

Rawls, Liberalism, and Leisure

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(Abstract)

There is a tension within liberalism between the ideal of equality on the one hand and the respect for freedom (in the form of non-interference) on the other. I shall try to show that in liberalism's efforts to simultaneously realize its goals of freedom and equality it must ultimately settle for less than the ideal of each. Since Rawls' theory of justice is a liberal one, it suffers from this tension as well. However Rawls' theory has also been accused of forcing some members of society to subsidizing the choices of others. I shall argue that one of the more recent attempts to defend his theory, by Walter Schaller, against such accusations, falls short of its goals. I shall also argue that Rawls' suggestion, in *Political Liberalism*, that a principle guaranteeing a social minimum 'may easily precede' the principle guaranteeing the basic liberties, should be rejected because it does not provide adequate protection of the basic liberties, especially freedom of the person.

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Introduction

The word ‘liberalism’ is derived from the Latin word *liber* which means ‘free.’

Liberalism as a modern political theory started with John Locke who believed that men are created ‘equally’ in the sense that all are created by God and none are sanctioned by God to have power over others. He argued that the function of government is to guarantee the liberty – or freedom – of individuals to do as they see fit with their own property, free from threats and transgressions of others. However in contemporary political philosophy, there is a disagreement over how to combine liberty and equality. On the one hand some believe equal treatment of all entails that each must have as much freedom as possible to do as he chooses without interference from others, including the government. On the other hand, others believe that equal treatment entails assuring that the range of choices to which each individual has access, are as great as possible. The lack of access to a sufficient range of choices interferes with liberty as well, so equal treatment might entail some interference (e.g. in the form of taxation) with certain individuals in order to increase the range of choices for other individuals.

An example might help to clarify these two views. As Nozick has argued, one might think that liberty – freedom – includes the right of a highly skilled basketball player to spend the large income he earns from his skills and labor as he chooses.[fn] This is Nozick’s example involving Wilt Chamberlain. See Nozick 1974, 161-163.] If he earned that income through free exchanges, with the skills he possesses and labor he performed, no individual or government has the right to interfere with his choice of what to do with that income (as long as he does not violate the liberties of others). To do so would be to interfere with his liberty – his right not to be interfered with when choosing how to spend his income.

On the other hand, suppose someone is capable of earning a degree in electrical engineering but does not have the resources (i.e. the money) to do so. In this case, one might think that his liberty is restricted by his lack of resources. He does not have the freedom to pursue a career as an electrical engineer, even though he has the capability to

do so. As a result, his liberty is being constrained by a lack of resources. From this perspective, it might seem plausible that the government does have a right – indeed an obligation – to interfere with the basketball player’s choices by appropriating a portion of his income. That is because equal treatment of all entails that those who have equal capabilities should have equal chances of developing them.

Generally speaking, since the first view places more emphasis on non-interference, i.e. no individual may be interfered with in selecting his choice from options he already possesses the means and capabilities to realize, I will refer to it as ‘liberty.’ Likewise, since the second view is more concerned with insuring a large range of options for all, i.e. individuals should have access to the means to realize the capabilities they possess, I will refer to it as ‘equality.’ That is because adherents of this view agree that some redistribution of resources (or welfare, etc.) is necessary in order to insure a large range of options for everyone. As a result, this view tends more towards egalitarianism than the former. With these terms I can now frame my inquiry into how the two should be combined as a debate over how much liberty should be sacrificed for equality and vice versa. The bulk of this thesis is concerned with that debate. In particular I will focus on the latter view as its egalitarian leanings tend to put equality in significant tension with liberty.

In this thesis I have two main objectives. The first is to expose some of the problems that result from the tension, within liberalism, between the ideal of equality on the one hand and the respect for freedom (in the form of non-interference) on the other. In liberalism’s efforts to simultaneously realize its goals of freedom and equality it must ultimately settle for less than the ideal of each. Its effort to realize its goal of freedom infringes upon its effort to realize its goal of equality and vice versa. I shall argue that this tension is present even at the ideal level, i.e. it cannot be eliminated even in principle. As a result of this problem, liberalism, if it is to respect the basic liberties and realize its goal of equality, works to the advantage of those who choose to pursue a life of leisure, especially when they are compared with those who choose to pursue a life of wealth. In addition, I shall argue that one of the most famous contemporary theories of justice, that

of John Rawls, suffers not only from that problem, but suffers from another related problem in that it forces some to subsidize the choices of others. I will argue that the latter problem is another example of the tension within liberalism between the ideal of equality and that of liberty, and so is most likely inherent to Rawls' theory and cannot be avoided.

My second objective is to show that Rawls' theory, in its final suggested form, is unacceptable because, at least in principle, it permits the basic liberties – including our most fundamental and basic individual rights – to be violated for the purpose of aiding others. This criticism is limited to Rawls' theory. Rawls suggests that a principle guaranteeing a 'social minimum' should be lexically prior even to the principle guaranteeing our most fundamental basic liberties, including freedom of the person. I shall argue that such a theory places far too much weight on egalitarian ideals, to the detriment of liberty, and as a result, is defective. In other words Rawls sacrifices too much freedom for the sake of equality. I shall ultimately argue that his theory should be rejected as a result.

The thesis consists of three chapters. The first is an explication of Rawls' theory of justice. The second chapter consists of the argument that liberalism works to the advantage of those who choose to pursue a life of leisure along with a brief argument that Rawls' theory suffers from that problem. The third and final chapter consists of an argument that his theory suffers from the problem of forcing some to subsidize the choices of others. Finally, I conclude the chapter with an argument that Rawls' theory, in its final suggested form, should be rejected because it does not provide adequate protection of the basic liberties.

1.

Rawls' Theory of Justice

In this chapter I shall explicate John Rawls' argument for his two principles of justice. It is not my objective to criticize his theory here, though I will occasionally note relevant

criticisms by others. Instead my objective is to get an overview of a contemporary liberal theory of justice. Rawls first presented his comprehensive theory of justice in *A Theory of Justice*. Later, in *Political Liberalism*, he expanded and revised his theory, especially those parts concerning the first principle. As a result I will refer to both in my explication, though my discussion of the second principle is mostly restricted to *Theory* while that of the first principle mostly concerns *Political Liberalism*. My main concern in choosing between the two is to capture his latest and most developed arguments.

Rawls' theory consists of two principles of justice:

First Principle

Each person has an equal right to a fully adequate scheme of equal basic liberties compatible with a similar system of liberty for all. (Rawls 1996, 291)

Second Principle

Social and economic inequalities are to be arranged so that they are both:

- (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
- (b) attached to offices and positions open to all under conditions of fair equality of opportunity. (Rawls 1971, 302)

The chapter consists of four sections. In the first section I discuss some of Rawls' background assumptions. In the second section I discuss the framework within which he argues for both the first and second principles. The third and fourth sections concern his arguments for the first and second principles. The third section is devoted to an explication of his argument for the second principle and the fourth section is devoted to his argument for the first principle.

I.

Before explicating Rawls' argument for his principles of justice, I want to note a couple of things. First, Rawls assumes his principles apply to a 'well-ordered society.' A well-ordered society is one that is "not only designed to advance the good of its members but is also effectively regulated by a public conception of justice." (Rawls 1971, 4-5) Such a

society is one “in which (1) everyone accepts and knows that the others accept the same principles of justice, and (2) the basic social institutions generally satisfy and are generally known to satisfy these principles.” (Rawls 1971, 5) Second, I want to discuss a couple of concepts that reside in the background of his conception of justice. These are the circumstances of justice and the ontological status of his principles. For Rawls the circumstances of justice obtain when a group of mutually disinterested persons attempt to divide ‘social advantages’ and express claims on these advantages that, on a whole, are greater than the overall amount of advantages. Each individual prefers a greater share to a lesser one and since ‘moderate scarcity’ is the rule, conflicting claims result. It is the objective of justice to adjudicate these claims. (Rawls 1971, 126)

The ontological status of Rawls’ principles is a complex matter. When considering the sources of the principles, he looks at two possibilities: rational intuitionism and constructivism.¹ In order to discuss those possibilities we need first to look at the conditions in a modern democratic society. He describes such a society as composed of a pluralism of incompatible yet reasonable comprehensive moral, philosophical and religious doctrines. There is not one that all citizens agree on and this is “the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime.” (Rawls 1996, xviii) Rawls also believes that this pluralism is “not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy.” (Rawls 1996, 36) Since an individual’s views on justice are generally a result of his comprehensive moral, philosophical and religious doctrines, and such comprehensive doctrines are often incompatible, it follows there are going to be many conflicting views on justice. It also follows that since these

¹ Here what I refer to as ‘constructivism’ is actually ‘political constructivism’ in Rawls’ terminology. He uses that term to distinguish constructivism as he uses it from ‘moral constructivism.’ This distinction is discussed in detail in *Political Liberalism* because it is very important to Rawls’ objective which is to create a *political* theory. In *Theory* his use of the term implied *moral* constructivism, especially in the context of his discussion of Kant (See Rawls 1971, 251f). The difference between the two, according to Rawls, is that moral implies a comprehensive doctrine (i.e. a moral, philosophical or religious doctrine) while political does not. Below we will see the importance of this distinction – it cannot be the job of government in a liberal society to favor any comprehensive conception of the good. Instead, the government must move beyond those doctrines, to a concept on which all can agree. For his discussion, see Rawls 1996, xlv-xlviii and Lecture III (pp. 89-129).

views are often going to be based on one's deepest convictions, they are unlikely to be changed.

As a result of this situation, Rawls does not believe rational intuitionism can work under the conditions of a modern democracy. In general rational intuitionism refers to a theory in which propositions that express necessary truths are derived from self-evident first principles that are also necessarily true. Rational intuitionism has several features that Rawls believes render it unacceptable in the role of determining the principles of justice in a modern democratic society, but the most important is that it "says that moral first principles and judgments, when correct, are true statements about an independent order of moral values; moreover this order does not depend on, nor is it to be explained by, the activity of any actual (human) minds."² (Rawls 1996, 91)

The biggest problem here is the diversity of comprehensive doctrines that exist in a modern democratic society. Some people do not believe such independent facts exist and those that do often do not agree on them. For example some may believe it self-evident that all individuals are created equally. On the other hand others may believe it just as self-evident they are not. Some may believe that the Christian God created a moral order independently of humans. Others may agree that a higher being did create such an order but believe that being to be Allah and that he created a different moral order. Both believe that their independent moral order applies to everyone.

In light of this problem Rawls believes that "a conception of justice cannot be deduced from self-evident premises or conditions on principles." (Rawls 1971, 21) Moral intuitionism simply will not work because "given the fact of reasonable pluralism, citizens cannot agree on any moral authority, whether a sacred text, or institution." (Rawls 1996, 97) Instead we must construct the principles of justice ourselves, as rational agents. Political constructivism is preferable to moral intuitionism when considering the principles of justice in a modern democratic society for three main reasons. First, it gives us the tools to construct principles on which *any rational agent*

² For Rawls' description of the features of rational intuitionism see Rawls 1996, 91-92.

can agree. It is not dependent upon any particular doctrine (e.g. Catholicism or Marxism). Instead it simply requires rational agents.³ The second reason is that it is not incompatible with moral intuitionism. This is important, for Rawls does not argue that independent moral facts do not exist; he merely argues that, even if they do exist, we have been unable to agree on what they are.⁴ The third reason is that political constructivism is compatible with the pluralism present in modern democratic societies. This is related to the first reason. The plethora of incompatible yet reasonable comprehensive moral, political, and religious doctrines is much less of a problem for constructivism because it concerns the rationality of the various agents, not their comprehensive doctrines.

II.

Rawls provides two, related arguments for his principles of justice in *Theory*. One is based on our intuitions and the other is contractual.⁵ He seeks to provide an alternative to utilitarianism by providing a more systematic approach to justice than intuitionism. Since Rawls seeks to find a more systematic approach than intuitionism, he seems to think that his main argument is the social contract one and I will concentrate on it. However it is not a standard social contract theory in the sense of say Locke. In Locke's case we imagine a group of people, living independently in a 'state of nature,' that come together and agree on a system of government. Rawls rejects this idea. Instead he uses the idea of an 'original position' and a 'veil of ignorance.'

Rawls rejects the 'state of nature' because it does not provide the equality that is his main premise. When deciding the principles of justice we must "ensure that no one is

³ Some argue that it does require a particular philosophical doctrine. Michael Sandel argues that Rawls' theory requires a particular metaphysical conception of the self. See Sandel 1982. His conclusion is that Rawls must have a conception "in which the self, shorn of all contingently-given attributes, assumes a kind of supra-empirical status, essentially unencumbered, bounded in advance and given prior to its ends, a pure subject of agency and possession." (Sandel 1982, 94) For Rawls' reply to that form of criticism, see "Justice as Fairness: Political not Metaphysical" in Rawls 1999. Kymlicka also defends Rawls' position. See especially Kymlicka 1990, 234, footnote 6.

⁴ See Rawls 1996, 95-97.

⁵ The two are related in the sense that we consider our intuitions and then set up a situation that results in a contractual agreement to reflect those intuitions. If that situation or agreement seems unfair, then we either alter it, reconsider our intuitions, or both. Eventually we reach a 'reflective equilibrium.' See Rawls 1971, 19-21; 48-51. For a discussion on the relationship between the two arguments, see Kymlicka 1990, 55-70.

advantaged or disadvantaged in the choice of principles by the outcome of natural chance of the contingency of social circumstances.” (Rawls 1971, 12) For Rawls the state of nature cannot accomplish this because ‘morally irrelevant’ factors may influence the participants’ decisions. For example those who are more intelligent may use their intelligence to negotiate a better position for themselves and this destroys the equality for which he strives. He argues that such factors should not weigh in the determining of the *principles* of justice. Justice is a moral consideration and such factors as intelligence should not matter in the initial process of setting up the background institutions of society, though they may enter when individuals seek certain offices, etc.⁶

In order to solve the problem of ‘morally irrelevant’ factors and model his main premise of equality, he places the participants in an ‘original position’ behind a ‘veil of ignorance.’ This situation “corresponds to the state of nature.” (Rawls 1971, 12) The participants are rational agents who are to decide the principles of justice for the society in which they might live. Behind the veil they are ignorant of the ‘morally irrelevant’ factors – their intelligence, birthplace in society, skills, ethnicity, etc., and their conception of the good – their comprehensive plan of life and their moral, philosophical and religious doctrines. Rawls writes:

Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. (Rawls 1971, 12)

⁶ There is a big difference between background institutions and individual circumstances. For example, it may be the case that someone of greater intelligence receives a higher salary than someone of lesser intelligence. However this is much different than allowing the more intelligent to set up background institutions that result in permanent privileges for themselves. This will become clearer as we work through the argument.

In this situation the above problem of the more intelligent negotiating a better position for themselves is not possible because the participants do not know their intelligence.⁷ Instead, the original position is a “state of affairs in which the parties are equally represented as moral persons and the outcome is not conditioned by arbitrary contingencies or the relative balance of social forces.” (Rawls 1971, 120)

At this point let us pause for a moment and review. We have participants in a situation in which they are to construct the principles of justice of a society to which they belong. While they are ignorant of the ‘morally irrelevant’ factors noted above, they are not ignorant of everything. They know that their society is subject to the circumstances of justice, they know the general facts about human society, the basis of social organization and the laws of human psychology, and they understand political affairs and the principles of economic theory. (Rawls 1971, 137) They also know that they have a conception of the good and a rational plan of life (though they do not know any of the details of that conception or plan as noted above). A very important point is that they know the fulfillment of their rational plan of life requires ‘primary social goods’ and the more of these any given individual possesses, the easier it is for him to realize his plan. These goods include wealth and income and self-respect.⁸ Finally they know this is the last word. Whatever principles are chosen in the original position are permanent. The participants cannot return and reconsider them.

Finally, and perhaps most importantly, the participants are rational. They are rational in the sense that, if they desire something, they choose the option that advances that desire as best as possible. Rawls writes:

⁷ Some have questioned the tenability of the original position as far as the amount of ‘ignorance’ involved. For example Benjamin Barber has raised the question of whether or not the participants have enough knowledge to make any decisions. See Barber 1975. On the other hand Thomas Nagel has raised an objection to the exclusion of the parties’ conception of the good. He argues that such conceptions are not morally irrelevant and to place them behind the veil of ignorance renders the original position unfair and results in unequal treatment of the parties. See Nagel 1973.

