ESSAY

A RESPONSE TO DAVID BLANKFEIN-TABACHNICK & KEVIN A. KORDANA, *ON RAWLSIAN CONTRACTUALISM AND THE PRIVATE LAW*

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Introduction

In their 2022 essay, David Blankfein-Tabachnick and Kevin Kordana reaffirm and further develop their long-standing position that John Rawls's principles of justice, including the difference principle, should apply to determine and interpret private law, including not just property and contract law, but also torts. In recent papers, Samuel Scheffler and I have made similar arguments, though we have modestly departed from their views. I contend that, while the difference principle applies to much of the private law of property and contract, it does not apply to all tort law. Rather, in tort law, the difference principle applies primarily to economic torts in unjust economic systems that do not satisfy Rawls's difference principle in the first place. Blankfein-Tabachnick and Kordana (hereinafter "the Authors") contest my argument, as well as my contention that Rawls's difference principle requires maximizing the position of society's less advantaged relative to the more advantaged, not their absolute position. After a brief summary of my position, I discuss

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¹ See David Blankfein-Tabachnick & Kevin A. Kordana, On Rawlsian Contractualism and the Private Law, 108 Va. L. Rev. 1657 (2022).

² Samuel Scheffler, Distributive Justice, the Basic Structure and the Place of Private Law, 35 Oxford J. Legal Stud. 213, 233 (2015); Samuel Freeman, Private Law and Rawls's Principles of Justice, *in* Liberalism and Distributive Justice 167, 168 (2018) (arguing that Rawls's principles apply to the private law).

³ Freeman, supra note 2, at 191–93 (arguing that in an unjust economy designed to maximally benefit the more rather than the less advantaged, the application of the difference principle to economic torts is a proper corrective to vast inequalities and economic injustices).

⁴ Blankfein-Tabachnick & Kordana, supra note 1, at 1683–87 (contending that Rawls's difference principle is "a maximizing and consequentialist theory, if a constrained one," and

why I believe the difference principle, under Rawls's final interpretation of it, is often not suitable for consistent application in determining personal tort liability and remedies, even though the principle can play a significant role in economic torts involving the violation of economic rights and liberties. I also discuss why the difference principle is best understood to require society to maximize the relative, not absolute, position of the least advantaged. I conclude with some remarks on Rawls's own reservations regarding courts' interpretation and enforcement of the difference principle, or any principle that structures the economy, including economic efficiency and utilitarian wealth maximization.

I. THE PRINCIPLES OF JUSTICE AND TORT LAW

According to Rawls, the first principle of justice guarantees equal basic rights and liberties.⁵ These guarantees include equal political liberties and their fair value; personal liberties of conscience, association, thought and expression; and basic rights protecting the freedom, security, and independence of the person, including freedom of occupation, movement, a right to hold private personal property, and the protections of the rule of law.⁶ Rawls distinguishes personal property from property in economic means of production and other productive assets, which is governed by the second principle of justice, including the difference principle.⁷ Personal property—within the realm of the first principle—covers possessions, including "certain forms of real property, such as dwellings"

not, as I contend, "an intra-schemic relational principle" of reciprocity that is nonconsequentialist and nonmaximizing).

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

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

John Rawls, Political Liberalism 5–6 (expanded ed. 2005) [hereinafter Rawls, PL]; see also John Rawls, Justice as Fairness: A Restatement 42–43 (2001) [hereinafter Rawls, JF] (paraphrasing Rawls's principles of justice); John Rawls, A Theory of Justice 266 (rev. ed. 1999) [hereinafter Rawls, TJ] (same).

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⁵ Rawls's principles of justice, in final form, are:

⁶ Rawls, PL, supra note 5, at 232, 335; Rawls, TJ, supra note 5, at 53.

⁷ Rawls, JF, supra note 5, at 114, 138 (distinguishing personal property from property in productive assets).

and private grounds,"⁸ the use of which is necessary for free and equal persons to maintain their individual independence and sense of self-respect, fruitfully exercise basic liberties, and take advantage of diverse opportunities in pursuing their "conception of the good."⁹ Property covered by the difference principle, by contrast, includes economic wealth and property in natural resources and means of production.¹⁰ Rawls says that ownership of this property involves nonbasic rights and liberties since these resources are not necessary for the exercise and development of the moral powers; they are not "an essential social basis of self-respect."¹¹ Rawls is clear that property held in productive assets and contracts for economic purposes are subject to the difference principle and are not among the basic rights and liberties protected by the first principle's rights to freedom of the person and personal property.¹² Here I agree with the Authors' position.

