

HYBRID THEORIES OF JUSTICE:
A NEW FOUNDATION BASED ON T.M. SCANLON'S
ETHICS OF REASONABLE REJECTION

by

Marc O. Hedahl

A Thesis Submitted in
Partial Fulfillment of the
Requirements for the Degree of

Master of the Arts
in Philosophy

at

The University of Wisconsin-Milwaukee

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ABSTRACT

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Marc O. Hedahl

The University of Wisconsin, Milwaukee, 2000
Under the Supervision of Professor Julius Sensat

Hybrid theories of justice accept John Rawls's requirements of equal basic liberties, fair value of political liberty, and fair equality of opportunity but replace his distributive principle, the difference principle, with a restricted principle of utility. Rawls advances several objections against these theories in A Theory of Justice and Justice as Fairness: A Briefer Restatement. Joshua Cohen also advances several objections against these theories of justice in "Democratic Equality". However, the force of these arguments can be reduced with a foundational shift to T. M. Scanlon's ethics of reasonable rejection. Supporters can maintain the flexibility of the hybrid theories and weaken the force of the objections made against them by shifting from a restricted principle of

utility to a restricted difference principle, which holds that the just distribution is the distribution that no one can reasonably reject. Although the foundational shift to Scanlon's ethics of reasonable rejection does not eliminate vagueness or the need for intuition, it does reduce the force of several other objections. It does appear to be a better foundation on which the arguments for flexibility and contextual dependence can be built.

Major Professor

Date

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For Abby

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1.0 Introduction

There have been numerous objections to John Rawls's justice as fairness since the original publication of A Theory of Justice. Some philosophers have argued against Rawls's two principles of justice in their entirety, others have focused their arguments on Rawls's distributive principle, the difference principle. In this paper, I will discuss three hybrid theories of justice that accept Rawls's requirements of equal basic liberties, fair value of political liberty, and fair equality of opportunity but replace the difference principle with a restricted principle of utility. I will not provide any arguments for these hybrid theories; I will instead focus on the arguments made against them by John Rawls in A Theory of Justice and Justice as Fairness: A Briefer Restatement, and by Joshua Cohen in "Democratic Equality".¹ I hope to demonstrate that the force of these arguments can be reduced if the supporters of these hybrid theories make a foundational shift to T. M. Scanlon's ethics of reasonable rejection. They can maintain the flexibility of the hybrid theories and weaken the force of the objections made

¹ Rawls, John. A Theory of Justice. *Revised Edition*, Belnap Press of Harvard University Press, Cambridge, 1999. Rawls, John. Justice as Fairness: A Briefer Restatement. *Unpublished*, Harvard University, Cambridge, 1989. Cohen, Joshua. "Democratic Equality" *Ethics*, Vol. 99, No. 4. (Jul., 1989), pp. 727-751.

against them by shifting from a restricted principle of utility to a restricted difference principle, which holds that the just distribution is the distribution that no one can reasonably reject.

2.0 John Rawls's Theory of Justice

In A Theory of Justice, John Rawls develops a theory of justice as fairness, a liberal theory of justice for a modern, democratic society. Rawls advocates a contractualist theory of justice in response to utilitarianism, which was the leading political theory at the time of the original publication of A Theory of Justice. Rawls is particularly interested in providing a theory of justice that can account for the pluralism found within a democratic society. He is attempting to develop a theory that can allow for a variety of conceptions of the good, a pluralism in the fundamental values, religions, philosophies, and moral values among the citizens of a democratic society.

2.1 The Original Position

According to Rawls, the justification for the concept of justice must be one that all citizens can reasonably accept. Therefore, Rawls believes that the conditions in

which the principles of justice are determined need to be conditions that all citizens can agree are fair and equitable. He believes that all citizens can reasonably accept principles of justice that are part of a hypothetical agreement in an 'original position'. When deciding on the principles of justice, each individual would want to secure the rights and resources that will enable her to do three things: first, to choose and revise a conception of the good; second, to develop and act from a sense of justice; and third, to pursue the conception of the good that she has at any given time.

The original position is constructed in the following manner in order to ensure that the conditions in which justice is determined are fair and equitable: First, the parties in the original position are aware of the general principles of science and common sense. Second, the parties know that their society is a pluralistic society, that there is more than one conception of the good. Third, they are also aware that there is moderate scarcity; the abundance of resources is not so great that all the citizens can live like royalty but there are enough resources to prevent a vast majority from living in poverty. Fourth, aside from this knowledge, the parties in the original position are placed behind a 'veil of

ignorance'. In choosing the principles of justice, they ignore their place in society, their physical and mental abilities, and their own particular conception of the good. Finally, it is essential that the hypothetical agreement is public and final. The principles of justice cannot be hidden from the public, and they need to be considered permanent features of our social institutions.

2.2 The Two Principles of Justice

Rawls argues that the parties in the original position will agree to two principles of justice:

"a. Each person has an equal claim to a fully adequate scheme of basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.

b. Social and economic inequities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society."²

The first principle requires that basic civil and political liberties will be equal, and granted to each citizen.

