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Rawlsian Justice: Reflections on a new Equilibrium

Forster, Monte S.

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Rawlsian Justice: Reflections on a new Equilibrium

by

Monte S. Forster

A THESIS

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ABSTRACT

This thesis considers the notion of intergenerational justice. I consider intertemporal justice largely through the lens of John Rawls's theory of justice. Nonetheless, Rawls incorrectly gives priority to the principle of reciprocity in his theory. I correct Rawls's misunderstanding concerning reciprocity. I also discuss the often-overlooked importance of natural duties to Rawls's theory. I add the condition of vulnerability to Rawls's circumstances of justice. By making these changes I (a) give priority to impartiality in Rawls's theory, (b) remove the difficulties created by Rawls's present-time-of-entry interpretation, (c) remove the need for Rawls's motivational assumption, and (c) remove the chance-timing of a person's birth as an arbitrary contingency and basis for bias in the decision-making of those behind the veil of ignorance.

PREFACE

This thesis is an original, unpublished, independent work by the author, Monte S. Forster.

ACKNOWLEDGMENTS

I wish to express especial thanks to my two supervisors. Professor Walter Glannon kindly agreed to act as my supervisor until he was forced to withdraw due to personal reasons. Professor Allen Habib then generously took up the torch and likewise provided invaluable assistance to me. Thanks as well to Professors Ann Levey and Gregory Hagen for agreeing to act with Professor Habib as my examiners. Errors in the following thesis are obviously and regrettably all mine.

I also thank the students and many other teachers in the department of philosophy at the University of Calgary for deigning to befriend and instruct an old lawyer very much past his “best-before” date.

I add my heartfelt thanks to Denise Retzlaff for all she has done for me and every other graduate student at the department of philosophy at the University of Calgary for so many years. She is there all the time, but especially when things get especially rough.

Finally, I thank my sweet wife, Terry, for putting up with me and my work on this thesis.

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The true measure of any society can be found in how it treats its most vulnerable members.

The Mahatma Mohandas K. Ghandi

...society is a system of cooperation between generations over time.

John Rawls, Political Liberalism

1.0 INTRODUCTION

I address in this thesis the notion of intergenerational justice. The notion of extending justice-based duties intertemporally is relatively new in the history of political and moral philosophy. It is new because the power we now possess to affect near-future and remote-future¹ generations is unparalleled in history, and the possession of new power inevitably leads to questions concerning how that power should be exercised.

¹ Except where the treatment of our contemporaries helps to understand our duties to future generations, I do not address questions of justice between individuals living in overlapping generations. When I speak of “future” generations or peoples or use terms like “remote” or “further-future” when speaking of people who will live in future generations, I mean people who live in generations which do not overlap with generations living today. To help clarify, when I use these terms I will mean generations conceived at least 200 years in the future. This should exclude the children and grandchildren of anyone living today.

I agree with Derek Parfit (1984) that, given our ever-increasing ability to affect the lives of those generations yet unborn, the issue of intergenerational justice has grown in importance until today it is one of the foremost human rights issues facing our generation.²

David Heyd (2008) wrote, '[e]very moral theory must define the scope of the subjects falling under its judgement'.³ And Stephen Bickham (1981) commented:

Were someone to suggest seriously that we have no ethical obligations to future generations and mean by this that we need take no care for what living conditions on the planet will be in a hundred years—that whether there would exist then, say, a lethal level of radioactivity in the atmosphere, it would be no concern of ours—we should regard that individual as lacking one of the most basic of human ethical sensibilities.⁴

Given our present power to affect the quality of life and very existence of those coming after us, even in the remote future, it is simply no longer acceptable for a theory of justice—or for a theory of morality generally—to ignore the question of what duties and obligations we owe to

² Parfit, Derek. 1984. *Reasons and Persons*. Oxford University Press. Oxford UK. ("Reasons and Persons"). Parfit said (p. 351), '[t]his is the part that covers how we affect future generations. This is the most important part of our moral theory, since the next few centuries will be the most important in human history'. I'm not sure how the next few centuries can rightly necessarily be considered the most important in history, but they surely are for those who are alive today and in the next few centuries. I would guess that every past generation saw their generation as *the* pivotal generation in history, and *the* generation setting the stage for future generations. But we do have the ability to affect the generations to follow us as few generations have been able to in the past. The mid-twentieth century saw humankind create the ability to *end humankind* and indeed all species of life on the earth. In that way those generations living today are indeed special, if only because we are peculiar. And the next few generations living in the next few centuries—assuming there are a next few generations—are thus certainly more reliant on our generation for their quality of life and for life itself than any past generation has been on their progenitors. We can thus say in this sense that questions of generational justice are the most important part of *our* morality.

³ Heyd, D. 2008. "A Value or an Obligation? Rawls on Justice to Future Generations". Gosseries, A. and Lukas H. Meyers (eds). *Intergenerational Justice*. Oxford University Press. pp. 168-189. ("Value") p. 168.

⁴ Bickham, Stephen. 1981. "Future Generations and Contemporary Ethical Theory". *The Journal of Value Inquiry*. Vol. 15. pp. 169-177. ("Contemporary Theory") p. 172.

future generations. I will assume that most of those reading this thesis will agree that we have duties in relation to future generations. I also expect that it would come as a surprise to most non-theorists how many ethicists *deny* that we have duties *to* future people.

While many ethicists deny that we have obligations to remote future generations, the constant discussion of and the increased efforts being undertaken to address concerns regarding climate change demonstrate that many of our generation are alert to and accept that we have duties to future people. In part, we have John Rawls (1971) to thank for the realization of our duties to those who will live after us.⁵

Rawls was one of the pioneers in intergenerational ethical thought. However, although Rawls was firmly of the view that those living today have duties to future generations, Rawls said that establishing a basis for justice-based duties intergenerationally ‘subjects any ethical theory to severe if not impossible tests’.⁶ Rawls’s theory, at times, unfortunately reflects this difficulty. Nonetheless, I consider intergenerational justice-based rights and duties largely through the lens of Rawls’s theory of justice.⁷ I do so not only because I think Rawls’s work is unparalleled in modern political thought, but, as well, because of the renown and broad acceptance of Rawls’s overall approach to justice-based rights and duties. Indeed, I consider

⁵ Rawls, John. 1971. *A Theory of Justice*. Harvard University Press. Cambridge Mass. (“Theory”) pp. 284-298 and passim. I add that our concern with the morality of the impacts we have had and continue today to have on the quality of life and on the very existence of future human beings has lagged and still lags moral-light-years behind those impacts.

⁶ Ibid. p. 284.

⁷ Ibid.

Rawls's theory, with its seminal ideas of the *original position*⁸ and *veil of ignorance*⁹ indispensable in guiding those seeking to advance the idea—and the as yet presently unrealized ideal—of intergenerational justice.

Rawls's efforts to establish intergenerational rights and duties were both benefited and burdened by the contractarian foundations of his theory. As broadly understood by social contract theorists, members of the human family warrant rights-recognition only if they have the *capacity to reciprocate* in a mutual give-and-take with others. This restriction in the scope of social contract theory is problematic when we consider the rights of children, of the severely mentally and physically handicapped, of the elderly, and of those living in the future.

This thesis isn't about children or others of our contemporaries who are vulnerable. However, there are parallels in Rawls's treatment of children living today and his treatment of future people.¹⁰

Children do not have the capacity to engage with others in a reciprocal exchange. A bargain, to be fair, assumes bargaining parties of equal or relatively equal strength. Children are weak. Their bargaining position, if we can call it that at all, is anything but equal. The ability of a party to bargain also assumes that party's ability to comprehend what is in his or her own

⁸ Ibid. pp. 118-136 and passim. See also Rawls, John. 2001. *Justice as Fairness: A Restatement*. Harvard University Press. Cambridge Mass. ("Restatement") pp. 80-135 and passim.

⁹ Rawls. Theory. pp. 136-142 and passim. See also Rawls. Restatement. pp. 85-89 and passim.

¹⁰ Barry, Brian. 1989. *A Treatise on Social Justice Vol. 1, Theories of Justice*. University of California Press. ("Treatise") said (p. 196): 'Rawls's way of dealing with duties to future generations is in fact best seen as an extension of the way that, from within a theory bounded by the circumstances of justice, one deals with the duties owed as a matter of justice by adults to children'. Whether Barry is 100 percent right, he seems largely right.

interest. Children do not have this understanding. Nor does a child understand what a bargain means. If a child agrees to give up her toy for another toy she couldn't know that this could mean that she might never again be able to play with her toy. She doesn't even know what "never again" means because she doesn't understand the nature of time. Indeed, it's likely she doesn't fully understand that effects follow causes. No one with such limited knowledge can possibly engage in a free and mutual exchange. A child really cannot engage in a mutual anything. A child is completely *vulnerable* to all adults of normal intelligence. And, vulnerability, by definition, *excludes reciprocity*.

It is true that future persons 'of full age, and the ordinary amount of understanding'¹¹ will, at some future time, understand time and those things that bring happiness. However, they do not understand these things today. Moreover, our present power—and the discretion which comes with that power—has made future people as vulnerable to us as own children, and arguably more so.¹²

Our present power with respect to future generations, coupled with the unidirectionality of time, means that we living today can both benefit and harm future human beings, but that future human beings can neither benefit nor harm us. It is thus nonsensical to speak of intergenerational reciprocity. Reciprocity between temporally remote people doesn't exist because it *cannot* exist.

¹¹ Mill, John Stuart. 1998. *On Liberty and Other Essays*. Gray, John. (ed). Oxford World's Classics. Oxford UK. p. 84.

¹² Our own children may one day be in a position of power with respect to us. Remote future generations do not have even this potential threat advantage.

Brian Barry (1995) said that Rawls's theory, as applied intergenerationally, couldn't be salvaged when seen as a theory of *justice-as-reciprocity*.¹³ I suggest that Barry was both right and wrong. We simply *cannot* say that there are intergenerational justice-based rights and duties if we see reciprocity as an indispensable prerequisite to such rights and duties. However, the answer isn't to ignore reciprocity. Rather, we need to realize:

1. That Rawls's theory is broader than often thought and includes *natural duties*¹⁴ as a primary basis upon which to argue for intertemporal rights and duties; and
2. That while an important feature of justice-based rights and obligations, *reciprocity isn't an invariable feature* of such rights and obligations.¹⁵

Rawls wrote, '[i]n justice as fairness society is interpreted as a cooperative venture for mutual advantage'.¹⁶ In incorporating Hume's *circumstances of justice*,¹⁷ Rawls's theory is

¹³ Barry, Brian. 1995. *Justice as Impartiality*. Clarendon University Press. Oxford UK. Reprinted 2004. ("Impartiality") p. 9.

¹⁴ Rawls. Theory. pp. 114-117 and passim.

¹⁵ "Obligations" and "duties" have distinct meanings in Rawlsian theory. Obligations arise out of contractual type arrangements. Duties are duties, agreement or no. Although the distinction should be kept in mind, I sometimes use the terms interchangeably where precision isn't important.

¹⁶ Rawls. Theory. p. 84. Rawls wrote in beginning Theory (p. 4):

... although a society is a cooperative venture for mutual advantage, it is typically marked by a conflict as well as by an identity of interests. There is an identity of interests since social cooperation makes possible a better life for all than any would have if each were to live solely by his own efforts. There is a conflict of interests since persons are not indifferent as to how the greater benefits produced by their collaboration are distributed, for in order to pursue their ends they each prefer a larger to a lesser share. A set of principles is required for choosing among the various social arrangements which determine this division of advantages and for underwriting an agreement on the proper distributive shares. These principles are the principles of social justice: they provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation.

¹⁷ Ibid. pp. 126-130 and passim.

undeniably, in part at least, about an armistice between the strong and the strong. However, it is far more than that. It is also about the natural duties *all* human beings owe to all other human beings *not to injure* and indeed *to actively aid* one another. And there is no time when our duties not to injure and to aid each other is greater than when those looking to us not to injure them or to aid them are weak and are thus vulnerable to us.

Our natural duty to protect and to aid the weak causes these duties to supersede any agreement reached in the original position. As Rawls said, the suggestion that we need to agree to some superadded ‘promise not to kill ... is normally ludicrously redundant, and the suggestion that it establishes a moral requirement where none already existed is mistaken’.¹⁸

I discuss in some detail Rawls’s understanding of our natural duties and our duties to care for the vulnerable. I address our duties of care, in part, via a discussion of the doctrine of *uberrima fides*. I address these topics in §§3.4 and 3.5 and elsewhere below. At this point I simply highlight that, for the most part, our duties to future people, and the concomitant rights future people have as against us, have nothing to do with some supposed intergenerational reciprocity. Again, our duties to future generations are largely predicated on duties which exist outside any superadded agreement supposedly entered for mutual advantage.

Further, even where our rights and obligations depend on agreement, reciprocity, in the sense of a mutual give-and-take between two parties, isn’t invariably essential. It is a thesis of this paper that our duties and obligations to future generations are *not* dependent on our receiving anything in return from them.

¹⁸ Ibid. p. 114.

As in any contract, the give-and-take or *consideration* needed to bind the parties (in this case parties in the original position) must flow *from* all the parties to the initial agreement, it does *not* however have to flow *back* to each party.

Although it would be wrong to discount the importance of reciprocity to any theory of justice, I interpret Rawls's theory first and foremost as a theory of *justice-as-impartiality* rather than a theory of justice-as-reciprocity. Many will think my interpretation of Rawls's theory as a theory of justice-as-impartiality belies any attempt to be true to Rawls's theory. I hope to show why this thinking is incorrect.

Seeing Rawls's theory of justice as justice-as-impartiality in no way negates the contractarian basis of Rawls's theory. The purpose of the original position is to enable decisionmakers to decide *fairly* on questions of justice. Rawls attempts to ensure this by endeavouring to remove from his decisionmakers all knowledge of their own circumstances. This is accomplished via the veil of ignorance. Rawls wrote, in part:

Somehow we must nullify the effects of specific contingencies which put men [and women] at odds and tempt them to exploit social and natural circumstances to their own advantage. Now in order to do this I assume that the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations.

It is assumed, then, that the parties do not know certain kinds of particular facts. First of all, no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like. Nor, again, does anyone know his conception of the good, the particulars of his rational plan of life, or even the special features of his psychology such as his aversion to risk or liability to optimism or pessimism.¹⁹

¹⁹ Rawls. Theory. p. 136.

The veil of ignorance makes those entering it *ignorant* of what Rawls calls *arbitrary contingencies*.²⁰ These contingencies include, but are not limited to, the innate, personal characteristics of those deliberating behind the veil. The idea of the veil is to *exclude* from those deciding questions of fundamental justice all knowledge of their own and other's innate characteristics. In this way *each must decide for all*. And each cannot do other than to decide for all because no one knows his or her own desires and interests and the social, economic and physical circumstances of their lives. In this way the veil assures *impartiality*—as all *partial* knowledge is excluded from the knowledge of those deciding.

Rawls recognized that questions of social justice arise between generations as well as within them.²¹ Because of this, in addition to no one knowing his place in society or his fortune in the distribution of natural assets and abilities, *no one deliberating behind the veil knows into which generation s/he will be conceived*.²² And in not knowing their own generation, those in the original position 'must choose principles the consequences of which they are prepared to live with whatever generation they turn out to belong to'.²³

²⁰ Also called 'arbitrary distinctions'. See Rawls. Theory. pp. 5, 15, 72-75, 95-102 and passim.

²¹ Ibid. p. 137.

²² In saying "conceived," I note Parfit's recognition that the identity of each human being is "set" at *conception* rather than birth. (See Parfit. Reasons and Persons. p. 322.) More correctly, we could perhaps say that the genetic makeup of each unique member of our species—and the *only* genetic makeup that will ever comprise and make extant a specific individual human being—is *set at conception as a necessary*, albeit not a entirely sufficient, condition of individual identity.

²³ Rawls. Theory. p. 137.

It is a thesis of this paper that the supposed dichotomy between Rawls's theory when seen as a theory of justice-as-reciprocity, on one side, and when seen as a theory of justice-as-impartiality, on the other, is a false dichotomy. This false dichotomy can be put aside:

1. When we see that Rawls misunderstood (or at least misstated) the demands of both the principle of reciprocity and the principle of impartiality; and,
2. When we recognize that the importance of the original position isn't just that those deliberating behind the veil reach an agreement but rather that those deliberating reach a just agreement.

Rawls's misunderstanding of the requirements of the principle of reciprocity were not his alone. Indeed, Rawls's fault was in the deference he paid to the standard interpretation of contractarianism. Rawls's deference to the standard ideas of social contract theory was unfortunate because Rawls's theory is much more than a standard social contract theory.

Protecting the weak is surely part of the natural duties we owe to others. I assume, as well, that protecting those unable to protect themselves ties directly to Rawls's expectation that all of those deliberating in the original position will possess the capacity for a *sense of justice*,²⁴ which is, in part at least, the desire to 'give justice'.²⁵ I suggest that a person's sense of justice will see reciprocity as *inessential* where any individual's failure to reciprocate is beyond her control.

²⁴ Ibid. pp. 12, 46-51, 138-148 and passim.

²⁵ Ibid. pp. 191, 510-511 and passim. The problem in Rawls's theory becomes apparent when we find him saying that '[b]y giving justice to those who can give justice in return, the principle of reciprocity is fulfilled at the highest level'. (p. 115.)

I also think that we can rationally support the idea of an obligation not to injure and to actively aid the weak *even if we assume nothing more than the self-interestedness and rationality*²⁶ of those in the original position. And, if I am right, then this means that those in the original position should be anxious to agree not to injure and to actively aid the weak—whether this agreement is superadded or not.

I say that even those motivated solely by self-interest will agree to a principle of mandating the protection of the vulnerable because the self-interested will realize that *as mortal beings* they will each be at a significant risk of being one of the vulnerable when exiting the original position. Indeed, the chances are much greater that they will be completely vulnerable than are the chances they will be strong. And what self-interested person would not clamour to protect him- or herself, first and foremost? Further, this recognition leads to the protection not only of children and other vulnerable beings in existing generations, but, as well, to the protection of all future generations, including remote future generations, who, as already discussed, are now completely vulnerable to those generations living today.

We find another false dichotomy when considering the *just savings principle*²⁷ specifically. Some commentators have claimed that Rawls's theory is inadequate in its scope because it extends only to the transfer of "capital" between generations. Stated in its simplest form, the criticism here is that future people will need a lot more in life than a solid economic base. The foremost concern expressed by those theorists who see Rawls's theory as limited to the

²⁶ Ibid. p. 14. Here I am using the definition of rationality that Rawls used; namely, 'the concept of rationality ... interpreted as far as possible in the narrow sense, standard in economic theory, of taking the most effective means to [one's own] given ends'.

²⁷ I discuss this principle at §2.2 and elsewhere.

economic wellbeing of future peoples is that Rawls's theory doesn't help us address *latent harms*—such as the remote future release of radioactive waste.

Contrary to those theorists who see Rawls's theory as too narrowly economic, other theorists see Rawls's savings principle as extending only to the cross-generational preservation of just institutions. Some of these latter theorists claim that Rawls erred in leaving concerns regarding intergenerational *distributive* justice²⁸—that is, concerns parallel to those concerns addressed *intragenerationally* via Rawls's *difference principle*²⁹—up to our charity and caprice. I suggest that both views are wrong. I address the dichotomy between these views in §§2.2, 3.5 and 3.6, as well as in other sections below.³⁰

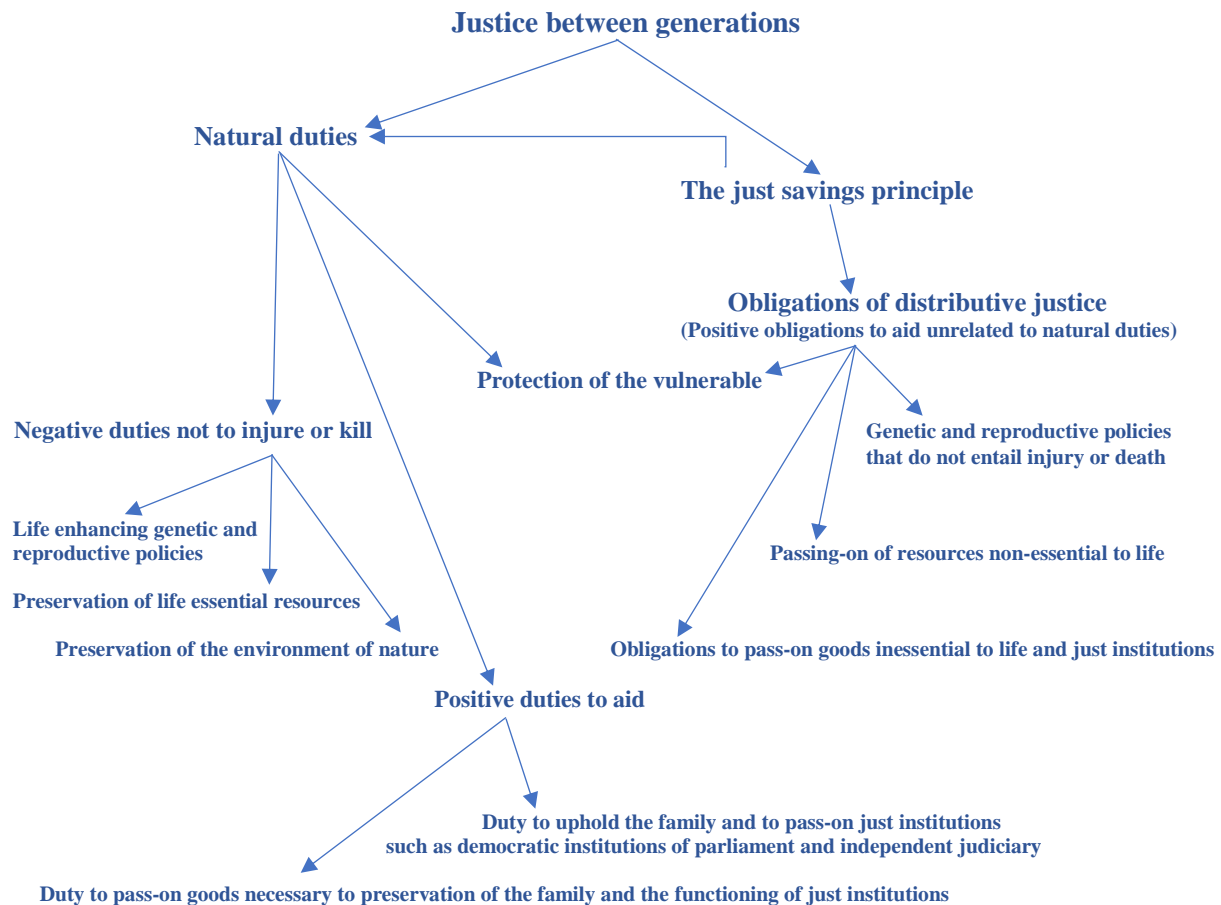
²⁸ Distributive justice can mean many things. However, it concerns the distribution and potential redistribution of societal benefits (goods) characteristically based on the egalitarian assumption that we should aim for the greatest equality of goods among equals. This of course leaves open the need to treat unequals unequally in order to treat unequals equally.

