

Justice in Ideal Theory: A Refutation

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I. Introduction

Political philosophers have recently begun to take seriously methodological questions concerning what a theoretical examination of political ideals (such as freedom, equality and justice) is suppose to accomplish and how effective theorising in ideal theory is in securing those aims. Andrew Mason (2004) and G.A. Cohen (2003), for example, believe that the fundamental principles of justice are logically independent of issues of feasibility and questions about human nature. Their position contrasts sharply with political theorists like John Dunn (1990) and Joseph Carens (2000) who believe that normative theorising must be integrated with an appreciation of the empirical realities of one's society. Rather than bracket questions of feasibility and human nature, empirically-oriented political theorists believe that real, non-ideal considerations (like our historical circumstances, problems of institutional design, etc.) must be taken seriously when deriving normative theories of justice. The disagreement between those political philosophers who feel inclined to invoke highly abstract hypotheticals when deriving the principles of justice, and those political theorists who take seriously real, non-ideal considerations, is a disagreement over how *fact-sensitive* a theory of distribute justice ought to be.

Mason raises a challenge for the more empirically grounded political theorists when he asks: "what reason do we have for thinking that any adequate analysis of an

ideal such as justice must be conducted in the light of an investigation of what is feasible?” (Mason, 2004, 255). In this paper I hope to provide a compelling response to Mason’s question. I believe there is some conceptual incoherence involved in saying “This is what justice involves, but there is no way it could be implemented” (Mason, 2004, 255). This incoherence stems from the fact that a theory of social justice, and the principles of justice it endorses, must function as an adequate *guide* for our collective action. A theory of social justice that yields impotent or misguided practical prescriptions is a deficient theory of justice. If the collective aspiration to implement the conclusions of a theory would not result in any noticeable increase in the justness of one’s society, then it fails as a *normative* theory.

Liberal egalitarian theories of justice are theories that typically function at the level of ideal theory. The distinction between ideal and non-ideal theory is not given rigorous classification in the existing literature. As Mason (2004, 265) notes, this distinction is employed by John Rawls in *The Law of Peoples*. An account of justice in ideal theory must recognise “some moderately strong feasibility constraints which require it to be realistic in the best of foreseeable conditions” (Mason, 2004, 265). Rawls describes ideal theory as being *realistically utopian*. Political philosophy is realistically utopian “when it extends what are ordinarily thought of as limits of practical political possibility” (Rawls, 1999, 6). This contrasts with non-ideal theory, which is concerned with problems of non-compliance or unfavourable (historical, social or economic) conditions.

In this paper I argue that theorising about justice at the level of ideal theory is inherently flawed and thus has impoverished liberal egalitarianism. Any theoretical

analysis that takes place at the level of ideal theory cannot take seriously the question of what is possible in the *best* possible conditions (or what constitutes a “realistic” utopia) as a determination of what constitutes the best possible conditions requires a thorough examination of non-ideal considerations (e.g. the facts of non-compliance, scarcity, indeterminacy, human vulnerability and fallibility, etc.). More specifically, liberal egalitarians who function at the level of ideal theory adopt a *cost-blind* approach to rights and a narrow view of possible human misfortune. The former issue leads liberal egalitarians to give priority to a serially ordered principle of equal basic liberties (Rawls, 1971, 1993) or to treat rights as “trumps” (Dworkin, 1978); and the former to a stringent prioritarian principle (Rawls’s difference principle) or luck egalitarianism. Taken together, the cost-blind approach to rights, coupled with the narrow view of human misfortune, mean the liberal egalitarian theories of justice cannot address the issue of tradeoffs that inevitably arises in real non-ideal societies that face the fact of scarcity. This makes liberal egalitarianism an ineffective theory of social justice.

In the concluding section of the paper I outline a general methodology intended to enhance the transformative potential of liberal egalitarianism. I call this method *practical* political philosophy. Doing practical political philosophy requires philosophers to engage in a *self-conscious* dialogue not only with other philosophers, but also with executives, legislatures, courts and other public administrators. In order to facilitate this self-conscious dialogue I recommend that political philosophers aspire to satisfy what Robert Goodin (2003) calls “deliberation from within”. Deliberating from within will help liberal egalitarians better understand why liberalism has been assailed by its many critics, including communitarians, democratic theorists, cosmopolitans,

environmentalists, multiculturalists and feminists. So, at a *minimum*, liberals will be better prepared to defend liberal egalitarianism against its many critics if they defend a public philosophy that takes non-ideal theory seriously. Furthermore, engaging in practical political philosophy will ensure that the theoretical analysis developed by liberal egalitarians will be sufficiently fact-sensitive so that their prescriptions can serve as a guide to our collective action in the real world. And this will make liberal egalitarianism a more defensible theory of social justice.

II. A Parody of the Original Position

Consider the following hypothetical scenario. Given the growing strains on the existing airports in London, British policy makers decide that a new airport should be created. They have grand ambitions for this airport and want it to be better than either Heathrow or Gatwick. These policy makers commission Dave, an aviation expert, to come up with a list of the “fundamental principles” that should guide the planning and construction of this new and improved airport.

In order to clarify what the ideal airport would look like Dave invokes a number of simplifying assumptions in order to derive his normative guidelines concerning how the airport should be designed. He begins by making the following assumptions which he believes are necessary to ensure that he functions at the level of *ideal theory*:

1. Assume that concerns of airplane safety, noise and pollution do not arise. So no airplane ever has a malfunction and no citizens will complain about the inconvenience of having an airport in their neighbourhood.
2. Assume that society is a closed society and thus all flights will be domestic flights.
3. Assume that all passengers who will use the airport will be “normal functioning” passengers. That is, no passengers will have physical disabilities that will limit their mobility of getting around the airport or boarding and leaving airplanes.