These liberties include (but are not limited to) freedom of

² John Rawls. Political Liberalism. Columbia University Press, New York, 1993, p .6.

religion, the right to vote, and the right to seek public office. The first principle also guarantees that the political liberties will have a fair value, i.e., any two people with equal abilities and motivation will have the same prospects of participation in the political process. The first half of the second principle insures fair equality of opportunity. Two people with equal abilities and motivation should have the same social, professional, and economic prospects. The second half of the second principle is the difference principle, which holds that inequalities in the distribution of economic goods and resources will be allowed if and only if they benefit all members of society and maximize the economic prospects of the least advantaged. It is important to note that the first principle of justice takes precedence over the second principle, i.e., a sacrifice of the liberties guaranteed by the first principle can never be justified by any increased social or economic advantage.

The first principle secures the political and civil rights that will enable citizens to choose and revise a conception of the good, to develop and act from a sense of justice, and to pursue the conception of the good they have at any given time. The second principle secures the opportunities and resources that will enable citizens to

choose and revise a conception of the good, to develop and act from a sense of justice, and to pursue the conception of the good they have at any given time. Together, the two principles of justice embody the fundamental ideal that we are free and equal citizens. Regardless of how much our social position and motivations may differentiate us; the two principles of justice guarantee that freedom and equality.³

2.3 The Difference Principle

The aim of the parties in the original position is to ensure that their social positions are acceptable, and the veil of ignorance guarantees that they will not know their place within society. Therefore, the parties in the original position concentrate their attention on the situation of the least fortunate because this is the situation that is most likely to be unacceptable. If the well being of the least advantaged is maximized, the least advantaged have no reason to complain; and if the least advantaged have no reason to complain, then it seems reasonable that no member of society could have good reason to complain.⁴ Therefore, Rawls argues that the parties in

³ Cohen, Joshua. "Democratic Equality", p.729.

⁴ Ibid. p.729.

the original position will agree to the difference principle as the principle of distribution. Economic inequalities are allowed if and only if they benefit every member of society and maximize the economic prospects of the least advantaged.

2.4 The *Maximin* Argument

Rawls provides arguments that support the two principles of justice in their entirety (which includes the difference principle), as well as arguments that support the difference principle itself. One of Rawls's main purposes in Theory of Justice is to demonstrate that his two principles of justice provide a favorable alternative to utilitarianism, and one of the arguments Rawls uses to demonstrate that the two principles of justice are the rational choice is the *maximin* argument. The *maximin* principle is a decision theoretic principle which holds that when choosing between two or more distributions, the rational choice is the distribution in which the minimum is maximized; the rational choice is the distribution in which the worst possible outcome is most favorable.

As Rawls points out, "Clearly the *maximin* principle is not, in general, a suitable guide for choices under uncertainty".⁵ However, Rawls provides three conditions under which the *maximin* principle is the rational choice:

1. "There must be some reason for sharply discounting estimates of ... probabilities"⁶
2. "The rejected alternatives have outcomes that one can hardly accept."⁷
3. "The person choosing has a conception of the good such that he cares very little, if anything, for what he might gain above the minimum stipend that he can, in fact be sure of following the *maximin* rule."⁸

Only the first condition is an inherent feature of the original position; the extent to which the other two conditions obtain depends upon the theories of justice that are being compared. Rawls even admits that these conditions are only satisfied in the original position, "to a very large degree."⁹ Therefore, the other two conditions need to be carefully considered independently of each other.

First, "The rejected alternatives have outcomes that one can hardly accept." This is certainly the case when comparing Rawls's two principles of justice with a

⁵ Rawls, John. A Theory of Justice, p. 133.

⁶ Ibid. p. 134.

⁷ Ibid. p. 134.

⁸ Ibid. p. 134.

utilitarian principle of justice, which is one of Rawls main purposes in Theory of Justice. The alternatives allowed with the principle of utility could be disastrous; it is possible that you could wind up with little or no economic resources. It is even possible that you will not possess the rights and liberties needed to pursue your conception of the good. However, while some alternatives to Rawls two principles of justice have potentially disastrous outcomes, this condition disappears when we are considering another theory of justice that guarantees an acceptable minimum.

Second, "the person choosing has a conception of the good such that he cares very little, if anything, for what he might gain above the minimum stipend that he can, in fact, be sure of following the *maximin* rule". As with the first condition, this condition holds when comparing Rawls's two principles of justice with a utilitarian principle of justice. Rawls's two principles of justice guarantee that the parties will be able to choose and revise a conception of the good, to develop and act from a sense of justice, and to pursue the conception of the good that they have at any given time. A utilitarian principle of justice, on the other hand, does not guarantee that the parties will be able to realize any of these intentions.

Therefore, the parties in the original position will care very little about improvement over the minimum when comparing Rawls's two principles of justice with a utilitarian principle of justice. The possibility of increasing one's economic situation by a few dollars (or even by thousands of dollars) is insignificant when compared to the inability to choose and revise a conception of the good, to develop and act from a sense of justice, or to pursue the conception of the good that one has at any given time. However, this second condition diminishes as the theory of justice that is being compared against Rawls's theory of justice guarantees an increasingly satisfactory minimum.¹⁰ The possibility of increasing our economic situation by a few dollars (or even by thousands of dollars) may become significant after a highly satisfactory minimum is secured.

