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## RAWLS, INEQUALITY, AND WELFARE-STATE CAPITALISM

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John Rawls offers a powerful framework for judging the astounding levels of inequality that modern capitalism has engendered. He is not, however, a good guide to that framework's implications, because his own response was ill-informed about how the economy operates today.

Rawls has often been taken to be a defender of welfare-state capitalism.<sup>1</sup> In fact, he believed capitalism (with or without a welfare state) is inherently unjust. The only morally acceptable economic systems are democratic socialism (in which “the means of production are owned by society”<sup>2</sup>) or “property-owning democracy,” a market economy in which government continually intervenes to ensure widespread dispersal of the ownership of capital.<sup>3</sup> He built these claims on a description of contemporary American capitalism that is almost completely false and a remarkably optimistic account of the alternatives. That is unfortunate, because his framework is one of our most useful tools for identifying the pathologies of inequality.

Rawls's misunderstanding of the effects of free markets leads many to reject his philosophy outright. Actually it merely shows that he got some facts wrong. His liberalism shows that the only viable path to a prosperous society based upon mutual respect is a

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1 KATRINA FORRESTER, *IN THE SHADOW OF JUSTICE: POSTWAR LIBERALISM AND THE REMAKING OF POLITICAL PHILOSOPHY* 104–39 (2019); WILLIAM A. EDMUNDSON, *JOHN RAWLS: RETICENT SOCIALIST* 3–5 (2017).

2 JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 138 (Erin I. Kelly ed., 2001) [hereinafter *JUSTICE AS FAIRNESS*].

3 He was drawn to this idea of property-owning democracy as early as the 1950s. See FORRESTER, *supra* note 1, at 16.

vigorous free market, with concomitant inequalities, backed up by an equally vigorous welfare state—one far more generous than the United States has now. It also highlights aspects of present America that are genuinely intolerable.

### I. WHY SOCIAL CONTRACT THEORY?

Social contract theory has enduring appeal because it offers an attractive justification for authority. The state can rightfully exercise sovereignty over us if we have agreed to give it that sovereignty: in the words of the Declaration of Independence, “Governments are instituted among Men, deriving their just powers from the consent of the governed.”<sup>4</sup>

The notion that our institutions are, have been, or ought to be unanimously agreed to provokes three familiar objections.

First, as David Hume pointed out, there never was any such agreement. Any social contract must be hypothetical, and how can we be bound by a hypothetical contract?<sup>5</sup>

Second, some of our obligations are unchosen and inherited, such as those of family. Social contract theory builds upon Hobbes’s dictum that there can be “no Obligation on any man, which ariseth not from some Act of his own.”<sup>6</sup> Yet, as Roger Scruton observed, any social contract presumes a determinate set of parties, who have mutual obligations that precede contract: “if they are in a position to decide their common future, it is because they already have one: because they recognize their mutual togetherness and reciprocal dependence, which makes it incumbent upon them to settle how they might be governed under a common jurisdiction in a common territory.”<sup>7</sup> We are born into communities that always already have claims upon us because they nurtured us into maturity and that we have claims upon from childhood on because they created us. Our social obligations cannot possibly be contractual all the way down.

Third, the disagreements among social contract theorists such as Hobbes, Locke, Rousseau, Kant, and Rawls show that the details of any hypothetical contract are contestable—so much so that many have thought the notion is useless.

These objections are sound only if one attempts to use social contract theory to justify the details of legislation and rights. Social contract theory’s value is primarily *negative*. It can show the outer boundaries of possible legitimate governance. Its claims are best understood as prolegomena to any possible future legislation.

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4 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

5 David Hume, *Of the Original Contract*, in *ESSAYS MORAL, POLITICAL, AND LITERARY* 465 (Eugene F. Miller ed., 1987).

6 THOMAS HOBBS, *LEVIATHAN* 268 (C.B. MacPherson ed., 1968).

7 ROGER SCRUTON, *HOW TO BE A CONSERVATIVE* 23 (2014). For elaboration, see ROGER SCRUTON, *MODERN PHILOSOPHY: AN INTRODUCTION AND SURVEY* 414–18 (1994), which acknowledges that this point was originally made by Hegel.

### A. *Defending the Contract*

A defense of social contract theory appropriately proceeds through two stages.

The first of these is what Jeremy Waldron calls “negative hypothetical contractarianism”: we can *rule out* some principles of justice using a contractarian approach. The answer to the excessive-detail objection is that social contract theory does not offer a detailed prescription for governance. But its entailments still matter. One can “show that a suggested principle of justice is *unacceptable* by showing that there is no remotely plausible or coherent counterfactual hypothesis under which the principle would command the universal consent of citizens.”<sup>8</sup> The nastiest principles are instantly excluded: slavery, hereditary aristocracy, the sort of utilitarianism that would impose enormous pain on some to make everyone else a little happier. And certain formulations of libertarianism, which would entail that those who lack the means to purchase food have an obligation to starve.<sup>9</sup> “Time and again, Locke argued (against various permutations of royal absolutism) *not* that the people have not in fact consented to these arrangements, but rather that the arrangements are such that rational consent to them is *unthinkable*.”<sup>10</sup>

The second stage is trickier: the proponent of the social contract must persuade *you*, the reader, the audience for political philosophy, to consent to the institutions of a just society. That is the deepest source of social contract theory’s continuing appeal. Once we stop believing that the holders of political power are ordained by God, legitimate authority must come from ourselves somehow, if it is to come from anywhere. We have to agree to it. Hume is right that you haven’t in fact agreed. Implied or tacit consent won’t do.

If political legitimacy depends on agreement, then Hume is right: the agreement must be actual, not hypothetical. Why should you agree to it? Perhaps agreement is in your interest, or you might have a moral duty to agree.<sup>11</sup> Both are pretty compelling. A world without legal obligations is a mighty scary place. We owe it to each other to bring a lawful world into existence.

### B. *Betrayal*

The prepolitical attachment to the polity that Scruton pointed to can exist only if the terms of cooperation fulfill certain conditions. Negative contractarianism sheds light on these. Even a thick web of social relations may be such as to generate no obligations.

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8 JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 273 (1988).

9 *Id.* at 271–83. More on that below.

10 *Id.* at 273.

11 Hobbes and Rousseau offered interest-based arguments, though they relied on different interests: physical safety (Hobbes) and the need not to be dominated by others (Rousseau). Kant’s argument is duty-based. Interpreters have read Locke both ways.

Consider the position of slaves in the antebellum United States. At the eve of the Civil War, most of them were born in America, importation of slaves having been banned in 1808.<sup>12</sup> In *Dred Scott v. Sandford*,<sup>13</sup> the Supreme Court declared that “The African race . . . born in the country, did owe allegiance to the Government, whether they were slave or free.”<sup>14</sup> This is a puzzling statement.

A sounder account is that of *State v. Mann*,<sup>15</sup> an 1829 decision by North Carolina Supreme Court Chief Justice Thomas Ruffin, which held that the law could not punish a master who had maimed a slave.<sup>16</sup> The demands of the master cannot rest “upon a principle of natural duty, or for the sake of [the slave’s] own personal happiness.”<sup>17</sup> Any such claim is one that “it is impossible but that the most stupid must feel and know can never be true.”<sup>18</sup> A slave must “toil that another may reap the fruits.”<sup>19</sup> The relation of master and slave is one of force. “Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect.”<sup>20</sup>

Chief Justice Ruffin’s frankness, which attracted the admiration of Harriet Beecher Stowe, shows the delusion of the Supreme Court’s claim that slaves owed allegiance to the government. Scrutonian prepolitical attachment would be nonsense.

Yet the slave, born in the United States, was part of this community. He was an American. Slavery was thus a betrayal of one’s own. Frederick Douglass’s 1852 speech, *What to the Slave is the Fourth of July?*, makes the point:

The blessings in which you, this day, rejoice, are not enjoyed in common. The rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you, not by me. . . . To drag a man in fetters into the grand illuminated temple of liberty, and call upon him to join you in joyous anthems, were inhuman mockery and sacrilegious irony.<sup>21</sup>

The point is not merely that African Americans are excluded. It is that “your celebration is a sham; . . . your shouts of liberty and equality, hollow mockery.”<sup>22</sup>

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12 Act Prohibiting Importation of Slaves of 1807 (Pub. L. No. 9-22, 2 Stat. 426).

13 *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

14 *Id.* at 420.

15 *State v. Mann*, 13 N.C. 263 (1829).

16 *Id.* at 268.

17 *Id.* at 266.

18 *Id.*

19 *Id.*

20 *Id.*

21 Frederick Douglass, *What to the Slave Is the Fourth of July?* (July 5, 1852), <https://www.ushistory.org/declaration/more/douglass.html>.

