

## **Filthy Lucre? The False Dichotomy of Justice and Efficiency**

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### **Abstract**

*In many normative accounts of distributive justice, the neoclassical economic term “efficiency” has come to act as a foil, used to represent a default state portrayed as the opposite of justice. I will argue through examples from economic theory, law and economics, and by reference to thinkers in the tradition of modern political thought that the influence of the concept of efficiency, which underpins the dyad efficiency vs. equality, conditions discourse on distributive justice. If my argument is correct, both “purely normative” theories using efficiency as their opposite and also those normative theories incorporating efficiency must be reexamined. Many contemporary theories of distributive justice—even the most influential one propounded by John Rawls—may explicitly reject neoclassical economic efficiency as a standard, but are still in meaningful ways influenced or even determined by the assumptions and apparatus of that view.*

**Keywords:** Distributive Justice, John Rawls, Equality, Efficiency

### **1. Introduction**

The problem of distributive justice is one of the oldest in political science. After justifications for the state, justice is certainly one of the most debated issues in politics. Thus, the literature dealing with distributive justice in its broadest conception is enormous (Elster, 1995). In this paper I focus on one aspect of this literature. In many normative accounts of distributive justice, the neoclassical economic term “efficiency” has come to act as a foil, used to represent a default state portrayed as the opposite of justice. I will argue that the influence of the concept of efficiency, which underpins the dyad efficiency vs. equality, conditions discourse on distributive justice. If my argument is correct, both “purely normative” theories using efficiency as their opposite and also those normative theories incorporating efficiency must be reexamined. If it proves true that efficiency as a normative principle is both troubled by a subjectivist critique and crucial in some ways as a backdrop to normative theories, then we have misconceived one of the most important debates in contemporary political philosophy. After introducing concepts relevant to my critique of efficiency, I use Richard Posner’s work to outline an ideal type efficiency as justice argument. Finally, I turn to implications of my critique of this use of the concept efficiency for the most important of contemporary theories of justice: John Rawls’ theory of “justice as fairness.”

### **2. Efficiency and Distributive Justice**

In his *Equality and Efficiency: The Big Tradeoff* (1975), Arthur M. Okun made the following well-known argument: Economic efficiency is at fundamental loggerheads with justice. The idea that equality and efficiency trade off against one another is surely common to most mainstream economists. To redress this deficiency, it is often argued that political action is needed to achieve equity in the distribution of resources as against the market’s default distribution pattern. Okun says of the market, “To the extent that the system succeeds, it generates an efficient economy. But that pursuit of efficiency necessarily creates inequalities. And hence society faces a tradeoff between equality and efficiency” (Okun, 1975, p. 1). This distinction between equality and efficiency needs to have its terms defined. Okun proceeds to do this. He defines efficiency as the argument that, “more is better, insofar as the ‘more’ consists of items that people want to buy” (Okun, 1975, p. 2). And he pinpoints the conflict with equality as the “principle that the equally distributed rights ought not to be bought and sold for money” (Okun, 1975, p. 5). This principle is Okun’s objection to the market. He makes clear that he does not take his preference for equality to an extreme, however, noting that, “egalitarianism in economics can be investigated as though it were an idiosyncrasy, perhaps even a type of neurosis” (Okun, 1975, p. 5). But a more precise definition of efficiency is needed. Economic efficiency describes a situation in which an optimum (Pareto optimum) allocation of goods exists. This means that “we cannot reallocate resources to improve one person’s welfare without impairing at least one other person’s welfare” (Rhoads, 1985, p. 63).

Of course, this is a profoundly conservative standard, for as Rhoads points out, “If a single person objects to changing the status quo, then the Pareto improvement criterion gives no unambiguous public policy guidance” (Rhoads, 1985, p. 63). A Potential Pareto (or Kaldor-Hicks efficiency) criterion allows changes to be made, as it requires only that winners be *able to* compensate losers after an efficiency producing move is made (Rhoads, 1985, p. 63). This innovation permits zero-sum wealth transfers and only forbids negative-sum policies. But ever here, the knowledge of who will win and lose, by how much and what is valued by each individual in a complex society is beyond the informational capabilities of individual observers.

Economic efficiency is, in principle, not a normative concept; it simply describes for economists one equilibrium state, in which certain conditions apply. However, it is true in normal language that efficiency is better than inefficiency, and it seems an almost natural step to make the attempt to convert efficiency into an ethical principle. The professional bias that Okun argues attributes “neurosis” to justice-based approaches is very much in evidence among economists. Efficient distribution of resources (in the technical sense) is often in conflict with the political system. Whenever concerns other than efficiency enter politics—for example, concerns for equality—inefficient outcomes occur. In fact, “Those critical of the economic approach to public policy often accuse economists of being preoccupied with economic efficiency and neglectful of equity” (Rhoads 1985, p. 82). Economists often point to inefficiencies perpetuated by democracies in particular. The economist, cast in the role of cheerleader for the market, must abhor deviations from efficient allocation. One characteristic attempt to convert efficiency into an explicitly normative principle this was advanced by Law and Economics pioneer Richard Posner (1981). I will return to Posner after introducing a triad of liberal ideas which threaten the philosophical integrity of the neoclassical efficiency approach.

