing Q with P does not entail, then, that Q is a physical object; mixing Q with P changes P, but not always in virtue of a product being added.

What, however, is the criterion of mixing to be employed in this context? Much interpretation has been made of Locke's "mixing" metaphor. I suggest that Y mixes Q with P if and only if X cannot, without exerting great effort, use P without also using Q, or, in the case in which Q is Y's labor, without making use of Q (one can be said to make use of someone else's labor, but not to use it). ¹

If, for instance, Y has added fertilizer to X's soil, then it is impossible for X to use his soil without also using the fertilizer; and even if a machine

¹Consider the following example. A clears land on which B later builds a house. Although B cannot use the house without making use of A's labor, nevertheless A's labor is not mixed with the house (although it is mixed with the land). This example illustrates the fact that 'mixing' is being used in a technical, not an ordinary language, sense, and hence that the principle above needs further refinement.
were available which could extract fertilizer from the soil, X would have to
go to great trouble to employ it. Y, then, has "mixed" his fertilizer with
X's soil. ¹ I do not wish to assert that the concept of use entails that of benefit.
If, for instance, Y injected one of X's oranges with poison, and as a result of
eating the orange died, then I would want to maintain that Y had mixed his
poison with X's orange, even though X obviously derived no benefit from his
use of the orange-with-poison.

I have claimed that Y forfeits his property right in Q by voluntarily mixing
it with P, in the absence of contractual agreements. The proof that he has
forfeited his right is as follows: If Y has mixed Q with P, then X cannot use
P and not Q without exerting great effort to remove Q from P. But since
X did not mix Y's property with his own, he is under no obligation to remove it.
And he has a right to use his own property, P. If Q is not removed from P
by anyone (a third party might, for instance, volunteer to remove it), then since
X is not obligated to remove Q, he has a right to use Q. If Y had a property
right in Q, then X's use of it, without his permission, would violate his property
right. But since X has a right to use Q, his use of it, without Y's permission,
does not violate a property right of Y in Q, and hence such a right does not exist.²

¹ If, on the other hand, Y left a bag of fertilizer on X's soil, the bag would
not be "mixed" with X's soil, as X would not have to make great efforts to remove
it.

² If, as in the previous example of the bag of fertilizer, Q is not mixed with
P, but nevertheless X must go to some trouble to use P without also using Q
(e.g., he must move the bag of fertilizer off his property), then, although Y
does not lose his property right, it might be overridden, making it permissible
for X to dispose of it, or restricted in certain ways.
I should like to point out that it does not follow, as some might be led to think, that if Q is mixed with P, then it is impossible for Y to remove Q without violating X's property right over P. Even if Q is joined to P, so that X cannot use P without exerting great effort to separate it from Q, it might nevertheless be possible for Y to separate Q without in any way damaging P or interfering with X's use of it. Suppose, for instance, that Y has painted X's house bright chartreuse, much to X's chagrin. Although it is not now technically possible, we might imagine that in the future it will be possible to remove the paint from X's house by the use of long-distance rays which dissolve paint on contact. Assuming the rays have no harmful effect on X's house, it would be possible to remove the paint without violating X's property rights over his house.

Nor does it follow from the fact that it is impossible for Y to remove Q from P without violating X's property rights over P that Q is mixed with P. Suppose P and Q are located as in the diagram below:

We can imagine that X's land (P) is doughnut shaped, as pictured, and that one day, when Y was outdoors tossing his frisbee (Q), he tossed it so that it landed in the hole in X's doughnut-shaped property. We can imagine, further, that in the age in which X and Y live there are no mechanical devices,
so that Y cannot use helicopters, cranes, or whatever to retrieve his frisbee, and the only way for him to get it back is to walk across X's land and pick it up. Y cannot, then, remove his frisbee from inside X's property without violating X's property right. However, Y's frisbee is located in such a place that X is able to use his land without also "using" Y's frisbee, and therefore Q is not mixed with P. Hence one cannot use the criterion of whether Y can remove Q from P without violating X's property right over P for picking out cases where Q is mixed with P, for, as we have shown, the set of cases in which this criterion is met is not coextensive with the set in which the use criterion, which identifies cases where Q is mixed with P, is met.

Although I have argued that Y loses his property rights in Q by mixing it with P, it does not seem to me that Y loses his property rights in Q if he places it where retrieving it would violate X's property rights over P, as long as it is still possible for X to use P without also using Q. If, as in the previous example, Y tossed his frisbee, even intending that it land in the middle of X's property, it seems plausible to suppose that he retains the property rights in the frisbee. Certainly X has no legitimate claim to the frisbee, as he is able to use his land as well as before without bothering the frisbee at all.
To return to the original point, Locke's labor argument, attempting to show how commonly owned natural resources can come to be privately owned, without the consent of the owners, goes awry because the second premise, which holds that people gain property rights in natural resources by mixing their property with them, is false. Mixing property, including labor, with natural resources never gives people entitlements to natural resources, unless the joint owners of the resources have unanimously agreed upon mixing property as a method of acquisition resulting in property rights in the natural resources.

But why does Locke want to maintain that consent of the joint owners is not necessary for private ownership, since he himself admits that the position is difficult to argue for? One reason seems to be that he thinks that nothing much is at stake in the acquisition of natural resources, since they are worth so little in their completely natural state, compared to what they are worth with labor invested in them:

For it is labor indeed that put the difference of value on everything; and let anyone consider what the difference is between an acre of land planted with tobacco or sugar, sown with wheat or barley, and an acre of the same land lying in common without any husbandry upon it, and he will find that the improvement of labor makes the far greater part of the value. I think it will be but a very modest computation to say that, of the products of the earth useful to the life of man,
nine-tenths are the effects of labor; nay, if we will rightly estimate things as they come to our use and cast up the several expenses about them, what in them is purely owing to nature, and what to labor, we shall find that in most of them, ninety-nine hundredths are wholly to be put on the account of labor... Land that is left wholly to nature, that has no improvement of pasturage, tillage, or planting is called, as indeed it is, 'waste'; and we shall find the benefit of it amount to little more than nothing.  

Locke seems to hold that it is immaterial whether the joint owners give their consent for the private appropriation of natural resources, since these resources are "almost worthless materials in themselves." Although Locke's assertion that natural resources are worth nearly nothing may have been true in the 17th century, especially in America, where resources were abundant and the population was small, it is not true today. In America even undeveloped land, which is "left wholly to nature, that has no improvement of pasturage, tillage, or planting" is sometimes worth several hundred dollars per acre. Perhaps, though, Locke included the above passage to indicate that his argument in favor of private ownership, as long as "enough and as good" is left for others, was meant to apply only under conditions in which natural resources are abundant (as they were in his day).

But even if Locke's assertion about the relative value of improved and unimproved natural resources were still true today, it would not be the case that common consent of the owners would not be required for the private

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1 Ibid., pp. 24-25.
appropriation of relatively valueless natural resources. The value of something is totally irrelevant to whether property rights in it can be acquired without the consent of the owner. If, for instance, X owns a small rock, which is worth almost nothing, but which Y could convert into a valuable object, by packing it in a miniature pet box with excelsior and advertising it as a pet rock, Y cannot, despite the low value of the rock, acquire a property right in it without X's consent.