²⁹ Rawls. *Theory*. pp. 75-109, 157-158, 177-180 and *passim*. And see Rawls, John. 2005. *Political Liberalism: Expanded Edition*. Columbia University Press. NY. ("Political Liberalism") pp. 278-283, 317-319 and 328-335. The difference principle one part of the second to Rawls's two fundamental principles of justice. The two principles of justice are those principles Rawls says would be adopted by impartial deliberators in the original position ignorant of the knowledge of their own and other's personal biases and interests. The two principles of justice are: '(a) each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and (b) social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions 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. This last is called "the difference principle"'. (Rawls. *Theory*. p. 476.)

³⁰ I don't overplay these dichotomies. They exist but they play a minor role in my analysis, which I consider more in-depth than a simple review juxtaposing the views found in some existing commentaries would allow.

I hope in this thesis to remove some of the misunderstandings concerning Rawls's theory as extended cross-generationally. As a picture is sometimes worth 10,000 words, I have added the following Figure to this introduction:

Figure 1



The above figure reflects my view that Rawls's savings principle addresses obligations of distributive justice. This will not be surprising to most commentators on Rawls. What might be surprising is my partial severing of natural duties and Rawls's savings principle. Natural duties are both independent of and encompassed within the savings principle. As Rawls

noted,³¹ unlike the savings principle, natural duties do not depend for their efficacy on some agreement reached in the original position.³² Rawls stated that ‘no binding action, consensual or otherwise, is a presupposition of their application’³³ and that ‘they apply unconditionally’.³⁴ Yet it is also clear that those deciding in the original position would readily agree to them.

Finally, the figure is intended to show that protection of the vulnerable—including the protection of remote future human beings in the case of intertemporal justice—is both a natural duty and a commitment those in the original position would adopt by agreement even if we consider only the self-interest of those deciding.³⁵ If the figure raises more questions than it answers, hopefully at least the context of our questions will be clearer.

Descending from the general to the particular; a happy consequence of not seeing reciprocity as an invariable precondition to justice-based duties between generations is that Rawls’s *present-time-of-entry* (“PTE”) *interpretation*³⁶ need no longer be seen as an obstacle to

³¹ See, for example, Rawls. Theory. pp. 115-117 and passim. Rawls stated, ‘[a] further feature of natural duties is that they hold between persons irrespective of their institutional relationships; they obtain between all as equal moral persons. In this sense the natural duties are owed not only to definite individuals, say to those cooperating together in a particular social arrangement, but to persons generally. This feature in particular suggests the propriety of the adjective “natural”’ (ibid. p. 115).

³² Of course, as adumbrated above and discussed further below, there is nothing to stop those in the original position from adding to their agreements to incorporate natural duties.

³³ Rawls. Theory. p. 115.

³⁴ Ibid.

³⁵ Protection of the vulnerable is in my view first and foremost a natural duty.

³⁶ Rawls. Theory. pp. 140 and 292. See also Rawls. Restatement. p. 160 and Rawls. Political Liberalism. p. 274.

intergenerational justice-based rights and obligations. Further, if the PTE interpretation doesn't foreclose justice-based duties between generations, then Rawls doesn't need his *motivational assumption*.³⁷ I review Rawls's PTE interpretation and motivational assumption in §§2.5 and 2.6 below.

Heyd suggested three alternative approaches to dealing with the question of justice between generations. First, we can 'modify the conception of the circumstances of justice'.³⁸ Second, we can 'establish intergenerational justice on non-contractarian grounds'.³⁹ Third, we can 'admit that intergenerational relations are in their nature not subject to judgements of justice at all (but rather to moral principles or duties of another kind)'.⁴⁰ Heyd opted for the third approach. I present a fourth approach.⁴¹ As Heyd suggested might be necessary, I propose a modification to the circumstances of justice in §3.3 of this thesis. I doubt, however, that Heyd was thinking of a modification of the nature I'm proposing. Further, I adopt Rawls's contractarian approach, but I reconsider the treatment both of impartiality and of reciprocity in social contract theory.

I turn now to my review of some of the main commentaries on Rawls's theory as extended intergenerationally.

³⁷ See §2.6 and elsewhere for discussion of this assumption.

³⁸ Heyd. *Value*. p. 170.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ I am in no way suggesting there are not other approaches.

2.0 REVIEWING THE REVIEWS

2.1 INTRODUCTION

Rawls's theory of justice, as extended intertemporally, has been subject to significant criticism. One reason for this is that Rawls didn't set out his theory of justice as extended intergenerationally in the depth he did the balance of his theory. This left several questions unanswered by Rawls concerning how his theory is to apply intertemporally.

Uncertainties include the extent of the duties and obligations owed under the just savings principle. Who owes duties and to whom are they owed? Is the savings principle workable within a contractarian approach to rights? And if it isn't workable, is it possible, while being true to the underlying principles Rawls's theory of justice, to amend Rawls's theory a bit? Or is it necessary to replace the theory with something completely different?

Since it may help to review some of the existing commentary on Rawls's theory as applied intertemporally, I provide a review in this chapter. I also address in this chapter where I believe past commentators have gone wrong in characterizing and criticizing Rawls's theory.

Rawls attempts to achieve intergenerational justice via his just savings principle and I therefore begin with that principle.

2.2 THE JUST SAVINGS PRINCIPLE

As a general proposition, we could expect that a "principle of savings" would concern a process of accumulation of some good or benefit. And if this process of accumulation is intended to reflect a system of societal cooperation over time and between generations⁴² then

⁴² Rawls. Political Liberalism. p. 273.

this accumulation must extend at least beyond one generation. Assuming we are looking at accumulation of some benefit over time, we also need to determine what it is that we need to accumulate and for whom it needs to be accumulated.

Rawls wrote that '[e]ach [generation] passes on to the next a *fair equivalent in real capital* as defined by a just savings principle'.⁴³ Human beings don't live and reproduce like 13-year cicadas. Accordingly, unless we were to assume that an existing generation decided, first, to place its "real capital" in a crypt in some unknown location, and, second, to hide the location of the crypt in a time capsule scheduled to return to earth in 300 years or so, then we can't assume that existing generations can pass-on *latent* capital benefits. On this assumption, capital transfers can only be passed from an existing generation to subsequent generations which *overlap* with it. Further, on these assumptions, we can have the transfer of real capital amongst, at most, four generations, each of which is replaced over time, with the oldest generations continuously dying off and younger generations replacing the older during the same time periods.⁴⁴ Therefore, the transfer of real capital, however broadly we interpret that term, must be amongst *living* generations in a continuing *chain-of-transfer*.⁴⁵

This leaves us with the question of what to transfer. I have spoken in terms that might suggest that the savings principle is limited to the transfer of capital to preserve or increase the

⁴³ Rawls. Theory. p. 288. (Emphasis added.)

⁴⁴ This is the extent of the four generations Axel Gosseries discusses in Gosseries, Axel. 2009. "Three Models of Reciprocity". Meyers, Lukas H. (ed). *Intergenerational Justice*. Ashgate Publishing Co. England. pp. 255-282. ("Three Models").

⁴⁵ I prefer the term "chain-of-transfer" rather than "chain-of-accumulation" because it is possible under the savings principle that a generation might receive more from preceding generations than it is able to pass-on to subsequent generations, without violating any duty.

economic or financial wellbeing of future generations. This narrow view of the savings principle fits well with the views of some theorists. For example, Bickham wrote that Rawls's contribution to questions of intergenerational justice was 'hampered ... by having to treat it in terms of his economically modeled theory of justice'.⁴⁶ However, although Rawls often spoke of "capital accumulation" it is clear he was speaking of much more than simply passing-on the means of economic growth. Limiting the savings principle to financial wellbeing would make the savings principle similar to Rawls's difference principle. However, Rawls was clear that 'the difference principle does not apply to the savings problem'.⁴⁷

According to Roger Paden (1997) the savings principle has little if anything to do with leveling the economic wellbeing of generations. Paden wrote that the savings principle requires 'each generation to save to *support and maintain just institutions, and that alone*'.⁴⁸ Heyd wrote similarly that the saving principle 'consists merely of the duty to contribute to the next generation's ability to achieve just institutions, to secure a just scheme of cooperation, to maintain the basic conditions for leading an autonomously chosen way of life'.⁴⁹ If this is what the savings principle is all about, then we are clearly not talking simply about an intergenerational application of the difference principle—which is a principle of distributive justice only.

⁴⁶ Bickham. *Contemporary Theory*. p. 172.

⁴⁷ *Ibid.* p. 291.

⁴⁸ Paden, Roger. 1997. "Rawls's Just Savings Principle and the Sense of Justice". *Social Theory and Practice*. Vol. 23. No. 1. Spring 1997. ("The Sense of Justice") pp. 22-51. p. 39. (Emphasis added.)

⁴⁹ Heyd. *Value*. p. 184.

I suggest that Paden and Heyd are correct about the primary function of the savings principle. Both are right that the savings principle mandates that existing generations ‘support and maintain just institutions’.⁵⁰ However, I suggest that both are also wrong in suggesting that this is all the savings principle does.

As Figure 1 depicts,⁵¹ I suggest that the savings principle can properly be broken down in *two parts*. The first part of the savings principle parallels the first of Rawls’s two principles of justice. The second part parallels the difference principle—but with important differences.

Rawls’s first principle of justice says that a just system of social cooperation will provide for the greatest liberty for each individual consistent with the same degree of liberty for all individuals. How does the savings principle parallel this principle? I suggest that Rawls’s thinking was:

1. That the creation and preservation of just institutions is essential to secure a ‘just scheme of cooperation, to maintain the basic conditions for leading an autonomously chosen way of life’;⁵² and
2. That to maintain the basic conditions to enable individuals to lead autonomously chosen ways of life is what equal liberty is all about.

⁵⁰ Paden. *The Sense of Justice*. p. 39.

⁵¹ See page 13 above.

⁵² Heyd. *Value*. p. 184

The first part of the just savings principle ensures—as best those living today can ensure—that the conditions necessary to the realization of the first principle of justice are carried forward into the future for the benefit of future peoples.

Rawls stated that ‘[t]he savings principle represents an interpretation, arrived at in the original position, of the previously accepted *natural duty to uphold and to further just institutions*’.⁵³

Rawls often spoke in terms of ‘accumulated capital,’ but we are meant to interpret “capital” in its broadest sense. As Rawls stated:

Each [generation] passes on to the next a fair equivalent in real capital as defined by a just savings principle. (It should be kept in mind here that capital is not only factories and machines, and so on, but also the knowledge and culture, as well as the techniques and skills, that *make possible just institutions and the fair value of liberty*.⁵⁴

As Heyd correctly noted, the savings principle also demands that we leave *resources* for future generations.⁵⁵ Rawls himself noted that questions of social justice arising between generations include not only the question of the appropriate rate of capital saving, but, as well, questions of the *conservation of natural resources and the environment of nature*.

The criticism that Rawls’s theory fails to address environmental concerns provides a segue to perhaps the most troubling criticism of the savings principle; namely, that it doesn’t stop existing generations from harming future people in a way that “skips” those generations immediately following us but has the potential to horrifically harm *remote* generations.

⁵³ Rawls. *Theory*. p. 289. (Emphasis added.)

⁵⁴ *Ibid.* p. 288

⁵⁵ Heyd. *Value*. p. 170 and *passim*.

Harms that can remain dormant for years are called *latent harms*.⁵⁶ The archetypal concern with respect to latent harms relates to possible future injuries and death caused by remote radioactive waste release.⁵⁷

We presently do not know what to do with nuclear waste except to store it as far from human population centres as possible. Unfortunately, none of the means we have devised for stockpiling this waste will keep the waste stored until it becomes non-lethal. Moreover, it is possible that earthquakes and other disasters can cause storage systems to fail and to release deadly waste much earlier. These are risks that we are presently foisting on further-future generations.

There is another aspect to this problem: Not only are the harms of such things as nuclear waste disposal latent in nature, a policy of supplying energy via nuclear power generation can be *beneficial* to our own and to *near-future* generations. If we add to this fact the argument that our only duties of care to future human beings are to those generations contemporaneous with our own or to one or two generations beyond our own and contiguous generations, then the damage done to further-future generations isn't something that need concern us.

The problem of such latent harms may at first seem insurmountable. However, I suggest that those objecting to Rawls's savings principle based on such concerns have failed to understand

⁵⁶ Harms that leave present and near-future people whole but injure further-future generations have been called "sleepers". (See Mathis, Klaus. 2009. "Future Generations in John Rawls's Theory of Justice". Archives for Philosophy of Law and Social Philosophy. Vol. 95. ("Generations") p. 50.) Mathis attributes this term to Barry. I don't recall it from Barry's works but I'm sure Mathis is right.

⁵⁷ Ibid. pp. 49ff. See also Heyd. Value. p. 177.

the nature of the duties underlying the savings principle. I discuss this point further at §2.7 below.

I have said that the savings principle can be considered as having two parts and that the second part has similarities to the difference principle. I say this because, to the extent the savings principle concerns questions of pure distributive justice separate from the transfers needed to preserve just institutions, the savings principle addresses *intergenerational* economic inequalities just as the difference principle addresses such inequalities *intragenerationally*. This is where the two principles are similar. However, even here there is an important distinction between the principles.

The difference principle is all about assisting those who are economically *worse-off*. It does not apply *intergenerationally* because there is ‘no way for later generations to improve the situation of the least fortunate first generation’.⁵⁸ Further, if we look to how people lived in the past, we might safely conclude—considering, at least, the modern so-called “first world” nations—that, from a narrow economic perspective, people generally live better today than people have ever lived in the past. If this is the case, then Rawls’s concern regarding the first generation—as being that generation least-fortunate—could be said to apply to the economic wellbeing of the second generation in relation to the third and the third in relation to the fourth and so on—at least as a general assumption. Thus, if applied intertemporally, the difference principle ‘would seem to imply, if anything, that there be no saving at all’⁵⁹ from any prior

⁵⁸ Heyd. Value. p. 184.

⁵⁹ Ibid.

generation to any subsequent generation. And Rawls, of course, wanted there to be savings amongst all generations.

In the savings principle we thus have a principle designed to promote savings between generations (a) when the benefits of saving can flow only from prior generations to subsequent generations, and (b) where history tells us that, as a general proposition, the economic wellbeing of prior generations is less than that of subsequent generations. This is different from the difference principle. Indeed, it raises the not unreasonable question whether the just savings principle can be called “just” at all.

There is much more to be said about the just savings principle. I pick up this discussion in §§3.5 and 3.6 and elsewhere below.

2.3 THE ORIGINAL POSITION AS A GENERAL ASSEMBLY

The original position ‘corresponds to the state of nature in the traditional theory of the social contract’.⁶⁰ It is ‘not to be thought of as an actual historical state of affairs, much less as a primitive condition of culture. It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice’.⁶¹ We see here that the original position is a hypothetical position, but who are we supposed to think of as hypothetically being in the original position?

⁶⁰ Rawls. Theory. p. 12

⁶¹ Ibid.

Rawls discussed two possibilities for the original position. His first approach was to think of the original position as a *general assembly of all persons of all generations*.⁶² His second approach was still a general assembly of persons but this time included only persons of a *single* generation. Rawls rejected the first idea. As he wrote, ‘the original position is not to be thought of as a general assembly which includes at one moment everyone who will live at some time; or, much less, as an assembly of everyone who could live at some time. It is not a gathering of all actual or possible persons’.⁶³ Rawls rejected the idea of a general assembly of all existing and possible human beings as he said it would ‘stretch fantasy too far; the conception would cease to be a natural guide to intuition’.⁶⁴ As noted earlier, I think Rawls was right here. At least, thinking of an assemblage of all human beings who ever have lived, who now live, and who may potentially live in the future, isn’t the easiest thing for me to wrap my mind around. However, in adopting Rawls’s second idea for the original position, we also face Hubin’s complaint that drawing the “fantasy-line” where Rawls did is itself arbitrary.⁶⁵

Hubin makes the (not unreasonable) point, that ‘there is an element of fantasy involved in conceiving of the original position as an assembly of all people now living’.⁶⁶ He suggests that we’d have ‘an even better guide to intuition if we imagined the original position as

⁶² Or as a general assembly of the representatives of all persons of all generations.

⁶³ Rawls. *Theory*. p. 138.

⁶⁴ *Ibid*.

⁶⁵ Hubin, D. Clayton. 1976. “Justice and Future Generations.” *Philosophy and Public Affairs*. Vol. 6. pp. 70–83 (“Future Generations”) p. 72.

⁶⁶ *Ibid*.

consisting of just *one* person suitably constrained from unfairly promoting his [her] own interests by choosing behind the veil of ignorance'.⁶⁷

I understand Hubin's concern. For me, personally, the idea of one person—me, in my case—in the original position, does help *me* better understand *my* obligations to others. I note as well that Ronald Dworkin (1979) was of the view that '*nothing turns*' in the original position '*on there being more than one potential party to the contract in the first place*'.⁶⁸ And Rawls himself commented that 'we can view the choice in the original position from the perspective of *one* person selected at random'.⁶⁹

I submit that the original position best serves its purpose when seen as a "*convention of one*". It is fine to think of the original position as a thought-experiment involving numerous decisionmakers, but its value is, above all, as a *private* thought experiment. And this would seem to be the case whatever stage of the four stages of deliberation we might find ourselves in.⁷⁰ Indeed, the original position has no value unless each person is prepared to accept its restrictions as constraints on his or her own decisions. And it is arguable that it is only as a *private* thought experiment that the decisions reached in the original position will bind anyone in the real world.

⁶⁷ Ibid.

⁶⁸ Dworkin, R. 1979. *Taking Rights Seriously*. Harvard University Press. Cambridge Mass. ("Rights") p. 173. (Emphasis added.)

⁶⁹ Rawls. Theory. p. 139. (Emphasis added.)

⁷⁰ Ibid. pp. 195-201. And see Rawls. Restatement. pp. 48-49 and Rawls. Political Liberalism. pp. 397-398.

Heyd rejected the idea of a convention of one. Heyd correctly noted that we cannot contract with ourselves. Nor are we an external threat to ourselves. And as we are not an external threat to ourselves, the circumstances of justice do not obtain if we assume a convention of one. As Heyd wrote, under social contract theory ‘just cooperation takes place only where human beings are mutually vulnerable as well as capable of benefiting each other’.⁷¹ These views seem correct and echo Rawls’s own stated views.

The problem for Rawls—for any theorist—in extending justice-based duties across generations to remote peoples is the ‘unidirectionality of time’.⁷² ‘Cooperation, and thus also the applicability of the principles of justice ... are precluded across time, in which we can give only to those from whom we cannot receive and receive from those to whom we cannot give’.⁷³ ‘[T]he earlier shapes the later, but not vice versa’.⁷⁴

It is difficult to find fault with Heyd’s treatment of the principle of reciprocity. It is near sacrosanct in Rawls’s theory. Barry argued that Rawls’s theory was best interpreted as a theory of *justice-as-impartiality*.⁷⁵ Allen Gibbard challenged Barry’s interpretation and placed reciprocity in priority to impartiality in Rawls’s theory.⁷⁶ In commenting on the dispute, Rawls said that Gibbard had it right.

⁷¹ Heyd. Value. p. 168.

⁷² Ibid. p. 175.

⁷³ Ibid.

⁷⁴ Ibid. p. 177.

⁷⁵ Barry. Impartiality. pp. 28-80 and passim.

⁷⁶ Gibbard, Allan. 1991. “Constructing Justice.” *Philosophy & Public Affairs*. Vol. 20, No. 3. Summer, 1991. pp. 264-279.

