Social Contract and Economic Justice
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1. From Hypothetical to Empirical Contracts

This paper seeks to construct a social contract theory of economic justice using Barry’s (1989: 347-8) empirical method of contractual reasoning. Barry described this method in a passage worth quoting at length:

“The empirical method starts from observation rather than pure thought. It is animated by the consideration that actual societies approximate more or less closely the conditions .... that I shall refer to for convenience as “the circumstances of impartiality”. Thus, a society in which each section of the population has its own organizations and organs of communication to articulate its interests and aspirations is closer to the circumstances of impartiality than one in which, say, business is well organized but labor is not, and in which almost all the organs of mass communication are owned and controlled by the rich. Similarly, a political system in which parties represent the distinctive interests and aspirations of different groups is closer to the circumstances of impartiality than one in which all successful candidates have either to have money or to be acceptable to those who have it. Again, a society in which there is a good deal of fellow feeling for other citizens will be closer to the circumstances of impartiality than one in which many people are unmoved by the lot of sections of the population with which they do not identify. And, finally, a culture in which politics is widely regarded as a matter of debate rather than as a game - where arguments are thought of as more than the window-dressing for self-interest - will obviously be closer to the circumstances of impartiality.' (Barry, 1989: 347-8).

The circumstances of impartiality are therefore those conditions that resemble, so far as the world allows, the conditions of a hypothetical impartial social contract. The same idea is picked up by Barry in a more extended discussion in section 16 of *Justice as Impartiality* where he develops the notion of the circumstances of impartiality as an empirical counterpart to the Scanlonian original position (Barry, 1995: 104) and where the guiding idea is ‘that just
laws and policies are more likely to arise in actual societies the closer they come to instantiating these hypothetical conditions’ (Barry, 1995: 100). What then characterises a political culture of impartiality and reasonableness? For Barry policy making in societies where the circumstances of impartiality obtain needs to be transparent and open so that measures are consulted on openly and with a real chance that the consultation will make a difference. Citizens need to be well informed and educated, with no monopoly of the means of communication and with public funding of political parties. Policy makers need to respect expert opinion. Committees in the legislature need to be strong relative to the executive, with weakly disciplined political parties so that legislators can follow the logic of the argument, a pattern that will be facilitated by multi-member constituencies using PR with a low threshold of representation. Empirically the conditions under which political decision-making is governed by a norm of reasonableness are to be found ‘in some of the smaller Western European countries such as the Netherlands and Scandinavia’ (Barry, 1995: 106).

For Barry those societies that approximate the circumstances of impartiality are empirical counterparts to a purely hypothetical social contract defined in an *a priori* way. Because we cannot be certain in the hypothetical model how the contracting parties would reason, we use the counterpart as a control on our *a priori* theorising. Among other things, this implies that if we fail to find empirical examples of societies in circumstances of impartiality that do not use a certain principle in their decision making, say that of average utility, then we should have less confidence in any *a priori* model of the social contract that yielded average utility as a uniquely justifiable principle. For Barry this is not to say that the societies that are the empirical counterparts to a hypothetical model have a contractual basis, for example that their origin can be traced back to a particular constitutional moment. Neither the Netherlands nor any of the Scandinavian societies was historically founded on a social contract negotiated in conditions of impartiality. Rather the argument is that, whatever their history, their political practices resemble the conditions that we would want to specify in a contract for justice and democracy.

Within Barry’s own approach, a guiding theme is the distinction between justice as mutual advantage and justice as impartiality. For various reasons (to be discussed elsewhere), this is not the approach taken in the present paper. Rather I shall take up the methodological programme, but in the context of a theory of justice understood as mutual advantage. That is to say, our understanding of the reasoning that is characteristic of the parties to a social contract should use empirical methods. More importantly, within Barry’s approach it obviously makes a difference as to which societies we take as our empirical instances, and Barry’s own choice of examples looks rather *ad hoc*. The examples Barry cites raise the
question of how far they can provide a more general model that carries lessons for societies that have had very different histories. Perhaps the circumstances that make these societies what they are cannot be replicated elsewhere. Of course, to say that a particular sub-set of societies can be taken as providing a normative model is not to say that they are a blueprint for all other societies, in the sense that other societies would be prudent to follow their institutional example. Although societies do undergo change and political reform, this is not to say that any particular model of political organisation is always open to any society. In short, if the empirical method is really to be of use, we have to think about how it is to be specified and what conditions any putative contract that uses the empirical method ought to meet.

2. Common Pool Resource Regimes

Consider communities of the sort studied by Elinor Ostrom (1990) in which common pool resources have to be managed. Common pool resources are a variant of pure public goods. Pure public goods (in the economist’s sense) are characterised by non-rivalness and non-excludability in their consumption. When goods are non-rival, then the consumption of one person does not deplete the availability of the resource to others. One person's use of clean air or the benefits that anyone derives from living in a tolerant society are non-rival in consumption. Non-excludability in consumption means that if one person in a society is able to gain access to the good, then anyone in the society can gain access. Again, clean air within an air shed or the practices and institutions of a tolerant society are non-excludable in this sense.

With common pool resources, by contrast, there is some rivalness in use, since appropriation by some, in particular appropriation by a sufficiently large number of people, will deplete the value of the resource for any particular individual. Examples of common pool resources of this type cited by Ostrom include fishing grounds, groundwater basins, grazing areas, irrigation canals, bridges, parking garages, mainframe computers and streams, lakes, oceans and other bodies of water. These common pool resources are typically large enough to make it difficult, if not impossible, to exclude potential beneficiaries within a community from use (although the ability to exclude members from other communities turn out to be significant). However, the actions of the non-excludable potential beneficiaries can spill over onto the use by others, as the example of over-fishing illustrates only too well, or as can be experienced by anybody who has tried to park their car at a busy time of the day in a public car park.
Problems of public goods, including common pool resources, are often treated by social scientists as instances of the prisoners’ dilemma, the classic example being Hardin’s (1968) discussion of the ‘tragedy of the commons’, by which the rational use by each individual of a common grazing area results in that area being depleted in value. If we think about these problems in terms of a game-theoretic model of the prisoners’ dilemma, then the failure to avoid resource depletion is built into the structure of the game, it being unconditionally better for each individual to grab as much of the resource available for fear that others will get the resource, even though collectively all may be worse off as a result. Such a model is of course \textit{a priori} and hypothetical. As Berkes (1985: 204) nicely puts it ‘the usefulness of the paradigm lies in its insolubility – the fact that it is a tautology’. A one-off prisoners' dilemma game is written so as to ensure mutual defection and, within this theoretical framework, the only ways of avoiding self-defeating individual competition are either through repeated plays of the game, where it can be shown that cooperation can emerge by trial and error, or by the imposition of suitable incentives by a hegemon, such as a Hobbesian Leviathan, who is thereby able to secure cooperation.