⁸ See Barber 1975 for a discussion of the difficulty of designing such an index. Rawls expanded his discussion of this in *Political Liberalism*. See Rawls 1996, 178-187.

The concept of rationality here, with the exception of one essential feature, is the standard one familiar in social theory. Thus in the usual way, a rational person is thought to have a coherent set of preferences between the options open to him. He ranks these options according to how well they further his purposes; he follows the plan which will satisfy more of his desires rather than less, and which has the greater chance of being successfully executed. (Rawls 1971, 143)

The ‘essential feature’ that is different from the ‘standard’ concept of rationality from social theory is that the individuals in the original position, though rational, do not suffer from envy. Rawls assumes the participants are not made discontented or jealous by the knowledge that others have more social primary goods, at least as long as they do not have a great deal more or, do not have more as a result of injustices. This is part of an essential feature of Rawls’ theory known as ‘mutually disinterested rationality.’ (Rawls 1971, 144) The participants do not seek to gain from others’ expense, nor do they seek to help others at their own expense.⁹

Now that we have completed the discussion of the conditions of the original position, let us pause for a moment and review those conditions. We have a group of rational, mutually disinterested individuals behind a veil of ignorance that prevents them from having knowledge of ‘morally irrelevant’ factors. On the other hand they do have enough knowledge to achieve the task at hand – that of choosing principles that dictate the division of the primary social goods. The participants “try to acknowledge principles [of justice] which advance their system of ends [their conception of the good or rational plan of life] as far as possible.” (Rawls 1971, 144) Since they advance their system of ends with primary social goods, then it is rational for them to attempt to gain the greatest amount of such goods they can, subject to the constraints discussed above. At this point one might think that it is rational to try to maximize his position with little other concerns. However we must remember the requirement of finality. The principles of justice they select are permanent. If they happen to place anyone in an intolerable

⁹ See Michael Sandel’s communitarian criticism of this notion in Sandel 1989.

situation, they have no recourse.¹⁰ Therefore their concerns cannot be with maximizing alone. They also must be concerned with the lowest position less they end up in that position.

As Kymlicka notes, many have criticized the original position as bizarre (Kymlicka 1990, 62). However Rawls clearly states that the original position is a hypothetical one:

It is clear, then, that the original position is a purely hypothetical situation. Nothing resembling it need ever take place, although we can by deliberately following the constraints it expresses simulate the reflections of the parties. (Rawls 1971, 120)

The original position is not only a ‘hypothetical device,’ but is also an ‘intuitive notion’ (Rawls 1971, 21).¹¹ Rawls does not derive his conception of equality from it. Instead he uses it to express his conception of equality. He uses the original position to model the conditions of equality and to see what the implications for such conditions are in terms of justice. The notion of equality is in effect his first principle and it is an intuitive one.¹² In the next section I will discuss his argument for the second principle.

III.

Rawls believes the participants would choose his principles of justice. In this section I discuss the second principle and in order to show how the participants might choose it, I want to set up a simpler version of the original position. Let us suppose that we have four people who know they are going on a trip but are behind a veil of ignorance. They do not know how far they are going, where they might stop, how they are to get there or

¹⁰ It is important to note that the original position is not like a game. The participants do not seek to win by gaining more than anyone else. It is more akin to a test in which you want to score as high as possible without failing – regardless of what anyone else scores.

¹¹ Even though one of Rawls’ objectives is to formulate an alternative to intuitionism, I agree with Kymlicka that he is still left with a great deal of intuitionism. Kymlicka argues that “the intuitive argument is the primary argument, whatever Rawls says to the contrary, and the contract argument (at best) just helps express it”. (Kymlicka 1990, 69) See C. 3 in that same book, especially pp. 66-70.

¹² Many have criticized Rawls for having ‘rigged’ the original position to yield the results he desired. I do not believe that to be a valid criticism because he does not derive his principles from a random original position. He has principles in mind – those of a modern democratic society. He then attempts to set up an original position that models the egalitarianism that is his main premise and see if that yields principles of justice that are acceptable to the citizens of such a society.

anything else pertaining to the trip. All they know is that they must make the trip and in order to do it they need money. However, since they do not know any details of the trip, they do not know how much money they need. They know only that there is money available to divide among themselves.¹³

There are many possibilities of division and I shall discuss four of them. The first that comes to mind for many people in such a situation is simply to divide whatever money there is equally among the participants. If there are 40 dollars to divide (they are going on a short trip) the division that results is:

(a) 10 : 10 : 10 : 10

Given the situation, Rawls argues that, once it becomes clear that any individual can receive at least 10 dollars under this division, it is irrational for him to agree to less than 10 dollars. Now suppose that the participants are allowed to gamble on the following distribution of the same 40 dollars:

(b) 14 : 12 : 12 : 2

The gambling will be totally random. Perhaps they might flip coins for example. Rawls argues that it is irrational for the participants to agree to this even though in (b) three out of four participants will be better off than in (a). This division is too risky because any one of the four risks ending up with only 2 dollars while he would receive 10 in (a).

Even though it would be better to have 14 or 12 than 10, since each runs the risk of being the person that receives 2, it is better to settle for 10 than to risk 2. One wants to go as far as possible but on the other hand one must avoid the risk of having too little to complete the trip. It is interesting to note that, even though the participants know little about their trip, they must know that 10 dollars is enough to complete the minimal trip necessary. In other words, in Rawls' original position, even though the participants know little about their society, they do know it produces enough to adequately care for all its citizens. We can see this is necessary if we look at an example in which that is not the case. Suppose that a certain 12 units are required to sustain any given individual and 10 units is the average amount per citizen the society produces. In that case, equal division would result

¹³ This is a good illustration of Rawls' desire to exclude desert from entering the discussion of the principles that regulate the background institutions of justice.

in the death of all. Instead of an equal distribution, it seems that one like (b) would be more rational because in that case three people would live as opposed to none under equal division.¹⁴

At this point I want to alter the situation. Instead of a fixed amount of money I am going to allow the amount to vary. Suppose that for some reason, if we allow some to have more than others, we can raise the overall amount. Consider the following:

(c) 35 : 30 : 28 : 4

The overall amount to be divided is now much greater and three out of four of the individual amounts are much greater than in (a) or (b). Again Rawls argues it is irrational for the participants to agree to this distribution because each risks being the one that receives 4 dollars and that is less than 10 dollars.¹⁵

Finally, let us consider one more distribution. Suppose the following:

(d) 28 : 22 : 18 : 15

Rawls argues that (d) is the best choice for the participants. That is because, even though the distribution is not equal, *everyone* knows that he will receive more money than in any other case *if he should be in the lowest position*. Each knows he must make the trip, must

¹⁴ Rawls does not overlook the situation in which the society in question cannot or does not adequately support all its citizens. In fact, a society that does adequately support all its citizens can be seen as a special case of a more general theory of justice. Under these circumstances, the first principle is lexically prior to the second. However, “the more general conception of justice . . . can be expressed as follows:

All social values – liberty and opportunity, income and wealth, and the bases of self-respect – are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone’s advantage. (Rawls 1971, 62)

The special case on which he concentrates – a wealthy democracy – is one in which individuals “will not exchange a lesser liberty for an improvement in economic well-being.” (Rawls 1971, 152) He continues:

It is only when the social conditions do not allow the effective establishment of these rights [i.e. the basic liberties] that one can concede their limitation; and these restrictions can be granted only to the extent that they are necessary to prepare the way for a free society. The denial of equal liberty can be defended only if it is necessary to raise the level of civilization so that in due course these freedoms can be enjoyed. Thus in adopting a serial order we are in effect making a special assumption . . . that the parties know that the conditions of their society . . . admit the effective realization of the equal liberties. (Rawls 1971, 152)

I will discuss the denial of the equal liberties in much greater detail in Chapter 3, section IV.

¹⁵ Incidentally, this might be a utilitarian solution and it illustrates Rawls’ opposition to that theory (in some of its forms) in that it might allow a few to be sacrificed for the benefit of the many. In this case the one for the three. Of course that is directly opposed to Rawls’ view that *everyone* be treated equally. See Part I, Chapter 3, sections 26, 27, and 28 of *A Theory of Justice* for a discussion of utilitarianism in this context.

go as far as possible and since none are concerned with the amount the others have (as long as none gained more because of injustices), it is rational to choose (d).

This is the essence of Rawls' 'maximin rule.' The term 'maximin' "means the *maximum minimorum*; and the rule directs our attention to the worst that can happen under an proposed course of action, and to decide in the light of that." (Rawls 1971, 154) The participants, since they may end up in the worst position, seek to maximize that position.¹⁶ One way to do this is to simply eliminate a 'worst' position by an equal division. A better way is to use inequalities to raise everyone's position. Hence the choice of (d). The result is Rawls' second principle of justice (the 'difference principle'): social and economic inequalities are permissible as long as those in the worst off position receive more than they would under an equal distribution.

One might raise an objection here. For example our present society consists of almost three hundred million people. In the case of (c), we might question the rationality of the participants if they only had for example a one-in-five thousand chance of being in the category below an equal distribution. In fact this makes it look like it may be rational to choose some form of utilitarianism. Rawls has an answer to this. Part of the problem lies in the simplicity of my example. In the original position the participants do not know the number of people that live in their society and so do not know their odds of being in the lowest position. Rawls writes:

The veil of ignorance excludes all but the vaguest knowledge of likelihoods. The parties have no basis for determining the probable nature of their society, or their place in it. Thus they have strong reasons for being wary of probability calculations if any other course is open to them. (Rawls 1971, 154)

¹⁶ Some have argued that the participants in the original position would not make such a conservative choice. For example, R. M. Hare argues that the participants are just as likely to choose a principle that guarantees a social minimum but leaves citizens free to gamble on the possibility of great wealth without being hampered by the requirement that the lowest position be *maximized*. Instead, they need only provide an adequate safety net. See Hare 1973.

This is because knowledge of such odds and the ability to understand and play them is counter to Rawls' intention to have the original position be one of equality in which no one can use his knowledge to win himself a better position.

In summary, we have rational agents that know they have a plan of life that requires as many social primary goods as possible without risking a catastrophe such as receiving less goods than one would under an equal distribution. Since they are behind the veil of ignorance, know their decision is final, and know they want to maximize their amount of the primary social goods while not risking a catastrophe, they choose the maximin strategy.

However, this leads to a question: how do we determine the 'worst off position' in order to maximize it? Rawls' answer is to introduce the notion of the 'representative person.' He writes that:

Another thing to bear in mind is that when principles mention persons, or require that everyone gain from an inequality, the reference is to representative persons holding the various social positions, or offices, or whatever, established by the basic structure. Thus in applying the second principle I assume that it is possible to assign an expectation of well-being to representative individuals holding these positions. This expectation indicates their life prospects as viewed from their social station. (Rawls 1971, 64)

We make interpersonal comparisons by comparing the expectations (of primary goods) of 'representative persons' of the different social positions. For example, someone who is of high intelligence and was born into a wealthy family has different expectations (of primary goods) than someone who is not of high intelligence and was born into a poor family. The objective concerning the difference principle is to determine the lowest social position and maximize it.

This has been a difficult area for Rawls' theory. There are 'less than satisfactory' assumptions involved in the process. For example, he assumes that by "taking these individuals [in the various social positions] as specified by the levels of income and

wealth, I assume that these social primary goods are sufficiently correlated with those of power and authority to avoid an index problem.” (Rawls 1971, 97) By this he means that he is “suppos[ing] that those with greater political authority, say, or those higher in institutional forms, are in general better off in other respects [i.e. wealth and income and social status].” (Rawls 1971, 97) As far as defining the ‘least fortunate’ group, it “seems impossible to avoid a certain arbitrariness.” (Rawls 1971, 98) Rawls offers two suggestions in *Theory*. One could choose a particular social position, that of the unskilled worker, and then count everyone with the average income and wealth of that group as the ‘least advantaged.’ Another possibility is to define the ‘least advantaged’ solely in terms of relative wealth and income, excluding social positions altogether. In that case we might define the ‘least advantaged’ group “as all persons with less than half of the median income or wealth.” (Rawls 1971, 98)

These definitions encountered many criticisms and Rawls subsequently offered other definitions. One defines that group as including “persons whose family and class origins are more disadvantaged than others, whose natural endowments have permitted them to fare less well and whose fortune and luck have been relatively less favorable.” (Rawls 1999, 258-259) Later they are defined as “those who have the lowest index of primary goods, when their prospects are viewed over a complete life . . . they are by definition those who are born into and remain in that group throughout their life.” (Rawls 1999, 364) I discuss this problem in detail in Chapter 3. For now one can use any of the definitions to get an idea of how the difference principle works.

Before continuing to Rawls’ first principle, I want to discuss a central feature of his theory and that is ‘fair equality of opportunity.’ Rawls rejects a theory such as libertarianism because such a system only guarantees a “formal equality of opportunity in that all have at least the same legal rights of access to all advantaged social positions.” (Rawls 1971, 72) However, since such a system makes “no effort to preserve an equality of social conditions . . . the initial distribution of assets for any period of time is strongly influenced by natural and social contingencies.” (Rawls 1971, 72) Rawls rejects that type of system because of the ‘obvious injustice’ in that “it permits distributive shares to be

improperly influenced by these factors [i.e. natural and social contingencies] so arbitrary from a moral point of view.” (Rawls 1971, 72) In Rawls’ terminology, that type of system is unacceptable because it permits distributive shares to be improperly influenced by ‘morally irrelevant’ factors.

Rawls argues that his theory is preferable to a theory that only guarantees ‘formal equality of opportunity.’ That is because under the latter, even though everyone has the legal right to some social position, i.e. no one may be actively excluded from seeking some position on the basis of sex, age, etc., they may be *effectively* excluded for some other reason, e.g. because of poverty. Rawls does not believe that a formal guarantee is sufficient to ensure a fair system of distributive justice. An example might help us to unpack his argument.

Suppose we have two individuals, Mary and Sally, both of whom are of equal, and high, intelligence. In fact they are both of sufficient intelligence to acquire a job at a major software corporation, as long as they have the requisite background, i.e. education and training. They both also desire the income that such a position entails. Mary lives in a middle income home and her parents have invested a great deal of money in her education and encouraged her to do well. On the other hand, Sally lives in a poor home and her parents have invested very little money in her education, and have not encouraged her to do well. As a result of this situation, even though both are equally entitled to seek the job, their chances of actually acquiring it are decidedly unequal. Even though both have equal potential to complete the necessary education and training, they do not have equal access to it because the training requires money and Sally’s parents have very little. Recall that for Rawls, Sally’s birthplace in society is a ‘morally irrelevant factor’ and so should play little or no role in determining her life prospects. However in a society that does not guarantee access to education, such a factor may play a very important role in determining those prospects. The fact that Sally’s parents are poor and the fact that they have not encouraged her to do well should not restrict her opportunities. In order to actually realize equality of opportunity, “the government tries to insure equal chances of education and culture for persons similarly endowed and

motivated either by subsidizing private schools or by establishing a public school system.” (Rawls 1971, 275)

Here we see that Rawls’ main premise is a very egalitarian one. In order to eliminate the influence of ‘morally irrelevant factors’ as far as possible when determining distributive shares, we need to ensure equal access for all to develop their talents and skills. If there are some that have talents but no resources to develop them, it the job of government to provide them the resources.

In addition to guaranteeing equality of opportunity, it is also the job of government to guarantee “a social minimum either by family allowances and special payments for sickness and employment, or more systematically by such devices as a gradual income supplement (a so-called negative income tax).” (Rawls 1971, 275) This leads us beyond the principles of justice to the question of government. Rawls divides the government into four branches: the allocation branch, the distribution branch, the stabilization branch, and the transfer branch. I am only concerned with one of them here and it is the distribution branch.¹⁷ Its “task is to preserve an approximate justice in distributive shares by means of taxation and necessary adjustments in the rights of property.” (Rawls 1971, 277) My focus here is on taxation. The distributive branch must “raise the revenues that justice requires. Social resources must be released to the government so that it can provide for the public goods and make the transfer payments necessary to satisfy the difference principle.” (Rawls 1971, 299) We see here that those of higher income are to be taxed and the money redistributed, either directly or indirectly, to those of lower income. I will return to this in the next chapter.