The second condition requires that the situation of the least fortunate cannot be disastrous, the third condition requires that the situation of the least fortunate needs to be highly satisfactory. Therefore, while the maximin argument appears to be a compelling argument against a utilitarian principle of justice, it is not as

¹⁰ Rawls provides three requirements for a stable constitutional regime in discussing the term 'highly satisfactory'. These requirements are discussed in §4.3.

strong an argument against theories of justice that guarantee an acceptable minimum, and the force of the argument diminishes incrementally when Rawls's theory of justice is compared with other theories of justice that guarantee an increasingly satisfactory minimum.

2.5 An Initial Objection and Reply

In §26 of A Theory of Justice, Rawls's addresses an initial objection against the difference principle. The objection claims that the difference principle cannot be just because it may require a sacrifice of vast social and economic advantages by some in order to obtain minute gains for others. The difference principle allows extreme disparities in social and economic status as long as the prospects of the least fortunate are improved. It seems absurd, however, to claim that the justice of increasing the economic situation of the most fortunate by millions of dollars should depend upon whether or not the economic situation of the least fortunate decreases by mere cents.

The objection raises the possibility that there could be two distributions like those described in Table 1:

Table 1

Distribution	Group 1	Group 2	Group 3
1	91	92	93
2	90	91	200

Two possible distributions of economic goods

Let us suppose that any change between 93 units and 90 units would make little to no impact on the life of a citizen in this society, but any change from less than 94 units to 200 units would radically improve the life of a citizen in this society. In this situation, the difference principle claims that distribution #1 is just, but the just distribution appears to be distribution #2. Rawls replies to this objection by saying,

"The difference principle is not intended to apply to such abstract possibilities ... the possibilities which the objection envisages cannot arise in real cases; the feasible set is so restricted they are excluded".¹¹

In effect, Rawls responds to this objection by claiming that it oversimplifies the situation. If two distributions of such great disparity are attainable, then there will

¹¹ Rawls, John. A Theory of Justice, p. 136.

always be another attainable distribution that possesses a greater minimum than distribution #1, and also possess greater equality than distribution #2. That is, if both of the distributions in Table 1 are attainable, then something like distribution #3 in Table 2 must be attainable as well:

Table 2

Distribution	Group 1	Group 2	Group 3
1	91	92	93
2	90	91	200
3	120	130	140

Three possible distributions of economic goods

In this more realistic and complete situation, the difference principle does not make the counter-intuitive claim that distribution #1 is just. Rather, it makes the claim that agrees with our intuitions, that in this situation distribution #3 is just.

Furthermore, the priority relationships between the two principles of justice provide a persistent tendency to minimize the possibility of such extreme disparities in social and economic status. The first principle of justice takes priority over the second principle; a sacrifice of fair value of political liberty can never be justified by

any increased social or economic advantage. In a similar manner both the first principle and the first half of the second principle take priority over the difference principle. A sacrifice of fair equality of opportunity can never be justified by any increased social or economic advantage. The first principle and the principle of fair equality of opportunity restrict the application of the difference principle to a limited domain; no change in the distribution of resources can be just if it sacrifices any citizen's basic rights and liberties. Although, in theoretical situations the difference principle would allow extreme inequities in economic goods, the first principle of justice and the principle of fair equality of opportunity provide a persistent tendency to create a more equitable distribution by widening the opportunities of the least advantaged. The objection is misguided because social and economic goods cannot be rearranged into every conceivable possibility. The two principles of justice apply to the basic structure of society as a whole.¹²

3.0 Hybrid Theories

The initial objection, although misguided, leads us to consider why the difference principle may seem unsatisfying

¹² Rawls, John. A Theory of Justice, p. 137.

to some people. Part of the answer lies in the fact that the difference principle makes relatively sharp demands when compared to other distribution principles.¹³ It tells us that in every situation involving the distribution of economic and social advantages, the just thing to do is maximize the prospects of the least advantaged. However, the only fact the parties in the original position know about the economic situation of their society is that while the abundance of resources is not so great that all the citizens can live like royalty, there are enough resources to prevent a vast majority from living in poverty. Obviously, there can be a great disparity in the total economic resources available within a democratic society. Although any deviation from the *maximin* distribution may be unjust in a society in which there are just enough resources to prevent a vast majority from living in poverty; it does not seem necessarily true that any deviation from the *maximin* distribution will be unjust in a society with significantly more resources. In addition, there are some situations in which laws may have great impact on certain groups within society and an insignificant impact on others. Some philosophers believe that in these situations a principle of utility, not the

¹³ Rawls, John. A Theory of Justice. p. 281.

difference principle, provides the correct answer to the question of which distribution of economic and social advantages is just.