### **3. Liberal Neutrality, Subjective Value and Fundamental Inequalities**

Economic efficiency, though it is ostensibly a value-free descriptive tool, is challenged both at its assumptions and as an ethical principle by many political thinkers. There are three ideas relevant to this discussion which have come to be embodied in the liberal conception of human nature: neutrality, subjectivism and fundamental inequality. These act as independent conceptual and empirical foils to the neoclassical concept of efficiency. These ideas can be seen in many modern conceptions of politics, and in particular in the political thought of on of the founding, and the arch-liberal thinkers, Thomas Hobbes.

Neutrality refers to the belief that human beings, as independent moral agents, have differing conceptions of the good life. In a radical break with, for example, both the Aristotelian and Medieval Christian conceptions of the good, this neutrality argues that no one conception of the good life has an *a priori* advantage over any other. Charles Larmore explains:

But liberalism has also taken to heart one of the cardinal experiences of modernity. It is the increasing awareness that reasonable people tend naturally to differ and disagree about the nature of the good life...Over the past four centuries, the nature of the good life in a great many of its aspects has come to seem a topic on which disagreement among reasonable people is not accidental, but to be expected. Being reasonable--that is, thinking and conversing in good faith and applying, as best as one can, the general capacities of reason that belong to every domain of inquiry--has ceased to seem a guarantee of unanimity. On these matters of supreme importance, the more we talk with one another, the more we disagree (Larmore, 1996, p. 122).

In response to this problem, liberalism "aims to be neutral with respect to controversial views of the good life" (Larmore, 1996, p. 125). The relevant problem posed by what is being recognized by this neutrality--subjectivism--can be seen in the context of one of the earliest proponents of liberalism. Thomas Hobbes work struggles against the subjectivism that he both recognizes and seeks to constrain. The creation of a common good was one of the difficulties that the Leviathan was meant to overcome. The argument for a common good can seen in several aspects of Hobbes' work, and its core is his search for a principle with which to solve this problem. First, the role death and fear of death plays in his work is an attempt to find (and forge) common ground among people (1994, p. 8). Hobbes must argue that this fear of death animates all men equally. This is of course false. Nihilists aside (and this may not be as insignificant a contingent as one might initially believe if one follows the arguments of those whose schema of values gives priority to non-human organisms and objects to their conclusions), it may be that the animosity Hobbes evidences towards religion is partially due to his realization that not all men fear death above all else (see Hobbes, 1994, 21); certainly many Christians embraced a view that scorned this world. And it does not seem that merely the instinctual impulse to self-preservation would be enough to prove Hobbes' claim. Indeed, the modern state may require that this assumption be violated: in its defense some men must place its aims above their own fear of death.

Second, the role that science is to play in raising up mankind points to an a-liberal certainty about both means and ends. This liberal agnosticism may take different forms: As communitarian theorists Avineri and de-Shalit (1992) argue, "The concept of neutrality serves to advocate the variety in interpretations of liberalism" (p. 11). This is of course a fault to be found with much of liberal political philosophy, a curious blindness to the inconsistency of defining a *raison d'etat* in a world of radical uncertainty. It may be argued (and I think that Hobbes would) that the peace established by the liberal state is prior to all ends that could be conceived by people; in a state of war, society cannot exist--and society is therefore the creation of the state.

Last, Hobbes reveals that the state creates a common good where there is none:

For in the condition of men that have no other law but their own appetites, there can be no general rule of good and evil actions. But in a commonwealth this measure is false...Not the appetite of private men but the law, which is the will and appetite of the state, is the measure (1994, p. 32).

Hobbes recognizes, more than two hundred years before the economics profession does, that value is subjective. Thus, the worth of a man, "is not absolute, but a thing dependent on the need and judgment of another...And as in other things, so in men, not the seller but the buyer determines the price" (1994, p. 16). This fact is corrosive to the state--there is a tension between the values of the many and the values of the one which cannot be resolved by the compact: "And this private measure of good is a doctrine, not only vain, but also pernicious to the public state" (1994, p. 32). The economic doctrine that Hobbes anticipates has been heralded as the marginalist revolution in economics. The concept of "marginalism" in economics has profound implications for democracy. The marginalist revolution of the late 19<sup>th</sup> century challenged and defeated older, classical notions of value. That marginal utility is derived from a particular understanding of how goods attain value is particularly important for understanding what is attempted and achieved through democratic procedures.