But the principle reason Locke does not assert that common consent is necessary for private ownership seems to be that he believes that if unanimous agreement by all human beings had to be given before anyone could acquire property rights in natural resources, no one could have survived:

And will anyone say he had no right to those acorns or apples he thus appropriated because he had not the consent of all mankind to make them his? Was it robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him. We see in commons, which remain so by compact, that it is the taking any part of what is common and removing it out of the state nature leaves it in which begins the property, without which the common is of no use.

Locke reiterates the point that people must have property rights in natural resources in order to survive:

...there must be of necessity be a means to appropriate them some way or other before they can be of any use or at all beneficial to any particular man. The fruit or venison which nourishes the wild Indian, who knows no enclosure

1 Ibid., p. 18.
and is still a tenant in common, must be his, and so his, i.e. a part of him, that another can no longer have any right to it before it can do him any good for the support of his life.¹

Locke believed that private property in natural resources was a necessary condition of human survival, and hence he simply assumed that there must be a way for people to acquire property rights in them. Mixing labor with natural resources was a natural choice, so to speak, as everyone who appropriates natural resources for himself must mix his labor with the resources in order to appropriate them; and hence every act of appropriation which does not violate the "enough and as good" proviso results in a property right in the resources appropriated. Apparently Locke was led to advance an argument in favor of private ownership of natural resources without common consent because he believed that private property was required for survival.

Another possible reason for Locke's sidestepping the common consent required for private acquisition of property is that he was influenced by a Puritanistic argument from God's intentions -- that God gave the world to man to be used, that He intended man to mix his labor with the world and in doing so acquire private property rights. Such property rights would be sanctioned by God. The need to acquire the common consent of human beings would be obviated by following God's directives, which presumably supercede all other moral directives.

¹ Ibid., p. 17.
Locke insisted that "the condition of human life which requires labor and materials to work on necessarily introduces private possessions."\(^1\) He argued that what enabled man to survive in the absence of common consent to private ownership was labor, but he simply assumed that all labor was individual labor, and hence all entitlements, based on mixing labor with natural resources, were individual entitlements. He neglected to consider that tribes and small groups might pool their labor, and hence have tribal or group entitlements.

It is simply not true, as Locke believed, that every person requires a share of private property in natural resources in order to survive (and if he had realized this, he would perhaps have given up his labor argument altogether). Strictly speaking, what he requires is the use of a share, whether he has property rights in it or not.

I would like to propose a weaker principle than Locke's, namely that everyone has a right to use the minimal share of natural resources which is sufficient for his survival (I shall henceforth refer to such a share as a survival share). The argument for this right is as follows: Since everyone has a right to life, and requires use of a survival share of natural resources in order to live, and natural resources are not privately owned, then everyone has a right to use a survival share of natural resources (unless natural resources are jointly owned and there has been

\(^1\) Ibid., p. 21.
an agreement by the joint owners about how natural resources are to be used). Such an argument from the right to life goes through only in cases where the goods which a person needs in order to live are not privately owned. In "A Defense of Abortion" Judith Thomson asserts, correctly, that the right to life does not entail a right to the bare minimum one needs in order to live. The inference cannot be made because the bare minimum which an individual needs in order to live might be something which is privately owned by another.

The weaker principle I have proposed does not rule out joint ownership of natural resources. If natural resources are in fact jointly owned, then an individual's right to use a survival share of natural resources is more stringent than the management right of the joint owners--"the right to decide how and by whom a thing shall be used"¹ and hence overrides this right. A general criterion for comparing the stringency of two rights possessed by two agents is that the right, the deprivation of which imposes a greater burden on its possessor, is the more stringent right. And clearly a very great burden is placed on an individual who is deprived of his right to use a survival share of natural resources, for he will die, whereas no such burden is placed on the joint owners of natural resources by depriving them of their management right over natural resources.

Even if individuals had used rights over survival shares, natural resources would still be jointly owned, as the joint owners would still retain the right to the capital, which is sufficient for ownership; private ownership would not be

¹Becker, op. cit, p. 22.
justified. However, individuals would have the right to use a survival share of natural resources in the event that the joint owners do not give their consent to private ownership (or use) of natural resources (and it is rather unrealistic for a person who is starving to wait for a meeting of all the members of the world community). The advantage of this position would be that, unlike Locke's position, it would not have the embarrassing result that the ownership right of all mankind in natural resources would be violated. And furthermore, everyone could survive without acting unjustifiably; it is not necessary, as Locke seemed to think it was, to establish the legitimacy of private ownership of natural resources to insure that this is the case.

Of course it might turn out that a particular life-sustaining resource is so scarce that not everyone can receive a portion adequate to sustain his life. In this case justice would require that each person be given an equal chance at a life-sustaining portion. The size of the portion required to sustain a life might vary from person to person. Even in the case of drinking water, the size of the portions might vary greatly (consider the needs of a 250-pound man, as compared with those of an infant). The resource would be allocated by randomly drawing names and distributing life-sustaining portions to the people whose names are drawn, until the resource is exhausted.

The total survival shares distributed will not, presumably, exhaust the total supply of natural resources. What principle should regulate the distribution of the resources which remain after everyone has a survival share?
One might, for instance, distribute use rights over the remainder of natural resources in a utilitarian manner, or according to Rawls's Difference Principle. I would like to suggest, somewhat speculatively, that if the presumption of equality applies anywhere, it applies in this case, where the following two conditions are satisfied: (1) the goods which are being distributed are unowned, or, if they are jointly owned, the joint owners have not agreed how the goods are to be used, and (2) none of the goods is needed for survival purposes. No individual has any greater claim on these goods than any other individual.

In Section Two of this chapter I argued against Rawls's *prima facie* rule in favor of equality that such a *prima facie* rule may violate the property rights of producers to the goods which they produce. However, since in this case use rights over natural resources, which are jointly owned or unowned, are being distributed, the private property rights of producers will not be violated. I tentatively suggest, then, the following principle:

Use rights over natural resources remaining after survival shares have been distributed ought to be distributed equally, unless there is a reason to the contrary.

This presumptive principle is unlike a *prima facie* principle in that no residual claim remains when there is an overriding reason for an unequal distribution. An example of a reason for an unequal distribution is the prevention of very great harm to some individuals.

By 'equal' I shall not mean equal in size. An acre of land in Siberia is worth far less than an acre of land in Manhattan. By 'equal' I shall mean
instead equal in value. The value of shares is determined not only by market conditions but also by the state of technology. If, for instance, there are mineral resources under the sea, but techniques for removing the minerals have not been developed, then the value of the resources cannot be considered in calculating the value of the shares.