Ostrom’s approach, however, is not to look at these issues in an \textit{a priori} way, but instead to examine empirically cases in which such common pool problems have been successfully managed (sometimes over centuries) by contrast with those cases in which they have not been managed successfully. One of Ostrom’s examples will give the flavour of what successful management involves (see Ostrom, 1990: 18-21; see also Berkes, (1986: 221-22), which introduces the example). In Alanya in southern Turkey coastal waters were being over-fished as a result of the over-capitalisation of the fleet and the competition for increased yields. In the early 1970s the local co-operative in Alanya began experimenting with allocating fish sites to local fishers, which consisted of the following system:

1. Each September a list of eligible fishers was prepared.
2. Within the area normally used, all fishers and all usable fishing locations were named and listed. The sites were so spaced that the nets in one site would not block the fish in an adjacent site.
3. These named locations were in effect from September to May.
4. In September the named fishers drew lots and were assigned to the named fishing locations.
5. From September to January each day each fisher moved east to the next location; after January each fisher moved west one place.
Note that we have here an example of what Young called an institution: ‘... identifiable practices consisting of recognised roles linked by clusters of rules or conventions governing relations among the occupants of those roles’ (Young, 1989: 5). Institutional practices of this sort operate by providing norms that individuals take to govern their actions, thus enabling coordinated human activity to take place in ways that avoid collective self-damage. Ostrom argues that institutions, of the sort of which Alanya provides an example, solve the collective action problems associated with the management of common-pool resources in ways that could not be achieved by uncoordinated individual action. In essence, the institution is providing a norm of behaviour for individuals, and action in accordance with that norm is sufficient to secure the common good on which the interest of each participant depends.

Common pool resource regimes emerge in situations where the physical environment and mode of production create the inter-dependence in which short-term individual maximising behaviour will create adverse effects for others. The examples of successful regimes cited by Ostrom include mountain grazing and crop harvesting in Switzerland and Japan and water management in Spain and the Philippines. These are cases where agreement on common rules is necessary if the underlying resource is to be conserved for the future. The success of regimes is evidenced by the length of time that they have performed the function of conserving resources. Among the oldest are the regime that governs grazing and foraging rights in Törbel in Switzerland, where the articles of association were signed in 1483, the management of common lands in Japan during the Tokugawa period (1600-1867) and beyond as well as the water irrigation regime in Valencia, Spain going back to 1435 (Ostrom, 1990: 62, 65 and 69 respectively).\footnote{Note that Netting (1981: 60) says that Törbel was regulating its affairs by written statute by 1473.} These and other regimes have survived fluctuating pressures in fragile environments. Ostrom does not claim that these regimes are optimal in any sense, the uncertainties and variable climatic conditions would make this difficult, but she does claim that they are successful given the challenges they confront and the period of time over which they have functioned (Ostrom, 1990: 59-60). The communities in which the resource regimes are established are stable and persist over time, so that costly investment at one time carries the expectation of return at a later time for the members of that community.

The monitoring of compliance with regime rules is important in all the regimes, but Ostrom (1990: 59) points out participants have also internalised the norms of the regime and individuals value their reputation for keeping promises, honest dealing and reliability, thus reinforcing acceptance of the norms of proper behaviour (Ostrom, 1990: 89). Of course, there is an endogeneity problem here, for the regimes that work may be ones in which the
background culture is one in which a norm of fairness is strong. However, although the environmental situations are similar as is the system of production, the norms emerge in very different background cultures, suggesting that there are common elements of human interaction that are being reflected in those norms rather than the specifics of any particular culture. Moreover, since all the regimes involve participants setting the rules for themselves, we also have evidence of the value of self-government even with highly diverse cultures. The idea of collective control through democratic participation is not one that is culturally specific in that sense. Collective control is required because in all cases common property resources sit side by side with private property (Ostrom, 1990: 60-1). This is not a world of wholly privatised property in which transactions can be limited to processes of market exchange. There is an essential task in the collective management of common property resources.

Inductively summarising from the successful cases, and contrasting with cases of regime failure, Ostrom (1990: 90) offers an account of the conditions that enable successful common-pool resources to survive a long time, some time over centuries, and they include:

1. Clearly defined boundaries: those entitled to use the resource must be identifiable.
2. A fit between appropriation rules and local conditions.
3. Individuals affected can participate in changing or modifying the rules.
4. There is an ability to monitor compliance.
5. There is a system of graduated sanctions in place.
6. There are conflict resolution mechanisms.
7. External authorities do not challenge the right to organise.

I propose that we can take common pool resource regimes as model of social contracts that meet the conditions that we should wish to impose upon any such model. Such regimes represent an enforceable agreement (5) among identified parties (1) that allows for continuing participation (3) and (4) in which feasible solutions to common problems have to be identified through deliberation (e.g., the scheme for sharing out the use of the waters in Alanya) and in which conflicts about the application of the rules can be discussed (6) and which represents a form of self-government (7). Of course, such institutions do not have the scope of authority that social contracts in the full sense would enjoy. They may not possess for example authority in respect of important matters of criminal law in respect of such matters as rules of evidence or the justifiability of capital punishment. However, within their limits they can serve as models for such contracts and their theoretical logic (so I shall argue) can be constructed so as to define a theory of justice.
Successful common pool resource regimes embody the conditions that we should require of an empirical social contract on which we can model an account of justice. Each participant has a reason to subscribe to the rules as a condition of securing the general restraint that it necessary for resources to be conserved. Participants are not purely self-interested. For example, since the household is the principal unit of production in many such communities, members of each household will care about other members of the household. However, though not wholly self-interested, their altruism is limited in the sense that solidarity within a household is compatible with competition for resources between households. Each participant may value the social constraint not for itself but for the advantages that it brings in raising the collective good over a non-agreement baseline with its over-exploitation of resources. All the successful regimes require joint action by agents in order to achieve their individual good. Ostrom (1990: 31) highlights the extent to which we need to distinguish between the act of appropriation of a resource, for example catching fish or abstracting water from a river basin, where producers are in competition with one another, from the act of maintaining the resource system, for example stocks of fish or river basin management, where producers have an interest in common in maintaining the integrity and well-functioning of the system. Producers are in a situation of scarcity not abundance, and so they are in competition with one another for the harvest that comes from the joint resource system, but they need to co-operate with one another to maintain that system in being. Given this situation they cannot avoid questions over the terms of their co-operation.

