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The Difference Principle, Rising Inequality, and Supply-side Economics: How Rawls Got Hijacked by the Right

Mark R Reiff*

Résumé
Selon Rawls, le principe de différence est un principe de justice à la fois libéral et égalitaire. On veut dire par là que Rawls entend donner une justification morale à une distribution modérée des revenus par les individus plus fortunés en faveur des individus les plus désavantagés. Cependant, depuis la parution de Une Théorie de la Justice, les inégalités économiques ont augmenté de manière dramatique, atteignant des niveaux jamais vus depuis la Grande Dépression — niveaux que Rawls aurait certainement trouvés pervers. Pour beaucoup cette augmentation est due à l’émersion de l’économie de l’offre et à la baisse spectaculaire des taux d’imposition sur les firmes et sur les revenus des plus aisés. A mes yeux, pourtant, le principe de différence, ou en tout cas la culture qu’il reflète, est en partie responsable de cet état de choses. Mon but, dans cet article, est de mettre en lumière le lien entre le principe de différence, l’économie de l’offre et l’augmentation des inégalités.

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d’expliquer en quoi le principe de différence est erroné, et d’établir ce que les libéraux fidèles aux idées égalitaires qui sous-tendent ce principe sont en mesure d’accomplir.


Abstract

Rawls intended the difference principle to be a liberal egalitarian principle of justice. By that I mean he intended it to provide a moral justification for a moderate amount of redistribution of income from the most advantaged members of society to the least. But since the difference principle was introduced, economic inequality has increased dramatically, reaching levels now not seen since just before the Great Depression, levels that Rawls surely would have thought perverse. Many blame this increase on the rise of supply-side economics and the dramatic cuts in marginal tax rates enacted by the supply-siders for corporations and those already at the top of the income distribution. But I contend that the difference principle, or at least the ethos that the difference principle embodies and represents, is also partially to blame. Accordingly, the purpose of this paper is to explain how the difference principle, the ideas and arguments of the supply-siders, and this dramatic rise in inequality are connected, to identify where the difference principle went wrong, and to discuss what those who remain committed to the liberal egalitarian ideals that the difference principle was thought to represent might do about it.

Keywords: Indeterminacy, Prioritarianism, Redistribution of Income, Trickle-Down Economics, Uncertainty

JEL classification: D31, D63

THE DIFFERENCE PRINCIPLE AND ECONOMIC INEQUALITY

Let us go back, for a moment, to the America of 1970. For some time now, the country has been wracked by social unrest. The Anti-war movement is in full swing, and more and more Americans are becoming disillusioned with the prospects for success in Vietnam. A nascent environmental movement is beginning to have some real purchase on public policy, and people are beginning to take the idea that government has a role to play in the protection of the environment seriously. The civil rights movement has already achieved some major successes, and while there is still a great deal of work to
be done, the separation of American society along racial lines no longer seems acceptable to a majority of Americans. And most importantly, at least for our purposes, more and more Americans are beginning to find it unacceptable that so many of their fellow citizens live in poverty within the most productive economy the world has ever known. The Great Society programs have been introduced, and while they have not yet achieved their aims, a great many people hope and expect that they will ultimately do so. A large segment of the American electorate and perhaps even a majority now seem prepared to support an increased degree of redistribution of income from the more advantaged to the poor, and an opportunity to make some real headway toward reducing economic inequality in America seems to be waiting just around the corner. The only element still missing is an intellectual justification for our growing intuition that an increased degree of income redistribution and the enactment of associated programs designed to prevent severe economic inequalities from continuing is indeed a moral imperative, an intellectual justification that (unlike, for example, Marx’s arguments) does not amount to an attack on our economic and political system but rather one that is consistent with maintaining America’s identity as a liberal capitalist society. Into this breach steps John Rawls.

Rawls’s now famous theory of distributive justice, which he called justice as fairness, was first published in 1958\(^1\), but was not fully developed and defended until the publication of *A Theory of Justice* in 1971\(^2\), a book now justly regarded even by its critics as one of the most important works of political philosophy of all time. In it, Rawls set forth a powerful and elegant liberal egalitarian conception of justice. Its two principles (or more precisely three, since the second principle has two parts) provides as follows: (1) each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and (2) social and economic inequalities are justified only if (a) they are attached to offices and positions open to all under conditions of fair equality of opportunity, and (b) they are to

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the greatest benefit of the least advantaged, meaning that some lesser degree of inequality would make the least advantaged even worse off. Rawls gave the first principle lexical priority over the second, meaning that basic liberties could not be sacrificed for greater equality of opportunity or greater social and economic equality, and he gave the first part of the second principle lexical priority over the second part, the part he called the difference principle, meaning that equality of opportunity could not be sacrificed for greater social and economic equality either.\(^3\)

Even though the difference principle was lexically inferior to both of Rawls’s other principles of justice, it was the difference principle that attracted the most immediate and vociferous criticism. Those on the right saw it as justifying an undue amount of government interference with the pattern of distribution resulting from free market forces, while those on the left saw it as allowing too much inequality, and argued for a much stricter principle that would severely limit and perhaps even prohibit economic inequality except in the most extreme circumstances. But this, it seemed, was the source of the difference principle’s strength – its imposition of some restrictions on economic inequality distinguished it from the principles advocated by those on the free market right, and its recognition that some level of economic inequality was morally justified because this would improve the life chances of the least advantaged distinguished it from the more radical principles of redistribution advocated by those on the strict egalitarian left. In contrast to these more extreme views, the difference principle seemed to represent a moderate approach. It therefore seemed to offer real hope that we could make some progress toward reducing

\(^3\) Note that the version of the two principles set forth in the text incorporates revisions made by Rawls in his later work and therefore differs somewhat from the version he originally set forth in *A Theory of Justice*. Compare Rawls (2001, p. 42) with Rawls (1971, p. 302). While Rawls considered the revisions made to the first principle important, it is only the second principle that is of interest to us here, and Rawls considered the revisions made to that principle merely stylistic. See Rawls (2001, p. 43). In any event, I have used the revised versions of each principle because they represent the best expression of what Rawls originally had in mind.
economic inequality in America without tearing American society apart. But a funny thing happened to economic inequality in America after the difference principle was introduced. While prior to 1970, economic inequality had been relatively stable for about 30 years, since 1970, and especially since the early 1980s, economic inequality began steadily and dramatically increasing, reaching levels now not seen since the 1930s. Indeed, the share of total income enjoyed by those in the top 10% of the income distribution increased from about 32% in 1970 to 43% in 2002, and to 50% in 2007, a share they have not enjoyed since 1928, just before the Great Depression. And even within this group, economic inequality was increasing. The gains of the top 10% were mostly the gains of the top 1%, and most of their gains, in turn, were gains of the top 0.1%, and so on up to the top 0.01%, a group consisting of only 14,588 taxpayers. If we then compare the members of this elite group with those who lie elsewhere on the income distribution, the results are staggering. For every additional dollar earned by the bottom 90% from 1950 to 1970, those in the top 0.01% earned “only” an additional $162. For every additional dollar earned by the bottom 90% from 1990 to 2002, in contrast, those in the top 0.01% earned an additional $18,000. In 1970, the top 0.01% of all taxpayers had 0.7% of total income. But by 1998, the top 0.01% had 3% of total income, a gain of 428%. And by 2007, the share enjoyed by the top 1% was 46.8%.

4. I recognize that in light of its willingness to accept some degree of inequality, there is some controversy over whether the difference principle should be characterized as egalitarian or utilitarian at all. Some critics prefer to describe the Rawlsian view as prioritarian. See, e.g., Parfit (1995). For purposes of this paper, however, I shall ignore this controversy and treat the difference principle as an expression of liberal egalitarianism, although not necessarily the only one, for like other forms of liberal egalitarianism, it treats inequality as a subject of moral concern but would regulate inequality rather than prohibit it.

6. See Piketty and Saez (2006a, p. 147); and Saez (2007).
7. For a discussion of the relative gains of the top 1%, see Congressional Budget Office (2011). For a discussion of the relative gains of groups within the top 1%, see Piketty and Saez (2006a), the Saez (2007) update, Mishel and Bivens (2011), and Dickinson (2011).
9. Ibid.
10. See Krugman (2002); Piketty and Saez (2003).
top 0.01% – those with incomes over $11.5 million a year – had increased to over 6% of total income, a gain of 857% from 1970. In 1970, the top 0.01% was earning “only” 50 times more than the average worker; but by 2002, the top 0.01% was earning 300 times more than the average worker, a level of inequality not seen since 1915. At the same time, the poverty rate in the United States hit 13.2%, the highest it had been in twelve years, and median family income fell, wiping out even the minimal gains that median family income had enjoyed over the previous three years. And then things got even worse – by 2010, the number of people living in poverty in the United States hit 46.2 million, the highest level in the 52 years the Census Bureau has been tracking such numbers. Those living in “near” poverty, with incomes just 50% above the poverty line, accounted for another 51 million, which means that by 2010, 100 million Americans – that is, one in three – were either living in poverty or in the fretful zone just above it. If the term ‘middle class’ was ever really accurate, it is now clearly a misnomer – the middle class is nowhere near the middle. And while the economic collapse of 2008 hurt everyone, those at the top have been quickest

13. See Piketty and Saez (2006a, p. 148). A similar rise in economic inequality has also been happening in the UK, where the top 0.1% in the UK consistently take home a larger percentage of national income than any other advanced country except the US. See High Pay Commission Final Report (2011, p. 74). See also Freedland (2005, p. 27); Atkinson (2007a); National Equality Panel (2010, esp. at p. 30); Jones, Annam, and Shah (2008, at p. 24).
15. See Tavernise (2011). An even more recent Census Bureau report using an alternative and supposedly more accurate methodology puts the number at 49.1 million. See Census Bureau (2011, p. 5). And even this number woefully undercounts those who are living in poverty. First, because it still arguably underestimates the amount of money required to live a minimally decent life (it effectively defines poverty as subsistence plus a little bit, in other words, as only slightly more than one would have to receive under current law if one were a domestic pet), and second, because it expressly includes as income direct government assistance received, such as food stamps, housing assistance, home energy assistance, and the like. In other words, there are 49.1 million people currently living in poverty in the United States despite receiving government assistance. Surely the more relevant number for purposes of determining income inequality is the number of people who would be living in poverty without government assistance.
The Difference Principle

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20. See Joshi (2011). See also Bivens (2011) (the compensation received by CEOs was 35 times greater than that received by the average worker in 1978, but is now 243 times greater, up from 185 times greater just a few years ago at the height of the Great Recession).
22. Note that I have not described the increases in economic inequality that have taken place since 1980 by reference to changes in the Gini coefficient, one of the other standard methods that economists use to measure changes in inequality. There are two reasons for this. First, the Gini coefficient is expressed as a number between 0 (representing complete equality) and 1, and so is not as transparent and readily understandable an indicator as the actual income and wealth figures used in the text. Second, the Gini coefficient is sensitive to a variety of factors, and therefore merely noting that there has been a change in the relevant Gini coefficient does not offer any insight into why that change has taken place. If we were to look at changes in the Gini coefficient over the relevant period, however, or at any other accepted measure of inequality for that matter, they would all reveal similar increases in inequality. See Atkinson (2007b, pp. 19-20). See also Page and Jacobs (2009, p. 7) (Gini coefficient now at its highest level in 60 years). For further discussion of the Gini coefficient and various other methods for measuring inequality, see Cowell (2011).
how this indeterminacy might be corrected, testing each possibility to see if it would produce results that accord with the liberal egalitarian intuitions that brought the difference principle to life and, at least among some people, keep it alive today. In light of the issues brought forth by this discussion, I will then describe the concerns that any acceptable amendment to the principle would have to address, and argue that there is in fact no such amendment that will do the job that needs doing. Finally, I will argue that the difference principle should be abandoned as a principle of liberal egalitarian justice, for despite its liberal egalitarian aspirations, it is impossible to ensure that these aspirations will be fulfilled. If we are to explain why greater redistribution of wealth and income is indeed a moral imperative, we must put some other principle into its place.