Or, if it would cost an individual a certain sum of money to develop the technology to the point where it is adequate to utilize the resources (whereas other individuals can utilize their resources immediately, with currently existing technological devices), then although the value of the resources may be calculated in the value of the share, he should have a share of increased value to cover the cost of developing the new form of technology. Or if the cost of utilizing the resources is greater for any other reason, whether it be because the machinery required is more expensive, or because the resources are dispersed in location, and there are greater transportation costs associated with making use of them, the extra cost should be taken account of in the value of his share.

The equal value of each share should also take account of the cost of the relocation of those individuals who are forced to move as a result of the equal division of shares. Since it may not be possible for every individual to have a share of resources in his immediate vicinity, some individuals may have to relocate. A share of natural resources which requires relocation in order to use is worth less than one which does not require relocation. Hence individuals who have to relocate should have a share of increased value to cover the cost of relocation,
and thus to insure that shares which are used are of equal value.

If the total shares in use (including the survival shares) exhaust the total amount of natural resources technologically available for use, then when the population decreases, everyone has a right to use a greater non-survival share. And when the population expands, a redistribution must occur so that survival shares, as well as "remainder shares" of equal value, are available to the new inhabitants of the earth.

The value of each remainder share in use before the population growth must decline as the population grows; the redistribution can, of course, be accomplished in a variety of ways, including each person transferring equally valued portions of his remainder share to the new people, or the remainder resources being redivided (with some individuals, possibly, using altogether different shares). Different methods of redistributing the resources do, of course, cause different degrees of disruption for different individuals. Although individuals may undergo disruption as a result of having their shares decreased or changed entirely, they do not deserve compensation for the disruption or for the decrease in their shares. Since an individual loses his right to use his remainder share as soon as new inhabitants exist, a change of or diminution in his share does not constitute a violation of his rights, and hence no compensation is due him.

However, the cost of disruption to the individual (which may be severe if, for instance, the individual must move or establish a different means of
livelihood as a result of being deprived of use of the natural resources he was formerly using) must not be borne by the individual. If his share is decreased, the decrease must be inversely proportional to the amount of disruption he would be caused; or, if he uses a new share, the value of the share must be increased to cover the cost of disruption to him in having to use a new share (e.g., retraining to develop skills necessary for the utilization of his new share). ¹

After new inhabitants receive survival shares, the total non-survival resources must be redistributed so that everyone has an equally valued share. However, determination of value includes a variety of factors, such as market conditions, the state of technology, the cost of utilizing resources, the cost of relocation and, in the case of redistribution which we are now discussing, disruption of activities. Of course it is not the case that the cost of all activities which are disrupted must be balanced out in the redistribution of resources. The cost associated with interrupting activities which individuals ought not to be engaging in (such as participation in Murder, Inc.) should not, for instance, be given any weight; however, costs associated with change in a means of livelihood which it was permissible for an individual to engage in must certainly be taken into account. If individuals had developed reasonable and morally legitimate expectations or plans on the basis of having the right to use certain shares of natural resources, then if these shares are decreased

¹Upper limits might have to be set on the increase in value of shares to cover the cost of disruption, in order to insure that new individuals have equally valued shares.
or changed, the cost of disruption of the activities associated with these expectations and plans must be considered when calculating the value of shares which individuals have a right to use under the new distribution. However, if the structure of institutions is made public, and individuals are aware that redistributions will be occurring with fluctuations in population, then very high expectations on the part of individuals cannot reasonably develop, and hence the costs of disruption, which have to be covered in the new shares, will actually be low.

I am not propounding a theory of use of remainder shares of natural resources according to which each share which an individual has a right to use must be as valuable to him as any other share in use. By 'equally valued' I do not mean equally valued to the person who has the right to use the share. If this sense of equally valued were employed, no individual would prefer any other share to his own, and it is unfeasible to assume that in every case resources can be distributed in such a way that every individual is indifferent between his own share and that of everyone else. A fisherman, because of the way in which previous use shares have been acquired, might be left with a share of farmland, and a farmer might end up with a share of fishing waters, and each would prefer to have use of the other's share of natural resources. (However, as I asserted before, in cases where acquisition of new skills is required to utilize one's share of natural resources, the value of the share must reflect the cost of acquiring such skills.)
I am suggesting a less subjective sense of 'equally valuable', one in which the value of resources is not dependent upon the peculiar propensities and preferences of individuals, but is determined by more objective factors such as market conditions, the state of technology, cost of relocation, acquisition of new skills, etc.—factors which can be applied across individuals. Such a method of determining the value of shares of resources is preferable, for it enables us to arrive at a unique calculation of value of a share, whereas if individual valuations were consulted different values might be ascribed to the same share by different individuals.

The redistributive scheme I have outlined would, of course, be exceedingly difficult to implement. As world population increased, use shares would be in a constant state of flux, and people's life activities would be frequently interrupted. Given the principles that have been articulated, however, I see little chance of avoiding these problems. Since no individual has a right to use a greater than equal share of remainder resources, justice requires that a redistribution occur, and at a pace which keeps up with the increase in population.

If, as I stated before, the redistributive schemes are made public, so that people are aware of the possibilities of redistribution and plan accordingly, the disruptive effects of redistribution will be minimized. However, even if such effects are kept to a minimum, everyone may nevertheless prefer to have a more predictable life under institutions which prescribe less frequent or less disruptive redistributions. Although such institutions would be imperfect, they
would be more stable and would cause less interference in the activities and
life-plans of individuals. One might want to argue, on utilitarian grounds,
for overriding justice to establish such institutions.

I can, however, suggest one method of alleviating the disruptive effect
of frequent redistribution. It would be less disruptive for some individuals
to transfer to new people benefits produced by their shares (whether the bene-
fits be in the form of money or actual goods) rather than to transfer parts of
their shares or to use entirely new shares of lesser value. New people,
however, have rights to use survival shares and equally valued remainder
shares of natural resources; and if they claim such shares, others are required
to give up parts of their shares or to use lesser shares, rather than to give
benefits from their shares to the new people.

However, if a new person engages in an agreement with a person who is
already using a remainder share, whereby he waives his right to use a remainder
share in exchange for benefits from the other person's share, then justice is
not violated, and those individuals who are already using shares are spared
some disruption by transferring benefits to the new people. Under these con-
ditions the individuals transferring benefits would have a right to use greater
than equal remainder shares.

This further modification would undoubtedly have a mitigating effect on inter-
ference with people's life plans caused by increased population. The precise
degree of the effect is, however, difficult to estimate. My own suspicion is
that most people would prefer to receive income or goods from those who are already using natural resources, rather than take the responsibility of utilizing the natural resources themselves, so that interference with people's life plans would be kept at a minimum, and that the distributive scheme I have proposed is not as unworkable as it might at first have seemed.

If a survival resource, which was formerly in everyone's survival share, suddenly becomes scarce, those persons whose remainder shares contain it no longer have the right to continue using all of it. No one has a right to hoard a resource which is necessary for the survival of others. If, for instance, a world drought occurs and only a few individuals are left with drinkable water on the property which they are using, then these individuals are required to make the drinking water available to those who do not have any. A redistribution must occur, so that every person has adequate supplies of the necessary resource. Those transferring the scarce resource to others may be entitled to some compensation, however, in virtue of investing labor in the resource to make it usable (e.g., by drilling wells to obtain drinking water) or in virtue of taking precautions to insure that the resource exists (e.g., by bottling water as a precaution in case a drought should occur).

