

# The Importance of Recognising the Underlying Assumptions of Legal and Moral Arguments: of Law and Rawls

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It is common knowledge that many arguments about basic legal and moral questions go nowhere. One reason for this is that the parties to the dispute often start from different basic assumptions yet they are either unaware or only dimly aware that they are each proceeding from different starting points. They thus end up arguing in an endlessly inconclusive manner about the implications of their unexpressed basic assumptions rather than trying to achieve some common agreement as to the basic initial assumptions that will serve as the background of their attempt to resolve their dispute. Without such initial agreement, reaching agreement on the matter that prompted the dispute is often unobtainable. In this article I wish to illustrate this thesis through the examination of certain legal and philosophical disputes that have engaged the interest of contemporary lawyers and philosophers.

The presuppositions we bring to any legal or philosophical dispute are many and varied. At the most basic level we would need to take note of how our conceptions of the content and form of ideal arguments affect legal and moral reasoning. These are the sorts of arguments that one would address to what Chaïm Perelman,<sup>1</sup> and Jürgen Habermas<sup>2</sup> following Perelman, called ‘the universal audience’, the audience to our discourse that we presuppose when we discuss notions such as truth, justice, or the basic values of human society. Some of these conceptions about the ideal form and structure of argument might be said to be truly universal in the sense of being widely shared among people of different beliefs and cultures, such as that it is a necessary condition of legal and moral argument that no one should consciously and deliberately put forward as true what he does not

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<sup>1</sup> Ch Perelman and L Olbrechts-Tyteca, *The New Rhetoric: A Treatise of Argumentation* (J Wilkinson and P Weaver transl 1969) s 4.

<sup>2</sup> Jürgen Habermas, *Between Facts and Norms* (W Rehg transl 1996) 228.

honestly believe to be true. These preconceptions or assumptions are so widely shared that it makes little difference whether they are consciously acknowledged by the participants in legal and moral disputes. Other conceptions as to the ideal structure and form of argument, however, are not so widely shared. The universal audience that they presuppose, whether consciously or unconsciously, arises out of a particular culture or tradition. For example, in the United States and at least traditionally at common law, it would be inconceivable that the prosecution could appeal against a jury verdict of acquittal no matter how perverse. In many European countries, prosecutorial appeals against trial court acquittals are not only possible as a matter of theory but occur in actual practice.<sup>3</sup> This is now also possible in Canada in some instances.<sup>4</sup> It is furthermore possible in some European countries for a person who has been acquitted to be retried in a new proceeding in some circumstances<sup>5</sup> and the British Government has announced its intention to introduce legislation to permit such retrials in the United Kingdom in some limited circumstances.<sup>6</sup> Indeed, in a recent case

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<sup>3</sup> See, eg, German Code of Criminal Procedure, St PO s 296.

<sup>4</sup> R.S.C. c. C-46, s 676 (1985) (prosecutorial appeals allowed and subsequent retrial of acquitted defendants permitted when errors of law are made, such as misdirection of the jury).

<sup>5</sup> See, eg, German Code of Criminal Procedure, St PO s 362 (allowing new prosecutions despite prior acquittal in cases of false statements at original trial as well as subsequent admissions of guilt by the acquitted person).

<sup>6</sup> See 'Home News', *The Times* (London), Thursday, 18 July 2002 at 7. New prosecutions are to be permitted when there is 'compelling new evidence.' It is interesting to note that Article 20 of the Statute of the International Criminal Court, the double jeopardy (or *ne bis idem*) provision, does allow subsequent prosecution before the International Criminal Court when the prior proceedings were undertaken to shield the accused from criminal prosecution for crimes within the jurisdiction of the Court or were not conducted impartially and were conducted in a manner 'inconsistent with an intent to bring the person concerned to justice.' I appreciate that, because of the separate sovereignty problem, a person convicted or acquitted in one jurisdiction can be prosecuted again in another for substantially the same crime. This possibility is explicitly recognised in German law St. PO s 153c(1)(3). Under this provision a German prosecutor has the discretion to prosecute a person who has been previously tried in another country. Moreover, in a federal nation-state, such as the United States, which, unlike Germany or Canada, has separate state and federal systems of criminal law, successive prosecutions can also occur, particularly with the continued extension of federal criminal law to cover matters that at one time were considered of concern only to the states. Congress, however, has made state judgments of conviction or acquittal on the merits conclusive with regard to a number of crimes. See United States Attorneys Manual § 9-2. 031. As to all other crimes a successive federal prosecution must be based on a finding of a substantial federal interest which the state prosecution left unvindicated