22 *Id.*

The soft, abstract idea of a social contract has sharp teeth. It is not too abstract to condemn certain specific social and political relations. For obligations to exist, it is not enough to find oneself born into a polity. The polity must be entitled to its claims.

### C. Rawls's Innovation

Rawls's core idea was to make mutual respect the ultimate foundation of the social contract. Other bases are deemed morally irrelevant and discarded. Take, for example, his revision of Locke. Rawls never relied on anything like Locke's claim that we have obligations because we are God's creations. He also rejected Locke's idea of a prepolitical entitlement to property that one enters into the social contract to protect. Locke's conception of the social contract allowed those with more property to exercise an unfair degree of power over those with less. Notably, his conception may be consistent with a property qualification for voting. In easily imaginable circumstances, it could be rational for the poor to bargain away their civil liberties when entering into a social contract.<sup>23</sup>

Property rights are artifacts of law. Political life did not begin as I was sitting in the state of nature with my brokerage account.<sup>24</sup> Rawls thus relied on contractualism in a deeper way than Locke: our rights, including our property rights, are specified by the social contract and so depend on what a fair social contract would entail.

Rawls famously argued that the basic structure of society would be fair if its terms were those that would be agreed to in a hypothetical "original position," in which a "veil of ignorance" prevents any of the parties from knowing such morally irrelevant facts as their position in society, most relevantly here whether they are rich or poor. With their information thus restricted, the parties would agree to what he called the "difference principle": inequalities are acceptable only to the extent that "they are to be to the greatest benefit of the least advantaged members of society."<sup>25</sup> Any inequalities must be arranged in such a way that the poor are better off than they would be under any alternative scheme of cooperation.<sup>26</sup>

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23 JOHN RAWLS, LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY 152–55 (Samuel Freeman ed., 2007) [hereinafter LECTURES]; JOHN RAWLS, POLITICAL LIBERALISM 286–88 (1993) [hereinafter POLITICAL LIBERALISM]. Rawls's reading of Locke on this point is contested. "Whether Locke assumed that the members of his political society were substantial property-owners or whether he held a more extended view of political membership is one of the most controversial questions in the secondary literature on Locke." RICHARD ASHCRAFT, LOCKE'S TWO TREATISES OF GOVERNMENT 166 (1987). Locke's position is at least ambiguous, and Rawls's modification of social contract theory removes the ambiguity.

24 See LIAM MURPHY AND THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE (2002).

25 RAWLS, POLITICAL LIBERALISM, *supra* note 23, at 6.

26 RAWLS, JUSTICE AS FAIRNESS, *supra* note 2, at 59–60, 63.

Negative hypothetical contractarianism plays an important role in Rawls. It would be irrational for the parties to risk “outcomes that one can hardly accept.”<sup>27</sup> That rules out religious persecution or hereditary aristocracy. It also excludes a state of affairs in which some “experience their condition as so miserable, or their needs so unmet, that they reject society’s conceptions of justice and are ready to resort to violence to improve their condition.”<sup>28</sup> Even those with the least wealth are “those to whom reciprocity is owed as a matter of political justice among those who are free and equal citizens along with everyone else.”<sup>29</sup> The distribution of wealth must not jeopardize their political equality. “Although they control fewer resources, they are doing their full share on terms recognized by all as mutually advantageous and consistent with everyone’s self-respect.”<sup>30</sup>

#### D. *How Markets Distribute*

Rawls was, of course, writing in a capitalist economy, which has two salient features: it generates enormous wealth that vastly improves the quality of nearly everyone’s life, and it makes some people far richer than everyone else.

The way in which markets create wealth necessarily entails that their rewards will be distributed unequally. Moreover, the distribution will inevitably be morally arbitrary. Prices transmit more information than any planner could know, coordinating the productive activities of millions who need not even be aware of one another’s existence. Shifts in supply and demand produce economic success and failure, often for reasons no one could have anticipated. Prices, including compensation for labor, reveal willingness to pay, not desert or need.

Claims about what’s deserved, Friedrich Hayek observed, are backward-looking. Prices are forward-looking. They tell people which of their efforts will be most valued by other people.<sup>31</sup> John may have toiled selflessly for years to produce a product that he knew would greatly improve the lives of consumers, but if some lazy lout happens to stumble upon a better or cheaper substitute, John will be ruined. And he should be ruined. No one wants his product, and it would be wasteful to keep producing it. In a free market, Hayek

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27 JOHN RAWLS, A THEORY OF JUSTICE 154/134 rev [hereinafter THEORY OF JUSTICE]. Rawls argued that they should follow the “maximin” rule for choice under uncertainty: “we are to adopt the alternative the worst outcome of which is superior to the worst outcomes of the others.” *Id.* at 153/133 rev. Maximin is a rational strategy only when the worst possible outcome is “altogether intolerable.” RAWLS, JUSTICE AS FAIRNESS, *supra* note 2, at 98. Departures from the difference principle are not in themselves intolerable if those at the bottom are having their basic needs met. Rawls acknowledged that the maximin rule does not itself support the difference principle. *Id.* at 94–95.

28 *Id.* at 129.

29 *Id.* at 139.

30 *Id.*

31 FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY: THE DEFINITIVE EDITION 148–165 (Ronald Hamowy ed., 2011).

concluded, rewards appropriately “will of necessity be determined partly by skill and partly by luck.”<sup>32</sup>

Rawls understood this arbitrariness and thought it was a reason to reject the notion that workers are entitled to no more than the marginal product of their labor. “The marginal product of labor depends on supply and demand.”<sup>33</sup> If your wage collapses because of some technological innovation, the introduction of competing sources of labor, or an economic contraction, you did not suddenly become less deserving.

Hayek thought that inequality is good for the poor. Any limit on capital accumulation would impair the economy’s capacity to respond to price signals. The prospect of extraordinary profits drives innovators (or at least attracts investors). Any such gains are inevitably temporary. The competition of imitators soon reduces returns to normal levels. Producers capture only about two percent of the social returns from technological advances.<sup>34</sup>

Free markets played a crucial role in what Deirdre McCloskey has called The Great Enrichment: after scraping by in desperate poverty for about 100,000 years, much of the human race became spectacularly rich beginning around 1800.<sup>35</sup> After the collapse of Soviet Communism and the abandonment of socialism by such major powers as China and India, the proportion of the world population living in desperate poverty plunged. In 1990, 35 percent of the world’s population lived on less than US\$1.90 a day. By 2013, that had dropped to 10.7 percent.<sup>36</sup> For the first time in history, more than half of the world is middle class or wealthier.<sup>37</sup> (Most of the remaining poor live in failed states.)

Economic growth consistently helps the poor in countries that protect rights and have the rule of law. There the correspondence between real GDP growth and the income of the lowest quintile is approximately 1:1.<sup>38</sup>

That growth brings with it inequality. The effect is particularly stark in the United States. Wealth in the United States is increasingly concentrated at the very top. In

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32 2 FRIEDRICH HAYEK, *LAW, LEGISLATION, AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* 71 (1976).

33 RAWLS, *THEORY OF JUSTICE*, *supra* note 27, at 308/271 rev.

34 William D. Nordhaus, *Schumpeterian Profits in the American Economy: Theory and Measurement* 22 (Nat’l Bureau of Econ. Rsch., Working Paper No. 10433, 2004), <https://www.nber.org/papers/w10433>.

35 DEIRDRE McCLOSKEY, *BOURGEOIS EQUALITY: HOW IDEAS, NOT CAPITAL OR INSTITUTIONS, ENRICHED THE WORLD* xii (2016).

36 WORLD BANK GROUP, *POVERTY AND SHARED PROSPERITY 2016: TAKING ON INEQUALITY* (2016), <https://openknowledge.worldbank.org/bitstream/handle/10986/25078/9781464809583.pdf>.

37 Homi Kharas & Kristofer Hamel, *A Global Tipping Point: Half the World Is Now Middle Class or Wealthier*, BROOKINGS (Sept. 27, 2018), <https://www.brookings.edu/blog/future-development/2018/09/27/a-global-tipping-point-half-the-world-is-now-middle-class-or-wealthier/>.

38 Jason Brennan, *Rawls’ Paradox*, 18 CONST. POL. ECON. 287, 294–95 (2007) (citing David Dollar & Aart Kraay, *Growth is Good for the Poor*, 7 J. ECON. GROWTH 195 (2002)).