The primary role of Rawls's difference principle is to provide basic standards for the fair and efficient organization of the economy and distribution of income, wealth, and economic powers and prerogatives among economic agents who do their fair share in contributing to the joint social product. As such, the difference principle applies to determine and assess the justice of social and economic policies, including taxation, and laws and regulations directly affecting the economy. The difference principle also applies to the private law of property and contracts for economic purposes, for these all play a fundamental role in the fair and efficient organization of the economy and the fair distribution of income and wealth. I agree with the Authors that the difference principle is also relevant (with certain caveats discussed in Part IV) to determine and settle economic torts that arise in the course of doing business and commercial transactions. 13 What concerns me, however, is the application of the difference principle to intentional and unintentional wrongs against persons in the normal course of daily life—in their legitimate exercise of their basic rights, liberties and opportunities—to determine rules of tort

⁸ Id. at 114 n.36.

⁹ Rawls, PL, supra note 5, at 18–19.

¹⁰ Rawls, JF, supra note 5, at 75.

¹¹ Id. at 114.

¹² Id. Rawls says that rights to property of certain kinds, including private or social control of means of production and laissez faire freedom of contract, are not among these basic rights and liberties. Rawls, TJ, supra note 5, at 54; Rawls, PL, supra note 5, at 338; Rawls, JF, supra note 5, at 138.

¹³ See Freeman, supra note 2, at 191–92.

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liability and remedies. Since we are addressing personal wrongs to the freedom, security, and integrity of persons and their right to hold personal property, Rawls's first principle of justice with its implicit principle of basic needs seems more relevant to determining rules of liability (and sometimes recovery) than the difference principle.¹⁴

There is a wide range of torts against persons and their property that would come under Rawls's first principle instead of the difference principle, including intentional torts such as assault, battery, and other intentional harms against persons; trespass to land or chattels and conversion; private nuisance; invasion of privacy; defamation; intentional infliction of emotional distress; false imprisonment; malicious prosecution; abuse of process; and violation of civil rights under 42 U.S.C. § 1983. Also, there are actions in personal negligence that would seem to be more appropriately covered by Rawls's first principle rather than the difference principle, including various forms of medical malpractice (e.g., failure to obtain medical consent), traffic accidents (e.g., resulting from DUIs), and other personal injury actions. What these personal torts have in common is that they impair the capacities of individuals to effectively exercise their basic personal rights and liberties and take advantage of basic opportunities, which are protected by Rawls's principles of justice guaranteeing equal basic liberties and fair equal opportunities. On the other hand, products liability law and economic torts within the course of business and trade are more suitable for the difference principle, since economic torts largely concern infringement of, or damage to, economic rights and liberties involving the organization of the economy and economic agents' ownership and control of productive assets, which are governed by Rawls's difference principle. This would include fraud and negligent misrepresentation; business nuisances; constraint of trade; tortious interference with contractual relations; insurance bad faith; civil conspiracy (e.g., collusion and price fixing); and injurious falsehood—as well as damages to business property; employment-related negligence; and other acts of negligence

¹⁴ See Rawls, PL, supra note 5, at 7, 166 (saying that the first principle presupposes a "prior principle requiring that citizens' basic needs be met, at least insofar as . . . is necessary for citizens to understand" and fruitfully exercise basic rights and liberties and to "take part in political and social life"). A social minimum providing for basic needs is a "constitutional essential[]," whereas the difference principle, which is more demanding, is not. Id. at 228–29, 230.

arising in commercial transactions and the course of business. Here I think I largely agree with the Authors.