the Privy Council expressly held that the values underlying the traditional common-law privilege against self-incrimination that is enshrined as an absolute in the American Constitution, although obviously important, need to be balanced against the other values implicated in the prosecution of a criminal accused.<sup>7</sup>

What accounts for such differences on such basic features of criminal justice? Why should what seems entirely fair and reasonable in one legal tradition seem completely unfair and unreasonable in another? Undoubtedly historical tradition is part of the explanation but there is probably also an underlying difference between the values encapsulated in the Bill of Rights of the United States Constitution, admittedly an Eighteenth Century constitution, and those reflected in the much more contemporary statements of basic rights that have been adopted in the last few years in other countries. The American Constitution and its Bill of Rights were addressed to and presuppose an ideal or universal audience that accepts that the purpose of such a constitution was, to quote a phrase often used by Justice William O Douglas in several variants, 'to get the government off the backs of the people and keep it off.'<sup>8</sup> And, in one of his opinions, he added that, in this respect, the American constitutional scheme was 'unlike more recent models promoting a welfare state.'<sup>9</sup> The universal or ideal audience to which more recent declarations of basic rights, such as the European Convention on Human Rights, are addressed is, in contrast, one that believes that not only certain traditional rights of the criminal accused but also even freedom of expression, while very important, are not so paramount that they cannot be restricted by the state in the name of some

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and on a belief that there is sufficient evidence to persuade an unbiased trier of fact to convict. Furthermore, any such successive prosecution must be approved by 'the appropriate Assistant Attorney General.' Ibid. State practice is sometimes more restrictive than federal law. In New York, 'any prior prosecution in any jurisdiction of the United States' bars any subsequent prosecution in the New York state courts. *N.Y. Crim Proc L s* 40.30. With the greater integration of the economic and social structure of the member states of the European Union, the issue of multiple prosecutions in different jurisdictions may likewise achieve increased prominence.

<sup>7</sup> *Brown v Stott* (2001) 187 W.L.R. 2, (P.C.) Ibid 834-38 (per Lord Bingham); ibid 864-65 (per Rt. Hon. Ian Kirkwood). The case involved the question, answered in negative, whether the provisions of Scottish Law that were in question contravened Article 6 of the European Convention for Protection of Human Rights and Fundamental Freedom, 5 *Europ. T.S.* 3, hereinafter referred to as European Convention.

<sup>8</sup> *W.E. Dubois Clubs of American v Clark* (1967) 389 U.S. 309, 318. For more citations, see Dorothy Glancey, 'Getting Government off the Backs of the People' (1981) 21 *Santa Clara Law Review* 1047.

<sup>9</sup> *Schneider v Smith* (1968) 390 U.S. 17, 25 (dissenting opinion).

other important democratic values.<sup>10</sup> In other words, the resolution of what seems to be a fairly limited question, such as whether a criminal should or should not be retried because the trier of fact has made an egregiously erroneous determination of fact or because of newly discovered evidence, like the limits of freedom of expression, ultimately really turns on the resolution of the more basic and often ignored question of the nature of the relationship of the individual to the social collective. It is with regard to this question that the real dispute lies.