2019, the mean income of the top one percent of adults was \$1.4 million,<sup>39</sup> and that group had 38.2% of the nation's wealth.<sup>40</sup> Between 1983 and 2019, the top twenty percent of households received 94.9% of the growth in wealth, with the top one percent getting 41.6% of the total and 14.9% going to the top one-tenth of one percent.<sup>41</sup> Between 2007 and 2019, income grew at a rate of 7% for the bottom quintile of workers, 22.6% for the top quintile. With income as with wealth, the growth is concentrated at the top of the top: "among the 600,000 or so that constitute the lower half of the top 1 percent, average pretax income roughly doubled between 1979 and 2014, from \$275,000 to \$500,000. Among the 12,000 households that make up the top 0.01 percent, average income quadrupled during those years, from \$7 million to \$29 million."<sup>42</sup>

The United States is an outlier in both its level of inequality and its pace of economic growth. From 1991 to 2012, net of inflation, the U.S. economy grew sixty-three percent, compared with France, thirty-five percent; Germany, twenty-eight percent; and Japan, sixteen percent.<sup>43</sup> The real gross domestic product of the United States grew from \$299 billion in 1950 to \$22 trillion (in 2012 dollars) at the end of 2021, from \$14,500 to \$59,692 per capita.<sup>44</sup>

The surge in inequality has no single cause. For the most part, it is the consequence of economic growth:

The rise in the top 1 percent's income share since the late 1970s is a product of multiple developments—growth in product market size, shifts in corporate governance, increases in the market power of some large firms, financialization, soaring stock values, union decline, and reductions in top tax rates—no one or two or even three of which look to have been dominant or decisive.<sup>45</sup>

Hayek declared that, because such unequal growth tended to benefit the poor, there was no necessary inconsistency between his view and that of Rawls. Rawls's difference principle acknowledges that inequalities can benefit the least advantaged. Hayek quoted with approval Rawls's claim that "principles of justice define the crucial constraints which

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39 SARAH A. DONOVAN ET AL., CONG. RSCH. SERV., REPORT NO. 44705, THE U.S. INCOME DISTRIBUTION: TRENDS AND ISSUES 14 (2021).

40 Edward N. Wolff, *Household Wealth Trends in the United States, 1962 to 2019: Median Wealth Rebounds . . . But Not Enough* 48 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28383, 2021).

41 *Id.* at 14.

42 Lane Kenworthy, *Why the Surge in Income Inequality?*, 46 CONTEMP. SOCIO. 1, 2 (2017).

43 EDWARD CONARD, UNINTENDED CONSEQUENCES: WHY EVERYTHING YOU'VE BEEN TOLD ABOUT THE ECONOMY IS WRONG 23 (2012).

44 U.S. Bureau of Econ. Analysis, *Real Gross Domestic Product per Capita*, retrieved from FRED, Federal Reserve Bank of St. Louis (Feb. 23, 2023), <https://fred.stlouisfed.org/series/A939RX0Q048SBEA>.

45 Kenworthy, *supra* note 42, at 8.



institutions and joint activities must satisfy if persons engaging in them are to have no complaints about them. If these constraints are satisfied, the resulting distribution, whatever it is, may be accepted as just (or at least not unjust).<sup>46</sup> Hayek wrote that this was “more or less what I have been trying to argue.”<sup>47</sup>

Hayek embraced something like Rawls’s difference principle: “we should regard as the most desirable order of society one which we would choose if we knew that our initial position in it would be decided purely by chance.”<sup>48</sup> Concern for the least advantaged is a reason to encourage free markets, which raise the standard of living of those on the bottom more than redistribution could.<sup>49</sup>

### E. Why Inequality Matters

Given the relationship between inequality and economic growth, can there be Rawlsian objections to the inequalities that free markets generate? The clearest such objections are developed by Rawls’s Harvard colleague T.M. Scanlon, in his book *Why Does Inequality Matter?*<sup>50</sup>

Scanlon, like Rawls, evaluates interpersonal relations in contractual terms, based upon what can be agreed to from a point of view that respects our equal moral status as rational autonomous agents.<sup>51</sup> From that standpoint, there is ample reason to support a principle

46 HAYEK, *supra* note 32, at 100 (quoting John Rawls, *Constitutional Liberty and the Concept of Justice*, 6 NOMOS 98, 102 (1963)).

47 *Id.* He later claimed that this statement was not altogether sincere:

I was trying to remind Rawls himself of something he has said in one of his earlier articles, which I’m afraid doesn’t recur in his book: that the conception of correcting the distribution according to the principles of social justice was unachievable, and that therefore he wanted to confine himself to inventing general rules which have this effect. Now if he was not prepared to defend social distributive justice, I thought I could pretend to agree with him. But studying his book further, my feeling is he doesn’t really stick to that he had announced first. And that there is so much egalitarianism, really, underlying his argument that he is driven to much more intervention than his original conception of justice has.

Free to Choose Network, *Hayek and Buchanan: Rawls, Egalitarianism and Social Justice*, YOUTUBE (Aug. 24, 2010), <https://www.youtube.com/watch?v=uRhs26o03ok> (Friedrich Hayek in conversation with James Buchanan); *Nobel Prize-Winning Economist Oral History Transcript 219*, INTERNET ARCHIVE (1983), <https://archive.org/details/nobelprizewinnin00haye/page/n473/mode/2up?q=rawls> (interview of Friedrich Hayek by UCLA Oral History Program).

48 HAYEK, *supra* note 32, at 132.

49 Hayek’s views on redistribution are less persuasive. He feared that income stabilization measures, such as Social Security, are a slippery slope to socialism. Elizabeth Anderson, *Common Property: How Social Insurance Became Confused With Socialism*, BOS. REV. (July 25, 2016), <https://www.bostonreview.net/articles/elizabeth-anderson-social-insurance-thomas-paine-friedrich-hayek/>.

50 T.M. SCANLON, *WHY DOES INEQUALITY MATTER?* (2018).

51 The similarities and differences in their philosophies are nicely summarized in *Contractualism (2. How Does Contractualism Differ from Other Social Contract Theories?)* (Apr. 20, 2018), STAN. ENCYC. PHILOSOPHY, <https://plato.stanford.edu/entries/contractualism/#HowDoeConDifOthSocConThe>.

of *sufficiency*: everyone should have the resources for a decent life. Redistribution, Scanlon observed, may be “a way of making the poor better off, at comparatively small cost to the welfare of the rich.”<sup>52</sup> But he observed that this is not an objection to inequality as such. A principle of sufficiency will support capitalism, with its concomitant inequalities, if that is the most reliable way to promote sufficiency for all.

Scanlon offered six different reasons why economic inequality *as such* could be in tension with mutual respect.

First, it may reflect that the state is treating people with unequal concern, valuing the well-being and autonomy of some more than others. Racist decision-making is the most obvious example, but politicians’ indifference to the poor could be another. Call this the *problem of bias*. (My labels are not Scanlon’s.)

Second, it may lead to inferior status in society, which tends to engender shame and degradation. This second wrong can easily lead to the first: the state tends to undervalue those with inferior status. Call this the *problem of humiliation*.

Third, it may violate equality of opportunity, giving those who are better off unfair access to the best positions. Opportunities should be available on the basis of talents rather than social circumstances. Call this the *problem of bottlenecks*.<sup>53</sup>

Fourth, it may give the rich unacceptable control over those who have less. Lack of resources may make it possible for the rich to push the poor around, and even to violate their rights. Call this the *problem of abusive power*.

The fifth is an instance of the fourth: it may undermine political fairness, giving the rich an undemocratic degree of influence. Here Scanlon cited research showing that in the United States, political outcomes tend to reflect the political preferences of the richest citizens and to be entirely unaffected by the preferences of the poorest when they contradict what the rich want. Call this the *problem of oligarchy*.

Sixth, it may be the consequence of an unfair distribution of income and wealth. Call this the *problem of unfairness*.

Scanlon thus carefully distinguished themes that, in common discourse, are often conflated. Barack Obama’s 2013 speech declaring inequality “the defining challenge of our time” drew on all of these, moving freely from one to another without pausing to note that they are different complaints that might call for different remedies.<sup>54</sup>

To Scanlon’s list one might add systemic effects. A survey of the evidence shows that “income inequality tends to reduce middle-class income growth, increase

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52 SCANLON, *supra* note 50, at 1.

53 I borrow this term from Joseph Fishkin. See JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* (2014).

54 President Barack Obama, Remarks by the President on Economic Mobility (Dec. 4, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/12/04/remarks-president-economic-mobility>.

disparities in education, health, family structure, and happiness, and heightened residential segregation.”<sup>55</sup>

The most salient aspect of all of these is their contingency and variability. None of them are necessary consequences of inequality in the way that morally pernicious relationships between persons are necessary consequences of slavery.

On the other hand, they happen a lot. Perhaps capitalism always generates one or more of these pathologies. (Or, if they are inevitable aspects of the human condition, perhaps it produces them more often than alternative economic systems would.) If that were true, then one might face a painful trade-off between the advantages of economic growth for the poorest members of society and the concomitant humiliation and abuse they would have to endure.

## II. RAWLS’S CASE AGAINST WELFARE-STATE CAPITALISM

The moral objections to inequality enumerated by Scanlon are implicit in Rawls’s arguments against welfare-state capitalism. Even with a generous welfare state, Rawls thought, there is too much power at the top and too much alienation and humiliation at the bottom.