I also agree with the Authors that Rawls's first principle, particularly its guarantee of security of the person, is relevant to interpreting personal torts. But the Authors do not seem to regard other basic liberties, including freedom of the person and the right to hold personal property, as relevant. Instead, they appear to rely on the difference principle to interpret torts involving personal property. Here it might appear our disagreement is simply a matter of degree. But it is more than that, for the Authors say:

Rawlsianism might construct a right for individuals to bring suit or demand recourse, but such a right would not be constructed for the Kantian reasons of freedom and responsibility. The right would instead be derived from security of the person, equality of opportunity, and economic distributive reasons. More comprehensive or Kantian conceptions would be too focused on conceptual independence, derived from freedom and responsibility, to be required at this stage of Rawlsian argument.¹⁵

I disagree to this extent: Rawls regarded justice as fairness and especially the first principle (but also even the difference principle) as Kantian in *A Theory of Justice* and afterwards, ¹⁶ at least up until *Political Liberalism*, since the basic rights and liberties are derived from a Kantian conception of the person as free and equal moral persons with fundamental interests in their moral powers of practical reasoning (the capacity for a sense of justice, and the capacity to form, revise, and rationally pursue a conception of the good). ¹⁷ Basic rights and liberties

¹⁶ For example, referring explicitly to Kant, Rawls contends that, unlike the principle of utility, "the difference principle interprets the distinction between treating men as a means only and treating them also as ends in themselves." Rawls, TJ, supra note 5, at 156–57.

¹⁵ Blankfein-Tabachnick & Kordana, supra note 1, at 1668.

¹⁷ That the conception of free and equal moral persons is Kantian is explicit in the 1980 Dewey Lectures. John Rawls, Kantian Constructivism in Moral Philosophy, *in* Collected Papers 303, 305 (Samuel Freeman ed., 1999) [hereinafter Collected Papers]; see also Rawls, PL, supra note 5, at 258–59, 280 (discussing the Kantian conception of free and equal moral persons). By 1993, in *Political Liberalism*, Lectures I–VI, Rawls dropped explicit reference to Kantian assumptions, but contended that a similar "political conception" of "citizens as free and equal persons" possessing the two moral powers of a capacity for a sense of justice and a capacity for a conception of the good is implicit in the tradition of democratic thought. Rawls, PL, supra note 5, at 18–19, 34. Even then, in the three published editions of *Political Liberalism* (1993, 1996, and the 2005 expanded edition), Rawls still maintained in Lecture III,

are those necessary to the adequate development and full and informed exercise of the moral powers in matters of justice and in determining and rationally pursuing one's conception of the good. Insofar as personal torts involve violations that impair the exercise of the basic rights and liberties and capacities to take advantage of fair opportunities, it would seem that liability rules should primarily consider the wrongs and harms done to persons' capacities and opportunities to exercise and take advantage of these basic rights, liberties, and opportunities, and their moral powers of rational and moral agency, rather than the consequences for economic rights and the overall economy as defined by the difference principle. The Authors' position is thus in tension with my position that civil torts committed against persons in the exercise of their basic rights, liberties, and opportunities—which would include freedom of occupation and personal and real property interests in one's home and personal belongings—should largely be governed by considerations affecting the freedom, independence, and powers of moral and rational agency of persons, regardless of their social class, and not the difference principle's focus on the fair and efficient organization of the economy and the economic position of the least advantaged members of society. On this account, standards of care and considerations of reasonable and unreasonable risk in personal torts (as opposed to economic/business torts) should then consider measures that effectively enable a reasonable and rational person to fruitfully exercise their basic rights and liberties, as they freely pursue their conception of their good, take advantage of diverse opportunities, and fulfill their role as democratic citizens. The role of economic considerations informed by the difference principle and/or considerations of economic efficiency should play a secondary role at most.

Take a case of medical negligence, for example, where a person dies from malpractice or loses the capacity to work for the rest of their life. Or a personal injury case where a swimming pool malfunctions and drains while occupied by children, who are severely injured. The injury here is not just to security but also the freedom and integrity of the person and

[&]quot;Political Constructivism," the Kantian assumption that "the principles of justice follow from the principles of practical reason in union with conceptions of society and person, themselves ideas of practical reason." Rawls, PL, supra note 5, at 90. In the 2005 expanded edition, he finally abjures this claim in referring to the unpublished 1998 revisions to *Political Liberalism*, saying "[a]ll of these phrases are deleted" and that it is a "serious mistake" to think his (final) position in *Political Liberalism* "is Kant's or similar to it." Rawls, PL, supra note 5, at 438.