Marginal utility as a concept entered modern economics in the early 1870s. Three economists, one Austrian, one English, and one Swiss, working independently, each discovered the concept in about 1871. Carl Menger, the Austrian member of this trio (the others were W.S. Jevons and Leon Walras), based his understanding of diminishing marginal utility on how goods become imbued with value. His solution stood in contrast to the "classical" theory of value. A problem of value, called the water-diamond paradox, had eluded solution by economists. The problem was that economic theory could not explain why water, essential to life, cost so little in comparison to a luxury good, diamonds. The classical solution—from Adam Smith to Karl Marx—had been that labor inputs determined the value of economic good. This was the classical labor theory of value.

Steven Rhoads writes in his *The Economists View of the World* that, "Smith had failed to distinguish between total and marginal utility" (Rhoads, 1985, p. 25). This is true, but incomplete. Even if one takes this approach, the question of how utility is evaluated remains. It is conceivable that an economist could construct an objective marginalist theory in which each additional unit of a good had a precise proportion of the original value. Diminishing marginal utility could be a strict mathematical function calculable from the objectively determined value of the first unit. But this is unsatisfactory. It cannot answer the question of why the first diamond costs more than the first unit of water. The fact that diamonds are scarcer than water leads back to the classical labor pain theory. But Rhoads writes, "The price of diamonds is higher *because people value them, and they are much scarcer*" (Rhoads, 1985, p. 25, my italics). This was Menger's solution. Marginal utility must be derived from subjective value; individual valuations of the worth of goods provides the first value as well as the diminishing marginal values (Menger, 1950 [1871], p. 116). Recognition of the subjective basis of value of all goods must necessarily impact all discussion of the common good; it means not only that interpersonal welfare comparisons are difficult if not impossible (Rhoads, 1985, p. 63) but that all public policy proceeds from a subjective basis.

There is, of course, significant contention around the issue of what democratic polities should attempt to accomplish. The first place many advocates look to answer this question is the idea of the common good. Often used as if it were trump, this aim of the liberal state is too rarely explored. In his *Capitalism, Socialism and Democracy*, Austrian-trained Joseph Schumpeter argued convincingly that because value has a subjective basis, there is

no such thing as a uniquely determined common good that all people could agree on or be made to agree on by the force of rational argument. This is due not primarily to the fact that some people may want things other than the common good but to the much more fundamental fact that to different individuals and groups the common good is bound to mean different things (1950, p. 251).

Although there can be no universally agreed upon common good, some democratic theories attempt to sidestep this point—again, with appeals to trusted heuristics such as efficiency and equity. The cost-benefit analysis employed by welfare economists posits a point on a society-wide production possibility curve that is “Pareto optimal.” Again, a Pareto optimal situation exists if no person in the society could be made better off without making someone else worse off. Laurence Tribe famously argued that:

This technique . . . assumes that it is possible for the policy analyst to estimate the quantities of benefits stemming from a (usually governmental) project under alternate designs, the quantities of things used up or reduced, and the prices that should be associated with both ends of this equation. Given this information, the analyst is to choose that design which maximizes the difference between benefits and costs (1972, p. 71).

Tribe makes clear that not only is the analyst's (standing in here for the democratic citizen) claim to objectivity false, but the emphasis placed on it distorts results in important ways: it collapses process into result; it is reductionist; it anesthetizes moral feeling; it narrows the role of rationality (p. 76-98).

Of course, the individual, is not capable of objectivity. Economic tools can not make determinations about end values. Charles Lindblom writes in his seminal *Inquiry and Change* (1990):

whenever social scientists take for granted—as does everyone—that people often design practices or institutions got various institutions for various benefits to be had from them—armies for national defense or schools for educating the young—they incorporate intention and purpose into their explanation (p.139).

This incorporation of intention and value by the political actor is inevitable but deadly to the idea of objectively good outcomes. Friedrich von Hayek made the point that human beings are limited by the information at their disposal and their information processing capabilities such that they are incapable of taking into account the differing “scales of value” that exist in each individual (Hayek, 1945, p. 210). Tribe suggests that the answer to these difficulties is just process rather than objectively good ends (1972, p. 107). But this solution is no less problematic. To return to Schumpeter, disagreements on process (or even whether just process is as important as Tribe believes) are still likely, given individual tastes and wants. Democratic regimes inherit no objective sanction of what constitutes the good life.

The last topic implied by and perhaps acknowledged by subjectivism is the existence of fundamental inequalities among human beings. I want to briefly take up this point with reference to one of the most vehement opponents of inequality, Jean-Jacques Rousseau. In his *Second Discourse*, Rousseau blithely dismisses the connection between “strength of body or mind, wisdom or virtue,” and resulting inequality as a subject “good for slaves to discuss in the hearing of their masters” (1964, p.102). This retort is pithy but only half-true. First, there are inequalities arising from differential natural and environmental endowments. Second, (and consistent with the argument of the *Second Discourse*), there are inequalities inherited by virtue of the social state in which we find ourselves. These inequalities point to non-rational components of subjectivism. Not only do we have differing conceptions of the good life because we are distinct from one another, but we are also not equal to one another in terms of our capacities, rational and otherwise. I make special note of our differences in how much we participate in reason because it has profound implications for the viability of a deliberative scheme. If human beings can not be characterized as rational creatures, but rather creatures that tend to use rational means to serve individualized, non-rational desires, then the search for a common good again suffers a blow.