Some people may have developed expectations and undertaken activities on the basis of having use of the resource which must now be redistributed. Someone may, for instance, have developed a beverage business, on the expectation of having use of the water. In such cases, as in the cases where remainder shares were decreased to provide survival shares and equally valued remainder
shares for others, disruption of morally legitimate activities should be taken account of in the value of the new shares.

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So far we have discussed constraints on the right to use shares of natural resources by members of a given generation. But what principle is to regulate the use of natural resources by different generations? Should there be a savings principle between generations, so that a certain amount of resources are not utilized by a given generation, but are saved instead for the next generation?

Just as every member of the current generation has the right to a survival share of natural resources, so does every member of the next generation. No generation has a right to use an amount of natural resources such that an amount which is adequate for survival is not left for the next generation.\(^1\) Since members of future generations will also be using natural resources, no generation has a right to use more of the natural resources— to overconsume, waste, or squander them so that less is left to the next generation than is adequate for it to survive. No generation should be put at a disadvantage with respect to natural resources enabling it to survive just because of its placement in time.

Accordingly, every member of the current generation has a duty to do his part to create an institution whose purpose is to insure that the natural resources inherited by the next generation will be such that it will be able to survive. The

\(^1\)I ignore exception-making conditions such as exchanges, transfers, etc., on the ground that generations are disparate in time, and hence transactions between them cannot take place.
sole function of this institution would be to regulate the use of natural resources by the current generation so that adequate survival resources will be left for the next generation. It will make predictions of changes in population, take account of fluctuations in the market, technological developments, etc., in insuring that adequate resources are left. It will set guidelines for the renewal of renewable resources, with which individuals have a duty to comply. Examples of such guidelines are: Fishing waters should not be overfished, so that marine species will not be endangered, but will continue to reproduce at an appropriate rate. Farmers should practice soil conservation techniques and should fertilize their soil to replenish the nutrients which they have removed. Forestry should be conducted in accord with principles which will insure that forests will continue to grow at the proper rate (e.g., a certain number of new trees should be planted to replace the ones that are cut down, or enough trees should be left standing to guarantee that the trees will reproduce at the correct rate). If food-producing resources are renewed and appropriate pollution standards are set for air and water (or purification facilities are developed), then the next generation should be assured of having adequate survival resources.

Of course not all resources are readily renewable; resources such as coal and petroleum, once removed from the earth, are not regenerated for millions of years. Therefore it would be necessary for the regulatory agency to set ceilings on the use of "non-renewable" resources, and to compensate for the loss in value coincident with their use by developing alternative energy
sources, exploring outer space for usable resources, and developing technology so that currently inaccessible resources can be utilized, and other resources which are currently being used can be used more efficiently.

In the last section I formulated the Production Principle, which stated that producers have rights to the products which they make using only what they own or have a right to use. Since we have established in this section that individuals have a right to use certain shares of natural resources, we can now see that they have property rights in those goods which they produce from these shares with their labor. They do not gain property rights in the shares themselves, with which they mix their labor, but they do gain property rights in the goods produced by the mixing process.
CHAPTER THREE

EQUALITY OF OPPORTUNITY

Inequalities Permitted by the Fair Equality of Opportunity Principle

Rawls has stressed several times in *A Theory of Justice* that the Difference Principle is a strongly egalitarian principle. In Chapter II we examined two of its egalitarian features - that it offers a *prima facie* rule in favor of equality and that it provides partial redress for inequalities of birth. But in fact it seems that the Difference Principle is only a weakly egalitarian principle, as it permits great inequalities; as long as the expectations of the least advantaged group are maximized, there is no limit on how high the expectations of the most advantaged group can be or how great the difference in expectations between the two groups can be.

Rawls attempts to forestall this objection by asserting that extreme inequalities, although allowed by the Difference Principle, will in actuality not occur because they are ruled out by the Greatest Equal Liberty Principle and the Principle of Fair Equality of Opportunity: "The possibilities which the objection envisages cannot arise in real cases; the feasible set is so restricted that they are excluded... The operation of the principles of equal liberty and open positions prevents these contingencies from occurring."\(^1\)

But how exactly do these principles restrict the feasible set of distributions?

\(^1\) Rawls, *op. cit.*, p. 158.
The Greatest Equal Liberty Principle guarantees the basic liberties of citizens, such as political liberty, freedom of speech and assembly, freedom of thought, etc. But it does not seem that a principle guaranteeing basic liberties in any way restricts the degree of inequality of goods in a society. Rawls himself admits as much when he declares that "the social structure can be divided into two more or less distinct parts [a part which assigns rights and duties and a part which distributes social and economic goods], the first principle applying to the one, the second to the other."¹

The Fair Equality of Opportunity Principle (FEOP) will, then, have to carry the weight of the argument to the effect that extreme inequalities will not occur. In this section I shall examine the principle to determine whether it does in fact rule out extreme inequalities.

The principle states that:

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, that is, irrespective of the income class into which they are born. In all sectors of society there should be roughly equal prospects of culture and achievement for everyone similarly motivated and endowed. The expectations of those with the same abilities and aspirations should not be affected by their social class.²

In short, the principle holds that all those equally endowed and motivated are to have equal chances of success. I presume that a full statement of the principle would be: Chances of success are to be in proportion to endowment and motivation. From this it would follow, of course, that people with equal

¹Ibid., p. 61.
²Ibid., p. 73.
endowment and motivation are to have equal chances of success.

It might be difficult to determine when two people are equally motivated, but it seems to me that it would be even more difficult to determine when two people are equally endowed. It is not clear offhand what criteria should be employed. It seems to me that to compare endowments one should focus on aptitudes — inherited, as opposed to acquired, capacities to perform well at certain tasks.

It is currently not known what sorts of aptitudes are inherited. We might discover that people inherit quite specific aptitudes — the aptitude for being a bookkeeper, say, or a farmer. If people do inherit aptitudes that are this specific, comparing natural endowments becomes something of a problem. How, for instance, would one decide whether A, who has an aptitude for being a bookkeeper, has a greater or lesser natural endowment than B, who has an aptitude for being a farmer? One might decide to rate the individuals on their aptitudes and make a direct comparison of the ratings. After all, A might have a very high aptitude for being a bookkeeper and B merely a moderate aptitude for being a farmer. In that case, one might say that A is more highly endowed than B. But the method of comparing aptitude ratings seems less suitable in other cases. Suppose, for instance, that C has a high aptitude for being a janitor (he would be exceedingly thorough and efficient) and D has a moderate aptitude for being a nuclear physicist. (He would make a good nuclear physicist, but not a top-notch one.) Surely we would not want to say that C is more highly endowed than D.
Of course people might not inherit such specific aptitudes; they might inherit more general, plastic sorts of aptitudes that permit them to perform well at a wide variety of tasks. There might, for instance, be aptitudes for physical, intellectual, and creative types of activities. A person with a physical aptitude might do well in many different athletic activities; a person with an intellectual aptitude might find himself well-suited to any task requiring analysis and critical evaluation; and a person with a creative aptitude might be successful at numerous artistic pursuits.