4. Assume that issues of domestic security do not arise. So there are no terrorists or criminals and thus the airport does not need to worry about the costs associated with extensive check-in procedures.
5. Assume that there will always be good weather so that flights will not be delayed or cancelled due to weather.

Having invoked these simplifying assumptions, Dave begins to reflect on what he thinks the ideal airport should achieve. He rejects the utilitarian ethic of company directors who only care about maximising profits. Dave adopts an *impartial, contractual* approach to his project. He imagines what the *representative passenger* would want from the airport if they were all equal and placed behind a “veil of ignorance”. This veil denies them knowledge about things like their preference for the kinds of restaurants and shops available in the airport, whether they will be travelling with or without children, the distance they will be flying, etc. From behind this veil of ignorance passengers only know that they seek to maximise their *airport primary goods*. These goods include safety, leaving on time and having their baggage arrive safely and promptly at the correct destination.

Dave further surmises that *priority rules* govern these primary goods and thus he concludes that the following three, *serially ordered*, principles should govern the design and construction of the new airport:

Principle 1: All persons (both passengers and flight crew) have the same indefeasible claim to safety. (*equal basic safety principle*)

Principle 2: Equal opportunity for boarding your flight promptly and departing on time. (*principle of fair equality of opportunity*)

Principle 3: We should maximize the promptness of getting the last pieces of baggage unloaded from an airplane to the baggage reclaim area. (*maximin baggage reclaim principle*)

Imagine now how the policy experts who solicited Dave's advice will react to the normative conclusions of Dave's ideal theorising. Will Dave's armchair theorising be of any use for planning and designing a *real* airport? An airport that will be subject to a variety of concerns that arise in the non-ideal world. These concerns range from safety and pollution to congestion and accessibility. Our policy makers will no doubt dismiss Dave's normative conclusions as being unrealistic and naïve as policy makers will have to struggle with a vast array of issues which Dave's ideal theorising ignores. It is easy to support Dave's three principles if, for example, airport and airplane security are not real concerns or if the congestion created by international flights did not arise. But of course in the real world these things do happen. Air traffic controllers can make mistakes, poor weather affects visibility and causes delays, the volume of international flights increases congestion, security measures delay boarding procedures and may delay flights, and the varying physical abilities of passengers impact the accessibility of an airport. There are countless complications that arise in the real world that must be taken into consideration when deciding what would constitute the best possible airport we can make. Tradeoffs must be made between safety and concerns of efficiency (e.g. costs) and feasibility (e.g. given that humans are *fallible* and that many things, like the weather, are *indeterminate*). To bracket or ignore the constraints of the real world is to obstruct, rather than clarify, how we should theorise about what the ideal airport would be. Perhaps Dave might protest against my criticisms by retorting that he was simply describing what an airport would look like in the "best foreseeable conditions". But if Dave knew anything about the empirical realities of airport transportation, he would have realised that he transcended real world considerations too often and too easily.

If it is wrong to invoke Dave's method of ideal theorising about airports, is it not also inappropriate to invoke similar ideal theorising about questions of distributive justice? I believe that it is. Like Dave, John Rawls makes a number of simplifying assumptions (e.g. society is a *closed system* and consists of *normal, fully cooperating* members) that severely limit the viability of "justice as fairness" as a theory of distributive justice. The publication of *A Theory of Justice* in 1971 sparked a renewed interest in political philosophy and Rawls's theory remains the most influential theory of distributive justice in contemporary debates. "Justice as fairness" has been the subject of intense debate, and criticism of Rawls's theory has come from theorists of almost every stripe. From egalitarians and libertarians to feminists, communitarians, cosmopolitans, and multiculturalists, it seems that everyone has an axe to grind with Rawls and grinding that axe often helps his opponents gain support for their alternative theoretical position. The most compelling of these criticisms of Rawls's theory stem, I believe, from deficiencies which follow from the fact that Rawls functions at the level of ideal theory.¹

¹ Rawls tries to accommodate non-ideal considerations more seriously in his later work. In *Political Liberalism*, for example, Rawls defends a *political conception* of justice which emphasises the need for stability and an overlapping consensus. Rawls's extension of his theory to global justice in *The Law of Peoples* is perhaps the best example of how, over the course of almost half a century, Rawls slowly began to shift from ideal to non-ideal theory. Though he never explicitly described his shift in such terms, it is implied by his aspiration to defend a theory that is *realistically utopian*. Given the simplifying assumptions Rawls makes in his earlier ideal theorising, such as society being a *closed system* consisting of *normal, fully cooperating* members, I think it is fair to say that Rawls often transcended the limits of practical political philosophy too easily. Had he resisted the temptation to bracket the complexities of non-ideal theory he might have defended a political philosophy that satisfied the requirements of a realistic utopia. Perhaps the clearest evidence of the fact that Rawls's political constructivism is not noticeably more fact-sensitive than his earlier theory is that the two principles of justice endorsed in both *A Theory of Justice* and *Political Liberalism* are (roughly) the same principles. The only substantive modification Rawls makes to his later theory is the

Communitarians, for example, complain that liberals like Rawls invoke an “unencumbered conception” of the self and that this inspires a neutralist public philosophy that undermines community and the importance of civic virtue. Feminists take issue with Rawls’s inattention to gender inequalities; whilst multiculturalists charge that liberals like Rawls ignore the fact that modern liberal societies are multicultural. Democratic theorists of various stripes have also taken issue with the idealising assumptions of contemporary theories of distributive justice. Jeremy Waldron (1999) criticises justice theorists for failing to take seriously what he calls the “circumstances of politics”. Paralleling Hume’s discussion of the circumstances of justice, Waldron argues that “the need for a common course of action would not give rise to politics as we know it if there was not at least the potential for disagreement about what the concerted course of action should be” (1999, 102). Waldron criticises justice theorists who treat rights as *trumps*. As Waldron puts it, “we cannot play trumps if we disagree about the suits” (1999, 12). The methodological insight of Waldron’s critique of normative political philosophy is that theorising about justice is itself only *part* of the task of the political philosopher. The second part is to theorise about politics. Because most work in political philosophy focuses exclusively on the first task it tends to be work that, in Waldron’s words, is of the following sort- “I-expect-you’d-all-like-to-know-what-I-would-do-if-I-ruled-the-world” (1999, 1).