### A. *The World According to Rawls*

Here I will outline Rawls’s claims. In the next section I will investigate whether they are true.

The deepest problem, for Rawls, was oligarchy. Capitalism “permits very large inequalities in the ownership of real property (productive assets and natural resources) so that the control of the economy and much of political life rests in a few hands.”<sup>56</sup> It does more

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55 LANE KENWORTHY, *Is Income Inequality Harmful?*, in *THE GOOD SOCIETY* (2016), <https://lanekenworthy.net/is-income-inequality-harmful/>. Other often-alleged effects have not been shown:

The evidence suggests that income inequality hasn’t slowed the growth of college completion. It either hasn’t reduced the increase in life expectancy or the decrease in infant mortality or, if it has, the impact has been small. It looks unlikely to have contributed to the rise in obesity. It hasn’t slowed the fall in teen births or homicides since the early 1990s. It hasn’t reduced economic growth. It hasn’t hindered employment. It isn’t systematically linked to the occurrence of economic crises. It hasn’t reduced income growth for poor households. It doesn’t appear to have affected average happiness. In the United States it has had little or no impact on trust in political institutions, on voter turnout, or on party polarization.

For some outcomes—trust, the Great Recession, household balance sheets, equality of opportunity, and inequality of political influence—the evidence is ambiguous or it is simply too soon to make any kind of informed judgment.

*Id.* Another surveyor of the evidence who is likewise skeptical of these effects is Scott Winship. See Scott Winship, *Overstating the Costs of Inequality*, 15 NAT’L AFFS. 33 (Spring 2013), <https://www.nationalaffairs.com/publications/detail/overstating-the-costs-of-inequality>.

56 RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 2, at 138.

than permit it: “the invisible hand guides things in the wrong direction and favors an oligopolistic configuration of accumulations.”<sup>57</sup>

The difference principle holds that inequalities are acceptable if they are to the benefit of the least advantaged. Welfare-state capitalism cannot be justified in this way, because it unfairly “permits a small class to have a near monopoly of the means of production.”<sup>58</sup>

A job is not sufficient to make one a full member of society and guarantee self-respect, if one must labor for a wage and have no control over capital. Inequality produces bottlenecks: “the institutions protecting fair equality of opportunity are put in jeopardy when inequalities of wealth exceed a certain limit.”<sup>59</sup> Some opportunities are available only to the children of the wealthy because of differences in either education or access to social networks that lead to the best jobs.<sup>60</sup>

A social safety net for the unemployed can produce effects that are even worse. In a welfare state, “given the lack of background justice and inequalities in income and wealth, there may develop a discouraged and depressed underclass many of whose members are chronically dependent on welfare. This underclass feels left out and does not participate in the public political culture.”<sup>61</sup> This sounds sufficientarian: not a concern about inequality, but about marginalization. But the alienation and humiliation are consequences of unequal control over the economy.

Welfare-state capitalism has the wrong “public aims and principles of design.”<sup>62</sup> Samuel Freeman explained that it “is for Rawls a ‘liberalism of happiness,’ the public aim of which is promoting individuals’ happiness or welfare. Its principle of design he sees as some form of utilitarianism.”<sup>63</sup> Arguments in support of capitalism, Freeman has claimed, tend to “assume that the best life for individuals is one of consumption, and that consumption is to be valued since it promotes individuals’ welfare.”<sup>64</sup>

Limitations on inheritance are the principal means by which Rawls proposed to remedy this unequal control over the means of production. The state should intervene

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57 RAWLS, *POLITICAL LIBERALISM*, *supra* note 23, at 267.

58 RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 2, at 139.

59 RAWLS, *THEORY OF JUSTICE*, *supra* note 27, at 278/246 rev.

60 Samuel Freeman, *Property-Owning Democracy and the Difference Principle*, 35 *ANALYSE & KRITIK* 9, 17 (2013). I will frequently cite Freeman’s sympathetic elaboration of Rawls’s case against welfare-state capitalism. Probably no one is a more reliable interpreter of Rawls. Freeman was selected by Rawls himself to edit his *Lectures on the History of Political Philosophy*, see RAWLS, *LECTURES*, *supra* note 23, and his *Collected Papers*, JOHN RAWLS, *COLLECTED PAPERS* (Samuel Freeman ed., 1999). He edited the *Cambridge Companion to Rawls*, THE *CAMBRIDGE COMPANION TO RAWLS* (Samuel Freeman ed., 2002), and his monumental study *Rawls*, SAMUEL FREEMAN, *RAWLS* (2007), is an indispensable guide.

61 RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 2, at 140.

62 *Id.* at 137.

63 Freeman, *supra* note 60, at 17.

64 *Id.* at 18.

“gradually and continually to correct the distribution of wealth,” for example through “inheritance and gift taxes” and “restrictions on the rights of bequest.”<sup>65</sup> Inequalities will not produce oligarchy if they cannot be perpetuated from one generation to the next.

This redistribution might have a depressing effect on economic growth, but that is not a flaw. Justice “does not require continual economic growth over generations.”<sup>66</sup> The point of the theory of justice is “not simply to increase, much less to maximize indefinitely, the average level of wealth, or the wealth of any society or any particular class in society.”<sup>67</sup> The goal of growth itself reflects the wrong public aims: “The thought that real saving and economic growth are to go on indefinitely, upwards and onwards, with no specified goal in sight, is the idea of the business class of a capitalist society.”<sup>68</sup>

In sum, the fundamental flaw of capitalism is the concentration of capital in a few hands, which is primarily the consequence of inherited wealth. Those lucky enough to be among those few hold oligarchical political power. Those who must sell their labor power for a wage—that is, most of the population—face humiliation, abusive power, and very limited opportunities. The ones who cannot find jobs are even worse off, regardless of whether welfare payments keep them out of destitution. This system may deliver growth and prosperity, but it reflects a philosophy based on consumption rather than mutual respect. No fair social contract could include such conditions.

### **B. Concentrated Capital**

Is Rawls’s picture of the capitalist economy accurate?

In almost every detail, it is not.

Consider the concentration of capital. The essential difference between welfare-state capitalism and the “property-owning democracy” that Rawls found acceptable is that the latter ensures that ownership of capital is widely shared. When “[s]ociety is not so divided that one fairly small sector controls the preponderance of productive resources . . . and distributive shares satisfy the principles of justice, many socialist criticisms of the market economy are met.”<sup>69</sup>

Rawls evidently took up this concern from Karl Marx, who defined social classes by their relationship to the means of production.<sup>70</sup> As Rawls summarized Marx: “In order to exercise and apply their labor-power, which is the only factor of production the workers own, the workers must have access to and be able to use the means of production owned

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65 RAWLS, *THEORY OF JUSTICE*, *supra* note 27, at 277/245 rev.

66 RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 2, at 63.

67 JOHN RAWLS, *THE LAW OF PEOPLES* 107 (1999).

68 *Id.* at 107 n.33.

69 RAWLS, *THEORY OF JUSTICE*, *supra* note 27, at 280/247-48 rev.

70 On Rawls’s affinity with Marx, see EDMUNDSON, *supra* note 1, at 182–83.

by the capitalists. Without those means, their labor is not productive.”<sup>71</sup> So, “since capitalists, as a class, own the means of production as their private property, they can extract a certain total of surplus or unpaid labor. Workers must, as it were, pay a fee—their surplus labor—for their use of those productive instruments.”<sup>72</sup>

Rawls similarly claimed, in his own voice, that in a just society, “basic institutions must from the outset put in the hands of citizens generally, and not only of a few, the productive means to be fully cooperating members of a society.”<sup>73</sup> Freeman thinks that workers who do not own capital “must accept the market wage they are offered and the conditions of labor imposed upon them, however unpleasant and demeaning their work conditions might be. To be in such a subservient position has serious consequences for worker’s [*sic*] self-respect and their image of themselves as social equals.”<sup>74</sup>

This might have been plausible when Marx was writing. A lot of labor was done in factories with heavy machinery. It was hard *not* to perceive the power that owners of capital held over workers, with concomitant bias, humiliation, bottlenecks, abusive power, and oligarchy. (Even then, the primary source of wealth was innovation rather than physical capital.<sup>75</sup>) But that isn’t today’s economy. Some of the most promising investments don’t buy much capital equipment. They pay salaries for enterprises that deploy their workers’ skills in novel ways.

Today, the most productive capital is human capital. A corporate CEO with a \$20 million salary is, by Marx’s criteria, a member of the proletariat, because he sells his labor power for a wage to the owners of capital. Has he limited opportunities? Is his relation to the corporation that employs him subservient and humiliating? The market for the best CEOs is particularly tight, which is why their pay is so astronomical.<sup>76</sup> They possess a kind of natural monopoly. But the point is not confined to them. Anyone with a scarce skill in a competitive labor market has leverage over her employer. It is not true that, as Freeman

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71 RAWLS, LECTURES, *supra* note 23, at 325.