In my view, Rawls's nod to Gibbard was unfortunate. However, the nod can be explained when we recognize that Rawls was thinking of impartiality—as he said—as an *altruistic* principle.⁷⁷

The law doesn't see impartiality as altruistic. Nor do I see why moral or political philosophy should. Indeed, Rawls set up the original position, as he said, to ensure that the decisions made in the original position were *impartial*. 'An *impartial judgment*, we can say, is one rendered in accordance with the principles which would be chosen in the original position. An *impartial person* is one whose situation and character enable him to judge in accordance with these principles *without bias or prejudice*'.⁷⁸ And I simply ask: How does this description of impartiality lead to the conclusion that impartiality is in any way altruistic?

Rawls assumed that those in the original position would be rational, and, in Rawls's theory, rational has its strict economic meaning; that is, of self-promotion. The moral sense of "reasonality" was established as a characteristic of those deliberating behind the veil, not via

⁷⁷ Rawls saw impartiality as altruistic and as Rawls didn't view his theory as altruistic—such a view would be rather surprising given the nature of Rawls's deliberators both in the original position and in the real world—Rawls rejected, out-of-hand, any characterization of his theory as one of impartiality. With impartiality excluded, reciprocity thus became a candidate. And, as reciprocity is a longstanding contractual principle; as Rawls was a social contractarian; and, as "mutual advantage" sounds like it has come straight out of a dissertation on raw capitalism, reciprocity was the last principle standing.

Barry said that he thought Rawls would accept an interpretation of his (Rawls's) theory as one of justice-as-impartiality, *if* Rawls accepted Barry's idea of impartiality. I think Barry was right. Barry's idea of impartiality is not dissimilar to the idea of impartiality I discuss herein. It is an impartiality as well which best fits Rawls's own theory; namely, that those deciding impartially must remove from their thinking arbitrary advantages which would place their reasoning in opposition to the interests of others. My guess is that Barry was both surprised and disappointed when Rawls rejected Barry's characterization of Rawls's theory as justice as impartiality.

⁷⁸ Rawls. Theory. p. 190. (Emphasis added.)

an internal moral sense, but, rather, *externally*, via the veil. Rationality is non-moral. Reasonality is moral. Altruism is quasi-moral.⁷⁹

Rawls didn't set up the original position so that the decisions made therein would be impartial in the sense of being altruistic; he set it up to ensure that the decisions made therein would be *impartial*, in the sense of (a) being arrived at in a procedurally fair manner, and (b) being substantively just.

However, even accepting the above analysis, we are still left with a conundrum: (a) if the original position was designed to ensure that the judgments rendered therein are just, (b) if justice as conceived via contractarian tradition requires reciprocity, and (c) if non-contiguous non-overlapping generations cannot reciprocate, then (d) there would appear to be no basis remaining to argue for justice-based duties between non-contiguous non-overlapping generations. A Passmorean 'chain of love'⁸⁰ might work for those benefits that can be passed directly from one generation to the next: But what of the latent harms of such issues as radioactive waste storage that "skip" generations within the chain? Can the savings principle address these concerns?

⁷⁹ Birnbacher, Dieter. 2008. "What Motivates Us to Care for the (Distant) Future?". Gosseries, A. and Lukas H. Meyers (eds). *Intergenerational Justice*. Oxford University Press. ("What Motivates Us?") pp. 123-148. pp. 129ff.

⁸⁰ Passmore, John. 1981. "Conservation" Partridge, E. (ed) *Responsibilities to Future Generations*. Prometheus Books. Buffalo NY. ("Conservation") pp. 45-59. pp. 45ff. See also Passmore, John. 1980. *Man's Responsibility for Nature. Ecological Problems and Western Traditions*. Duckworth. London. Birnbacher wrote, '[t]he most well-known construction of an indirect motivation in future ethics is Passmore's idea of a "chain of love". "Chain of love" means the intergenerational concatenation of each generation's love for its children and grandchildren'. (See Birnbacher. What Motivates Us? pp. 285-286.) Heyd speaks of a 'unified intergenerational chain'. (Heyd, Value. p. 176.)

The above discussion unfortunately doesn't exhaust the concerns of theorists like Heyd regarding Rawls's theory of justice as applied intertemporally. Heyd also wrote:

A general assembly of representatives of all generations, which is expected to decide intergenerational principles of justice, is logically problematic, even absurd, since it presupposes the existence and size of all generations as *given*. But this presupposition ignores the connection between demographic policies and savings policies in modern society. Schematically, one may say that in order to secure and advance the level of welfare necessary for the existence of a just future society one can *either* increase the rate of savings and leave more capital and resources to the next generation, *or* reduce the rate of population growth and the size of the next generation, thus avoiding the duty to provide it with more resources.

Once a link is made between the just savings principle and policies of procreation it is easy to see why the general assembly idea is logically absurd. For how can an assembly of all *possible* people decide who is to be born? An assembly of individuals cannot decide on its own size. Even if we can imagine ourselves belonging to another sex or another social status, we cannot imagine ourselves unborn or assess the risks of such a situation. Hence, the number of represented generations must be fixed and so must the number of people in each generation if we wish to engage in the thought experiment of a contract. And although an assembly of all *actual* people (i.e. those who lived, are living and are actually going to live) is logically coherent, it is implausible. For we (at least since the invention of effective means of birth control) exercise control over the size of future populations, i.e. the number of people in the future is not given but subject to our choice (on the basis, among other things, of considerations of justice!).⁸¹

Heyd's above remarks are *prima facie* compelling. However, I suggest that talk of general or other assemblies of vast congeries of people, whether of multiple or even of one generation, mistakes Rawls's hypothetical original position for something else entirely—something like an actual gathering.

No one ever has nor ever will sit in an assembly of all possible or even of all existing people. Such a gathering just isn't possible. Manifestly, *future* people cannot take part in such an assembly. They cannot because they do not yet exist! Nor can our distant progenitors. They are gone. We have only the here and now. Further, even ignoring the fact (a) that it is

⁸¹ Ibid. p. 174.

impossible to have an assembly even of all existing people, and (b) that babel has ensured most people cannot understand most others any way, if approached, most people wouldn't understand the purpose of entering the original assembly, and, if they did understand it, wouldn't be interested in entering it.⁸² Further, I submit that Heyd is wrong in suggesting that *we* can neither imagine *ourselves* unborn nor assess the risks of such a situation. I can. And I would guess that many can.

I *can* "see myself in the position of others". Indeed, this type of transference of my interests to others is precisely what the original position is supposed to achieve and what Rawls's idea of the sense of justice of moral persons is supposed to entail. As Barry wrote, 'Rawls invites people to put themselves in others' shoes in order to concentrate their minds on what they should think is fair while wearing their own shoes'.⁸³ And Rawls's invite is a real one.

This sense of justice is a key condition of Rawls's core theory. The assumption of mutual disinterested rationality is needed so that the deliberators in the original position will seek benefits for themselves or for those whom they represent.⁸⁴ However, the idea of justice

⁸² For the most part, those seeking to employ Rawls's thought experiment, will, unfortunately, be few. There will likely always be few, even though, unlike Derek Parfit's suggestion toward the end of *Reasons and Persons* that we would do well to hide his *non-identity problem* from those making decisions affecting future generations, we should be doing all that we can to ensure that those in power understand the need for intertemporal *impartiality*. Perhaps we are failing, or perhaps they are not listening, as there is little evidence that modern decisionmakers on a national and international level have imbibed the ethical wisdom that is the benefit of Rawls's theory, particularly when deciding issues such as structural deficit spending and the preservation of the earth's aesthetic and economic resources.

⁸³ Barry. *Impartiality*. p. 56.

⁸⁴ Rawls wrote (*Rawls. Theory*. pp. 144-145) in part:

The assumption of mutually disinterested rationality, then, comes to this: the persons in the original position try to acknowledge principles which advance their system of ends as far as possible. They do this by attempting to win for themselves the highest index of primary social goods, since this enables them to

being based solely on mutual advantage is, as Barry wrote, ‘unstable because it has the structure of a prisoner’s dilemma’.⁸⁵ All armistices are unstable.

Rawls’s theory is not susceptible to the “prisoner’s dilemma” challenge. And Rawls’s theory isn’t susceptible to this challenge because it doesn’t rely solely for its efficacy on the idea of mutual advantage. As Rawls wrote:

*There is one further assumption to guarantee strict compliance. The parties are presumed to be capable of a sense of justice and this fact is public knowledge among them. This condition is to insure the integrity of the agreement made in the original position. ... [This capability for a sense of justice] means that the parties can rely on each other to understand and to act in accordance with whatever principles are finally agreed to. Once principles are acknowledged the parties can depend on one another to conform to them. In reaching an agreement, then, they know that their undertaking is not in vain: *their capacity for a sense of justice insures that the principles chosen will be respected.*⁸⁶*

It would be difficult to overemphasize the importance to Rawls’s theory of the requirement that those deliberating behind the veil and those living in the real world have the capacity for and follow this sense of justice.⁸⁷

promote their conception of the good most effectively whatever it turns out to be. The parties do not seek to confer benefits or to impose injuries on one another; they are not moved by affection or rancor. Nor do they try to gain relative to each other; they are not envious or vain. Put in terms of a game, we might say: they strive for as high an absolute score as possible. They do not wish a high or a low score for their opponents, nor do they seek to maximize or minimize the difference between their successes and those of others. The idea of a game does not really apply, since the parties are not concerned to win but to get as many points as possible judged by their own system of ends.

⁸⁵ Barry. Impartiality. p. 51.

⁸⁶ Ibid. p. 145. (Emphasis added.) I note that the idea of a representative in the original position having a duty of undivided loyalty to those s/he represents accomplishes the same thing as disinterested rationality. Such a sense of loyalty is also not discrete from a sense of justice. (See in part §3.3 below for a discussion of the duties of a fiduciary.)

⁸⁷ I agree with Barry when he wrote: ‘The most serious error is to regard the derivation of principles of justice from rational choice in the original position as if it were the whole theory’. (See Barry. Impartiality. p. 53.)

I *can* imagine myself as one of the vulnerable in Palestine, in Rwanda, in Darfur and in Syria. I *can* similarly imagine myself born into a generation, say, 300 years from now, when previously stored lethal radioactive waste begins to escape. I *know* what I would feel in each case. I know I would feel that the world had either turned its back on me, or worse, recklessly or intentionally injured me. And, as I would not want to be in that position, my sense of justice is such that I should not want anyone to be in that position. Nor would I adopt today a policy that would leave present people or that would put future people in harm's way in these ways.

Further, I disagree entirely that it is implausible, simply because we now exercise control over the size of future populations, that questions of population control aren't questions of justice. Indeed, Heyd is express that questions of population control *can be questions of justice!* And as questions of justice, I disagree that such questions are somehow outside the realm of our reasoning ability.

I might have agreed with Heyd if he had said that we have no duties of justice to future generations regarding population size *if we had no control* over population size. However, I disagree completely that we have no such duties of justice *because we have control* over population size. Of course, we ultimately might decide that we have no such duties; but, if we do decide this, it must be for reasons other than that we have the power to control the size and existence of future generations. Here "can" decidedly does entail "ought".

Hubin largely anticipated Heyd's concerns.⁸⁸ Hubin noted, following Rawls, that the principles of justice can be adopted only where the circumstances of justice hold. Hubin added that we simply do not know whether the circumstances of justice will hold for future generations. 'In order to show that the circumstances of justice obtain for all future generations, we must postulate either that there will be ever-expanding sources of raw materials and energy for us to exploit or that, through population control and technological advances, mankind will achieve homeostasis in his environment'.⁸⁹ Hubin's conclusion was that, because we do not know whether the circumstances of justice will exist in the future, we cannot enter into justice-based agreements. And we cannot enter into such agreements because such agreements presume that the circumstances of justice obtain for all contracting parties. Hubin wrote:

We now seem to have a good reason for rejecting the interpretation of the original position that views it as an assemblage of all people regardless of their place in time. It is not clear that any principles of justice could be agreed upon by members of all generations. And if we amend the membership criterion to allow the members of only those generations in which the circumstances of justice obtain, an interesting paradox arises. Whether the circumstances of justice obtain for a given generation in the future depends in part on the rate of saving of this generation and those in between. But, assuming strict compliance with the principles of justice, the rate of saving will depend upon the principle of saving adopted by the contractors. So, whether a future generation will be represented or not depends in part upon which principles are agreed to in the original position.⁹⁰

It would be nice (for a while at least) to live in a utopia where the sustenance necessary to life grows spontaneously and abundantly. But I don't think we should consider this possibility all

⁸⁸ Heyd notes Hubin's paper, but distinguishes Hubin's approach by noting, not unreasonably, that Hubin, 'draws attention to the paradox involved in the dependence of the existence of the circumstances of justice on the intergenerational axis on the present generation's chosen savings policy'. (Heyd. *Value*. p. 174. footnote 10.)

⁸⁹ Hubin. *Future Generations*. p. 73.

⁹⁰ *Ibid.* p. 74.

that likely for the future. On the flipside, it is possible, and far more likely, that the circumstances facing future people will not be conducive to justice due to maximal population size and minimal resource quantity. What does this mean? Does it mean that we can in good conscience simply say: “Well, you know, all of you future folks are likely going to starve whatever we do, so we might as well do nothing”?

Again, I suggest that we can put ourselves in the position of future people, and, if we do, I think that as future people we would want those who preceded us to do what they can to help us, even if, whatever they do, they will be unable to do no more than dip their finger in some water and cool our tongue. Further, whatever is done, we—those living today—must ensure that we are not the cause of future sufferings.

2.4 INTERGENERATIONAL JUSTICE AND INTRAGENERATIONAL COMMITMENTS

As noted, Bickham commented that if someone were to suggest that we could, without compunction, allow the release of a lethal level of radiation in, say, 200 or 300 years, ‘we should regard that individual as lacking one of the most basic of human ethical sensibilities’.⁹¹

I will assume that anyone still reading this thesis agrees with Bickham here. However, it is Bickham’s next comment that causes concern. Bickham adds that our ‘serious responsibility for the future ... does *not* commit us to the more particular position that we have ethical obligations *to* future generations’.⁹² So, what obligations do we have?

⁹¹ Bickham. *Contemporary Theory*. p. 172.

⁹² *Ibid.* p. 169.

Like Bickham, Heyd disagreed that we have obligations *to* future people. According to Heyd, our obligations extend to future generations only in the sense that our obligations may restrict what we can do *with regard to* future people. We *owe nothing* to future people. Our only obligations are to our *contemporaries*. What is needed, again according to Heyd, is a ‘universal rational commitment to the promotion of justice’⁹³ that reaches across generations but only exists between ‘*contemporary* individuals who see themselves as cooperating in the shaping of the future’.⁹⁴ ‘It is ultimately *we* (in the present) who are the subject of the contract’.⁹⁵

Hubin reaches much the same conclusion. Indeed, Hubin begins his analysis of Rawls’s theory of intergenerational justice by assuming that ‘we do *not* owe obligations *to* future generations’.⁹⁶ Hubin likes his position because it allows him to ‘avoid the rather sticky problem of how persons who do not share a common period of life could come to acquire obligations to one another. This relationship could not result from a relationship of mutual benefit (reciprocity) nor from explicit or implicit agreement’.⁹⁷ With specific reference to Rawls’s theory of justice, Hubin wrote, ‘[i]n order to obtain the savings principle it is not necessary that the contractors be motivated to protect the interests of their immediate

⁹³ Heyd. *Value*. p. 178.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.* p. 179.

⁹⁶ Hubin. *Future Generations*. p. 71. (Emphasis in original.)

⁹⁷ *Ibid.*

descendents [sic] *because* they *have* ties of sentiment toward them. They must simply be motivated to do so *for some reason*'.⁹⁸ And, according to Hubin, egoistic reasons are just fine:

If we assume that it is a general psychological principle that people who have children see their children's well-being *as essential to their own*, then they will represent the interests of their immediate descendents [sic] in the deliberations concerning the principles of justice. *Their motivation for doing this will be egoistic rather than altruistic*. They will recognize that the possibility of their having children (and caring about their children in this way) makes it possible that in real life they will have a direct and vital interest in the conditions under which the subsequent generation lives.⁹⁹

Hubin doesn't deny that we might have a duty not to despoil the earth for future generations.

However, he argues that this 'is because in doing so we have treated our *contemporaries* unjustly'.¹⁰⁰

We see perhaps the same thinking in Kant in relation to the treatment of *non*-humans. Kant wrote,

... from all our experience we know of no being other than a human being that would be capable of obligation (active or passive). A human being can therefore have no duty to any beings other than human beings; and if he thinks he has such duties, it is because of an *amphiboly* in his *concepts of reflection*, and his supposed duty to other beings is only a duty to himself. He is led to the misunderstanding by mistaking his duty *with regard to* beings for a duty *to* those beings.¹⁰¹

Here we see not only the distinction between direct and indirect obligations, but, possibly, as well, an adumbration of the idea, prevalent in social contract theory, that human beings must

⁹⁸ Ibid. p. 76. (Emphasis in original and added.)

⁹⁹ Ibid. (Emphasis added.)

¹⁰⁰ Ibid. p. 80. (Emphasis added.)

¹⁰¹ Kant, Immanuel. 1996. *The Metaphysics of Morals*. Translated by Gregor, Mary. Cambridge University Press. Cambridge UK. §16. (Emphasis in original.). Mathis makes note of this point as well.

be capable of assuming an obligation to others before they should be seen as persons and as having a valid claim to rights-recognition.

Mathis (2009) correctly notes that Rawls's motivational assumption itself raised a question whether the duties Rawls said existing generations owe to future generations could be seen as duties of justice at all. According to Mathis, Rawls's approach 'can only be called justice which bears future generations in mind'.¹⁰² Echoing Hubin and Heyd, Mathis wrote, '[t]his being the case, there would be no obligations *towards* future generations, only towards members of the present generation *with regard to* future generations'.¹⁰³

Not only did Heyd deny that we have duties of justice *to* future generations, he also argued that our duties to uphold justice is not itself a duty of justice.¹⁰⁴ Heyd calls this "duty" a '*motive as solidarity*'.¹⁰⁵

Heyd sees solidarity as the 'more meaningful' flipside to the motive we all possess to seek personal protection from potential harm. Rather than seeking a cooperative bulwark to protect ourselves from harm, solidarity 'is the *positive* motive we have to cooperate with particular

¹⁰² Mathis. *Generations*. p. 102. (Emphasis in original.) We might, not unfairly, accuse Mathis of stretching Rawls's analysis, but we might not be able to say that he did so unfairly. Certainly, as Rawls (at least initially) premised intergenerational duties on his motivational assumption, it is questionable whether he succeeded in establishing a valid argument for justice-based duties rather than some untethered "duty" to be charitable.

¹⁰³ *Ibid.*

¹⁰⁴ Heyd. *Value*. pp. 184ff.

¹⁰⁵ *Ibid.* p. 185. (Emphasis added.)

people rather than with others, our wish to produce and consume together material goods and create for our society a fair scheme of cooperation and a common way of life'.¹⁰⁶

Birnbacher constructs his theory via an idea similar to Heyd's idea of solidarity. Birnbacher sets out possible moral, quasi-moral and non-moral motives to care for future generations.¹⁰⁷ He finds none of these motivations compelling. He then considers what he calls '*indirect motivations*' to care for future people.¹⁰⁸ According to Birnbacher, '[t]he distinction between direct and indirect motivations cuts across the distinctions between moral, quasi-moral and non-moral motivations'.¹⁰⁹ Further, indirect motivations are able to use the 'full scope of quasi-moral motives, such as love, compassion, care, and solidarity, directed to objects accessible to experience'.¹¹⁰

Birnbacher's reference to 'objects accessible to experience' obviously limits the reach of his indirect motivations. Indeed, the fact these motivations are *indirect*, signals a potential limitation to the scope of the motivation to the motivation to care for those near to us (perhaps only our own or overlapping generations).

Birnbacher's idea also expressly finds fruitful soil in Passmore's chain of love. Birnbacher wrote that '[a]ccording to this [Passmore's] model each generation cares exclusively for the generation of its children and grandchildren, with the result that the sequence of limited

¹⁰⁶ Ibid. (Emphasis in original.)

¹⁰⁷ Birnbacher. What Motivates Us? pp. 129ff.

¹⁰⁸ Ibid. pp. 133ff.

¹⁰⁹ Ibid. p. 133.

¹¹⁰ Ibid.

responsibilities has the same or even better effects on the whole series of generations than postulates of a more future-oriented responsibility'.¹¹¹ According to Birnbacher, 'the aim of each generation's intergenerational sympathy is only the welfare of the directly following generations [and] this welfare is a compound of its own egoistic welfare and the welfare of subsequent generations'.¹¹²

As noted, Birnbacher's "solidarity-chain-of-love" theory is limited in scope to persons accessible to our experience. Heyd's solidarity-based intergenerational theory is even more restricted in its reach. According to Heyd:

What we owe distant societies, in space and in time, are the more limited duties of assistance (in the former) and the preservation of justice (in the latter). We, contemporaneous members of a particular society ('people') may claim not only territorial sovereignty, but also 'temporal' or generational sovereignty. That is to say, we are entitled to choose our way of life and a particular scheme of distribution and re-distribution (within the constraints of the difference principle) with no regard to remote or future people (once we have secured the future of the institutions of justice).¹¹³

These last remarks of Heyd are strange from a theorist who recognizes that 'location in time plays no role'¹¹⁴ in Rawls's theory. Nor, thinking of myself as a future person, would I get the warm and fuzzies from the idea that I just might get an indirect benefit from an obligation owed to someone else, if I happen to be lucky enough.