THE DIFFERENCE PRINCIPLE AND SUPPLY-SIDE ECONOMICS

During much of the period that this dramatic rise in economic inequality occurred, the economic policies that were in place were those of "supply-side economics", a revivalist version of the classical economic theory that dominated Republican administrations from the late 1800s through the beginning of the Great Depression. The central thesis of the supply-siders, according to George Gilder, one of the most important and influential proponents of the supply-side revival that began with the election of Ronald Reagan in 1980, is that "to help the poor and the middle classes, one must cut the taxes on the rich". Indeed, if we really want to help the poor, Gilder argued, we must abandon the idea of progressive taxation altogether, for despite what many so-called liberals seem to believe, "regressive taxes [actually] help the poor! Cuts in middle-class rates will merely make the system more progressive and reduce still further the productivity of the rich." 24.


The reasoning behind this is as follows: by reducing marginal tax rates – that is, the tax burden on the rich and on corporations and on investment income, the government incentivizes those with control of the means of production to produce more. This will increase the supply of goods in the economy, and this, in turn, will stimulate economic activity to such an extent that the some of the additional income and wealth this will generate for the richest Americans will “trickle down” to the middle class and eventually to the poor. Despite these cuts in taxes, no correlative spending cuts will be required because the additional investment that these tax cuts encourage will actually produce more jobs and a larger tax base, leading to an increase in overall government revenue, not deficits. And we need not fear inflation because as long as the tax cuts are targeted at those who have control of the supply of goods – once again, rich individuals and corporations, we will be directly stimulating supply and not demand and therefore there is no reason for inflation to result. We also need not fear recession and the build-up of inventories of unsold goods, for “supply creates its own demand”, which means that demand will inevitably albeit indirectly quickly follow on from increased supply. In other words, like a magical elixir, tax cuts for the rich are a one-size-fits-all cure for whatever is ailing the economy. Reducing taxes on the rich will not only benefit the poor, it will benefit the poor more than any other policy that could be implemented in its place. At least this is what the proponents of supply-side economics vigorously contend.

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25. For an example of this argument, see Laffer (1984, at p. 137).
27. This is known as Say’s Law, after Jean Baptiste Say, the nineteenth-century French classical economist who first put this argument forward. “Say’s Law declared that goods are ultimately paid for with other goods. Thus, it is aggregate supply that determines national income. Consumption (demand) therefore is an effect, not a cause, of production. If the creation of goods and services (supply) were encouraged, consumption (demand) would follow automatically” Bartlett and Roth (1984, p. 1).
Setting aside for the moment the question of whether the supply-siders are right about this – and this is very controversial – as a result of their policies, marginal tax rates are now almost as low as they were during the last Gilded Age, the last time economic inequality was at similar levels, and the correlation between the rise in inequality since 1980 and the cuts in marginal tax rates enacted by the Reagan and George W. Bush Administrations is rather striking. While some supply-siders deny that cuts in marginal tax rates and other tax breaks for the rich have actually caused this rise in inequality, the evidence in support of such a causal relationship is very strong. Indeed, some supporters of the supply-side policies of the most recent Bush administration not only admit that there is a causal relationship, they argue that increasing inequality is not merely the price one has to pay to secure economic growth – an unintended but unavoidable side-effect – it is in fact the means by which greater economic growth is achieved. In any case, while the poor may have benefited a little from the supply-side approach (and even this is controversial), the rich, and especially the super-rich – the top one-hundredth of one percent of the most well-off Americans – have been the greatest beneficiaries of the economic policies of the supply-siders. A billionaire who is among the top 400 richest Americans now pays less than 17% of his total income in taxes, while a bus driver earning $26,000 a year pays five percentage points more.

Unfortunately, it is not at all clear under the difference principle that there is anything wrong with this. While most Rawlsian liberal
egalitarians reject supply-side economics, there is a problem that the Rawlsians seem determined to ignore – the difference principle seems to directly endorse both the supply-siders’ objectives and their way of thinking. As Gilder and many others supply-siders claim, supply-side economics does not aim to encourage economic growth for the sake of growth alone, but rather to improve the position of the poor. Even Arthur Laffer, the creator of the now famous “Laffer curve”, which captured the imagination of Ronald Reagan and led Reagan to make supply-side economics the guiding principle of the conservative wing of the Republican Party and later his administration, claims that

My dream has always been to make the poor richer, not to make the rich poorer. And, in fact, it is an added bonus if the rich get richer while the poor get richer, as well. My favorite quote on this subject is from President John F. Kennedy who said: “No American is ever made better off by pulling a fellow American down, and every American is made better off whenever any one of us is made better off. A rising tide raises all boats” 34.

And while the method the supply-siders recommend – giving tax breaks to the rich to help the poor – strikes many liberal egalitarians as highly counter-intuitive, if this would improve the life chances of the poor more than the available alternatives, then implementation of such a policy would not only be permitted by the difference principle, it would be required by it.

The question then is whether the supply-side approach has indeed benefited the least advantaged as the supply-siders contend. Most liberal egalitarians scoff at the mere suggestion of such a benefit, whether they are Rawlsians or not, but the evidence for this is not as clear as these liberal egalitarians would like to believe. The position of the least advantaged has improved slightly during the relevant period, and it is not clear that they would have fared better under some other policy, although it is clear that the rich would not

34. Laffer (2007). Unfortunately, it appears that President Kennedy never actually said the first sentence that Laffer attributes to him, although he did say the second on numerous occasions, for example in his Remarks in Heber Springs, Arkansas at the Dedication of Greers Ferry Dam (October 3, 1963). The “rising tide” metaphor was also used repeatedly by candidate Ronald Reagan to justify his own support for supply-side economics. See Lazere (2009).
have fared as well. Accordingly, it is at least possible that the least advantaged would have been worse off under any other economic program. And even if the position of the least advantaged has not improved, who is to say that those in this segment of the income distribution would have fared better under some other economic policy? Indeed, it seems perfectly plausible that given their empirical assumptions, the supply-siders are doing exactly what the difference principle recommends, and this is indeed what many of the most prominent supply-siders actually claim.

David Schaefer, for example, a prominent supply-sider and otherwise ferocious critic of everything Rawlsian notes that “without empirical investigation of the sort that Rawls never undertakes, it cannot be known which scheme [direct redistribution through greater taxation of the rich or the supply-side trickle-down approach] will most benefit the least advantaged.” Even more forcefully, Nathan Glazer, a leading neoconservative intellectual and co-editor with Irving Kristol of the magazine *The Public Interest*, one of the leading forums for the promotion of supply-side economics and other neoconservative ideas, argues that “the benefits to investment, productivity, and economic growth [of cutting taxes as the supply-siders recommend] would indeed be ‘to everyone’s advantage’”, and therefore not only consistent with but also required by the difference principle. A similar argument was made by Robert Bartley, who as director of *The Wall Street Journal* editorial pages during the 1980s was one of the most vociferous and effective advocates of the supply-side agenda and expressly claimed that the supply-side approach was “justified even by the Rawls

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35. For example, the poorest 12.5% of Americans, those who earned less than $10,000 a year, saved an average of $335 between 2004 and 2010 a result of the George W. Bush administration’s supply-side tax cuts, while the richest 0.1%, those who earned more than $7.7 million a year, saved $2,326,607, and the next richest 0.9%, those who earned more that $1 million a year, saved $858,405. See Marsh (2010). When these tax cuts were extended into 2011, in turn, the poorest Americans received an after-tax increase in income of 0.1%, while the richest 0.1% received an increase of 6.9%, that is, 69 times greater than the poor enjoyed.

36. For an argument that despite this increase in inequality the poor are clearly better off, see Laffer et al. (2008, pp. 7-8 and Table 1-2).


criteria”\textsuperscript{39}. In other words, notwithstanding how uncomfortable this makes many Rawlsians feel, the policies that the supply-siders and their followers so relentlessly pursued once they came to power are, in a large part and in an important way, not only consistent with but required by the difference principle, at least in the view of some of the supply-side’s most influential advocates\textsuperscript{40}. What this means is that while those in the academy on the moderate left have spent the last 30 plus years celebrating the difference principle and tweaking its requirements, those in power on the right have been using the difference principle (or more precisely, the justification for inequality it promotes – the idea that economic inequalities are justified if they make the least advantaged better off) to provide moral cover for one of the largest increases in economic inequality in the history of the United States. What those who support the difference principle have seemingly failed to notice is that by focusing our attention on the effect that inequality has on the least advantaged rather than on the degree of inequality obtaining in society, the difference principle suggests that the debate between those who support giving tax breaks to the rich and those who oppose them is merely about means, not ends\textsuperscript{41}. This, in turn, robs the argument against such tax breaks of much of its moral force. Rather than providing the intellectual justification for more redistribution of income, the difference principle, or at least the ethos it represents, has actually been used to justify less. The difference principle, in effect, has been hijacked by the right.