This conflict between perspectives that give paramount weight to the interests of the individual and perspectives that focus more on the interests of the social collective is, of course an old one. It is the conflict between two ways of conceiving the common good. Is it, to quote Michael Oakeshott, ‘composed of the various goods that might be sought by individuals on their own account ... [or] an independent entity?’<sup>11</sup> It is a conflict, unfortunately all too often unexpressed, that plays itself out in discussions as disparate as whether affirmative action is morally permissible or whether, as in Philippa Foot<sup>12</sup> and Judith Jarvis Thomson’s<sup>13</sup> trolley problem, one can legally or morally kill one innocent person to save, say, five equally innocent persons from certain death.<sup>14</sup>

The examples that I have thus far been using for illustrative purposes have involved different conceptions and presuppositions about the nature of the moral universe or what might be called the moral world. In this article I intend to focus more attention on the presuppositions underlying our conceptions of what might loosely be called the material world. The distinction between the world of values and the material world is of course not subject to clear demarcation and, as will appear as the discussion proceeds, our preconceptions about the nature of the material world are often influenced by our conceptions of the nature of the moral world. In this article I am going to discuss a set of assumptions about the nature of the world that has tremendous importance for legal and moral reasoning. This set of assumptions, which as we shall see underlies the work not only of lawyers and judges but also of moral philosophers like John Rawls, does

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<sup>10</sup> European Convention, Art. 10(2).

<sup>11</sup> Michael Oakeshott, ‘The Masses in Representative Democracy’, reprinted in *Rationalism in Politics and Other Essays* (1991) 363, 375.

<sup>12</sup> Philippa Foot, ‘The Problem of Abortion and the Doctrine of Double Effect’, reprinted in *Virtues & Vices and other Essays in Moral Philosophy* (1968) 19, 23.

<sup>13</sup> Judith Jarvis Thomson, *The Realm of Rights* (1980) 176.

<sup>14</sup> I have discussed this subject in some detail in George C Christie, ‘The Defense of Necessity Considered from the Legal and Moral Points of View’ (1999) 48 *Duke Law Journal* 975, and again with more extensive comparative law references in George C Christie, *The Notion of An Ideal Audience in Legal Argument* (2000) 76-107.

not appear on its face to be about the normative structure of the legal and moral universes but it probably has had as much impact on legal and moral argument as any of the legal and moral preconceptions to which I have thus far briefly alluded. I am referring to the question of whether, in our legal and moral reasoning, we conceive of the social and material structure of the world we live in as static or dynamic. When asked, almost everyone, in the developed world at least, would say that of course the social and material worlds in which we live are dynamic, but, if one examines in detail the arguments used in much legal and moral reasoning, it is not at all apparent that this is, in point of fact, the case.

We are sometimes tempted to dismiss arguments for a static vision of the world as mere manoeuvring with an ulterior purpose, as for example when federal regulation of telegraph lines was attacked in 1878 on the ground that, at the time the United States Constitution was adopted in the late Eighteenth Century, the telegraph had not been invented or even conceived of; and thus its regulation by the federal government was not covered by the interstate commerce clause's grant to Congress of power to regulate commerce among the state.<sup>15</sup> In many other instances of legal and moral argument, however, the question of whether we have a dynamic or static view of the world is a real one and yet either escapes attention altogether or, for some other reason, is totally ignored. In legal argumentation, an instance that deserves more attention than it has received is the curious opinion of Justice Douglas in *Standard Oil Company of California v United States*,<sup>16</sup> decided in 1949, and often referred to as the '*Standard Stations Case*.' In that case the question presented was whether exclusive dealing arrangements between Standard Oil and independent filling station operators covering gasoline, lubricating oil, and automobile accessories violated Section 3 of the Clayton Act of 1914 which prohibits such arrangements where 'the effect [of such arrangements] ... may be to substantially lessen competition.'<sup>17</sup> The principal product covered was gasoline and the evidence showed that these arrangements covered roughly \$58,000,000 or 6.7 per cent of the total volume of gasoline sold annually in the relevant seven state area. Since no evidence was introduced as to whether there had in fact been a lessening of competition in the geographic area in question, the issue before the Court boiled down to whether, because \$58,000,000 was a substantial sum of money in 1949, it might plausibly be

<sup>15</sup> *Pensacola Tel. Co. v Western Union Tel. Co.* (1878) 96 U.S. 1. The two dissenters agreed that Congress could authorise the United States to build a telegraph line on the right of way of a railroad and it could even regulate the telegraph industry but it could not authorise a new company to establish a telegraph line in Florida when the state of Florida had already granted an exclusive franchise for 20 years to another company.