Even if we take successful common pool resource regimes as models of a social contract, why should we think that their workings tell us anything about justice? In answering this question, the crucial point is that the regimes arise in situations of rough equality of power. All participants have some ability to impose harm on others (Ostrom, 1990: 26). As examples, in Törbel, Netting (1981: 46) notes that highly terraced agriculture means that control of water use and maintenance of walls are important, because an unrepaired wall could wash out years of planting and threaten lower terraces and in Alanya, Berkes (1986: 225) points out that without regulation, fishing boats could easily interfere with one another by placing their nets too close and crowding out the best sites. To be sure such equality of power is only likely to be rough in the sense that some individuals may be in a better position to impose harm than others. For example, those upstream in a river basin may be able to abstract more than those downstream in such a way that there is less than is required for those farming downstream. Similarly those with better capitalised boats may be able to harvest more fish from a given stock of water than others less well capitalised. However, the general situation with common pool resource regimes is that each participant has some ability to impose harm on the rest.
If we accept Hume's conditions for the circumstances of justice - moderate scarcity, limited altruism and rough equality of power – then Ostrom's common pool resource regimes fit such conditions. Given that participants in common pool resource regimes are in competition for scarce resources, they do not enjoy such economic abundance that there is no competition between the different members of society. However, if the resource system is well maintained, neither are they in a position of harsh scarcity in which time horizons become short and rules of controlled behaviour break down. Hence none of these societies are in the words of Hume (1751: 182) in ‘such want of all common necessaries, that the utmost frugality and industry cannot preserve the greater number from perishing, and the whole from extreme misery’. In fact Hume’s summary of the conditions of justice could well serve as a general summary of the circumstances that we find in common pool resource regimes:

‘The common situation of society is a medium amidst all these extremes. We are naturally partial to ourselves, and to our friends: but we are capable of learning the advantage resulting from more equitable conduct. Few enjoyments are given us from the open and liberal hand of nature; but by art, labour, and industry, we can extract them in great abundance. Hence the ideas of property become necessary in all civil society.…’ (Hume, 1751: 183).

In these circumstances, as Hume points out, justice derives is usefulness to the public and thereby acquires its merit and moral obligation. If we take Hume's account of the circumstances of justice as a guide, we have reason to regard resource regimes not only as social contracts but also as forms of just social contracts. What principles of economic justice are implied by such empirical contracts?

3. The Full Fruits of Labour

In the common pool resource regimes identified by Ostrom, a general principle is that participants receive the full fruits of their labour. The fish they catch, the wood and plants they harvest or the cows they graze belong to them. Often work is organised around the household, as it is in Törbel, where kin live together and undertake the basis work including the provision of food and shelter (Netting, 1981: 15). In the Turkish fishing communities, the boats need not be household based but involve a number of different individuals (Berkes, 1986). These differences presumably reflect the different technologies of production. However, where the household is the productive unit it is that unit receives the full fruits of the labour of its members. This is an important qualification, the implications of which are
discussed in the next chapter, but for now we may say that the product of labour is owned by those who undertake the work involved in securing that product.

The principle of retaining the full fruits of one's labour is qualified in various ways within the common pool resources regimes. Firstly, although households have their own private property, all have access to the common resources. In theory it would be possible in many cases for there to be entirely private ownership of the means of production, according to which some individuals could command the use of all resources in the economy leaving others as landless labourers or emigrants. After all, enclosure has after all been a frequent occurrence historically in agricultural communities. Yet a significant feature of common pool resource regimes, noted by Ostrom herself, is that the commons remain common, with collective control being maintained over their use. Having such resources in common thus plays a part in limiting the extent to which individuals can accumulate advantages over others through their control of the means of production.

Secondly, across common pool resource regimes, there is a random, and therefore equalising, element in the assignment of rights to harvest or to use the common resources. In Törbel, for example, the trees used for heating and construction are marked to be felled, and assigned by lot to a group of households. In Hirano, Nagaike and Yamanoka each *kumi* (collection of households) are assigned a zone by rotation for harvesting winter fodder, and the crop is harvested collectively for technical reasons to do with the minimisation of accidents. In Valencia a rotation scheme is used for access to water via the communal canals, from which each farmer can extract as much as possible in turn; in Murcia each farmer is assigned a fixed time period for water use. In the *zanjera* communities in The Philippines, when water is scarce, rotation systems are established. To be sure, straight randomisation (and therefore equalisation over time) is not the only rule that is used for allocating rights to harvest. In Törbel, a proportionality rule is used for grazing rights, with each farmer allowed rights in proportion to the number of cows owned and a proportionality rule is used in the lower *zanjera* communities for the allocation of water. However, such proportionality, whilst a modification to a strict egalitarianism is not a gross departure from an egalitarian arrangement given its limited extent.

Thirdly, there is some redistribution from productive effort of different kinds. Sometimes it involves provision for the poor, as has been true in Törbel since the original terms of the social agreement in 1473 (Netting, 1981: 60). Sometimes it involves a principle of averaging returns in order to reduce the incentive to over-harvest. In some fishing communities noted by Berkes in citing previous literature averaging of this sort is practised. In the Cornish
oyster fishery at Fal River, a boat with a catch considerably higher than the average would be a source of adverse comment; in the New York Gull Haven fishery, the cooperative manager set a quota that could be sold at an acceptable price and the proceeds of sale were shares among all the crews; and in the fisheries of eastern Lake Erie in Canada, those who landed more than their share were forced to average out their catches with others.

Even without these egalitarian elements stemming from secure access to common pool resources, there are features of the mode of production that constrain the degree of inequality arising from the operation of the full fruits principle. In particular, the mode of production is such that variation in the ability to harvest reflects primarily skill differences and luck rather than position within an organisation with control of the coordinated resources that an organisation allows. Members of the community are harvesting from nature and therefore have a limited capacity to increase their returns above a certain level. Where skill acquisition is through custom and practice the span of taught ability in productive activities will be low, as skills and techniques are diffused throughout the community. In short, differences in productivity are not related to the emergence of a separate class of persons who can control the means of production or the scale and pace at which others work.

From one point of view the fundamental principle of appropriation can be regarded as one of equality of opportunity, where the relevant opportunities are made up of the physical features of the harvesting regime with suitably randomised allocation of appropriation rights. However, it is also possible to argue that the system permits the opportunity to become unequal simply because implicitly it is understood that there is no ability on the part of any participants to accumulate so much property that they would fall into a different economic class from their peers. The unequal outcomes that arise as a result of the equal opportunities are thereby limited in span. Despite this, the rule of appropriation from labour is not one that is based upon a substantive conception of what participants are entitled to, for example the rule that they are entitled either to a minimum share of produce or to an equal share or even to a share that though unequal maximises their expectations, as would happen under the difference principle. The implicit rule is free and unequal appropriation within a limited span.

Since the returns to individuals from the common pool resources require there to be agreement on collective appropriation rules, we can see the rules of allocation as a contract to maximise the long-term total appropriation from the resource regime. If not, then it would always be possible for a participant to propose changing the rules so as to increase yield without detriment to future stock. With a fixed sized population, a contract to maximise long-term yield is equivalent to maximising the average yield of participants. So with constraints
on individual appropriation the implicit principle can also be seen as one that maximises the average yield subject to a constraint around the mean. This is not to say that the implicit rules of justice require appropriation to conform to some profile of return. In some years, under some circumstances, variance will increase or decrease purely by chance or as the result of variations of effort among participants. Nonetheless, although an average return maximizing rule, it is so with an implicit constraint on the span of variation. In noting the constraints that are implicit elements in the appropriation rule of the common pool resources, I do not mean to suggest that the formal rule is the adoption of a maximum average returns principle plus a constraint relating to the variance around the mean. We should still conceptualise the rule as allowing those working to receive the full fruits of their labour, but acknowledge that this rule is acceptable because the social and economic conditions in which it is adopted are ones in which the variance of returns will not be high. Strictly speaking, then, we should refer to the 'constrained full fruits' principle, rather than a simple principle of allowing people to take what they can get.