In response to the apparently stringent requirements of the difference principle, these philosophers have developed hybrid theories of justice that endorse Rawls's first principle of justice and the principle of fair equality of opportunity but replace the difference principle with a utilitarian distribution principle. In this paper, I will consider three of these hybrid theories. Like Rawls's theory of justice, all three of these hybrid theories require equal basic liberty, fair value of political liberty, and fair equality of opportunity. Unlike Rawls's theory of justice, however, the three hybrid theories reject the difference principle in favor of three different principles of utility. The first theory (M1) has the principle of average utility as its distribution principle. The second theory (M2) has a poverty line; and as long as every citizen is above that poverty line, its distribution principle dictates that average utility should be maximized. The third theory (M3) has a poverty line like (M2), but its utilitarian distribution principle is

discounted by a factor that reflects the degree of income concentration.¹⁴

It is important to note that only (M1) allows the possibility of a disastrous outcome, and it is not as catastrophic as those that would be allowed without the requirements that guarantee equal basic liberty, fair value of political liberty, and fair equality of opportunity. The maximin argument, therefore, does not have as much force against (M1) as it does against a utilitarian principle of justice. Furthermore, the *maximin* argument has even less force against (M2) and (M3) for two reasons: first, each principle guarantees an acceptable minimum excluding disastrous outcomes; second, as poverty lines are raised, the guaranteed minimums become increasingly satisfactory. Therefore, different arguments need to be provided against these restricted principles of utility.

4.0 Arguments for the Difference Principle

Rawls provides several arguments against these restricted principles of utility in Theory of Justice and Justice as Fairness: A Briefer Restatement, Joshua Cohen also provides arguments against them in "Democratic Equality". It is important to note, however, that Rawls

¹⁴ Cohen, Joshua. "Democratic Equality", p. 728.

and Cohen are merely attempting to provide a "balance of reasons" in favor of the difference principle.¹⁵ Some arguments may provide decisive reasons for abandoning a particular principle of distribution, but no single argument can provide definite support for the difference principle against all other distributive principles. Together, these arguments are supposed to provide a balance of reasons for selecting the difference principle over other distributive principles.

4.1 Poverty Line

One of the objections Rawls raises against these hybrid theories is that they rely too much on our intuition. Rawls concedes that every theory of justice, including his own, must make an appeal to intuitive judgments at some point. The problem with hybrid theories, however, is they appeal to our intuitions too early in the deliberative process, and therefore do not provide a clear alternative to the difference principle.¹⁶ One example of how hybrid principles rely too much on our intuitions is the use of a poverty line in (M2) and (M3). If a poverty line is going to be an inherent part of a theory of

¹⁵ Rawls, John. A Theory of Justice, p. 183.

¹⁶ Ibid. p. 281.

justice, then the supporters of that theory cannot simply argue that poverty lines are just, they have to provide a way of determining which *specific* poverty line is just within a given society. They have to provide a way of determining how the poverty line is to be selected and judged within different societies. They also have to be able to argue that their *specific* means of determining the poverty line is the just way to determine the social minimum.¹⁷

Another example of how hybrid principles rely too much on our intuitions is the use of an equality factor in (M3). If an equality factor is going to be an inherent part of a theory of justice, then the supporters of that theory cannot simply argue that equality factors are just, they have to provide a way of determining what *specific* equality factor is just within a given society. According to this objection, the hybrid theories of justice possess two inherent problems: first, they rely too much on our intuitions; second, the theories that include a poverty line and/or an equality factor as intrinsic features need to provide an argument why a particular mathematical formulation for determining a poverty line and/or an equality factor is just.

¹⁷ Rawls, John. A Theory of Justice, p. 278.

4.2 Self-respect and Reciprocity

Another argument that helps provide the balance of reasons in favor of the difference principle is Joshua Cohen's argument appealing to self-respect. An important element that is required for any situation to be acceptable is self-respect, because self-respect is a fundamental good, and also because self-respect enables citizens to pursue their conception of the good. Therefore, the parties in the original position must consider the effects that a distribution principle will have on self-respect.¹⁸ Cohen argues that the value of a person's liberties depends upon the level of resources available to him.¹⁹ Since the difference principle guarantees that the situation of the least fortunate will be maximized, it also guarantees that the least fortunate will have more self-respect.

If we do not accept the difference principle, we are asking the least advantaged to sacrifice the benefits of social cooperation for the good of society as a whole. These three restricted principles of utility are, in effect, treating the least advantaged individuals as *means* to an *end*, not *ends* in themselves; and their self-respect would no doubt suffer as a consequence. The difference

¹⁸ Cohen, Joshua. "Democratic Equality", p. 737.

¹⁹ Ibid. p. 738.

principle is committed to maximizing the situation of the least fortunate, and because of that fact the least fortunate will possess more self-respect than they would with a restricted principle of utility. The self-respect argument, therefore, seems to favor the difference principle over (M1), (M2), and (M3). It is important to note, however, that the minimums guaranteed by the three distribution principles will be radically different. While (M1) does not explicitly guarantee any resources, (M2) and (M3) guarantee a certain minimum, and those minimums are increased as their poverty lines are raised. While the self-respect argument appears to significantly favor the difference principle over (M1), the force of this argument diminishes with respect to (M2) and (M3) because those principles are committed to ensuring that every citizen possesses a minimum amount of resources. Furthermore, the force of the argument further diminishes as the poverty lines in (M2) and (M3) are increased, thereby increasing their commitment to the least fortunate.

Rawls's argument of reciprocity in Justice as Fairness: A Briefer Restatement is similar to Cohen's argument of self-respect. Rawls argues that while the difference principle has an inherent tendency to maintain equality and reciprocity, the restricted principles of

utility do not. Since the restricted principles of utility are focused on maximizing the social aggregate, there is no tendency towards equality and reciprocity. On the other hand, the difference principle embodies the idea that we start from a position of equal advantages. The difference principle is superior to the restricted principles of utility because it embodies the idea that we are equal partners in social cooperation. However, while the reciprocity argument appears to significantly favor the difference principle over (M1) and (M2), the force of this argument diminishes with respect to (M3) because it possesses a factor that favors equality. Furthermore, the force of this argument diminishes incrementally as that equality factor is increased.