But even if aptitudes are more general, the problem still arises whether in comparing natural endowments one would be justified in rating people on their aptitudes and then directly comparing the ratings. Is someone with a high physical aptitude (someone who would make an outstanding hockey or football player) as highly endowed as someone with a high intellectual aptitude (someone who would make a great mathematician or scientist)? The question seems difficult to answer, even though the aptitudes are of a rather general sort. It does seem, however, that one is more justified in making a direct comparison of aptitude ratings in this case than in the case of the janitor and the nuclear physicist, where the aptitudes were more specific.

I propose that, when making comparisons, ratings of aptitudes for activities that are more complex, whose execution requires a more complicated set of steps, be weighted more heavily than aptitudes for activities that are less complex. Two people would have equal natural endowments, then, if and only if they have an equal weighted index of aptitudes. Weighted indices would
be obtained by rating each person on his aptitudes, weighting the ratings according to the complexity of the activities involved, and then summing the weighted ratings. Of course the criterion of complexity to be used in evaluating activities needs to be spelled out more fully. But at least we can see straight off that the activity of repairing watches, for instance, would be given more weight than that of sweeping floors.

Of course the problem of rating people on their aptitudes — their inherited abilities — is a rather refractory one, since as soon as a baby is born (and even before to some extent) the environment comes into play. Tests must be devised which are successful in isolating inherited abilities from acquired ones. There is a notable paucity of such tests. IQ tests, for instance, most certainly do not measure intellectual aptitude; one study has highlighted the influence of the environment on IQ scores by showing that crash courses designed to improve people's scores on the IQ tests are remarkably effective. The recently developed neural efficiency analyzer, however, quite possibly represents a breakthrough in measuring intellectual aptitude. The machine records the speed at which information is transmitted from neuron to neuron in the brain.¹

To return to the FEOP, which requires that everyone equally endowed and motivated is to have an equal chance of success, Rawls maintains that the principle requires elimination of wide variations in environmental opportunities, as these prevent people who are equally endowed and motivated from

¹For more information about the neural efficiency analyzer, see the Kappan interview with John Ertl, Phi Delta Kappan, October 1972, pp. 89-94.
having equal chances of success. Accordingly, he alleges, the principle requires that the degree of inequality of wealth and income be restricted and that differences in the quality of education at public and private schools be leveled out.

Rawls does not, however, assert that the principle requires abolition of the family system of child-rearing and the establishment of child-rearing institutions where the quality of child-rearing would be uniform. Instead, he argues that the family system can be compatible with the FEOP:

... although the internal life and culture of the family influence, perhaps as much as anything else, a child's motivation and his capacity to gain from education, and so in turn his life prospects, these effects are not necessarily inconsistent with fair equality of opportunity. Even in a well-ordered society that satisfies the two principles of justice, the family may be a barrier to equal chances between individuals. For as I have defined it, the second principle only requires equal life prospects in all sectors of society for those similarly endowed and motivated. If there are variations among families in the same sector in how they shape the child's aspirations, then while fair equality of opportunity may obtain between sectors, equal chances between individuals will not.¹

Although the passage is somewhat murky, Rawls's point seems to be that since motivation is a function of family life, all children who are equally motivated, and hence all who are equally motivated and endowed (for obviously the group which satisfies the criteria of equal motivation and endowment is a subset of the group which satisfies the criterion of equal motivation) will in fact have similar families. This interpretation is reinforced by Rawls's comment that "the willingness to make an effort, to try, and so to be deserving in the ordinary sense is itself dependent upon happy family circumstances."² The family system

¹Rawls, op. cit., p. 301.
²Ibid., p. 74.
will not, then, prevent satisfaction of the FEOP because, although the quality of families may vary within sectors, nevertheless children with equal endowments and motivation in the different sectors will have families of similar quality.

Despite the fact that similarity of families among children of equal endowment and motivation is insured, however, very great differences in quality of education and amount of wealth and income are allowed by the principle. Suppose, for instance, that one group of children (group A) has high endowment and motivation levels, whereas a second group (B) has low endowment and motivation levels. It is consistent with satisfaction of the FEOP that children in group A come from families with high income and wealth and receive a high quality education, whereas children in group B have families with low income and wealth and receive a markedly inferior education. The equally endowed and motivated children in groups A and B will, under this scheme, have equal chances of success. Those with high endowments and motivation will have very great chances of success, whereas those with low endowments and motivation will have little chance of success.

The FEOP does, then, permit large inequalities of income and wealth (as well as great differences in quality of education). It is compatible with an extremely hierarchical society — one in which most of society's wealth and income is concentrated in the hands of the highly endowed and motivated and little in the hands of the poorly endowed and motivated.

Yet even though inequalities of wealth and income, as well as
differences in the quality of education, could exist without violating the FEOP, a society operating on the principle would find it impracticable to allow such inequalities and differences. The task of arranging them so that they did not violate the principle would be herculean. It would not be necessary for a society to insure that all equally endowed and motivated children receive the same quality of education and have families with the same amount of income and wealth; it would only be necessary to guarantee that all equally endowed and motivated children have an equal weighted index of these factors, where the factors would be weighted by their importance in determining life prospects. Even so, the administration of a program designed to equalize the indices of such factors for equally endowed and motivated children (while allowing inequalities and differences of the sort described above) would be highly unworkable.

The most feasible (though perhaps still unwieldy) means of satisfying the FEOP would be to send all children, shortly after birth, to special institutions where education and material conditions would be comparable. In this way all children (including all equally endowed and motivated children) would be afforded equal environmental opportunities. Even so, they would have different life prospects, depending on their degree of natural endowment. (We can assume that there would not be very great differences in motivation, since the quality of child rearing would be roughly uniform in such an institutional setting.) Children with a high natural endowment would still have greater life prospects than children with a low natural endowment,
even though both had been given the same opportunities as children. Great inequalities of wealth and income might, therefore, still occur, especially if the range of natural endowments is quite wide (if, for instance, some members of society are extremely beautiful, intelligent, etc., while others are exceedingly ugly, stupid, etc.).

Rawls simply cannot maintain, in the face of these objections, that the FEOP rules out great inequalities of income and wealth. He does finally concede that "nothing guarantees that inequalities will not be significant," although he adds that "the disparities likely to result will be much less than men have often tolerated in the past."¹ But of course this is an exceedingly weak claim, for in the past some people have starved to death while an elite has lived in opulence.