IV.

Now I want to discuss Rawls’ first principle. In *A Theory of Justice* Rawls presents an argument for the first principle and its priority. Essentially he gives a short argument for liberty of conscience (and freedom of thought) and then states that the same general

¹⁷ For the complete discussion see Rawls 1971, Part II, Chapter V, section 43.

argument could be expanded to the other basic liberties: political liberty (the right to vote and to be eligible for public office), together with freedom of speech and assembly; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law. Many people have raised objections to that approach and Rawls substantially revised and expanded it in *Political Liberalism*. Therefore I will explicate the latter argument.¹⁸

Rawls offers several grounds for the adoption of the first principle and its priority under two headings: that of a person's conception of the good being firmly rooted and that in which an individual's conception is considered as revisable in accordance with deliberative reason. In order to show these grounds Rawls revises and expands his argument in *Theory* in several ways.¹⁹ The most important, and the one I will concentrate on here, is that he sharpens the distinction between the reasoning of the parties and the conditions that restrict them by introducing a "certain conception of the person with a companion conception of social cooperation." (Rawls 1996, 299) This conception, according to Rawls, is a political conception, not a metaphysical one.²⁰

The connection between social cooperation and the conception of the person can be seen in two parts: the reasonable and the rational. The reasonable involves "a shared notion of fair terms of cooperation' where each participant may reasonably be expected to accept, provided that everyone else likewise accepts them." (Rawls 1996, 300) The rational refers to "what, as individuals, the participants are trying to advance." (Rawls 1996, 300) The reasonable is shared by all while the rational tends to differ from person

¹⁸ In particular Rawls is responding to H. L. A. Hart's objections to the grounds for adoption of the first principle and its priority by the participants in the original position. See Hart 1973. Norman Daniels has an objection to Rawls' belief that the argument for liberty of conscience in *Theory* is generalizable to the other basic liberties. See Daniels 1975.

¹⁹ In *Liberalism* Rawls also speaks explicitly of the original position as consisting of 'representatives' of the members of society instead of the members themselves. In *Theory* it is sometimes difficult to tell if he intends the parties in the original position to be the members of society or their representatives, or if they can be either. At times it seems the participants are the members of society. For example he writes that "no one knows *his* place in society, *his* position or social status; nor does he know *his* fortune in the distribution of natural assets and abilities, *his* intelligence and strength and the like." (Rawls 1971, 137)[my emphasis] He continues, saying that "they [i.e. those in the original position] must choose principle the consequences of which *they* are prepared to live with whatever generation *they* belong to. (Rawls 1971, 137)[my emphasis]

to person. These in turn correspond to two moral powers. The reasonable corresponds to the capacity for right and justice while the rational corresponds to the capacity to formulate (and revise and pursue) a conception of the good. These two moral powers are ‘taken’ as “the necessary and sufficient conditions for being counted a full and equal member of society in questions of political justice.” (Rawls 1996, 302)

Given this, the inequalities that arise in natural abilities (the ‘morally irrelevant’ factors) do not affect any individual’s status as an equal citizen. Instead, they become relevant only when we aspire to certain offices or careers, etc. In this way “political justice concerns the basic structure as the encompassing institutional framework within which the natural gifts and abilities of individuals are developed and exercised, and the various associations in society exist.” (Rawls 1996, 302) Rawls believes this reduces justice to ‘fairness’ and the questions concerning the first principle “can be seen as the problem of determining appropriate fair terms of cooperation on the basis of mutual respect.” (Rawls 1996, 303) This is a very important concept. He refers to his theory as ‘justice as fairness’ and it uses a ‘fundamental organizing idea’ which is “that of a society as a fair system of societal cooperation between free and equal persons.” (Rawls 1996, 9) I will discuss this in greater detail in both the following chapters. The argument here is that we are not equal in our skills, intelligence, etc. (the ‘morally irrelevant’ factors), but we are equal in the sense that we possess the two moral powers.²¹ As a result, we must guarantee strict equality as far as the basic liberties are concerned because they involve the two moral powers – powers that we all possess equally in the sense that we all are rational and capable of moral judgments. This provides the ‘framework’ within which we develop our natural skills and capabilities – skills and capabilities that we all do not possess equally. Since the basic liberties provide the ‘framework,’ they take priority over matters concerning the development of our natural gifts and abilities.

Now the original position itself can be divided into parts corresponding to the reasonable and the rational. The rational involves the actual reasoning of the representatives as to

²⁰ Again, see “Justice as Fairness: Political not Metaphysical,” Rawls 1999.

²¹ One might argue that all of us do not possess such powers, e.g. the severely mentally retarded. However at this point, Rawls is considering only ‘fully participating members of society.’

what is best when an individual's capacity to have a conception of the good and their conception itself is taken into account. The reasonable involves the various restrictions placed on the participants (e.g. their placement behind the veil of ignorance) and their agreement.

Rawls gives several reasons why different primary goods should be included in the group of basic liberties and therefore take priority over those in the second principle. In some cases this is evident from the reasons given for the liberty being basic such as equal liberty of conscience and I will concentrate on that here. In other cases it comes from the role of that liberty in regulating the basic structure as a whole such as the case of equal political liberties.²² A third way is that some liberties become basic when other liberties become basic. For example the freedom of thought and association become necessary once the liberty of conscience becomes a basic liberty, for without the former, the latter cannot be realized.²³

Once again, as I discussed in respect to the second principle, we have parties that are to choose the principles of justice from behind a veil of ignorance, except this time Rawls explicitly says the parties represent the citizens of a society. Now the veil of ignorance applies to the parties in the sense that they are not aware of the 'morally irrelevant' factors of the people they represent. When the parties choose the principles of justice, there are three kinds of considerations they must distinguish during their deliberations. These considerations are related to the development (and full and informed exercise) of each of the two moral powers, and to an individual's determinate conception of the good. A determinate conception of the good includes what is valuable in human life. It "normally consists of a more or less determinate scheme of final ends, that is, ends we want to realize for their own sake." (Rawls 1996, 19)

As in *Theory*, Rawls uses the liberty of conscience as an example (though not the only one). In fact his discussion is a restatement "in a somewhat different way the main

²² For a discussion of this case, see Rawls 1996, Lecture VIII, section 8.

²³ For a discussion of this case, see Rawls 1996, Lecture VIII, sections 10-12.

consideration given for liberty of conscience in *Theory*, S. 33.” (Rawls 1996, 311, footnote 23) Rawls provides three grounds for this liberty. The first considers the situation as one in which the parties represented already have firmly held moral, philosophical and religious doctrines while the second and third are more concerned with an individual’s capacity for such doctrines.

In the first case, due to the veil of ignorance, the parties do not know if the persons they represent hold the majority beliefs or the minority beliefs as far as moral, philosophical and religious doctrines are concerned. Therefore they cannot take a chance on less liberty of conscience for the minority even if it means a greater liberty for the majority, because the minority would suffer and the parties do not know who they represent. They might represent either the majority or the minority and to gamble on that shows that the parties did not take the moral, philosophical and religious convictions of the people they represent seriously.²⁴

The second and third grounds involve one’s capacity for a conception for the good but approach that capacity in different ways. The second concerns this capacity as a means to a person’s good and not a part of it. In other words the development and exercise of the liberty of conscience is a necessary means to full development and exercise of the capacity to form and revise a conception of the good. Rawls writes:

There is no guarantee that all aspects of our present way of life are the most rational for us and not in need of at least minor revision if not major revision. For these reasons the adequate and full exercise of the capacity for a conception of the good is a means to a person’s good. (Rawls 1996, 313)

The freedom to ‘try out’ some conception of the good and then, if one is not happy, to revise it, is necessary if our capacity for a conception of the good is to be respected. Recall that this capacity is one of the moral powers of every member of society and as such, if every member is to be treated equally, it must be respected. Incidentally, we

²⁴ This seems a situation that is made more convincing if we think of each member of society as being in the original position and acting to “acknowledge principles [of justice] which advance their system of ends.” (Rawls 1971, 144) In that case I cannot risk a lesser liberty of conscience for the minority view

might note here that Rawls presents a very brief argument that another basic liberty, the freedom of association, is required to give effect to the liberty of conscience.²⁵ Finally, the third ground concerns the “broad scope and regulative nature of this capacity [i.e. for a conception of the good] and the inherent principles that guide its operations (the principles of rational deliberation).” (Rawls 1996, 313) In this way the capacity becomes a part of our conception of the good (as opposed to a means). This is due to the relation between deliberative reason and our way of life itself. We “think of ourselves as affirming our way of life in accordance with the full, deliberate, and reasoned exercise of our intellectual and moral powers.” (Rawls 1996, 313) It becomes a part of our conception of the good because “in addition to our beliefs being true, our actions right, and our ends good, we may also strive to appreciate *why*” each of these is the case. (Rawls 1996, 313) It is important to many of us why we choose a particular conception of the good. Appreciating why we choose particular ends is not only valuable as a means, e.g. to help us revise or realize those ends, but also as an end itself because it helps us understand who we are as individuals. It reflects both our intellectual and moral capabilities, and the connection between those two.

The second main point of Rawls’ argument is the ‘social cooperation’ element and I will only briefly discuss it here. Again, he offers three grounds. The first is that a just and stable scheme of cooperation is a great advantage to everyone’s conception of the good. This scheme is best provided by the two principles of justice (Rawls 1996, 316-318). The second is that self-respect “is most effectively encouraged and supported by the two principles of justice.” (Rawls 1996, 318) This is because the development and exercise of both moral powers presupposes self-respect (Rawls 1996, 318-329). Finally a well-ordered democratic society that obeys the two principles of justice can allow each person to realize a far more comprehensive good than can any individual realize on his own with only his own conception of the good (Rawls 1996, 320-323). Rawls gives the example of musicians. A group of musicians can make music together, each using his own talent for one instrument, in a way that none can alone (Rawls 1996, 321). The two principles of

because *I* might be in the minority. The revision to representatives in the original position from the members of society itself seems to me to weaken the argument in this case.

²⁵ See Rawls 1996, 313.

justice provide the best atmosphere in which individuals can realize their own conceptions of the good while being a part of a much larger and diverse group that is unified in their respect for justice and each other.

Before concluding, I want to note one last thing. In my explication of the second principle, I discussed Rawls' notion of fair equality of opportunity. He is also concerned with fair equality when it comes to realization of the basic liberties. In this case fair equality "parallels that of fair equality of opportunity in the second principle of justice." (Rawls 1996, 327) The concern here is "how does justice as fairness meet the long-standing problem that the basic liberties may prove to be merely formal, so to speak?" (Rawls 1996, 325) He writes that "of course, ignorance and poverty, and the lack of material means generally, prevent people from exercising their rights and from taking advantage of these openings." (Rawls 1996, 325-326) However we do not count such 'obstacles' as ignorance as restricting a person's liberty; rather we "count them as affecting the worth of liberty, that is the usefulness to persons of their liberties." (Rawls 1996, 326) Nonetheless we must try to guarantee equal *worth* of the basic liberties, at least insofar as is possible. This "guarantee means that the worth of the political liberties to all citizens, whatever their social or economic position, must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions." (Rawls 1996, 327) This is a very important point and I will return to it in the third chapter.

Conclusion

In conclusion, it seems to me that one of the most powerful arguments for the priority of the first principle is that the first principle seeks to exclude the inequalities in natural abilities from the discussion of basic rights of liberty. The fact is, we are not all equal in natural abilities. Some are more intelligent, some are physically stronger or more agile, and some possess certain skills and talents that others lack. However the first principle moves beyond these specific inequalities to the more general notion of a person. We are equal in the sense that we are all members of the human species and any member of that species possesses the potential to make moral judgments (e.g. concerning justice) and

develop a rational plan of life – in short possesses Rawls' two moral powers. The best way to respect those moral powers is to ensure that all have equal basic liberties, e.g. all have the right to vote. Once we are guaranteed these liberties, we can discuss the distribution of wealth, income and social status. It is only at this point that the inequalities in natural abilities enter the discussion.

Another factor is the difference between the subjects of the two principles. It is not clear that the basic liberties could be treated in the same way as wealth and income. It is possible, up to a point, to increase everyone's wealth by allowing inequalities in the distribution of it. However that seems much more difficult with, for example, freedom of speech. It is hard to see how, by allowing some to have more freedom than others, we can raise the amount of freedom for *each* individual.

In this chapter I have provided an explication of Rawls' theory. I have not criticized it though I have noted criticism by others. In the next and last chapter I will provide my own criticisms, both of his theory and of liberal theories in general. I start with liberal theories in general, often referring to Rawls' theory as embodying the essence of modern liberal theories in that it calls for a redistribution of income.

2.

Liberalism, Leisure and Justice

Contemporary liberalism is a balancing act. It attempts to balance the demands of egalitarianism (as it pertains to opportunity, welfare, resources or whatever) with those of liberty. This chapter is concerned with the inherent difficulties in that attempt. I intend to show that if liberalism respects what Rawls terms the basic liberties, it fails to treat everyone equally, and, if it succeeds in treating everyone equally, it fails to respect the basic liberties.

This chapter consists of five sections. In the first section, I set up an imaginary society and consider the implications of both liberalism and libertarianism in four different

scenarios. While each view has its strength and weaknesses – dealing more plausibly with certain cases than with others – I argue that the liberal’s responses to two of these scenarios give rise to a difficult puzzle, revealing a tension between the values of liberty and equality. In the second section I explicate Kymlicka’s version of what I refer to as the ‘starvation argument’ against libertarianism in order to provide background for the puzzle. In the third and fourth sections I go on to explore possible responses to this puzzle and raise problems for each of those responses. In section III, I argue that liberalism fails to treat all personal conceptions of the good equally, by showing that it works to the advantage of those who pursue a life of leisure. In section IV, I argue that liberalism, if it succeeds in treating everyone equally, violates its principle of liberty. Finally, in section V, I show that Rawls’ theory works to the advantage of those who pursue a life of leisure.

I.

Consider an imaginary society consisting of three persons. Two are citizens of the society and a third represents the redistributive mechanism of the state. In this society there is enough arable land to produce plenty of food. To eliminate the problems of land ownership, let us say that there is plenty of land such that a large excess of food can be produced and neither person has tried to possess all the land. Person A has superior natural abilities in all four scenarios. Let us suppose that one of those abilities is a superior skill at producing food:

- i) Person A has produced more food than he needs while person B, even though he could produce enough food for himself, has chosen not to produce any food.
- ii) Person A has produced more food than he needs but person B, for whatever reason, is unable to produce food for himself.

In both of these situations a libertarian will hold that it is a violation of A’s (Lockean) rights to *forcibly* remove some of his produce and redistribute it to B. It is good for A to choose to give some of his produce to B, but it is wrong for a third party to force him to do so. On the other hand (most) liberals believe that the state has an obligation to

intervene in (ii) to aid B while it may not in (i). Liberals have argued that this situation results in a problem for libertarianism. The problem is: how can a society be just when some live a life of luxury while others starve to death due to no fault of their own? I refer to this as the ‘starvation-argument’ and I will discuss it in greater detail below. At this point I want to consider two more scenarios:

- iii) Person A has chosen to produce only enough for himself, even though he could produce enough for B as well. Person B, though able to produce enough food for himself, has chosen not to produce any food.
- iv) Person A has chosen to produce only enough for himself, even though he could produce enough for B as well. Person B, for whatever reason, is unable to produce food for himself.

The libertarian’s response to both these situations is the same as above. However it is not as simple for the liberal if he is to respect both the view that no one should be forced to labor against his will and the view that one should not suffer due to no fault of his own. He must argue that the state can intervene – with force if necessary – in scenario (ii) but not in scenario (iv). In fact scenario (iv) produces a situation for the liberal that is quite similar to that of scenario (ii) for the libertarian. In (iv), as in (ii), B is going to starve to death due to no fault of his own. Nothing has changed for him. A life is a life. It still is not his fault that he is in his condition. When combined, scenarios (ii) and (iv) result in a puzzle for the liberal. The puzzle is: if the libertarian society is unjust because some live in luxury while others starve to death due to no fault of their own, how can a liberal society be just when some are lying about in hammocks while others starve to death due to no fault of their own?