Of course, I am not claiming that Rawls’s introduction of the difference principle and the moral cover it has provided for the policies of the supply-siders is the sole or even the predominate cause of what has happened to economic inequality in America – this is certainly not the case. While many advocates of supply-side economics are true believers, at least some are simply using a professed belief in supply-side economics as a cover for what are in

\textsuperscript{39} Bartley (1992, p. xi and 277). Bartley’s influence should not be underestimated. As the Nobel prize-winning economist and New York Times columnist Paul Krugman says, the ultimate adoption of the supply-sides approach by the conservative wing of Republican party is “due in large part to one man: Robert Bartley” Krugman (1994, p. 83).

\textsuperscript{40} For a similar view, see DeMartino (2000, pp. 109-110).

\textsuperscript{41} A similar point is made in Rorty (1997, at p. 18).
fact other ideological or personal objectives. For example, rather than help the poor, many professed supply-siders really just want to “starve the beast” and thereby make it easier to eliminate government programs they detest by depriving the government of the resources necessary to pay for them. Or, even more selfishly, no doubt some professed supply-siders simply want to improve their own position through improving the position of the rich. In any event, it is unlikely that the supply-side approach could have become the economic policy of the United States without the support of these more insincere supply-siders as well as true believers. But it is nevertheless undeniable that the impact of the difference principle in the real world has not been what Rawls hoped and perhaps even expected. The ethos it promotes has in fact made society more susceptible to the arguments made by those advocating tax cuts for the rich. Rather than help move us toward a more egalitarian society, it has helped, in some way and to a significant extent, move us in the opposite direction.

WHERE THE DIFFERENCE PRINCIPLE WENT WRONG

Despite the apparent similarities between the ethos that the difference principle represents and the central tenet of supply-side economics, there has been surprisingly little academic discussion of how the two principles might be distinguished. Most Rawlsians simply ignore the apparent similarities – indeed, it is extremely rare for a Rawlsian to even mention the supply-side view in the course of a discussion of the difference principle. Those few who do

42. See Dickinson (2011); Frank (2010); Krugman (2010a and b); Bartlett (2007).

43. See Rampell (2011) (discussing the various motives behind the supply-siders’ tax cut fervor). One reason for Congress’s increased sensitivity to the concerns of the rich, of course, is that the number of millionaires in Congress has increased dramatically. Indeed, many members of Congress have enjoined unprecedented gains in income during their terms, even while their constituents were suffering. See Lichtblau (2011).

44. For example, in the whole of The Cambridge Companion to Rawls, the apparent similarity between the difference principle and the trickle-down principle of supply-side economics is only mentioned once, and even then, only a single sentence is devoted to discussing this. See Daniels (2003, at p. 251). There is no mention of this issue at all in Kukathas and Pettit (1990), or in Daniels (1989), both of which are leading studies of Rawls’s theory.
mostly just deny that the two principles are in any way related without providing any explanation of how the principles might differ and why the former does not support implementation of the latter, or simply suggest that while the trickle-down theory requires that the least advantaged be made merely “somewhat better off”, the difference principle requires that the least advantaged be made “as well off as possible”, a distinction whose significance, it seems fair to say, is rather overstated. Indeed, even those who rely on this way of distinguishing the two principles concede that it holds only in an ideal setting – in a non-ideal setting, such as the one in which we actually find ourselves, they admit that “Rawls is willing to say that an improvement is not unjust as long as it moves the worse-off groups closer – even if not maximally closer – to be as well off as possible.” In other words, even if their characterization of the trickle-down approach is correct (and many supply-siders would deny this – that is, they would deny that the trickle-down approach will not make the least advantaged as well off as possible), these Rawlsians concede that as a practical matter the objectives of the difference principle and those of supply-side economics are effectively identical. The number of theorists who attempt to show how the difference principle and supply-side economics might operate differently under non-ideal conditions is actually very small.

The Effect of the Basic Liberties and Fair Equality of Opportunity Principles

Before I explain why these very few attempts to distinguish the difference principle and supply-side economics are unconvincing, however, let me address one argument that many Rawlsians raise in an attempt to head off my claims at the proverbial pass. This is the view that there is no need to distinguish the difference principle and supply-side economics because the supply-side approach is eliminated by the lexically prior principles of equal basic liberties and fair equality of opportunity. Under the principle of equal basic liberties, for example, everyone must have equal access to the political

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45. The quotations are from Daniels (2008, pp. 54, 93), but other Rawlsians make similar claims. See, e.g., Freeman (2007, pp. 191, 222-223); Gutmann (1980, pp. 131-132).
46. See Daniels (2008, p. 93 n. 13).
process. If inequalities are severe, this is likely to be corrupting, or will at least give the better off much more influence in the political process than the principle of equal basic liberties allows, so the kind of extreme economic inequality that we are experiencing today as a result of following supply-side policies would simply be ruled out in advance. And if we give the principle of fair equality of opportunity sufficiently broad scope, as Brian Barry for one argues that we should, it would also prevent almost all social and economic inequalities from arising, even if some degree of inequality does manage to survive the principle of equal basic liberties. In either case, by the time we reach the filter that the difference principle provides for sorting acceptable economic policies from those that are unacceptable, the supply-side agenda is simply something that would not even be open to consideration.

Support for this position can be found in a variety of places in Rawls’s writings, but perhaps the most explicit expression of it is in an unpublished memo Rawls wrote to himself in response to G. A. Cohen’s 1991 Tanner Lectures on “Incentives, Inequality and Community”. In this lecture, Cohen noted (as I have now) that the ethos of the difference principle – the idea that inequalities are just if some lesser inequality would make the least advantaged worse off – was “one of the most politically effective justifications of the unequalizing [tax] policy of Thatcher conservatism”, which among other things reduced the marginal tax rate on the rich in Britain from 60 to 40 percent. In his memo, in turn, Rawls said,

[...] Justice as fairness does not justify economic and social inequalities, even when they do contribute somewhat to the well-being of the least advantaged, given how things now are. I emphasized that inequalities are not unless the prior principles to which the difference principle is subordinate are also satisfied.

It cannot be said that they are satisfied in Great Britain or the United States. Otherwise we might find ourselves saying such callous things as: The inequalities enjoyed by what Cohen calls “high-fliers” (presumably an English term for the corporate

47. See, e.g., Barry (2005).
wealthy) are justified because they are somewhat to the advantage of the poor in Harlem. These poor might be even worse off were those inequalities less. So we get the justification of Thatcher’s or Reagan’s tax cut. Surely Cohen is correct that the justification here is at best prudential, only as a matter of policy in unfortunate circumstances, when no other feasible policy is available given the political climate 49.

In other words, Rawls arguably recognized that the justification offered by the supply-siders for their tax cuts might technically be within the letter (and perhaps even the spirit) of the difference principle, but he nevertheless thought this irrelevant unless the lexically prior principles to which the difference principle is subordinated were also satisfied, and he thought it clear that these principles were not satisfied under the conditions then obtaining in either Britain or the United States.

Rawls said other things, however, that make the matter much less clear. In the preface to the 1999 revised edition of *A Theory of Justice*, for example, Rawls noted that the role of the difference principle varied depending upon whether it was being applied in the context of a property-owning democracy (or a liberal socialist regime) or a welfare state 50. The distinction, as Rawls saw it, was that in a welfare state – a category that would no doubt include contemporary America and most other liberal capitalist democracies as well – the state tries to ameliorate the effects of large economic inequalities by redistributing income from the most advantaged to the least at the end of each relevant period, with the justification for doing being provided by the difference principle. In a property-owning democracy, in contrast, the state tries to prevent such inequalities from arising by putting everyone on an equal footing at the beginning of the relevant period and then ensuring fair equality of opportunity for all, leaving much less work for something like the difference principle to do. Indeed, “the background institutions of a property-owning democracy work to disperse the ownership of wealth and capital, and thus to prevent a small part of society from

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49. Rawls (1994, p. 2). Note that there seems to be a word missing in the fourth line of the quote, after the word “not”. From the context, however, it seems clear that Rawls meant “not just”.

controlling the economy, and indirectly, political life as well” 51. In other words, in a property-owning democracy, the kind of inequalities we are now experiencing would arguably never arise, so there is no need to worry about whether the difference principle would support or prohibit them.

But we do not live in a property-owning democracy; we live in a welfare state. Rawls’s own description of the varying importance of the difference principle accordingly makes it clear that in this context he thought there was real work for the difference principle to do, even after the principles of equal basic liberties and fair equality of opportunity had made their mark. At least Rawls recognized that there would be some unjustified inequality arising in this context, for if there was no more work for the difference principle to do in a welfare state under justice as fairness than in a property-owning democracy, there would be little reason for the difference principle to exist. Do we really think that Rawls intended the difference principle to be relegated to the status of a trivial afterthought whose function was merely to clean up whatever few economic inequalities remained after all the heavy lifting had been done by the principles of equal basic liberties and fair equality of opportunity? Why would Rawls have spent so much time deriving and defending the difference principle if he thought it had so little work to do no matter what the context? And why would both his supporters and his critics have devoted so much attention to the difference principle if they thought it was supposed to have such a limited role in the scheme of justice as fairness? 52

Most importantly, how would we square this conclusion with Rawls’ own comment in Justice as Fairness that giving lexical priority to the principle of fair equality of opportunity might be “too strong, and that either a weaker priority or a weaker form of the opportunity principle would be better” 53. This statement could only mean that Rawls did indeed think the difference principle had an important role to play, at least in a welfare state, and that we should not take its lexical inferiority to

52. For a list of just some of the hundreds of books and articles discussing the difference principle, at least in part, see Freeman (2003, pp. 524-531, 537-539).
suggest otherwise. The most expansive reading of the principles of equal basic liberties and fair equality of opportunity is accordingly not really consistent with the bulk of Rawls’s own writing or Rawlsian scholarship.

But let’s assume that Rawls thought that the lexically prior principles of equal basic liberty and fair equality of opportunity would indeed impose some significant limits on economic inequality, even in the welfare state. The problem then is that it is very difficult to see how these limits could be derived. Rawls certainly never told us how these limits were to be articulated and applied. And with regard to the principle of fair equality of opportunity, at least, Rawls conceded just before his death that the principle remained “a difficult and not altogether clear idea” 54. Any attempt to divine the actual extent to which either principle could function as a limit on economic inequality is accordingly bound to generate as much heat as it does light.