Before I present my own views about equality of opportunity in section 2, I would like to draw attention to a perplexing problem concerning Rawls's discussion of equality of opportunity. He presents a principle calling for equal chances of success for people with equal endowments and motivation (and also, presumably, for greater chances of success for those with greater endowments and motivation and lesser chances for those with lesser endowments and motivation) but then proceeds to say, when discussing the liberal conception of justice (the principle of efficiency plus the FEOP), that:

it permits the distribution of wealth and income to be

¹ Ibd., p. 158.
determined by the natural distribution of abilities and talents. Within the limits allowed by the background arrangements, distributive shares are decided by the outcome of the natural lottery; and this outcome is arbitrary from a moral perspective. There is no more reason to permit the distribution of income and wealth to be settled by the distribution of natural assets than by historical and social fortune.\footnote{Ibid., pp. 73-74.}

Although in this passage Rawls neglects to mention the second criterion for distribution — equal motivation — the omission is not serious. Elsewhere he has claimed that "the superior character that enables [a person] to make the effort to cultivate his abilities is equally problematic" (from the point of view of being a morally relevant feature for the distribution of income and wealth), for a person's character "depends in large part upon fortunate family and social circumstances for which he can claim no credit."\footnote{Ibid., p. 104.}

Presumably Rawls is referring to motivation when he speaks of the effort involved in developing one's talents. Therefore the argument Rawls is making in the above passage would, in his view, apply equally well against distribution in accord with motivation.

To mitigate what Rawls considers to be the defect of his conception of justice — that it calls for wealth and income to be distributed on the basis of natural endowment (as well as motivation), a feature of persons which he claims is arbitrary from a moral point of view — he introduces the Difference Principle, which, he says, guarantees that "the naturally advantaged are not to gain merely because they are more gifted, but only
to cover the costs of training and education and for using their endowments in ways that help the less fortunate as well.¹ The Difference Principle compensates for the moral arbitrariness of the motivation condition, as well as that of the natural endowment condition, of the FEOP, for the members of the less advantaged class, the "less fortunate" as Rawls refers to them, have lower expectations not only because of their lesser endowments but also because of their lower motivation (or because of a low weighted index of the two factors), since motivation and endowment are both principal determinants of success.

But if Rawls regarded the liberal conception of justice as defective because of the requirements of the FEOP, why did he not reject that principle and replace it with a sound one, instead of introducing the Difference Principle to compensate (and only partially at that) for its defects? He equivocates by first arguing for a principle prescribing distribution of wealth and income on the basis of natural endowment (and motivation) and then later criticizing it for requiring distribution in accord with a morally arbitrary feature.

¹Ibid., p. 102.
Section Two

Opportunities, Rights, and Oughts

I would now like to address myself to the question of whether institutional justice (hereafter referred to as I-justice)\(^1\) requires equality of opportunity. However, since some writers (notably Rawls) have advocated equality of opportunity only for those children who are equally endowed, whereas other writers have advocated equality of opportunity for all children, I shall consider whether either of the following principles is a principle of justice:

1. All equally endowed children are to have equality of opportunity.
2. All children are to have equality of opportunity.

Do all children, or all equally endowed children, have rights against any institution to equality of opportunity? If so, are these rights special rights or general rights?

\(^1\) The term 'institutional justice' seems more appropriate in this discussion than the term 'social justice', which is used by Rawls and many other writers, as the institutions whose justice it is important to assess (and in fact those institutions which Rawls claims are constitutive of the "basic structure of society \[which\] is the primary subject of justice" (A Theory of Justice, p. 7)) include not only social institutions but also economic, political, educational, and cultural institutions as well (any institution which assigns rights and duties and/or distributes social primary goods).
Special rights, says Hart, are rights which "arise out of special transactions... or out of some special relationship"\(^1\); those with the right and the corresponding obligation "are limited to the parties in the special transaction or special relationship". 2 Contrasted with special rights, general rights "do not arise out of any special relationship or transaction"\(^3\) but are "moral rights which are thought of as rights against (i.e. as imposing obligations upon) everyone". 4

In the above passage Hart says that every special right arises from a special transaction or a special relationship; but other passages indicate that he in fact meant to say that every special right arises from both a special transaction and a special relationship:

The simplest case of promising illustrates two points characteristic of all special rights: (1) the right and obligation arise not because the promised action has itself any particular moral quality, but just because of the voluntary transaction between the parties. 5

\(^2\) Ibid.
\(^3\) Ibid., p. 64.
\(^4\) Ibid., p. 60.
\(^5\) Ibid., p. 61. In this passage Hart uses the term 'voluntary transaction' rather than 'special transaction'; and throughout his article he vacillates between the two terms. Since it is not clear exactly what Hart means by 'special transaction' (perhaps he means a transaction limited to two parties, I prefer to adhere to the term 'voluntary transaction').
All special rights have one thing in common, viz., that they arise out of special relationships... and not out of the character of the action to be done or its effects.1

Hart does not offer necessary and sufficient conditions for a relationship being special. Is, for instance, a biological relationship such as that between a parent and child a special relationship? If so, then a special relationship is not a necessary condition of a special right; for, as Judith Thomson points out in her paper "A Defense of Abortion", a fetus conceived by rape does not have a special right against the mother to the use of her body (or, for that matter, to anything else that belongs to her). A voluntary transaction is not a necessary condition of a special right, as such a transaction entails an intention to transfer goods or services on the part of one party and an expectation of receiving such goods on the part of the other party (as in a promise) — neither of which is necessary for a special right. To use an example from the Thomson paper referred to above, a woman who voluntarily engages in intercourse, without using any method of birth control and knowing that a possible result of her action is the conception of a child, has a special duty to let the child use her body (and the child a corresponding special right to use it), irrespective of any intention on the part of the mother to let the child use her body (and of course the child has no expectation of using it). Or, to take another example, if Smith hits

1Ibid., p. 63.
Jones and breaks his arm, Jones has a special right to compensation, even if the intention to provide such compensation is absent on Smith's part. A voluntary action of some sort is required for a special right to exist, but not a voluntary transaction.

Now if a child has a right against an institution to equality of opportunity, it is either a general right or a special right. Which is it, then? Before it is possible to say, we must determine what, precisely, the right to equality of opportunity consists in. A right to equality of opportunity is either a welfare right (a right to goods or services) or a right to exclude others from goods or services, or both. Equalization of opportunity can be accomplished by agents with greater opportunities contributing some of their opportunity-goods (or services) to agents with lesser opportunities, or by agents with lesser opportunities excluding those with greater opportunities from some of their opportunity-goods (or services), or by a combination of the two methods.

Welfare rights and exclusion rights are not plausible candidates for inclusion among general rights -- rights which people have simply in virtue of being human beings and which hold unconditionally. But as Feinberg

1 According to one theory of property acquisition, property is justly acquired only under the condition that the owner use it in a certain manner. In specific cases the "use requirement" may be that the owner contribute a certain portion of the benefits produced by the property to individuals falling into a class defined by one or more properties (e.g. individuals whose income is below poverty level). In such a case the right of an individual to benefits would be neither a special nor a general right -- not a special right because the right does not exist in virtue of some voluntary transaction between the parties, and not a general right because the right is not a right against everyone, but only against specific property owners. The principles of property acquisition which I present in Chapter Two do not place any use requirement on property owners, and so do not give rise to any rights which are neither special nor general.
points out in Social Philosophy, "the positive rights to be given certain essentials -- food, shelter, security, education -- clearly depend upon the existence of an adequate supply, something that cannot be guaranteed categorically and universally."¹ Such rights do not satisfy the constraint on general rights that they be characterizable in such a way that they hold universally, independently of external circumstances.