¹¹¹ Ibid. pp. 133-134.

¹¹² Ibid. p. 134.

¹¹³ Heyd. Value. p. 178.

¹¹⁴ Ibid. pp. 184-185.

If my opportunities to share equally in the fruits of social cooperation shouldn't depend on luck (what Rawls calls arbitrary contingencies) surely the protection of my fundamental rights shouldn't depend on luck (or on such contingencies).

We can see the problem when considering Hubin's analysis:

If human beings are the kind of beings that have the requisite sort of vital and immediate concern for the well-being of descendents [sic] several times removed, then the interests of the members of these generations would be represented. *Similarly, if we had no concern for members of even the next generation, their interests would not be represented in the original position and therefore no duty of justice would exist with regard to them.*¹¹⁵

Acknowledging duties *with regard to* others but not *to* others is, in my view, completely inconsistent with the treatment of future generations as human beings and as persons. I might have a duty *with regard to* a dog and *to* its owner if I promise the owner to feed the dog while the owner away. However, in dealing with a human being, our duties are owed *to* the human being not to someone or something else.

I agree with Martin Golding when he wrote, 'when I owe it to someone to promote his good, he is never, to this extent, merely an incidental beneficiary of my effort to fulfill the obligation'.¹¹⁶ I add, that, for me, Edwin Delattre's (1972) essay better typifies the intertemporal justice Rawls sought:

To be consistent with our claim of these rights for ourselves, we must attempt to satisfy the conditions which will provide in the future such rights to young people who have presently only potential for adulthood. To do otherwise is to sanctify as exclusive and final the potential and rights of a particular generation. We would thereby ignore the fact that *these*

¹¹⁵ Hubin. Future Generations. p. 77. (Emphasis added.)

¹¹⁶ Golding, Martin, P. 1972. "Obligations to Future Generations". *The Monist*. Vol. 56. No. 1. Philosophy and Public Policy. January. 1972. Oxford University Press. pp. 85-99. p. 88. Also reprinted from the *Monist* in Golding, Martin, P. 1981. "Obligations to Future Generations". Partridge, E. (ed) *Responsibilities to Future Generations*. Prometheus Books. Buffalo NY. pp. 61-72.

sorts of rights accrue to us because we are human rather than because of any genetic accident concerning our time of birth.

*That I was born in 1941 is no more relevant to my rights as a human than are the color of my skin, my physical attractiveness, my economic status, or any other accidental features not definitive of being human. If we grant this principle of consistency as morally relevant, then we must conceive of ourselves as having responsibilities for the maintenance of ecological balance.*¹¹⁷

Delattre comments that his principle ‘holds irrespective of whether we have responsibilities to people of the future, since the responsibilities must be met to safeguard the rights of present children with the potential for adulthood’.¹¹⁸ However, this latter remark takes nothing away from Delattre’s principle of intergenerational justice-based duties: It is one thing to say that we can provide for transgenerational rights and responsibilities directly and as a primarily duty to future people, but, also, secondarily, or indirectly, due to the existence of other rights and responsibilities. It is another thing entirely to say that there are no transgenerational rights and responsibilities at all and that the best we can do is to indirectly benefit future persons via our obligations to our contemporaries.

In my submission, those criticizing Rawls’s theory of justice as applied intergenerationally have failed to understand the full scope and strength of that theory. Part of this error is due to Rawls’s own misunderstanding of the principle of reciprocity. Part is due to the deference paid by Rawls (and others) to Hume’s articulation of the circumstances of justice. However,

¹¹⁷ Delattre, Edwin. 1972. “Rights, Responsibilities, and Future Persons”. *Ethics*. Vol. 82. No. 3. Apr., 1972. The University of Chicago Press. pp. 254-258. p. 255. (Emphasis added.) It should be noted that Delattre was presenting his own ideas, not responding to Rawls’s theory.

¹¹⁸ Ibid.

we have enough to guide us to the correct answer. I intend to address each of these matters below. For now, I turn to Rawls's PTE interpretation.

2.5 CONTEMPORANEOUS OR PRESENT TIME OF ENTRY

The PTE interpretation¹¹⁹ mandates that those entering the original position (a) be all of one generation, and (b) know they are all of one generation. The PTE interpretation is innocuous vis-à-vis claims of justice between those of one generation.¹²⁰ However, it is highly significant vis-à-vis intergenerational justice-based claims. Indeed, Rawls recognized that his PTE interpretation could potentially negate intergenerational justice-based rights and obligations.

Rawls said that he needed the PTE interpretation because any other interpretation would 'stretch fantasy too far'.¹²¹ Again, I think Rawls was right here. However, the chief reasons Rawls needed his PTE interpretation were (a) that the original position is presented generally as an initial bargaining position (b) that bargaining is generally seen as entailing reciprocity, or, in other words, an exchange for mutual advantage, and (c) that *non-contemporaries* cannot reciprocate with each other.

Hubin thought that Rawls could circumvent the problems created by his PTE interpretation by (a) making all of those deliberating in the original position contemporaries, and (b) ensuring that those deliberating *don't* know they are contemporaries.

¹¹⁹ Rawls. Theory. pp. 140 and 292. See also Rawls. Restatement. p. 160 and Rawls. Political Liberalism. p. 274.

¹²⁰ As it is obviously tautologous that those of one generation are of one generation.

¹²¹ Rawls. Theory. p. 139.

I don't know how Hubin's idea would work. First of all, as noted, the only reasonable explanation for Rawls superimposing the PTE interpretation on his theory is that only contemporaries can bargain, or, in other words, reciprocate in a mutual give-and-take. And if I don't know whether those deliberating with me are my contemporaries, then I don't know if I need to deliberate with them—assuming, of course, that it is self-interest that motivates me.

Second, as discussed earlier, Hubin suggested that those deliberating in the original position needed to know that those in future generations were also subject to the circumstances of justice. This was needed, Hubin said, before those deliberating could bargain with future people for their mutual advantage. I simply ask here: How it is reasonable to postulate (a) that, as a deliberator, I need to know whether the circumstances of justice exist in future societies, but (b) that I can, at the same time, have removed from my knowledge any idea that those I'm deliberating with are my contemporaries? Surely, if I don't know whether all the other deliberators in the original position are my contemporaries, then I don't know if the circumstances of justice obtain for one or more or all of the other deliberators.

It might be that we could simply stipulate that the circumstances of justice obtain for everyone in the original position but leave the deliberators to *speculate* on whether they are all contemporaries or whether some are future persons for whom the circumstances of justice obtain. This might work. However, it seems to me that knowledge that another deliberators are my contemporaries is a far more pressing and immediate concern than whether the circumstances of justice hold in future generations.

Perhaps I have misinterpreted Hubin's point. However, his fix does seem artificial and in being artificial doesn't help better visualize what we are to intuit from the original position as a 'natural guide to intuition'.¹²²

In my view, assuming we want to continue talk of a general assembly of some nature, we are stuck with the PTE interpretation. I say this, first, because I think it is all there is. There cannot be a general assembly of those living in the past and the present and potentially living sometime in the future. Second, I suggest Rawls was right that such a general assembly 'stretch[es] fantasy too far'. Perhaps the reason it does is that it cannot exist. Third, a cross-generational assembly simply isn't necessary.

I say that a cross-generational assembly isn't necessary for three reasons:

1. It isn't needed due to the strict compliance nature of Rawls's theory.
2. It isn't needed since the deliberators in the original position will in any event choose to protect all future persons as a *rational self-interested* choice as long as they do not know into which generation they will be born.
3. It isn't needed because reciprocity isn't an invariable precondition to our duties to others.

No additional explanation is needed concerning the first reason. Jane English's (1977) arguments (discussed in §2.6 below) adequately address the strict compliance nature of Rawls's theory. As to the second point, I argue that those in the original position will choose

¹²² Ibid.

to benefit future generations based on self-interest, among other reasons, because that is just the way the math works out as long as those deciding behind the veil make the assumption that humankind will exist for three or more generations, which seems a rational assumption. Third, I argue that reciprocity *isn't* an invariable feature of justice-based duties based on (a) the equitable principle of *uberrima fides*, (b) Rawls's acceptance of natural duties, and (c) the fact that when considering intergenerational obligations, existing generations do not have a reasonable expectation of direct or personal benefit from those living in future non-overlapping generations. I address points two and three in §3.5 below.

2.6 MOTIVATING JUST SAVINGS

Rawls superimposed his motivational assumption on his theory as a psychological feature of those deliberating behind the veil. It is assumed via this assumption that all people possess a *familial affection* for their offspring—for up to two generations. It was Rawls's hope that this revised assumption—working continuously from one generation to the next—would form a perpetual chain of affection such as to ensure that *all* future generations would enjoy benefits from their respective immediate forebears.

Jane English's 1977 essay remains the primary source of discussion regarding Rawls's motivational assumption.¹²³ There are likely two reasons for this: First, the assumption is no longer part of Rawls's theory. If the assumption has been removed, why flog a dead argument? Second, English addresses the problems raised by the assumption as good as

¹²³ English, Jane. 1977. "Justice Between Generations." *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*. Vol. 31. No. 2. Feb. 1977. pp. 91-104 ("Justice Between Generations").

anyone could. Indeed, Rawls noted English's criticisms when removing the motivation from his theory.

One of the main criticisms of Rawls's motivational assumption is that it violates his assumption of the *mutual disinterest* of the deliberators in the original position. English commented, accurately, that, when Rawls applied his theory to the duties we owe to our contemporaries, Rawls 'argues *against* introducing any motivational assumptions in the original position'.¹²⁴ As English highlighted, Rawls's view was that, '[o]ptimally, "a conception of justice should not presuppose ... extensive ties of natural sentiment"'.¹²⁵ She further noted that, as Rawls articulated his theory, 'the saving principle is, in effect, being built into the premises of the theory in the form of a motivational assumption rather than being justified by the theory'.¹²⁶

English's criticisms of Rawls's theory are interesting. However, criticisms of the above nature fail to address the fact that, given Rawls's PTE interpretation, the motivational assumption, applicable as it is to *future* generations, needn't impact the disinterestedness of a *deliberator* in the original position vis-à-vis *other deliberators*. Thus, the *mutual disinterestedness of the deliberators* in the original position is preserved.

Other problems created by Rawls's motivational assumption are not as easily put to one-side. It is also the case that the motivational assumption *displaces* justice-based obligations between generations. Further, the assumption, coupled as it is with Rawls's "heads -of-

¹²⁴ Ibid. p. 92.

¹²⁵ Ibid. p. 93.

¹²⁶ Ibid.

family” approach, excludes questions of justice that could potentially arise within families from the scope of Rawls’s theory.¹²⁷

English wrote of Rawls’s motivational assumption, that “[u]nlike his [contractarian] predecessors, Rawls characterizes the parties in the original position not as individuals but variously as “continuing persons (family heads, or genetic lines)”, “representatives of families,” “heads of families,” “representing continuing lines of claims,” and “deputies for a kind of everlasting moral agent””.¹²⁸ English added, insightfully, “[i]n this respect Rawls’ theory is reminiscent of Hegel. His theory of right was not said to apply within the family, since this is a sphere of love rather than right”.¹²⁹ English challenged that, “[b]y making the parties on the original position heads of families rather than individuals, Rawls makes the family opaque to claims of justice’.¹³⁰

While feeling might be deepest within the family, there is ample historical evidence that if the family unit is placed above the individual, individual rights suffer. As English cautioned,

... special provisions based on sex could be acceptable. For example, suppose that due to efficiency, all families gain significantly if the natural child bearers are universally appointed as child rearers. Each family knows that it will have to do some child rearing, and that this work will be divided among its members in some fashion. No doubt vast sums could be saved if this were not left as a matter of individual choice, since boys would not have to be educated in child rearing techniques or girls taught higher mathematics.

Similarly, efficiency might dictate other inequalities. Perhaps destructive and costly infighting could be avoided if it was decided in advance that the first-born inherits all the

¹²⁷ However, this concern does not appear as a discrete issue once it is realized that *all* intergenerational justice-based questions are excluded from Rawls’s theory by reason of the motivational assumption, but it remains a concern.

¹²⁸ English. *Justice Between Generations*. p. 92.

¹²⁹ *Ibid.* p. 95.

¹³⁰ *Ibid.*

family land while the later-born must go into trades. Primogeniture was justified by appeal to how the family as a whole would suffer if the property were divided and subdivided with each generation.¹³¹

English commented that Rawls considered it “more realistic” to assume parents are not disinterested in the welfare of their offspring’.¹³² English didn’t disagree. However, she added that it could also be argued that ‘the assumption of mutual disinterest is artificial and unrealistic in other cases, too, since we often care about others’.¹³³ She suggested, there ‘is no more reason to suppose familial ties than it is to assume [a more general] benevolence’.¹³⁴ Hubin advances a similar point.¹³⁵ I disagree with both English and Hubin here.

I might belong to a club. I might belong to a church. I might have a dog. But unless I have been brainwashed or unless I suffer from Munchausen syndrome by proxy or am otherwise mentally ill, I will, all other things equal, always put my family’s interests above the interests of nonrelatives and strangers. And, other than the fact that Rawls’s motivational assumption allowed Rawls to truncate his thinking about intergenerational justice-based claims, I have no problem with the assumption. It seems to me to be nothing more than recognition of normal human psychology.

¹³¹ Ibid. pp. 94-95.

¹³² Ibid. p. 93.

¹³³ Ibid.

¹³⁴ I think English is stretching the point here. Most people feel the greatest affections for their own families. Moreover, while this has unquestionably been the case historically, such affection is surely needed if our species is going to survive. Nonetheless, it could be argued that English now has it right.

¹³⁵ Hubin. *Future Generations*. p. 75.

English also expanded on Rawls's own obvious concern that if we are talking simply about benevolence—rather than about justice-based duties—we have *no standard* by which to judge if benevolence has been satisfied. Rawls noted that we do not know the 'relative strength'¹³⁶ of beneficence. Some parents care deeply about their children; others care little. 'Are heads willing to starve to death to send their children to college, or are they only willing to drive a Datsun instead of a Buick to achieve that end?'¹³⁷ We might all agree that no loving parent would allow her child to drive Iacocca's Ford Pinto if any other option presented itself, but which is the "right" purchase between a Datsun and a Buick, or between a Chevy and a BMW? 'Since the interests of family members conflict ... some technique for measuring and balancing these interests is required'.¹³⁸

Rawls, of course, didn't want to introduce benevolence or altruism as characteristics of his deliberators, as he didn't want the efficacy of his theory of justice to be dependent on some elevated theory of human nature.¹³⁹ '[T]he idea is to derive satisfactory principles from the weakest possible assumptions'.¹⁴⁰ And how are we supposed mandate benevolence? "Obligatory altruism" is an oxymoron. Nonetheless, Rawls felt that it was reasonable to

¹³⁶ Rawls. Theory. p. 148.

¹³⁷ English. Justice Between Generations. p. 94.

¹³⁸ Ibid.

¹³⁹ Rawls. Theory, pp. 148-149.

¹⁴⁰ Ibid. pp. 520-521. Rawls wrote (Theory p. 521): 'Thus each person assesses social arrangements solely as a means to his private aims. No one takes account of the good of others, or of what they possess; rather everyone prefers the most efficient scheme that gives him the largest share of assets. (Expressed more formally, the only variables in an individual's utility function are commodities and assets held by him, and not items possessed by others nor their level of utility.)'

adopt his motivational assumption to reflect the familial affection people normally feel for their children. Moreover, the assumption was essential to underpin savings by prior worse-off generations for succeeding better-off generations. As noted, imposing a duty of saving where the party doing the saving is worse-off than the party for whom the saving is intended is contrary to Rawls's difference principle. The difference principle is, of course, a principle Rawls argued would be adopted in the original position. However, the savings principle is also adopted in the original position. Accordingly, something had to "give" to justify a shift from the difference principle to the savings principle. Rawls's answer was to insert his motivational assumption—a move English helped to dismantle.

English said that Rawls's motivational assumption wasn't needed. She argued that, as Rawls presented his theory assuming strict compliance, 'the choosers in the original position should assume that other generations save according to just principles, too'.¹⁴¹ This means that all generations are assumed to do what is best, and, because compliance with the savings principle will benefit *all* generations (except the first), saving for other generations is not contrary to any generation's self-interest (again, except for the first). As English submitted, '[t]he original position is supposed to be a point of view or basis for moral reasoning which anyone can adopt at any time. Our simulating it today is compatible with our predecessors' having done likewise'.¹⁴²

Rawls recognized, partly due to English's essay and partly due to discussions he said he had with Nagel and Parfit, that his concern that a generation behind the veil of ignorance might

¹⁴¹ English. *Justice Between Generations*. p. 98.

¹⁴² *Ibid.*

cheat other generations would be foreclosed by the ‘ideal’ or ‘strict compliance’ nature of his theory.¹⁴³ Rawls thus recognized that his strict compliance approach would require that all generations adopt the *same* principles behind the veil.¹⁴⁴ With that realization, one might have thought that all Rawls needed to do was to remove his motivational assumption and allow his deliberators’ self-interest to support his savings principle. Indeed, it is arguable that this is precisely what he did. However, Rawls *seemingly* added another (and another arguably *ad hoc*) condition to enable those behind the veil to adopt the savings principle.

Rawls said in his later works that his decisionmakers’ acceptance of the savings principle would be ‘subject to the *further* condition that they must want all *previous* generations to have followed it’.¹⁴⁵

Some theorists have suggested that Rawls’s stipulation that those deliberating in the original position are assumed to accept the just savings principle ‘subject to the further condition that they must want all *previous* generations to have followed it’¹⁴⁶ is something new. I disagree. If we equate “want” with “expect” then isn’t this simply what strict compliance means? And

¹⁴³ Rawls. Political Liberalism. p. 274 footnote 304.

¹⁴⁴ It might be helpful to highlight what can be forgotten; namely, that it is the sense of justice of the decisionmakers behind the veil that helps to guarantee strict compliance. Rawls. Theory. p. 145

¹⁴⁵ Rawls wrote:

Rather than imagine a (hypothetical and nonhistorical) direct agreement between all generations, the parties can be required to agree to a savings principle subject to the further condition that they must want all *previous* generations to have followed it. Thus the correct principle is that which the members of any generation (and so all generations) would adopt as the one their generation is to follow and as the principle they would want preceding generations to have followed (and later generations to follow), no matter how far back (or forward) in time. [Rawls. Political Liberalism. p. 274. (Emphasis in original.) See also Rawls. Restatement. p. 160.]

¹⁴⁶ Rawls. Political Liberalism. p. 274.

if we cannot equate the two, what does it help to add in the stipulation of “wanting” prior generations to do something? I *want* to win the lottery. But I don’t think I will.

Further, I do not see how the statement that the acceptance of the savings principle would be subject to:

C_1 the deliberators in the original position must want all previous generations to have followed the savings principle,

differs in any material way from:

C_2 the deliberators in the original position ‘are to ask themselves how much they would be willing to save at each stage of advance on the assumption that all other generations are to save at the same rates’.¹⁴⁷

And C_2 is nothing more than the condition of strict compliance we find articulated by Rawls in 1971 in *A Theory of Justice*.¹⁴⁸

The stipulation that all deliberators in the original position must want all previous generations to have followed the savings principle is nothing more than a restatement of Rawls’s requirement of strict compliance. If the condition that all deliberators in the original position

¹⁴⁷ Rawls. *Theory*. p. 287.

¹⁴⁸ Ibid. Rawls added:

That is, [those in the original position] are to consider their willingness to save at any given phase of civilization with the understanding that the rates they propose are to regulate the whole span of accumulation. In effect, then, they must choose a just savings principle that assigns an appropriate rate of accumulation to each level of advance. Presumably this rate changes depending upon the state of society. When people are poor and saving is difficult, a lower rate of saving should be required; whereas in a wealthier society greater savings may reasonably be expected since the real burden is less. Eventually once just institutions are firmly established, the net accumulation required falls to zero. [Ibid.]

must want all previous generations to have followed the savings principle was intended by Rawls to mean more than strict compliance, the condition is both unnecessary and potentially harmful. It is unnecessary, as I have noted, because the condition is implicit (if not express) in the definition of strict compliance itself. Further, seen as a new condition, the condition is potentially harmful, because, in this case, adding what could be argued to be a new condition creates confusion and looks like Rawls again needed to add another *ad hoc* condition¹⁴⁹ to make his case, when none was needed.

Steven Wall (2003) argued that Rawls's 'new derivation of the just saving principle,'¹⁵⁰ which includes (a) removing the stipulation that existing generations have familial affection for future generations, and (b) retaining the assumption that the parties are mutually disinterested, 'is in harmony with the central organizing idea behind "justice as fairness;" namely, that society should be viewed as "a fair system of cooperation over time from one generation to the next," one in which each member is treated impartially'.¹⁵¹ If Wall is right, and I suggest he is, nothing else is needed.

English too went further than needed. Having shown that Rawls's view that generations would accept a savings principle on the bases of (a) self-interest, and (b) the strict compliance nature of Rawls's theory, she had no need to remove Rawls's PTE interpretation as a

¹⁴⁹ The first condition which might be argued to be *ad hoc* was, of course, Rawls's motivational assumption.

¹⁵⁰ Wall, Steven. 2003. "Just Savings and the Difference Principle". *Philosophical Studies*. Vol. 116. pp. 79–102. p. 81.

¹⁵¹ *Ibid.*

condition of his theory. This may be why Rawls, while giving a nod to English, nonetheless retained his PTE interpretation.