#### **4. Utilitarianism vs. Wealth Maximization: Richard Posner**

Posner explicitly argues for a normative rule of public policy squarely based in economic efficiency. In making the case for this standard, he distinguishes this position both from Benthamite utilitarianism and a variety of Kantian approaches that he argues are more concerned with autonomy than wealth. Posner sets up Benthamite utilitarianism as the main hurdle his wealth maximization norm must cross. There are several grave problems he argues that Bentham’s theory creates. Posner characterizes Benthamite utilitarianism as arguing for the maximization of average happiness in a society:

[Bentham] got his ideas for legislative reform by deduction from the “greatest happiness,” or utility, principle. Already stated clearly in the writings of Priestly, Beccaria, and others, this principle was that the test of sound social policy was whether it promoted the greatest happiness of the greatest number of people (Posner, 1981, p. 33).

He observes that making happiness the measure of social justice leads Bentham to propose a conflicting mix of policies, some increasing liberty, others infringing on it.

The most basic problem is that of “the spongy, nonoperational character of the principle itself. The happiness of millions of different people cannot be measured and aggregated for purposes of comparing the utilities of different policies” (Posner, 1981, p. 33). Bentham himself did not see this problem because he “evinced no misgivings about the power of reason—in particular his own—to decide any question of policy *de novo*, without benefit of authority, consensus, or precedent” (Posner, 1981, p. 45). In short, Benthamite utilitarianism allows for paternalism, under the argument that a policymaker may know better than a citizen what will best maximize happiness.

Posner details several more objections to this utilitarianism. First, he argues that the “domain is uncertain” (Posner, 1981, p. 52). The argument is that non-human animals also have the capacity to enjoy utility as well. Similarly, foreigners are problematic. They beg the question of the nation-state because there seems no clear reason (inside of utilitarianism) to exclude them from utility calculations (1981, pp. 52-53). Posner additionally remarks that rights are only instrumental in this schema:

If happiness is maximized by allowing people to own property, marry as they choose, change jobs, and so on, then the utilitarian will grant them the rights to these things, but if happiness can be increased by treating people more like sheep, then rights are out the window (Posner, 1981, p. 56).

Last, Posner argues that Benthamite utilitarianism leads to two types of “moral monstrosity” (1981, p. 56). The first of these involves the moral relativism embraced by this view. Intensely felt pleasure from despicable behavior would have to be allowed in the name of increasing overall happiness. The second type “arises from the utilitarian’s willingness to sacrifice the innocent individual on the altar of social need” (Posner 1981: 57). At the most extreme, the denominator in the average of utility can be decreased (and average utility thereby increased) by eliminating persons from the calculus.

To address these deficiencies in this type of utilitarianism, Posner proposes a wealth maximization standard. He defines wealth in the following way:

The wealth of society includes not only the market value in the sense of price times quantity of all goods and services produced in it, but also the total consumer and producer surplus generated by those goods. . . [W]ealth of society is the aggregate satisfaction of those preferences (the only ones that have ethical weight in a system of wealth maximization) that are backed up by money, that is, that are registered in a market (Posner, 1981, pp. 60-61).

Wealth maximization appears to solve many of the indeterminacies that plague Benthamite utilitarianism. It should be made clear that such a standard does not necessitate *laissez-faire*. Indeed, a wide range of economic planning and intervention through laws, subsidies and transfers is endorsed by Posner’s view. This view also does not in principle rule out a socialist writ large organization of the economy—if it could be shown to be more efficient than the state-fostered capitalism that Posner argues for. He gives the following example, one fairly typical for efficiency-based jurisprudence, to distinguish his utilitarianism from Bentham’s:

Suppose a polluting factory lowers residential property values in an area by \$2 million, but that it would cost the factory \$3 million to relocate (the only way to eliminate the pollution), and on this basis the factory prevails in the property owner’s nuisance action (Posner, 1981, p. 62).

This action may not increase happiness, but it does increase economic efficiency. Posner explicitly makes the point that “people are not just wealth maximizers” (Posner, 1981, p. 64), so efficiency is not a proxy for happiness.

Posner anticipates a major objection to an efficiency standard coming out what he calls the Kantian tradition. The means by which he responds to this challenge bears close scrutiny. He acknowledges that utilitarianism “seems to invite gross invasions of individual liberty” (Posner, 1981, p. 65).

But uncompromising insistence on individual liberty or autonomy regardless of the consequences for the happiness or utility of the people of the society seems equally misplaced and unacceptable (Posner, 1981, p. 65).