Since it does not seem plausible to suppose that there are general welfare rights and exclusion rights, we cannot maintain that the right to equality of opportunity is a general right. If a child does have a right to equality of opportunity, then, it is presumably a special right. Do, then, any children have special rights against institutions to equality of opportunity? We have noted that a necessary condition of a special right is a voluntary action of some sort. For instance, for a child to have a special right against an institution to equality of opportunity, an institution must perform a voluntary act in virtue of which the child acquires rights over a bundle of goods or services which would provide that child with equal material advantages, an equal education, and an equal child-rearing, or an equal weighted index of all three -- equal, of course, to the weighted indices of some other children, whether they be all children, all equally endowed children, all blue-eyed children, all children with freckles, or whomever.

Now it doesn't follow from the fact that an institution exists that it has performed a voluntary action resulting in a right on the part of any child to goods or services providing that child with equality of opportunity. An

institution might refrain from engaging in such a voluntary action, and if it does, no child has a special right against it to equality of opportunity. And hence I-justice does not require any institution to provide all children, or all equally endowed children -- in fact, any children -- with equality of opportunity.

We see now that both principles of I-justice presented at the beginning of this section -- that (1) All equally endowed children are to have equality of opportunity; and (2) All children are to have equality of opportunity -- are incorrect, for they require that, in the one case, all equally endowed children, and in the other case, all children, have equality of opportunity, regardless of whether any institution has engaged in a voluntary, right-creating action. But as we have shown, if no institution has performed such an action, I-justice does not require that equality of opportunity be provided for any child. In fact, in such a case I-justice does not require that any child have any level of opportunity -- even a minimal level. I-justice requires that a child have an L-level of opportunity when and only when an institution has voluntarily performed an act in virtue of which a child has a right to goods or services which would provide that child with an L-level of opportunity.

II

Let us suppose, then, that no institution has performed an action giving rise to rights over any goods or services. In such a case, we have noted, I-justice does not require that any children have any level of opportunity. Nevertheless, if children do not have at least minimal opportunities ¹ bad

¹What will count as opportunities (factors affecting success) will of course vary from society to society, but in our society such factors include, as Rawls has pointed out, income/wealth level of one's family, type of child care and level of education.
consequences will result. Their life prospects will be so diminished that the only life possible for them will be one of extreme suffering, as their income/wealth level will be so low that they will be unable to afford even the so-called "necessities of life" -- adequate food, housing, clothing and medical care.

For instance, if children do not obtain at least a minimal education, they will encounter great difficulty in finding jobs -- at least in most industrial societies, as jobs which have not been assumed by machines frequently require conceptual, verbal and symbolic skills. Educationally deprived workers have the highest unemployment rates and receive a major portion of welfare aid. If their educational level is sufficiently low, they cannot even qualify for vocational training and retraining. And even if they are able to find employment, they are on the lowest rungs of the economic ladder. The 1970 Bureau of the Census Subject Reports\(^1\) reveals that families whose head had less than eight years of education had a median income of $5,737, whereas those whose head had completed high school had a median income of $10,234, and those whose head had completed college had a median income of $14,194.

Extremely bad consequences will result if children are not provided with minimal opportunities. Now it seems plain that if any agent can prevent bad consequences by contributing certain of his goods (or services), at little

risk or cost to himself, then he ought to do so. If, for instance, Jones is
drowning in the ocean and Smith, standing on shore, can, without risking
his life, throw Jones a life preserver, then clearly Smith ought to do so.
Jones may not have a right to have Smith throw him the life preserver, but
Smith ought to do so nevertheless. Or if, as in the Kitty Genovese case,
someone can prevent the death of a person who is being attacked simply
by dialing the police, then clearly he ought to do so, even if the attacked
person does not have a right to have anyone call the police. I shall refer
to the above principle as the Minimally Decent Samaritan Principle (MDSP),
as it holds that every agent ought to be, if not a Good Samaritan, at least
a Minimally Decent Samaritan.¹

According to the MDSP, if an agent can prevent (some of) the bad
consequences produced by sub-minimal opportunities (henceforth referred to
as O-consequences) by contributing certain of his goods (or services) at
little risk or cost to himself, then he ought to do so. Although he may not,
by his act, be able to prevent all the bad consequences resulting from even
one child's lacking minimal opportunities, he may at least be able to prevent
some of them. How much he is able to do will of course depend upon a
variety of factors, including how many goods he has, or how talented he is
at performing opportunity-services such as teaching, caring for children,

¹ For a discussion of different types of Samaritanism, see Judith Jarvis
Thomson, "A Defense of Abortion", Philosophy and Public Affairs, Vol. 1,
providing medical care, etc. Some wealthy individuals could contribute millions of dollars to the elimination of sub-minimal opportunities without even noticing the loss, whereas other individuals could contribute only a small amount of money without feeling a tight squeeze in their budget (but might be able to devote part of their spare time to volunteer work in a hospital or day care center). Presumably most people (except of course those individuals whose children are suffering from sub-minimal opportunities) could contribute some goods (or services), at little risk or cost to themselves, that would help to eliminate 0-consequences.

III

In formulating the MDSP I purposely chose the word 'agents' rather than 'persons', as the principle properly applies to all entities capable of performing actions, rather than simply to persons. Some may assume that the classes of agents and persons are co-extensive. Some non-human entities, however, are capable of performing actions. Institutions are an example. Their actions are the fusions of sets of actions of individuals acting in accordance with the rules of the institutions. For example, the conviction of a defendant in a criminal proceeding by a court is identical to the fusion of the set of the following actions: the reaching of a unanimous agreement on the guilt of the defendant by members of the jury, the conveying of the

1 I shall, for simplicity's sake, refer only to goods in what follows.
verdict to the judge by the foreman of the jury, the polling of the jury by
the judge, the recording of the verdict by the judge, and the filing of the
judge's record of the verdict by the clerk of the court.

In Section I we concluded that I-justice does not require that any
institution provide equality of opportunity (or in fact any level of opportunity)
for any children if no institution has performed a voluntary action in
virtue of which a child has rights over any goods. According to the MDSP
every institution nevertheless ought to contribute its "spare goods"
goods the loss of which imposes little risk or cost) in order to provide
at least minimal opportunities for all children.

The question arises, of course, how institutions acquire their spare
goods. People can either contribute goods to institutions voluntarily, or
be forced to contribute. Institutions which do not use coercive means to
acquire goods, but which rely on voluntary contributions, may not receive
sufficient contributions to have "spare goods." Political institutions
customarily acquire goods through a coercive system of taxation. Would
political institutions be justified in taxing citizens in order to provide
minimal opportunities?