2.7 JUSTICE AS RECIPROCITY

Rawls saw reciprocity as an essential feature of justice-based claims. He was not alone. Richard Hiskes (2009) wrote, '[t]raditionally since Aristotle and running forward through Locke and most liberal justice theorists, philosophers have viewed any moral obligations to future persons or generations as "supererogatory"; that is, *they arise because of a general duty to be altruistic or humane rather than from the actual requirements of justice*'.¹⁵² Barry commented, similarly, 'it is perhaps surprising to realize that a variety of commonly held views about the basis of morality seem to entail that the *absence* of reciprocal power relations *eliminates* the possibility of our having moral obligations (or at any rate obligations of justice) to our successors'.¹⁵³ Barry added, '[e]very society of which I have read has some notion as to the rightness of meeting reasonable expectations that a favour will be returned, of pulling one's weight in co-operatives enterprises, of keeping agreements that provide for mutual benefits, and so on'.¹⁵⁴ Barry commented that other theorists too embrace the view that there

¹⁵² Hiskes, Richard. 2009. *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice*. Cambridge University Press. Cambridge UK. pp. 10-11. (Emphasis added.)

¹⁵³ Barry. 1991. *Liberty and Justice, Essays in Political Theory 2*. Clarendon Press. Oxford UK. ("Liberty") p. 244. (Emphasis added.)

¹⁵⁴ Ibid. p. 212.

is ‘a universally recognized obligation to reciprocate gifts which have been accepted,’¹⁵⁵ and a standard in justice of ‘equivalent return’.¹⁵⁶

Buchanan similarly remarked:

There is a strain of thought in the history of ethics that surfaces from time to time in the work of powerful thinkers and that threatens to shatter the basic conceptual framework within which our legal system and commonsense morality formulate the problems of justice. This idea may be called justice as reciprocity. While taking several forms, it has more often appeared as a disturbing challenge to orthodox thinking and practice concerning justice than as a systematically developed theory in its own right. In Hume it is the speculation that creatures otherwise like us but powerless to harm us can at most hope to be treated mercifully, but cannot expect to be treated justly. It is at least strongly suggested by Epicurus’s thesis that justice is founded solely on mutual gain and that for this reason animals, as beings from whom one can benefit without reciprocating, are not within the scope of justice.¹⁵⁷

As noted, the idea of reciprocity is similar to the idea of *consideration* in contract law.¹⁵⁸

Both concepts entail the giving of something in exchange for a benefit given. More precisely, “consideration” is the idea of returning value for value. As Axel Gosseries (2009) wrote, “[t]he idea of reciprocity refers ... to a notion of equivalence in respective contributions, in the context of an exchange’ and ‘it follows from a strict understanding of the reciprocity requirement that no one would be allowed or forced to end up being a net beneficiary or a net recipient’.¹⁵⁹

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Buchanan, Allen. 1990. “Justice as Reciprocity versus Subject-Centered Justice”. *Philosophy & Public Affairs*. Vol. 19. No. 3. Summer 1990. pp. 227-252. (“Justice as Reciprocity”) p. 227.

¹⁵⁸ I also discuss this point in Chapter 1 of this thesis.

¹⁵⁹ Gosseries. Three Models. p. 256. A ‘net beneficiary or a net recipient’ is the same thing. So, we should we should interpret Gosseries as using two terms to refer to the same party, i.e. the net beneficiary of a bargain

A simple contract is not binding unless something of value flows *from* each party to the contract. Party *A* agrees to provide something of value to party *B* (or to *B*'s designate) if party *B* agrees to provide something of value to party *A* (or to *A*'s designate). In contract law, the failure of one party to supply the agreed-upon value releases the other party from its contractual obligations. This is why reciprocity is usually seen as aligned with the notion of mutual advantage: No one acting freely and rationally will agree to provide something of value without receiving in return something s/he considers to be of at least equal value—at least in an arms-length commercial context. Contracts are accordingly said to be of mutual benefit or mutual value.

Justice and reciprocity are kindred concepts. Additionally, I submit that we cannot deny justice without denying (a) the nature of human beings—a nature that seeks justice, and (b) the reason for human beings choosing to live in society. However, while related concepts, “justice” and “reciprocity” are not identical concepts. Further, justice controls reciprocity, not the other way around.

Rawls noted three elements to the idea of social cooperation. The one element relevant for present purposes is the idea of ‘fair terms of cooperation’ which Rawls saw as ‘specifying an idea of reciprocity’.¹⁶⁰ Reciprocity here means ‘all who are engaged in cooperation and who

that is intended to benefit both parties equivalently. We see this a bit clearer in a subsequent statement where Gosseries says that no one should be a ‘net contributor or a net recipient’.

¹⁶⁰ Rawls. *Political Liberalism*. p. 16.

do their part as the rules and procedure require, are to benefit in an appropriate way as assessed by a suitable benchmark of comparison'.¹⁶¹

Rawls juxtaposed the ideas of reciprocity and impartiality and suggested that *reciprocity lies between* the idea of impartiality and mutual advantage. Rawls characterized impartiality as 'altruistic';¹⁶² that is, as 'being moved by the general good'.¹⁶³ On the other side, Rawls said that mutual advantage was to be 'understood as everyone's being advantaged with respect to each person's present or expected future situation as things are'.¹⁶⁴

As Rawls placed the principle of reciprocity between the principles of impartiality and mutual advantage, Rawls obviously rejected the idea that reciprocity was the same as mutual advantage. Perhaps he was right. But it really doesn't matter where reciprocity sits in relation to mutual advantage if the results of both are the same for those who cannot reciprocate, and there seems to be no difference between the results of the two in Rawls's theory.

¹⁶¹ Ibid. Reciprocity also means, with less embroidering, that I agree to give something to you today given your situation X, on the expectation that you'll give the same to me tomorrow when I'm in situation X. Reciprocity can mean numerous things. Buchanan discusses three senses of reciprocity. Alex Gosseries (Gosseries. Three Models.) also discusses three variations of the principle of reciprocity. His variations all assume overlapping generations. They are therefore not directly relevant to this thesis. Confucius gave us another meaning: 'What you do not want done to yourself, do not do to others'. *The Analects of Confucius* (from the Chinese Classics) (p. 51).

¹⁶² Rawls. *Political Liberalism*. p. 17 footnote 18.

¹⁶³ Ibid. p. 16.

¹⁶⁴ Ibid. pp. 16-17.

Buchanan distinguished what he called a ‘contribution variant of justice as reciprocity’ with what he called Hume’s ‘reciprocal threat capacity variant’.¹⁶⁵ Having once set out the two main divisions of reciprocity-based theory, Buchanan then divided contribution-reciprocity into two subtypes: (a) Justice as *self-interested* reciprocity; and (b) Justice as *fair* reciprocity.

Buchanan writes that Peter Gauthier is a major proponent first version of contribution reciprocity, i.e. self-interested reciprocity. He suggests that Gauthier would hold to the view that, ‘*those who cannot make a contribution (indeed, a net contribution) to the cooperative surplus are entitled to nothing* because they have nothing to offer, nothing with which to bargain’.¹⁶⁶ According to self-interested reciprocity, ‘if being just is to be rational, then it must be rational for the individual to be just, and for it to be rational for the individual, it must be to the individual’s advantage’.¹⁶⁷

Justice as *fair* reciprocity, being a variant of contribution-based reciprocity, also requires a *contribution capacity* in the one seeking equal status with others. Of this variant of justice-as-reciprocity Buchanan says that fairness demands that ‘[e]ach person who benefits from the contributions of others in a cooperative enterprise in which that person participates owes something to those other contributors, and they, for the same reason, owe something to the individual, but only insofar as that individual is a contributor’.¹⁶⁸

¹⁶⁵ Buchanan. Justice as Reciprocity. p. 228.

¹⁶⁶ Ibid. p. 229.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

So far it is difficult to distinguish Buchanan's two versions of contribution reciprocity. 'What is common to both versions of justice as reciprocity is what may be called the reciprocity thesis: the claim that only those who do (or at least can) make a contribution to the cooperative surplus have rights to social resources'.¹⁶⁹ However, Buchanan adds, that '[u]nlike the self-interest version, justice as fair reciprocity does not (or at least need not attempt to) found justice (or morality in general) on rationality as individual utility-maximization'.¹⁷⁰ Buchanan's distinctions are finely crafted but are perhaps too fine. In the final result, nothing turns on his distinctions. The treatment of those unable to cooperate in society is the same whichever version of reciprocity is applied.

As Buchanan noted, '[t]he implications of the reciprocity thesis for the treatment of severely disabled persons are as disturbing as they are obvious'.¹⁷¹ He wrote:

If, as Gauthier believes, all moral rights, including the so-called negative rights to refrain from injuring and killing, are rationally ascribable only to potential contributors to social wealth, then we violate no rights if we choose to use noncontributors in experiments on the nature of pain or for military research on the performance of various designs of bullets when they strike human tissue, slaughter them for food, or bronze them to make lifelike statues.¹⁷²

Is the above hyperbole?¹⁷³ Barry made a similar point about Rawls's theory of justice as reciprocity. Barry noted that the proposition that people should *not* be advantaged or

¹⁶⁹ Ibid. p. 230.

¹⁷⁰ Ibid. pp. 229-230.

¹⁷¹ Ibid. p. 230.

¹⁷² Ibid. p. 232.

¹⁷³ Before the Nazis turned their attention to the Jews, the Nazis murdered over 60,000 unwanted children and handicapped children and adults as "useless eaters" or *lebensunwertes leben*—"life unworthy of life". The Nazis decided these children and adults weren't contributing to the Fatherland, indeed, they were seen as a drain

disadvantaged on the basis of their fortune in the distribution of natural assets and abilities—a proposition central to Rawls’s theory of justice—‘clearly implies that the congenitally disabled *cannot* be held responsible for lack of productivity and should therefore have a valid claim on a share of their society’s resources’.¹⁷⁴ Yet, as Barry (not unfairly¹⁷⁵) charged, Rawls ‘accepts that the grim logic of justice as reciprocity excludes them from its scope’.¹⁷⁶

Buchanan’s discussion of how we might separate reciprocity-based theories of justice into self-interest-based and fairness-based theories is interesting. However, assuming I were (or may eventually become) someone who might be excluded via either of the versions of the contribution-based reciprocity Buchanan presents, I really don’t think I’d care too much whether those considering me as of zero-worth, are smiling or frowning when using me as a crash-test dummy. Nor does Buchanan mention that, if all that matters in contribution-based reciprocity theories is what someone can contribute to the overall social welfare, numerous forms of technology are, and historically, a good work horse was, of more value than many human beings.¹⁷⁷

on the resources of the Fatherland, just as the Jewish population of Europe was seen. These experiences evidence as clearly as any could that Hume was wrong: The theories of philosophers can be more than simple foolishness; they can be very dangerous—especially as philosophers are seen increasingly as a new (secular) clergy.

¹⁷⁴ Barry. Impartiality. p. 60.

¹⁷⁵ I say, “not unfairly”. I think Barry may have misinterpreted Rawls. Nonetheless, Rawls’s lack of clarity on the point is to a large part to blame.

¹⁷⁶ Barry. Impartiality. p. 60.

¹⁷⁷ Historically, women and children were no more than the property of their husbands and fathers. The woman’s value was in how much she could carry, especially in the form of the children (additional property) she

Buchanan juxtaposes reciprocity-based theories with *subject-centered* theories, which, according to Buchanan, have as their first premise, the ‘fundamental moral equality of *persons*’.¹⁷⁸ Few ethicists would *disagree* that all *persons* should be treated equally—at least according to some standard of equality. Certainly, theorists supporting reciprocity-based rights and obligations wouldn’t disagree. Speaking of the moral equality of all *persons* gets us nowhere and it gets us nowhere because, in reciprocity-based theories, *non-contributing* human beings are, by definition, *non-persons*. The real question for ethical theory is: What makes a human being a person, not whether persons are deserving of equal concern and respect.

Buchanan claims that his subject-centered justice-based theory ‘is radically different from the perspective of justice as reciprocity’.¹⁷⁹ I wish it were. Unfortunately, a further problem with Buchanan’s juxtaposition of reciprocity-based theories and subject-centered justice theories is that Buchanan himself doesn’t think that being a human being is enough to entitle a human being to be seen as *an-other* or as a *subject* and as a bearer of rights. He just disagrees that having the capacity to be a threat to others or to contribute in good faith social cooperation with others are the proper criteria upon which to withhold rights.

As Buchanan writes, ‘any example of this type of [subject-centered] theory makes the ascription of rights depend upon certain features of the individual himself, independently of

could bear. I see little difference in principle between such societies and a modern society that sees value only in what its members can contribute.

¹⁷⁸ Buchanan. *Justice as Reciprocity*. p. 233. (Emphasis added.)

¹⁷⁹ *Ibid.*

whether the individual possesses the strategic property of being able to contribute (or being able to threaten or coerce)'.¹⁸⁰ Unfortunately, most subject-centered justice theories *do* make human rights dependent on some additional criterion, other than *being* itself. H.L.A. Hart understood this phenomenon well. Hart commented that in most modern communities it is recognized that all human beings should be treated alike.¹⁸¹ 'Indeed so deeply imbedded in modern man is the principle that *prima facie* human beings are entitled to be treated alike that almost universally where the laws do discriminate by reference to such matters as colour and race, lip service at least is still widely paid to this principle'.¹⁸²

Hart then germanely noted what he called 'often disingenuous devices'¹⁸³ used by those who, while paying lip service to the principle that all human beings are to be treated as moral equals, nonetheless find the need (desire) to discriminate:

If such discriminations are attacked they are often defended by the assertion that the class discriminated against lack, or have not yet developed, certain essential human attributes; or it may be said that, regrettable though it is, the demands of justice requiring their equal treatment must be overridden in order to preserve something held to be of greater value, which would be jeopardized if such discriminations were not made.¹⁸⁴

I don't intend to spend more time on this issue here. I do agree with Buchanan that a subject-centered theory of moral equality 'is not a mere prejudice or irrational benevolent impulse'.¹⁸⁵

Rather, as he said, it is a theory at least on par with reciprocity-based theories of justice and

¹⁸⁰ Ibid. p. 235.

¹⁸¹ Hart, H.L.A. 1961. *The Concept of Law*. Oxford University Press. Oxford. UK. p. 158.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Buchanan. *Justice as Reciprocity*. p. 233.

‘is a stable, theoretically embedded, practical belief’.¹⁸⁶ However, we need to be alert that subject-centered theories do not themselves become theories of prejudice.

I intend to leave further discussion of Rawls’s reciprocity principle to the next chapter. What I hope to show there is, first, that Rawls misunderstood the principle of reciprocity, and, second, that those deliberating behind the veil of ignorance will adopt cross-generational principles of justice.

I turn now to my own views of Rawls’s theory of justice as applied intergenerationally.

¹⁸⁶ Ibid.

3.0 REFLECTING ON RAWLS'S THEORY OF JUSTICE

3.1 INTRODUCTION

My approach to the question of intergenerational rights and duties has similarities to the works of Barry and Paden. However, I diverge from each of these theorists in important respects.

I agree with Barry, first and foremost, that Rawls's theory is best seen as a theory of *justice-as-impartiality*. This will be considered by some as a significant departure from Rawls's theory of justice as fairness. However, I hope to show that this isn't the case.

I submit that Rawls misunderstood or misapplied the principle of reciprocity. I agree with Rawls that reciprocity is an important feature of justice, which is violated at a society's peril. However, I disagree that it is an invariable precondition to justice and justice-based duties.

My restatement of the principle of reciprocity has the happy result of allowing the principles of reciprocity and impartiality to stand together as key features of Rawls's theory. It does, however, also place the principle of impartiality above reciprocity where the two principles might be seen as conflicting. Should conflict arise between the two principles, this placement of impartiality above reciprocity meshes well with Rawls's efforts via his original position to ground his theory on the principle of *pure procedural justice*.¹⁸⁷

I agree with Paden, first and foremost, in agreeing that *natural duties* play an essential role in Rawls's overall theory of morality and in his theory of intergenerational justice specifically.

¹⁸⁷ Rawls. Theory. pp. 120, 136 and passim.

It would be hard to overstate the importance of natural duties to Rawls's theory; particularly as these duties have been ignored by a number of commentators on Rawls.

An understanding of the place of impartiality and natural duties in Rawls's theory of justice is essential if we want to salvage that theory as a basis to argue for intergenerational justice-based rights and duties. However, to truly lay the groundwork to extend Rawls's theory intergenerationally, we also need to reconsider the structure of Rawls original position and harken back to Hume's circumstances of justice. Restructuring the original position and restating the circumstances of justice might seem like a lot. However, I think that, once presented, my changes will be seen for what they are: Intuitive, reasonable and generally minor.

3.2 REFLECTING ON THE ORIGINAL POSITION

The original position isn't 'an actual historical state of affairs, much less ... a primitive condition of culture. It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice'.¹⁸⁸ And while Dworkin was correct (as a matter of law) in his statement that 'a hypothetical contract is not simply a pale form of contract; it is no contract at all',¹⁸⁹ it would be to miss the significance of the original position to discount it

¹⁸⁸ Rawls. *Theory*. p. 12. I think it is fair to say that the original position has lead to a *concept* of justice, not a mere conception of justice. (Ibid. page 5.)

¹⁸⁹ Dworkin. *Taking Rights Seriously*. p. 151.

due to its hypothetical nature.¹⁹⁰ Indeed, I suggest that the significance of the original position is *greater* due to its hypothetical nature.¹⁹¹

While the original position is *not* an actual *physical* position, it is an *intellectual* position which we can assume any time we are faced with a question involving justice-based rights and obligations. ‘It may be helpful’ Rawls wrote, ‘to observe that one or more persons can at any time enter this position, or perhaps, better, simulate the deliberations of this hypothetical situation, simply by reasoning in accordance with the appropriate restrictions’.¹⁹²

Rawls, of course, was careful to answer the question why an agreement we might theoretically reach in a hypothetical original situation should have persuasive force. ‘The answer is that *the conditions embodied in the description of the original position are ones that we do in fact accept*. Or, if we do not, then perhaps we can be persuaded to do so by philosophical reflection’.¹⁹³ As Rawls wrote:

First, [the original position] models *what we regard—here and now—as fair conditions under which the representatives of citizens, viewed solely as free and equal persons, are to agree to the fair terms of cooperation whereby the basic structure is to be regulated.*

¹⁹⁰ As Dworkin agreed. Ibid. Chapter 6.

¹⁹¹ An historical event is just that: Historical. Assuming it occurred during some remote prior generation, it predated us, and we thus came along too late to have any part in it and for it to play a part for us. As Locke said, even had our forbearers actually entered into an agreement, the agreement is not binding on us: ‘It is true, that whatever engagements or promises any one has made for himself, he is under the obligation of them, but *cannot*, by any *compact* whatsoever, *bind his children or posterity*’. [See Locke, John. 1884. Two Treatises of Government. A.R.N. Publications. Kindle Edition. (“Two Treatises”) p. 157. (Emphasis added.)]

¹⁹² Rawls. Theory. p. 138. See also Rawls, Restatement. p. 86.

¹⁹³ Rawls. Theory. p. 21. (Emphasis added.) See also pp. 587-588.

Second, *it models what we regard—here and now—as acceptable restrictions on the reasons on the basis of which the parties, situated in fair conditions, may properly put forward certain principles of political justice and reject others.*

Thus if the original position suitably models our convictions about these two things (namely, fair conditions of agreement between citizens as free and equal, and appropriate restrictions on reasons), we conjecture that the principles of justice the parties would agree to (could we properly work them out) would specify the terms of cooperation that we regard—here and now—as fair and supported by the best reasons. This is because, in that case, the original position would have succeeded in modelling in a suitable manner what we think on due deliberation are the reasonable considerations to ground the principles of a political conception of justice.¹⁹⁴

The basic rights and duties of a society cannot justly favour some individuals over others due to historical bias or luck. We know this, and we know this, as Rawls wrote, *here and now*.

The original position was structured in an effort to ensure that decisions made therein would be impartial. Impartiality is achieved, in part, by ensuring that those deciding questions of fundamental justice are made oblivious to what Rawls calls *arbitrary contingencies*. Rawls wrote:

Now the reasons for the veil of ignorance go beyond mere simplicity. We want to define the original position so that we get the desired solution. If a knowledge of particulars is allowed, then the outcome is biased by arbitrary contingencies. As already observed, to each according to his threat advantage is not a principle of justice.¹⁹⁵

We know that granting or withholding benefits to individuals according to their ‘threat advantage’¹⁹⁶ is antithetical to justice. Again, we know this, here and now. Benefiting parties

¹⁹⁴ Rawls. Restatement. pp. 17-18. (Emphasis added.)

¹⁹⁵ Rawls. Theory. p. 141.

¹⁹⁶ Ibid. p. 134.

according to their ‘capacity to intimidate and coerce’¹⁹⁷ would be no different than granting a bully the run of a schoolyard playground while every other child cowers indoors.

The original position is designed ‘to make vivid to ourselves the restrictions that it seems reasonable to impose on arguments for principles of justice, and therefore on these principles themselves’.¹⁹⁸ The original position is *not* significant because it somehow suggests to us some original *agreement*, but rather because it presents a way for us to visualize, and, once having visualized, presents a way for us to *assume an impartial* intellectual position consistent with what we in fact already know and accept concerning how to reach fair decisions on questions of fundamental justice.