The problem for the liberal is how to answer the puzzle without violating his simultaneous demands for liberty (i.e. the government has no right to force someone to labor) and equality (the government does have a right to interfere with some in order to aid others who suffer from severe disadvantages due to no fault of their own). Liberals must argue that a society that allows some the freedom to pursue a life of leisure while

others starve to death due to no fault of their own is a just one.²⁶ In the next section I discuss Kymlicka's argument against libertarianism. That argument not only provides background for the puzzle I have discussed here but also sheds light on the liberal argument for state intervention in scenario (ii) that I shall criticize in section III below.

II.

In scenario (iv) B will starve to death if A does not labor for him. The problem for the liberal is to provide a morally relevant distinction between scenarios (ii) and (iv). Such a distinction certainly does not lie in B's situation. He is in his situation due to what liberals term 'morally irrelevant' factors and this is the case for both (ii) and (iv). Such factors are beyond one's control and include race, gender, and physical handicaps.²⁷ Obviously B would not *choose* to be born severely handicapped. Since he did not he should not suffer because of it.

In order to look at the liberal's distinction I will first explicate Kymlicka's version of what I refer to as the 'starvation argument' against libertarianism. He uses that argument both to criticize libertarianism and to show the superiority of the liberal position. To begin, I want briefly to discuss the theory of libertarianism toward which Kymlicka directs that argument.

In *Anarchy, State and Utopia* Robert Nozick explains what Kymlicka terms his 'entitlement theory' argument for libertarianism (Nozick 1974, 150-153, overall 150-182). Succinctly put, assuming that everyone is entitled to the goods that they currently possess, then a just distribution is whatever distribution results from their free exchanges (i.e. exchanges that do not involve coercion, etc.). The best way to accomplish the objective of a truly free society is simply to allow everyone to use their resources in whatever manner they choose without intervention from third parties. To illustrate how this fits our intuitions Nozick uses the example of Wilt Chamberlain. Suppose D1 is the

²⁶ 'Leisure' is a difficult term to define. For the purposes of this paper, in order to avoid a long definition of leisure, and to keep the discussion simple, I take 'leisure' to mean time spent at activities other than productive labor. Similarly I take productive labor to be labor for which one expects compensation.

²⁷ For a discussion of these factors see Chapter 1, Section II.

initial just distribution of goods. If fans freely choose to spend their resources on tickets for basketball games in which Chamberlain plays and as a result he earns \$250,000, he is entitled to that fortune because it arose out of free exchanges. Each person freely chose to buy tickets and Chamberlain simply employed skills he possessed to amass his fortune. Nozick writes “if the people were entitled to dispose of the resources to which they were entitled (under D1), didn’t this include their being entitled to give it to, or exchange it with, Wilt Chamberlain?” In other words, if we truly want to allow people the freedom to do as they please with their resources, then we should allow everyone to do so, including Chamberlain. Nozick continues “By what process could such a transfer among two persons [Chamberlain and a fan] give rise to a legitimate claim of distributive justice on a portion of what was transferred, by a third party who had no claim of justice on any holding of the others *before* the transfer?” (Nozick 1974, 161-62).

Kymlicka criticizes this argument in *Contemporary Political Philosophy* and I’ll summarize it briefly here. He accuses Nozick of bestowing *absolute* rights to the goods distributed in D1 and argues that a modern liberal need not, indeed cannot, grant him that premise. If everyone did have absolute rights over those goods, and they engaged in free exchanges, then Chamberlain would have absolute rights over his fortune and it could not be taxed. Kymlicka thinks it should be taxed because taxation “removes undeserved disadvantages in people’s circumstances” and we should “put limits on the way that resources can be transferred” (Kymlicka 1990, 102). We must put a “redistributive taxation scheme in place as a way of continuing to mitigate the effects of undeserved natural disadvantages after that initial distribution” so as to implement a “more general right to a fair go in life” (Kymlicka 1990, 102). Kymlicka uses his own example to illustrate the intuitive appeal of his position. Suppose that every person starts with an equal share of resources. At the “end of the basketball season, Chamberlain will have earned \$250,000, while the handicapped person, who may have no earning power, will have exhausted her resources, and will be on the verge of starvation” (Kymlicka 1990, 100). In such a case as this “our intuitions still tell us that we can tax Chamberlain’s income to prevent that starvation” (Kymlicka 1990, 100). Kymlicka and most other

liberals argue that this is the problem that results for the libertarian society in scenario (ii).

Simply put, Nozick and other libertarians argue that individuals have absolute rights over goods they acquire through free exchanges, while Kymlicka and other liberals argue that the state has rights over at least part of such goods and therefore has the final say in how they are distributed.

Nozick gives another argument in support of libertarianism on pages 31-33 in *Anarchy, State and Utopia*. It is a Kantian autonomy argument and it proceeds like this²⁸. Every individual must be treated as an end and not merely as a means. No one may be used as a means for the “achieving of other ends without their consent” (Nozick 1974, 31). For example any taxation scheme that involves taking money from one person against his will and giving it to another in order to raise the latter’s income is a violation of the former’s Kantian rights. This is because the former is being used as a mere means (by the taking of money that he earned) for achieving ends (raising the latter’s income) without the possibility of his consent. Preventing such violations requires a strong theory of rights as these affirm our individual existences and the fact that we are not resources for others (Nozick 1974, 33). Such a theory prevents some individuals from being used by others as mere means to the latter’s ends. In his criticism of this argument, Kymlicka argues that theories of justice such as Rawls’ also take into account our individual existences. The difference is “we can say that for Rawls, one of the most important rights is a right to a certain share of society’s resources” and for Nozick “the most important rights are rights over oneself” (Kymlicka 1990, 105).

Kymlicka refers to this as the ‘self-ownership’ argument. Nozick believes that if one owns one’s self, then she owns her talents and she owns whatever she produces with those talents (assuming it is earned justly through free exchanges) and that Rawls’ difference principle violates this by demanding that part of that production be transferred

²⁸ He also uses it to criticize Rawls’ theory of justice. See Nozick 1974, 228-229.

to others²⁹. It institutes “(partial) ownership by others of people and their actions and labor” (Nozick 1974, 172). Kymlicka believes that Rawls’ theory does “respect individual’s claims over their own talents” (Kymlicka 1990, 105). He writes:

Liberals accept that I am the legitimate possessor of my talents, and that I am free to use them in accordance with my chosen projects. However, liberals say that because it is a matter of brute luck that people have the talents they do, their rights over their talents do not include the right to accrue unequal rewards from the exercise of those talents. . . People who are born naturally disadvantaged have a legitimate claim on those with advantages, and the naturally advantaged have a moral obligation to the disadvantaged. (Kymlicka 1990, 105-106)

The last statement in the above passage is very important and I’ll return to it in a moment. The point Kymlicka is trying to make often falls under the label of ‘fairness.’ Differences in income are unfair if they arise due to ‘morally irrelevant’ factors. Rawls is perhaps the most famous promulgator of that view and describes his theory as ‘justice as fairness’. He writes:

The public political culture may be of two minds at a very deep level. Indeed, this must be so with such an enduring controversy as that concerning the most appropriate understanding of liberty and equality. This suggests that if we are to succeed in finding a basis for public agreement, we must find a way of organizing familiar ideas and principles into a conception of political justice that expresses those ideas and principles in a somewhat different way than before. Justice as fairness tries to do this by using a *fundamental organizing idea* within which all ideas and principles can be systematically connected and related. This *fundamental*

²⁹ Recall that the difference principle states that economic and social inequalities are permissible only if they are to the greatest benefit to the least advantaged members of society. For example if the permitting of some to earn greater incomes than others increases the overall economic output (because the possibility of greater rewards than they would receive under a system of strictly equal distribution of wealth and income inspires them to work much harder) to the point that the least advantaged members of society are better off than they would be under a system of strictly equal distribution (because there is more to redistribute), then those economic inequalities are just because the least advantaged are better off than they would be under the system of equal distribution.

idea is that of a society as a fair system of social cooperation between free and equal persons viewed as fully cooperating members of society over a complete life.

(Rawls 1996, 9) [my emphasis]

And also:

I now turn to one of the principles that applies to individuals, the principle of fairness. I shall try to use this principle to account for all requirements that are obligations as distinct from natural duties. This principle holds that a person is required to do his part as defined by the rules of an institution when two conditions are met: first the institution is just (or *fair*), that is, it satisfies the two principles of justice; and second, one has voluntarily accepted the benefits of the arrangements or taken advantage of the opportunities it offers to further one's interests. The main idea is that when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restricts their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission. We are not to gain from the cooperative labors of others without doing our fair share. *The two principles of justice define what is a fair share* in the case of institutions belonging to the basic structure. So if these arrangements are just, each person receives a fair share when all (himself included) do their part.

(Rawls 1971, 111-112) [my emphasis]

For Rawls, the notion of justice is very closely linked to that of fairness. Kymlicka also places fairness as fundamental. In *Contemporary Political Theory* he writes:

But it is unfair for individuals to be disadvantaged or privileged by arbitrary and undeserved differences in their social circumstances. (Kymlicka 1990, pg. 56)

No one deserves to be born handicapped, or with an IQ of 140, any more than they deserve to be born into a certain class or sex or race. If it is unjust for people's fate to be influenced by the latter factors, then it is unclear why the same injustice is not

equally present when people's fate is determined by the former factors. The injustice in each case is the same . . . (Kymlicka 1990, 56)

In *Liberalism, Community and Culture*, while defending Rawls' theory against criticism from Michael Sandel (*Liberalism and the Limits of Justice*), he writes:

The reason Rawls denies that people are entitled to the fruits of the exercise of their natural talents is that no one deserves their place in the lottery of natural talents, no one deserves to have more natural talents than someone else. Differential natural talents, and corresponding differential earning power, are undeserved, and *undeserved inequalities should be compensated for*. [my emphasis] (Kymlicka 1989, pg. 71)

Let us recall Kymlicka's argument against Nozick's 'self-ownership' argument, in particular the last statement in the first quote: "People who are born naturally disadvantaged have a legitimate *claim* on those with advantages" (Kymlicka 1990, 106) [my emphasis]. The question here is what kind of claim? A claim to goods they may produce? Or a stronger claim, such as a claim on their labor? If the handicapped person's being on the verge of starvation gives her a claim on goods the advantaged have *chosen* to produce, why should she not have a claim on their *labor* so as to be sure they *do* produce? After all, her life is in danger and it is in danger due to no fault of her own.

Interestingly enough, the standard liberal response to that question is very similar to the libertarian's response to scenario (ii). It is good for A to choose to help B but it is wrong for the state to force him to help. That is a violation of one of our most fundamental rights – freedom of the person – and it is impermissible. On the other hand it is permissible to tax A in (ii) because that is not a violation of liberty. I will discuss these in turn, starting with the latter.

III.

In *Anarchy, State and Utopia* Nozick argues that “taxation of earnings from labor is on a par with forced labor” (169). However liberals argue that in the case of taxation, any given individual has not been *forced* to do anything. The labor is conditional in the sense that, *if* one chooses to pursue a life of material wealth, then one of the conditions he must meet is that of paying taxes. That condition exists in order to create and sustain a ‘just society’ – one in which a situation that consists of some living a life of extreme wealth while others starve cannot arise. If he is against such taxation he can simply choose some other conception of the good life, i.e. one that does not involve material wealth, and he will be free of that taxation. In that way he is still free – he can choose either life – there are simply conditions on one of the choices. In this section I intend to show that the issue is more complicated than that. I shall use an example to show that, while it might be true that liberalism may not *absolutely* force anyone to labor, it does require far more labor from some than others, even when both groups are *equally* capable of providing that labor.

My intention here is to show that the liberal’s scheme of taxation and redistribution of income presents him with yet another puzzle and violates his own code of ‘fairness’.³⁰ Nozick writes:

Some persons find this claim [that taxation of earnings from labor is on a par with forced labor] obviously true: taking the earnings of n hours of labor is like taking n hours from the person; it is like forcing the person to work for n hours for another’s purpose. Others find the claim absurd. But even these, *if* they object to forced labor, would oppose forcing unemployed hippies to work for the benefit of the needy. And they would also object to forcing each person to work five extra hours each week for the benefit of the needy. (Nozick 1974, 169)

Suppose Chamberlain desires a lifestyle that requires him to earn \$250,000 net annually and further suppose that the tax rate is fifty percent. We might further suppose that half

³⁰ Much of the following discussion is an expansion of Nozick’s argument. It also includes a deeper exploration of the implications that taxation might have for a liberal state. For Nozick’s argument see Nozick 1974, pp. 169-172.

the amount he pays in taxes goes to support government expenditures that benefit him in some way (e.g. police, roads, etc.) while the other half is purely for redistribution to others.³¹ In that case Chamberlain must labor three months out of the year in order to satisfy the redistributive requirements of the state. In other words Chamberlain must work three months out of the year for which he receives *no compensation*. And he must do so solely to earn his ‘right’ to pursue his conception of the good life. In order to illustrate this I shall introduce an example.

Let us compare two people. One has chosen a conception of the good life that involves material wealth. The other has chosen a conception of the good life that involves leisure. Let us further compare their situations in both the libertarian state and the liberal welfare state.³² We will denote person C as having chosen to pursue a life of material wealth and person D as having chosen to pursue a life of leisure. Both are physically and mentally capable of pursuing either life. Under both the libertarian and liberal state both must provide for their basic necessities (i.e. food, shelter, etc.). First we shall consider the status of their choices in the libertarian state.

Since both C and D must provide for their own necessities our discussion begins at the level above that – the free time each have beyond the time required to provide for their basic needs. Since C has chosen to pursue a life of material wealth, she must engage in productive labor for some of that time. If her conception of the good life requires her to earn \$250,000 annually, she must work the additional time required to earn the difference between \$250,000 and the amount she needs for basic necessities. Similarly, once D earns a sufficient amount to provide his basic necessities, he is free to spend his extra time at leisure activities. We see that, for both C and D, once they spend the necessary time to earn their basic necessities, they are both free to spend their time as they wish.

³¹ Here I need not claim that all taxation involves labor used to produce benefits for others. Instead, to isolate the fact that a liberal state requires some to labor for others, I focus on that percentage of taxes levied on Chamberlain that is used for redistributive purposes (as opposed to that used to pay for government services that might benefit him directly (e.g. maintenance of roads)).

³² Here I take the libertarian state to be the standard ‘night-watchman’ state. The state’s tasks are limited to enforcement of contracts, protecting its citizens against violence, theft and fraud, etc. Some may argue that this is still redistributive in a sense, i.e. it allows freeriders since some may receive protection even if they

In the liberal state the situation changes. Here C must engage in extra productive labor over and above the amount required in the libertarian state. This is because she must earn enough to pay the extra taxes incurred due to her being in a high taxation bracket. If taxes are such that she must actually earn \$350,000 annually in order to in order net \$250,000 after taxes, she must engage in enough productive labor to earn the additional \$100,000 even though she will not receive any of it. However, under most contemporary political theories, D's situation will not change in the liberal state. Since he earns only the amount he needs for basic necessities, he incurs no (or at the most a very small) tax bill and is still free to spend all of his extra time as he wishes. In other words C and D are not treated equally (or perhaps 'fairly') because one (C) is forced to labor for the state while the other (D) is not.

It seems to me that the issue of taxation does indeed present the liberal with another puzzle. If it is morally acceptable for the liberal to require labor for the state from one that chooses a life of wealth why is it not morally acceptable to require labor from one that chooses a life of leisure? Is that 'fair'? Why not require *everyone* who is able to labor for the state? This seems a much more equitable way for the liberal to treat both *all* those who can labor and those who cannot (e.g. the handicapped person). However, due to its simultaneous demands for liberty and equality, liberalism ends up working to the advantage of those who pursue a life of leisure, especially when they are compared to those who pursue a life of wealth. Those who pursue a life of leisure must contribute very little to the redistributive mechanism of the state while those who pursue a life of wealth must contribute a great deal.

This is a very serious problem. Rawls argues that the basic institutions in a liberal democracy must be neutral with respect to "comprehensive doctrines and their associated conceptions of the good" (Rawls 1996, 193). By 'comprehensive doctrines' he means

do not make any contribution to the state. For a discussion of this problem see Nozick 1974, chapters 4, 5, and 6.

one's moral, philosophical, and religious doctrines – in short how one pursues his life. He writes that such neutrality might mean:

That the state is not to do anything intended to favor or promote any particular comprehensive doctrine rather than another, or to give greater assistance to those that pursue it (Rawls 1996, 193).