their capacities and basic needs to effectively function, fruitfully exercise their basic rights and liberties, and take advantage of diverse opportunities. The relevance of the difference principle's focus on economic fairness and efficiency—efficiently maximizing the position of the least advantaged economic class—in determining rules of liability and reasonableness of risk resulting from infringement of basic personal rights and liberties is secondary. The injury or wrong is to the fundamental rights, liberties, and opportunity interests of free and equal citizens, the least and the more advantaged alike. The question of injury should focus on the wrong done to an equal citizen's capacities to exercise their basic rights, liberties, and opportunities, as they employ their capacities in pursuit of their conception of the good and in their role as equal citizens. This is not a question directly relevant to the difference principle, with its focus on specifying property rights and economic liberties, the fair and efficient structuring of the economy, and the economic position of the least advantaged. Where the difference principle may have some role in personal torts is in helping to determine damages, which are economic rights, including loss of income over the remainder of their lives, as discussed below in addressing the baseline problem. For example, if the wages and lifetime income that less advantaged people receive is less than a fair social minimum, the difference principle, together with the basic needs principle, can be relevant in determining damages for their loss of income for personal claims.

II. ABSOLUTE VS. RELATIVE MAXIMIZING OF THE POSITION OF THE LEAST ADVANTAGED

The Authors say that Rawls's account of distributive justice "is...a maximizing and consequentialist theory, if a constrained one," which requires society to organize the economy and system of transfers to maximize the absolute position of the least advantaged class (subject to the fair value of political liberties and fair equality of opportunity). They contest my understanding of the difference principle as a nonconsequentialist relational principle of reciprocity that does not mandate maximizing the absolute position of the least advantaged, but rather maximizing their relative position compared to the position of the more advantaged. Rawls states numerous times that the difference

¹⁸ Blankfein-Tabachnick & Kordana, supra note 1, at 1687.

¹⁹ Id. at 1684.

principle is a principle or form of reciprocity;²⁰ that it is not a maximizing-aggregative principle like the principle of restricted utility;²¹ that the difference principle has "a deeper ideal of reciprocity implicit in it";²² and that the idea of equality implicit in justice as fairness exhibits "reciprocity at the deepest level and thus democratic equality . . . requires something like the difference principle."²³

This dispute is best understood by referring to the illustration Rawls provides to explain the difference principle, which the Authors conveniently reproduce in Part IV of their essay.²⁴ Our disagreement is this: Does Rawls understand the difference principle as a constrained consequentialist principle mandating that societies always seek to maximize the absolute sum of income and wealth for the least advantaged class at point D? Or does the difference principle require instead that a society regulate inequalities by remaining on the rising part of the OP curve, so that inequalities maximally benefit the least advantaged relative to the position of the more advantaged, making the least advantaged better off than any alternative measure that sustains the level of income and wealth of the more advantaged? The consequentialist reading of the difference principle for which the Authors advocate argues the former position, thereby construing the difference principle as a kind of absoluteminimum prioritarianism that requires increasing inequalities so long as they maximally benefit the least advantaged. The reciprocity view—the second view—leaves it up to democratic processes and citizens' discretionary judgment to decide the extent of permissible inequality within society, requiring that whatever the level of inequality, it must be to the maximal benefit of the least advantaged at that level.

The wording of the difference principle itself does not support the adoption of the consequentialist reading. It simply says, "[s]ocial and economic inequalities are to be arranged so that they are...to the

²⁰ The difference principle "is a principle of reciprocity, or mutuality, for society seen as a fair system of cooperation among free and equal citizens from one generation to the next." Rawls, TJ, supra note 5, at xv; see Collected Papers, supra note 17, at 420; see also Rawls, TJ, supra note 5, at 88–90 (describing the difference principle as a principle of reciprocity); Rawls, JF, supra note 5, at 49, 60, 62, 64, 76–77, 96, 123–24, 126, 130, 133 (same).

²¹ Rawls, JF, supra note 5, at 122.

²² Id. at 124.

²³ Id. at 49.