This defense of efficiency is entirely consequentialist. It does not respond to his “Kantian” critique or, for that matter, any philosophical critique of an efficiency standard. Posner argues (correctly) that there have been many recent attempts to blend utilitarianism and the Kantian tradition (p. 65) and that his proposal falls inside this philosophical project. This argument does not win for such blends sole rights to the debate, however. However “misplaced and unacceptable” (p. 65) these alternative theories are to Posner, they cannot be dismissed with such a tricky gesture.

The consequentialist argument Posner makes for efficiency includes the following components. First, it performs better than Bentham's utilitarianism in that it allows "greater respect for individual choice" (Posner, 1981, p. 66). Just how far this comparative works will be explored in a moment. The rest of the argument includes claims that an efficiency standard makes individuals more productive, provides economic liberty, and encourages "'Calvinist' or 'Protestant' virtues" of honesty, thrift and altruism (p. 68). Posner argues that consequentially justified rights--property rights--are part of the wealth maximization principle. They are more secure than in a purely normative justification. However, these rights are "contingent on transaction costs and subservient or instrumental to the goal of wealth maximization" (pp. 70-71). They are as contingent as neoclassical economic theory. In this sense the rights are as arbitrary as decisions of the political system that enforces them.

Posner proceeds to compare the performance of these two utilitarianisms in light of his earlier criticisms of Bentham. One must keep in mind, however, that he has taken on a very weak opponent. In general, Posner's system seems a relative improvement. However, it suffers from many of the same faults as Bentham's. First, he argued that in Bentham's system, no comparisons between people's utilities was possible. Posner argues that interpersonal utility comparisons are possible in a wealth maximization regime; whenever a voluntary transaction occurs, wealth in that society is increased. He argues further that involuntary transactions can be gauged by estimating values from similar or previous exchanges. These involuntary, or coerced, transfers are validated by the presence of market failures. Posner acknowledges that market failure is a tricky concept, open to wide interpretation, but believes, just as Bentham did, in the power of reason to determine their presence or existence. The theoretical debate is far more contentious than Posner admits, and with this increase in uncertainty, much of his advantage over Bentham vanishes; decisions to coerce become arbitrary, albeit in a more circumscribed sphere. On the philosophical level, "less arbitrary" is not good enough to force a conviction. Another objection to Bentham is that rights are severely contingent in utilitarianism. What this discussion shows is that because rights are instruments of efficiency, they are equally contingent (albeit disputable within a narrower rhetoric, that of neoclassical economics).

Posner argues that domain issues, such as those offered up by animals and foreigners, are better solved by wealth maximization in comparison to utilitarianism. Because I do not take the "animals" objection to utilitarianism seriously, I will only comment that beings without moral agency have no a priori claim on the attentions of human beings. In the case of foreigners, it is argued that free immigration and free trade should be pursued as a result of wealth maximization. This is all well and good, but it does not address the question of where to draw state borders--who deserves the extra attention conferred by citizenship and why. Posner wants to treat foreigners as inputs to societal wealth, just as citizens are. But this seems to advantage foreigners in the sense that they are never called upon to pay costs in the name of efficiency. Posner's principle does not seem to me to be an improvement over Bentham.

The charge of the moral monstrosity of utilitarianism was based on relativism and the individual being subservient to social need. The Posnerian state is not relativistic. However, this is no argument for fixing economic growth as the highest value to which all others are subject. Bentham's fault is, in terms of liberalism, an objection to the efficiency criterion. Because neutrality, subjective value and basic inequalities are not only part of liberal ideology but empirical observations about human beings, setting one value above others is a philosophically dubious move. Indeed, consequentialist nature of Posner's analysis leads one to ask, growth for what? The answer must be for the satisfaction of preferences of individual citizens. If this is the case, and satisfying individual preferences is the true end of Posner's system (and efficiency simply a *modus vivendi*) then excluding non-economic preferences from consideration is invalid. But it is worse than this. Posner argues that interpersonal comparisons of value are possible in an economy because we know the prices at which goods are exchanged.

However, in any given exchange, we have very limited information about the values involved; we know that the seller values the monetary or barter price more than the good sold and the buyer values the good more than the monetary or barter price. The price to which Posner alludes is an aggregate of all such exchanges. Consumer and producer surplus, being subjective and fleeting, cannot be measured. This means that even positing reliable data about the economy (which is also in dispute) moves intended to promote efficiency are stabs in the dark. The charge that the individual is subservient to social need is potentially more true of wealth maximization, because it cannot even attempt to take into account the manifold and shifting values and desires of individual citizens. I shall ignore Posner's argument for the legitimacy of a wealth maximization regime. Suffice it to say that he finds it in consent deriving from rationally expected consequences of such a system.