But as our taxation example shows, the very combination of liberty and equality (or 'fairness') violates that neutrality. The liberal argues it necessary to tax C because of the need to aid someone who might be unable to care for herself due to 'morally irrelevant' factors. However, as our first puzzle illustrated, there may be cases in which that is not enough. It seems to me that in order for the liberal to treat both B equally in scenarios (ii) and (iv), and to treat C and D equally as far as their conceptions of the good life are concerned, it is going to be necessary to require those that choose a life of *leisure* to labor for the state as well. The problem with this is that many, including not just libertarians but (most) liberals as well, may not agree they are treated *justly*. I will discuss this problem in the next section.

IV.

The liberal argues that we cannot intervene in (iv) because it would violate the liberal ideal of liberty. It is wrong to force someone to labor against his or her will. Such an endeavor is tantamount to slavery and that violates our most cherished beliefs about freedom and liberty.³³

³³ The liberal might argue that there are already cases in which the citizens of a liberal state are forced to labor. For example there is jury duty and the military draft. All citizens that have the capacity to fulfill these duties must do so (at least in some liberal societies). I might offer three reasons why this is not equivalent to the situation I am presently discussing. The first is that these institutions serve every citizen and not just some particular group (e.g. the handicapped). In other words no one is forced to labor solely for *another's* benefit (For a much deeper discussion of this aspect, see C3, section IV). The second reason is that in most cases when one serves in such a capacity he is subject to financial (albeit in some cases a very small) compensation of some kind. For example the members of the armed forces are paid for their time (either directly or through some benefit such as college tuition). And finally the third and most important reason is that such duties are usually of short duration. The question of taxation is not something that is completed at some point. It is a requirement that must be met for as long as one seeks to maintain a certain level of income. It might last for one's entire career (and beyond). Similarly, if one who seeks a life of leisure is to be treated equally he too must labor for as long as he pursues his life of leisure. In other

It will help us to understand the liberal conception of liberty if we return to Rawls' theory of justice. Recall that his theory consists of two general principles of justice. The first principle concerns the basic liberties while the second concerns social and economic inequalities. The principles are labeled 'first' and 'second' because the basic liberties are more important in the sense that they must be satisfied first. Rawls writes that "this ordering means that a departure from the institutions of equal liberty required by the first principle cannot be justified by, or compensated for, by greater social and economic advantages." (Rawls 1971, 61) In other words we cannot for example, sacrifice freedom of speech because it might elevate the overall wealth of society or even because it might elevate the wealth of the very poorest in society (assuming they receive adequate care).

For example, one of his criticisms of utilitarianism is that "there is no reason in principle why the greater gains of some should not compensate for the lesser losses of others."

(Rawls 1971, 26) I agree with Rawls that this is wrong because it violates our individualism. Furthermore:

It has seemed to many philosophers, and it appears to be supported by the convictions of common sense, that we distinguish as a matter of principle between the claims of liberty and right on the one hand and the desirability of increasing aggregate social welfare on the other; and that we give a certain priority, if not *absolute weight*, to the former. Each member of society is thought to have inviolability founded on justice, or as some say, on natural right, which even the welfare of every one else cannot override. . . Therefore in a just society the basic liberties are taken for granted and the rights secured by justice are not subject to political bargaining or to the calculus of social interests. [my emphasis] (Rawls 1971, 27-28)

words the citizens of the liberal society, if they are all to be treated equally (or *fairly*), should labor for the state from the time they reach adulthood until they retire.

Therefore the possibility that some may starve while others are engaged in leisure activity does not outweigh the right to engage in leisure activity. That right is founded on the basic liberty of the integrity of the person – a person has the right to do with his or her mind and body as he or she sees fit. No government, even under the pretense of aiding others, may violate that right.

Rawls has in fact discussed a situation vaguely similar to scenario (iv) in response to criticism by R. A. Musgrave. In his paper “Maximin, Uncertainty, and the Leisure Trade-off”, Musgrave argued that Rawls’ theory was deficient in that it allowed the ‘most advantaged’ to sacrifice material wealth for leisure. When this sacrifice is made, the position of the ‘least advantaged’ is not improved as much as it could be because the ‘most advantaged’ do not produce as much wealth as they might under other circumstances, e.g. lower taxation. However, he did not extend his argument to the much more serious situation (scenario (iv)) I have described; his concern seems to lie more with maximization of welfare and the possibility that the ‘most advantaged’ might escape their duties to maximize the position of the ‘least advantaged’ by reducing the amount of productive labor in which they engage. His solution is to determine who belongs to the ‘most advantaged’ group by for example, some form of testing. Then perhaps some form of lump sum tax, proportional to one’s abilities, can be levied. As a result, even if some members of the ‘most advantaged’ group should choose to sacrifice material wealth for leisure, they must still help raise the position of the ‘least advantaged’ because they must pay their ‘ability tax.’ My main interest here is to note Rawls’ reply to that criticism. He writes that “everyone recognizes the enormous practical difficulties of such a scheme; ability may be impossible to measure, and individuals will have a strong motive to conceal their talents. I had mentioned that there is another difficulty. By that I meant, although I did not explain, *interference with the basic liberties* (as already mentioned).” (Rawls 1999, 252)[my emphasis] Hopefully, anyone concerned with liberty will agree with Rawls’ rejection of this frightening idea.

To summarize the argument for liberty, we must respect each individual’s freedom and inviolability and the best way to accomplish that objective is to organize the basic

principles of justice such that certain basic liberties cannot be violated. Forcing one person without his consent to do something for the benefit of another – whether directly or through a third party – violates those basic liberties. Therefore the liberal must not force anyone to labor for the state if he is to realize his requirement of inviolability. The problem with this argument is that the ideal of equality has been violated. The liberal treats neither A nor B equally in both scenario (ii) and (iv) as I have already shown in the previous section.

In this and the previous section we have looked at liberalism's argument for the morally relevant distinction between scenario (ii) and (iv) and shown it to be weaker than originally thought for two reasons. The first is that in spite of the liberal state's huge redistributive justice system, if that state respects the basic liberties, it is still (conceivably) possible for one to starve to death due to 'morally irrelevant' factors. The second is that the liberal's view violates his own ideal of equality in at least two ways: it treats neither A nor B equally in (ii) and (iv).

It seems to me that, of those two problems, the fact that liberalism does not treat all its citizens equally because it requires those who pursue a life of wealth to contribute a great deal to the state, while those who pursue a life of leisure are required to contribute very little, is by far the more serious. That is because, given human nature, the likelihood of a situation such as scenario (iv) seems quite low. In fact I introduced that scenario mainly as a thought experiment – a tool if you will – to tease out the difficulties that leisure presents for liberalism.

V.

Next, I want briefly to show that Rawls' theory, as it is generally stated, suffers from the difficulty of leisure I have been discussing, i.e. it works to the advantage of those who pursue a life of leisure. In the first chapter I briefly mentioned the type of government Rawls held would satisfy his principles of justice.³⁴ Of the four branches of government he described, two are pertinent here. The first is the 'transfer branch,' whose main

³⁴ See the end of section III.

responsibility is the ‘social minimum.’ A social minimum is necessary because the market does not take needs into account. However, justice requires an institution that does, so as to insure that there is adequate care for all. Rawls’ argument goes like this.³⁵ Suppose the market is the sole determinant of wages. Further suppose that a large number of people seek positions in a particular area, e.g. unskilled labor, while the demand for such positions is low. The law of supply and demand yields a low wage level. The level may be below that which is necessary to meet any given individual’s needs (i.e. adequate food, shelter, etc.). However, the market is not concerned with that. Wages are determined solely by the number of positions available and the number of individuals seeking to fill them. As a result, justice requires a way to insure that those who want to work (and those who are unable) have enough resources to meet their needs. This is the responsibility of the transfer branch.

It is the task of the distribution branch to secure funds for the transfer branch, and in fact, all revenues that are required by justice. This of course, is going to require taxation. Income is going to be taken from some members of society and used to pay for the services used by everyone or given directly to others. We need one more ingredient to show that Rawls’ theory works to the advantage of those who pursue a life of leisure, and that is the first principle and its priority over the second principle. Recall that the basic liberties take priority and included in these is freedom of the person. That freedom includes the freedom not to be forced to work against one’s will in the way for example, a slave is required. As a result, should one earn enough to take care of himself and choose to spend all the rest of his time at leisure, even if he has a great deal of leisure time, he cannot be forced by the government to work for the purpose of benefiting others. In other words, he cannot be forced to labor because the ‘calculus of social interests’ demands it. On the other hand, should one choose to pursue a life of wealth, he must pay taxes on that wealth to the government, which means he must work extra time for the government, as I discussed in section III.

³⁵ See Rawls 1971, pg. 276. For a wider discussion on the use of markets in economic systems, see 270-274 in the same book.

Conclusion

The objective of this chapter is not to refute liberalism. Instead my goal is to show some of the inherent problems in liberalism. These problems do not arise only in the practical applications of liberalism; rather they are present even at the ideal level. In particular I have tried to show that liberalism does not treat all its citizens equally. It works to the advantage of those who pursue a life of leisure. They are required to contribute very little to the redistributive program while those who pursue a life of wealth must contribute a great deal. I also argued that the liberal must either accept this or violate the basic liberties, and that most liberals simply accept it as a price that must be paid in order to respect the basic liberties. I also showed that John Rawls' theory of justice, at least as he generally states it, suffers from this problem.

In the next chapter, I turn to some criticisms specifically of Rawls' theory. One is the objection that his theory forces some to subsidize the choices of others. However a second criticism is directed against his later suggestion that an additional principle be added to his theory. This principle guarantees a 'social minimum' for all its citizens, and surprisingly, Rawls suggests it be placed lexically prior even to the principle that secures the basic liberties. In other words, there may indeed be situations (other than military invasions) in which the basic liberties can – and should – be suspended in order to realize other societal goals.

Chapter 3

Rawls, Choice and the Social Minimum

In this chapter I have two objectives. The first is to show that Rawls' theory forces some to subsidize the choices of others. In order to accomplish my objective, I first discuss one of the many counterexamples offered that aims to show this particular weakness in Rawls' theory. Then I discuss what I consider to be one of the best attempted solutions to that problem, one that Rawls has sketched, but Walter E. Schaller has developed more fully. Though Schaller adds little in substance to Rawls' ideas, he does show how Rawls'

theory might address particular objections that Rawls himself has not directly addressed in detail. I then argue that their solution does not totally solve the problem of subsidization of choices, and furthermore, that that problem may be unsolvable within Rawls' theory.

My second objective is to show that Rawls' theory, in its last suggested form, gives rise to the potential that our most important basic liberty – freedom of the person – may be violated in the name of justice. In fact Rawls' last version of his theory actually supports the possibility that the government may be obligated to force the 'most advantaged' to help the 'least advantaged.' Not only may the government be obligated to force them to help those who may starve to death, but it may be obligated to force them to go far beyond that. Such a violation is wrong not only because it is prone to abuse, but even in principle.

The chapter consists of five sections. In the first section I introduce one of the counterexamples that is supposed to show that the difference principle may force some to subsidize the choices of others, and I discuss Schaller's argument that Rawls' notion of 'expectations' and 'representative person' solve that problem. Section II consists of an argument that those notions do not solve the problems raised by such counterexamples. In sections III and IV, I discuss and reject the possibility of including leisure time in the index of primary goods covered by the difference principle. Finally in section V, I argue that Rawls' suggestion that a principle guaranteeing a social minimum be placed lexically prior to one guaranteeing the basic liberties, results in a theory that does not provide sufficient protection of the latter, and should be rejected.

I

The difficulty that leisure poses for Rawls' theory has been raised by many scholars and many counterexamples, in which Rawls' theory produces situations that are opposed to our moral intuitions, have been produced. This difficulty goes beyond the one I discussed in the previous chapter, in that it also may force those who pursue a life of wealth to raise the income of those who pursue a life of leisure, even if those pursuing

that life of leisure are doing so by *choice*. I will use several such counterexamples in this chapter, but I want to start with one raised by Will Kymlicka that involves a tennis player and a farmer (Kymlicka 1990, 73-76). Imagine two people of equal background and natural talent, and equal resources (e.g. land). One prefers to play tennis all day while the other wants to farm. The tennis player works only long enough to sustain himself (i.e. shelter, food, etc.) and his lifestyle (purchase and maintain tennis equipment). The farmer not only sustains herself, but also seeks to grow enough surplus vegetables to sell to others. If we allow the market to work freely, the farmer will soon acquire more wealth and income than the tennis player. Now recall the difference principle: inequalities in income and wealth are permissible only if they benefit those ‘least well off.’ Since wealth and income are a major ingredient in determining who is ‘least well off’ (Rawls 1971, 98, also refer back to my discussion in Chapter 1, section III.), and the tennis player has little income, he is now in the ‘least well off’ group – by choice. It appears that the only way we can satisfy the second principle here is to transfer some of the farmer’s income to that of the tennis player. Otherwise the tennis player would be better off if all wealth and income is divided equally. However this seems patently unjust. The tennis player *chose* to sacrifice wealth for leisure and it is morally wrong to force the farmer to transfer some of her wealth to the tennis player.

This does not seem right because the tennis player could have chosen to farm just as the farmer could have chosen to play tennis. Both made the choice they preferred from a range of options. The farmer sacrificed leisure for wealth while the tennis player sacrificed wealth for leisure. For justice to require the farmer to pay taxes in order to transfer wealth to the tennis player seems more a case of injustice than of justice. In this case the difference principle “does not promote equality, it undermines it.” (Kymlicka 1990, 74) The farmer “has to pay for the costs of her choice – i.e. she forgoes leisure in order to get more income. But the tennis player does not forgo income in order to get more leisure.” (Kymlicka 1990, 74) That is because he receives income from the government – income derived from her taxes. In such cases as this, the difference

principle seems incapable of responding to people's choices – something Rawls held to be very important.³⁶

The result is that individuals can place themselves in the 'least advantaged' group – and receive benefits targeted for that group – simply by their own choice.³⁷ However, the intention of the difference principle is to help those who are disadvantaged *due to no fault of their own* (e.g. they do not possess skills that are in demand by society).

Many, including Rawls, have attempted to solve this problem. In the course of those attempts, two objections have been raised and one further adjustment in the index of primary goods has been offered. The most common objection to a counterexample such as the farmer-tennis player is that it involves individual cases while the difference principle applies only to background institutions. A second objection is that the difference principle applies to reasonable expectations and not solely to one's present position. In "Rawls, the Difference Principle, and Inequality," Walter E. Schaller presents one of the most coherent attempts at a solution both to the general problem of choice and the more specific one concerned with leisure. Much of his solution is based on Rawls' own writings and so I believe Rawls would agree with it.³⁸ Here I want to explain that solution and then argue that he not only fails to give a satisfactory solution, but has in fact raised new problems.

Schaller's argument incorporates three main features in an attempt to deal with the counterexample. The first involves the notion of background institutions, the second, that of the 'representative person,' and the third, the idea to include leisure time in the index of primary goods. I will explain his argument as he applies it to another counterexample, one produced by Richard Arneson.

³⁶ See Kymlicka 1990, 75-76 for a discussion on Rawls and people's choices.

³⁷ I often will refer to this as the 'problem of choice' or simply 'choice.'

³⁸ Henceforth, since the article is by Schaller, I shall occasionally refer to the solution as Schaller's even though it is based largely on Rawls' views.

Arneson's counterexample consists of four people. However, since I need only consider part of his example here, I will describe only two of those people. Consider two graduates of elite law schools, Smith and Black. Black chooses a lucrative law career while "Smith opts for the life of a Bohemian artist." (Arneson 1990, 443) The argument here is that Smith has voluntarily placed himself in the 'least advantaged' group and hence in a position to receive the same benefits that say, an unskilled worker, or other person that is in that group by no choice, might receive. Of course, for an elite law-school graduate to place himself in a position to accrue benefits designed for the 'least advantaged' in society strikes us as patently unfair. However, goes the argument, that is precisely what Rawls' theory allows.