Ian Shapiro echoes Waldron’s concern and claims that many political philosophers “appear to take it for granted that there is a correct answer to the question

justification of “justice as fairness”. But Rawls does not alter much of the content of the theory.

what principles of justice we ought to affirm; that Rawls, Ronald Dworkin, Robert Nozick, Amartya Sen, or someone else will eventually get it right” (1999, 3). But if the demands of justice can be established by simply invoking the principles chosen in the original position or those entailed by equality of resources, then what is the role of democratic politics? It seems that the latter is *superfluous*. By theorising about justice at the level of ideal theory it is easy to gloss over the non-ideal considerations that arise in the circumstances of politics. But in doing so political philosophers unjustifiably place too much faith in their own armchair theorising.

In addition to ignoring (or at least downplaying) the importance of democracy (as well as community, cultural diversity, patriarchy, the environment, globalization, global poverty, etc.) perhaps the most pressing failure of Rawlsian ideal theorising is that it fails to take *scarcity* seriously. This is a particularly troubling problem for Rawls’s theory because he serially orders his two principles of justice. Such ordering yields impotent prescriptions for real societies that face conditions of scarcity. Defenders of Rawls might reply that such a charge is misplaced as Rawls acknowledges the so-called “circumstances of justice”. These include the fact of *moderate scarcity*. Following David Hume, Rawls argues that justice is only necessary and possible when society falls between the extremes of severe scarcity and abundance of goods. Whilst it is true that Rawls does mention moderate scarcity this fact does not figure into the deliberation of the parties in the original position and Rawls makes a number of idealising assumptions (e.g. full compliance, society is closed and filled with healthy people) that obscure how constraining scarcity will be on fulfilling the demands of his two principles of justice.

This becomes most evident if we consider some of the comments Rawls makes concerning maximin in *Justice as Fairness: A Restatement*.

III. Maximin and the Cost-Blind Approach to Rights

Rawls violates the assumption of moderate scarcity when he explains why the contracting parties would choose his two principles of justice over the principle of utility. Let me expand on this particular critique for it illustrates the problem with functioning at the level of ideal theory. By assuming full compliance Rawls's idealising assumptions collapse into what Onora O'Neill (1966, 41) calls "idealization". Idealization involves making claims that are actually false, in order to simplify an argument. Rawls engages in idealization when he argues that the maximin strategy would lead the parties in the original position to endorse his two serially ordered principles of justice over the principle of utility.

I will assume that most of my readership are familiar with the basic details of Rawls's original position so I shall not rehearse, in any great detail, those points here. The parties in the original position are placed behind the "veil of ignorance" and are presented with a shortlist of traditional conceptions of justice. They must decide which of these will secure them the largest share of social primary goods (rights and liberties, powers and opportunities, income and wealth and self-respect). Rawls believes that it is rational for the parties to choose his two principles of justice over the rival principles. He defends this claim by arguing that the two principles of justice are the *maximin solution* to the problem of social justice. "The maximin rule tells us to rank alternatives by their worst possible outcomes: we are to adopt the alternative the worst outcome of which is superior to the worst outcomes of the others" (Rawls, 1999b, 133). Given that the parties

do not know what their social position will be, or what their level of natural assets will be, it is rational, Rawls claims, for them to adopt the conservative attitude expressed by this rule. The maximin rule is “a useful heuristic rule of thumb for the parties to use to organize their deliberations” (Rawls, 2001, 97 note 19).

The maximin rule, argues Rawls, instructs the parties to choose the two principles of justice for they guarantee the highest minimum payoff. Rawls believes that utilitarianism permits the interests of some to be sacrificed for the greater good of others and thus he argues that the principle of utility would not be chosen as it does not satisfy the requirements of maximin. Some have questioned whether it is rational for the parties to adopt such a conservative stance. John Harsanyi (1975), for example, argues that the maximin principle has some very irrational conclusions. But let us put these issues aside as my point is to show that Rawls falsely assumes that the rights entailed in the equal basic liberties principle are costless “negative” rights. Hence why he believes that the first principle of justice can be given an absolute priority over the principle of fair equality of opportunity and the difference principle.

Without knowing the probability of being talented or born into a favourable social position, Rawls maintains that it is rational to assume you have the least desirable genetic endowments² and family position. A crucial assumption that Rawls slips in in his discussion of maximin is that the contracting parties are deliberating about what their place would be within a society that exists in the circumstances of justice under *reasonably favourable conditions*. Elaborating on what the latter entails Rawls claims

² This is qualified, however, by Rawls’s assumption that all persons fall within the normal range of functioning. So we should assume that the least endowed possess a decent minimum level of natural primary goods (e.g. health and vigor).

that they are the “conditions that, provided the political will exists, make a constitutional regime possible”.³ Conditions such as sufficient economic and technological development, sufficient natural resources and an educated citizenry. But this assumption is a blatant violation of one of the considerations blocked by the veil of ignorance. Namely, how rich or poor our society is. Now perhaps Rawls thinks that even poor societies could, if only they had the political will, become liberal democracies like America. But this assumption is simply baffling.⁴ It really demonstrates how localised and insular Rawls’s discussion of social justice is. How many of the world’s non-democratic countries are non-democratic *simply* because they lack the political will to become a constitutional democracy? It is more than just a coincidence that the world’s most stable constitutional democracies are also those that enjoy the highest levels of economic and technological development, are rich in resources and have an educated citizenry.