72 *Id.* at 330. For both Rawls and Marx, the problem was not maldistribution, but alienation. Marx understood that, in a growing economy, there might be “a constant growth in the labourer’s means of subsistence.” 1 KARL MARX, CAPITAL 523 (Int’l Publishers 1972). But this did not satisfy him, because higher wages would “be nothing but *better payment for the slave*, and would not conquer either for the worker or for labour their human status and dignity.” *Economic and Philosophic Manuscripts of 1844*, in THE MARX-ENGELS READER 80 (Robert C. Tucker ed., 2d ed. 1978). Human status and dignity were of course Rawls’s central concerns. Rawls summarized Marx’s ideal in terms that could also describe his own view: “What concerns [the members of society] is how social and economic institutions are to be organized so that they can cooperate on fair terms and use their combined labor effectively with the forces of nature in ways to be decided by society as a whole.” RAWLS, LECTURES, *supra* note 23, at 351.

73 RAWLS, THEORY OF JUSTICE, *supra* note 27, at xv rev. For a nearly identical formulation, see RAWLS, JUSTICE AS FAIRNESS, *supra* note 2, at 140.

74 Freeman, *supra* note 60, at 23.

75 DEIRDRE McCLOSKEY, BOURGEOIS DIGNITY: WHY ECONOMICS CAN’T EXPLAIN THE MODERN WORLD 133–39 (2010).

76 TYLER COWAN, BIG BUSINESS: A LOVE LETTER TO AN AMERICAN ANTI-HERO 41–62 (2019).

claimed, the wage relationship inherently “leaves workers powerless in their relationships with ownership and management.”<sup>77</sup>

There are, of course, horror stories of humiliation and abuse of power. Apple agreed to pay a \$30 million settlement to retail workers at its California stores after it required them to spend unpaid time waiting in line every day for their personal belongings to be inspected.<sup>78</sup> Tyson will not allow its poultry workers to use the bathroom; some have urinated on themselves while their supervisors mocked them. About half of U.S. employees are at least formally subject to suspicionless drug screening. Employees lose billions each year in wage theft.<sup>79</sup>

But these problems are not inherent in the wage relation. There are good jobs and bad ones. The proportion of Americans who said they were “completely satisfied” with their jobs was 56% in 2020 and had been steadily rising for years; in 1993 it was 35%. Those completely or somewhat dissatisfied comprised 9%, compared with 20% in 1993.<sup>80</sup> When surveyed about their jobs and asked to consider pay, job security, opportunity for advancement, benefits, stability, and dignity, forty percent classified their employment as good. Almost forty-five percent rated their jobs mediocre, and sixteen percent said they’re working bad jobs. The quality of work is stratified by income. Two-thirds of workers in the top ten percent of income earners classified their jobs as good, compared with less than one-third of income earners in the bottom twenty percent.<sup>81</sup>

The bad jobs are there. One in four Americans said in 2008 that their workplace is a dictatorship.<sup>82</sup> Elizabeth Anderson, who emphasizes these abuses (and who was a student of Rawls and Scanlon), does not, however, think that the only solution is abandoning capitalism. The experience of Germany, where worker codetermination is institutionalized, “already demonstrates that empowering workers in that way is both feasible and compatible with an extraordinarily high level of prosperity.” She does not endorse any specific

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77 Freeman, *supra* note 60, at 23.

78 Jody Serrano, *Apple to Pay Store Workers \$30 Million Settlement for Bag Checks That Occurred Off the Clock*, GIZMODO (Nov. 13, 2021), <https://gizmodo.com/apple-to-pay-store-workers-30-million-settlement-for-b-1848053946>.

79 ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT)* (2017).

80 *Work and Workplace*, GALLUP, <https://news.gallup.com/poll/1720/work-work-place.aspx> (last visited Mar. 25, 2023).

81 JONATHAN ROTHWELL & STEVE CRABTREE, *NOT JUST A JOB: NEW EVIDENCE ON THE QUALITY OF WORK IN THE UNITED STATES* (2019), <https://www.luminafoundation.org/wp-content/uploads/2019/11/not-just-a-job-new-evidence-on-the-quality-of-work-in-the-united-states.pdf>.

82 *Zogby Poll: As Independence Day Nears, Workplace Democracy Association Survey Finds One in Four Working Americans Describe Their Employer as a “Dictatorship,”* WORKPLACE DEMOCRACY ASS’N (June 23, 2008), <https://workplacedemocracy.wordpress.com/workplace-democracy-survey/>.

model. There is “plenty of room to experiment with alternative constitutions that guarantee workers’ voices, and to consider the costs and benefits of these alternatives.”<sup>83</sup>

The notion that self-respect depends on being a partial owner of the firm for which one works is, Kevin Vallier observed, “based on psychological claims about the basis of self-respect that seem highly speculative.”<sup>84</sup>

### C. *The Discouraged Underclass*

What about the alienating effect of a welfare state?

Rawls came to this worry late. In his first book, he defined “a conception of justice as providing in the first instance a standard whereby the distributive aspects of the basic structure of society are to be assessed.”<sup>85</sup> This paid too much attention to the distribution of things and too little to social relations, even though social relations were his deepest concern. In particular, it overlooked the destructive effects of marginalization—exclusion from the economic life of the community. There are people whom the economic system will not use, often racially marked. “Even if marginals were provided a comfortable material life within institutions that respected their freedom and dignity,” Iris Marion Young objected, “injustices of marginality would remain in the form of uselessness, boredom, and lack of self-respect.”<sup>86</sup> In his late work, Rawls evidently took this criticism to heart. A fair social contract would avoid the development of such an underclass.

But not all welfare programs produce an alienated class of dependents. The welfare state is a young historical phenomenon. Its most important form of wealth redistribution is publicly funded education, including higher education, which enables the poor to build human capital.<sup>87</sup> Some pathologies are rookie errors that come with any innovation.

Consider the Earned Income Tax Credit (EITC), first enacted in 1975. The program supports low-income working parents by subsidizing their wages up to a maximum, phasing out with each dollar of income above that level. It is designed so that the worker benefits from each additional dollar of earned income, so the program does not diminish the incentive to work more hours or get a better job. Rather, that incentive is increased, because the worker is paid more than the market would pay her. She has more reason to

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83 ANDERSON, *supra* note 79, at 143.

84 Kevin Vallier, *A Moral and Economic Critique of the New Property-Owning Democrats: On Behalf of a Rawlsian Welfare State*, 172 PHIL. STUD. 283, 299 (2015).

85 RAWLS, *THEORY OF JUSTICE*, *supra* note 27, at 9.

86 IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 55 (1990). Tomasi similarly argued that Rawls tended “to emphasize the importance of the *status* of citizens over that of their *agency*.” JOHN TOMASI, *FREE MARKET FAIRNESS* 265 (2012).

87 It does so with varying degrees of success. The difficulty of giving marginal populations access to marketable skills and social capital is the strongest reinforcer of social class divisions in the United States. See BRINK LINDSEY, *HUMAN CAPITALISM* (2012). It is not an artifact of capitalism as such.



get a job in the first place, which is precisely what the program aims at. (Taxation of high incomes similarly leaves untouched the incentive to shift human and other capital to its most productive uses.<sup>88</sup>)

The EITC has pulled millions of working poor families out of poverty. The positive effects on the children of families who receive the EITC are particularly pronounced: they are healthier from infancy onward, stay in school longer and get better grades, and, as adults, work more hours, have higher earnings, are more likely to attend college, and (because they contribute more to Social Security) will have more retirement income.<sup>89</sup> It is one of the most successful antipoverty programs ever devised.

Rawls's paradigm appears to be the most dysfunctional welfare programs, which did sometimes produce the marginalization he described. He did not consider better programs such as the EITC or the welfare states of the Nordic countries, which are far more munificent than those of the United States and yet manage to increase, rather than reduce, employment.<sup>90</sup>

#### D. Political Oligarchy

Rawls's biggest concern was oligarchy: "those with wealth and income tend to dominate those with less and increasingly to control political power in their own favor."<sup>91</sup>

The evidence of this is, however, uncertain. Unquestionably some rich people have used their money to powerfully influence American politics. The anecdotal evidence is impressive. The overall pattern, however, is not well understood. Money is obviously useful to political campaigns, but democratic politics is chaotic, and superior resources do not guarantee success. Donald Trump won the presidency while spending only about half of what Hillary Clinton did.<sup>92</sup> In 2004, the American Political Science Association Task Force on Inequality and American Democracy concluded, "We know little about the connections between changing economic inequality and changes in political behavior, governing

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88 Whether it reduces the incentive to work is a complex question. Some workers will decide that, because of taxation, an additional hour of work is not worth it. Others will conclude that they need to work more hours to secure the income they want. The relative proportions are difficult to quantify.