Before we look at Schaller's reply, let us review Rawls' own writings:

The difference principle . . . introduc[es] a simplification for the basis of interpersonal comparisons. These comparisons are made in terms of expectations of primary social goods. In fact, I define these expectations simply as the index of these goods which a representative individual can look forward to. (Rawls 1971, 92)

Next I want to quote one of Schaller's quotes of Rawls:

I assume that it is possible to assign an expectation of well-being to representative individuals holding these [social] positions. This expectation indicates their life prospects *as viewed from their social station* (my [Schaller's] emphasis).³⁹
(Schaller 1998, 371)

Based on such quotes as these Schaller argues that "the Difference Principle applies only to the lifetime *expectations* of the least advantaged *representative* persons." (Schaller 1998, 371) It does not apply to any particular person or particular time. Smith's lifetime prospects, "viewed from the perspective of his 'social station' – as a law school graduate – are far above the national median; they are not the prospects of the least advantaged." (Schaller 1998, 371) In other words, Smith's prospects are quite good compared to an unskilled worker with few natural abilities. There is no need to maximize his prospects for they are already high – a lawyer can *expect* to do well as far as the index of primary

³⁹ See Chapter 1, section III, pp. 15-16 for more on the 'representative individual' and 'expectations.'

goods is concerned. It is up to him to realize those expectations. Since his prospects are already far above the ‘least advantaged,’ “it does not follow that [his] lifetime expectations or income must be increased at all.” (Schaller 1998, 371) Consequently, the difference principle does not apply to the law school graduate.

One might alter the example to challenge the above argument. Suppose instead of attending law school, Smith decided to pursue the life of a bohemian artist earlier in his life and did not attend law school. Schaller has considered this and writes “even if he [Smith] had chosen not to attend law school, his lifetime expectations would presumably have been above average because of his intellectual abilities.” (Schaller 1998, 371) Here, his intellectual abilities would have prevented him from being in the category of ‘least advantaged’ because those abilities, should he choose to apply them, would allow him to do well as far as the primary goods are concerned.

At this point I want to pause and raise an objection to Schaller’s argument in the last example. To accomplish this I want to return to R. A. Musgrave’s objection to the difference principle. While Rawls includes income and wealth, and self-respect in the primary goods that make it possible for an individual to pursue a good life, Musgrave notes that a “person’s welfare depends on his consumption of both goods and leisure.” (Musgrave 1974, 629) He also believes that “the nature of things is such that redistribution can be expedited through the transfer of goods or income only.” (Musgrave 1974, 629) However, anyone subject to an income tax may, if he chooses, substitute leisure for income (and hence goods). If one believes the income tax too high, he may conclude his time is better spent at leisure than at work, and so reduce the amount of time he works, along with both his income and income tax bill. The problem that arises in the context of the difference principle is that it leads “to a redistributive system that, among individuals with equal earnings ability, favors those with a high preference for leisure. It is to the advantage of recluses, saints, and (nonconsulting) scholars who earn but little and hence will not have to contribute greatly to redistribution.” (Musgrave 1974, 632) The details of Musgrave’s proposal are beyond the scope of this project. I need only note the main point of his solution which is to apply a lump sum tax to each person based on

his or her earning *capacity*. That way, someone could not substitute leisure for income so easily because he would have to earn enough to pay his tax. The proceeds from such taxes would assist in the redistributive scheme.

Rawls rejected Musgrave's proposal. He "suspect[s] that the idea of a lump sum tax on abilities is subject to more than merely practical difficulties." (Rawls 1999, 253) He writes:

It seems doubtful, in fact, whether natural abilities even exist in a form that could be measured, even theoretically, for purposes of lump sum taxation. If an ability were, for example, a computer in the head with a measurable and fixed capacity, and with definite and unchanging social uses, this would not be so. But intelligence, for example, is hardly any one such fixed native ability. It must have indefinitely many dimensions that are shaped and nurtured by different social conditions; even as a potential, as opposed to a realized, capacity it is bound to vary significantly in little understood and complex ways. And among the elements affecting these capacities are the social attitudes and institutions directly concerned with their training and recognition. This *potential earning capacity* is not something independent from the social forms and the particular contingencies over the course of life, and the idea of a lump sum tax does not apply. All this is bad enough, but the situation is even worse if we ask at what time of life the tax is to be assessed. (Rawls 1999, 253) [my emphasis]

He finally concludes with the belief that "the lump sum tax version of maximin is theoretically inapplicable." (Rawls 1999, 253) Perhaps even more importantly, he also believes such a scheme will interfere with the basic liberties (Rawls 1999, 252).⁴⁰

My point here is to note that Rawls believes it is impossible to determine one's abilities (intelligence, skills, etc.) and earning capacity even at the theoretical level. If it is impossible to determine one's abilities and earning capacity, then it seems impossible to determine one's lifetime expectations in regard to the primary goods, for it is just that earning capacity that determines, for the most part, one's expectations.

⁴⁰ For more on Musgrave's proposal, see Chapter 2, section IV.

Let us return to our example with Black and Smith and suppose that Smith not only did not attend law school, but also did not apply himself in primary school either. In other words, there is no evidence that he has superior intellectual skills because he was always interested in other things (perhaps some hobby).⁴¹ We will also suppose that he was born into the ‘least advantaged’ group. This sets us up to look at another of Rawls’ attempts to define that group. Recall from Chapter 1 that Rawls’ latest attempt at determining the ‘least advantaged’ group is to define them as “those who have the lowest index of primary goods, when their prospects are viewed over a complete life.” (Rawls 1999, 364) They are “by definition those who are born into and remain in that group throughout their life.” (Rawls 1999, 364)

This simply results in the same problem as before. How do we determine that he is intellectually gifted? Should he be forced to take a test? Perhaps it could be determined by some medical procedure. Even if these were practical possibilities, I agree with Rawls that such procedures probably – I would go farther and say *do* – violate the basic liberties, e.g. freedom and integrity of the person. So not only is it both practically and theoretically impossible to determine Smith’s abilities, but it also violates the basic liberties. Hence, we cannot determine his expectations for primary goods and we cannot determine whether he is in the ‘least advantaged’ group because he does not have the skills, etc. necessary to raise himself above it, or because he has the skills and simply chooses not to use them.

II

However, Schaller believes that even if Rawls’ theory does permit some to place themselves in the ‘least advantaged’ group by choice, any objection based on this is directed against a feature of Rawls’ theory which is inconsequential. That is because Schaller argues that much of the objection against the possibility of one placing himself in the ‘least advantaged’ group by choice is based on the notion of desert, and that such

⁴¹ Another good example is someone who is born poor but has outstanding physical ability in the sense that he (or she) could be a professional athlete if he (or she) desired.

an objection does not apply to Rawls' theory because Rawls is a 'skeptic about desert.' He writes:

His [Rawls'] argument that no one deserves his or her natural endowment is purely negative: it is meant to rule out appeals to (moral) deservingness as justification of inequalities in the distribution of primary goods. (Schaller 1998, 373)

Schaller asks us to consider the possibility of raising the lifetime expectations of the 'least advantaged' representative person through a statutory minimum wage. He sees "no reason for supposing that only 'deserving' individuals should be covered by such legislation, that employees should (*ceteris paribus*) be able to pay people like Smith [who has the ability to obtain a higher paying job] wages lower than they pay more 'deserving' employees." (Schaller 1998, 373) Even though Smith, due to his ability to work at a much higher paying job is "not in danger of being exploited" in the way that someone who does not have that ability might be, "nevertheless, Smith may have good prudential reasons to choose such labor (low-wage jobs are often 'easy entrance, easy exit' jobs)." (Schaller 1998, 373)

Schaller's solution to the problem of a minimum wage is a system of 'employment subsidies' (See Schaller 1998, 377-378). Under this system, the wages are determined by the free market initially, and then the government subsidizes the employer, who in turn passes that subsidy on to the employee, depending on how far under the mandated minimum the wage happens to be.⁴² In order to 'reward work,' wages would continue to be subsidized beyond the minimum up to a certain point, using a sliding scale. For example, suppose it is deemed that seven dollars per hour (for a forty hour work week) is the minimum necessary to support a full-time, year-round worker. Further suppose the market wage of some job is four dollars per hour. In that case the worker of such a job would receive a three dollar per hour subsidy. For a job with a market rate of five dollars per hour, the subsidy would be \$2.29, at a market rate of six dollars per hour it would be \$1.65, and so on until the subsidies effectively ended at twelve dollars per hour. Since

⁴² Schaller attributes this particular scheme to Edmund Phelps. See Phelps' *Rewarding Work: How to Restore Participation and Self-Support to Free Enterprise*. Harvard University Press, Harvard. 1997

the wages continue to be subsidized beyond the minimum of seven dollars per hour, people are encouraged to seek higher paying jobs.

According to Schaller these subsidies have ‘several positive effects.’ They “would increase the income of low-skilled workers.” (Schaller 1998, 377) They would also “increase the number of jobs for low-skilled workers as well as the work force participation of low-skilled workers – the least advantaged – especially if the minimum wage were repealed (as Phelps favors).” (Schaller 1998, 378) It is not my objective to determine how successful such a program might be in raising the position of the ‘least advantaged.’ However it is my objective to show that this proposal has not solved the problem of choice. Consider the following situation:

Two people, Jack and Jill, have the same background and talents, etc. Jill decides to take a job with a market wage of fifteen dollars per hour. Jack who could do the same, decides instead to take a job with a market wage of four dollars per hour because it is an ‘easy entrance, easy exit’ job (let us suppose he enjoys experiencing new locations, and so prefers to move around a lot). Further suppose that the average minimum hourly wage deemed necessary to support someone is seven dollars per hour for a forty hour workweek. Jack decided to forfeit income for mobility while Jill decided to forfeit mobility for wealth.

Here Jack has ‘good prudential reasons’ for his choice of a low-wage job. However it does not follow that society ought to subsidize someone because he has ‘good prudential reasons’ to make a choice. In fact no one has argued that such reasons are not behind Smith’s choice nor the tennis player’s choice. That is not the point, nor must desert be the point. While it is true that Rawls is skeptical of desert, it is also true that ‘fairness’ is a central feature of his theory – in fact he refers to it as ‘justice as fairness.’⁴³ Suppose the above situation is one in which Jill is the representative person of the ‘most advantaged’ group while Jack is the representative person of the ‘least advantaged’ group. Is it really *fair* to take three dollars an hour from Jill in order to raise Jack’s pay to

⁴³ The first chapter in *A Theory of Justice* is entitled “Justice as Fairness.” See especially section 3, “The Main Idea of the Theory of Justice,” pp. 11-17.

the minimum level? Why should she have to subsidize his choice? Both had the same range of options and both made choices that reflected *their preferences*. Why should Jack be able to satisfy his preference for mobility while at the same time not forfeiting as much income as he might have, while she forfeits her preference for mobility while not gaining the increase in income that she desired? It is unfair to make Jill subsidize Jack. And if it is unfair, then the difficulties of such a case cannot simply be dismissed as an appeal to desert and so irrelevant Rawls' theory. Therefore, if Rawls seeks 'a system of fairness,' the unfairness that results from this case shows a flaw in Rawls' theory. It may be a flaw worth accepting, but a flaw nonetheless.

The problem here of course, is that of the basic liberties, and Schaller acknowledges it. He writes that if "high-skilled workers were not covered by minimum wage laws, then . . . it would be necessary to determine on a case-by-case basis who was high-skilled and who was not . . . and this would be *unduly intrusive*." (Schaller 1998, 373-374)[my emphasis] I agree with Schaller (and Rawls). We are right back to the problem of determining an individual's abilities and to accomplish that entails a violation of the basic liberties and is therefore unacceptable. If it is impossible to determine a given individual's expectations – both practically and because it interferes with the basic liberties – then it is not clear that such a notion is of much use in Rawls' theory.

Therefore, I do not believe that the notion of 'expectations of the least advantaged representative person' has solved the problem of someone being able to place (or keep) himself in the category of 'least advantaged' by choice. Without the ability to determine anyone's capacity for earnings, we are left with what someone can expect *if they choose a certain position*, not what they can *expect from their own abilities*. And that is just the point. If we pick the position of the unskilled worker as the 'least advantaged representative person,' then one can simply place oneself in that group by choice because there is no way to determine whether or not one has the capability for employment at a higher paying position. Even if we require that an individual be born into a poor family and remain poor, there is still the possibility that he or she has remained that way by

choice and received subsidies, etc., intended to assist those who are poor because they have no choice.⁴⁴

It is important to note here that while the use of individuals and particular cases is quite helpful in showing that Rawls' theory suffers from the problem of choice, such cases are not necessary, and so one cannot simply dismiss that problem as irrelevant to Rawls' theory because his theory only applies to background institutions. It is largely in virtue of the fact that Rawls defines the 'least advantaged' representative person in terms of a group (e.g. unskilled workers or those below a certain level of income and wealth), that the problem of choice arises. Once we grant the lexical priority of the basic liberties, and the maximization of a position in the particular group in question (e.g. via subsidization of wages of unskilled workers), the problem arises of *individuals* placing themselves in that group by choice and thereby receiving benefits (e.g. subsidized wages) intended to aid those confined to that position without a choice. It is the elimination – by the lexical priority of the basic liberties – of the possibility of deciding on a case-by-case basis whether or not one is a member of the 'least advantaged' group that allows an individual to place (or at the very least keep) himself in the 'least advantaged' group by choice. It seems impossible to eliminate this possibility within the confines of Rawls' theory.

III

However, there is yet another possible way one might solve the problem of leisure and it hearkens back to Musgrave's criticism. Rawls does not reject all of Musgrave's suggestions. He writes that "while the notion of leisure seems to me to call for clarification, there may be good reasons for including it among the primary goods." (Rawls 1999, 253) Rawls repeats that idea again later when he writes that "we can, if need be, expand the list [of primary goods] to include other goods, for example leisure time." (Rawls 1996, 181)

⁴⁴ There is also the possibility that the process of determining one's birthplace in society, i.e. whether or not one really was born into the 'least advantaged' group, may also violate the basic liberties.

Let us look at this possibility in the context of our farmer-tennis player example. If we set aside the problems of expectations and wage subsidies and isolate the situation in the context of the difference principle – all primary goods are to be divided equally unless they are to the benefit of the ‘least advantaged’ – this approach appears to solve the problem of the tennis player outright. That is because his life now is rich in primary goods because he has lots of leisure time. Hence, he no longer presents a problem for the difference principle. There is no need to transfer wealth to him from the farmer – his lack of wealth is simply a result of his choice to sacrifice wealth for leisure (as the farmer’s lack of leisure is due to her choice to sacrifice leisure for wealth). Both are in the ‘most advantaged’ group because each has a life rich in the primary goods – the farmer in wealth and income and the tennis player in leisure time. However, I intend to show that this solution leads to three other problems. One is that it raises anew questions concerning fairness. It illustrates in stark contrast how one subgroup in the ‘most advantaged’ must bear all or most of the burden of raising the position of the ‘least advantaged.’ The second is the question of whether or not leisure time is consistent with the purpose of the difference principle in the same way as the other primary goods that fall under it. The third is that the inclusion of leisure time in the index of primary goods that fall under the difference principle may simply move the question of choice one step back without really solving it. Let us start with the first problem.

First, we are looking to determine whether or not those who possess a large amount of leisure time are in the ‘most advantaged’ group, so we are considering placing leisure time in the list of primary goods that fall under the difference principle, not the first principle. Since the debate on the primary goods occurs in the original position, we will begin our discussion there. Recall that the parties first consider dividing all primary goods equally. This is simple enough with income and wealth. It seems possible within Rawls’ theory, at least in principle, to accomplish that without violating any of the basic liberties. On the other hand, leisure is much more difficult.

One might suppose that it is impossible to divide leisure time equally. However I intend to show that it might be possible in principle to do so with certain conditions and

assumptions. In order to show this I want to do several things. First I want to sharpen my definition of leisure time from the last chapter. In addition to leisure time being that time one does not spend at productive labor, I also want to exclude the time an average healthy person needs for rest, i.e. sleep or time other than sleep one needs for rejuvenation, and time for caring for oneself such as nourishment and personal hygiene, etc. For the sake of example, let us take ten hours to be the time one needs for rest and caring. That leaves fourteen hours per day to divide between work and leisure. Finally we will suppose that our society decides to divide leisure time and productive labor time equally – seven hours of work and seven hours of leisure.