The assumption that these favourable conditions will hold in our society violates the requirements of the maximin rule. This rule requires us to rank alternatives by their worst possible outcomes. The worst possible outcome would be to be the least advantaged in the least advantaged society that satisfies the circumstances of justice. Just as we cannot assume that we will be born with “reasonably favourable genetic endowments” or into a family with “reasonably favourable social advantages”, nor can

³ Rawls 2001, p. 101.

⁴ Though this assumption perhaps helps explain why some were naïve enough to believe that simply removing Saddam Hussein from power would be sufficient for establishing a democratic Iraq. The many challenges of re-building Iraq demonstrate that numerous considerations, besides simply lacking the “political will”, can impede the path to a stable constitutional democracy. Perhaps the Bush administration has been reading too much political philosophy and not enough political sociology!

we assume that we will be born into a society that has the reasonably favourable conditions stipulated by Rawls. One of the things the parties in the original position do not know is what the particular circumstances of their society (e.g. its economic or political situation) will be. We do not know how rich or poor our society will be. So Rawls is not justified in claiming that the parties can assume that whatever society they end up in it will be one in which the reasonably favourable conditions that make a constitutional democracy possible exist. Behind the veil of ignorance we do not know what the probability of being born into an affluent country is, just as we do not know what the probability of being born into an affluent family is.

We can thus make a distinction between what I call the *Lax Maximin Rule* and the *Stringent Maximin Rule*. The former is adopted by Rawls and requires us to assume that we will be members of the least advantaged group in a society that exists in reasonably favourable conditions. The Stringent Maximin Rule requires us to assume that we will be the least advantaged in the least advantaged society. We can assume that our society will satisfy the circumstances of justice and thus social cooperation is better than the non-cooperative baseline of a Hobbesian state of nature. But we cannot assume, as Rawls does, that things will be more favourable than satisfying just this minimal condition.

Once we emphasize the point that the parties do not know what the probabilities of being born into an affluent society are and thus that they should, as a matter of consistency, adopt the Stringent Maximin Rule, new considerations will enter into their deliberations. Considerations concerning how scarce resources could be best used to maximise the social primary goods of the least advantaged in a society with budget constraints. This shifts things in favour of the principle of utility over Rawls's two

principles of justice as the latter does not take seriously the issue of tradeoffs in levels of rights protection. Such tradeoffs are necessary in any society but especially in those that are less affluent than a country like contemporary America.

The parties in the original position, argues Rawls, know commonsense facts of human psychology and political sociology (Rawls, 2001, 101). One of the basic facts of political sociology is that *rights have costs*. The fact that rights cost money is a simple truism but something many of us tend to forget. The basic rights enshrined in the American Constitution have budgetary costs. Here are some of the staggering costs, for the year 2002 alone, of funding the various agencies necessary for protecting negative rights in America:

Defence: 327.8 billion dollars

Homeland Security: 15.7 billion dollars

Health and Human Services: 59.5 billion dollars

Education: 48.5 billion dollars

Justice: 18.6 billion dollars

Environmental Protection Agency: 7.9 billion dollars⁵

Reflecting on the budget costs of protecting various rights is something which the parties in the original position must contemplate as they decide whether the principle of utility or Rawls's two principles of justice will maximise the minimum. Assuming, as maximin requires them to, they will be the least advantaged members of the least advantaged society, they will know that it is *inevitable* that trade-offs in rights protection

⁵ These figures are taken from the *Budget of the United States: Fiscal Year 2004* available at: <http://w3.access.gpo.gov/usbudget/fy2004/budget.html>

must occur. With only limited revenues available the state will not be able to make rights absolute in the way Rawls's two principles presuppose.

Faced with these kinds of considerations, which are ones the contracting parties must reflect upon, is it rational for them to opt for Rawls's two principles of justice? No. The equal basic liberties principle, for example, tells us that individual rights should take a priority over concerns of equal opportunity and socio-economic inequalities. But Rawls assumes that these negative rights are *costless*. That any society that exists in the circumstances of justice under reasonably favourable conditions could, if it just had the political will, *guarantee* the protection of these rights. This is a common (but mistaken) assumption among both liberals and libertarians. Rawls assumes that negative rights only require the state to *refrain from interference* and thus satisfying the requirements of this principle will not have any (or at least no significant) costs so we can then move on to the second principle of justice to address positive state action, like providing adequate education. But "taking rights seriously means taking scarcity seriously" (Holmes and Sunstein, 1999, 94). Rawls's two principles of justice do not do this. They give a priority to protecting rights and liberties over fair equality of opportunity and the difference principle but they do not deal with the issue of *prioritising* between different levels of rights protection. Furthermore, pursuing the former aim could be an never-ending aim. We could pump all our available wealth into making our streets and borders more secure, better monitoring our police force, ensuring food and drugs are safe for human consumption, etc. The first principle of justice is thus an impotent principle of justice. The parties in the original position would not choose such a principle over the principle of utility.