²⁴ Blankfein-Tabachnick & Kordana, supra note 1, at 1686 fig.1; see Rawls, JF, supra note 5, at 62 fig.1; see also Rawls, TJ, supra note 5, at 66 fig.6 (illustrating Rawls's difference principle).

greatest benefit of the least advantaged"²⁵—not that inequalities are to be arranged to maximize the absolute position of the least advantaged. This fits with Rawls's numerous assertions that the difference principle regulates "permissible inequalities." Rawls emphasizes, "Society would always be on the upward-rising part or at the top of the OP curve. Permissible inequalities (thus defined) satisfy that condition"²⁶

In some of Rawls's other glosses on the difference principle, however, he does appear to introduce the idea of maximizing the absolute position of the least advantaged:

- (1) "The second principle . . . dictates that social and economic policies be aimed at maximizing the long-term expectations of the least advantaged under conditions of fair equality of opportunity "27"
- (2) "Other things being equal, the difference principle directs society to aim at the highest point on the OP curve of the most effectively designed scheme of cooperation."²⁸
- (3) "[T]he difference principle requires a minimum that, together with the whole family of social policies, maximizes the life-prospects of the least advantaged over time."²⁹

Still, Rawls does not suggest that the failure to increase economic inequalities to maximize the absolute position of the least advantaged is itself an injustice. He says that, while the maximum D point is "[t]he best arrangement" and is even "perfectly just," points below it on the rising OP curve are also just—even if they are "not the best just arrangement," they are still "just throughout." It is not then an injustice—no one's rights are violated—when a society chooses for legitimate reasons to limit economic growth and raise the social minimum any further, such as, for example, to protect the environment, control pollution, or prevent further climate change; or to mitigate the degree of inequality in society to maintain its sense of community; or fund public libraries, museums and

²⁵ Rawls, TJ, supra note 5, at 266. The final published statements of the difference principle end with "the least advantaged members of society." Rawls, PL, supra note 5, at 6–7; Rawls, JF, supra note 5, at 43.

²⁶ Rawls, JF, supra note 5, at 64; see also id. at 159 (repeating the same idea).

²⁷ Rawls, TJ, supra note 5, at 175.

²⁸ Rawls, JF, supra note 5, at 63 (emphasis added); see also id. at 123 (explaining that the difference principle "selects the highest point on the (most efficient) OP curve").

²⁹ Id. at 129.

³⁰ Rawls, TJ, supra note 5, at 68.

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the arts, national parks, or wilderness areas instead of further increasing a social minimum that is itself fully adequate.³¹ Injustice instead consists in excessive expectations of the more advantaged where, "[i]f these expectations were decreased, the situation of the least favored would be improved."³²

Rawls's later works especially emphasize this reciprocity interpretation of the difference principle:

- (4) "[T]he difference principle . . . does not require continual economic growth over generations to maximize upward indefinitely the expectations of the least advantaged (assessed in terms of income and wealth) What the difference principle does require is that during an appropriate interval of time the differences in income and wealth earned in producing the social product be such that if the legitimate expectations of the more advantaged were less, those of the less advantaged would also be less." ³³
- (5) "[T]he difference principle requires that... existing inequalities must contribute effectively to the benefit of the least advantaged. Otherwise the inequalities are not permissible."³⁴
- (6) "[T]he difference principle expresses the idea that, starting from equal division, the more advantaged are not to be better off at any point to the detriment of the less well off." 35
- (7) "One scheme is more effective than another if its OP curve always gives a greater return to the less advantaged for any given return to the more advantaged." ³⁶
- (8) "[T]he so-called difference principle... says that the social and economic inequalities attached to offices and positions are to be

³¹ "Fundamental justice must be achieved first. After that a democratic electorate may devote large resources to grand projects in art and science if it so chooses." Rawls, JF, supra note 5, at 152; see also id. at 91 (explaining the permissibility of voting funds for museums, the arts, and other similar endeavors). This modifies the much-criticized position in *A Theory of Justice* that taxation for purposes of "subsidizing universities and institutes, or opera and the theater... can be justified only as promoting directly or indirectly the social conditions that secure the equal liberties and as advancing in an appropriate way the long-term interests of the least advantaged." Rawls, TJ, supra note 5, at 291–92.

³² Rawls, TJ, supra note 5, at 68.

³³ Rawls, JF, supra note 5, at 63–64 (emphasis added).

³⁴ Id. at 64; see also Rawls, PL, supra note 5, at 7 n.5 (paraphrasing the same).