For example, let’s say that we interpret the principles of equal basic liberties and fair equality of opportunity as precluding inequalities that are so severe they corrupt the political process, giving the minority rich political power that unjustly dwarfs that of the majority poor. The first problem, of course, is how to draw the line here. How do we tell what degree of inequality is corrupting and what degree is not? If all inequality is unacceptably corrupting, then we will have once again effectively eliminated the need for the difference principle entirely, and as we have already seen, that is inconsistent with the whole structure and tenor of Rawls’s principles of justice as fairness. Yet it is difficult to see how we could otherwise draw a principled line between a level of inequality that is unacceptably corrupting and one that is not. And without such a principled line, there is nowhere for the argument for a diminished role for the difference principle to go.

Even if we could come up with some principled basis for explaining how these prior principles limit the degree of economic inequality obtaining in society short of complete abolition, however, there would still be problems. For example, let’s say we interpret the prior principles of equal basic liberties and fair equality of

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opportunity as kicking in only when inequalities become “excessive”, whatever this is supposed to mean, as some Rawlsians do. At the very least, we will have a society that consistently hovers just below this threshold unless we can explain why the supply-side policies that will inevitably bring us to this point are not policies that the difference principle recommends. Also note that there are two ways that the corrupting effect of economic inequality can be prevented. One is to artificially cap the degree of inequality we will allow. The other is to enact campaign finance laws that ensure that everyone, regardless of income or wealth, will have the same opportunity to influence the political process as everyone else. And the latter approach, it turns out, is the one that Rawls himself preferred. Yet if we do this we will once again have to face the kind of extreme inequalities the supply-side approach can produce, and determining whether and to what extent this degree of inequality is acceptable will once more be exclusively a matter for the difference principle, so we will be right back where we started. Only if the difference principle can be shown to stake out some territory of its own, to somehow limit inequality beyond the limits imposed by the principles of equal basic liberties and fair equality of opportunity, could Rawlsians justifiably argue that the difference principle and the supply-side approach are inconsistent.

Finally, even if the difference principle was not intended to have a substantial role in regulating economic inequality regardless of whether it was being applied to a property-owning democracy or a welfare state, this would not show that the difference principle does not endorse the supply-side way of thinking. On the contrary, all it would show is that in Rawls’s system it is irrelevant that it does. The ethos it endorses would still provide moral cover to those trying to use it for other purposes. So even those who believe that the difference principle was intended to be no more than a trivial afterthought still have reason to try to create some distance between supply-side economics and the attitude toward inequality that the

56. See, e.g., Rawls (1999a, pp. 198-199); Rawls (1999b, p. 24 n. 19); Rawls (1993, pp. 356-363) (arguing that campaign reform is also required in order to maintain the fair value of equal political liberties guaranteed by the first principle of justice as fairness).
difference principle recommends. There is thus little support for the argument that the principle of equal basic liberties or fair equality of opportunity can save the day here.

*What Counts as an Argument against Ideal Theory?*

There is one other preliminary argument that some Rawlsians make, however, that in fairness I should also consider here. They point out that *A Theory of Justice* was meant to be an exercise in *ideal* theory, and claim that this means the difference principle is somehow immunized from criticism about problems that may arise when applying it to the kind of policies we are forced to choose between out in the real world. But this objection rests on a misunderstanding of what Rawls meant by describing his theory as “ideal”. He did not mean that his theory was to be taken as giving us no practical guidance about what we should do given the actual institutions and public policy choices available to us at the time. He simply meant that he would assume that people would embrace whatever principles of justice arose from the original position decision procedure and endeavor to comply with these principles in good faith rather than attempt to subvert them whenever given the opportunity to do so. As long as this requirement were satisfied, and that is the underlying assumption on which we are proceeding here, there is nothing in the fact that *A Theory of Justice* is an exercise in ideal theory that would take the question of the relationship between the difference principle and the supply-side agenda off the table.

*Can the Difference Principle and the Supply-Side Approach be Distinguished?*

Back, then, to the arguments for distinguishing the difference principle from the supply-siders’ trickle-down approach. One of the few Rawlsians who actually offers such an argument is Henry Shue. Shue argues that what distinguishes the two principles is that the supply-side approach *assumes* that increases in the economic position of the rich will increase the economic position of the poor, whereas

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the difference principle merely says that if an increase in inequality will benefit the poor it is justified. But there are two problems with this argument. First, the distinction on which Shue relies does not really exist, for no supply-sider claims that tax cuts for the rich will benefit the least advantaged under all conditions – they merely contend that this will be true given the economic conditions in which we currently find ourselves. True, the conditions in which such tax cuts would have a trickle-down effect are widely defined, so the practical import of Shue’s overstatement may be rather minimal. Nevertheless, the strict automatic/conditional distinction on which Shue relies does not actually exist.

Second, and more importantly, the distinction that Shue articulates is really beside the point. Even if the benefits of supply-side economics are taken by its supporters to be automatic, it does not mean that the trickle-down approach is not a valid way of implementing the difference principle. While Rawls clearly did not believe that the least advantaged would always benefit from tax cuts on the rich, he also did not believe they would never benefit. Whether the least advantaged do benefit from increases in the position of the rich is a question of what Rawls called “chain-connectedness” and “close-knittedness”, connections that he noted will sometimes but not always hold. There is nothing in the difference principle which would preclude tax cuts for the rich when they would improve the position of the least advantaged, and the whole point of supply-side economics is to make the case that such cuts are not only a way but also the best way to accomplish this, at least under the economic conditions that currently obtain.

Remember, while there may be stark differences between the Rawlsians and the supply-siders with regard to their respective empirical assumptions regarding the effect of the supply-side approach, there is nothing in the difference principle that gives us any guidance on which set of empirical assumptions is correct. On the contrary, the difference principle is neutral as to what empirical

60. See Rawls (1999a, pp. 70-72). For an illuminating discussion of these connections, see Williams (1995, esp. pp. 261-263).
assumptions one should make; it merely sets the standard that government economic policy should meet once some set of empirical assumptions has been deemed correct. Accordingly, merely showing that the Rawlsians and supply-siders differ with regard to their respective empirical assumptions does not undermine the claim that the difference principle could be read to endorse the implementation of supply-side economics. If we are to distinguish the two, we must show why the difference principle delivers no such endorsement even if the supply-siders’ empirical claims regarding the effect on the poor of giving money to the rich are true.

Now I acknowledge that many Rawlsians would deny this. They would argue that precisely because the difference principle is neutral between the various empirical assumptions necessary to operationalize it, there is no need to show that the difference principle does not endorse supply-side economics if the empirical claims made by the supply-siders regarding the inevitable trickle-down are true. The argument between those who reject supply-side economics and those who support it is simply an empirical one that has nothing to do with whether the difference principle accurately captures what justice has to say about economic inequality. But I do not think this is correct, for two reasons. The first I call the argument from intuition; the second I call the argument from indeterminacy.

61. Of course, many non-Rawlsians would deny this also. G. A. Cohen, for example, argues that the difference principle is unjust even if it does make the least advantaged better off, not because of the degree of inequality this might produce, but because accepting that the more talented should be rewarded for producing more is inconsistent with the assumption that the distribution of natural talents and abilities is morally arbitrary. If this is true, in turn, then those who have natural talents and abilities do not deserve the extra rewards the difference principle contemplates giving them. Cohen further argues that in a world where everyone internalized this view of natural talents and abilities, everyone would be maximally productive to the best of their abilities regardless of the presence of incentive rewards for this, and therefore nothing would be gained by offering these incentives to the most talented. See, e. g., Cohen (2000a); Cohen (2000b, ch. 8-9); Cohen (2008).

62. Note that neither of these arguments depends on whether Cohen’s anti-incentives argument is correct. They should therefore be much harder for Rawlsians to reject.
Why Pointing to Differing Empirical Assumptions is Not Enough: The Argument from Intuition

The major premise on which the argument from intuition relies is that the difference principle was supposed to be in reflective equilibrium with our considered judgments. The minor premise is that the reason it seemed to be is that it seemed to represent a way of justifying having less economic inequality by 1970 standards, not more. If the difference principle would indeed justify vast increases in inequality from the 1970 baseline, this would not accord with our liberal egalitarian intuitions, even when this would make the least advantaged better off and would not be politically corrupting. Indeed, as Rawls notes in *Justice as Fairness*,

The difference principle specifies no definite limits within which the shares of the more and less advantaged are to fall. Indeed, we hope to avoid having to specify such limits, since we want to leave this ratio to fall where it may, as the outcome of pure background procedural justice. This is perfectly acceptable, unless, on due reflection, the ratio strikes us as unjust.

In other words, Rawls did not think that vast inequalities in wealth and income would necessarily be justified even if they benefited the least advantaged and the lexically prior principles of justice as fairness were fully satisfied. These inequalities would still be subject to due reflection and objection; they would not be immunized from our considered judgment. And given that the inequalities we are experiencing now are quite extreme, it seems highly likely that not only Rawls but also many like-minded liberal egalitarians would find them intuitively unjust, regardless of the background conditions out of which these inequalities arose. These inequalities would accordingly fail the ultimate test that Rawls set forth for all his principles of justice, despite their technical compliance with each principle.

But intuitions vary, even among liberal egalitarians, and despite Rawls’s statement that the ultimate test for any inequality is that of reflective equilibrium, some may not agree that we can justify using 1970 or indeed any other fixed date as providing the relevant

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64. Rawls (2001, p. 68 footnote omitted).
baseline. Personally, this objection strikes me as being obstinately close-minded, for one cannot read *A Theory of Justice* without being impressed by its humanistic tone, and I find it impossible to believe that Rawls had no view on whether justice required the degree of economic inequality surrounding him in 1970 to be reduced. Nevertheless, I recognize that my claim that 1970 should be taken as the relevant baseline is going to strike some as controversial, and that without an accepted baseline, it is impossible to specify what the intuitive limits on economic inequality might be. So while I find the argument from intuition persuasive, I do not intend to place much weight on it, and I will have nothing more to say about it here. It is the argument from indeterminacy that I shall spend the remainder of this paper developing and defending.