Unlike Rawls's two principles of justice, the principle of utility is designed to tackle the issue of which trade-offs in rights protection must be made. Rawls of course sees this as its main shortcoming. Recall that for Rawls, justice denies that the loss of freedom for some is made right by a greater good shared by others. But in our deliberations about the maximin strategy we must assume that some loss of freedom is inevitable. We do not know if we will be born into an affluent country that has the (endless?) supply of resources necessary to satisfy the requirements of the equal basic liberties principle. We must assume that we will be born into a society that is rich enough to make pursuing social cooperation better than non-cooperation, but not so well-off that the rights of all can be guaranteed. Would we choose utilitarianism in this scenario? I think it is more rational to choose utilitarianism than the two principles of justice in such circumstances. Of course there is no guarantee that your rights will be protected in this utilitarian society. The same is true of a society governed by Rawls's two principles of justice. But the utilitarian society will be able to make some progress towards prioritising among the different levels of rights protection the state could offer so that the trade-offs necessary to maximise utility can be made. It will invest scarce resources in protecting those rights most essential to human welfare rather than simply saying that all rights are absolute.

Once we follow the conservative reasoning of the maximin strategy through, and reflect upon the commonsense facts of political sociology, we realise that no principle can *guarantee* the rights of minorities (or the rights of anyone). And this is precisely why we should reject Rawls's priority rules which give an absolute priority to liberty. Such a strategy presumes rights are costless. But rights have costs; vast amounts of revenue are

needed to effectively legally enforce these rights. Rawls's idealising assumptions (e.g. society is closed and there is full compliance) explain why he believes that the equal basic liberties principle can be guaranteed. Namely, that legally enforcing these rights only necessitates that the state refrain from interference. By ignoring the realities of non-compliance and scarcity of resources, Rawls's theory of "justice as fairness" insulates itself from the most pressing concerns that face every real society. The assumption that protecting the negative rights will have not costs might be true if we lived in a society with full compliance and abundance of resources. But such an assumption goes beyond what ideal theory is suppose to presuppose- namely, that we be *realistic* about what the best of foreseeable conditions are. The best foreseeable conditions do not include the possibility of living in a society of saints or transcending moderate scarcity. Such conditions would violate Hume's circumstances of justice. We would not need justice if this kind of utopian society were possible.

A number of other simplifying assumptions that Rawls makes in his account of justice demonstrate that his abstraction collapses into idealization. Rawls (1999b, 83) invokes the assumption that everyone has physical needs and psychological capacities within the normal range, for example, when he attempts to identify who the least advantaged are. The difference principle requires the basic structure of society to be organized so that social and economic inequalities are to the greatest benefit of the least advantaged. But if all citizens are within the normal range of functioning then we would not need to worry about healthcare concerns that arise in a world where there are accidents and disease. Is such a fact one that we can ignore because, in ideal theory, we are concerned with what is required in the best possible scenario? No. No society (not

even a realistic utopia) can transcend the fact of human vulnerability. The idea that we can derive the principles of justice by simply ignoring or postponing such facts is severely misguided.

Rawls's reason for making this assumption is not that issues of just healthcare fall outside the scope of justice, rather they should be dealt with "at the legislative stage when the prevalence and kinds of these misfortunes are known and the costs of treating them can be ascertained and balanced along with total government expenditure" (Rawls, 1996, 184). But once Rawls's legislators have the information about the prevalence of these misfortunes and the costs of treating them, they will need some *criteria* by which to make a judgment about how much should be spent on healthcare. If the fundamental principles of justice that are suppose to help guide their deliberations are ones that are derived for ideal societies that do not have people in need of medical treatment, then such a theory will be of no use to them. The principles of justice will be *ineffective* in helping them determine how much they should spend on healthcare.

Rawls's assumption that society is a closed system also results in further idealizations. This is evident when one considers one of the central institutional prescriptions he advocates in the paperback edition of *Political Liberalism*. This is the prescription that society should take the role as employer of last resort through general or local government, or other social and economic policies (Rawls, 1996, lix). This prescription might sound like a good idea when we assume that our society is the Rawlsian closed society (*and* a society consisting of fully compliant, healthy citizens). But the case for such a prescription is much harder to make in a society whose economy is subject to the pressures of a competitive global economy. Rawls assumes that 100%

employment is something that can be attained in the best foreseeable circumstances. But this is an enormous empirical assumption. It is arguably an easy assumption to make if one assumes society is closed but it is a very contentious empirical claim to make about real, open societies. Ballooning deficits, the migration of unskilled (and illegal) workers, coupled with the pressures for remaining competitive in a global economy, all pose formidable obstacles to the aim of having 100% employment. Nothing in Rawls's account of justice addresses these non-ideal considerations. And thus the institutional prescriptions he advocates are of little use when applied to real societies. Like Rawls's assumption that no major obstacles face legally enforcing constitutional rights (except having the political will), the idea that the only obstacle facing 100% employment is the political will to make this a reality is naïve. Contemporary political disagreements are largely disagreements over how to *best achieve* such an aim, rather than over whether such an aim is itself desirable. Neither American President George W. Bush nor Democratic candidate John Kerry would object to the idea that being employed is crucial for achieving self-respect, but the former believes that the best way of promoting job-growth in America is through tax cuts for the wealthy whilst the latter believes that preventing the outsourcing of jobs is the more appropriate tactic. So there is fundamental disagreement about what is possible, though one might retort that this disagreement is not one that concerns what is possible in the *best* conditions. But how confident should political philosophers who engage in ideal theorizing be in their judgment that they know what is feasible in the best possible conditions? I think we should be very modest about such judgments as they will rely on large, contentious empirical assumptions. Assumptions that one does not have to make explicit (let alone defend) if one can simply

say “I am talking about justice in ideal theory”. But such assumptions will receive the attention they deserve if one explicitly functions at the level of non-ideal theory.