4.3 Stability

A final argument that both Rawls and Cohen advance in favor of the difference principle is the argument of *stability*. A theory of justice needs to be *stable*: upon reflection, each present and future citizen needs to affirm the principles of justice, which includes the distribution principle. If a society's institutions satisfy the principles of justice, then over time the citizens will come to regard those institutions as just and they will

develop an allegiance to them. They will also develop a conception of the good that is worth pursuing and that is compatible with the principles of justice.²⁰ Rawls provides three requirements for a stable constitutional regime, while Cohen argues for two factors that play an important role in maintaining stability.

Rawls's first requirement for a stable constitutional regime is that it must fix the basic rights and liberties and assign them a special priority.²¹ Although this requirement favors the two principles of justice over a utilitarian principle of justice, all of the hybrid theories require equal basic liberty and fair equality of opportunity; all three theories fix the basic rights and liberties and assign them a special priority. Therefore, the first requirement of a stable constitutional regime does not favor the difference principle over a restricted principle of utility.

Rawls second requirement is that the principles of justice need to provide a clear basis of public reason, a foundation that can publicly be seen to be reasonably reliable.²² This is similar to one of Cohen's factors of stability: for a principle of justice to be stable, it must

²⁰ Cohen, Joshua. "Democratic Equality", p. 735.

²¹ Rawls, John. Justice as Fairness: A Briefer Restatement. p. 82.

²² *Ibid.* p. 82.

be simple. Compared to Rawls two principles of justice, the hybrid theories of justice are vague and complex. Once again, Rawls concedes that all ethical principles, including his own, are vague and complex. Nonetheless, the difference principle has the advantage of relative simplicity and determinacy when compared to the restricted principles of utility of (M1), (M2), and (M3). First, Rawls two principles of justice are conceptually simpler than the hybrid theories of justice. The hybrid theories are conceptually based on two different theories while Rawls's justice as fairness is based on only one. Second, the process in which the difference principle can be precisely interpreted and applied is simpler than the process required by the restricted principles of utility. The information that the difference principle requires is relatively more accessible, and it is relatively more definitive than the information required by the restricted principles of utility of (M1), (M2), and (M3). Third, the difference principle has the advantage of the greater determinacy; the difference principle provides determinate answers in more situations than the restricted principles of utility do. Therefore, the second requirement of a stable constitutional regime appears to favor the difference principle over a restricted principle of utility

because of the comparative ease with which the difference principle can determinately be interpreted and applied.²³

Rawls third requirement is that our basic social institutions should encourage the cooperative virtues of social life: they should encourage a sense of fairness, a spirit of compromise, and they should embody the idea that other citizens are equals.²⁴ The difference principle possesses this feature to a greater extent than the restricted principles of utility of (M1), (M2), or (M3). It embodies the idea that we are equal partners in social cooperation more than any of the restricted principles of utility; it encourages the virtues of social life more than any of restricted principles of utility.

Cohen's second factor for maintaining stability does not correspond to any of Rawls three requirements, but it is related to Rawls second condition for the *maximin* rule. As we saw earlier, the second condition is, "the person choosing has a conception of the good such that he cares very little, if anything, for what he might gain above the minimum stipend that he can, in fact be sure of following the *maximin* rule". Cohen argues that principles of justice will possess greater stability if they are more likely to be

²³ Rawls, John. A Theory of Justice, p. 281.

²⁴ Rawls, John. Justice as Fairness: A Briefer Restatement. p. 83.

affirmed by the least fortunate. The difference principle is more likely to be affirmed by the least fortunate, and therefore it is the more stable principle. The least fortunate will be more likely to reaffirm that the difference principle is just because their situation could only be improved if other citizens were placed in an economic situation worse than any existing situation. With the utilitarian distribution principles, however, the least fortunate will be less likely to reaffirm that the restricted principles of utility are just because they know that their situation could be improved without placing other citizens in an economic situation worse than their own. However, while Cohen's 'attitude portion' of the stability argument appears to significantly favor the difference principle with respect to (M1), the force of the argument diminishes with respect to (M2) and (M3), and it is diminished further as the poverty lines are increased.

The force of the poverty line argument is strongest against (M3) and (M2), and slightly weaker against (M1). Likewise, the force of the simplicity portion of the stability argument is strongest against (M3) and (M2), and slightly weaker against (M1). However, the force of the *self-respect* argument and the attitude portion of the *stability* argument are strongest when we are comparing the

difference principle with (M1), and weaker when we are comparing the difference principle with (M2) and (M3). Finally, the force of both the reciprocity argument and Rawls's third requirement for a stable democracy are strongest against (M1) and (M2), and weaker against (M3). Therefore, although no one of these arguments appears sufficient by itself to eliminate all three distribution principles as viable alternatives to the difference principle, taken together they do seem to provide a balance of reasons that favor the difference principle.