To understand the logic of the full fruits principle it is useful to contrast its operation with a regime governed by a principle of Hohfeldian liberty rights in which each is free to appropriate but none is under any obligation to allow the other to appropriate (Hohfeld, 1922). In a regime governed by Hohfeldian liberties, participants are free to appropriate, but are under no obligation to allow others to appropriate. For example, two salvage vessels may compete with one another to be first to the wreck. The second is under an obligation to allow the first to conduct the salvage, but is under no obligation to allow the other to be first. A property regime of Hohfeldian liberties can still generate a tragedy of the commons, however, since the cumulative unintended effects of each person exercising their liberty is to destroy the natural resource for all.

If we think that the social contract embodied in the common pool resource regimes is a contract to replace Hohfeldian liberty, we can see the logic of the full fruits principle. Under common pool resources regimes, there are duties to refrain from interfering with others appropriation, for example by waiting one's turn in a rotation system but, within those constraints, the participants secure the full fruits of their labour and are under no obligation of justice to share their product with others. Why should this be? The contract abridging the Hohfeldian liberty is intended to be one to mutual advantage. That is to say, each participant intends to be better off as a result of the contract than without the mutual restraint, because the contract promises an end to the mutually destructive exercise of Hohfeldian liberties. No one would agree to give up their Hohfeldian liberty unless it was advantageous to do so. In this situation, we might think that those who can anticipate being more productive or luckier
in respect of their labours will not accept a contract that gives them less than their anticipated marginal product. Those who anticipate being less fortunate cannot force the more productive to do so. The full fruits principle can be seen as the best that the most productive can do in exchange for giving up their Hohfeldian liberties.

Yet, this line of argument seems insufficient. All it establishes is that without some gain, it would not make sense of an appropriator to sign a contract requiring a restriction upon the freedom to appropriate. It does not show that in a contract from which each gains, some gainers might have to share the reward of their work with others. After all, one can gain and still share some of the fruits of that gain with others. Moreover, those who anticipate being less productive cannot be forced into an arrangement in which there is no sharing at all, since they could always threaten to continue acting under the freedom to appropriate what they can, thus undermining the basis of the social agreement. Of course, this threat could mean that there is less available for all, since over-harvesting of a resource will lead to the depletion of that resource, but that is simply the nature of the threat-advantage that the less productive have.

Indeed, this principle – that in gaining one is under an obligation to share the fruits of one's labour with others - is a central part of Rawls's rationale for the difference principle, as we shall see later. So the logic of contractual advantage, by itself, will not justify the full fruits principle. We need an additional set of arguments for showing why the mutual gain secured by the social contract is accompanied by the right to retain the full fruits of one's labour rather than mutual gain accompanied by an obligation to pool those fruits.

4. The Logic of the Full Fruits Principle

Can we give an account of the norms by which we might rationalise such a constrained full fruits principle? What concepts and principles need to be in place before we can reconstruct the logic of such a social contract? Consider what values might be lost if the connection were not maintained between productive effort and retaining the right to the product of that productive effort.

To answer this question we need the method of comparative evaluation, by which we consider the most favourable alternative that we can to a regime in which producers keep the full fruits of their own labour. To illustrate this, consider a situation in which each individual was entitled to the full fruits not of their own labour but of someone else's labour. Let us imagine
a community confronted by a common pool resources problem that constrained the appropriation of each individual producer, but then randomly assigned the product of each person’s effort to someone else. Each person is matched with one other person. No person can keep his or her own product, but no person is left without someone else's product upon which they could call. This is a system of random one-to-one assignment of product. Of course, such an arrangement would increase transactions costs compared to a situation in which producers keep their own product, transactions costs being here defined as the costs of running a particular economic system. Under the one-to-one assignment regime, records of transactions would be needed, products might have to be stored waiting collection and transport would have to be provided. However, even if we ignore these transactions costs issues, there are other serious problems with the random assignment model.

The first is the loss of incentive to production that such a system would entail. Where individuals are allowed to keep the fruits of their labour, they have greater incentive to put in more effort and so raise productivity. We need only a modest bias to self to secure greater returns under the full fruits principle that under random one-to-one assignment, since under random one-to-one assignment there would be no reason at the margin of activity to extend effort as much for others as there would be for oneself. Of course, we could expect paired individuals would seek to bind themselves in various ways, making the transfer of their product conditional upon certain minimum requirements forthcoming from the other side. Here again there would be increased transaction costs, since agreements would need to be drawn up and compliance monitored. So, from the point of view of common interests, there is a reason to allow individuals the full fruits of their labour as a way of ensuring that resources are not wasted.

Deviations from effort for others compared to oneself also risks problems of fairness in exchange. Under the principle of one-to-one assignment two parties exchange their products. But the exchange might not be fair in the sense of being an exchange of equivalents. Within the standard construction of an exchange economy, even in barter form, participants exchange goods at their equivalent value, since they would not enter the exchange unless they were getting something of at least equivalent value to that which they give up. However, under one-to-one assignment, there is just the stock of goods your counter-part has produced in a given period, which is assigned to you, and the stock of goods you have produced in a given period assigned to your counter-part. There is no reason why such an exchange should lead to a transfer of equivalents. Perhaps for example your fishing or your crop growing has been blessed with good fortune during the course of time, whereas your counter-part has been unlucky. In terms of exchange value, you would not be getting the full value of what you
have given up, whereas your counter-part would be getting more by way of exchange value than what he or she was giving up. In that sense, exchange would be unfair. It could be, of course, that these differences would be evened out over time if the pairing went on long enough, but this just highlights the increased transactions costs that are associated with such a regime.

Yet again, although the reassignment regime creates problems of fairness, it is possible to imagine situations in which these problems are dealt with. We could suppose that instead of being assigned the product of one other person, you were assigned the average product of everyone else but yourself, via a mechanism that first pooled product and then redistributed it. However, then the question arises as to how the balance is struck between what one puts into the common pot for others and what one is allowed to draw out of the common pot for oneself. If one put into the pot as much as the average of everyone else, then there is no problem, but this cannot be guaranteed.

5. The Full Fruits and Difference Principles

The constrained full fruits principle contrasts with a number of other principles and approaches to question of economic justice and we can highlight the distinctiveness of the empirical approach by identifying these contrasts alongside such similarities as there are. The most important of these alternatives is the Rawlsian difference principle.