*Why Pointing to Differing Empirical Assumptions is Not Enough: The Argument from Indeterminacy*

In brief, the argument from indeterminacy runs like this. Even if the empirical assumptions made by the supply-siders *are* true, we can never know this with 100% certainty. All we can ever do is associate various probabilities with the potential outcomes of various economic policies, and different people will come to different conclusions regarding the appropriate probabilities to assign. Moreover, we will necessarily have varying and often conflicting degrees of confidence in these probability judgments depending on the circumstances. Decisions regarding which economic policy to implement must accordingly always be made under conditions of uncertainty. Given that these are the conditions under which the difference principle must operate, these are the conditions under which the difference principle must give us guidance on what to do. Its endorsement of the supply-side approach must accordingly not depend on whether the assumptions made by the supply-siders are true, but on whether the risks associated with endorsing that approach are risks that justice demands we take or, at the very least, risks that justice does not demand we eschew. This is what the difference principle must tell us if it is to be judged an appropriate principle of distributive justice. Yet this is exactly what the difference principle fails to do.
To see why, we need to go back to the original position, before the principles of justice that will govern society are chosen. Remember, it is the task of those in the original position to choose principles of justice, but this choice must be made behind a veil of ignorance that deprives them of knowledge of their race, gender, natural talents and abilities, and particular place within the social and economic structure. Thus, as Rawls points out, the choice of principles of justice must be made under conditions of uncertainty. Since this choice will be made under conditions of uncertainty, those who are making this choice will need a principle of decision-making to guide them. Rawls claims that the principle of decision-making on which those in the original position would rely is maximin, which recommends that one choose the option that offers the best worst outcome. But Rawls does not just assert this—he has an argument for why maximin is the most rational principle to employ in this situation. This is a very important decision, he points out, so we want to be very conservative, the best worst outcome is acceptable, and because the probabilities associated with the various outcomes of the available options are unknown, improvements to the best worst position given the corresponding downside are simply not worth the risk. If people in the original position do use maximin, in turn, the difference principle is the principle they would select, for the difference principle ensures the best outcome for the least advantaged, and anyone in the original position could find themselves in this position once the veil of ignorance is lifted.

I recognize, of course, that Rawls does not rely on the maximin argument alone. In *Justice as Fairness*, as part of what he calls “the second fundamental comparison”, where he considers the possibility of replacing the difference principle with the principle of restricted average utility, Rawls also offers various additional arguments for why those in the original position would choose the difference principle. But these arguments are not relevant to any point I am making here. I am not concerned about whether people in the original position would indeed pick the difference principle as one of their principles of justice, or if they would, why they would do

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so. I am merely noting that in constructing his argument for justice as fairness, Rawls recognized that the decision to be made had to be made under conditions of uncertainty, and that under such conditions, we need a principle of decision-making to guide us. That principle may not produce unique results, and therefore further argument may be needed if we are to choose between otherwise equally acceptable candidates, but that principle of decision-making is still doing a lot of work. It is reducing the field of acceptable candidates to those that at least conform to certain criteria, thereby eliminating a vast number of what would otherwise be possible choices. And while some of Rawls’s critics have argued that people in the original position conducting the second fundamental comparison would actually choose the principle of restricted average utility over the difference principle, at least if the veil of ignorance did not exclude knowledge of probabilities, there is at least some basis for believing that Rawls’s view that people in the original position would choose the difference principle is correct.

The problem is that even if Rawls is right about this, choosing between the difference principle and other competing principals of justice is not the only decision his hypothetical bargainers must make under conditions of uncertainty. The difference principle provides that inequalities are unjustified unless they make the least advantaged better off. But in order to apply this principle, we must make predictions about the future economic effects of current economic policies, predictions that are notoriously difficult to make. Only rarely will the economic effect of a particular policy choice be certain. In most cases, the best we can do is identify the various possible outcomes and associate subjective probabilities with each. And in many cases, these probabilities will be disputed, with some arguing that one outcome is more likely while others arguing that another is. In other words, the difference principle must not only be selected under conditions of uncertainty, it must be applied under conditions of uncertainty as well. Accordingly, when we apply the difference principle, we need a principle of decision-making to guide us, even if that principle may not get us all the way, just as we needed a principle to guide us toward selecting the difference principle in the first place. There are in fact two decisions under conditions of uncertainty confronting people in the original position, and Rawls has given us an argument for what principle they would
choose in only one. With regard to what principle they would choose to make the difference principle operational, Rawls is silent.

To see why this is an important omission, consider what would happen if we used maximin in this situation. The maximin principle, remember, is a very conservative principle of decision-making, for it suggests that we should assume the worst will happen and then choose among options according to which option offers the best worst outcome. This makes sense when we are choosing the difference principle over, say, the principle of restricted average utility, which would conceivably allow some people to be sacrificed for the economic benefit of others in particular situations. But there is always some possibility that any economic policy will have an adverse impact on the least advantaged. So if we applied maximin here, this would effectively mean that economic inequality could never be justified. Clearly, however, this is not what Rawls intended. On the contrary, he thought that absolute equality could make the least advantaged worse off in some cases than they would be if some degree of inequality were allowed. Indeed, recognizing that our concern for equality in wealth and income should sometimes be sacrificed to improve the position of the least advantaged is what makes the difference principle a principle of liberal as opposed to strict egalitarian justice. But if we did employ maximin to make the difference principle determinate, all that careful language in the difference principle would be mere surplusage – it would simply reduce to “all inequalities are prohibited”.

In response to this argument, some Rawlsians have pointed out that maximin would only have this effect if we included unlikely outcomes amongst the possible outcomes of each economic policy on offer, and that if we simply eliminated such unlikely outcomes from consideration, using maximin to render the difference principle determinate would no longer be problematic. But eliminating unlikely outcomes from consideration is not at all consistent with the thinking underlying maximin. The whole point of that principle is to ensure that we avoid the worst outcome no matter how unlikely. This is why maximin rules out utilitarianism as a complete principle of justice, even though it is unlikely that it would ever really maximize utility to sacrifice one individual for the greater good. If Rawlsians want to insist on a strict version of maximin to eliminate utilitarianism from competition with Rawls’s two
principles of justice, I cannot see how they can also insist that we use a more lax version of maximin to evaluate competing economic policies once the principle of utility has been eliminated.

Even if we were to do so, however, this would not render maximin unproblematic. Predicting the economic future is, alas, not a science but an art; no economic program promises a sure thing. Outside of strict egalitarianism, all economic policies worthy of our attention offer both a modest but nonetheless significant chance of increasing inequality and a modest but nonetheless significant risk of making the least advantaged worse off. This would include supply-side economics, at least as long as the views of its critics are taken seriously, and the more traditional versions of demand-side (Keynesian) economics, again as long as the views of its critics are taken seriously. So even if we eliminate the more remote extreme outcomes from consideration, it is still unlikely that using maximin to render the difference principle determinate will result in anything other than the prohibition of all inequalities. At least, if there are policies that would increase economic inequality but which would not offer at least a modest chance of reducing the position of the poor and therefore would not be eliminated by a lax version of maximin, it is very difficult to imagine what these policies might be.

Conversely, consider what would happen if we used maximax to make the difference principle determinate. Maximax, as the name suggests, is very much the opposite of maximin. It is a very optimistic principle of decision-making, for it recommends that you assume everything will work out for the best and then choose among options according to which offers the best best outcome, which is why maximax is often called “wishful thinking”. Just as there is always some possibility than an economic policy will hurt the least advantaged, there is always some possibility that it will help the least advantaged too, at least if we exclude certain extremist policies that are not reasonably likely to be proposed in either a property-owning democracy or a welfare state in any event. Accordingly, if we applied maximax to make the difference principle determinate, this would effectively mean that all inequalities would be permitted – we would have turned what was intended as a principle of liberal egalitarian justice into a principle of unrestricted free market capitalism. So maximax, like maximin, cannot be the principle that
we should insert within the difference principle to make it operational.

What all this means is that as Rawls designed it, the difference principle is radically indeterminate. Indeed, at one point in *A Theory of Justice* Rawls himself seems to recognize this, for he notes that “the application of the difference principle in a precise way normally requires more information than we can expect to have and, in any case, more than [is required] in connection with the application of [the principle of equal basic liberty]” 67. Despite recognizing that the acquisition of the required information may be problematic, however, Rawls never tells us how to deal with the potential for injustice this creates. And this is a troubling omission, for depending on what principle one uses to cure the indeterminacy this lack of precise information creates, the difference principle can allow all inequalities or none. If we are to capture the liberal egalitarian spirit behind the difference principle, as fidelity to Rawls’s vision suggests we should, what we need is a principle that allows some inequalities but not others. We need a principle that takes probabilities into account, and makes an appropriate recommendation even when the outcome for the least advantaged is uncertain. We need a principle of decision-making that allows us to discriminate between economic policies that pose an unacceptable risk to the least advantaged and those that do not. For as far as instantiating a liberal egalitarian view of distributive justice goes, it is this second principle of decision-making, not the difference principle itself, which does all the work. Whether such a principle exists is accordingly the question we turn to next 68.


68. Note that there may be other indeterminacies in the difference principle besides the ones I have identified. See, e.g., Attas (2007), in which Attas argues that the difference principle is indeterminate with regard to time. My purpose, however, is not to identify all the possible indeterminacies in the difference principle, but only those arising out uncertainties regarding states of affairs, for these are the ones that have allowed the difference principle to be hijacked by the right. As we shall see, these uncertainties alone are enough to warrant rejection of the difference principle as a liberal egalitarian principle of justice.
Looking for a principle of decision-making to insert within the difference principle to cure its indeterminacy involves two tasks, not just one. First, we must come up with a principle that produces satisfactory results – that is, one that regulates but not prohibits inequality and reflects the appropriate attitude toward risk when the effects of a particular policy are uncertain. Merely coming up with a principle that has the “right” effects, however, is not enough. Just as Rawls has an argument for why we should use maximin when choosing between the difference principle and the principle of restricted average utility, we must have an argument for why the principle of decision-making we wish to use is the right choice, an argument that is consistent with those behind the difference principle itself. In the final section of this paper, I will address the concerns that our principle must satisfy if it is to be the appropriate choice for curing the difference principle’s indeterminacy given the principle’s liberal egalitarian aspirations. In this section, however, I will set the question of justification aside, and simply search for a principle of decision-making that works – a principle that would allow us to instantiate the liberal egalitarian intuitions the difference principle was thought to express.

*Expected Utility*

As we have already seen, neither maximax nor maximin will work here. The next obvious candidate, of course, is expected utility. If we employed this principle, we would define utility as increasing the position of the least advantaged and then choose among options according to which one offered the largest increase multiplied by the probability this increase would indeed occur and the appropriate utility factor. And on first glance, this approach looks promising. While Rawls stipulates that people in the original position do not know probabilities, they do know they will know these probabilities once the veil of ignorance is lifted. Indeed, they would have to have such knowledge, otherwise they would never be able to determine which of the various economic policies on offer best satisfied the difference principle’s demands, and that, of course,
is exactly what people living in a society that embraces the difference principle as one of its principles of justice must do. So it seems that the principle of expected utility with an appropriately modified maximand is indeed one of the principles we might use to fill the gap in the difference principle that Rawls seems to have left behind.