<sup>16</sup> 337 U.S. 293, 315 (1949).

<sup>17</sup> 15 U.S.C. s 14.

inferred, as the trial judge had found, that such arrangements might in fact have the effect of lessening competition.

Writing for himself and the four other Justices who comprised the majority, Justice Frankfurter concluded that the evidence was sufficient to support the inference. Justice Jackson, writing for himself and two other Justices, concluded that this evidence was inconclusive and dissented. Justice Douglas also dissented but, in the official reports, his opinion is merely labelled 'Opinion of Justice Douglas' and not as a 'Dissenting Opinion' as is the normal practice. Instead of focusing on whether Congress had a quantitative test in mind when it enacted the 'may be to substantially lessen competition' language, as did Justice Frankfurter, or focusing on the probative value of the evidence, as did Justice Jackson, Justice Douglas talked about the value of small businesses in the American social scheme and the importance of maintaining independently owned local businesses. For Douglas, it was obvious that the oil companies would respond to the Court's decision by either operating filling stations through subsidiaries or through the greater use of agency relationships which, in both cases, would spell the end of local, independently owned filling stations selling branded products of the major oil companies.<sup>18</sup>

One recalls Justice Holmes declaration in *The Path of the Law*<sup>19</sup> that judges should 'recognize their duty of weighing considerations of social advantage'<sup>20</sup> and that 'a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated.'<sup>21</sup> Douglas' opinion in the Standard Stations Case, comes the closest of any that I have ever seen to fulfilling Holmes' exhortation. Douglas' opinion may also illustrate the impracticability of taking Holmes' advice seriously. As a judge, Holmes surely did not.<sup>22</sup> Be that as it may, Douglas made it clear that, by ignoring the fact that the American economy was a dynamic one, the end result of the Court's

<sup>18</sup> My own experience as an observer over the entire period and as an active motorist since 1954 suggests that Justice Douglas was correct in his prediction, at least until the Arab oil embargo of 1973 resulted in even more drastic changes in the economics of the oil industry. At any rate neither the majority or dissenting opinions even considered the question.

<sup>19</sup> (1897) 10 *Harvard Law Review* 457.

<sup>20</sup> *Ibid* 467.

<sup>21</sup> *Ibid* 469.

<sup>22</sup> See Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 847-70; Mark Tushnet, 'The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court' (1977) 63 *Virginia Law Review* 1023-25. See also Patrick J Kelley, 'Holmes, Langdell and Formalism' (2002) 15 *Ratio Juris* 28, 43-44.

decision was likely to be a lessening of competition, the very evil the statute was designed to prevent, and not the enhancement of competition.

One might say that the inability of courts to properly take into account, and sometimes not even to understand the consequences of the dynamic nature of society, is a reason not to give courts or even quasi-judicial administrative agencies broad authority over the economy. In the famous *Red Lion*<sup>23</sup> case, for example, that was decided in 1969, the Supreme Court of the United States upheld a rule of the Federal Communications Commission that required a radio station that aired a personal attack on an individual to give that person free air time to respond to the attack. The stated basis of the decision was that the air waves were a scarce commodity and that, therefore, a degree of government regulation would be acceptable, and even perhaps desirable, that would clearly be an unconstitutional infringement of speech if applied to the print media. We all know what has happened. The number of possibly available radio and television channels has expanded literally exponentially<sup>24</sup> while the principal traditional print medium, the daily newspaper – which the Supreme Court has subsequently held can even refuse a right of reply to political candidates that they have attacked<sup>25</sup> – has become a largely monopoly business in most parts of the United States. It was only in 2000, and under judicial compulsion, that the FCC rescinded the regulation.<sup>26</sup>

The assumption of a static universe is more prominent in moral philosophy, particularly in discussions of ‘justice’. It is, for example, an important feature of John Rawls<sup>27</sup> work that requires close attention from legal scholars because not only has Rawls had a significant influence on legal theory but also, and perhaps more urgently, because the potential of Rawls’ work to affect the actual law itself cannot be ignored, as Rawls in his later work has commented more and more on the need for the legal

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<sup>23</sup> *Red Lion Broadcasting Co. v FCC* (1969) 395 U.S. 367.