He himself believes that his theory asks, "Why should not society's ruling principle be the protection and enhancement of personal autonomy, the value that underlies the principle of consent, rather than the maximization of wealth?" (98) He charges (incorrectly) that even partisans of autonomy of the Kantian variety concede that their ideas would cause human misery. The answer is that, at least from a liberal perspective, a certain autonomy does not need to be upheld by state power. The autonomy expressed through inequality, in subjective value and recognized in liberal neutrality is an argument for human capacities that precede the state. One value, which Posner expresses as wealth maximization, does not lay claim to being the ultimate expression of the good. In fact, the subjective nature of value makes the calculation of good, better, best in GNP figures patently ridiculous. At best, such figures show that preferences for some goods are being satisfied. But it gives no sanction to the claim that economic growth is the good. Even less does it sanction coercive policies aiming at aggregate wealth.

I have given considerable attention to Posner's views because they more or less approximate the view of efficiency which many contemporary political philosophers contrast their normative theories. Pointing out what I view as flaws in the argument for efficiency as political *raison d'être* does not, in most cases, help the three normative theories I am about to examine. In most cases, the theorists commit what are, in the context of the three liberal ideas I introduced at the beginning of this essay, parallel blunders. Indeed, I will argue that the misunderstanding of efficiency as some sort of pure expression of classical liberal, *laissez-faire* doctrine tilts the expression of opposing normative views in important ways.

### **5. Efficiency and Distributive Justice: John Rawls and Efficiency**

Among contemporary theories of justice, Rawls' theory is perhaps the most intimately connected with efficiency. His is arguably the most influential contemporary account of justice. Situated as it is, in the mainstream of contemporary liberal thought, one could expect that his theory has affinities with its fellow in that tradition, efficiency. Indeed, Rawls is very concerned with efficiency; it acts as the primary foil against which his theory is built. Arguing in the contractarian tradition, Rawls proposes a social democratic order in which two principles of justice obtain:

First, each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

Second, social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all (Rawls, 1971, p. 60).

In Rawls view, the first principle is prior to the second: "The distribution of wealth and income, and the hierarchies of authority, must be consistent with both the liberties of equal citizenship and equality of opportunity" (p. 61). The liberties of which Rawls speaks are political liberties and also liberties arguably necessary to democracy such as freedom of speech, assembly and conscience (p. 61). Part (b) of the second principle is an explicit call for democracy. In the development of part (a) of the second principle, Rawls argues for a maximin standard, in which rational individuals, choosing societal distribution patterns behind his famous veil of ignorance (p. 136), endorse a standard which maximizes the well-being of the least well-off individuals in the society: "Given certain assumptions, economic and social inequalities are to be judged in terms of the long-run expectations of the least advantaged social group" (p. 44).

Rawls introduces his theory against the counter-example of utilitarianism. He characterizes utilitarianism as follows:

The main idea is that society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over the individuals belonging to it (p. 22).

This appears to be closely related to what Posner calls Benthamite utilitarianism, with its emphasis on all preferences. It soon becomes clear that Rawls means an economic utilitarianism, an efficiency standard, modified by a concern for equality :

It [Utilitarianism] has two principles: the basic structure of society is to be designed first to produce the most good in the sense of the greatest net balance of satisfaction, and second to distribute satisfactions equally. Both principles have, of course, *ceteris paribus* clauses. The first principle, the principle of utility, acts in this case as a standard of efficiency, urging us to produce as large a total as we can, other things equal; whereas the second principle serves as a standard of justice constraining the pursuit of aggregate well-being and evening out of the distribution of advantages (p. 37).

Rawls subsumes his account of utilitarianism within a framework of what he terms intuitionism. Intuitionism as Rawls presents it is a public doctrine arguing that no one meta-principle of justice is possible. Instead, there might be a call for as many justices as there are situations. He explains that,

Intuitionist theories, then, have two features: first, they consist of a plurality of first principles which may conflict or give contrary directives in particular types of cases; and second, they include no explicit method, no priority rules, for weighing these principles against one another: we are simply to strike a balance by intuition, by what seems to us most nearly right (p. 34).

Rawls assumes that the conflicting first principles, whatever they may be and however they are justified, is a viable part of this view. What he takes issue with is the inability of intuitionist accounts to prioritize principles in a meta-ethical system like his own. It is first of all on this basis that his theory is superior. Of course, Rawls also sees justification for his first principles in the presumed results of a hypothetical contract situation.

Rawls also charges that utilitarianism is teleological: “the good is defined independently from the right, and then the right is defined as that which maximizes the good” (p. 24). Rawls argues that utilitarianism therefore has no definition of the good independent from the right; the right is the process of maximizing the good. Deontological theories such as Rawls’ “justice as fairness”, reverses this ordering: The good is dependent on the right. Nevertheless, Rawls argues that consequences should be paid attention to, even in deontological accounts of justice (p. 30). He can do this because although in his view persons in the original position choose equal liberty, “there is no reason to think that just institutions will maximize the good” (30). This makes clear that Rawls’ theory is not utilitarian as he has defined that term. However, it does seem that we could hold the definition of deontological theory of justice to a higher standard, requiring that the right entirely eclipse the good in importance. In other words, a through and through deontological theory would not care if it inflicted misery (just as Posner argues, above). So this is an instance in which utilitarianism gains entry to Rawls’ system. What is important to notice here is that both utilitarianism and Rawls’ theory assume is that concepts of the right and good can be meaningfully discussed in a public sphere; there is a claim to universalism, or objective truth, explicit in both accounts.