IV. Dworkin and Equality of Resources

In the early 1980’s Ronald Dworkin (1981, 1981b) published a series of influential articles on equality. These two articles now form part of Dworkin’s recent book entitled *Sovereign Virtue*. Dworkin’s theory is in many respects an attempt to improve upon Rawls’s theory. His account of “equality of resources” attempts to take seriously the concern for mitigating natural inequalities (i.e. handicaps) and holding people responsible for their choices. Dworkin’s defence of equality has given rise to the position Elizabeth Anderson (1999) calls “luck egalitarianism”.⁶ Luck egalitarians construct their theories around what is called the *choice/chance* (or choice/circumstances) distinction. “People’s fates are determined by their choices and their circumstances” (Dworkin, 2000, 322) and this must remain, argue luck egalitarians, a fundamental insight when considering what constitutes a just distribution. Luck egalitarians disagree on exactly what should be equalised (e.g. resources, opportunity for welfare, etc.) but they believe that inequalities in the advantages that people enjoy are just if they derive from the choices people have voluntarily made, but that inequalities deriving from unchosen features of people’s circumstances are unjust. Luck egalitarians also function at the level of ideal theory and thus are guilty of idealization. And this results in impotent or misguided normative prescriptions.

⁶ Those who endorse this position include, among others, Ronald Dworkin (2000), Richard Arneson (1989), G.A. Cohen (1989) and Philippe Van Parijs (1995).

Dworkin's egalitarianism is premised on two fundamental principles of ethical individualism- the principle of equal importance and the principle of special responsibility. These principles maintain the following:

Principle of Equal Importance: It is important, from an objective point of view, that human lives be successful rather than wasted, and this is equally important, from an objective point of view, for each human life.

Principle of Special Responsibility: though we must all recognise the equal objective importance of the success of a human life, one person has a special and final responsibility for that success- the person whose life it is. (Dworkin, 2000, 5)

Dworkin's attempt to merge the two fundamental principles of ethical individualism are most stark in his hypothetical tale of shipwrecked survivors who are washed up on a desert island that has abundant resources. I will assume that most of my readers are familiar with the basic details of Dworkin's tale. My criticism focuses on the normative prescriptions that Dworkin believes can be derived from his *hypothetical insurance scheme*.

After telling the story about the hypothetical auction, the challenge for Dworkin is translating how this applies to real, non-ideal societies. In the real world, he argues, there is a need for taxation and redistribution. Income tax is a device society can use to neutralise the effects of handicaps and differential talents. A tax system, admits Dworkin, can only roughly approximate the results of the insurance scheme and will not achieve a truly ambition-sensitive/endowment insensitive distribution. But the problems facing Dworkin's theory are more formidable than the concern that it is only a second-best solution. Dworkin assumes that the appropriate level of public funding for healthcare and welfare can be determined by asking how much people would insure against these misfortunes in the hypothetical auction (where people do not know what

their risk is of faring poorly in natural endowments). But this makes a number of idealizations that obscure our liberal and prioritarian commitments. Firstly, we must ask why Dworkin's insurance scheme is limited to only these *two* forms of misfortune? Citizens of even affluent liberal democracies are vulnerable to numerous forms of misfortune beyond handicaps and differential talents. We face risks of misfortune from crime, food preparation and sanitation, terrorist attack, natural disasters, injury at work, pollution, etc. So if Dworkin is to utilise the insurance scheme as the model for determining the appropriate level of state provisions then we must add protection against *all* forms of brute luck disadvantage to the list of things we could insure against. Like Rawls, Dworkin assumes that protecting the equal basic liberties of all will be costless, hence why he is only concerned with the costs of healthcare and welfare. But this assumption is mistaken. Rights cost money. Legally enforcing any right (e.g. protecting property, security of the person, education, etc.) will mean that numerous strains will be placed on the funds available for promoting the aims of healthcare and welfare. So the question "How many of your 100 clam shells would you spend insuring against disease, illness, (brute luck) accidents and unemployment" must be extended to something like the following:

Non-ideal Insurance Scheme (or Real Politics!): How much would you be willing to spend on insurance to mitigate the misfortunes of disease, illness, (brute luck) accidents, unemployment, crime, terrorism, natural disasters (hurricanes, floods, famine, etc.), injury at work, and every other conceivable misfortune that citizens could face.

Dworkin is not justified in limiting his insurance scheme to the two brute luck considerations he limits himself to (i.e. handicaps and differential talents). Furthermore, his discussion of healthcare and welfare ignores many other complex considerations that

arise in real life. Consider, for instance, his discussion of welfare reform in *Sovereign Virtue*. Dworkin's hypothetical unemployment insurance scheme does not provide a definitive answer to the question of what welfare program real societies should adopt but it does "bracket a range of welfare programs that a reasonable person or legislature might think required by the twin principles that people's lives are of equal importance and that each person has a responsibility to take control of his own life" (Dworkin, 2000, 340). In particular, Dworkin believes that "a welfare scheme with no cutoff, that either may or must provide training and job assistance, and that conditions compensation on good-faith endeavor to find employment, is preferable either to a more severe or a more generous program" (2000, 340).