³⁵ Rawls, JF, supra note 5, at 124; see also id. at 64 (paraphrasing the same).

³⁶ Id. at 63.

adjusted so that, whatever the level of those inequalities, whether great or small, they are to the greatest benefit of the least advantaged members of society."³⁷

None of these statements suggest maximizing the absolute position of the least advantaged class. Rather, they substantiate the reciprocity view. Accordingly, I believe the difference principle is best read to say, under ideal conditions and where feasible, that rules and institutions integral to the economy are to be organized so that, taking any specific level of collective social wealth in society, the share going to the least advantaged class is to be maximized at that level, thereby minimizing the degree of inequality necessary to sustain that level of social wealth. If a society decides to increase inequality to improve the position of the least advantaged, it may do so, up to point D, where their share is maximized overall, and any further degree of inequality would make them worse off. But creating inequalities to maximize the absolute level of income and wealth of the least advantaged, though permissible, is not mandated by justice. If not, then it does not require that either public or private law defining rules of property, contracts, or tort rules of liability and recovery maximize the absolute position of the least advantaged class. For reasons discussed below, I believe this reciprocity interpretation is especially appropriate under our nonideal, unjust economic conditions where there is no tendency or support for maximizing the absolute position of the least advantaged class.

III. THE BASELINE PROBLEM

Following Scheffler, the Authors contend that in determining rules of property, contract, and tort in private law, the difference principle imposes a baseline of a society whose basic structure is organized to maximize the position of the least advantaged, making them better off than any alternative economic system.

Tort law, and accident management more broadly, would find their home in an *overall* scheme that maximizes the position of the least well-off. That scheme is, of course, subject to the lexically prior liberty constraints governing security of the person.³⁸

³⁷ Rawls, PL, supra note 5, at 6–7 (emphasis added).

³⁸ Blankfein-Tabachnick & Kordana, supra note 1, at 1669.

This is "the High Rawlsian position," distinguished from "strong distributivism" which holds that *all* private law is constructed according to the difference principle, and "weak distributivism," which is a "not worsening" requirement that the least advantaged not be made worse off by rules of private law or changes to them.³⁹ The Authors contend that weak distributivism in effect validates the gross inequalities and injustices of the status quo and duplicates the conventional view:

[W]eak distributivism, despite recognizing that private law is in the basic structure, may be in many ways analogous to the conventional view—which we and Scheffler reject—leaving Rawlsianism neutral with respect to a range of private law constructions.⁴⁰

To suggest an example, suppose a personal injury case where a 45year-old corporate manager earning an income in the top 0.1% (on average \$3,312,693 per year)⁴¹ is paralyzed for life. The loss in earning capacity over 20 years is on average over \$66,000,000. Under the conventional rule of recovery, to "make whole" losses suffered by victims of negligent misconduct, this huge sum might well be a legitimate jury award (also adding in medical expenses and pain and suffering). Such a rule of recovery does not tend to maximize the economic position of the least advantaged over their lifetimes and may not benefit them in any way. But assuming it does not make the least advantaged worse off than they already are, it would be justified according to a weak distributivist application of the difference principle the Authors reject. Whereas if a well-ordered society wherein the position of the least advantaged is maximized were the baseline, as assumed by strong distributivism and the High Rawlsian position, then the wealthy corporate manager might receive no more than the wealthiest corporate manager in the top 0.1% in such an ideal society—\$500,000 to \$1 million per year (conjecturally).

This raises the difficult question of the relation between ideal and nonideal theory in Rawls. Under nonideal conditions such as our own where the economy does not maximize the position of the least advantaged, it is unrealistic to apply the strong distributivist criterion that applies in a well-ordered society where the position of the least

³⁹ Id. at 1663-64.

⁴⁰ Id. at 1664–65.