For Rawls, the difference principle is a special case of his general conception of justice, the central idea of which he states as follow:

> 'All social values – liberty and opportunity, income and wealth, and the social bases of self-respect – are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage.' (Rawls, 1999: 54)

Working from this general conception in a number of different interpretations, Rawls makes it clear that his preferred alternative rests upon an idea of democratic equality, according to which the position from which to judge the justice of inequalities is from the point of view of the least well off: 'the higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society' (Rawls, 1999: 65). The canonical statement of the principles governing social and economic goods runs as follows (Rawls, 1999: 266):
'Social and economic inequalities are to be arranged so that they are both:

(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
(b) attached to offices and positions open to all under conditions of fair equality of opportunity.'

Thus, according to the difference principle, no inequality is just unless it works to the advantage of the least well off, provided also that the just savings and equal opportunities principles are also satisfied.

The difference principle contrasts in a number of respects with the constrained full fruits principle. The constraints imposed on producers by the full fruits principle consist in limitations on their freedom to use resources to ensure that resources are conserved for the long-run and in such a way as to share access, usually on a rotational or random basis, with other producers. These constraints limit the span of inequality of advantage that might otherwise be generated by a simple application of the full fruits principle, reflecting the rough equality of power assumption that is a feature of justice-conforming social contracts. However, since there is no redistribution of the fruits of labour from those whose efforts secure a larger return to those whose efforts secure a smaller one, inequalities of possessions will sometimes (perhaps even typically) arise when the position of the least well-off could be improved by redistribution from the better off to the worse off. To understand the significance of this contrast, it is useful to compare the difference principle with the full fruits principle both in terms of their respective logical structures and in terms of the values and conceptions of society that they presuppose.

The difference principle is often interpreted as an 'end-state' principle of justice (Nozick, 1974: 155), that is to say a principle that judges the justice of a distribution by its correspondence with a particular pattern in the distribution of resources. Understood in this way, an end-state principle of justice places an obligation on those agents for whom the duties of justice are relevant to bring about that end-state. Thus, we may suppose that an end-state conception of justice would oblige those with political authority to bring about that end-state, or at least establish institutions the general tendency of which was to produce that end-state, as well as require members of society to cooperate in achieving that goal.

However, although the difference principle is often interpreted in this way, it is only one possible reading and one that is incompatible with at least some of Rawls's own mature
formulations of the issues. In the mature version of the statement of the difference principle it cannot be interpreted as placing a duty on members of a society to ensure that the position of the least well-off is as high as it can be. Rather it says that when individuals seek advantages for themselves, they can only do so in justice so long as they secure the maximum benefits possible to the least advantaged. Thus, Rawls says:

‘… the more advantaged have a right to their natural assets, as does everyone else; this right is covered by the first principle under the basic liberty protecting the integrity of the person. And so the more advantaged are entitled to whatever they can acquire in accordance with the rules of a fair system of social cooperation.’ (Rawls, 1999: 89, italics added)

In this formulation, the right to one's natural assets is prior to any obligations one may have to promote the well-being of the least advantaged. That this is an important element in Rawls's mature formulation is highlighted by the fact that the italicised words are added to the corresponding passage in the first edition which simply reads:

‘… the more advantaged representative man cannot say that he deserves and therefore has a right to a scheme of cooperation in which he is permitted to acquire benefits in ways that do not contribute to the welfare of others.’ (Rawls, 1971: 104)

There is thus a move in Rawls's rationale for the difference principle from the earlier claim that one has no liberty to acquire advantages unless one thereby benefits others to the later claim that one has a liberty to acquire advantages provided that others are benefited. Although people do not deserve their natural talents, principles of freedom and the basic integrity of the person mean that people do have a right to their natural assets.

Any such move undermines an interpretation of the difference principle as an end-state principle requiring the members of society to bring about a particular pattern in economic possessions. The end-state interpretation is misleading because it implies that the members of a society are required in justice to act so as to maximise the well-being of the least well off. On this view of the difference principle, Cohen (2000: 126-7; compare Cohen, 2008: chapter 1) is right to say that Rawls's acceptance of economic inequality is problematic, because if the more productive members of society were to affirm the underlying values of the difference principle, they would see that they had no right to secure greater advantages by holding out for incentives when they could make the same contribution for the same final income as everyone else. By contrast, if we see the difference principle as a condition on individual
appropriation rather than a goal implying a duty on individuals to undertake appropriation, then the difference principle does not impose an obligation upon all to raise the well-being of the least well-off to the highest level possible. Rather, when the more productive use assets that are rightfully theirs, they should also accept an obligation to pool the benefits of those assets. The difference principle says that when seeking to advantage themselves all members of society may only take those benefits that arise from a system in which the well-being of the least well-off is maximised.

The distinction is important because it has implications about the extent to which the more productive are required to exercise their abilities. Taken as a goal of public policy, a goal that had to be internalised by the more productive, the difference principle might require those who were more productive to work beyond any level of effort they might freely chose in order to raise the well-being of the least well-off, an obligation inconsistent with a right to one's natural assets grounded in ideas of basic liberty and personal integrity. To illustrate the issue, consider how the balance between work and leisure might be structured. Suppose a society in which the more productive chose to work only three days a week. In such a society, the least well-off might be better off were the more productive to work for five days a week. Yet, if working the extra two days is not valued by the more productive, the situation of the worst-off is not improved. The more productive may not work the extra two days, because they do not value the gain they receive in material goods as highly as they value the loss of leisure they incur from the extra days of work. Under a scheme in which the combination of work and leisure were freely chosen by the more productive, the least well-off may not be as well-off as they could be.

We can strengthen the contrast even further by noting that the lot of the least well-off could be improved, without any loss of economic efficiency, by tilting the incentives of the better off toward longer working hours by imposing a lump-sum tax on ability that the well off were required to pay. In these circumstances, the better off would work longer hours and a portion of the material benefits they produced would be available to the least well-off to improve their position in accordance with the difference principle interpreted as a social goal. Standard economic theory shows that a lump-sum tax does not distort incentives at the margin and so will not reduce work effort below that which is maximally attainable. Were such lump-sum taxes to be imposed, then there would be grounds for Nozick's (174: 169) otherwise implausible claim that taxation is 'on a par with forced labour'. Another way of putting the point is to say that lump-sum taxation is inconsistent with recognising the separateness of persons (Weale, 1993: 81-2). If we see the issues from this point of view, it is possible to see why Rawls revised his earlier formulation of the difference principle by making it clear that
the freedom and integrity of the person need to be preserved in any account of a just
distribution. The fruits of the labour of the better off are to be redistributed to the least well-
off, so far as possible, but conditional upon a free choice about work effort made by the better
off.