5.0 A Different Foundation

These arguments appear to provide a balance of reasons in favor of the difference principle not only over the three hybrid theories mentioned, but over any possible hybrid theory as well. These objections attack hybrid theories at their foundation, and therefore a hybrid theory can avoid these objections only by changing its foundation. The new distribution principle cannot result from a shift within a utilitarian framework, for it would be vulnerable to the same objections of stability, self-respect, and reciprocity as the restricted principles of utility of (M1), (M2), and (M3). A new foundation has to be provided,

and I believe it can be found in T. M. Scanlon's ethics of reasonable rejection.

5.1 Scanlon's Ethics of Reasonable Rejection

T. M. Scanlon advances his own ethical theory in "Contractualism and Utilitarianism". Scanlon argues that our moral motivation stems from our desire to be able to justify our actions to others, and he bases his ethics on this justification: our ethical principles are the principles that no one could reasonably reject. In Section II of "Contractualism and Utilitarianism", Scanlon provides the foundation for a theory of reasonable rejection:

"An act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behavior which no one could reasonably reject as the basis for an informed, unforced general agreement."²⁵

Scanlon's ethics is based on a hypothetical choice situation radically different from the situation described in Theory of Justice. Scanlon's choice situation involves mutually disinterested individuals with full knowledge of their situations and a desire to find principles to which no one could reasonably reject. Scanlon develops his ethical theory of reasonable rejection further in his book,

²⁵ Scanlon, T. M. "Contractualism and Utilitarianism," Moral Discourse and Practice. Ed. By Steven Darwell, Allan Gibbard, and Peter Railton, Oxford University Press, New York, 1997, p. 272.

What We Owe to Each Other, where he argues that it is a mistake to base an ethical theory on the decisions made by parties under a veil of ignorance.²⁶

Scanlon replies to the obvious objection that he offers no further analysis of the concept of reasonableness, the central notion of his theory by arguing that a complete analysis of the concept is impossible because it is a basic concept, and therefore not analyzable. He does, however, offer descriptions and elucidations of the concept of reasonableness and attempts to demonstrate how the other features of his ethical theory can be understood in terms of this basic concept.

5.2 Scanlon and Rawls

There are several differences between Rawls's contractualism in Theory of Justice and Scanlon's contractualism in "Contractualism and Utilitarianism" and What We Owe to Each Other. There are three dissimilarities that will be particularly important in the following discussion:

- 1) The scope of the theories
- 2) The choice situations
- 3) Their beliefs on the limits of moral agreement

²⁶ Scanlon, T.M. What We Owe to Each Other. Belnap Press: Harvard University Press, Cambridge, 1998.

The first two dissimilarities are fundamental differences. Rawls's theory is designed specifically for the justice of basic social institutions. Scanlon's theory, on the other hand, is a theory for a broader portion of morality meant to encompass our duties to other people. Scanlon's domain of 'what we owe to each other' is a domain that includes justice, but it also includes what individuals owe to each other outside of our collective institutions. The fundamental choice situation is also radically different in the two theories. Scanlon's choice situation involves mutually disinterested individuals with full knowledge of their situations and a desire to find principles that no one could reasonably reject. Rawls's choice situation involves mutually disinterested parties making decisions in an original position behind a veil of ignorance.

The third difference, however, is not a difference between the theories themselves, but a fundamental and almost unstated difference between the aims of the two theories: Scanlon and Rawls have different expectations of the amount of moral agreement that can and will be achieved. In Theory of Justice, Rawls considers a choice situation like the one Scanlon advances. However, he rejects it in favor of his own choice situation because he believes that in the original position, under a veil of

ignorance, we will be able to reach definitive results.

Rawls states that "if in choosing principles we required unanimity even where there is full information, only a few rather obvious cases would be decided."²⁷ Scanlon questions the advantage of Rawls's choice situation; but notes that his suspicions may stem from the fact that his expectations for moral agreement are "more modest than Rawls's."²⁸

5.3 The Difference Principle and Reasonable Rejection

Some people may object that the difference principle cannot be incorporated into Scanlon's ethics of reasonable rejection because Scanlon himself claims, "It is sufficient ground for rejecting a principle that it singles others out, without justification, for a privileged moral status."²⁹ However, this objection rests on a misunderstanding of the difference principle. The difference principle is a structural principle; it does not single out any individual or group of individuals. The difference principle simply states that we should maximize the prospects associated with the bottom of the social structure. Let us suppose, for example, that in the *maximin* distribution bankers possess the fewest social and

²⁷ Rawls, John. A Theory of Justice, p.141.

²⁸ Scanlon, T. M. "Contractualism and Utilitarianism," p. 284.

²⁹ Scanlon, T.M. What We Owe to Each Other. p. 219.

economic advantages. In this situation, the difference principle does not favor maximizing the situation of bankers, for surely there is another distribution in which bankers are better off. However, in that distribution there would be another group whose economic situation would be worse than the bankers' situation is in the maximin distribution. The difference principle maximizes the situation of the least advantaged, but it does not maximize the situation of any individual or group of individuals.

Furthermore, Scanlon claims that the argument for the difference principle starts from the idea that members of society are equal partners in a system of social cooperation. Although, "it is sufficient ground for rejecting a principle that it singles others out, without justification, for a privileged moral status", there is a justification for giving the interests of the least privileged members of society priority within social institutions.³⁰ Since all the members of society are equal, each individual has a *prima facie* claim to an equal share in the benefits it creates.³¹ The question that arises within the limited scope of justice is under what conditions departures from a state of perfect equality can

³⁰ Scanlon, T.M. What We Owe to Each Other. p. 219.