⁴¹ Julia Kagan, How Much Income Puts You in the Top 1%, 5%, 10%?, Investopedia, https://www.investopedia.com/personal-finance/how-much-income-puts-you-top-1-5-10 [https://perma.cc/JKN8-7KJM] (last updated Oct. 31, 2023).

advantaged is maximized (a property-owning democracy, according to Rawls). To begin with, many economic institutions that would exist there do not exist in our society, and vice versa: for example, a constitutionally guaranteed minimum for the less advantaged, significant wealth and inheritance taxes to reduce inequalities, and widespread dispersal of ownership of capital and resources.⁴² Rawls says in nonideal circumstances we must usually choose between several second-best arrangements that might be unjust and rejected in a well-ordered society; "then we look to nonideal theory to find the least unjust scheme." This suggests that the difference principle requires measures that maximize the least advantaged position only so far as is realistically possible within nonideal economic conditions. Moreover, this criterion must be balanced against feasible measures that enable the gradual transition to an economy in which the least advantaged are better off than in any alternative economic system (property-owning democracy or liberal socialism, depending on a society's historical circumstances).⁴⁴ So rather than requiring rules of private law that would apply in a well-ordered society to maximize the position of the least advantaged (whether relatively or absolutely), we must settle for feasible rules of liability and recovery that both improve the position of the least advantaged while also reforming the economy—given existing constraints—in the direction of a wellordered society governed by the principles of justice.

The problem is that, in our neoliberal capitalist society, there are no restrictions on economic inequalities and no guaranteed social minimum or widespread dispersal of ownership of capital. The most advantaged have incomes of tens, even hundreds of millions, which many, including the less advantaged, admire instead of critique as a systemic problem. Most people, including judges and jurors, would not accept strong or High Rawlsian distributivist rules that ignore and regard as unjust existing distributions of income and wealth and severely curtail existing rules of private law that predominantly benefit the more advantaged. Rawls recognizes this: "the difference principle is not often expressly endorsed; indeed, it may prove to have little support in our public political culture

⁴² Rawls, TJ, supra note 5, at xv (describing basic institutions of a property-owning democracy required by the difference principle).

⁴³ Id. at 247.

⁴⁴ Rawls, JF, supra note 5, at 138–39 (discussing societies in which justice as fairness can be realized).

at the present time."⁴⁵ Determining property, contract, and tort rules and remedies by reference to a baseline that would hold in ideal circumstances of a well-ordered society where the position of the least advantaged is maximized could prove to be ineffectual and even self-defeating. Justice does not demand the practicably impossible in nonideal conditions. Accordingly, Rawls envisioned a long and gradual transition to an economy fully structured by the difference principle.

The alternative interpretation of the difference principle I recommend, the reciprocity view, results in a more realistic application of the difference principle to our nonideal world. Rather than seeking measures that maximize the absolute position of the least advantaged, or simply trying to avoid worsening the position of the least advantaged as weak distributivism does, the reciprocity view asks: "What practicable rule of liability and recovery best improves the position of the least advantaged under current conditions, making them better off relative to the more advantaged than any feasibly acceptable alternative that can remain stable and enduring under our non-ideal circumstances?" There may be several realistic alternatives here. To use tort recovery for economic losses as an example: rather than the conventional view that seeks to make plaintiffs "whole," reasonable restrictions on recoveries for lost earnings might be imposed where, for example, jurors are told to award an amount that is "fair and reasonable in light of their findings as to the injuries plaintiff has suffered and will suffer because of the defendant's tortious conduct."46 Another suggestion relates to how compensation for economic loss from the September 11th Victim Compensation Fund was capped "at an amount corresponding to the median income of those whose earnings placed them in the top 2 percent of earners nationally."47 Without either reproducing vast inequalities, or aspiring to maximize the absolute position of the least advantaged, these proposals mitigate inequalities compatible with the difference principle. They are also more likely to be accepted and incorporated into the legal system than is a baseline of the highly idealized well-ordered society that maximizes the income and wealth of the least advantaged within a basic structure that makes the least advantaged better off than any alternative economic system.

⁴⁵ Id. at 132–33.

⁴⁶ John C.P. Goldberg, Leslie C. Kendrick, Anthony J. Sebok & Benjamin C. Zipursky, Tort Law: Responsibilities and Redress 589 (5th ed. 2021).

⁴⁷ Id. at 591.

IV. FURTHER IMPLICATIONS FOR PRIVATE LAW

Responding to my concerns that the difference principle is not appropriately applied directly to cases arising in personal tort law to determine standards of liability, the Authors say that constructions of negligence standards and the bounds of strict liability are not to be "read... off" from the difference principle, but rather are to be made part of an "overall scheme that maximizes the position of the least well-off."