But one may reasonably wonder how Dworkin comes to the conclusion that equality precludes cutting off welfare benefits as such a measure might be seen as a blatant violation of Dworkin's principle of special responsibility. Dworkin anticipates this response and argues that conservatives who maintain that long-term unemployment is the result of work-aversion or other negative traits (such as laziness) overestimate the extent to which personality accounts for these things. The conservative argument relies on predictive judgements about the motivational and behavioural consequences of welfare (e.g. that welfare perpetuates a culture of dependency). Rather than attempt to substantiate the claim that the factual and predicative judgements of the conservative argument are false, Dworkin simply claims that his competing welfare strategy does not get entangled in these controversial psychological presumptions. But this response to the conservative argument is unsatisfactory because Dworkin's hypothetical unemployment insurance tale is bound to get just as entangled in these issues. Consider the following

passage in which Dworkin asks us to imagine what unemployment insurance people in contemporary America would be willing to buy.

But we might nevertheless capitalize on the imaginary [unemployment insurance] exercise by asking what unemployment insurance people with a representative mixture of the tastes and ambitions most Americans have... would buy if they had the wealth that is average among us and were acting prudently. There is no single right answer, I agree, to hypothetical questions like that one. Which insurance opportunities people would be offered, and which of these they would take up, would depend on hosts of contingencies and market and personal decisions that we can sensibly imagine in different ways. But if we could construct a narrow range of unemployment insurance policies such that it is plausible to assume that almost every American who was acting rationally would buy a policy within that range, whatever other insurance he added to it, we could design the core structure of an eminently defensible welfare program based on that information. (Dworkin, 2000, 333)

If many Americans believe (as no doubt at least some do) that long-term unemployment *is* mostly a case of individual choice and not circumstances beyond their control, then why should we believe Dworkin's claim that the insurance scheme would produce a narrow range of unemployment policies that precluded those that cut benefits off after a few years of receiving benefits? Whether or not it would be prudent to opt for policies that have no limit on welfare benefits will depend on what we think of the controversial psychological presumptions Dworkin thinks his approach can avoid. Without providing a more conclusive argument as to why we should not ascribe more personal responsibility to the issue of unemployment, Dworkin's conclusions for welfare reform are unpersuasive. Theorising about what people would choose in ideal theory does not dispense with the difficult factual and predictive judgements about the motivational and behavioural consequences of welfare. So once again ideal theory obstructs, rather than clarifies, the particular stakes involved in fundamental questions about justice.

The charge that the Dworkinian insurance model obstructs our prioritarian commitments is evident in the proposal put forth by Justice Burley (2000) in “The Price of Eggs: Who Should Bear the Cost of Fertility Treatments”. Burley argues, via recourse to Dworkin’s theory of equality, “that justice demands that [infertile] individuals be compensated for all or part of the costs of the assisted conception techniques that they undergo” (2000, 129). Burley believes the Dworkinian approach to justice is attractive because it is an alternative to needs-based approaches to healthcare which get drawn into a debate about what our “fundamental needs” are. The needs-based approach is typically viewed as being opposed to state-funding of assisted conception techniques because infertile individuals are not at risk of *physical* harm if they do not undergo such treatments. The Dworkinian model only requires us to determine if infertility counts as a deficit in personal resource holding (i.e. a handicap). Burley (2000, 141) argues that two conditions must be satisfied in order for fertility to count as a handicap: (1) the infertile person must envy the capacity of others to bear genetically related offspring and (2) the deficit in personal resources at issue must not be traceable to her tastes of choices. After stating the case for why these two conditions are satisfied in the case of infertility, Burley remarks:

Recall that only those handicaps individuals in the aggregate would have insured against will be compensated. In the hypothetical insurance scheme people would have knowledge of the actual incidence of this handicap. They would know that 20 per cent of all couples experience infertility, and that up to 10 per cent of this number will not conceive other than through artificial means... I contend that in this situation the average individual would deem having genetically related offspring a constitutive element of leading a good life... It is therefore plausible to insist that individuals in the aggregate would stipulate infertility as one handicap that they were particularly concerned to receive compensation for. (Burley, 2000, 142)

The problem with Burley's argument is that she does not consider how *enormous* the list of possible misfortunes that we could insure against is. Focusing on one handicap in isolation will of course garner support for the position that this handicap is one we should insure against. But when placed against the background of all possible handicaps (and other possible misfortunes) where does the interest of having genetically related children figure? That is the question that Burley needs to address and it is not one that political philosophers can answer by simply engaging in armchair theorising. The danger of invoking the Dworkinian model is that we will tend to treat particular misfortunes in isolation, as Burley does with infertility, and then make the leap to the real-world prescription that *compensation* for this particular disadvantage is required. Given scarcity of resources, this conclusion could jeopardize state-funding for other, *more pressing*, treatments. By attempting to forego a debate about what our "fundamental needs" are, Burley's position does not give adequate weight to the other forms of possible misfortune that we are vulnerable to. Engaging in the ideal theorising of the Dworkinian model obstructs the importance of the empirical information (e.g. how pervasive and severe different forms of disadvantage are, etc.) one would need to have in order to make informed decisions about the allocation of scarce public funds.

The problems facing Dworkin's version of egalitarianism, and luck egalitarianism more generally, are more extensive than the ones I have mentioned above. Two recent critics of luck egalitarianism, who raise pragmatic concerns about the adequacy of it as a normative theory, are Jonathan Wolff (1998) and Elizabeth Anderson (1999). In "Fairness, Respect and the Egalitarian Ethos" Wolff criticises the egalitarian methodology, a methodology that invokes fictional examples and two-person worlds.