<sup>24</sup> Yochai Benkler, ‘Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment’ (1998) 11 *Harvard Journal of Law and Technology* 290.

<sup>25</sup> *Miami Herald Pub. Co. v Tornillo* (1974) 418 U.S. 241.

<sup>26</sup> Because a divided Federal Communications Commission was unable, over a period of 20 years, to respond to a petition to revoke 47 C.F.R.s 47.1920, the personal attack regulation at issue in the *Red Lion*, it was finally ordered, in *Radio-Television News Directors v FCC* (D.C. Cir. 2000) 229 F. 2d 269, to rescind that provision, and the Commission did so, effective 26 October 2000. See (7 November 2000) 65 Fed. Reg. 66643-01.

<sup>27</sup> John Rawls, *A Theory of Justice* (1971) (hereinafter *A Theory of Justice*) (revised ed, 1999) (hereinafter *A Theory of Justice* (rev ed)); *Political Liberalism* (1993) (hereinafter *Political Liberalism*); *Justice as Fairness: A Restatement* (2001) (hereinafter *Justice as Fairness*).

regulation of speech and other social practices.<sup>28</sup> The late Robert Nozick<sup>29</sup> long ago pointed out that a society organised in accordance with Rawls' principles that permitted any significant degree of free exchange among its members would sooner or later, and much more likely sooner rather than later, find that its citizens had traded themselves into a situation in which increasing disparities of wealth could not easily, if at all, be justified by any improvement in the lot of the least advantaged. An example showing the inadequacy of all end-state theories of justice that Nozick found attractive involves a professional basketball player whom people so much enjoy seeing play that they are prepared to pay sufficiently large sums of money for that privilege that he can command an enormous salary.<sup>30</sup> Nozick's point was that to preserve Rawls' desired end state, namely a society in which economic inequalities are only permitted to the extent of their producing an improvement in the lot of the least advantaged members of society, would require an extensive degree of state intervention to insure the continual redistribution of wealth that would be needed to maintain the desired equilibrium.<sup>31</sup>

Rawls has never really responded to this criticism, possibly because he was prepared to accept the confiscatory rates of taxation and the constant close surveillance of economic activity to prevent tax avoidance that would be necessary to maintain the equilibrium that he seeks. In such circumstances the commitment to a relatively free society would be severely compromised. The required level of governmental intrusion into the lives of citizens might be sufficiently low to be tolerable in a static society; it could escalate to intolerable levels in a dynamic society.

The problem, particularly in a dynamic world, of state intrusion into the life of its citizens is highlighted in Rawls' later work.<sup>32</sup> As everyone is aware, Rawls is vehement on the need to regulate and limit the amount anyone can spend on political campaigns.<sup>33</sup> The rationale is that people are entitled not merely to the legal right to free political discussion but to the equal opportunity actually to exercise that right. Rawls never tells us why people like Rupert Murdoch or the late Robert Maxwell should be able, in their all too partisan newspapers, to advocate the election of one candidate rather than another but the attacked candidate should not be able to raise enough money to purchase television time or space in other news media to counteract that endorsement. If Rawls were consistent he would have to

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<sup>28</sup> See *Political Liberalism* (passim). As the discussion proceeds there will be more specific references.

<sup>29</sup> Robert Nozick, *Anarchy, State and Utopia* (1974) 183-231.

<sup>30</sup> Ibid 160-64.

<sup>31</sup> Ibid 204-31.

<sup>32</sup> See, eg, *Political Liberalism* (passim).