The first thing that becomes apparent is that, in order to fix leisure time, we must also fix work time, at least to some extent. In other words, to insure that everyone has seven hours per day of leisure time, we must not only see that none have less than that, i.e. no one works more than seven hours per day, but we must also see that everyone works at least seven hours per day. In that way none have more leisure time than others. This becomes a problem for those that prefer more leisure than they are allotted, e.g. eight hours a day. They are going to be required to work more than they would otherwise, e.g. in some society that allows one as much leisure as she desires as long she supports herself. As a result we have already run into problems with some of the basic liberties. We have violated liberty of the person in the sense that one should not be forced to labor if she does not desire to. It seems that Rawls' starting point of equality as applied to leisure may be incompatible with the basic liberties. However, since strict equality is only a starting point, let us continue to the difference principle itself, setting aside problems associated with the starting point.

The difference principle says that all inequalities are to be set up to benefit the 'least advantaged' which are those who have the lowest amount of primary social goods. For example, one way to do this with wealth and income is to transfer some of the extra wealth generated due to the inequalities, to those who have the least amount of wealth. At first this might seem impractical for leisure, but as I shall show, there is a way in which we can – and do – increase the leisure time of the 'least advantaged.'

Consider the unskilled worker who has little wealth or leisure. We can transfer some of the wealthy person's wealth to the worker and raise his level of wealth. We could also 'transfer' some of the leisure time from a person who has a lot, to the worker by requiring the former to work extra time to earn extra money that then could be transferred to the worker. In that way the worker could reduce the amount of time he must work to earn the same amount of money. However, as I noted above and in the second chapter, this conflicts with the basic liberties, especially freedom of the person. Actually that problem can be solved rather easily. We simply require those who pursue wealth to pick up the tab for redistributing both wealth *and* leisure. We can simply transfer enough wealth from those who earn it to the 'least advantaged' in order to raise their income so that they need to work less time to earn an adequate living. If we add to this that such transfers of wealth may also be necessary to raise the self-respect of those 'least advantaged,' we have a clear picture of the redistributive scheme under Rawls' two principles of justice.⁴⁵ The 'least advantaged' do benefit from the inequalities in the primary goods, but there seems to be one group in particular that makes it possible – the 'most advantaged' who use their skills, etc. to pursue a life of wealth. If one is a member of the 'most advantaged' group by way of leisure time, he has little or no responsibility for paying for the benefits that are received by the 'least advantaged.' Here we see in detail how Rawls' theory works to the advantage – in a big way – of those who pursue a life of leisure. They share little or none of the burden to raise the index of primary goods for the 'least advantaged,' while those who pursue a life of wealth must bear all or most of that burden.

Many have criticized the difference principle because it gives the 'least advantaged' a veto over the inequalities in wealth and income that the 'most advantaged' are allowed to accumulate due to their superior skills, etc. However, with the inclusion of leisure time in the index of primary goods, we now seem to have at least two subsets within the 'most advantaged.' There is the one that consists of those with lots of wealth and another that consists of those with lots of leisure (the various combinations add more subsets). Now

⁴⁵ See Chapter 1, section II, pg. 8, including footnote 8 for a brief discussion of the goods that fall under the difference principle.

the burden of paying for the benefits that go to the ‘least advantaged’ falls on the former but not the latter. Under these circumstances, it seems that those who pursue a life of wealth have an even greater cause for complaint. As Rawls himself writes:

Social cooperation is always for mutual benefit and this implies that it involves two elements: the first is a shared notion of *fair* terms of cooperation, which each participant may reasonably be expected to accept, provided that everyone else likewise accepts them. Fair terms of cooperation articulate an idea of reciprocity and mutuality: all who cooperate must benefit, or *share in common burdens*, in some appropriate fashion judged by a suitable benchmark of comparison. This element in social cooperation I call ‘the reasonable.’ (Rawls 1996, 300) [my emphasis]

Those who pursue a life of wealth not only may question the fairness of their position, but also whether they can be ‘reasonably expected to accept it,’ and whether everyone is ‘sharing in the common burdens.’ Both those in the original position and those in contemporary liberal societies whose job is to find a ‘reflective equilibrium,’ may question why one particular group within the ‘most advantaged’ must bear most or all the burden of raising the position of the ‘least advantaged’ while another bears little or none.⁴⁶

IV

Now let us discuss the second problem. The inclusion of leisure time in the index of primary goods that falls under the difference principle raises a question: if inequalities are to be for the benefit of the ‘least advantaged,’ how does the tennis player’s greater amount of leisure time benefit the ‘least advantaged?’ It is the function of the difference principle to use inequalities in the primary goods to raise the index of those goods for the ‘least advantaged.’ It is not at all clear that allowing some to have more leisure time than others benefits the ‘least advantaged’ in any way, especially when compared to those who have more wealth. Allowing some to accumulate more wealth than others can raise the position of the ‘least advantaged’ in at least two ways: some of their wealth can be

⁴⁶ See Chapter 2, section II for more on ‘fairness.’

transferred to the ‘least advantaged’ or the incentive of extra wealth can drive them to invent and/or lower the price of labor-saving devices.⁴⁷ I simply cannot see how allowing the tennis player to have more leisure time than someone in the ‘least advantaged’ group is going to help the latter. This seems to be the biggest problem with including leisure time in the list of primary goods. I simply cannot see how it raises the position of the ‘least advantaged’ in regards to wealth, income, self-respect, or leisure time. In fact it appears that it may hurt those in the ‘least advantaged’ group because those in the ‘most advantaged’ group due to leisure time are contributing very little to maximizing the position of the former, while it is possible they have the ability to contribute much. This might especially seem to be the case with self-respect. It is hard to believe that the self-respect of someone who is poor because they have no choice, is not harmed by the fact that someone who could be doing more to raise his position, has chosen to play tennis instead.

One might argue that it helps the ‘least advantaged’ in the sense that they too are not forced to labor for the state. However, leisure time falls under the domain of freedom of the person and that is guaranteed by the first principle, not the second principle. In other words, the fact that one lives in a more just society due to the fact that no one is forced (in an absolute way) to labor for the state, is already guaranteed by the first principle. Freedom of the person guarantees an individual as much leisure time as he can afford because to do otherwise violates freedom of the person (and possibly other basic liberties, e.g. freedom of occupation). Therefore it does not seem that including leisure time in the index of primary goods that fall under the second principle is going to accomplish anything that is not accomplished already by the first principle.

Finally I want to discuss the third problem: the possibility that the inclusion of leisure time in the primary goods simply moves the problem of choice one step back. Consider the following situation:

Two people are poor and spend a lot of time watching television. One possesses many skills that society demands and could earn a great deal of income. Instead of

⁴⁷ And safety devices, etc.

doing so, he has chosen to pursue a life of leisure. The second person is mentally handicapped and has the ability to earn but a small amount of income because he is unable to work very much. However, since a great deal of leisure time is now a sufficient condition for inclusion in the ‘most advantaged’ group, both are considered to be members of that group.

Certainly our intuitions tell us that a mentally handicapped person is not one of the ‘most advantaged’ members of society. In fact we seem to have the bizarre situation of someone being in the ‘most advantaged’ group and being unable to get out of it. We need a way to determine who has a lot of leisure time by choice and who has a lot but has no choice in the matter. However this is simply the problem of choice applied to leisure time instead of wealth.

If I am right, and allowing inequalities in leisure time does not benefit the ‘least advantaged’ and it cannot be divided equally, (and the determination of who is at leisure by choice and who is not raises the possibility of violating the basic liberties), then the inclusion of leisure time in the primary goods that are regulated by the difference principle is incompatible with the rest of Rawls’ theory. Leisure time is already completely covered by the lexically prior first principle, and so the second principle can neither add nor subtract anything from that. Therefore such an approach will not solve our counterexample.⁴⁸ And even if it could, it still would not solve the difficulty of someone being born into the ‘least advantaged group’ and remaining there by choice, nor would it solve the problem of someone choosing a job with subsidized wages in order to satisfy some preference when he has the capability to work at a job that does not have subsidized wages.

It seems to me that Schaller has not so much *solved* the problem that choice presents for the difference principle as he has shown it most likely to be intractable. If one accepts the difference principle, then it seems as if it is always going to be possible for some to place themselves (or at the very least, keep themselves) in the ‘least advantaged’ group

⁴⁸ However this does not necessarily rule out including a certain amount of leisure time in a ‘social minimum.’ I have simply argued that including leisure time in the set of primary goods that is subject to the difference principle does not solve the problem of choice.

by choice. Near the end of his article Schaller writes that “it is unlikely that any redistributive policy will benefit only the least advantaged.” (Schaller 1998, 380) That may be true but the problem of choice seems much more serious than that. Rawls’ main objective as far as the primary social goods are concerned is to maximize the position of the ‘least advantaged.’ For his theory also to be arranged such that people may become members of that group by choice – and so have much of the rest of society playing by rules set up to maximize their position – is much more serious than a situation in which a few stray benefits reach someone other than the ‘least advantaged.’⁴⁹

To a certain extent this is another manifestation of the tension, within liberalism, between freedom and equality. Recall that Rawls wants to eliminate the ‘morally irrelevant’ factors from the question of distributive justice. In this way each individual is treated equally as a human being – a moral agent. That an individual is for example, born with a lower level of intelligence or a lack of skills in demand by society, should have no bearing on whether or not he has adequate food, shelter, etc., nor is it a valid moral reason to relegate some to a much smaller index of primary goods compared to others. Hence the difference principle, and as we will see shortly, a social minimum, are needed to assist those who are members of the ‘least advantaged’ group due to no fault of their own. On the other hand, belonging to the ‘most advantaged’ group is a sufficient condition for one not suffering from a lack of primary goods or skills, etc., due to no fault of his own. In his case it means that he has a choice in the matter – freedom if you will – and can decide to stay in the ‘most advantaged’ group or not (as far as primary goods are concerned). However those who have *chosen* to pursue wealth and income should have the freedom to spend it as they see fit – minus the amount that must be relinquished in order to raise the position of the ‘least advantaged.’ To force them to relinquish an additional amount of their income for the purpose of raising the position of someone who has the capability of raising his position himself is a violation of the freedom of the former due to the fact that he no longer has the freedom to spend his money (less the

⁴⁹ Incidentally, it seems as if the problem of choice is not solely due to the difference principle. It appears that a society that has a guaranteed social minimum might suffer from that problem as well. A society that has a subsidized minimum wage without the difference principle would also suffer from it as the case of Jack and Jill illustrated. In all of the cases I assume that the societies in question respect the basic liberties.

amount needed to help those who are ‘least advantaged’ *due to no fault of their own*) as he wishes. It simply is not the fairness that Rawls desires. However, given his objectives and constraints, it may be the best that one can hope for.

In the preceding sections, I have tried to show that Schaller has not solved the problem that choice presents for Rawls’ theory. I have also argued that, if one’s goals are to respect the basic liberties and to help those who are members of the ‘least advantaged’ group due to no fault of their own, the problem of choice is most likely unsolvable. However, I have not argued that one should therefore abandon Rawls’ theory on the basis of this problem. Some may accept this problem as a price that must be paid in order to accomplish those goals. It is not my objective to determine whether or not that price is acceptable. Instead, I want to move on to the final suggested form of Rawls’ theory of justice, and argue that it suffers from a much more serious difficulty, one serious enough to warrant the rejection of that form of his theory.

V

In this section I want to show that, even if we accept the problem of choice, Rawls’ theory may still possess the potential to allow for a serious threat to the basic liberties. Recall that one part of the proposed solution to the problem of leisure concerns the notion of the ‘representative man’ and the fact that the difference principle only applies to the background institutions of society. While this might be of assistance in solving the counterexamples we have discussed, there is the problem of individuals whom for whatever reason, are not among the ‘least advantaged’ in terms of lifetime expectations, and yet need help but do not receive any from the difference principle. Schaller writes “that the Difference Principle applies only to representative persons is one reason why it needs to be supplemented by a guaranteed ‘social minimum’ which addresses the basic needs of individuals.” (Schaller 1998, 371-372) He continues:

The social minimum is a necessary component of Rawls’ theory of justice. Even if the lifetime expectations of the least advantaged representative person are as high as possible (as required by the Difference Principle), in the absence of a social minimum the actual (annual, monthly) incomes of some individuals fall below the

poverty line (because of illness, unemployment, disability, loss of spousal earnings, etc.), even if their lifetime expectations are above-average. To focus exclusively upon lifetime expectations risks disregarding how poorly individuals may fare during some segment of their life. The role of the social minimum, therefore, is to ensure that no one's basic needs cannot be satisfied. (Schaller 1998, 376)

The first statement in the above passage is certainly true. When distinguishing between those areas of distributive justice that must be narrowly specified in the constitution, and those that need not, Rawls writes that both the basic liberties and the social minimum belong to the former:

But while some principle of opportunity is surely . . . [a constitutional] essential, for example, a principle requiring at least freedom of movement and free choice of occupation, fair equality of opportunity (as I have specified it) goes beyond that and is not such an essential. Similarly, though a social minimum providing for the basic needs of all citizens is also an essential, what I have called the “difference principle” is more demanding and is not. (Rawls 1996, 228-229)

Here we see that not only is the social minimum a requirement, but it is a ‘constitutional essential’ along with the basic liberties. However Rawls suggests that the social minimum may be more important than even the basic liberties:

In particular, the first principle covering the equal basic rights and liberties may easily be preceded by a lexically prior principle requiring that citizens' basic needs be met, at least insofar as their being met is necessary for citizens to understand and to be able fruitfully to exercise those rights and liberties. Certainly any such principle must be assumed in applying the first principle. (Rawls 1996, 7)

There are two important things here. The first is that not only does Rawls agree that a social minimum is necessary, but surprisingly he believes it may ‘easily’ be placed lexically prior to the first principle. The second is that he is not only concerned with food, shelter, etc., but also with “needs” that are “necessary for citizens to understand and

to be able fruitfully to exercise those [i.e. the basic] rights and liberties.”⁵⁰ This implies at the very least that some level of education for everyone also would be prior to the first principle under such a scheme. This list also leads me to believe that Rawls is not merely concerned with a pre-democratic society, by which I mean a non-democratic one that seeks to install a democracy, but also a democratic society in which a significant number of people fall below the social minimum. Recall that Rawls views the lexical priority of the first principle over the second as a ‘special case.’ In more general terms the “denial of equal liberty can be defended only if it is necessary to raise the level of civilization so that in due course these freedoms [i.e. the basic liberties] can be enjoyed.”⁵¹ (Rawls 1971, 152) For example, given a pre-democratic society in which the basic liberties are not guaranteed for everyone, and significant numbers of people live under conditions of extreme poverty, should a popular government rise to power, it is not necessary for it to immediately guarantee all the basic liberties. Its first job may be a redistribution of wealth in order to raise the living conditions of all its people to a decent level. Such an extreme redistribution may be incompatible with at least some of the basic liberties, but once that redistribution has been completed, then the basic liberties take precedence.⁵² However I believe that Rawls may have committed himself to a situation in which this principle (i.e. the one ensuring a social minimum) is not merely restricted to scenarios such as the one above.

That is because of the requirement that citizens be able to understand and exercise their basic rights and liberties. This requirement seems especially to apply to a society in which these rights are already guaranteed, but only ‘formally.’ Recall from the first chapter that Rawls rejects a theory that only guarantees the basic liberties formally.⁵³ Recall also that part of his later expansion of his discussion of the basic liberties was a response to criticism that his theory provides only a formal guarantee of the basic

⁵⁰ Schaller briefly mentions this as well. He writes that “regarding Rawls’ qualification (“at least insofar as . . .”), it is worth noting that individuals in families with incomes less than \$15,000 per year are about three-fifths as likely to vote as people with incomes over \$75,000 (Sidney Verba, Kay Lehman Schlozman, and Harry Brady, “The Big Tilt: Participatory Inequality in America,” *The American Prospect*, No. 32, May-June 1997, p. 76.” (Schaller 1990, footnote 30, 387-388)

⁵¹ For more on this see Chapter 1, footnote 14

⁵² This, I believe, is what Rawls means by the last statement in that last quote, i.e. “Certainly any such principle must be assumed in applying the first principle.”

liberties, not a fair one.⁵⁴ In the context of our discussion, we might look at the right to run for political office. That is a right that is formally guaranteed for all citizens (within certain constraints such as age, etc.). However, some argue that the mere formal guarantee does not really provide for an equal access for everyone to run for office because of the expense involved in such an endeavor. Instead, only the wealthy or those who cater to the wealthy can afford it. In order to guarantee the right of everyone to seek political office, the government must also guarantee the means, i.e. the money, required to run for office (subject to certain constraints such as polling a certain percentage of the vote).⁵⁵ In light of this it seems that not only is an education going to be an essential part of the social minimum, but that the education must be something beyond merely learning to read and write, for a political candidate, at least for some offices, needs quite a bit more than that. One might argue that the same goes for being able to make an informed vote. I will return to the requirement that citizens possess the capability to make an informed vote later.