This is particularly interesting because Rawls takes utilitarianism to task by arguing that it does “not take seriously the distinction between persons” (p. 27). In his view,

This view of social cooperation is the consequence of extending to society the principle of choice for one man, and then to make this extension work, conflating all persons into one through the imaginative acts of the impartial sympathetic spectator (p. 27).

This critique of utilitarianism (and for that matter this sort of argument for the liberal state) does seem to be true. What seems baffling is that the critique seems equally true for Rawls’ original position justification for his theory. He recognizes this tension, explaining that,

justice as fairness, being a contract view, assumes that the principles of social choice, and so the principles of justice, are themselves the object of an original agreement. There is no reason to suppose that the principles which should regulate an association of men is simply an extension of the principle of choice for one man (pp. 28-29).

This has two important implications. First, it voids the possibility of a specific human moral content. If the principles of social choice can be agreed upon in this fashion—agreed on by *tabula rasa* beings, then there can be no one correct view. Second, Rawls the utilitarian theory of human nature (self-interested maximizers) far too seriously. He does not merely have to oppose this view, he must also make a case for his own. And this is precisely what he does not do. Proponents of a normative efficiency standard argue that each and every rational human being, behind a veil of ignorance, would choose a utility maximizing order. Rawls argues that, each and every rational human being, behind a veil of ignorance, would choose a two principles. The move is the same. When Rawls points to the content of utilitarianism, he does not disprove the shaky structure of its contractarian justification. Rawls does correctly point out that utilitarianism is individualistic, albeit in a misleading way:

Yet utilitarianism is not individualistic, at least when arrived at by the more natural course of reflection, in that, by conflating all systems of desires, it applies to society the principle of choice for one man (p. 29).



This is not quite right. Utilitarians would avoid Rawls' criticism by arguing that theirs is a view equating human nature with self-interested maximization. In other words, all human beings are really the same in this sense. They are individuals intent on maximizing their individual desires.

What is not individualistic about this is that to make this argument into a political system, the choices of which desires are to be maximized are taken out of individual hands. It is in this way that the choice of one man (the ruler, or the results of "social choice") is conflated with the individual choices of all members of a society. Jousting with utility shapes Rawls' argument for his conception of justice. It also leads him to defend his account in a specific way; objections from utilitarianism are anticipated. As we saw in the last paragraph, having utilitarianism so closely in mind leads Rawls into some peculiar arguments, showing his theory's affinities with justice as efficiency. Indeed, he goes so far as to argue that once the demands of justice are satisfied, efficient economic policies should be pursued (p. 79). This connection to efficiency will be even clearer when Rawls is examined in the light of subjectivism, neutrality and inequalities.

Subjective value is something no normative theory of justice may admit. If value is subjective, then both the good and the right become unknowable. Only a consequentialist theory of justice may attempt to assuage this problem. Rawls does not recognize this aspect of utilitarianism's appeal. It is precisely because value is subjective that utilitarianism argues for a state policy of allowing persons to maximize their own utilities. As Posner argues above, this is soon mired in contradiction; people maximize along too many contradictory axes, many of which are in conflict. And so the policymaker must pick an axis (in Posner's case wealth) along which state policy encourages maximization.

But for Rawls, neither the right nor the good are subjective. With reference to utilitarian arguments for freedom, Rawls writes, "teleological principles permit at best uncertain grounds for liberty, or at least for equal liberty" (p. 243). Subjective value, on the other hand, argues for equal liberty on the basis of the equal moral stature of each person. Rawls dismisses this claim:

And liberty of conscience and freedom of thought should not be founded on philosophical or ethical skepticism, nor on indifference to religious and moral interests. The principles of justice define an appropriate path between dogmatism and intolerance on the one side and a reductionism which regards religion and morality as mere preferences on the other (p. 243).

This is not an argument. It is an assertion. If preferences are treated with the moral weight that subjectivism demands of them, then they are not "mere". When the possibility of objective truth is ruled out, then preferences must take on this weight. As for the consequentialist argument that Rawlsian justice makes these freedoms secure, it is belied by the contingency with which he discusses even freedom of conscience: "Liberty of conscience is limited, everyone agrees, by the common interest in public order and security" (p. 212). Such a statement is not possible if value is subjective; freedom of conscience is an empirical fact. So too are tolerance and the priority of liberty reasonable deductions from subjective value. In Rawls' scheme, toleration follows from the principle of equal liberty (p. 214), which is justified on the following grounds:

as the conditions of civilization improve, the marginal significance for our good of further economic and social advantages diminishes relative to the interests of liberty, which become stronger as the conditions for the exercise of the equal freedoms are more fully realized. Beyond some point it becomes and then remains irrational from the standpoint of the original position to acknowledge a lesser liberty for the sake of greater material means and amenities of office (p. 542).