<sup>33</sup> Ibid 356-63.



admit that he really is not in favour of a largely unfettered and unregulated press. But, even leaving aside the Murdochs or the Maxwells or even the *New York Times*, if one takes seriously Rawls' assertion that no one has a moral entitlement to his greater talents and abilities or to his strength of character,<sup>34</sup> since these are all the result either of genetics or of nurturing, then it would follow that the state should intervene to insure that the more articulate and charismatic do not, by the exercise of those morally undeserved personal characteristics, prevent others, over time, from having a fair equality of opportunity to influence political debate. Rawls may in fact believe that a state as intrusive as the one preferred by Plato is a necessary feature of a society committed to justice as fairness. If so, he should have said it more directly, and not merely hinted at it as in the instance I have discussed or in the suggestion that the tax laws and the antitrust laws should be used to hinder or restrict a corporation's ability to advertise socially useless products.<sup>35</sup> As determined by whom, we might ask.

The dynamic nature of the real world poses additional and even more basic problems for Rawls. The core of Rawls' theory is based on the assumption that universal agreement on a comprehensive vision of the nature of the good is impossible.<sup>36</sup> Instead one should try to determine what the structure of an ideal society, or, at least, one with the level of social and economic development achieved in the western world – that is, what Rawls calls a modern democratic society<sup>37</sup> – would look like if chosen by representative people on the basis of their perception of their self-interest under certain ideal conditions.<sup>38</sup> These ideal conditions, described as the original position, include a veil of ignorance, that is to say a complete lack of knowledge on the part of the participants about their health, physical and mental abilities, and any other contingent feature of actual existence, that might influence their choice of the basic principles that are to govern their society. As is well known, Rawls concludes that rational, self-interested people deliberating under such conditions would insist on the lexical priority of personal liberty, including freedom of expression, although as we have seen Rawls' view as to what those liberties are does not exactly track the liberties enshrined in constitutions such as that of the United States. They would also insist on a society characterised by fair equality of opportunity, premised, as we have noted, on the assumption that no one has

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<sup>34</sup> *Theory of Justice* at *ibid* s 17 (100-08), and *passim* (especially *id* at 74, 300, 500). Rawls has softened his language in the revised edition but not his position, which remains the same. See *Theory of Justice* (rev ed) at 87.

<sup>35</sup> *Ibid* 364-65.

<sup>36</sup> *Ibid* 85-88. Cf. *id* at 90-94, 395-99. See also *Justice as Fairness* at 9.

<sup>37</sup> See *id* at 33-35; cf. *id* at 12-13. See also John Rawls, 'Justice as Fairness: Political not Metaphysical' (1985) 14 *Philosophy and Public Affairs* 232.

<sup>38</sup> See *Theory of Justice*, chs 1-3 (pp. 3-194).

any moral claim to the advantages he obtains from his intellectual or moral or, presumably, his physical abilities. Having achieved these two desiderata, they would then insist that the distribution of social goods like wealth should be based on the system that would be chosen by these representative people through the application of the maximin principle which, although it operates most clearly at the level of the distribution of social goods, also informs both the discussion about the nature of the political liberty to be guaranteed in the ideal state and the discussion of what the fair equality of opportunity means.<sup>39</sup>

The maximin principle does not, however, establish the lexical priority of either personal liberty or the special weight to be granted to the principle of fair equality of opportunity. That requires, as Rawls came to recognise, an assumption that the participants in the discussions taking place in the original position, who know nothing about what the lottery of life will deliver to them in the way of health and physical and mental abilities, nonetheless know that they are creating a framework for a relatively advanced society.<sup>40</sup> Whether this is a significant piercing of Rawls' veil of ignorance or not, this extra bit of knowledge presumably would lead all rational, self-interested people to place basic liberty lexically prior to any other basic social goods and, among social goods, to place fair equality of opportunity above all the remaining social goods. Without it rational, self-interested people might well choose material welfare over liberty or equality of opportunity.

The inadequacy of the maximin principle to support Rawls' thesis is most evident, however, in the core area of its application, namely in the formulation of the difference principle which is to govern the distribution of most basic social goods. Rawls' argument is of course well known. Any deviations from the equal distribution of these social goods must be justified by a showing that permitting an unequal distribution will enhance the lot of the least advantaged members of society.<sup>41</sup> This is presumably what rational, self-interested people, who know nothing about what their eventual position in society will be, would choose if they found themselves in Rawls' original position. But, as the difference principle itself implicitly acknowledges, social life is not static; it changes over time and those who choose the difference principle are obviously aware of this general fact of social life. Given this presumed knowledge about social development, what strategy would a rational, self-interested person who is guided by the maximin principle in his deliberations choose to pursue?