The implications of such a position are profound. Rawls seems to be saying that, once a social minimum is set, some or all members of society may have some or all of their basic liberties suspended if the social minimum has not been universally realized.⁵⁶ I shall argue that such a position is wrong both in principle and because it is too risky from a practical standpoint. It is too risky from a practical standpoint because of the great potential for abuse and it is wrong in principle because it implies that in certain

⁵³ See Chapter 1, section IV, pp. 26-27.

⁵⁴ See Daniels 1975, for an argument that Rawls' theory provides only a formal guarantee of the basic liberties. For Rawls' later discussion of fair opportunity in the context of the basic liberties, see Rawls 1996, 324-331.

⁵⁵ My point here is that the state must be much more active in the election process if it is to guarantee fair as opposed to formal equality of the right to seek political office. One might argue that that objective may be achieved with much less outlay of money by e.g., guaranteeing all candidates equal and free airtime on publicly owned television stations. However that may still fail to accomplish fair equality of opportunity because those who have the money may purchase time on privately owned television stations that reach a much larger audience. In order to ensure that candidates who cannot afford that get equal exposure, it may be necessary for the state to restrict the freedom of speech of the wealthier candidates, or require all television stations to provide equal and free airtime for all candidates.

⁵⁶ Whether or not he has committed himself (or would) to such a position is unclear. What is clear is that he suggested that it may 'easily' be the case. He also argues that the social minimum is a 'constitutional essential' along with the basic liberties. He does not say what the relative positions of two might be within the constitution. Since he is not clear on this point, the succeeding argument can be taken to be directed

circumstances it would be morally permissible for a third party to *force* one to labor in order to help another. In the context of our discussion in chapter 2, such a view holds it to be morally obligatory for the state to force A to help B in scenario (iv).⁵⁷

First, the difficulties of putting such an arrangement in practice are rather obvious. Not only is there the question of where the level is to be set and how that level itself is decided, but there is also the question of when the liberties are to be suspended in order to realize it. For example, during a severe economic downturn during which government revenues cannot support the social minimum, how long should the government wait before suspending the basic liberties in order to realize the social minimum, e.g. requiring some to perform services for those below the minimum.⁵⁸ The most serious difficulty seems to me to be the possibility that, simply by a vote, a majority of the citizenry may force a minority to labor for the state simply to raise the index of primary goods for some target group, perhaps even themselves. This seems to present the greatest potential for abuse.

From a practical standpoint my question is this: do we really want a mechanism in place that allows some to set a social minimum (one that perhaps is higher than their current position), and then vote to force others to realize that minimum if it is not realized otherwise? One might think that such a move is permissible but only during an emergency. The problem with that view is twofold. First, what constitutes an emergency? Second, once a government uses such a mechanism, it is often difficult to relinquish it afterwards. As an example, consider the federal income tax in the United States. Prior to World War I such a tax had always been ruled unconstitutional. However, the ‘emergency’ of WWI provided an opportunity to implement it ‘temporarily.’ The rest, as they say, is history.

against Rawls’ theory if it is committed to a social minimum that always takes top priority, and against his suggestion that such situation is permissible, if in fact his theory is not committed to that position.

⁵⁷ See Chapter 2, section I.

⁵⁸ Note that I am not referring to a requirement that those who *receive* direct transfer payments or services must perform some service in return for those payments. Quite the contrary. I am referring to those who

In addition to the potential dangers of implementing a theory of justice in which the guarantee of a social minimum is placed lexically prior to the guarantee of the basic liberties, there is also the question of principle. Even if the potential for abuse of such a mechanism were low, it does not follow that it is morally permissible. We must consider the implications of such a view. As an illuminating way to discuss those implications, consider socialism for a moment. Most socialists believe that natural resources and the 'means of production' belong to everyone and no specific group has a right to control them in a manner that is not under control of the democratic process. The question that now needs to be asked is: are a person's body and mind to be treated in the same way? Does the government 'own' those as well? Does it ultimately own the people in the way that socialists argue that it owns natural resources, etc? This seems to me to lead to the very heart of the matter, and it is a question of principle – it is wrong in principle to give the government that kind of 'ownership' (i.e. of individual persons). However, before discussing that matter, I want to respond to a possible objection.

One might argue that democracies have already faced similar circumstances and in fact did suspend some of the basic liberties and force some citizens to work. The situation is one of war that includes conscription. Not only are some forced to work but they are even forced to risk their lives. While it is true that there are many instances of conscription in democracies both historically and currently, it does not follow that such a thing is just or morally right. When it comes to the right of an entity to force – under the threat of punishment – an individual to risk his life to support a cause, whether that cause is for his own good or the good of others, one must be very careful. I have my suspicions concerning the moral permissibility of such a right. However, let us suppose for a moment that the military draft is just in certain cases, for example when a democratic country is threatened with invasion by an authoritarian regime. I think most will agree that, if there is any case where conscription is just, that is such a case. We can assume that anyone, including those who may be living a life of leisure, may be forced to labor, possibly under the most appalling of conditions. The question is this: if it is morally

do not require and do not receive any direct payments or services from the government and yet are required to perform some services for the government.

permissible to force some to labor under the threat of death, why is it not permissible to force some to labor under better conditions to help those in need of aid?

There are two main points to make here. The first one strengthens my previous point about the possibility of abusing the right to force people to labor. It seems that the American military involvement in Vietnam is a good example of the potential for abuse of a right as powerful as the one to force people to labor for the state. At the very least it is a good example of the social divisiveness such a right may cause.

The second point involves perhaps subtle but important distinctions between a military draft such as the one above and a social minimum like Rawls'. For one thing, when an invasion is imminent (or under way), the entire nation is under threat. The basic liberties of everyone are under threat and everyone is expected to do his or her part. When one is forced to go to war under such circumstances, that individual supports goals that will benefit him as much as anyone else. When the benefits are spread more equally, and one who is being forced to labor is going to receive as many benefits (give or take) as he is going to create, perhaps the forced labor is permissible. However our case involving Rawls' social minimum is different in an important way. In this case, individuals may be forced to make sacrifices for which they may receive little or no direct benefits. Instead, the benefits are largely directed toward those below the social minimum. The problem here, I believe, is a question of Kantian autonomy. It seems to me that forcing some to labor – possibly against their will – in order to benefit others, is an example of using individuals as a mere means to an end. They are being used to realize the end of raising those below the social minimum to a position above it, in much the same way that an ox is used as a beast of burden. Being treated in this way does not respect the fact that we are individual rational beings that have the capacity to choose our own ends and pursue our own goals.⁵⁹ Rather, we are ordered by our 'owner' – the state – to perform labor for the benefit of it. If we refuse, we may be punished. It is analogous to a case in which an ox's owner may order it to carry goods for him. If the ox refuses, he too may be

⁵⁹ See also my discussion of Nozick's use of Kantian autonomy as an argument against taxation in Chapter 2, section II.

punished. The fact that the owner provides the ox with food and shelter does not negate the fact that the ox has no choice in what he may do. Nor does the fact that on some days he is allowed to do as he pleases (within a confined area). Ultimately, when his owner orders him to perform a task for his benefit, the ox has no choice in the matter. He is a mere means to an end.

Recall that Rawls' social minimum is not merely adequate food, shelter, etc. necessary to survive. On the contrary, it involves 'needs' that are 'necessary for citizens to understand and to be able fruitfully to exercise' the basic liberties, including the right to make an informed vote or run for office. In order to make this clearer, and to explore some of the implications of Rawls' position, let us consider the public education system. We currently live in a very technologically sophisticated society. Making an informed vote may involve considering and understanding the consequences of human cloning, nuclear power, the world wide web, and space exploration, to mention a few. It seems obvious that many people currently are not capable of making an informed vote on these matters. How might this objective be met? If we suppose that incentives such as higher pay for teachers do not attract more people to the profession, a theory of justice that places the guarantee of a social minimum lexically prior to that of the basic liberties gives the government the right to suspend the basic liberties in order to do so. For example the government might force some to teach, either by bringing those already capable out of retirement, or forcing some to train as teachers (as one might be forced to train as a fighter pilot in wartime). Another possibility might be to send those already trained to teach in areas other than primary education, to teach in that area instead. For example, someone trained to teach at a community college or a university, could be, with a minimum of additional training, sent to teach at a high school in an inner city. However, those might be considered extreme cases. Let us suppose that the economy is healthy and that people are willing to accept the incentives if they are great enough. Further let us suppose that all that is necessary to meet our objective is to require people that may work overtime but have previously chosen not to (perhaps because they preferred to pursue leisure activities instead), to work five hours a week of overtime. The taxes generated by this additional income will be sufficient to pay for the necessary incentives. Here, those

forced to work the extra time even receive some direct benefits, e.g. perhaps the tax rate is such that they receive half the income from their extra work.

I do not believe that such a case is permissible. For one thing, we are not talking about someone starving to death because they have no food. Instead, we are talking about forcing some to work to raise the education level of others. However, I do not believe forced labor is permissible even in a case in which some may be on the verge of starvation.⁶⁰ It is not the severity of the situation that determines the permissibility of forced labor for the benefit of others. This leads us back to the point I made about Kantian autonomy. The central point is whether or not an individual has control over his own body and mind and is to be treated as a rational being who can choose his own ends. The decision as to whether or not to work overtime should be based on the circumstances involving the individual making that decision. It should not be made by a third party who bases their decision on the requirements of others.

In the previous chapter I argued that liberalism suffers from the problem that it requires some to labor a great deal for the state (i.e. those who pursue a life of wealth) while it requires others to labor very little or none (i.e. those who pursue a life of leisure).⁶¹ I also discussed the liberal response that no one is actually *forced* to labor for the state. They still have a *choice* – if they do not want to labor for the state, they can choose a life that does not involve the pursuit of wealth (and hence high taxation).⁶² However, under Rawls' theory, they may no longer have that choice. They may indeed be forced to labor – for the benefit of others – regardless of their choice, and that is simply wrong. It is wrong even in our last example where the individuals forced to labor still receive some compensation. Compensation is not the point. We do not oppose forced labor merely when it involves little or no compensation. We oppose it in all cases in which an individual is forced to labor in order to produce benefits for others because it fails to treat that individual as a rational being with the capability of choosing his own ends.

⁶⁰ I want to stress here, as I did in Chapter 2 when I presented my puzzle, that I am not arguing that an individual does not have a *moral* obligation to help someone in such a case. I am merely arguing that no third party has the right to *force* an individual to help in such a case.

⁶¹ See Chapter 2, especially section III, and also IV.

Once again we arrive at the heart of the matter: where do the rights to one's person – to his mind and body – ultimately reside? Do they reside in the individual with the function of the government being to guarantee that right, or do they ultimately reside in the government (or 'community') with its function being to dispense and withdraw them at will?

As is evident from my discussion in chapter 2, I believe that the rights to one's person ultimately reside in him. Even if we need communities to realize our potential, the communities are composed of individuals, each with their own mind and body. I think Warren S. Quinn made the point very well:

A person is constituted by his body and mind. They are parts or aspects of him. For that very reason, it is fitting that he have primary say over what may be done to them – not because such an arrangement best promotes overall human welfare, but because any arrangement that denied him that say would be a grave indignity. In giving him that authority, morality recognizes his existence as an individual with ends of his own – an independent *being*. Since that is what he is, he deserves this recognition. . . The moral sense in which your mind or body is yours seems to be the same as that in which your life is yours.⁶³ (Quinn 1989, 156-157)

The rights to an individual's body and mind, i.e. the right to decide what he is to do with his body and his mind, ultimately belong to that person. No government has the right to take it away from him without *his consent* merely in order to use him to produce benefits for others, and when a government does, it has performed not a just act but an unjust one. It has treated the individual as its property when that individual belongs to no one but himself and only he has the right to decide if he should belong to another in that way. I

⁶² See Chapter 2, section III.

⁶³ Here Quinn is arguing for the priority of negative rights over positive rights as an objection to utilitarianism.

therefore conclude that a theory of justice that has a social minimum lexically prior to the basic liberties is unjust.⁶⁴

Conclusion

In this chapter I have argued that Schaller's (and Rawls') solution to the problem of leisure in relation to Rawls' theory of justice is not satisfactory. While the notions of the 'representative person' and 'lifetime expectations' appear to solve the problem, we can still imagine another counterexample. Furthermore, the addition of leisure time to the index of primary goods solves one problem but raises others, including questions of fairness. Those who belong to the 'most advantaged' group because of wealth and income must bear all or most of the cost of benefits paid to the 'least advantaged' while those who are 'most advantaged' due to leisure time bear little or none. Finally, when we include the social minimum in the theory in a position lexically prior to the first principle, we raise the specter of the government forcing some to labor to improve the position of others. I have argued that such a situation is a gross violation of an individual's rights and as such is unjust and morally wrong.

Conclusion

On these pages I have argued a number of things. I have argued that liberalism is faced with inherent problems, even at the ideal level, and that it appears unlikely these problems can be solved. In particular I have discussed liberalism's inability to treat everyone equally as far as laboring for the state is concerned, while at the same time respecting everyone's basic liberties. In the end it seems to me the liberal must accept this shortcoming. Those who pursue a life of leisure hold a special place in a liberal society that respects everyone's basic liberties and that reflects a situation in which the basic liberties are held to be the most important rights a society of individuals can possess.

⁶⁴ This is not to say that implementing a social minimum must always interfere with the basic liberties. I have argued that Rawls' suggestion of placing the social minimum lexically prior to the principle concerning the basic liberties results in an unjust theory because of that violation. For example, one could

I have also argued that John Rawls' theory of justice, in addition to suffering from the problem I just mentioned, also suffers from the difficulty of some being forced to subsidize the choices of others. In that respect I have tried to show two things. First, what I consider the best attempt to solve that problem has been less than satisfactory. In spite of that attempt, it is still possible for some to place themselves (or remain) in the 'least advantaged' group by choice and receive benefits intended to assist those who are in that group because they have no choice. In other words it is still possible for some to receive benefits that were not intended for them. Furthermore, though I did not argue this point, it is my suspicion that the difference principle is not solely responsible for this problem. It appears that the problem of choice will present difficulties for any theory that respects the basic liberties and also contains a guaranteed minimum wage and (or) a social minimum.

Second, I have tried to show that Rawls' suggestion that we include a social minimum in a principle that is lexically prior even to the first principle, which guarantees the basic liberties, is untenable because it does not provide a sufficient guarantee of the basic liberties. I argued that such a theory of justice not only presents risks in practice, but is also unjust and immoral in principle and therefore should be rejected.

Finally, I want to use Kymlicka's criticism of libertarianism to discuss another aspect of justice. Kymlicka slyly invokes the familiar 'starvation' argument against libertarianism while only mentioning 'moral obligations' when referring to liberalism. We all (hopefully) want to think that the advantaged are morally obligated to the disadvantaged in some ways. However *justice* is more than obligations one individual owes to another. Justice here entails the state and its monopoly on force. Justice says not only that person A is morally obligated to person B in cases such as scenario (ii) but that if A does not fulfill that obligation, the state is obligated to *force* him to fulfill that obligation. If he still refuses, the state may punish him. It seems to me we must not lose sight of this

place the social minimum in second place (between the first principle and the difference principle) and perhaps avoid that problem.

aspect when discussing distributive justice. When we discuss justice merely in terms of moral obligations, as Kymlicka does when criticizing libertarianism, it can seem much milder than when we remind ourselves that the state may punish those who do not fulfill such obligations. Such a reminder can serve as a warning that preserving the basic liberties is not to be taken lightly.

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