Unfortunately, however, the principle of expected utility cannot fill that gap. The problem is that while we would have sufficient knowledge of probabilities to apply expected utility, at least once the veil of ignorance was lifted, we would not have sufficient knowledge to determine what utility function to employ. Merely discounting expected outcomes by the probability they will not occur does not produce expected utility; it produces expected value. To produce expected utility, we have to multiply expected value by a factor that reflects, among other things, the decision-maker’s attitude toward risk. In other words, the requisite utility function has risk preference built into it. What attitude toward risk would be appropriate in this decision situation, however, is precisely what we are trying to determine. Accordingly, unless we know what risk preference would be appropriate in this decision situation, we cannot calculate the requisite utility factor, and without this we cannot calculate expected utility.

Ordinarily, this is not a problem, for people’s utility functions are revealed by their choices. Given a sufficiently comprehensive history of an individual’s choices across a variety of decision situations, we can work out what the requisite utility factor must be. We can then apply this factor and predict the individual’s choices in future decision situations. But in this case, we have no such history, and even if we did, it would not be relevant. We are not simply trying to predict what any particular individual will do given the past history of his choices – we are trying to determine what an individual should do under conditions of uncertainty based on the attitude toward risk required by justice. Expected utility will accordingly do us no good here unless we can justify the a priori selection of a particular utility function. And that, unfortunately, we cannot do.

69. See, e.g., the discussion in Broome (1991, pp. 70-80, 144).
Prospect Theory

Perhaps, then, we should consider prospect theory. Briefly, prospect theory differs from expected utility in that it looks to changes in position rather than ultimate outcomes. It also allows us to predict risk preference given the nature of these changes and various other heuristics and biases that affect human decision-making. It suggests, for example, that people are risk averse when it comes to choosing between a certain gain and a chance at a larger gain or no gain at all, and that they are risk inclined when it comes to choosing between accepting a certain loss and a chance of an even greater loss or no loss whatsoever. While prospect theory, unlike expected utility theory, is purely descriptive, meaning that no one argues (at least not yet) that people should do as prospect theory predicts, we could try to develop an argument that shows the risk preferences it predicts are indeed the appropriate risk preferences for these particular choice situations given that most people seem intuitively drawn to them. This, in turn, would supply us with the information we lacked when we attempted to cure the indeterminacy in the difference principle by using the principle of expected utility.

The problem here, however, is that prospect theory is itself indeterminate. It makes firm predictions on what risk preference decision-makers will adopt only once we have decided how to frame the particular choice under consideration. Many choices, however, can be framed in more than one way. Consider, for example, the following case. Suppose a country is preparing for an outbreak of flu that is expected to kill 600 people – if program A is adopted 200 people will be saved, and if program B is adopted there is a 1/3 chance that 600 people will be saved. Given the way this choice is framed most people choose program A even though the expected number of lives saved under each program is identical. But if the choice is framed differently – say if program C is adopted 400 people will die and if program D is adopted there is a 1/3 chance that nobody will die, people choose to take the risk even though once again the expected number of lives saved is the same. So the

70. See Kahneman and Tversky (1979).

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choice between what do here is heavily influenced by whether the outcomes are framed in terms of mortality or survival – that is, whether the option is framed as offering a risk of loss or a risk of gain. Because many prospects can be framed as either a gain or a loss, risk preference is subject to manipulation. Without some guidance on how prospects should be framed, prospect theory leaves us no better off than we were with expected utility.

*Expected Value*

Perhaps then we could use expected value. Expected value assumes risk neutrality, and therefore allows us to simply discount the estimated payoff by the probability it will not occur. But this will not work either, because a small chance of very high negative or positive payoff will always skew the results. To see how this could occur, consider a policy that offered a 99.9% chance of a loss of 10 for the least advantaged and a 0.01% chance of a gain 10,000. The net expected value of such an option would be a gain of 0.01%, so if we used expected value as our principle of decision-making, it would suggest we should adopt this policy if it was the only alternative to the *status quo*. But this seems antithetical to our decision to use the difference principle in the first place. This choice is almost certain to reduce the position of the least advantaged. Given that the whole idea of the difference principle is to try and avoid this, it would seem like this is an option that we should reject. Expected value will accordingly not do. We must have a principle that is sensitive to risk.

*Minimax Regret*

Well, then, perhaps we could use minimax regret. The intuitive notion behind this principle is that people compare their actual situation with the situation they would have been in had they made different choices, and if hindsight reveals a different choice would have produced a better outcome, they experience regret. Anticipating such feelings, people take them into account when making their decisions, and seek to minimize their maximum regret. For these purposes, then, regret is defined as the opportunity cost of selecting the wrong option in each possible state of affairs, the *wrong* option being any option other than the one with the highest pay-off.
in that state of affairs. The regret associated with choosing the right option in each state of affairs is accordingly zero, and the regret associated with choosing any other option is the difference between what that option pays and what we would have received had we selected the option with the highest pay-off in that state of affairs. Having made these calculations, we then select the option that minimizes our maximum possible regret\(^\text{72}\).

The advantage of minimax regret is that it embodies a moderate attitude toward risk, since it considers opportunity costs as well as expected payoffs. If we used minimax regret as our principle of decision-making, the difference principle would allow an increase in inequality whenever a proposed policy offered a serious upside, even though it offered a downside risk as well. The problem, however, is that minimax regret would also recommend that we take a series of incremental risks where the downside is small but the upside, while unlikely, is large. The result of these incremental steps over time may be substantial decreases in the position of the least advantaged and large increases in inequality. While this might be avoided if we evaluated all policies in one go rather than incrementally as they occur, this is impractical and unrealistic. These policy decisions present themselves individually over time, and have to be evaluated when they occur. I accordingly see no way of avoiding the potential for minimax regret to dramatically increase inequality. Indeed, rather than immunizing the difference principle from inegalitarian abuse, minimax regret has almost certainly contributed to such abuse by encouraging even those who will be hurt by inegalitarian policies to support them. In essence, using minimax regret to make the difference principle determinate has produced a form of “economic masochism” in the very people that the difference principle was designed to protect, encouraging the least advantaged to support economic policies that are almost certain to make them economically worse off\(^\text{73}\). Minimax regret

\(^{72}\) This statement of the principle of minimax regret is derived from Savage (1951) and Savage (1954).

\(^{73}\) For an extended discussion of this phenomenon and how minimax regret has contributed to it, see Reiff (2003).
accordingly cannot solve the problems with the difference principle; it can only serve to make those problems worse.

**Winner-Take-All**

What, then, if we simply took the most probable outcome as the actual outcome and ignored all other possibilities? Again, this might accord with our intuitions in some cases, but not when the most probable outcome offers only a slight improvement in the position of the least advantaged and the alternative is very bad indeed. For example, a 51% chance of a gain of 1 for the least advantaged and a 49% chance of a loss of 100 is not something that we would want to risk. Downside risk matters, even when it is less probable than potential gain. So merely relying on the most probable outcome and ignoring everything else will not do.

**Trial and Error**

Finally, perhaps we could deal with the problem of indeterminacy by enforcing the difference principle through trial and error. We simply try a policy, and if this does not make the least advantaged better off we reverse it. But trial and error is not really a principle of decision-making—it is a strategy for dealing with the absence of such a principle. If we were to employ such a strategy, we would still need a principle to help us decide which economic policy to pursue first, and if that principle did not work, which principle to pursue next, and so on. Without some further guidance as to the order in which we should try the various policies on offer, we would be left with no choice but to do this randomly, a rather unsatisfying approach for a supposed principle of justice.

More importantly, even if we could determine how the difference principle would initially rank the various policy options available or if establishing an initial ranking randomly would be appropriate, the problems entailed by a trial and error approach would still be numerous and substantial. Reversing a policy that turned out to benefit the rich but not the poor would be difficult indeed, for there would be a powerful political constituency fighting to keep that policy in place. And the more erroneous this policy turned out to be in terms of creating unjustified inequalities, the more powerful the potential opposition would be to its reversal.
Finally, even if we see this as a problem with the people who resist reversal rather than with the difference principle itself, a principle of justice cannot be an appropriate choice from the original position, Rawls tells us, unless it can resist what Rawls calls “the strains of commitment”, the reasons why people might violate their agreement to abide by that principle or urge renegotiation once the veil of ignorance is lifted. If the strains of commitment will be excessive, Rawls tells us, then the principle will be unstable, and this provides those in the original position with good grounds to reject it.

In this case, there is good reason to believe that the strains of commitment that would arise from following a policy of trial and error would indeed be excessive. Even without the problem of indeterminacy, there is already some reason to be concerned about the strains of commitment generated by the difference principle, for those who turn out to be better off would be better off still if they can be released from its restrictions. But while Rawls argues that these strains can be overcome, most people are loss averse. Even those who would have been willing to forgo gains by selecting a more egalitarian policy going forward might accordingly not be willing to accept the losses that a policy reversal would entail. The additional strain of absorbing losses that would result from relying too heavily on trial and error are at least arguably too high for the difference principle to bear.

There are also the transaction costs to consider. Adopting a policy and then reversing it is likely to be costly indeed, especially if it involves systemic changes rather than mere adjustments to systems that are already in place. Both privatization and nationalization, for example, are often very expensive to implement and even more expensive to reverse. The transaction costs of such policy reversals are alone likely to make any trial and error policy unworkable.

74. See Rawls (2001, sec. 29.3 and sec. 37); Rawls (1999a, sec. 25, pp. 125-26, and sec. 29, p. 153).
75. Ibid.
76. Experimental evidence suggests that people may associate twice the decision weight with avoiding losses than they do with acquiring gains. See Kahneman, Knetsch, and Thaler (1991).
The fundamental problem with implementing a trial and error policy, however, is that there is no control group to tell us whether a particular policy is really working. Even if the position of the least advantaged grows worse after a policy is implemented, who is to say that their position would not have been worse still had we adopted some other policy instead? The same problem that arises when we try to predict what effects a policy will have arises when we try to determine what would have happened had we done something else. So trial and error does not avoid the problem of uncertainty, it merely moves the uncertainty at issue from one arena to another.