Wolff does not dispute the claim that such an approach to political philosophy has some gains, but he expresses concern about what the losses of such a methodology are. In particular, by making responsibility the focus of an egalitarian theory of justice luck egalitarians run the risk of compromising other important values- such as respect. Collecting the data required to actually achieve an “ambition sensitive”/ “endowment insensitive” distribution would result in the unfair treatment of the disadvantaged. Wolff argues:

To press a claim, then, one is required not merely to admit but to make a convincing case that one is a failure, unable to gain employment even when there is no difficulty for others. Some people refuse to claim benefit on the grounds that they do not want to admit that they cannot find a job. But think how it must feel- how demeaning it must be- to have to admit to oneself and then convince others that one has not been able to secure a job, despite one’s best efforts, at a time when others appear to obtain employment with ease.... Thus the unemployed must give a humiliating answer to a question it is humiliating even to consider, in order to qualify for welfare benefit. (Wolff, 1998, 114)

In “What is Point of Equality?” Elizabeth Anderson makes a similar critique of luck egalitarianism. She argues (1999, 289) that luck egalitarianism fails the most fundamental test any egalitarian theory must meet: that its principles express equal respect and concern for all citizens. It fails this test in a number of ways. For example, it excludes some citizens from enjoying the social conditions of freedom on the spurious ground that it’s their fault for losing them. Recall Dworkin’s hypothetical insurance scheme. Dworkin argues that justice demands that the state compensate everyone for whatever risks of bad brute luck they would have insured themselves against if all were equally likely to suffer from the risk. But a problem arises with respect to what Dworkin calls “option luck”. Option luck concerns risks that are the result of our choices. Dworkin’s principle of equal concern requires us to compensate people for the

misfortunes of bad brute luck but not bad option luck. Taking this line seriously has troubling consequences. It permits society to turn its back on many who may need medical assistance due to the decisions these individuals have voluntarily made (e.g. negligent drivers, those in dangerous occupations, etc.).

The criticisms raised by Wolff and Anderson reinforce the point that luck egalitarians have failed to take seriously the question of how their normative principles of justice are to be related to real life. As Wolff argues, egalitarian philosophers “should become aware that the task for the egalitarian philosopher is at best only half done when the ideal principle is found. The next question is: how does justice fit into a wider egalitarian view?” (Wolff, 1998, 120-1). Starting at the level of non-ideal theory will help political philosophers develop a more complete conception of justice. But how should political philosophers who wish to take non-ideal theory seriously proceed? I now attempt to shed light on this general methodological issue.

V. Conclusion: Where the Action (Really) Is- On the Site of Non-Ideal Theory

I have argued that armchair theorising about justice in ideal theory severely limits the practical insights of liberal egalitarianism as such theorising often brackets the complex and contentious issues that make the struggle for justice in real societies difficult. In this concluding section I seek to make a positive contribution to helping political philosophers shift from ideal to non-ideal theory. My argument here is primarily *methodological* and I do not attempt, in this paper, to take on the more ambitious project of actually defending a conception of liberal justice in non-ideal theory.⁷ But drawing from the lessons to be

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learned from the shortcomings of the theories of Rawls and Dworkin, liberal egalitarians should take seriously, at a minimum, the issue of tradeoffs and the value of democracy.

In order to enhance the transformative potential of liberal egalitarianism political philosophers must engage in a self-conscious dialogue, not only with other philosophers (e.g. libertarians, conservatives, etc.), but also with executives, legislatures, courts and other public administrators. Doing this ensures that non-ideal considerations, like budget constraints, disagreement, limited knowledge and indeterminacy, will figure prominently into our philosophical analysis. Rather than bracketing these complex considerations we ought to endorse a public philosophy that takes non-ideal considerations seriously. So practical political philosophy is itself an exercise in *deliberative democracy*. Political philosophers should aspire to satisfy what Robert Goodin (2003) calls “deliberation from within”. “Deliberation from within” means that we hold others “imaginatively present” in our deliberations about what the demands of justice are. By doing this we will recognise that theorising at the level of ideal theory violates the demands of “deliberation from within” for it asks us to bracket or ignore many of the complex concerns that arise in real, non-ideal societies. Consider, for example, what public administrators would say about Rawls’s assumption that society is a *closed system* and a society of *normal, fully cooperating* members. Like our hypothetical aviation expert Dave, who assumes all flights are domestic flights and that concerns about airplane safety and weather do not arise, the political philosopher who engages in idealising hypotheticals will alienate many from their deliberations about justice. In particular, they will alienate those who actually face the distributive questions that normative theories of justice address. For example, legislators and public administrators who must make important decisions about the

allocation of scarce public funds. If we do not make these persons “imaginatively present” in our theorising about justice then we run the risk that our normative conclusions will be impotent.

At a minimum, political philosophers who function at the level of non-ideal theory must take seriously the facts of scarcity and disagreement. Doing this will mean that the issue of tradeoffs and the value of democracy should figure more prominently in our theorising about justice. Taking tradeoffs seriously means that we should reject the idea that we can *serially order* the principles of justice. Taking democracy seriously means that political philosophers should have realistic expectations concerning what their armchair theorising can accomplish. We should purge ourselves of the urge to engage in normative projects that make democracy and politics superfluous. Political philosophers should aspire to *enhance*, rather than *pre-empt*, our deliberations concerning what important political values (e.g. justice, freedom, equality, etc.) both mean and require. Conceiving of the discipline in this way will help enhance the transformative potential of liberal egalitarianism and at the same time expand the diversity of interlocutors which political philosophers can engage with. By making a wider array of people “imaginatively present” in our theorising, political philosophers will realise the severe limits of “I-expect-you’d-all-like-to-know-what-I-would-do-if-I-ruled-the-world” normative theories. The recent “deliberative turn” (Dryzek, 2000) in democratic theory is encouraging not only because it has brought theoreticians of democracy and justice closer together, but as more political philosophers begin to internalise the prescriptions of deliberative democracy the greater the chances are that liberal political philosophy in

particular will revive its practical focus and inspire a public ethic that takes seriously the complexities of justice in non-ideal theory.

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