89 *Chart Book: The Earned Income Tax Credit and Child Tax Credit*, CTR. ON BUDGET & POL'Y PRIORITIES (May 24, 2016), <https://www.cbpp.org/research/federal-tax/chart-book-the-earned-income-tax-credit-and-child-tax-credit>.

90 See LANE KENWORTHY, *SOCIAL DEMOCRATIC CAPITALISM* (2019).

91 RAWLS, *POLITICAL LIBERALISM*, *supra* note 23, at lvii.

92 Jeremy W. Peters & Rachel Shorey, *Trump Spent Far Less Than Clinton, but Paid His Companies Well*, N.Y. TIMES (Dec. 9, 2016), <https://www.nytimes.com/2016/12/09/us/politics/campaign-spending-donald-trump-hillary-clinton.html>.

institutions, and public policy.”<sup>93</sup> A recent survey of the research confirmed that the connection between wealth inequality and political inequality remains unproven.<sup>94</sup>

A more potent source of political inequality is the decline of private sector labor unions, the most effective source of organized power that the working class had.<sup>95</sup> Without institutions that give voice to the people on the bottom, they won’t be helped much by muffling those at the top. Rawls worried that inequality necessarily undermines democracy, but this is a hypothesis, not an established fact.

### E. Economic Oligarchy

The other oligarchy that concerned Rawls is economic: “control of the economy . . . rests in a few hands.”<sup>96</sup> Yet widespread ownership of capital would probably make no difference to investment decisions. The separation of ownership from control in the modern corporation is old news. Those to whom ownership would be redistributed, if they handled it prudently (which would be true of only some of them), would do what most people who have some savings do now: invest in their homes and managed retirement accounts while continuing to work for a wage or run small businesses. (When wealth inequality in the United States decreased between 1990 and 2007, it was primarily because of increases in the value of homes owned by the middle class.<sup>97</sup>) The overall structure of control of capital would not be affected.

The biggest businesses don’t have dictatorial power over what they produce. They keep their commanding market shares through superior efficiency and responsiveness to consumer demands. The strategies of Amazon and Walmart, for example, are “perpetually low prices, followed by taking in insanely large amounts of business and using data collection to outcompete their rivals on the basis of cost and quality service.”<sup>98</sup> Innovation is a substantial check on monopoly power. Cell phones and internet service, for example, have both steadily improved because of intense competition among enormous businesses. Corporate entities whose dominance seemed permanent, such as Nokia and America

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93 Am. Pol. Sci. Task Force, *American Democracy in an Age of Rising Inequality*, 2 PERSPS. ON POL. 651, 661–62 (2004).

94 Lane Kenworthy, *Economic Inequality and Plutocracy*, 51 CONTEMP. SOCIO. 6 (2022).

95 JAKE ROSENFELD, WHAT UNIONS NO LONGER DO (2014). Some other rich democracies still have unionization rates around fifty-five to seventy-five percent, which suggests that strong unions aren’t incompatible with welfare-state capitalism. LANE KENWORTHY, *Employee Voice*, in THE GOOD SOCIETY (2023), <https://lanekenworthy.net/employee-voice/#laborunions>.

96 RAWLS, JUSTICE AS FAIRNESS, *supra* note 2, at 138.

97 LANE KENWORTHY, *Wealth Distribution*, in THE GOOD SOCIETY (2021), <https://lanekenworthy.net/wealth-inequality/>.

98 COWAN, *supra* note 76, at 88.

Online, have learned the limits of their power. This doesn't look much like the Soviet Union, in which a small group gets to decide what commodities the people may have. Consumers have more choices than they did a few decades ago. Producers know it.

#### F. Inheritance

Rawls's primary remedy, limitations on inheritance, relies on a basic error of fact. Inheritance is of declining significance as a source of inequality in the United States today. Most billionaires are self-made. Since 1982, *Forbes* has published an annual list of the 400 richest Americans with the highest net worth. In 2014, only sixty-nine individuals and their descendants remained from 1982, and their overall wealth had grown more slowly than if they had passively invested in stocks and bonds.<sup>99</sup>

Most of modern America's most stratospheric incomes are not generated by ownership of physical capital. Lane Kenworthy reported:

Of income earners in the top 1 percent, about one in three are executives, managers, or supervisors, and one in ten are in financial professions. These two groups account for about half of the income share of the top 1 percent and nearly two-thirds of the increase in that share since the late 1970s. Unlike in the 1920s, most of their income comes from compensation—salaries, bonuses, fees, stock options, stock awards, golden parachutes—rather than from assets they own.<sup>100</sup>

These high incomes are, for the most part, artifacts of supply and demand in markets in which some kinds of scarce human capital have become very valuable. Whatever one thinks of this, restrictions on inheritance won't change it.

#### G. The System's Aims

Finally, there is the strange idea that a capitalist system has the wrong aims. Freeman wrote that "Rawls thought that welfare-state capitalism could not fulfill his principles; it is mainly because of the connection he perceived between capitalism and utilitarianism."<sup>101</sup>

Jason Brennan observed that a society that aims directly to satisfy the difference principle might do a worse job of satisfying it than one that simply follows laissez-faire rules. He thinks that this is a paradox within Rawls's theory.<sup>102</sup> It's not a paradox. It's just a mistake Rawls made.

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99 Chris Edwards & Ryan Bourne, *Exploring Wealth Inequality*, CATO INST. (Nov. 5, 2019), <https://www.cato.org/policy-analysis/exploring-wealth-inequality>.

100 KENWORTHY, *supra* note 42, at 2.

101 Freeman, *supra* note 60, at 9.

102 Brennan, *supra* note 38, at 287.

Brennan is right that “basic structures, states, and societies are not moral agents.”<sup>103</sup> Rawls proposed to judge each possible regime by its “declared aims and objectives.”<sup>104</sup> This can coherently be said of institutions that are designed for a purpose, such as a Leninist ministry of production. But a market economy is not like that. Freeman writes that, for Rawls, welfare-state capitalism’s “principle of design” is “some form of utilitarianism”<sup>105</sup> and tends to “assume that the best life for individuals is one of consumption.”<sup>106</sup> This is a category mistake, like attributing intentions to asteroids.

A market economy has no aims. Its overall patterns of production and distribution emerge from millions of individual transactions between people who need not have any shared aims at all. Many of them despise business and capitalism, yet benefit from its works. Hayek wrote, “What makes agreement and peace in such a society possible is that the individuals are not required to agree on ends but only on means which are capable of serving a great variety of purposes and which each hopes will assist him in the pursuit of his own purposes.”<sup>107</sup>

Even when a welfare state makes allocative decisions, this is unlikely to reflect any coherent philosophy. Freeman claimed that the level of benefits in a welfare state is “decided by utilitarian calculations regarding the comparison of a projected social minimum with a minimum wage level that does not create disincentives to work,” rather than by “focusing on the needs of the least advantaged themselves or considerations of equality or reciprocity.”<sup>108</sup> In the real world, benefits are the product of continual struggle between devotees of Rawlsian reciprocity, utilitarians of the kind Freeman describes, Bismarckians who fear and despise the poor and merely want to keep them quiescent, clients who want more money, minimal-state libertarians who want to abolish all such programs, and other factions.

None of the market systems that exist today are the product of conscious design. Even if they were, many participants would not know that. Support for any set of economic arrangements is inevitably based on what Rawls called “overlapping consensus”: a set of principles that are embraced by different people who hold different, probably inconsistent comprehensive views.

In the original position, the parties will embrace whatever basic structure satisfies the difference principle. Acting as fiduciaries, they have plenty of reason to worry about the effects of the institutions they agree to. They have no reason to attribute to those institutions any aims separate from their effects.<sup>109</sup>

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103 *Id.* at 292.

104 RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 2, at 136.

105 Freeman, *supra* note 60, at 17.

106 *Id.* at 18.

107 HAYEK, *supra* note 32, at 3.

108 FREEMAN, *supra* note 60, at 225.

109 Brennan is correct that “Rawls’s principles should in fact be considered meta-principles, providing rules of recognition for the actual principles of justice to govern a basic structure.” Brennan, *supra* note 38, at 298.