WHY THE DIFFERENCE PRINCIPLE IS FATALLY INDETERMINATE

The reason why none of these principles will actually work is that there are a variety of factors that are important to us here, and no one decision-making principle is capable of incorporating all of them. First, given the already precarious position of the least advantaged, we want whatever principle we employ to be relatively conservative. We should be willing to accept some degree of risk, but since this is a very important decision, we want to avoid a substantial downside risk no matter how unlikely and no matter how substantial the potential upside. We also want to avoid even a slight downside risk if the chance of such a loss is high even when there is a potentially large but relatively unlikely upside. Slight to moderate downside risks may be taken only when the chances of such a risk materializing are low and the potential payoff is sufficiently high to warrant it. In other words, there are (at least) three variables to consider here – the degree of potential gain, the degree of potential loss, and the probability associated with each potential payoff. While our risk preference should vary accordingly, it is extremely difficult to come up with a single principle that will adjust for all these variables at once. And even if we could do this, we would still face the extremely difficult task of coming up with a defensible way of determining precisely where the appropriate borderline between acceptable and unacceptable risk should be.

Second, the burden of the risk of error must be distributed equitably – not necessarily equally, but at least in a way that is
consistent with the priorities established by the difference principle. What this means is that the possible effects of a policy on the position of the most advantaged matters too. A policy that offers a 50% chance of a small gain for the poor and a 50% chance of slightly smaller loss but a 100% chance of a large gain for the rich seems unacceptable, for in this case the burden of the risk of error lies solely on the least advantaged, and this is the group it is our priority to protect. In contrast, if there is only a 50% chance of a small gain for the rich and a 50% chance of a small loss, then this seems acceptable, because now the risk of error is borne equally. Even if there is a 99% chance of a small loss for the rich this seems acceptable if we truly believe that we should give priority to the worst-off (if there were a 100% chance of a small loss for the rich and this loss would exceed the potential loss for the poor, the difference principle would not be implicated, for there would be no danger of an increase in inequality).

It is this failure to distribute the burden of the risk of error equitably that renders supply-side economics unacceptable. If improving the position of the rich does “trickle down” and help the least advantaged and they benefit more from this than they would have from alternative policies, then the fact that the most advantaged benefit too is simply the price that must be paid to improve the position of the poor. But if there is no trickle down, the most advantaged still benefit. Indeed, if we try to help the poor by cutting taxes on the rich, the rich benefit directly and to the same degree no matter what, while the poor benefit contingently, only if these tax cuts produce greater economic growth and the benefits of this trickle down through the entire income distribution. Even if we have the former, there is no guarantee we will have the latter, as the most recent period of economic growth has made all too clear. What this means is that under supply-side economics, the burden of the risk of error is placed squarely and exclusively on the poor. Supply-side economics is accordingly unfair, at least as long as some other principle could have produced an equal benefit for the poor while distributing the burden of the risk of error more equitably. The difference principle, in turn, is unjust because it lacks a mechanism for ensuring that the burden of the risk of error is distributed equitably and therefore has no way of identifying this
potential source of unfairness or of otherwise filtering such a potentially unfair economic policy out.

Third, the potential effect of a policy on the position of the most advantaged matters not only for purposes of determining whether the burden of the risk of error is distributed equitably, but also absolutely, although this is more controversial. For example, consider a policy that offered a 1% chance of a slight gain for the least advantaged and a 99% chance of no change at all but a 99% chance of a massive loss for the most advantaged and a 1% chance of a modest gain. In this case, the difference principle would be implicated, since there would be a chance of increasing inequality (only if the policy had a 100% chance of a loss for the rich would the difference principle not be implicated). And while the difference principle is technically unconcerned with potential losses for the rich, focusing exclusively on whether we will improve the position of the poor creates a problem, for it is one thing to say that we are willing to sacrifice the rich when a gain for the poor is a sure thing; it is quite another to say we are willing to sacrifice the rich to obtain a mere 1% chance of a gain for the poor. In the latter case, the policy we are endorsing looks awfully close to leveling down, a policy with which many of those who endorse the difference principle would disagree. While it is difficult to draw a line between a risk of loss for the most advantaged that is worth taking given the corresponding upside for the poor and one that comes too close to leveling down, it seems that drawing such a line is something that our principle of decision-making should help us do. Our principle must not only be sensitive to the effects of economic policy on the least advantaged, it must be sensitive to the effects such policies have on the most advantaged too.

Fourth and finally, if any principle of decision-making is to work, we must have a way of determining which probability assessments to take into account. Obviously, only assessments made in good faith should be considered – probability assessments that are designed to subvert the objectives of the difference principle and

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77. Indeed, avoiding the leveling down objection is often offered by supporters of the difference principle as the reason why their “prioritarian” view is superior to that of strict egalitarians. See Brown (2003, at p. 112); Temkin (2000, pp. 130-132).
instantiate some other pattern of distribution should be excluded, although as a practical matter it may be impossible to sort one kind of assessment from the other. But even if we were able to identify and eliminate probability assessments that are in fact disguised attempts to instantiate some other political agenda, we would still face questions about which assessments to consider. Do we look only at the view prevailing among some pre-established panel of economic experts, or do we take some sort of average based on the views of all economic experts, or do we instead rely on the views of those who have been democratically elected?

Unfortunately, while each of these options has something to recommend it, each also suffers various problems. There may be no prevailing view among our pre-established panel of experts, and if there is, studies suggest that the kind of experts who often dominate such panels – intellectually aggressive “hedgehogs” who believe with near absolute certainty in one big theory that purports to explain a wide range of complex inter-connected events – are no more likely to be correct in their macroeconomic predictions than dart-throwing chimps. For an example of this, one need look no further than the discussions taking place within the Federal Reserve Board of Governors regarding what effect a collapse in housing prices might have on the larger economy, discussions that reveal how little that possibility was taken seriously.

The transcripts of the 2006 [Open Market Committee] meetings, released after the standard five-year delay, clearly show some of the nation’s pre-eminent economic minds did not fully understand the basic mechanics of the economy that they were charged with shepherding. The problem was not just lack of information; it was lack of comprehension, born in part of their deep confidence in economic forecasting models that turned out to be broken.

78. See Tetlock (2005, esp. pp. 41, 51-54). The term “hedgehogs” comes from Isaiah Berlin. See Berlin (1997). While hedgehogs know or think they know one big thing and try to force all phenomena into a pre-existing schema, foxes know or think they know many little things, and are more willing to be flexible in their analysis and approach to complex problems. They do outperform dart-throwing chimps, although not by much. See, e.g., Tetlock (2005, p. 20).

In any event, the more established our experts are, the more likely it is that their views will simply reflect conventional wisdom, and we will therefore necessarily be eliminating new and innovative solutions from our set of options without necessarily gaining any predictive accuracy. And because these experts are also most likely to be members of the more advantaged class, there is also reason to be concerned that their views may be biased, since inherent concerns for one’s own welfare are difficult to suppress even if one is consciously committed to doing so.

On the other hand, calculating an average view weighted to reflect the proportion of the wider economic community that holds it is likely to be extremely complex, especially when there are different probabilities associated with the potential outcomes for the poor and for the rich, although there are companies out there that attempt to do something just like this. Blue Chip Forecasts, for example, surveys top “business economists” and attempts to publish an average of their views for a wide variety of macroeconomic indicators. Of course, this once again only gives us a sense of what the mainstream believes, and the mainstream is often wrong, as it was about the “non-existence” of the housing bubble and the “limited” effect it would have if it were to pop. Indeed, “for nearly a decade, it turns out, the most accurate forecasts have come from the fringe.” In any event, relying on an average view to make important policy choices necessarily represents what Ronald Dworkin calls a “checkerboard solution” to the problem of justice; that is, a pragmatic compromise of inconsistent positions that has no principled basis, and making such an average view our guiding principle would be morally objectionable for that reason alone.

Such a checkerboard solution would also likely be politically

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80. This, arguably, is what happened when Alan Greenspan supported (or at least failed to clearly object to) the Bush administration’s 2001 and 2003 proposed tax cuts for the wealthy – Greenspan allowed his desire to help his friends in the administration and perhaps even his desire to be reappointed to another term cloud his judgment about the economic effect of the deep cuts the administration was proposing, or at least that is how it appears now to some observers. See, e.g., Noonan (2007); Krugman (2007b).

81. See http://www.aspenpublishers.com/blue-chip-publications.htm for information on these reports.

82. Davidson (2012b). See also Leonhardt (2012b).

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unviable, for it would have no committed backers and therefore no one with the political will to promote it and see it carried through. It would accordingly once again be unlikely to hold up under the strains of commitment. And even if it the strains of commitment would not be excessive and an economic policy based on some sort of average of competing views could be adopted and carried through, it is unlikely that it would produce satisfactory results, for as a compromise position it would have no underlying theoretical consistency, but rather be a hodge-podge of different fundamental views.

Finally, relying on the view of those democratically elected to determine which probability assessments to take into account means endorsing the assumptions of trickle-down economics whenever those who embrace such a view are in power. But if the trickle-down approach is eliminated because it unfairly distributes the burden of the risk of error and is therefore inconsistent with the underlying ethos of the difference principle, what are we to do? It seems that we are left with a set of probability assessments that are consistent with a theory that our principle of justice says we cannot apply and are inconsistent with those we can. And even if we were to decide that the trickle-down approach did not unfairly distribute the burden of the risk of error, there is serious reason to question whether the evaluation of the probable effect of various economic policies is something that justice commits to the political process even when this process is indisputably fair, or whether this is something like the choice of the difference principle itself – a choice that is not a proper subject of the democratic process but rather one of the principles that restrains the choices that the majority can make and thereby ensures that what emerges from the democratic process after the veil of ignorance is lifted is indeed just. In any case, it seems that relying on the democratic process to resolve the uncertainties here has real problems too.

What this means is that none of the solutions available to us is entirely satisfactory. We want some way of evaluating probabilities that is free from direct political control but not institutionally biased or unlikely to engage in innovative thinking, yet no such method is available. This is a serious problem, for without a just method for resolving disagreements about probability assessments, the difference principle cannot function as a principle of justice, but
only as a constituent principle of a personal moral code, even if its other problems could be rectified. By this I mean that it can give an individual guidance on what economic policies he should support once that individual has come to a determination as to what probability assessments to apply, assuming the problem of the proper attitude toward risk can be resolved. But it cannot give society guidance on what pattern of distribution it should enforce in order to ensure that the relations between its members are just, for the “justness” of any particular pattern of distribution depends on the probabilities associated with various counterfactual scenarios, and these probabilities are disputed. At least in these circumstances, the difference principle cannot be a coherent principle of justice, in the sense that absent an acceptable method for arriving at a single set of probability assessments, it cannot be represented by an expectational utility function.