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<sup>39</sup> Ibid 228-34, 100-07. See also *ibid* 243-51.

<sup>40</sup> See text and accompanying citations, above n 37.

<sup>41</sup> See *eg id* at 75-83.

Rawls himself gives a hint at the choices such a person would face in his latest book, *Justice as Fairness: A Restatement*, where he actually discusses the question of why a rational, self-interested person would choose the difference principle as the basic distributive principle of social goods rather than some version of a capitalist society with a state-guaranteed minimum level of welfare for all its citizens.<sup>42</sup> His argument is not very convincing. From the position of a rational, self-interested person the choice would seem to be clear. Such a person would realise that there is an absolute limit to the downside risk, even if he is one of the few who fall into the category of the least advantaged. So the question is, given the limited downside outcome – which by the way need not be assumed to be any lower, and indeed as Rawls himself recognises might well be higher,<sup>43</sup> than the share of the least advantaged members in the same society were it governed by the difference principle – why would not such a individual, knowing with a certainty that he is unlikely to be among the least advantaged members of society, choose, as the preferable social scheme, one that would offer him a potentially greater material pay off than one organised under the difference principle? If one now takes into account that such a rational, self-interested person would also know that there is a 50 per cent probability that he would have an above-average endowment of physical and mental abilities and that therefore, if he were above average, he would be highly likely to benefit from a system which, because it is of necessity dynamic, would allow him greater opportunity to reap over time the advantages that those above-average endowments would afford him, the rational choice becomes obvious to any self-interested person, even if he uses the maximin principle to decide among possible alternatives.

Rawls gives two kinds of reasons why a rational, self-interested person would not choose a society that permitted the economic freedom and the resultant greater economic inequality that would be permitted in a guaranteed-minimum, capitalist welfare state organised on democratic principles. The first kind of reason relates to the administrative feasibility of the two alternatives under consideration. Rawls suggests that a guaranteed-minimum-welfare capitalist regime, which he believes should be characterised as an instance of a society organised on the principle of restricted utility, would suffer from indeterminacy.<sup>44</sup> Why it would be more difficult in practice to establish the guaranteed minimum than to establish who are the least advantaged, or to determine ex ante what proposed changes in distribution would or would not enhance the position of the least advantaged, is not immediately obvious. Moreover, Rawls, as we have

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<sup>42</sup> *Justice as Fairness* at 126-30.

<sup>43</sup> Ibid. See also *ibid* 137-38.

<sup>44</sup> Ibid 129.

already noted,<sup>45</sup> also argued that society should regulate and limit expenditures on ‘socially wasteful’ advertising.<sup>46</sup> Rawls seems to have felt that a democratic society could easily determine what is advertising that appeals to consumers on the basis of ‘superficial and unimportant properties’ or what should be forbidden or discouraged because it tries ‘to influence consumers preferences by presenting the firm as trustworthy through the use of slogans, eye-catching photographs, and so on.’<sup>47</sup> The supposed greater ease of making these determinations escapes me. Indeed the apparent drabness of the type of society that Rawls sets forth as the optimal one is perhaps a good reason to believe that it is not a desirable one. Be that as it may, the success of guaranteed-minimum-welfare capitalist societies in Western Europe, Canada, Australia, and New Zealand is certainly very strong evidence that establishing such minimums is not such an insurmountable problem.