Yet, if we accept this interpretation of the difference principle, there is a problem in finding a
rationale for a strong difference principle, understood as requiring more redistribution than
the constrained full fruits principle, within a framework of contractual reasoning. This
difficulty is seen in the successive formulations Rawls himself offered. Over the years Rawls
sought to justify versions of the difference principle by means of a succession of different
assumptions about how the contracting parties would reason. In 'Justice as Fairness' we find
what we might call the proto-difference principle, namely that inequalities are arbitrary
'unless it is reasonable to expect that they will work out to everyone's advantage' (Rawls,
1958: 48). This does not have the exclusive focus on the least well-off that the canonical
difference principle does, but it nonetheless ties the fortune of those with lower economic
productivity to the returns to those with high productivity. This proto-difference principle is
justified by appealing to the reasoning of the parties establishing a social contract as reflecting
restrictions which 'might be thought of as those a person would keep in mind if he were
designing a practice in which his enemy were to assign him his place' (Rawls, 1958: 54).
Following Barry's early critique of this approach, namely that it required the parties to reason
from assumptions that were false, most people, including Rawls himself, have given up on
this justification of the difference principle. The replacement strategy was initially to seek to
justify the principle as the outcome of the maximin procedure of rational choice behind the
full veil of ignorance, but again this ran into insuperable opposition. Yet another approach,
 canvassed by Barry (1989: 229-31), is to imagine the difference principle as the outcome of a
bargain between social groups successively moving from an initial situation of equality and in
which the representatives of any group can veto a move. Yet this line of argument that will
not yield the difference principle if there are more than two groups in society since it may
well be the case that the middle income group, say, will veto a departure from equality even if
it worked to the advantage of the least well-off.

The difficulty of finding an adequate rationale for the difference principle within the
framework of contractual reasoning stems from the fact that the principle itself can be seen as
the expression of a conception of society that is at odds with a contractualist understanding.
The contractualist conception starts with the basic freedom of individuals, understood as
Hohfeldian liberties, and inquire into the character of a collective agreement that would take
individuals beyond their non-agreement point. Social union is not assumed but emerges as a
product of an agreement that all individuals, from their different points of view, can accept. By contrast, behind Rawls's understanding of the difference principle in its strongest version, there is a specific conception of society, the economy and the part that individuals severally and collectively play in production, in which a strong form of social union is presupposed as the basis for agreement. Here is a crucial passage to this effect worth quoting at some length (differences from the first edition are stylistic rather than substantive):

The difference principle represents, in effect, an agreement to regard the distribution of natural talents as in some respects a common asset and to share in the greater social and economic benefits made possible by the complementarities of this distribution. Those who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out. The naturally advantaged are not to gain merely because they are more gifted, but only to cover the costs of training and education and for using their endowments in ways that help the less fortunate as well. No one deserves his greater natural capacity nor merits a more favorable starting place in society. But, of course, this is no reason to ignore, much less to eliminate these distinctions. Instead, the basic structure can be arranged so that these contingencies work for the good of the least fortunate. Thus we are led to the difference principle if we wish to set up the social system so that no one gains or loses from his arbitrary place in the distribution of natural assets or his initial position in society without giving or receiving compensating advantages in return.’ (Rawls, 1999: 87)

It is this commitment to the idea of natural talents as a common asset that formed the moral core of Rawls's proposal for the difference principle.

If we compare the idea in this passage that we are 'to regard the distribution of natural talents as in some respects a common asset' with the idea from Rawls cited earlier that 'the more advantaged have a right to their natural assets', then there is an obvious tension. If the distribution of natural talents is to be regarded as a common asset, it would be allowable to require of the most able that they work so as to raise the position of the least well-off, and it is hard to see how one could resist the permissibility of lump-sum taxes on ability if they were required to achieve this aim. A further implication, as Cohen pointed out, is that it would then be impossible to reject the logic of full economic equality. Apart from the sort of 'incentives' necessary to compensate for the extra expenses there might be involved in training to enhance ability or invest in human capital, there would be no case of higher returns to the more advantaged. By contrast, if the more advantaged have a right to their natural assets, it
would be a violation of the integrity of their person to require them to work longer than they would freely choose, no lump-sum taxes would be permitted and difference in returns would be allowed.

There are then at least three principles that can be identified. The first is a strong difference principle, grounded in the idea of natural talents being a common asset and perhaps most plausibly understood as involving strict economic equality rather allowing inequalities that benefit the least well-off. The second is Rawls's mature difference principle, which accepts the idea of individuals having a right to their natural assets and so allows differences in reward, but which holds that those differences are only permissible provided they work to the advantage of the least well-off. The third position is the constrained full fruits principle, which rests upon the idea that only social agreement can limit a Hohfeldian liberty to appropriate resources on the part of individuals but which also limits the inequalities of possession that may result from such an agreement.

There is one implication of the common assets assumption that seems counter-intuitive, and is at odds not only with Rawls's mature version of the difference principle but also with the full fruits principle and longer traditions of theorising. The common assets assumption has the effect of making the exercise of one's labour power a means by which one's freedom to acquire possessions is lost. Without either a Hohfeldian liberty or a right to one's natural assets, labour power comes to be regarded as part of a common store of capacity under the control of the community. This contrasts not only with one version of the mature Rawls but also with liberal Lockean and Ricardian socialist position of Thomas Hodgskin. In the Locke/Hodgskin interpretation of the full fruits principle, the exercise of labour power is the means by which goods and products are removed from the common store and reserved entirely to the use of particular individuals. Locke's example of the acorns, which merely replicates the practice of those involved in common pool resource regimes, is intended to establish that it is labour that enables individuals to appropriate. Thus, rather than regarding labour power as a common asset under the control of those who manage common assets, the full fruits principle rests on the assumption that labour distinguishes what is common from what is private. The Locke/Hodgskin theory and the practice of common pool resources regimes rest on the assumption that no one owns the labour of another. Instead of the ownership of each by all, there is the recognition that in order for individual to enjoy the returns to their own labour they must grant a similar right to others.

The collectivism of the common assets assumption can thus be contrasted with the individualism of both the mature Rawls account of the difference principle, with its
assumption of individuals having a right to their natural assets, and a contractarian viewpoint built upon the idea of Hohfeldian liberties in the non-agreement point. In this respect the mature Rawlsian account of the difference principle is closer to the constrained full fruits principle than it is to the common assets version of the difference principle. There is, I think, no easy way of arbitrating between the collectivism of the common assets viewpoint by contrast with the individualism of the basic right/Hohfeldian liberty account of the grounds of distribution. My own view is that the collectivist viewpoint only really makes sense for the members of a tightly knit ideological or religious community the members of which see themselves solely as the instruments of a common purpose and where the labour of each is seen as a contribution to the whole. There is a sense in which the members of such a community are beyond what Hume called the 'cautious jealous virtue' of justice which presupposes a distinction between 'mine and thine', the principle of bourgeois right that Marx thought needed to be transcended. For these reasons, the contest seems to be between the difference principle as in the mature Rawls and the constrained full fruits principle. In making this comparison there are considerations both of method and of content.