Among the effects of a free market is economic growth. Rawls seems to have envisioned this as pointless production and consumption once society reaches the point where everyone's needs can be provided for. Hayek thought, on the contrary, that economic progress is not simply "an accumulation of ever greater quantities of goods and equipment." On the contrary, "the growth of income . . . more probably depends on our learning to use our resources more effectively and for new purposes."<sup>110</sup> Improved goods and services might be wasted on conspicuous consumption. They might also free people's time so they finally have the leisure to read *A Theory of Justice*. People are various. John Tomasi is right that "the system that most benefits the poor is the one that best encourages the production of goods, opportunities, and experiences that those citizens find valuable."<sup>111</sup>

Rawls's attribution of aims to a market economy may have been an inference from his publicity condition: principles of justice are to be assessed "on the basis of their being intelligently and regularly followed by everyone," so that they are "publicly acknowledged and fully effective moral constitutions of social life."<sup>112</sup> Even if a capitalist economy is not the product of conscious design, we must still decide whether to accept it as an element of a fair social contract. The public aim of welfare-state capitalism could then be whatever reason can be given and shared for accepting it. One such reason, the reason offered here, is to generate wealth in a way that satisfies the difference principle.

#### H. Political Sociology

In *A Theory of Justice*, Rawls noted the concern that "inequities in the economic and social system may soon undermine whatever political equality might have existed under fortunate historical conditions."<sup>113</sup> But as late as the revised edition of *Theory*, he was sometimes ambivalent about the magnitude of this danger: "These questions, however, belong to political sociology."<sup>114</sup> Elsewhere in the same book, he was not so tentative. He should have been.

There are in fact capitalist states, such as Sweden, Denmark, Norway, and Finland, in which the poorest members are better off than their counterparts in any other society in history, with universal health insurance, paid parental and sick leave, free or inexpensive college, and access to quality preschool and childcare. These countries have low income

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110 FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY* 42–43 (1960).

111 TOMASI, *supra* note 86, at 231.

112 RAWLS, *THEORY OF JUSTICE*, *supra* note 27, at 133/115 rev. See also Paul Weithman, *Book Review*, NOTRE DAME PHIL. REVS. (Aug. 7, 2013), <https://ndpr.nd.edu/reviews/property-owning-democracy-rawls-and-beyond/> (reviewing PROPERTY-OWNING DEMOCRACY: RAWLS AND BEYOND (Martin O'Neill & Thad Williamson eds., 2012)).

113 RAWLS, *THEORY OF JUSTICE*, *supra* note 27, at 225/199 rev.

114 *Id.* at 226–27/199 rev. The ambivalence is noted in Edmundson, *supra* note 1, at 86–89.

inequality but high wealth inequality (though not as much as the United States).<sup>115</sup> Norway and Sweden have more billionaires per capita than we do.<sup>116</sup>

Concentrated wealth does not keep a society from maintaining an expensive system of social insurance. The poor can become better off—in much of the world, they *have* become better off—while inequality becomes wider than ever. Even if America were to develop a welfare state comparable to that of the Nordic countries, there would still be extreme concentrations of wealth. Unlike democratic socialism or property-owning democracy, these regimes are not imaginary constructs undergirded by optimistic projections of how they will work in practice.

### *I. Alternatives*

Any critique of welfare-state capitalism must reckon with alternatives. Rawls's favored structures, democratic socialism and property-owning democracy, have never existed anywhere. Brian Kogelmann observed that Rawls's project may be understood as a kind of possibility proof:

Just as a mathematician tries to show that a certain mathematical object with interesting properties exists, or a theoretical economist might try to show that there exists a certain kind of equilibrium solution for a particular class of games, Rawls is trying to show that a certain kind of society—a just and well-ordered constitutional democracy—can, in fact, exist.<sup>117</sup>

The proof is less persuasive if it depends on confident prophecies about a scheme that has never been tried. Observable regularities matter, and, Gerald Gaus noted, “There has never been a political order characterized by deep respect for personal freedom that was not based on a market order with widespread private ownership in the means of production.”<sup>118</sup>

The sorry history of centralized economic control suggests that any system that can stamp out billionaires will have its own elite, who need enough discretionary power to do

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115 LANE KENWORTHY, *Income Distribution*, in *THE GOOD SOCIETY* (2023), <https://lanekenworthy.net/income-inequality/>.

116 Will Wilkinson, Opinion, *Don't Abolish Billionaires*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/opinion/billionaires-innovation.html>.

117 Brian Kogelmann, *Political Philosophy and the Search for the Possible*, NEW RAMBLER (Jan. 15, 2020), <https://newramblerreview.com/book-reviews/philosophy/political-philosophy-and-the-search-for-the-possible> (reviewing KATRINA FORRESTER, *IN THE SHADOW OF JUSTICE: POSTWAR LIBERALISM AND THE REMAKING OF POLITICAL PHILOSOPHY* (2019)).

118 GERALD F. GAUS, *THE ORDER OF PUBLIC REASON: A THEORY OF FREEDOM AND MORALITY IN A DIVERSE AND BOUNDED WORLD* 514 (2011).

the stamping. They will almost certainly be worse than the billionaires, because their coercive power will not be the product of avoidable corruption (as is sometimes true of the very rich) but will be baked into the system.<sup>119</sup>

Jeff Bezos is one of the richest people in history. When he launched Amazon as an online bookstore in 1994, he warned his investors that there was a seventy percent chance that the company would fail. It was a spectacular success, and he has kept reinvesting his profits. Luck certainly played a role: he started an internet retailing company just at a time when the market was awakening to that medium's possibilities. Yet so did skill: the company operates with remarkable efficiency, prospering with very low profit margins. His wealth spiked during the COVID-19 pandemic, when demand for online purchases became intense. By that time Amazon had become the most efficient delivery service of all time, fulfilling many orders within twenty-four hours.

It is impossible to calculate the benefit to ordinary people (in technical terms, the amount of consumer surplus) the company has generated. It was also impossible to anticipate the benefits of the company's innovations. By making it unnecessary to visit retail shops during the pandemic, Amazon must have saved thousands of lives. Bezos can look you in the eye and argue that you have good reason to consent to the economic structure that made him rich. He is "doing [his] full share on terms recognized by all as mutually advantageous and consistent with everyone's self-respect."<sup>120</sup>

At what point, in a Rawlsian property-owning democracy, ought the state to have stepped in and broken up ownership of his company? In liberal socialism, at what point should the company have been nationalized, which would almost certainly have brought its innovations to a halt?

"For many people," Tomasi observed, "commercial activity in a competitive marketplace is a deeply meaningful aspect of their lives."<sup>121</sup> A society that seeks to facilitate the exercise of the moral powers ought to have a wide space for such activity. One need not elevate it to the level of a judicially protected fundamental right, as Tomasi proposed.<sup>122</sup> It is enough to say that "justice is infringed whenever equal liberty is denied without sufficient reason."<sup>123</sup>

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119 On the dangers in property-owning democracy, see TOMASI, *supra* note 86, at 251–52; EDMUNDSON, *supra* note 1, at 139–69; *see also* Vallier, *supra* note 84.

120 RAWLS, *THEORY OF JUSTICE*, *supra* note 1, at 139.

121 TOMASI, *supra* note 86, at 182.

122 *Id.* at 241. The United States has had unhappy experience with such judicial limitations.

123 RAWLS, *THEORY OF JUSTICE*, *supra* note 27, at 218/191 rev. Rawls thought that "beyond some point [wealth] is more likely to be a positive hindrance, a meaningless distraction at best if not a temptation to indulgence and emptiness." *Id.* at 290/258 rev. That is true for some but not for those, like Bezos, who find meaning in their lives by running large commercial enterprises. His capacity to do that job is enhanced by his status as the largest holder of Amazon stock.

One need not claim that Bezos is morally entitled to his entire estate or bless everything he has done. (And of course the argument here is no objection to a progressive income tax: without a substantial redistributive apparatus, Bezos will not be able to say truthfully that the system that enriches him is to everyone's benefit.) Working conditions at some Amazon warehouses are reportedly oppressive.<sup>124</sup> His resistance to unionization, at a time when America so badly needs a reinvigorated labor movement, is reprehensible.<sup>125</sup> But these grievances sting in part because he could remedy them and still be the richest person on earth. He and his customers were not wrong to do what they have done; his fortune was the inevitable result of his company's success, and the company made almost everyone else better off.

### *J. Unfairness and the Difference Principle*

Consider again the problem of unfairness in the distribution of wealth. Scanlon argued that “an institution is unfair if it produces significant differences in income and wealth for which no sufficient reason can be given.”<sup>126</sup> If there is to be a basic structure of society that generates such differences, that structure is acceptable only if one of two conditions is met: either they “could not be eliminated without infringing important personal liberties,” or “they are required in order for the economic system to function in a way that benefits all.”<sup>127</sup>

Today's most profound sources of economic inequality can be justified in Scanlon's terms. Free markets generate enormous wealth, and that tends to benefit the poorest. Even if you doubt that they satisfy his first condition—Americans disagree about the importance of economic liberties—they certainly satisfy the second.