The second and, to him, more important objection put forth by Rawls against a guaranteed-minimum-welfare capitalist society is that the greater the inequality of condition permitted by society the greater the resentment and the loss of self-esteem and alienation of those who enjoy lesser advantages.<sup>48</sup> Rawls believes that a society with greater disparities of income and wealth than he believes optimal would be a less-stable society,<sup>49</sup> which clearly must be one of the reasons he claims that rational, self-interested and risk-averse people would choose his system of political justice, even if it were considerably more likely that they would be materially better off under a guaranteed-minimum-welfare capitalist regime,<sup>50</sup> in which basic material welfare was guaranteed and the chances of their being among the least advantaged were quite low. To prefer Rawls’ proposal, because it promises greater social stability, however, involves the assumption that, in a dynamic world, a society which permits a greater degree of inequality than would be permitted in a society organised as Rawls wishes would necessarily generate greater alienation and resentment, even if, as Rawls himself at times seems to recognise, the maintenance of his preferred social structure would require a very intrusive and at times

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<sup>45</sup> See above n 35 and accompanying text.

<sup>46</sup> *Political Liberalism* at 365. The regulation of advertising is discussed at *ibid* 363-65.

<sup>47</sup> *Ibid* 365.

<sup>48</sup> *Justice as Fairness* at 126-32. Those more well off, Rawls believes, will have a tendency to arrogance.

<sup>49</sup> *Ibid* 127. This discussion concerns Rawls’ general objections to the principle of restricted utility as the basis for social organisation, of which a guaranteed minimum-welfare capitalist regime is one instance.

<sup>50</sup> See above n 43.

coercive state.<sup>51</sup> The history of civilisation comes as close as anything in the real world can to demonstrating the falsity of that assumption.<sup>52</sup>

Despite his protestations that universal agreement about the content of the good is unobtainable, Rawls position can only be maintained if one accepts that equality is an ultimate social good that all would accept.<sup>53</sup> Moreover, it is not equality in the abstract but a specific vision of equality that must be universally accepted. One might secure as universal an agreement as is practically possible for the proposition that equality before the law is an ultimate good. General agreement that no one is entitled to the advantages obtainable by superior abilities or talents has never yet been attained, despite massive re-education schemes, and the history of the human race suggests that it never will be. Rawls himself admits that the family is the greatest single impediment to the achievement of equality in the real world.<sup>54</sup> The fact that he shrinks from proposing a solution to what some might consider an ‘unfortunate’ social contingency speaks volumes. It is no answer that Rawls is only talking about what noumenal persons, in some Kantian sense, would choose as the ideal structure of society. After all, Rawls asks us to accept the validity of his vision of the structure of justice by taking into consideration, in our search for a reflective

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<sup>51</sup> Rawls asserts that his purpose is that of ‘ensuing the widespread ownership of productive capital (that is, education and trained skills) at the beginning of each period, all this against a background of fair assets and human equality and opportunity.’ Ibid 139. I am of course not arguing against either the widespread ownership of what Rawls calls productive capital or equality of opportunity but the means to be used to achieve these desiderata. See also above n 27 to 35 and accompanying text.

<sup>52</sup> Whatever criticisms have been made of the United States, which clearly does not approach Rawls’ ideal as closely as does a guaranteed-minimum-welfare capitalist regime, no one has suggested that it is an unstable society.

<sup>53</sup> Rawls comes close to actually taking this position when he states: ‘The least advantaged are not, if all goes well, the unfortunate and unlucky – objects of our charity and compassion, much less our pity – but those to whom reciprocity is owed as a matter of political justice among those who are free and equal citizens along with everyone else. Although they control fewer resources, they are doing their full share on terms recognized by all as mutually advantageous and consistent with everyone’s self-respect.’ Ibid 139.

<sup>54</sup> *Theory of Justice* at 500. See also id at 74, 300. In *Justice as Fairness* 162-68, Rawls discusses principles of justice that should be applied to families but he confesses that it is not clear that ‘fulfillment of these principles suffices to remedy the system’s faults.’ Ibid 168. Rawls’ suggestions only relate to establishing a more just and democratic family structure, not the ‘undeserved’ benefits of nurturing which his suggestions might only serve to accentuate.

equilibrium,<sup>55</sup> our knowledge of real people living in the real world. However we structure our thought experiments, it is we as real people, that is as members of a species that is the product of a very long period of animal evolution, who must decide what is to be the ideal structure of justice in the societies in which we live.

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<sup>55</sup> *Theory of Justice* at 48-51.