Why a veil? Because we know that if people are allowed to self-judge, their self-interest will bias their decisions. Further, we know that if people are allowed to act on their preferences, their personal and external prejudices¹⁹⁹ are equally likely to bias their decisions.²⁰⁰

We nullify the effect of ‘specific contingencies,’ such as a person’s ‘place in society ... class position or social status ... his intelligence and strength, and the like’²⁰¹ by making the person

¹⁹⁷ Ibid.

¹⁹⁸ Ibid. p. 18.

¹⁹⁹ Dworkin, Ronald. 1978. “Liberalism.” *Public and Private Morality*. Hampshire, S. (ed). Cambridge University Press. Cambridge Mass. p. 113.

²⁰⁰ Dworkin, Ronald. 1977. “Social Sciences and Constitutional Rights - The Consequences of Uncertainty.” *6 Journal of Law & Education*. 3.

²⁰¹ Rawls. *Theory*. pp. 136-137.

ignorant of or blind to these contingencies. And once blind to their own interests, they must, when deciding, decide for everyone.

The veil of ignorance is intended to be “thick”. Those deciding behind the veil do not see their (and others’) personal interests ‘through a glass darkly’:²⁰² Rather, they do not see (or are not supposed to see) their own and others’ personal interests at all.²⁰³

Rawls noted as an essential feature of the concept of justice that ‘[t]hose who hold different conceptions of justice, can ... still agree that institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules [adopted by society] determine a proper balance between competing claims to the advantages of social life’.²⁰⁴ Rawls is, of course, not alone in pursuing a structure to achieve ‘pure procedural fairness’²⁰⁵ to realize impartiality. Nor is his approach limited to the realm of theory.²⁰⁶

²⁰² Plato. *The Complete Works of Plato, The Phaedo*. Translated by Jowett, Benjamin. Latus ePublishing. Kindle Ed.

²⁰³ Rawls’s veil cannot take from a deliberator her prejudices, such as her dislike of coloured people. However, it removes from her the knowledge of whether, when she exits the veil, she is herself coloured.

²⁰⁴ Rawls. *Theory*. p. 5.

²⁰⁵ *Ibid.* pp. 89, 136 and *passim*.

²⁰⁶ By way of one example of multiple, the Alberta Court of Appeal said in *Malton v Attia*, 2016 ABCA 130, speaking of procedural fairness, ‘[a] fair trial must comply with the rules of natural justice, for all parties’. (*Ibid.* paras. 35 to 37.) And, as the Court was careful to note, *the first of the rules of natural justice* is that ‘an adjudicator be disinterested and unbiased (*nemo iudex in causa sua*)’. (In English, ‘no one is judge in her own cause’.) And no one is able to judge her own cause when behind the veil of ignorance *because no one knows her own cause*.

As we have seen, Rawls intended to exclude knowledge of arbitrary contingencies from those in the original position. Rawls's thinking was, of course, that arbitrary contingencies are irrelevant to questions of justice—as the label “arbitrary” makes rather evident.

Unfortunately, when considering questions of intergenerational social justice, Rawls was unsuccessful in fully veiling arbitrary contingencies from the minds of his decisionmakers.

Indeed, it may be impossible to blind those deliberating behind the veil to arbitrary temporal contingencies as long as we retain Rawls's PTE interpretation.

If those in the original position know that they are all of one generation, all they need to know in addition is that time is perceived as flowing only in one direction and thus that effects follow causes. If we grant the obvious, first, that Rawls mandated, via his PTE interpretation, the first bit of knowledge—that is, that all deliberators assembled in the original position at any one time are and know they are all of one generation—and, second, that the flow-of-time is the type of general knowledge that Rawls assumed all his deliberators would possess—and any other assumption would be silly—then all deliberators in the original position will know they are in a position of power and possess a *threat-advantage* over all subsequent generations. But this can't be. And we know it can't be (or shouldn't be) because we've already seen that Rawls's intent in structuring the original position was to remove all knowledge of threat-advantage from his deliberators. So, what is to be done to eliminate this continuing intergenerational threat-advantage in Rawls's theory?

One option is to jettison the PTE interpretation from Rawls's theory. This is what English suggested we do. However, I've already noted that Rawls had in mind English's proposal to remove the PTE interpretation from Rawls's theory when Rawls removed his revised

motivational assumption and retained the PTE interpretation. I accordingly think that we should keep the PTE interpretation in place to be as true to Rawls's thinking as possible.

A second option would be to retain the condition that all decisionmakers in the original position be contemporaries but follow Hubin's idea and stipulate that, although all deliberators in the original position must be contemporaries, the deliberators don't know they're contemporaries. I've already noted my rejection of this option. Hubin's proposal seems both *pro tem* and artificial. To me, Hubin's proposal is no more natural than a general assembly of all existing and potential people.

Third, we can adopt Hubin and Heyd's lead and accept that we don't have obligations *to* future people but only *with regard to* future people. I reject this option because it denies intergenerational justice-based rights and duties, and that's giving up the fight prematurely.

Fourth, we can accept that the decisionmakers in the original position possess and know that they possess this intergenerational threat-advantage but seek arguments that will persuade even self-centered egoists that they shouldn't use this threat-advantage to the detriment of others (including future others). This will entail bringing to the awareness of those in positions of power (a) that any power they have will be fleeting, and (b) that power must be used *for the benefit* of those subject to that power, not against them. I pursue this fourth option in this thesis.

I turn now to Hume's circumstances of justice.

3.3 THE CIRCUMSTANCES OF JUSTICE

Hume's circumstances of justice recognize that justice can exist only in certain conditions.

One condition is that of moderate scarcity. Another is conflicting purposes. If we were fortunate enough to live in a Garden of Eden-like environment, where population growth is static or minimal, where the mores and climate are such that we require no clothes or shelter, where all the food we need grows spontaneously and abundantly, and where all people exist in a family setting with familial affection governing relations, justice would be both foreign and unnecessary.

Conversely, if we lived in conditions of scarcity such that no amount of cooperation would enable most people to subsist, justice would be impossible. We would have a situation where all would be against all and where life truly would be, if not solitary, certainly poor, nasty, brutish and short.²⁰⁷

Simon Hope (2010) wrote, 'Hume's point is simply this: if there was either a superabundance or drastic scarcity of resources, or if everyone were either completely and unfailingly virtuous or completely and unfailingly wicked, we would not need rules of justice at all'.²⁰⁸ A Garden of Eden-type existence would be a child's utopia. Existence at a time of drastic scarcity of resources would be everyone's dystopia.

²⁰⁷ Hobbes of course characterized the state of nature, as that state where 'the life of man [was] solitary, poore, nasty, brutish and short'. (Hobbes, Thomas. *Leviathan*. Kindle Edition. p. 57.)

²⁰⁸ Hope, Simon. 2010. "The Circumstances of Justice". *Hume Studies*. Vol. 36. No. 2. pp. 125-148. pp. 125-126.

I suggest that there is nothing wrong with Hume's statement of the circumstances of justice, as far as it goes. However, Hume wasn't a social contract theorist. And we accordingly do not see in Hume a concentration on the idea of a social contract as a 'general image of society as a contract *for mutual advantage* (people getting something by living together that they could not get each on their own) among people who are "free, equal, and independent"''.²⁰⁹ We accordingly also do not see in Hume's articulation of the circumstances of justice a full explication of the idea of *threat*-advantage. And we thus do not see emerging in Hume the ideas that everyone who will potentially have at some time in their lives the power to threaten others, will also be, as a matter of mortal certainty, at one point in their lives, *at the mercy* of others.

That any one deliberator in the original position could *potentially* find him- or herself in a position of power when exiting the original position is obvious. That every deliberator will, *as a matter of certainty*, be, at least at one time in their lives, *not* free of others, *not* equal with others, and *not* independent of others, is equally clear. This is manifestly so (a) because all human beings begin their lives as children, and (b) because children are completely vulnerable to others. Hume can be excused for failing to consider the fact that all human beings are at one time in their lives completely vulnerable. However, as a contractarian, Rawls cannot be as readily excused, particularly given his seminal idea of the original position.

²⁰⁹ Nussbaum, Martha C. 2006. *Frontiers of Justice: Disability, Nationality, Species Membership*. The Belknap Press. Harvard University. p. 14.

Martha Nussbaum (2006) wrote when addressing the unsolved problems of social contract theory:

Despite the tradition's major contributions and ongoing value, its modern exemplars prove insufficient to address three of the most pressing problems of justice in today's world. The classical theorists all assumed that their contracting agents were men who were roughly equal in capacity, and capable of productive economic activity. They thus omitted from the bargaining situation women (understood as non-"productive"), children, and elderly people-although the parties might represent their interests. These omissions, already striking in the seventeenth and eighteenth centuries, have to some extent been rectified in contemporary contract doctrines, though the idea that the family is a private sphere immune from law and contract has not always received the thoroughgoing criticism it deserves.

No social contract doctrine, however, includes people with severe and atypical physical and mental impairments in the group of those by whom basic political principles are chosen.²¹⁰

The standard interpretation of Rawls sees him following the historical contractarian tradition of excluding children and those with handicaps from his theory of justice due to the fact that children and the handicapped are not "fully productive" members of society. *But is this exclusion of the vulnerable consistent with the decisions those in the original position would reach?*

Rawls wrote, '[t]he guiding idea is that the principles of justice ... are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality'.²¹¹ We can grant this, but would a deliberator in an original position of equality, i.e. where s/he has equal bargaining power with all others making decisions on questions of fundamental justice, decide to *exclude* infants and child from the benefits of

²¹⁰ Ibid. p. 14.

²¹¹ Rawls. Theory. p. 11.

justice-based duties? Would s/he exclude women as those members of our species who are generally physically weaker than men?

Rawls, of course, ensures that those deciding in the original position cannot discriminate on the basis of sex by ensuring that no one behind the veil of ignorance knows what sex they will be upon exiting the original position. No deliberator will choose to place women in a subservient position with respect to men because no deliberator will know whether s/he will be a woman when stepping out from behind the veil. I suggest that the same holds true when we consider the vulnerability of the young, and, by extrapolation, when considering the vulnerability of future generations.

If no deliberator knows into what generation s/he will be conceived, s/he will not know, upon exiting the veil, whether s/he will be an adult, or an infant, or a child yet to be born in an existing generation. And, given this fact, and given that each deliberator would know that as an infant or a young child s/he will be weak and completely vulnerable to the whims of those who are strong, I suggest that all of those behind the veil will provide at least for the equal protection (a) of infants and children already born, and (b) of those of future generations presently unborn. I suggest further that the provision for the equal protection of these vulnerable classes of human beings will be *rationally* provided for as a matter of *self*-preservation. Thus, we needn't look to some altruistic motive on the part of those deliberating: An egoistic motive is enough.

I submit, based on the above thinking, that the fact that *all* human beings are vulnerable during their infancy should be added as a circumstance of justice essential to Rawls's brand of social contract theory. I submit further that the realization on the part of the deliberators in

the original position that each and all of them will be completely vulnerable to the powers and discretion of others, at least at one period of their lives—either because they will find upon exiting the veil that they are as yet unborn or born but as yet a child—will lead to decisions in the original position that ensure that both (a) children living contemporaneously with the decisionmakers and (b) future generations, are protected via the underlying principles and enacted laws of the societies in which the deliberators expect to find themselves upon vacating the original position.²¹²

Now, I said that those deliberating in the original position would provide for *at least* the equal protection of children, both existing and future. I say this because I suggest that *greater* than equal protection of children is warranted and would be adopted by those acting in the original position solely from self-interest.

Rawls wrote that '[t]he parties [in the original position], as *representatives* of free and equal citizens, act as trustees or guardians. Thus, in agreeing to principles of justice, they must secure the fundamental interests of those they represent'.²¹³ I *disagree* with this statement insofar as Rawls intends—which it seems he did—to *exclude* children, the handicapped, and the elderly, from his definition of “free and equal citizens”. However, I agree fully with his stipulation that those deciding in the original position can be *representatives* of others.

²¹² I add that rational decisionmakers in the original position will also realize that there is a good chance, given the vicissitudes of life, that each might reach old age, with its attendant vulnerability, and may, on-route to that hoary age, become sick and as vulnerable as a child. I therefore suggest, given these realizations, and given Rawls's stipulation that those in the original position are not great risktakers, that it is not unreasonable to assume that such decisionmakers would also adopt principles that would extend protection to elderly persons.

²¹³ Rawls. Restatement. p. 84.

Indeed, as Rawls's thinking progressed he increasingly characterized those in the original position as "representatives" of individuals not present in the original position. This is significant, because, while it is necessary that those deliberating behind the veil be rational, stipulating that the *representatives* be rational *removes* the need *for those represented* to be rational. Thus, the interests of each of the groups we have been discussing, i.e. children (both present and future); the handicapped; and the elderly, can be, in this sense, seamlessly and fully represented in the original position. All in the original position must be rational but those represented neither need be rational nor in the original position themselves.

Of equal importance in the above quoted passage is Rawls's recognition that the representatives in the original position are *trustees or guardians* for those whom they represent. It will not have escaped Rawls's attention that trustees (and fiduciaries in general) have not only a duty of good faith—a duty implied by courts of law in all contractual relationships—but, rather, the higher duty of *uberrima fides*; that is, a duty of "utmost good faith" of "most abundant faith" and of undivided loyalty.

I suggest that Rawls was right in seeing the representatives in the original position as fiduciaries for those they represent. Locke spoke of the executive and legislative branches of government as having fiduciary duties to the people of a sovereign state.²¹⁴ Likewise, kings are no more than fathers whose duties have extended from the family to the entire state and who have the same parental (fiduciary) duties to those under their stewardship.

²¹⁴ Locke. Two Treatises. pp. 170ff.

The law, of course, also recognizes the higher fiduciary standard imposed on those in power.²¹⁵ As the Supreme Court of Canada said a number of years ago, ‘the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other’s discretion’.²¹⁶ Clearly, if *A* is representing all of the fundamental interests of *B*, and if *B* has no power to represent herself, then *B* is at the mercy of *A*’s power and discretion.

²¹⁵ See *Keech v Sandford*, (1726), Sel. Cas. T. King 61, 25 ER 223. See also the discussion in *Hodgkinson v Simms*, [1994] 3 SCR 377. Professor Donovan Waters stated that the fiduciary relationship and duties arising from it have their roots in the fourteenth century concept of the “use”. (See forward to Rotman, Leonard, I. *Fiduciary Law*. 2005. Thomson Carswell.) I have not researched this claim, but any claim by Waters in the realm of trusts and trust-like duties has to be taken seriously.

²¹⁶ *Guerin v R*, [1984] 2 SCR 335, p. 384. Dickson J who wrote for the Court further cites professor Ernest [“The Fiduciary Obligation.” 1975. 25 *UTLJ* 1. p. 7], for the proposition that where there is a fiduciary obligation ‘...there is relation in which the principal’s interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him’. Dickson J stated, p. 384:

I make no comment upon whether this description is broad enough to encompass all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.

See also Sheppard, J. C. *Law of Fiduciaries*. 1981. Carswell. pp. 28-34, for example, where Sheppard discusses the fiduciary obligations of parents to children. And see Justice La Forest’s judgment in *M.(K.) v M.(H.)* (1992), 96 DLR (4th) 289 pp. 323-328.

In *Manitoba Metis Federation v Canada (Attorney General)*, [2013] SCJ No. 14 the Supreme Court held at para. 61 that before a fiduciary relationship will be adjudged to exist, ‘[t]he party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake’. I do not think the decision will stand the test of time. The fact that I, as a contracting party, have a duty, say, to party A, to act in good faith with respect to some matter *x*, doesn’t vitiate my duty to act with utmost good faith toward party B with respect to the same matter *x*, assuming my fiduciary duty to B is otherwise established. It is also possible, of course, that I may have *two* beneficiaries with interest in the same matter. If I as a parent have two children do I now have no duty of loyalty to either of them? This doesn’t end my fiduciary duty; it means that I need to balance their interests, as their fiduciary. Why is this important? It is important because it could be argued that both the difference principle and the savings principle apply with respect to the same resources.

And just as clearly, in this case, *A*'s discretion in dealing with *B* do not become unlimited: Rather they become limited in the extreme.

Again, I agree with Rawls here. However, I suggest that Rawls missed the most important relationship of trust extant in our real-world relationships. Who among us is most at the mercy of the discretion of others if not children, the sick and the elderly? Moreover, we hear as a constant refrain from those theorists opposing any idea of intergenerational justice-based duties that our generation has no obligations to future generations *because* those living after us *cannot* reciprocate with us in the sense of either harming or aiding us. After all, *we* can benefit and harm future persons, but *they can do nothing* for or against us! This is true. However, it isn't the fact that future people aren't reciprocating with us that is all-important. What is essential to consider is the *reason* a (present or future) party isn't reciprocating with us. Future people *cannot* reciprocate with us *because* they are *at the mercy of our discretion and power* in relation to them. We can recall Buchanan's comments that, according to social contract theory, 'those who cannot make a contribution ... to the cooperative surplus are entitled to nothing because they have nothing to offer, nothing with which to bargain'.²¹⁷ However, contrary to social contract theory, according to trust principles, the fact that future generations are at our mercy *doesn't* mean that we have *no* duties of justice to future generations: Rather, it means that we have *duties of utmost justice* toward and concerning them.

What does this introduction of trust-based duties do to Rawls's theory when seen as a theory of justice-as-reciprocity? The answer necessitates that we consider Rawls's views regarding

²¹⁷ Buchanan. Justice as Reciprocity. p. 229.

both (a) reciprocity, and (b) natural duties. At this point I simply suggest that Hume's circumstances of justice must be broadened to include the fact that all human beings are completely vulnerable at a minimum during their infancy to the power and discretion of others.

Further, I submit that where reciprocity is lacking due to the unequal bargaining position of the parties to any relationship, reciprocity is unnecessary and any claim that reciprocity vitiates the duties of the party in the position of power vis-à-vis another party, is itself vitiated by the trust obligations of the party in power.²¹⁸

3.4 REFLECTING ON RECIPROCITY

I agree that reciprocity is a key feature of any well-ordered society. However, I argue that, in following uncritically social contract theory Rawls misapplied the principle of reciprocity.

As discussed, Rawls's theory is intended, in large part, to nullify the effects of arbitrary contingencies. Indeed, Rawls argues that rational deliberators in the original position—when divested of the knowledge of their own luck in the distribution of natural assets and abilities—would agree to principles that redistribute chance benefits and burdens. There is force in this argument. However, the question remains whether Rawls's theory accomplishes what he set out to achieve.

²¹⁸ I don't have the space in this thesis to address one of the more fundamental problems with social contractarianism. As the above reasoning adumbrates social contract theory generally fails give us an adequate definition of "personhood". What contractarianism tells us is that to be seen as a *subject* or as a *being* deserving of equal concern and respect, a member of the human species needs to be a "fully contributing" member of modern society. I have already discussed H.L.A. Hart's negative discussion of approaches of this nature. However, I leave a full discussion to another time.

Barry argued that Rawls's theory was irredeemable unless seen as a theory of justice-as-impartiality.²¹⁹ Like Barry, Heyd and Gibbard have dichotomized Rawls's contractarianism and justice-as-impartiality. Unfortunately, Rawls is partly to blame for the false disavowing of the concepts of reciprocity and impartiality in his theory. Again, synthesis comes when we recognize (a) that Rawls wasn't just seeking a social compact; rather, he was seeking a *just* social compact, and, (b) that Rawls misunderstood (or at least mischaracterized) both the principle reciprocity and the principle of impartiality.

Barry provided a helpful example of when Rawls's theory of justice fails to meet its own criteria when seen as a theory of justice-as-reciprocity.²²⁰ Barry's example is framed around two imaginary deserted islands, one of which is fertile and the other largely barren. Barry has one individual, whom he calls "Crusoe" wash up on the barren island, and a second individual, "Friday," land on the fertile island. Both Crusoe and Friday work equally hard to survive on their respective islands but because Friday chances to be on the fertile island his reward for his efforts is much greater than Crusoe's, who expends more energy cultivating his island than it returns to him.

Barry argued that, according to Rawls's theory, the greater prosperity enjoyed by Friday 'derives from a morally arbitrary advantage,'²²¹ i.e., the chance-happening of landing on a fertile island. Barry argued further, and his argument seems to me to follow inexorably from Rawls's own views, that, as Friday's favoured position arises from a morally arbitrary

²¹⁹ Barry. Treatise. pp. 238-241.

²²⁰ Ibid.

²²¹ Ibid. p. 239.

advantage, Friday, in fairness, shouldn't be able to reap the benefits of his fortune while ignoring Crusoe's plight. The 'essential point,' according to Barry, is that *'if we agree in rejecting the justice of any qualities based on morally arbitrary advantages, we cannot combine it with the proviso that redistribution can occur only among those engaged in fruitful cooperation'*.²²²

In other words, in Barry's view, (a) even though the greater benefits enjoyed by Friday are morally arbitrary, and (b) even though the removal of morally arbitrary advantages is *required* by Rawls's theory of justice as fairness, (c) because there has been *no exchange of benefits* between Crusoe and Friday, (d) Rawls's theory, *when seen as justice as reciprocity*, allows Friday to ignore Crusoe's misfortune.

Now, perhaps we think Friday ignoring Crusoe's plight is morally okay. However, if we do think it's okay, then we need to revisit Rawls's idea that *all* morally arbitrary contingencies *must* be nullified when choosing principles of justice. That isn't a move I wish to make. Nor do I think Rawls would have made it.