An economic structure is unfair if “there are other ways of achieving the same productive advantages while distributing the benefits more equally.”<sup>128</sup> Thus Scanlon thinks that his argument “leads naturally to something very much like Rawls's stronger principle, which requires that justifiable inequalities must not only benefit those who have less but benefit them as much as possible.”<sup>129</sup> Welfare-state capitalism satisfies that demand. The most prominent leaders of the American left see this, even though they sometimes

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124 See, e.g., News Release, US Department of Labor Finds Amazon Exposed Workers to Unsafe Conditions, Ergonomic Hazards at Three More Warehouses in Colorado, Idaho, New York, U.S. Dep't of Labor (Feb. 1, 2023), <https://www.dol.gov/newsroom/releases/osha/osha20230201-0>.

125 David Streitfeld, *How Amazon Crushes Unions*, N.Y. TIMES (Oct. 21, 2021), <https://www.nytimes.com/2021/03/16/technology/amazon-unions-virginia.html>.

126 SCANLON, *supra* note 50, at 139.

127 *Id.* at 141.

128 *Id.* at 151.

129 *Id.*



misleadingly call themselves socialists.<sup>130</sup> Senator Bernie Sanders, for instance, admires the Nordic countries: he envisions “an economy in which you have wealth being created by the private sector, but you have a fair distribution of that wealth, and you make sure the most vulnerable people in this country are doing well.”<sup>131</sup> Rawls is to the left of Sanders, but here Sanders is the better Rawlsian.

### III. SHARP TEETH

I said earlier that social contract theory has sharp teeth. There is a powerful Rawlsian objection to certain inequalities that exist in American society. I will focus on two, but you’ll think of others. That objection is rooted in the prosperity that American capitalism has brought into existence.

Approximately 233,832 Americans are homeless and unsheltered.<sup>132</sup> The discomfort of sleeping outdoors is the least of their troubles. There is no place where they are legally permitted to sleep, defecate, or urinate. They are often in physical danger, worse when they are female. Their situation violates the most basic requirement of the rule of law: that it must be possible to follow the law’s commands.<sup>133</sup> It also makes them into persistently subordinated and alienated members of society, subject to the whims of the police. The abuses of inequality that Scanlon enumerated are their daily lot. No one could agree to a social contract that places one in such a condition.

The claims of the homeless sound sufficientarian, but they have a contractarian dimension. Once there is enough wealth to provide for urgent needs, neglect of those needs has nasty interpersonal significance: I could help you, at fairly little cost to myself, but I choose not to.

Or consider the millions who (even after Obamacare) still lack reliable health care. Here, too, negative hypothetical contractarianism has some bite. A distribution of property that entails that some die of easily preventable diseases is, from a contractarian perspective, unthinkable: no one could reasonably agree to such terms of cooperation.

Yet a powerful faction in American government hopes to swell their number. During the failed Republican attempt to repeal Obamacare in 2017, Senator Rand Paul and House Freedom Caucus chair Mark Meadows explained why they were blocking any reform that

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130 See Andrew Koppelman, *Socialists for Capitalism*, NISKANEN CTR. BLOG (Feb. 2, 2021), [niskanencenter.org/socialists-for-capitalism/](https://niskanencenter.org/socialists-for-capitalism/).

131 Joseph Simonson, Bernie Sanders: Soviet Socialism “Not My Thing” but “Denmark and Sweden Do Very Well,” WASH. EXAM’R (Apr. 6, 2019), <https://www.washingtonexaminer.com/news/bernie-sanders-says-soviet-socialism-is-not-my-thing-but-denmark-and-sweden-do-very-well>.

132 U.S. DEP’T OF HOUS. & URB. DEV., THE 2022 ANNUAL HOMELESSNESS ASSESSMENT REPORT (HAR) TO CONGRESS 12 (2022), <https://www.huduser.gov/portal/sites/default/files/pdf/2022-AHAR-Part-1.pdf>.

133 PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 46–47 (2016).

preserved subsidies for those who could not pay for health insurance: “Leadership wants to keep Obamacare-like subsidies to buy insurance but rename them refundable tax credits (families will be given up to \$14,000 dollars of other people’s money).”<sup>134</sup> They prevailed in that legislative debate: the bill the House passed would have taken insurance away from between 22 and 32 million people, using the money saved for massive tax breaks, primarily for the rich.<sup>135</sup> (In the end the Senate could not stomach the House bill, Obamacare remained in place, and the issue helped the Democrats retake the House in 2018.<sup>136</sup>)

The Freedom Caucus are libertarians, who, like Rawls, trace their views to Locke’s contractarianism.<sup>137</sup> But Locke thought that everyone has “a Title to so much out of another’s Plenty, as will keep him from extream want, where he has no means to subsist otherwise.”<sup>138</sup> The refusal to provide others what they need to stay alive is tantamount to murder.<sup>139</sup> “God hath not left one Man so to the Mercy of another, that he may starve him if he please.”<sup>140</sup> Locke was thinking about food, of course, but death is death, however caused. “Since [for Locke] a person has a property for the sake of preserving himself and others,” James Tully explained, “once his preservation is secured, any further use for enjoyment is conditional on the preservation of others.”<sup>141</sup> The inability to afford life-saving medical care is the functional equivalent of starvation. So a society that can afford to provide everyone with basic medical care is under the same kind of moral constraint as a society with enough food for everyone.

Paul and Meadows spoke of property rights, but this is, to put it charitably, a philosophical error. It’s sometimes said that property is a relation between a person and a thing, but that’s confused. Property rights are relations between people. If I own something (rather than merely possessing it, as might be true of stolen goods), everyone else on the planet has an obligation to keep their hands off it. If that’s going to be true, then there

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134 Rand Paul & Mark Meadows, *Let’s Fully Repeal ObamaCare, Then Have an Open Debate on How to Replace It*, Fox News (Mar. 6, 2017, 11:01 PM), <https://www.foxnews.com/opinion/senator-paul-rep-meadows-lets-fully-repeal-obamacare-then-have-an-open-debate-on-how-to-replace-it>.

135 The Congressional Budget Office estimated that in the following decade, 23 million Americans would lose their insurance and taxes would be cut by \$661 billion. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE: H.R. 1628, AMERICAN HEALTH CARE ACT OF 2017 (2017), <https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/hr1628aspassed.pdf>.

136 JONATHAN COHN, *THE TEN YEAR WAR: OBAMACARE AND THE UNFINISHED CRUSADE FOR UNIVERSAL COVERAGE* 289–325 (2021).

137 On the role of libertarianism in the attacks on Obamacare, see ANDREW KOPPELMAN, *THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM* (2013). For elaboration on why this harsh libertarianism is inconsistent with Locke, see ANDREW KOPPELMAN, *BURNING DOWN THE HOUSE: HOW LIBERTARIAN PHILOSOPHY WAS CORRUPTED BY DELUSION AND GREED* (2022).

138 1 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 170 (Peter Laslett ed., 1988).

139 JOHN LOCKE, *Venditio*, in *POLITICAL WRITINGS* 445 (David Wooton ed., 2004).

140 LOCKE, *supra* note 138, at 170.

141 JAMES TULLY, *A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES* 132 (1980).

has to be some reasonable basis for thinking that they have that obligation. The principles Paul and Meadows invoke could not be consented to in any imaginable social contract. What could they say without shame to an Obamacare recipient who faced death if their bill passed?

Respectful relations between citizens, based on equal dignity, are possible in a society that has Jeff Bezos in it. Such relations cannot exist if basic health care is denied to the precariat who drive the Ubers, deliver the groceries, care for the elderly, clean the buildings, and do other indispensable work. They are not receiving a fair share of the wealth that they have helped to create. As the 1829 North Carolina court put it, they “must toil that another may reap the fruits.”<sup>142</sup>

The comparison is not entirely to the disadvantage of Chief Justice Ruffin. Rights to health care would cost prosperous Americans far less than legal protection of slaves would have cost him and his class, who understandably feared for their safety. And Chief Justice Ruffin understood that his security rested on brute force. He did not have the temerity to clothe his claims in the language of rights.

What makes both homelessness and the denial of medical care grotesque is the fact that American society could easily provide for these needs. The existence of that wealth is what makes the deprivation a betrayal of our own people, the kind of betrayal that Frederick Douglass described.

Any remedy had best not attack the mechanisms that are generating the wealth.

We must learn to live with inequality. We need institutional mechanisms that keep it from producing bias, humiliation, bottlenecks, abusive power, and oligarchy. Rawlsian contractarianism shows the urgency of that undertaking. Implementing it takes us into the weeds of policy.

The International Classification of Diseases lists the various ills that flesh is heir to. It is not a set of objections to having a mortal body. It is a guide to the sicknesses to which our bodies are prone. Inequality is probably a permanent part of the human condition, and it brings with it characteristic congenital morbid symptoms. These can't be cured, but they can be managed.

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142 State v. Mann, 13 N.C. 263, 265 (1829).