The complete set of legal rules would be set in reference to the position of the least well-off. The selection ultimately is inter-schemic in order to best satisfy the requirements of the two principles of justice, not an intra-schemic reflection of equality as between individual people in rendering legal verdicts, whether in tort or taxation.⁴⁹

This holistic interpretation of the role of the difference principle applying to "the complete set of legal rules" in tort law and perhaps even beyond is an instructive way to understand the application of the difference principle. It resembles Rawls's account of the difference principle, primarily as applying to systems of rules within economic policy formation, not one law or regulation at a time. This takes the pressure off judges having to decide the rule that maximally benefits the least advantaged under current or ideal conditions. But then it is no longer clear what role the mandatory maximizing interpretation of the difference principle has with respect to specifying rules and standards of care within the law of torts or private law in general. The reciprocity view, or at least weak distributivism, would be more practicable on the understanding that, so long as rules of private law marginally improve the least advantaged (or at least do not make them worse off as a class), then society should rely on other areas—including legislative and administrative policies with respect to taxation and transfers, the specification of property rights in both personal property and means of production, rules of contract, securities law, and so on—to maximize the (relative or absolute) position of the least advantaged.

The holistic understanding of the role of the difference principle's application to private law underscores Rawls's caution regarding judicial application of the difference principle in the absence of statutory guidance. If judges are to understand specific tort rules as interdependent

⁴⁹ Id

⁴⁸ Blankfein-Tabachnick & Kordana, supra note 1, at 1669 (emphasis omitted).

with much or even everything that is regulated by the difference principle—not only private law, but also taxation, corporate law, finance, securities, and multiple other laws and regulations affecting the economy—then this imposes an overwhelming demand on the capacities of judges to take into account all kinds of expertise and information relevant to these decisions. Judges and lawyers are not well-situated to have access to or knowledgeably consider the complexity of information bearing on economic policies that are relevant to the informed application of the difference principle, especially on the consequentialist interpretation. As Rawls says in contending that the difference principle should not be made part of a democratic society's constitution:

[T]his risks making it a constitutional essential which the *courts are to interpret and enforce, and this task is not one they can perform well.* Whether that principle is met requires a full understanding of how the economy works and is extremely difficult to settle with any exactness, *although it may often be clear that it is not satisfied.* Still, if there is sufficient agreement on the principle, it might be accepted as one of society's political aspirations in a preamble that lacks legal force (as with the U.S. Constitution).⁵⁰

Perhaps the most that courts can do, as Rawls suggests, is assess whether existing law clearly does not satisfy the difference principle, and remedy that by moderately improving, or if not then preventing, less advantaged positions from being further worsened. The best that courts can do in our nonideal conditions, where the difference principle is accepted neither by most legislators, the general public, nor the vast majority of economists and lawyers, is to adopt the more flexible reciprocity interpretation of the difference principle I recommend, which increases the position of the least advantaged as much as possible compared with existing levels of income and wealth of the more advantaged.

These are among the considerations underlying my earlier claim that the difference principle is not conceived as serving the same role of the principle of Kaldor-Hicks efficiency that drives the wealth maximization thesis in private law. ⁵¹ For unlike the difference principle, the application of principles of wealth maximization and especially utility apply to all

⁵⁰ Rawls, JF, supra note 5, at 162 (emphases added).

⁵¹ Freeman, supra note 2, at 190.

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questions of economic and social welfare, and are the same whether applied in ideal or nonideal circumstances. Moreover, principles of efficiency and utility strictly construed also apply to questions concerning opportunities and even basic rights and liberties, in addition to economic rights and liberties. Still, if it comes down to a choice between wealth maximization and the difference principle, like the Authors I would advocate a version of the difference principle that prioritizes improving the position of the least advantaged over wealth maximization and other practical alternatives. Unlike utilitarian wealth maximization—which imposes no constraints on maximizing the wealth of the more advantaged and ever-increasing inequalities—the difference principle moderates inequalities to benefit the least advantaged, guarantees a reasonable social minimum, and combined with principles of equal basic liberties and fair opportunities, enables each citizen to fruitfully exercise their basic rights and liberties and take advantage of fair opportunities as they freely pursue their conceptions of the good and realize their fundamental interests as free and equal democratic citizens.