³¹ *Ibid.* p. 228.

be justified. As Scanlon points out, the priority given to the least advantaged members of society does not arise out of a humanitarian concern for them, it stems from the fact that they are receiving less than equal shares of the benefits to which they have an equal claim. Although the difference principle seems to favor the least advantaged, this appearance is merely the effect of the limited scope of justice.³²

6.0 A Restricted Difference Principle

In "Contractualism and Utilitarianism", Scanlon argues that almost all of Rawls's arguments from Theory of Justice have at least as much force when they are interpreted within his ethics of reasonable rejection; the only exceptions are the arguments for the difference principle. Scanlon, however, does not argue for any modifications to the difference principle. He explains this disparity by focusing on the different scopes of the two theories: the scope of Rawls's theory is justice while the scope of Scanlon's theory is ethical obligations.

The interesting question that Scanlon leaves unasked, however, is whether there could be an independent

³² Scanlon, T.M. What We Owe to Each Other. p.229.

distributive principle for a theory of reasonable rejection. What if we focused on the differences between Rawls and Scanlon's choice situations and their beliefs about the limits of moral agreement instead of the differences between the scopes of their theories? Instead of being used to support the difference principle, can we use Scanlon's ethics of reasonable rejection to support a principle of restricted utility? In other words, can we use Scanlon's ethics of reasonable rejection to develop a distribution principle similar to (M2) or (M3), one that maintains their flexibility yet is not as susceptible to Rawls and Cohen's objections? Can we use Scanlon's ethics of reasonable rejection to develop a 'restricted difference principle' that is, in effect, a restricted principle of utility built on a foundation of reasonable rejection?

Some people may initially object that a restricted principle of utility cannot be built on a foundation of reasonable rejection. After all, reasonable rejection is Scanlon's foundation for a contractualist theory of ethics; therefore, we cannot build a utilitarian theory on a foundation of reasonable rejection. However, there are two important facts that need to be remembered: First, hybrid theories are not utilitarian theories; all hybrid theories accept Rawls first principle of justice and the principle

of fair equality of opportunity. None of the hybrid theories are utilitarian theories because the principles of equal liberty and equal opportunity take priority over the utilitarian distribution principle.³³ Second, a hybrid theory can maintain some utilitarian features within a foundation of reasonable rejection. Although the term 'reasonable' is regarded as fundamental and therefore not analyzable, it can be consistent with a theory of reasonable rejection to suppose that something resembling a principle of utility may sometimes be used in determining what is reasonable. In other words, a restricted difference principle can maintain some utilitarian features if there are situations in which some sacrifices by the least fortunate are considered reasonable because they increase the average economic situation of all members of society.

Therefore, we can arrive at a restricted difference principle based on a theory of reasonable rejection using the following guidelines: First, Rawls's priority relations between the first principle of justice, the principle of fair equality of opportunity, and the principle of economic distribution are maintained; no

³³ Rawls, John. A Theory of Justice, p. 278.

sacrifice of equal liberty or equal opportunity can ever be justified by an increase in social or economic goods.

Second, a just distribution of resources is defined as one that no one can reasonably reject. As in the case of Rawls's difference principle, our attention is focused on the situation of the least advantaged. This focus is not a fundamental feature; it stems from the fact that the least advantaged will be the ones who will most likely be able to reasonably reject a given distribution.

The restricted difference principle allows for a distribution that does not maximize the prospects of the least advantaged if and only if:

1. No one (including the least fortunate) could reasonably reject the distribution in question when it is compared with the *maximin* distribution.
2. Someone could reasonably reject the *maximin* distribution when it is compared to the distribution in question.

There are two important consequences of a restricted difference principle. First, like Rawls's difference principle, it precludes disastrous situations for the least advantaged. For, if choosing a particular distribution has disastrous effects on the least advantaged, then it is obvious that they could reasonably reject that particular distribution. Second, inequities that do not maximize the

prospects of the least advantaged will be allowed if and only if the benefits that the least advantaged would gain from choosing a *maximin* distribution instead are not substantial, and the benefits other members of society would gain from rejecting a *maximin* distribution are considerable.

6.1 The Principle of Diminishing Returns

The principle of diminishing returns holds that the value a unit of a given resource has will decline the more of that resource a person possesses. For example, as someone's wealth increases, the value of each additional dollar decreases. While \$10,000 would be of great value to me and of even greater value to someone who is homeless, it has less relative value for someone like Bill Gates. (In fact, Bill Gates probably earned \$10,000 while I was writing this sentence and never noticed it.) The principle of diminishing returns provides a persistent tendency to minimize the inequalities that a restricted difference principle allows. The principle of diminishing returns ensures that the ability a person has to reasonably reject the potential forfeiture of a given resource decreases as the total of his possessions increases. For example, while the least advantaged most likely will be able to reasonably

reject a distribution that provides them with \$10,000 less than the *maximin* distribution; the most advantaged most likely will not be able to reasonably reject the *maximin* distribution simply because it provides them with \$10,000 less than another distribution. The principle of diminishing returns ensures that inequalities that do not maximize the situation of the least advantaged will be allowed if and only if the benefits that the worst off would gain in a *maximin* distribution are not substantial, and the benefits other members of society would gain from rejecting a *maximin* distribution are considerable.