If it is permissible for political institutions to tax citizens for some
purposes, then surely it is permissible for them to tax citizens for the
purpose of doing what they (the political institutions) morally ought to do.
Since we have already established that institutions ought to contribute spare goods to provide minimal opportunity levels, then assuming that taxation by political institutions is ever permissible (that proper taxation procedures have been instituted, by the vote of the majority), it is permissible for political institutions to tax citizens in order to raise opportunities to minimal levels. If the tax were graduated, it would have the advantage of taking from individuals only those goods which are "spare", so that individuals who had already contributed their spare goods voluntarily, in compliance with the MDSP, would not be forced, under such a system of taxation, to contribute again.

It is not the case that any institution ought to contribute spare goods in order to provide equality of opportunity, since it is not inequality of opportunity which produces bad consequences, but rather sub-minimal opportunity levels. It is permissible that there be differences among children in their material conditions, child care, and education. It is permissible, for instance, for some children to receive an education at public schools while others receive an education at superior private schools; but it is not permissible for children to have sub-minimal opportunities, because of the bad consequences produced.

There might, I suppose, be exceptional people who are able to succeed as adults despite the fact that they have had sub-minimal opportunities as
children. It is conceivable that a child who had parents who mistreated or even abused him, an inferior education, and poor material conditions, would overcome his background (for instance, by undertaking a self-education program) and achieve success nevertheless. Our culture has, through Horatio Alger-type success stories, perpetuated the myth that any child can succeed — can even become President! Cases where children are able to succeed despite highly adverse conditions are, I believe, quite rare. However, if such children do exist, it is worth noting that my argument in favor of institutions providing minimal opportunities does not apply to them, as they will not suffer bad consequences if they are not provided with minimal opportunities. Since, in practice, however, it is virtually impossible to distinguish such children from other children, the only practicable method of providing minimal opportunities for the others is to provide minimal opportunities for all children.

As an addendum I should point out that the MDSP is not, strictly speaking, part of a theory of justice, as it holds that agents ought to contribute spare goods in order to prevent bad consequences, not that they are required to do so by justice.
In this dissertation I have given a skeletal account of a substantive theory of distributive justice which, I believe, avoids the objections I have raised to Rawls's theory. Many problems remain unresolved, however, and I would like to suggest some directions for further inquiry, so that my skeletal account can be fleshed in to provide a more complete theory of justice.

The section of my dissertation which was the most speculative and which left the most questions unanswered was the section concerning the distribution of natural resources (Chapter Two, section four). Yet it seems to me that there is no question today of greater importance than the question of how to distribute natural resources. The United Nations is currently sponsoring a conference on the laws of the seas in an attempt to establish equitable principles for the use of the seas and their resources. The most recent outcome of this conference was the declaration of 200-mile fishing limits. And with increasing exploration of outer space, it is becoming essential to have a workable and just set of principles for distributing these newly discovered resources. Furthermore, there has recently been an upsurge of often
militant claims from Indian tribes for the return of land, or for compensation for land, which they maintain was unjustly taken from them by white settlers. One of the most pressing problems, however, is that of the amount and quality of natural resources we are obligated to leave for future generations. Renewable and non-renewable resources are fast being depleted, the problem of pollution has reached crisis proportions, and energy consumption has hit an all-time high; it is estimated that in the next twenty-five years more energy will be consumed than has been consumed in the entire history of mankind up to this point. In my discussion of obligations to future generations I suggested that we at least owe members of the next generation resources which are sufficient for their survival. But is it the case that we ought to leave them more than they need merely to survive? Should we insure that the total value of resources which they inherit is equal to the value of resources available to us now? Or should we take into account population growth (after all, it is we who are responsible for the size of the next generation), increasing the amount of available resources so that each individual has not only a survival share but also a remainder share of equal value to those in use by members of the current generation?

In section four I argued that individuals have use rights over survival shares and equally valued remainder shares. Do, however, such individuals also have management rights over these shares—rights to decide how and by whom their shares are used? Do they have rights, for instance, to let others rent or use portions of their shares, or to exchange shares? One argument
for individual management rights is that they facilitate a more efficient use of resources. Suppose, for instance, that a result of allocating shares of natural resources is that a farmer receives a share of fishing waters and a fisherman receives a share of farmland. If the two are allowed to exchange shares, the added cost of disruption and retraining for both of them to utilize their shares is avoided. Or, suppose a farmer, because of ill health, is unable to use all of his share of farmland, but an industrious farmer down the road would be willing to pay for the use of his neighbor's unutilized farmland. The allocation of resources resulting from the rental would be more efficient. If everyone is allowed to rent or exchange shares, a Pareto optimal distribution is achieved. It could be argued that even if natural resources are jointly owned, the Pareto optimality resulting from individuals having management rights over their shares of natural resources overrides the management right of the joint owners, in the case where the joint owners have not agreed how natural resources are to be used. A counter-argument, however, is that individual management rights could lead to excessive accumulations of goods, through some individuals using much larger shares than others.

Another issue left unresolved by my discussion of natural resources is that of whether natural resources are jointly owned or unowned. I presented considerations in favor of both positions, but was unable to devise a conclusive argument in favor of either. I hope that others will give further thought to the matter, and will be able to develop an argument establishing the correctness of one position or the other. The last problem in the natural resources
section which I would like to draw attention to is that of clarifying the difference between natural resources and the products produced from them. Such a clarification is important, for I have maintained that producers have private property rights, not in natural resources themselves, but in products produced from them. If, for instance, a person cuts down a tree on his share of natural resources, is the felled tree a product which he has produced and now owns, or is it still a natural resource? If he does not own the tree, but nevertheless has a right to use it, what rights does his right to use entail? the right to sit on it? to carve it into a chair? to chop it up and burn it in his fireplace?

A problem I mentioned in passing in Chapter Two, section three, is that of what sort of compensation producers are entitled to when their rights over goods they have produced in accord with the Production Principle are overridden on utilitarian grounds. I pointed out that they are obviously not entitled to full compensation, such that they are indifferent between having the good and receiving compensation for its loss. But what they are entitled to short of this I find difficult to say. And who is required to do the compensating? the person on whose account the producer's rights were overridden in the first place? the institution which excludes the producer from his goods? those who can afford to do the compensating?

Finally, one question which I did not address in Chapter Three, section two, is how individuals ought to act toward other individuals who ought to contribute their spare goods (those goods the loss of which does not impose great risk or cost upon the agent) to help prevent the bad consequences from
sub-minimal opportunity levels but do not. If an individual has contributed his own spare goods, but sub-minimal opportunities still remain (political institutions are not functioning effectively to remove them), is it then permissible for him to, or ought he to, take goods from others who ought to have contributed spare goods but did not, and use those goods to increase opportunities? If so, ought he to impose the burden of losing such goods fairly on as many individuals as possible, or is it permissible for him to take all of one person's spare goods, leaving those of another person, which are equally available to him, untouched?

My dissertation leaves many more problems unsolved, but I hope that these few suggestions will at least point the way toward further philosophical investigations of a fruitful nature.
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