Rawls invokes the right to one's natural assets as an implication of the first principle of justice granting a basic liberty that protects the integrity of the person. If the ascription of rights is understood as performing one of its essential functions, namely protecting individuals against the demands of collective welfare, then one can see how the difference principle may be derived. In making it a condition for one's own gain to benefit the least well-off, the difference principle can be said to protect liberty, for just as making it a condition of driving that one has a license does not restrict one's liberty to drive, so making the sharing of benefits of condition of accrual does not affect one's liberty to work or not. If liberty is taken to mean that one is undetermined in one's choice of options as presented to one, then it is no abridgement of liberty however those options are defined. Of course, if one defines liberty more extensively as having a choice among the widest range of possible options, then the difference principle will restrict liberty, since it rules out the more advantaged working without benefiting the least well-off. So the extent to which the right to one's natural assets protects one's liberty is itself a contentious matter. On the other hand, it can be argued that framing the issue in terms of the integrity of the person over-protects the right to one's natural assets since it would rule out a regime in which all individuals were required to work a certain amount of time on a generally, though not unanimously, agreed common project related to such matters as flood defence or protection against soil erosion. In short, a right resting on the integrity of the person may under-protect or over-protect against the demands of a just contribution to the common good.
For this reason, there is some merit in avoiding the language of rights as part of the argument and making agreement to abridge common Hohfeldian liberties the key intellectual move. However, a proponent of the mature Rawlsian difference principle can reply on the issue of content at this point and say that the full fruits principle, even in its constrained form, is insufficiently redistributive. Why should the more productive be entitled to keep the fruits of their labour if the less productive could be made better off? An egalitarian theory of justice, it might seem, would require such redistribution. One answer to this question is to note the difficulty that Rawls always had in providing a coherent rationale for the difference principle without the strong common assets assumption that we have already discussed. Indeed, if one accepts Rawls's 'mutual disinterest' assumption of how the contracting parties would negotiate, the logical upshot of that approach would not be a difference principle but an enhanced version of the Pareto principle, according to which there should be no inequalities that do not work to the disadvantage of the least well off (or of anyone else), and this could be a much more inegalitarian outcome than that allowed by the constrained full fruits principle. For what is significant about the constrained full fruits principle is that it implicitly limits the range of inequality that is permitted, both because it is only differences of skill and productivity that are allowed to make a difference and in randomising access to common pool resources. A principle that has the effect of maximising productive use subject to an equality constraint may turn out to be more egalitarian than one formally directed at the position of the least well-off.

6. What about Redistribution?

An important element in our common sense thinking about justice is that goods – or at least some goods – should be distributed according to need. The point is not simply that a good society is one that ensures that the needs of its members are met. Rather, to claim that distribution according to need embodies justice is to say that those in need have claims that they can assert as a matter of right against the fellow members of their society. Where the relief of poverty or destitution is not associated with claims based on right, then we may have a regime of humanity or compassion, but we do not have a regime of justice. Yet, redistribution according to need seems incompatible with the principles that those who work are entitled to the full fruits of their labour.

This dilemma was put very well by Cohen from within his own socialist theory of justice, although he notes that the same point was made by Anton Menger nearly a hundred years before. Cohen begins by noting that the traditional communist theory of the working class
was that it combined four distinct elements: it constituted the majority of society; it produced the wealth of society; its members were the exploited in society; and its members were the needy people in society. For Cohen, a significant problem facing any theory of justice is the way in which under contemporary class conditions, these elements come apart:

'Particularly problematic, from the point of view of a socialist political philosopher, is the coming apart of the exploitation and need features. It forces a choice between the principle of a right to the product of one's labor embedded in the doctrine of exploitation and a principle of an equality of benefits and burdens which negates the right to the product of one's labor and which is required to defend support for very needy people who are not producers and who are, a fortiori, not exploited.' (Cohen, 2000: 108)

The implication of this disjuncture of circumstances is that a theory of justice can no longer be based upon a claim by workers to the full fruits of their labour. How can one respond to this difficulty?

The empirical social contract is being used as a model of reasoning about principles of justice, not a model of actual social organisation. Because the full fruits principle is typically adopted for empirical social contracts that the same principle can be applied to social and economic conditions in the real world. Perhaps the most important feature of the empirically modelled social contract is a rough equality of power among participants. However, in the absence of that condition being satisfied, application of the full fruits principle would allow actual inequalities of power to influence the fate of people. If real world conditions are unjust, then a simple application of the full fruits principle might compound that injustice rather than alleviate it. For example, the ability to labour is dependent upon training and the imparting of skills. Applying the full fruits principle in the absence of such training would not mean greater justice but less. Similarly, an important element on the applicability of the full fruits principle is that individuals labour in the context of a randomising assignment of opportunities, thus off-setting positional advantages that some might gain over others. Where this condition is not satisfied, then it would be wrong to apply the full fruits principle without modification. Gauthier faced a similar problem in using the idea of the market as a morally free zone. However, he noted that the use of the idea of a market did not imply support for laissez-faire in the world as it is (Gauthier, 1986: 84; 262) and commentators agreed (Braybrooke, 1987: 750-1). Similarly, there should be no assumption that a constrained full fruits principle will rule out all forms of compulsory redistribution as being unjust in the real world.
We have to consider how need arises before considering the role that it has a theory of justice. People are born and immediately and for many years subsequently are utterly dependent upon others for their sustenance, education and prospects. At various points in their lives they work and are productive. They share their product among families, households and friends. They have children, depleting their family or household earnings power. They fall ill, have periods of involuntary unemployment or suffer disability as a result of injury or accident. They grow old becoming increasingly frail, if they are lucky avoiding second childhood but often not. They die with the residue of their affairs to be attended to. Need is the name we give to the vulnerable periods. From the individual point of view, the task of a life well led in economic terms is be productive enough in one's good years to be able to cope with the demands of one's vulnerable years. From the point of view of a person who is a partner in a social contract, the life lived well in economic terms is equivalent to playing one's part in an agreement in which the costs and benefits of the life-course are fairly shared.

Some will argue that we do not require a social contract to deal with occasions of need, since the periods of vulnerability can be dealt with through private contractual arrangements. Rational people will foresee the periods of need to which they are going to be subject and will insure themselves against loss of income and financial risk. In a great society such insurance is grounded on the advantages that can be obtained by spreading risk among very large numbers. Social protection through the accumulation of private contracts will be sufficient to deal with the problem of need. If we believe that in some sense the full fruits of what people earn belong to them, then there is no place for compulsory redistribution on grounds of need alone. If people have not taken out insurance to cover their needs, then they have simply chosen to spread the costs and benefits of their life-course in a particular way, and it would be wrong to expect others, who have to make provision for their own needs, to pay for the needs of others when those others could have paid for themselves.