Gibbard noted Barry's view that the *equal division* of the fruit of the labours of each of Crusoe and Friday would 'prima facie be required'²²³ by Rawls's theory of justice if Rawls's theory were separated from the idea of reciprocity. Gibbard didn't disagree, but continued, supporting the view of justice as reciprocity,

... from the bare assumption that [island] fertility is morally arbitrary, no obligation to share follows. The lucky ones could admit that their luck is morally arbitrary, and still ask "Why share?" One answer they could not be given is that sharing pays others back for their

²²² Ibid. (Emphasis added.)

²²³ Ibid. p. 269.

cooperation or their restraint. No one has cooperated and no one has restrained himself, and so there is nothing to pay back. Motives of fair reciprocity, then, would not lead the lucky ones to share, even though they freely admitted that their luck was morally arbitrary.²²⁴

Barry might simply have thanked Gibbard for making his (Barry's) point: Barry *wants* to say that Friday *should* share, but, as Gibbard noted, justice as reciprocity doesn't lead Friday—as the party benefiting via luck alone—to share.

Some will likely deny that justice requires that Friday share his good fortune. However, the point is that *sharing better aligns* with Rawls's views that *morally arbitrary contingencies* should *not*, in fairness, be permitted to disadvantage those suffering under them. Further, *justice as impartiality is* consistent with sharing²²⁵ and thus *better aligns* with Rawls's views, where, again, justice as reciprocity is not and thus does not.²²⁶

Barry's example is, of course, just one example and might be considered somewhat artificial. We can add to it.

Suppose that the islands were not so distant and that, even though Crusoe isn't a great swimmer and so any effort at swimming in the ocean is dangerous for him, Crusoe is able daily to swim to Friday's island and plant and cultivate a small crop. Is Friday allowed to stop Crusoe from coming on "his island"? After all, Friday claimed it for himself on the first day

²²⁴ Ibid.

²²⁵ We might surmise that, as with the deliberators in the original position, if Friday were to decide whether sharing was a good idea *before* discovering that he was going to land on the fertile island there would be a good chance he would opt for sharing.

²²⁶ This is for precisely the reasons noted by Gibbard above. (I note Gibbard to the extent I have not because I think we can gain insight from his review of Barry, but because Rawls referred with approval to Gibbard's characterization of Rawls's theory.)

he landed on it by sticking a bent stake in the ground, putting his shorts on the stake, and saying some pretty words to the effect that he was claiming the island in his name and for all future Fridayans. Another question: Is Friday justified, given Crusoe's daily unwelcome "encroachments" on his island, in building a wall around his island to keep those troublesome Crusoeans out?

Whatever gloss we add to Barry's example, Barry's analysis of the deficiencies of justice, when seen as requiring reciprocity in all cases, highlights a potentially significant failing in Rawls's thinking. This is troubling. Nonetheless, I believe this failing can be remedied simply by revisiting Rawls's treatment of the principle of reciprocity. Indeed, if we fix Rawls's view of reciprocity, the other problems with Rawls's theory fade away.

I noted above Barry's statement that, '[e]very society of which [he had] read has some notion as to the rightness of meeting reasonable expectations that a favour will be returned, of pulling one's weight in co-operatives enterprises, of keeping agreements that provide for mutual benefits, and so on'.²²⁷ In granting Barry's point and granting the arguments of other theorists of the persuasion of the liberal theorists noted by Hiskes,²²⁸ I have granted that reciprocity is a key feature of justice-based duties. Nonetheless, we still need to ask: Is reciprocity an *invariable precondition* to justice-based rights and obligations? And, if it isn't, when is reciprocity essential and when isn't it?

²²⁷ Barry. Liberty. p. 212.

²²⁸ See §2.7 above at footnote 152. I am referring here to those who see the ability to reciprocate as essential to validate a person's claim to moral equality.

Barry's statement that all societies of which he was aware had 'some notion as to the rightness of meeting reasonable expectations that a favour will be returned'²²⁹ presents a strong endorsement of the principle of reciprocity. However, as Barry's statement adumbrates, justice *doesn't* require reciprocity *in all cases*. Rather, justice requires reciprocity only where reciprocity can be *reasonably expected*.

There is nothing in any conception of justice at law that I am aware of that says that where reciprocity cannot be reasonably expected, justice-based duties cease to exist. And if reciprocity isn't essential at law to establish duties of justice, I don't see why justice theory or moral theory generally would impose such a strict requirement. Further, I have already highlighted the fact that moral and political theory both recognize the greater duties of those in positions of power to those vulnerable to that power. And, of course, one who is completely vulnerable to another cannot reciprocate—by definition.

We do not expect to enjoy reciprocity from a person who has been rendered (or always has been) quadriplegic or mentally handicapped. But we have justice-based duties to her nonetheless. Public institutions and private businesses must make their buildings accessible to people with severe handicaps. Caretakers and nurses are assigned to feed, clothe, and administer medications to those physically and mentally disabled. Further, these are *duties that we owe*, not niceties we deign to bestow.

We rightly speak of rights and duties as if these concepts are correlative to each other. As Stanley Benn (1959) wrote, '[t]he answer lies in the correlation between rights and duties,

²²⁹ Barry. Liberty. p. 212.

such that the right of X is the duty of Y ... Without the possibility of the correlative duty resting somewhere, the attribution of the right to X would be meaningless'.²³⁰ Rights and duties are correlative, but this does *not* mean that the fact that Y has a duty to X means that X has a duty to Y. Rather, it means that if X has a right as against Y, Y has a duty to respect X's right.

We can agree with Rawls that only those who are rational can *bargain* in their own interest. However, as discussed, Rawls was clear that the decisionmakers in the original position could be seen—and perhaps are better seen—as *representatives* of those whose rights they are seeking to protect. Accordingly, so long as the *representatives* in the original position are rational, that is all that is needed. Further, (a) given the vagaries of human life, and (b) given that *all human beings, by the very nature of what it means to be human, at some point in their lives will be completely vulnerable and non-rational*, why would it be thought that the representatives in the original position would bargain only for bargain-based rights? I suggest that, given the vagaries of life, the only logical (rational) conclusion is that the representatives in the original position would ensure that their bargain *includes a bargain for non-bargain-based rights*.²³¹ Further, once it is recognized that the deliberators in the original position, acting rationally, would bargain for *non-bargain-based* rights, the proposition that reciprocity is an invariable precondition to rights-recognition goes out the window, even assuming we defer to contractarianism as the justification of our tradition of rights-recognition.

²³⁰ Benn, Stanley, I. and R. S. Peters. 1959. *Social Principles and the Democratic State*. George Allen & Unwin. London. p. 88.

²³¹ I thank Professor Allen Habib for wording the nature of this bargain in this manner.

The failure to recognize that reciprocity is a feature of justice only when it can be reasonably expected, is, in my view, one of Rawls's most problematic errors. The oversight leads to Rawls's unpardonable exclusion of children and even the *temporarily* ill from the full scope of his theory of justice and to significant problems for his efforts to extend his theory of justice intergenerationally.

This point is too vital to overlook: By elevating reciprocity as he did, *Rawls excluded those unable to reason and unable to reciprocate from the original position itself*. They are not permitted in the original position. They are not even entitled to have an advocate there.

Again, I agree that reciprocity, or, in other words, the like exchange of like, is an essential feature of justice-based duties *where reciprocity can be reasonably expected*. I further suggest that where reciprocity can be reasonably expected, reciprocity can only be ignored at society's peril. However, as the preceding statements of concept highlight, justice does *not* demand reciprocity *in all cases*. Most importantly, justice does *not* demand reciprocity where the vulnerability or infirmity of a party provides the explanation for her failure to reciprocate. Infirmities excusing the return of like-for-like include mental and physical disabilities and other forms of permanent, temporary and temporal vulnerability.

As discussed, Rawls proposed the veil of ignorance to remove arbitrary or chance contingencies from the knowledge of those deliberating in the original position. I agree fully with Rawls's thinking here. However, how does complete vulnerability become a *non-arbitrary* contingency when minor infirmity is not?

I suggest that we can safely say that because *all* recognize that they will be vulnerable at some point in their lives, all will agree—here and now—and thus would agree *a fortiori*, as *rational*

beings, to bargain for the rights they will need when they are least able to bargain. But what about the *sense of justice*²³² Rawls argued was essential ‘*to insure the integrity of the agreement made in the original position*’?²³³ Does this sense of justice not come in to play when considering whether we owe duties of justice to those who cannot reciprocate with us? I suggest it does and that on this basis as well the lack of reciprocity between generations in no way vitiates the duties and obligations we owe to future generations.²³⁴

Turning directly now to the dichotomy that is supposed to exist between Rawls’s theory and impartiality, once we recognize that reciprocity is not an invariable prerequisite to the receipt of justice-based benefits, the principle of impartiality can be allowed to take its rightful place in Rawls’s theory.²³⁵ Relegating impartiality to a place second in importance to reciprocity is

²³² See my discussion of this point in §3.5 below.

²³³ Rawls. *Theory*. p. 145. (Emphasis added.)

²³⁴ I note here Barry’s following insightful comments:

An appeal to mutual advantage might suffice to resolve a stand-off between two well-entrenched religious groups. But it is apparent that justice as impartiality goes far beyond anything that could be under-written by such considerations of mutual advantage. Protestants and Catholics might agree to set their differences aside and allow freedom of worship, and then combine to condemn homosexuals to death amid appalling torments—as they did in parts of Western Europe in the seventeenth and eighteenth centuries. The point of justice as impartiality is that powerless minorities should be protected as well as groups that are able to look after themselves. [Barry. *Impartiality*. pp. 163-164.]

I fully agree with the above statements. Moreover, I suggest that those possessing a sense of justice will also see the strength in Barry’s remarks. Those possessing a sense of justice do not require reciprocity where reciprocity cannot be reasonably expected.

²³⁵ It is extremely difficult at times to determine what Rawls’s theory is. While setting a minimum standard of rationality for those ‘entitled to equal justice’ Rawls said (*Theory*. p. 506):

Nothing beyond the essential minimum is required. Whether moral personality is also a necessary condition I shall leave aside. I assume that the capacity for a sense of justice is possessed by the overwhelming majority of mankind, and therefore this question does not raise a serious practical problem. That moral personality suffices to make one a subject of claims is the essential thing. We cannot go far wrong in supposing that the sufficient condition is always satisfied. Even if the capacity were necessary, it would be unwise in practice to withhold justice on this ground. The risk to just institutions would be too great.

highly unjust when considering *intragenerational* justice-based duties. However, it is even more problematic when considering claims of intergenerational justice where no one in non-overlapping generations can reciprocate.

3.5 NATURAL DUTIES AND RAWLS'S SENSE OF JUSTICE

Paden wrote, placing heavy reliance on Rawls's own writings:²³⁶

To make the first part of this argument, it is necessary to distinguish between what Rawls terms "natural duties," the most important of which is the "duty of justice" (TJ 114-17 and 333-42), and "natural obligations," the most important of which is the "principle of fairness" (TJ 108-14 and 342-50). According to Rawls, the principle of fairness

... holds that a person is required to do his part as defined by the rules of an institution when ... [that] institution is just ... [and when he] has voluntarily accepted the benefits ... [or] the opportunities it offers to further [his] interests. The main idea is that when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to similar acquiescence on the part of those who have benefitted from their submission. We are not to gain from the cooperative labors of others without doing our fair share. (TJ 111-12)

In contrast, natural duties

... apply to us without regard to our voluntary acts. Moreover, they have no necessary connection with [existing] institutions or social practices; their content is not, in general, defined by the rules of these arrangements. [Finally, they] hold between persons irrespective of their institutional relationships; they obtain between all as equal moral persons. In this sense the natural duties are owed not only to definite individuals, say to those cooperating together in a particular social arrangement, but to persons generally. (TJ 114-15)

If the just savings principle is an interpretation of the natural duty of justice, rather than the principle of fairness, then it must be a duty that has "no necessary connection with

If we are to invariably assume that every living human being has the minimum level of rationality to be rightfully treated as an equal with all others, then *why stipulate a minimum at all?* And while other statements by Rawls militate against the view that he excludes children and the mentally and physically disabled from his theory (see for example Ibid. p. 509) the majority of his analysis evidences that he does precisely this.

Whatever his views, Rawls was surely correct when noting that it would be 'unwise in practice to withhold justice on this ground' i.e., on the ground of lack of reasoning capacity, as '[t]he risk to just institutions would be too great'. (Ibid. p. 506.)

²³⁶ The citations in this quote are Paden's.

*[just] institutions” and is owed to “all moral persons, irrespective of their institutional relationships.” It follows that, if the just savings principle is to be based on the natural duty of justice, the just savings principle ... is unlimited in scope, imposing duties on all persons to all persons.*²³⁷

Paden would thus have us understand that the just savings principle ‘applies to what a society is to save *as a matter of justice*’²³⁸ and that what is “just” is what is required *as a matter of duty* between *all moral persons* independent of an agreement between them. Paden argued, ‘the members of [a well-ordered] society cooperate not because they must, nor simply because it is in their self-interest to do so. ... Instead, they cooperate because *they are motivated by their sense of justice* to respect those rules to which they could all agree’.²³⁹

Paden’s contribution here is in reminding us, contra Heyd, Hubin et al, that the duties Rawls sees as existing between generations are based on *natural duties* owed to future human beings *as* future moral persons—not simply as an adjunctive obligation *with regard to* future people.

According to Paden’s thinking, when we look to the definition of “moral persons,” i.e. to ‘creatures having a conception of their good and capable of a sense of justice,’²⁴⁰ we should be looking *not* at the idea of rational, *self-interested* persons; that is, to persons seeking their own ends to the exclusion of all others via some contract, but, rather, to the capacity of such persons to “sense” justice. Accordingly, on this thinking, when seeking justification for the

²³⁷ Paden. The Sense of Justice. pp. 42-43.

²³⁸ Ibid.

²³⁹ Paden, Roger. 1996. “Reciprocity and Intergenerational Justice”. *Public Affairs Quarterly*. Vol. 10. No. 3. Jul. 1996. pp. 249-266. p. 259.

²⁴⁰ Rawls. Theory. p. 19.

savings principle, we should be looking to the individual's capacity for a sense of justice not to his or her self-interestedness.

The above view aligns well with Rawls's idea that *reasonable* persons concerned with justice—as distinguished from *rational* persons concerned with their own interests—will ultimately choose his two principles of justice. It does not, however, align well with the thinking of most commentators on Rawls. As Paden noted:

According to the standard interpretation, Rawls attributes only self-interested motives to the people in the original position. However, I would argue that in at least two different places in *A Theory of justice*, Rawls attributes to these people another motive, namely a desire to live under mutually agreeable principles of justice, and that this motive would lead them to accept the natural duty of justice.²⁴¹

The “standard interpretation” has a lot going for it. If it didn't it wouldn't be the standard.

One of the points the standard interpretation has going for it is Rawls's near incessant concern with the lack of reciprocity between generations. If Rawls had premised all our responsibilities to future generations on natural duties this concern makes no sense. And it makes no sense because natural duties are *independent of agreement* and only agreements require reciprocity.

So, is the just savings principle a principle that we must comply with as a natural duty or is it something else? I submit that the answer is that the savings principle encompasses both natural duties and obligations of fairness.

²⁴¹ Paden. *The Sense of Justice*. p. 44.

Rawls recognized the longstanding distinction between positive and negative rights and duties. It is a distinction well-known in the law,²⁴² and, whether expressed as a distinction in moral discourse generally, is soon acknowledged by those previously unaware of the distinction. Rawls wrote:

The following are examples of natural duties: the duty of helping another when he is in need or jeopardy, provided that one can do so without excessive risk or loss to oneself; the duty not to harm or injure another; and the duty not to cause unnecessary suffering. The first of these duties, the duty of mutual aid, is a positive duty in that it is a duty to do something good for another; whereas the last two duties are negative in that they require us not to do something that is bad.²⁴³

Rawls also rightly noted that the ‘distinction between positive and negative duties is intuitively clear in many cases, but often gives way’.²⁴⁴ It is likely because the distinction between positive and negative duties sometimes “gives way” that Rawls didn’t emphasize the distinction further in his work. However, the distinction could have been emphasized with some profit when considering the savings principle: At least doing so would have truncated some of the criticism directed at the principle.

We can recall here the criticisms directed at the savings principle to the effect that Rawls erred in discussing the savings principle in the context only of a transfer of “capital”. But even assuming *arguendo* that this criticism were valid, if capital transfer is only *part* of Rawls’s theory of just savings then the criticism loses much of its force. What if we were to see the balance of the savings principle as directed to our *natural duties* to ensure that future

²⁴² See for example Salmon, John W. 1913. *Jurisprudence*. Stevens and Hynes, 4th ed. London pp. 201-202. See also Glannon, Walter. 2005. *Biomedical Ethics*. Oxford University Press. Oxford UK. pp. 73-76.

²⁴³ Rawls. *Theory*. p. 114.

²⁴⁴ *Ibid.*

generations enjoy the benefits of the first of Rawls's two principles of justice; namely, the greatest liberty consistent with equal liberty for all? This is surely extremely important. And, as I've suggested, this is precisely what the preservation of just institutions over-time is meant to do.

As to our natural duties to aid, Rawls was clearly of the view that preserving just institutions is a natural duty:

The present generation cannot do as it pleases but is bound by the principles that would be chosen in the original position to define justice between persons at different moments of time. In addition, *men have a natural duty to uphold and to further just institutions and for this the improvement of civilization up to a certain level is required.*²⁴⁵

Why is upholding just institutions a natural duty? It is a natural duty because without such institutions, the *primary goods* enumerated in *A Theory of Justice*, and, in particular, the fundamental liberties of future persons, would be placed in serious jeopardy. And, as a natural duty, we have a duty to preserve these goods and liberties for others, whether they are our contemporaries or our successors, reciprocity or no.

So, although the standard interpretation of Rawls isn't completely wrong, it does ignore Rawls's reliance on natural duties. Further, many of the responsibilities the standard interpretation would ascribe to self-interest, are natural duties.

Having found (a) that Rawls supported the idea of natural duties, and (b) that Rawls saw the preservation of just institutions as a natural duty essential to the autonomy of future generations, it might be thought that I could now move-on to that part of the savings principle

²⁴⁵ Ibid. p. 293. (Emphasis added.)

that is supported by other than our natural duties. I have called this the “second part” of the savings principle and I have suggested that this second part in some respects parallels the difference principle. However, some additional clarification of the first part of the savings principle is in order.

There is no benefit to future people in receiving large congeries of massive structures meant to house legislatures, senates and courts if they don’t have sufficient natural resources to feed themselves. Thus, although economic wellbeing at some level can be separated from our duties to pass-on just institutions, at a basic level, it cannot be separated. Accordingly, it is reasonable to conclude that transferring a certain level of resources (capital and otherwise) is part and parcel of our duties to preserve and transfer just institutions intertemporally.²⁴⁶ It will not do any good to leave intact majestic houses of justice and houses of parliament if we fail to leave enough resources behind for future people to feed themselves. Conversely, we needn’t pass-on grandiose neo-Gothic or classical Corinthian architectural style buildings. Nor is a Western common law tradition of adjudication essential. I suggest that the efforts by generations of various First Nation Peoples in North America to preserve the Potlatch and (arguably at least) by generations of Germanic Peoples to preserve their general assemblies or *Things*, met the just demands of the savings principle for those generations and their successors.

It is important as well to recognize that Rawls considered the *family* to be a just institution. The difference principle looks to questions of distributive justice as a *social* obligation. The savings principle too looks at questions of distributive justice on a societal level—this time

²⁴⁶ See again Figure 1 above at page 13.

intertemporally rather than within one generation—but it goes further. Its reach extends beyond *social* cooperation to questions of *familial* fidelity. The savings principle thus extends first and foremost to our own direct descendants. Accordingly, when grandparents care for the financial needs of their children and grandchildren, to the extent this care can be seen as necessary to the preservation of the family over time, such care should be seen as a duty within the scope of the first part of the savings principle.²⁴⁷ It is perhaps due to the extended scope of the savings principle to *intergenerational intra-family* concerns that Rawls chose to place the demands of even this aspect of the savings principle above the demands of the difference principle.²⁴⁸

I addressed earlier the significant concern that the savings principle is too *temporally* limited to address questions like the rightfulness or wrongfulness of a policy of nuclear proliferation, with its attendant latent hazards. Significant though it is, I believe this concern can also be easily answered.

We have seen that, to the extent the savings principle encompasses the fundamental rights and responsibilities captured by Rawls's first principle of justice, the savings principle is predicated on our natural duties. Further, because disposal of radioactive waste is presently attended by the risk of the release of lethal radioactive waste, and because this release has the

²⁴⁷ This realization should have played in to the need for Rawls's motivational assumption. However, as the assumption is no longer part of Rawls's theory, I don't intend to consider the point other than to mention it here.

²⁴⁸ See the discussion above at §2.6 regarding English's criticisms of Rawls's motivational assumption. If Rawls intended to include intra-family justice-based demands within the reach of his savings principle, then additional thought might be warranted concerning English's claim that Rawls's assumption excluded such matters.

potential to kill or seriously injure future human beings, any policy of nuclear power proliferation will violate our natural duties not to kill or injure others. Here again, the lack of reciprocity between our generation and remote future generations is a nonissue: No superadded agreement not to kill or injure is necessary.