To show this, I will rely in part on the work of John Broome. In *Weighing Goods*, Broome demonstrates that the Pareto principle, which ranks the goodness of states of affairs according to people’s preferences, cannot be coherent if people disagree about the probabilities on which their preferences are based. Broome distinguishes the Pareto principle from what he calls the principle of personal good, which does not tie goodness to preferences. He says goodness implies fixed probabilities, and so the principle of personal good is coherent. But this is true only if we take goodness to relate to outcomes, as Broome does, and only to a certain kind of outcome at that. If, for example, our moral principle says, “wealth and income should be equally divided”, we can look at the world after we have attempted to implement our principle and see whether we have been successful. In deciding what to do, we may have had to rely on a probability-relative notion of what means

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84. The Pareto principle states (a) two alternatives are equally good if everyone is indifferent between them, and (b) if everyone either prefers the first of two alternatives or is indifferent between the two, and someone definitely prefers the first, then the first is better than the second. See Broome (1991, p. 152).
85. See Broome (1991, pp. 121-159).
86. The principle of personal good states (a) two alternatives are equally good if they are equally good for each person, and (b) if one alternative is at least as good as another for everyone and definitely better for someone, then it is better. See Broome (1991, p. 155).
will best achieve the end our principle recommends, but after the fact no probability-relative determinations are required. This, however, is only because the outcome in this case does not have any counterfactual notions embedded within it. In contrast, if our moral principle says, “inequalities are unjust unless they make the least advantaged better off”, we not only have to use a probability-relative notion of what means will best achieve the end our principle recommends to determine what we should do, we also have to use a probability-relative notion to determine what we have done, for whether we have done as we set out to do depends on whether the least advantaged would have been better off had we done something else, and this counterfactual determination is necessarily probability-relative. So outcomes are sometimes probability-relative too.

There is another way of saying the same thing. This is that as a result of our epistemological limitations, certain acts have no outcomes, only prospects, because outcomes must be fully determinate. Using this terminology, we preserve the idea that outcomes are not probability-relative, but at the cost of using the term “prospect” somewhat unconventionally, to describe both \textit{ex ante} possibilities and, in certain cases, \textit{ex post} results. Whatever language we use to acknowledge the situation, however, it is clear that principles which have their recommendations tied to preferences are not the only principles that can produce probability-relative results. Any principle that requires counterfactual comparisons, as the difference principle does, can be probability-relative too, for the precise nature of any counterfactual state of the world may be uncertain, and the probability associated with the existence of any particular counterfactual world may and often will be disputed. Like the Pareto principle, then, the difference principle cannot be represented by an expectational utility function without some way of ensuring that disagreements over probability assessments can be justly resolved. Or, to put it more precisely, it cannot be represented by an

\begin{footnotesize}
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  \item 88. Some Rawlsians will no doubt claim that the difference principle is a principle of the right, not of the good, and therefore Broome’s concerns about principles that focus on preferences and outcomes do not apply. But the difference principle determines what is right by comparing the consequences of certain actions in this and other possible worlds. It is therefore a principle of the good of far as Broome’s terminology is concerned.
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expectational utility function that we know is just. And if the difference principle cannot be represented by a utility function we know is just, then there is no way to cure its indeterminacy, even if we could decide what attitude toward risk justice requires in a particular situation.

Finally, even if we could find a just method for arriving at a single set of probability assessments and construct an expectational utility function that took all the relevant factors into account and assigned the correct varying relative priorities to each as changing circumstances dictated, perhaps, say, by using simultaneous equations, this would still not save the difference principle. Such a utility function would be extremely complex, too complex to be understood much less used by the average citizen. If such a utility function were grafted on to the difference principle, the difference principle would accordingly no longer be the kind of principle that would facilitate the construction and maintenance of a well-ordered society, for the justness of any particular pattern of income distribution would no longer be transparent for all to see. In short, the difference principle would fail the publicity criterion Rawls set for justice as fairness, and could no longer be the object of what Rawls calls public justification.

What this means is that it is in fact impossible to design a more determinate difference principle that would balance all the relevant factors and generate satisfactory results within the constraints that Rawls established for his principles of justice. Accordingly, we are left to balance these various factors by intuition. The entire Rawlsian project, however, was designed not only as an alternative to utilitarianism but also as an alternative to intuitionism – it aimed to “set forth the recognizably ethical criteria that account for the weights which, in our considered judgments, we think appropriate to give to the plurality of principles” that are relevant to the determination of whether a distribution is unjust. If we cannot devise a principle that allows us to take all these factors and their varying weights into account, then in the end the Rawlsian project fails, at

90. Rawls (1999a, p. 35).
least with regard to social and economic inequalities, because it still leaves critical aspects of the principle regulating such inequalities to be decided by intuition.

Instead of continuing to ignore this failure, it is time now for liberal egalitarians to come to grips with it. As Rawls himself recognizes, for a theory of distributive justice to be acceptable it must be practical — it must provide a workable mechanism for regulating economic inequality, the principles it applies must be ones that most people if not everyone can understand and publically embrace, and the degree to which society actually conforms to these public principles must be apparent for most if not all to see. Because of its indeterminacy, the difference principle fails on all three counts. What is needed is a replacement that is both more likely to support liberal egalitarian ideals and more resistant to being co-opted by the right — one that will tell us what to do given the high degree of uncertainty that necessarily surrounds economic projections and determinations, not one that tell us whether an economic policy is just only once we know what we do not and cannot ever know.

**BUT ARE NOT ALL PRINCIPLES OF JUSTICE EQUALLY INDETERMINATE?**

Before I close, there is one final argument I would like to address. This is that whatever problems arise in trying to make the difference principle determinate, these problems do not apply to the difference principle alone. In other words, any principle of decision-making we could employ to assess economic justice would face either the same or similar problems of indeterminacy. And while this does not make the difference principle any easier to apply, it at least suggests that this is not a valid criticism to be raised against it, since the available alternatives would all be subject to this criticism too.

Take, for example, luck egalitarianism — the view that we should correct for economic inequalities that are the result of bad luck but not those that are the result of choices made by those now

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disadvantaged by inequality. This view is also subject to a great deal of indeterminacy, for depending on where one draws the line between luck and choice, luck egalitarianism can prohibit almost all economic inequalities from arising, none of them, or something in between. Only in the latter situation is luck egalitarianism even within the family of liberal egalitarian theories of justice as I have defined it, for only when we take a middle view as to the difference between luck and choice does luck egalitarianism regulate inequality but not prohibit it. But drawing a principled line between luck and choice is not easy to do. To some extent, all states of affairs are the product of both luck and choice in a meaningful sense, at least assuming there is such a thing as free will. The absence of any real pure cases means that it is always possible to argue either way. Indeed, many luck egalitarians do not even attempt to engage in line-drawing here. Instead, they either ignore the problem entirely, implying that the distinction between luck and choice is obvious, or they expressly leave the question open, acknowledging that the practical effect of luck egalitarianism is contingent on how its central distinction is cashed out. And while some luck egalitarians do attempt to articulate a defensible distinction between luck and choice, even the most convincing of these arguments produced distinctions that remain very controversial. And as long as these remain controversial, the liberal version of luck egalitarianism will necessarily remain amenable, like the difference principle itself, to being hijacked by both the free market right and the strict egalitarian left.

But not all liberal egalitarian theories of justice are necessarily subject to this degree of indeterminacy. Sufficientarianism, for example — the idea that the relative difference between the poor and


93. For further discussion of the indeterminacy of luck egalitarianism, see Hurley (2003, pp. 162-166); Vallentyne (2002, at pp. 531-538); and Kymlicka (2002, pp. 75-86).

94. Note that if I am wrong about this, and luck egalitarianism is not indeterminate, this does not weaken my argument against the difference principle. On the contrary, it strengthens it, for this would mean that the indeterminacy claim would not have equal force against the difference principle’s leading liberal egalitarian competitor.
the rich does not matter as long as the poor have enough – does not suffer from the kind of radical indeterminacy I have ascribed to the difference principle and others have ascribed to luck egalitarianism too. Which is not to say that sufficientarianism does not have some indeterminacy problems of its own. The determination of how much is “enough” is no doubt somewhat controversial, and drawing a line that is neither too generous nor too stingy will accordingly be difficult, but at least the lower bound of what constitutes enough is relatively clear, for it hard to argue that people have enough if they are starving, homeless, or otherwise living below what is widely acknowledged to be a poverty line that is already set unjustly low. If tens of millions of people are currently living in poverty, as they are in the United States, it is clear that there is a great deal of work for society to do – we do not need to make predictions about the economic future or decide when a choice is really a choice and not merely the product of circumstances beyond the ability of anyone to control before we can determine that a substantial degree of redistribution is required. So while its liberal egalitarian aspirations may be comparatively weak, at least sufficientarianism is not so easily turned into a theory that justifies making no efforts at redistribution at all.

One could also derive a liberal egalitarian theory of justice that avoids the indeterminacy of having to make counterfactual comparisons or predictions about the economic future by basing it on a new, non-Marxist concept of exploitation. Suppose, for example, that such a theory began with an objective cost-of-production concept of the just price. Suppose further that this theory allowed for the pursuit of profit, but offered a principled way of limiting the pursuit of profit when this became excessive. Suppose finally that determining whether profits were excessive did not depend on some vague, indeterminate, intuitive calculation, but rather on an objective calculation of investment risk, the same kind of calculation that is made every day and published in the newspaper for every publically traded security. Such a theory would then offer a determinate way of calculating when a transaction was exploitive, and if exploitive transactions were prohibited, we could count on a

95. For an argument for this view, see Frankfurt (1987).
vast reduction in inequality. Of course, I realize that this brief description of such a theory leaves much to be cashed out and much to be explained and defended. I have provided that explanation and defense in a much longer and more detailed forthcoming work, but the limited space I have available to me now prevents me from saying much more about it here. All I can say is that if such a theory could be adequately developed and defended it would offer yet another more determinate alternative to the difference principle. I simply ask those who are skeptical that such a determinate non-Marxist theory of exploitation could exist to refrain from making a final judgment on this until that forthcoming work comes out.

Finally, and most importantly, even if all the currently available principled alternatives would encounter the same problems of indeterminacy, this would not save the difference principle. As we have seen, the indeterminacy problem can always be solved by intuition, a fact even Rawls acknowledged. While we may currently be unable to articulate the principle on which this intuition relies, this does not mean that such a principle does not exist. Trying to articulate the basis of this intuition simply requires thinking outside the box that the difference principle has tended to create. Many people remain committed to these liberal egalitarian intuitions, and as long as this is the case, the task of turning these intuitions into principles remains the most important project that liberal egalitarians can undertake.

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