In a world of agents with perfect foresight in which the probability of all future events were predictable, this line of argument would carry weight. However, this is not the world of bounded rationality and defeasible practical reasoning. One can only insure against predictable events the incidence of which are unknown. One cannot insure against the intrinsically unpredictable. It follows from this that one cannot insure against the sort of risks that are associated with technical and economic innovation, for example the risks of finding oneself in the middle of life having invested in skills for which there is now no market. Since technical innovation is intrinsically unpredictable – by the familiar argument that if it were predictable it would in effect already have been invented – there is no insurance market
protecting individuals from the effects of technological redundancy. By the same token relevant forms of insurance will not have been invented for unexpected threats to health and well-being, for example the emergence of AIDS or the growth in those suffering dementia.

Secondly, insurance cannot be devised to protect you from some forms of risk that are utterly predictable and with potentially large consequences, the most important of which is the risk that your parents did not do well by you in various ways. The risks associated with parental neglect and mistreatment may have lasting effects to the detriment of one's earnings power and ability to compete in a market. (Of course, they also have effects for personal happiness, but that is not the issue here.) The first rule of a flourishing life is to choose your parents wisely. The second rule is to take out insurance against the prospect that you cannot do this. Embryos are hardly in a position to do either and retrospective insurance coverage is a contradiction in terms. By the same token, insurance will not protect you against the financial losses associated with having children. The same market that rewards people, so far as it does, according to their marginal productivity fails to take differences of size of family dependents into account. Moreover, the recommendation that people save before having children runs up against the problem that there is not enough time before children are viable to accumulate sufficient assets to cover their costs, particularly if the period of education and training lengthens. There is no private arbitrage between the present needs of those undergoing education and training and the future increase in earnings that such education and training provides.

Thirdly, the benefits of large numbers cannot be gained if too many people under-insure themselves for the number of people among whom the risks can be spread will be too small. If individuals have a systematic bias to the near – and experimental economics and empirical analysis suggests that many do – then the conditions will not be in place for insurance to play its role. A social contract over insurance can be understood as a way of counteracting the deficiencies of individual rationality in this regard. There is potentially a collective action problem – akin to the provision of public goods – in respect of creating protecting institutions from which all could potentially benefit, when only some will see the logic of the contribution. Moreover, where there are asymmetries of information such that individuals know their circumstances better than their potential insurers, problems of adverse selection will arise, by which those who know they are a bad risk have the incentive to take out the insurance, whilst those who know that they are a good risk will avoid doing so, with predictable consequences for the solvency of the insurance fund.
In the face of these barriers to the establishment of successful private insurance markets in respect of the risks associated with the life-course, much of what might otherwise be thought of as vertical redistribution from the better off to the worse off is better regarded as the protection available to all only under some form of social contract. Redistribution should not be regarded as a device by which income is transferred from the more productive to the less productive, but as a device by which income is spread over the life-cycle. In this way we can reconcile a commitment to the principle that people are entitled to the full fruits of their labour, insofar as this is captured by one's marginal productivity, and the widespread moral intuition that there is a social responsibility to meet human need. What we can envisage in respect of redistribution is the operation of a social device for spreading marginal product over the course of one's life in a way that is both individually prudent and dependent upon a social contract than mandates cooperation.

Looking at the issue of redistribution in this way helps us resolve what would otherwise be an embarrassment for the general approach taken in our theory. Although we have modified the rationality assumption and placed contracting parties in an empirical equivalent of the Humean circumstances of justice, we have followed Gauthier (1986), who in turn saw himself as following Rawls (1971) – as well ultimately as Hobbes and Glaucon- in characterising justice as a form of cooperation among equals to mutual advantage, with the consequence that it becomes hard in terms of contractarian reasoning to deal with the congenitally disabled (see Gauthier, 1986: 18 n.30 and 268). It was this implication of the mutual advantage approach that Brian Barry (1989: 245-7) drew attention to as being an obvious deficiency, since it left the weakest members of society with no claims of justice against the stronger. Barry allows that an argument might be created by which it is the families of the congenitally disabled who have a claim of justice, but thinks this is insufficient since it makes such individuals only the derivative beneficiaries of those claims. However, the embarrassment is not as great as Barry's line of argument supposes. The mutual advantage that is gained by individuals through redistribution is protection against risks that occur in the life-course given the fact of family interdependence. If adequate protection is not provided it is not simply that the heads of households can complain of an injustice because the burdens of care have unduly fallen upon them, it is also true that those who need the care can complain that they are being excluded from the advantages that would accompany a redistributive scheme.

Of course to say that the logic of redistribution in a social contract approach is one of mutual insurance to mutual advantage against otherwise uninsurable risks is not to say that all forms of redistribution take this form. As it happens, a high proportion, about two thirds to three quarters, does, but that still leaves the remainder that cannot be rationalised in this way. For
someone who thinks that justice requires more redistribution in the welfare state than there currently is, our theory, which seems to imply that there should be about one quarter to one third less, may seem inadequate. However, this would be to confuse the construction of a theory designed under the assumption of circumstances of justice obtaining with our intuitive judgement from the world as it is. There is no reason to assume that the world as it is is just. Indeed, in referring to the problem of excessive executive salaries, I have suggested at least one form of current injustice. Some at least of what we observe currently in the form of redistribution is occasioned by existing forms of injustice, not least the social deprivation that fails to provide the education and training that would equip individuals to make as much of a productive contribution as they are in principle able to do. To apply intuitions derived from this context to the quite separate case where there is an association between marginal product and effort would be a mistake.

The structure of a social contract theory is proceduralist, relying upon the claim that the principles that emerge from a suitably characterised situation of collective choice will provide us with an understanding of the principles of justice. In a broadly empirical approach, we try to find examples of collective choice operating under conditions that approximate to those we would require in a justifiable social contract. In the example of common pool resource regimes, we saw that the successful social contract required participation in the making of rules. What would an analysis imply for our understanding of political constitutions in great societies? Moreover, would that understanding reinforce or undermine the account of justice we have tried to develop in relation to economic justice and the great society? To those questions we now turn.

Any human being is going to be in need at some point in their life, if only when an infant. More generally, periods of need typically coincide with the life-course – infancy and old age – or with contingent events that create financial dependence, whether that be illness, disability or involuntary interruption of work. Much of what we observe as redistribution to the needy should not be thought of as a form of vertical redistribution from the well-off to the poor, but a horizontal form of redistribution from periods in peoples' lives when there is a surplus to periods in their lives when there is a deficit. Institutionalised redistribution – from which it is easy, but misleading, to form our intuitive judgements – is then best conceptualised as a form of collective insurance rather than a simple transfer from one group to another. It certainly ought not to be thought of as a transfer from those who work to those who do not work. When such collective insurance is provided, members of society are not being deprived of the full fruits of their labour. Rather, when the collective insurance is well-designed, beneficiaries are consuming the fruits of their own labour in ways that even out the
fluctuations of consumption over the life-cycle. To the extent to which this situation obtains, there is no conflict between redistribution according to need and a fair return to labour.
References