7.0 Comparing Principles

A comparison between Rawls's difference principle and the restricted difference principle cannot be made within the original position because the restricted difference principle is founded on the concept of reasonableness, a concept unavailable to the parties in the original position. Therefore, we need to return to the objections Rawls and Cohen provide against the restricted principles of utility in order to compare the two principles. The *maximin* argument cannot be considered because it is only relevant to a choice in the original position. However, the arguments that Rawls and Cohen provide against the

restricted principles of utility can be advanced independently of the original position; and therefore, they can be considered in a comparison between Rawls's difference principle and the restricted difference principle. Nonetheless, the mathematical formulation portion of Rawls's poverty line argument does not seem to provide much support for Rawls difference principle over the restricted difference principle. Supporters of both (M2) and (M3) need to provide an argument why a particular mathematical formulation for determining the poverty line and/or an equality factor is just. Although one could argue that the restricted difference principle relies on our intuitions more than Rawls's difference principle, neither principle has to specify either a specific poverty line or a specific equality factor to guarantee a satisfactory minimum.

Furthermore, neither Cohen's argument of self-respect nor his attitude portion of the stability argument appears to provide much support for Rawls's difference principle over the restricted difference principle. The force of these arguments is strongest when comparing the difference principle with (M1), and they are weaker when comparing the difference principle with (M2) and (M3). While (M1) does not explicitly guarantee any resources, (M2) and (M3)

guarantee a certain minimum, and their minimums are increased as their poverty lines are raised. While these arguments appear to significantly favor the difference principle over (M1), the force of these arguments diminishes with respect to (M2) and (M3) because those principles are committed to ensuring that every citizen possesses a minimum amount of resources. Furthermore, the force of these arguments further diminishes as the poverty lines in (M2) and (M3) are increased, thereby increasing their commitment to the least fortunate. However, the restricted difference principle has an even stronger commitment to the least advantaged than the restricted principles of utility; it allows deviations from the *maximin* distribution if and only if the least advantaged cannot reasonably object. Therefore, neither Cohen's argument of self-respect nor the attitude portion of his stability argument appears to provide much support for Rawls's difference principle over the restricted difference principle.

Finally, neither Rawls's argument of reciprocity nor his third requirement for a stable democracy appears to provide much support for Rawls's difference principle over a restricted difference principle. The force of both these arguments is strongest against (M1) and (M2), and weaker

against (M3) because (M3) possesses a factor that favors equality. Furthermore, the force of these arguments diminishes incrementally as that equality factor is increased. However, the restricted difference principle possesses an inherent tendency to maintain equality and reciprocity. Like Rawls's difference principle, it embodies the idea that we are equal partners in social cooperation. In addition, the restricted difference principle encourages the spirit of compromise and treating citizens as equals more than any of the restricted principles of utility. Therefore, neither Rawls's augment of reciprocity nor his third requirement for a stable democracy appears to provide much support for Rawls's difference principle over the restricted difference principle.

8.0 Conclusion

Rawls would most likely dismiss any debate between the difference principle and a restricted difference principle; he would probably point out that the cure is worse than the disease. Rawls's difference principle provides a precision that a restricted difference principle can never hope to provide; in effect, a restricted difference principle introduces vagueness into a perfectly determinate theory. For Rawls, a principle of justice that is indeterminate is

inherently flawed because it has to function as a public guide for social cooperation. Although Rawls concedes that all ethical principles, including his own, are vague and complex, he would argue that the difference principle is simpler and more determinate than the restricted difference principle. He would also argue that a restricted difference principle relies on our intuition for its application much more than the difference principle does because a restricted difference principle would require us to use our intuitions every time we needed to determine the reasonableness of a possible objection.

In one sense, it seems that these would be valid objections; the restricted difference principle abandons the determinacy of Rawls's difference principle and it relies on our intuitions more than Rawls's difference principle does. However, while we strive for a high degree of precision and determinacy in specific laws, e.g. we require drivers to stay under fifty-five miles per hour rather than simply requiring them to drive at a reasonable speed, it does not necessarily follow that such a high degree of precision and determinacy is possible or even desirable in our ethics and in the basic principles of justice. Furthermore, although the restricted difference principle lacks the simplicity of application and the

determinacy of the difference principle, so do the restricted principles of utility. Although the intuition portion of the poverty line argument and the simplicity portion of the stability argument favor the difference principle over a restricted difference principle, they do not by themselves rule out a restricted difference principle as a possible alternative. The supporters of the hybrid theories can still attempt to demonstrate, as they were required to do before, that the difference principle achieves determinacy in an arbitrary or morally insensitive fashion. They can still attempt to argue that the just distributions are more complicated than Rawls difference principle claims, that determining the just distribution is best settled in individual situations by deciding what is reasonable. Although the foundational shift to Scanlon's ethics of reasonable rejection does not eliminate vagueness or the need for intuition, it does reduce the force of several other objections made against restricted principles of utility. It does appear to be a better foundation on which the arguments for flexibility and contextual dependence can be built.