Now this is truly peculiar. What Rawls argues here is that liberty is something that can be afforded after material prosperity is guaranteed. Justice is an afterthought to efficiency and contingent on it.

In another set of arguments in conflict with subjectivism, Rawls actually objectively assigns value. He argues that reason is good and therefore so is justice (p. 405). In "The Unity of the Self," he similarly writes that the "moral personality is characterized by two capacities, one for a conception of the good, the other for a sense of justice" (p. 561). Good here means rationality of life plan, and the sense of justice, it has been explained follows either from reflection on the original position (to which I will return) or from "moral education" (p. 516). It is difficult to see how the light of reason gives moral sanction to any endeavor; reason is a tool to be placed in the service of an infinite number of ends. Rawls argues that the precepts of his justice are already universally held or could be: "the conditions embodied in the description of the original position are ones that we do in fact accept. Or if we do not, perhaps we can be persuaded to do so by philosophical reflection" (p. 21).

This original position holds the status of pure exercise of reason, but it seems that the outcome is a function of the rules and assumptions of the game rather than a free choosing by autonomous persons (the reasonable way through a game of poker or a boxing match are quite different for example). The liberal principle of neutrality, deriving from the belief that moral ambiguity requires respect and toleration of others views, is swept away by the contention of unanimity in the original position.

It is also challenged by the prospect of "moral education" that Rawls endorses. Again, justice as fairness derives from two sources. First of these is common sense views that Rawls argued are universal. The second is the argument that social choice arrangements are agreed upon in the original contract (p. 28). The principle of neutrality is challenged by this contention that everyone holds (or would hold, given sufficient reason) the complex set of view that Rawls argues they do in fact possess. The idea that humans are fundamentally unequal in their capacities also comes under attack in Rawls. He argues that the concept of desert is invalid, because "distributional shares" and "the extent to which natural capacities develop and reach full fruition is affected by all sorts of social conditions and class attitudes" (p. 74). The liberal concept of desert fails "to mitigate the arbitrary effects of the natural lottery" (p. 74). At the same time, he would preserve the structure of capitalist society, because after the difference principle is satisfied, "it is compatible with the principle of efficiency" (p. 79). That is, the arbitrary and purely conventional rules of the game allow for the accumulation of wealth, which Rawls also argues for as a secondary concern. But it is unclear how he may do this. We have just seen that these inequalities do not hold up to reason for Rawls. The right is prior to the good, but Rawls wants to stop at a very minimal imposition of the right. Any conventional and non-justifiable results of the lottery should be fair game for rational planning.

A second problem bearing on natural inequality and stemming from natural (or in Rawls view, conventional) inequalities is the static view of society after the imposition of the social contract. Rawls argues that the arrangements set out in the contract will contribute indefinitely into the future (p. 175). But it is unclear why this would be so, particularly if the conventional structure of capitalism, which unfairly rewards arbitrary personal attributes, is allowed to persist. Rawls is arguing for a democratic order, and he would presumably argue that over time democratic means will correct the deficiencies of conventional society. But here he is in a bind. Either conventional endowments are recognized and produce efficiency after the maximin solution has been imposed, or society is rationalized so that it is just from top to bottom (and even inside each self, p. 561). The problem, I think, stems from the tacit acceptance of a static, timeless view shared by many contractarian thinkers but also neoclassical economics. This view argues for an equilibrium state, unchanging. It should be clear that such a view is untenable. Both democratic and economic changes may be expected, but where they lead is unpredictable. In other words, we may examine the first effects of the hypothetical contract, but not say where that society will be after the first passage of time. Here too, Rawls is captured and constrained by neoclassical notions of efficiency.

## **6. Conclusion**

What I have attempted to show in this essay is that contemporary theories of distributive justice, although they may explicitly reject neoclassical economic efficiency as a standard, are still in meaningful ways influenced or even determined by the assumptions and apparatus of that view. By contrasting efficiency with alternative liberal ideas, ideas that are empirical as much as they are philosophical, these affinities with efficiency can be brought into bold relief. What I have not attempted is an alternative account of distributive justice. However, my treatment the normative accounts of Rawls gives some indication of how such a theory might be constructed. I share the subjectivist impulse that lead Michael Walzer (1983) to suggest spheres of justice, and the view that an institutional focus that maintains both the realization that institutions are conventional and that rational, philosophical inquiry into these institutions may be damaging to them (Barry, 1989, p. 374). Stripped of the universalist and eternal legitimacy that the state seeks to lend to these institutions, though, both justice as impartiality and justice as mutual advantage seem tenable positions, especially given the subjectivist perspective that I bring to the discussion. In this view, reason is part of the picture, and a negative one at that. Natural inequalities, preferences that shift over time and in relation to time (in the form of short or long time preferences) and of course in relation to the social context of any one individual all play a role in determining what we think about distributive justice.

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