Recognition of the role of natural duties in justifying most aspects of the savings principle answers many otherwise seemingly hard questions. However, not all aspects of the savings principle are supported by our natural duties. Things get tricky due to Rawls's extension of primary goods to 'income and wealth' and the overlap of these goods with nothing remotely needed to support equal rights-recognition and just institutions. The difference principle, as a construct of distributive justice, is all about leveling income and wealth. And, to the extent the savings principle extends to the same income-leveling, it is very close to the difference principle and our natural duties do not kick-in.

3.6 JUSTIFYING DUTIES OF DISTRIBUTIVE JUSTICE THROUGH THE SAVINGS PRINCIPLE

Rawls said that it wasn't possible to 'define precise limits on what the rate of savings [under the savings principle] should be'.²⁴⁹ Rawls also said that the difference principle was limited by the savings principle.²⁵⁰ Thus, it is, I suppose, not possible to define the precise limits of the difference principle.

²⁴⁹ Rawls. Theory. p. 286.

²⁵⁰ The difference principle is limited by the savings principle because the latter principle mandates that we (a) not harm future persons, and (b) preserve just institutions, and thereby (c) preserve the priority of the right to equal liberty of all future persons. Moreover, as discussed, even were the savings principle considered an *intergenerational* extension of the *intragenerational* difference principle, the former would still supersede the

The difference principle is one-half of the second principle of justice Rawls argues all those deliberating in the original position would adopt. It is a strongly egalitarian concept.²⁵¹

Rawls doesn't suggest that the idea of an equal distribution of wealth flows from some natural duty of care. Rather, it is a principle Rawls says that those in the original position would agree to. And since the difference principle arises via agreement, we need to be cognizant of the role reciprocity plays in the difference principle. Further, the same is true of the savings principle, assuming the savings principle imposes obligations in addition to those duties motivated by our natural duties and sense of justice.

While I am not saying that other argued cannot be made to support the purely distributive aspects of the savings principle, I want to consider here whether the just savings principle can be justified as a matter of unalloyed self-interest.

It is difficult to know where Rawls's idea of *mutual disinterestedness* fits with his ideas of rationality and mutual advantage. Rawls's idea of rationality was for the most part the narrow economic idea of self-interest, i.e. follow[ing] the plan which will satisfy more of his desires rather than less'.²⁵²

latter as the difference principle applies outside the family while the savings principle includes the distribution of benefits within the family.

²⁵¹ Ibid. p. 76.

²⁵² Ibid. p. 143. See also p. 14. Rawls said (p. 143):

The concept of rationality invoked here, with the exception of one essential feature, is the standard one familiar in social theory. Thus in the usual way, a rational person is thought to have a coherent set of preferences between the options open to him. He ranks these options according to how well they further his purposes; he follows the plan which will satisfy more of his desires rather than less, and which has the greater chance of being successfully executed. The special assumption I make is that a rational individual does not suffer from envy.

But does Rawls's idea of *disinterest* simply mean *uninterest* or does it mean "unbiased by personal interest"? Rawls spoke of 'the assumption of mutually disinterested rationality'.²⁵³

Those in the original position acting under mutually disinterested rationality,

...try to acknowledge principles which advance *their system of ends as far as possible*. They do this by attempting to *win for themselves* the highest index of primary social goods, since this enables them to promote *their* conception of the good most effectively whatever it turns out to be.²⁵⁴

Here disinterestedness seems to be nothing more than the absence of interest in anyone else.

Perhaps those in the original position are both disinterested and uninterested in others. Bias is overcome in the original position by the veil of ignorance which removes from the knowledge of those deciding all knowledge of their own and others' personal characteristics. Uninterest is stipulated via Rawls's conditions that his decisionmakers lack both envy and rancor toward others. Indeed, how could a deliberator in the original position have rancor to anyone when s/he doesn't know in the original position what their own social status and political views will be when returning to the real world? But is this mutual unbiased interest enough to answer the concerns of those who think that reciprocity is an invariable precondition to justice-based duties?

Rawls said that '[i]n searching for the most favored description of this [original] situation we work from both ends. We begin by describing it so that it represents generally shared and preferably weak conditions. We then see if these conditions are strong enough to yield a

²⁵³ Ibid. p. 144.

²⁵⁴ Ibid.

significant set of principles'.²⁵⁵ To say that people are self-interested, selfish, or narrowly rational, will not violate many generally shared views of human nature. Moreover, self-interest is about the weakest condition from which we can work in order to find a set of principles of justice.

I have already addressed the fact that our own self-interest should cause us to rethink Hume's circumstances of justice. We can also note here the principle of reasonable expectations and the idea of *paying-forward* benefits to future generations in recognition that past generations *payed-forward* benefits to us. We might think here of barn raisings. I might help a new member of my community build his barn even if he wasn't around to help when my barn was built. I would, of course, *expect* him to do the same for another neighbour even if that neighbour wasn't around when his barn was raised.

Heyd wrote that 'present people should take into consideration the possibility that some future generations will abandon the commitment to justice and to the just savings principle altogether'.²⁵⁶ He proposed, '[i]f we know that the resources we are now saving are going to be used to promote a racist dictatorship in the next generation, maybe it is our duty to consume them all rather than leave them for the future!'²⁵⁷ I suggest that these remarks bring to the fore the idea that our care for future generations carries with it some level of *expectation interest*. As the earlier noted farmer, I would expect the farmer I helped to help

²⁵⁵ Ibid. p. 20.

²⁵⁶ Heyd. Value. p. 184. If Heyd is right, the duty of saving, based on the commitment to the preservation of just institutions, would become vacuous.

²⁵⁷ Ibid.

the next farmer. We can add to this the parable of the unjust servant:²⁵⁸ If I forgive you your debt, I can reasonably expect you to forgive another's debt.

Personally, I have an expectation that my children will be at least as kind to their children as I was to them: Indeed, I expect them to try as hard as I did to be a good parent, and, if they do, I hope that they will be better parents than I was. Henry Sidgwick (1884) speaking of the 'claim of Gratitude,' said, 'we have not only a natural impulse to requite benefits, but also a conviction that such requital is a duty, and its omission blameworthy, to some extent at least; though we find it difficult to define the extent'.²⁵⁹ Sidgwick added that when we '*universalise* this impulse and conviction, we get the element in the common view of Justice'; namely, that 'good deeds ought to be requited'.²⁶⁰ Requital of a gift, yes; but not necessarily requital solely to the one who gave the gift.

Even on the assumption that reciprocity is always mandatory, once it is recognized that reciprocity isn't limited to the return of a gift to the one giving the gift, we can do what reason dictates.

Further, assuming solely the self-interest or rationality of those in the original position, each will understand that it is better to save something for future generations, *because the economic reality is that every generation, except the first generation, will be better off if saving is undertaken.* This economic efficiency argument would readily present itself to

²⁵⁸ Matthew 18:21-35

²⁵⁹ Sidgwick, Henry. 1884. *The Methods of Ethics*. MacMillan & Co. London. p. 278.

²⁶⁰ Ibid.

deliberators in the original position, who, we are to assume, understand fundamental economics.

The prosperity of each future generation will obviously be greater if each new generation doesn't have to start from scratch. If I start out with cleared land, I can begin growing crops immediately. If I can shelter my flock behind a rock wall already built, I'll lose fewer sheep. If I know how to better crossbreed my dairy herd, I'll get more milk. And since, even if those in the original position know they are all contemporaries, they will also know that they are more likely to be a member of a middle generation or of the last generation than a member of the first generation—because that's just the way the math works out as long as we assume there are three or more generations—being rational, each group of contemporaries in the original position will adopt a just savings principle.²⁶¹ Knowing the general principles of economics, each of the decisionmakers in the original position would see the value of standing on the “economic shoulders” of past generations. A “scorched earth” economic policy will benefit no one.

Thus, it seems to me that, as the decisionmakers in the original position are (by stipulation) rational and thus self-interested, whether the decisionmakers are representatives or principals, all would agree that it is preferable overall for each generation to pass-on a fair amount of savings to future generations.

I have noted the parallels between reciprocity in social contract theory and the doctrine of consideration in the law of contracts. Contracts are often bilateral in nature. Usually a

²⁶¹ Rawls. *Theory*. p. 137. Rawls notes that the veil of ignorance keeps from each individual her level of risk aversion/ acceptance.

bilateral contract will see party *A* giving consideration to party *B* in exchange for party *B* giving consideration back to party *A*. However, as mentioned, *A* can also enter into a binding contract with *B* by extending consideration to *B* on the understanding that *B* will give consideration to party *C*. The reason such an “exchange” will work in the original position is that those in the original position know that they will *not* be a party to *one* contract only. Any deliberator will know that, unless she is a member of the first generation or of the last generation, she will, at different times, and in different roles in her life, be, at times, party *C*, at times party *B*, and at times party *A*, in a continuing series of contracts with multiple counterparties. Reason suggests that no self-interested party will want to break this chain-of-exchange and Rawls’s theory of strict compliance doesn’t allow bait-and-switch schemes.

4.0 CONCLUSION

One of the biggest problems with Rawls's seminal theory of justice as extended intertemporally is the deference Rawls's paid to the standard view in social contract theory of the principle of reciprocity. Once reciprocity is properly understood, reciprocity works with impartiality as two key aspects of justice-based rights and duties. All other difficulties with Rawls's theory as applied intergenerationally arise out of misinterpretations of his theory.

Rawls extends his theory to intergenerationally via his just savings principle. Rawls's savings principle is far more robust than it has been given credit for. The savings principle is for the most part supported by our natural sense of justice and our natural duty (a) not to injure and (b) to aid others. This carries the scope of the savings principle well beyond the scope of a simple principle of distributive justice. The fact the savings principle is based primarily on our natural duties and sense of justice allows the savings principle to address difficult questions of latent harms and forecloses policies like Parfit's *Risky Policy*²⁶² that would create risks of the remote release of lethal radioactive waste.

Our natural duties are independent of any superadded agreement between persons, whether the agreements are hypothetical or actual. Accordingly, the savings principle removes the need for agreement and concomitantly relegates questions of the existence or non-existence of reciprocity to irrelevancy. Problems generally seen as caused by Rawls's PTE interpretation thus fade-away, as does the need for Rawls's motivational assumption.

²⁶² Parfit. *Reasons and Persons*. pp. 371ff.

Rawls's savings principle is not simply an intertemporal difference principle. It is most importantly concerned with preserving Rawls's first principle of justice cross-generationally for future generations. It does this largely through the preservation of just institutions. Even where the savings principle does address questions which might appear as first to be limited to questions of distributive justice, and thus might *prima facie* seem to track the concerns of the difference principle intertemporally, it does for the most part only due to the fact that a minimum level of wealth is essential to enable any person, group or society to exercise their right to equal liberty.

Finally, to the extent the savings principle concerns our responsibilities to address the economic wellbeing of those worse-off in future generations and to address their wellbeing above the level needed to allow the effective exercise of their rights, reciprocity is not essential. Reciprocity is not possible when dealing with accommodations between non-overlapping generations. And reciprocity is a key feature of justice-based rights and obligations only *where it is possible*.

Under Rawls's theory, any agreement reached in the original position is "just" by definition. I have argued that, assuming those in the original position are rational in the sense of being solely self-interested, all in the original position would agree to principles that would protect all human beings when vulnerable. They will agree readily to protect the vulnerable because all of those deciding in the original position will know that they are far more likely to be vulnerable immediately upon leaving the original position than they are likely to be strong when they exist the veil. And they will know this because they will know that as mortal beings their vulnerability far exceeds their strength. Indeed, they will know that they will

face a significant risk upon leaving the veil that they may be completely vulnerable as an existing child or as a child yet to be born.

I have suggested that the realization of those deliberating under conditions of impartiality—again, in Rawls’s theory, all those deliberating behind the veil of ignorance—leads us inexorably to the conclusion that even those unable to bargain due to their innate weakness are rightly treated with at least equal respect and concern in any just society.

Heyd wrote that ‘[t]he problem of accommodating intergenerational justice within Rawls’ general theory of justice is an enlightening test to the general methodological issue whether Rawls is committed to a genuine *contractarian* method or whether his views can be understood in more impersonal (Kantian) terms of *impartiality*’.²⁶³ According to Heyd, a “genuine contractarian method” is a method that sees reciprocity as indispensable to justice-based rights and duties. Heyd also wrote that the ‘circumstances of justice are ... essentially associated with the condition of *mutuality* or reciprocity’.²⁶⁴ I have submitted that the dichotomy between impartiality and reciprocity is false. I have also submitted that Hume’s circumstances of justice should be expanded to include the mortal fact that all human beings are universally completely vulnerable to others.

I suggest that those deny that we have justice-based duties *to* those future generations near and remote to us have it wrong. The fact that future human beings cannot reciprocate with us

²⁶³ Ibid. p. 171. (Emphasis in the original.)

²⁶⁴ Heyd. Value. p. 169.

due to their complete vulnerability to us does reduce our justice-based responsibilities to them—it *increases* our duties. We stand in a fiduciary role to future people.

It has been suggested to me that my position that future generations are entitled to equal consideration with our own is problematic as my arguments could lead to the conclusion that we should *defer* to the interests of future generations, or, in other words, that we are required, by justice, to place the interests of future generations *above* our own. This counter-claim assumes, what is likely; namely, that *greater* numbers of people will be living in the future than are alive today.

I don't believe that we need to prefer future peoples. The argument that we must prefer future generations misunderstands the nature of rights and improperly interposes utilitarian concepts into a rights-based discussion.²⁶⁵ What we must do is to treat future peoples as we would wish to be treated if our positions were reversed.

I do recognize that my views might require our generation to rethink a lot of what we are doing. And I think that is a good thing.

We need to rethink and undo the debt we have imposed on future generations through our excessive rate of capital spending. We need to reverse our destruction of this planet and begin

²⁶⁵ Rawls alludes to the fact that utilitarianism might 'lead to an extremely high rate of saving' for future generations which may cause 'excessive hardships on earlier generations'. (Rawls. *Theory*. p. 297.) I have addressed this challenge at length in another paper when considering Parfit's *Depletion* case (Parfit. *Reasons and Persons*. pp. 361ff.). The discussion is outside the scope of this thesis and I leave the challenge unanswered here.

to conserve its environment and its natural resources. Rawls's concerns with theoretical genetic policies are now real.²⁶⁶

I was in Malta a few years back and saw a beautiful stone sculpture of the earth on the seafront at St. Julian's Bay. This globe sits on a carved depression in a stone base and revolves on a small stream of water coming out of the base. The sculpture has inscribed along the bottom of the base the following North American Native proverb: '*We do not inherit the earth from our forefathers; we borrow it from our children*'. The worldview conveyed here is similar to Edith Brown-Wiess's (1990) thinking that '[a]s members of the present generation, we hold the earth *in trust* for future generations'.²⁶⁷ This is the kind of paradigm shift in thinking we need to embrace and translate into our everyday actions. And if we do, we will be a lot closer to fulfilling our duties to the generations who follow us.

²⁶⁶ We also need to address and answer the question of the morality and justice of elective abortion. (See Rawls. Restatement. p. 117.)

²⁶⁷ Brown-Wiess, Edith. "Our Rights and Obligations to Future Generations for the Environment." *84 Am. J. Int'l L.* 198 (1990). p. 199. (Emphasis added.)

BIBLIOGRAPHY

1. Barry, Brian. 1989. *A Treatise on Social Justice Vol. 1, Theories of Justice*. University of California Press.
2. ———. 1991. *Liberty and Justice, Essays in Political Theory 2*. Clarendon Press. Oxford UK.
3. ———. 2004. *Justice as Impartiality*. Clarendon University Press. Oxford UK.
4. Benn, Stanley I. and R. S. Peters. 1959. *Social Principles and the Democratic State*. George Allen & Unwin. London.
5. Bickham, Stephen. 1981. "Future Generations and Contemporary Ethical Theory". *The Journal of Value Inquiry*. Vol. 15. 169-177.
6. Birnbacher, Dieter. 2008. "What Motivates Us to Care for the (Distant) Future?". Gosseries, A. and Lukas H. Meyers (eds). *Intergenerational Justice*. Oxford University Press. 273-300.
7. Brown-Wiess, Edith. 1990. "Our Rights and Obligations to Future Generations for the Environment." *84 Am. J. Int'l L.* 198.
8. Buchanan, Allen. 1990. "Justice as Reciprocity versus Subject-Centered Justice". *Philosophy & Public Affairs*. Vol. 19. No. 3. Summer 1990. 227-252.
9. Confucius. *The Analects of Confucius*. (Chinese Classics) CHAP. XXIII. Kindle Edition.
10. Delattre, Edwin. 1972. "Rights, Responsibilities, and Future Persons". *Ethics*. Vol. 82. No. 3. Apr. 1972. The University of Chicago Press. 254-258.

11. Dworkin, Ronald. 1977. "Social Sciences and Constitutional Rights - The Consequences of Uncertainty." 6 *Journal of Law & Education*. 3.
12. ———. 1978. "Liberalism." *Public and Private Morality*. Hampshire, S. (ed). Cambridge University Press. Cambridge UK. 113.
13. ———. 1979. *Taking Rights Seriously*. Harvard University Press. Cambridge Mass.
14. English, Jane. 1977. "Justice Between Generations." *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*. Vol. 31. No. 2. Feb. 1977. 91-104.
15. Gibbard, Allan. 1991. "Constructing Justice." *Philosophy & Public Affairs*. Vol. 20, No. 3. Summer, 1991. 264-279.
16. Glannon, Walter. 2005. *Biomedical Ethics*. Oxford University Press. Oxford UK.
17. Golding, Martin, P. 1972. "Obligations to Future Generations". *The Monist*. Vol. 56. No. 1. January. 1972. Oxford University Press. 85-99; Golding, Martin, P. 1981. "Obligations to Future Generations". Partridge, E. (ed) *Responsibilities to Future Generations*. Prometheus Books. Buffalo NY. 61-72.
18. Gosseries, Axel. 2009. "Three Models of Reciprocity". Meyers, Lukas H. (ed). *Intergenerational Justice*. Ashgate Publishing Co. England. 255-282.
19. Hart, H.L.A. 1961. *The Concept of Law*. Oxford University Press. Oxford UK.
20. Heyd, David. 2008. "A Value or an Obligation? Rawls on Justice to Future Generations". Gosseries, Alex and Lukas H. Meyers (eds). *Intergenerational Justice*. Oxford University Press. 168-189.

21. Hiskes, Richard. 2009. *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice*. Cambridge University Press. Cambridge UK.
22. Hobbes, Thomas. *Leviathan*. Kindle Edition.
23. Hope, Simon. 2010. "The Circumstances of Justice". *Hume Studies*. Vol. 36. No. 2. 125-148.
24. Hubin D. Clayton. 1976. "Justice and Future Generations". *Philosophy and Public Affairs*. Vol. 6. 70–83.
25. Kant, Immanuel. 1996. *The Metaphysics of Morals*. Translated by Gregor, Mary. Cambridge University Press. Cambridge UK.
26. Locke, John. 1884. *Two Treatises of Government*. A.R.N. Publications. Kindle Edition.
27. Mathis, Klaus. 2009. "Future Generations in John Rawls's Theory of Justice". *Archives for Philosophy of Law and Social Philosophy*. Vol. 95. 49.
28. Mill, John Stuart. 1998. *On Liberty and Other Essays*. Gray, John. (ed). Oxford World's Classics. Oxford UK.
29. Nussbaum, Martha C. 2006. *Frontiers of Justice: Disability, Nationality, Species Membership*. The Belknap Press. Harvard University.
30. Paden, Roger. 1996. "Reciprocity and Intergenerational Justice". *Public Affairs Quarterly*. Vol. 10. No. 3. Jul. 1996. 249-266.
31. ———. 1997. "Rawls's Just Savings Principle and the Sense of Justice". *Social Theory and Practice*. Vol. 23. No. 1. Spring 1997. 22-51.
32. Parfit. Derek. 1984. *Reasons and Persons*. Oxford University Press. Oxford UK.

33. Passmore, John. 1980. *Man's Responsibility for Nature. Ecological Problems and Western Traditions*. Duckworth. London.
34. ———. 1981. "Conservation" Partridge, E. (ed) *Responsibilities to Future Generations*. Prometheus Books. Buffalo NY. 45-59.
35. Plato. *The Complete Works of Plato, The Phaedo*. Translated by Jowett, Benjamin. Latus ePublishing. Kindle Edition.
36. Rawls, John. 1971. *A Theory of Justice*. Harvard University Press.
37. ———. 2001. *Justice as Fairness: A Restatement*. Harvard University Press. Cambridge Mass.
38. ———. 2005. *Political Liberalism: Expanded Edition*. Columbia University Press. NY.
39. Rotman, Leonard, I. 2005. *Fiduciary Law*. Thomson Carswell.
40. Salmon, John W. 1913. *Jurisprudence*. Stevens and Haynes, 4th ed. London.
41. Sheppard, J. C. 1981. *Law of Fiduciaries*. Carswell.
42. Sidgwick, Henry. 1884. *The Methods of Ethics*. MacMillan & Co. London.
43. Wall, Steven. 2003. "Just Savings and the Difference Principle". *Philosophical Studies*. Vol. 116. 79–102.

Case law

Guerin v R, [1984] 2 SCR 335.

Hodgkinson v Simms, [1994] 3 SCR 377.

Keech v Sandford, (1726), Sel. Cas. T. King 61, 25 ER 223.

Malton v Attia, 2016 ABCA 130.

Manitoba Metis Federation v Canada (Attorney General), [2013] SCJ No. 14.

M.(K.) v M.(H.) (1992), 96 DLR (4th) 289 pp. 323-328.