

## Liberty and a Rawlsian Ethos of Justice

1. Rawls' theory of justice consists in two principles: the principle of liberty and the principle of equality. The principle of liberty is "each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."<sup>1</sup> The principle of equality is "social an economic inequalities are to 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."<sup>2</sup> These principles along with two priority rules (the priority of liberty and the priority of justice over efficiency) constitute the special conception of justice.

Rawls, as well as most Rawlsians, believes that the principles of justice extend only to social institutions, and not to individual action or choice (where not regulated by institutions).<sup>3</sup> Cohen finds this position to be untenable, instead arguing that there must be an ethos of justice for a society to be just.<sup>4</sup> Whether or not this is the case has been a topic of contention, and so has the question of whether Cohen correctly describes what a Rawlsian ethos would look like.<sup>5</sup> This paper will largely address the second question, granting that an ethos is required. Of course, much of the argument for what the ethos must look like will be driven by considerations of why the ethos would be needed. But even so, I will not address the question of whether the principles of justice apply in some way to the people in addition to the basic structure. The central idea is that the "sense of justice" that Rawls includes is insufficient for ensuring certain features that Rawls asserts are essential to the well-ordered

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<sup>1</sup> John Rawls, *A Theory of Justice*, Revised Edition, (Belknap Press (Harvard), Cambridge, MA: 1999), p. 266.

<sup>2</sup> *Ibid.*

<sup>3</sup> Rawls, *A Theory of Justice*, p. 47.

<sup>4</sup> G. A. Cohen, *Rescuing Justice and Equality* (Cambridge: Harvard University Press, 2008), p. 123.

<sup>5</sup> David Estlund, "Debate: Liberalism, Equality, and Fraternity in Cohen's Critique of Rawls," in *The Journal of Political Philosophy* 6, no. 1, 1998, 99-112. Michael G. Titelbaum, "What Would a Rawlsian Ethos of Justice Look Like?" in *Philosophy and Public Affairs* 36, no. 3, 289-322.

society. If that is not the case, and the sense of justice is stronger and more committing than standardly thought, and what to call it is just a semantical choice. I'll continue to use the term "sense of justice" to refer to the element as standardly conceived, and use "ethos" for the stronger element.

Even after Cohen makes revisions in light of objections from Estlund, Titelbaum contends that ethos ignores a significant part of Rawls's conception of justice. A more complete ethos will include a more complete recognition of the first principle of justice. By examining the plausible reason for an ethos, the role it would play in Rawls' theory, and the value of liberty, Titelbaum concludes that the ethos would additionally involve an element limiting the requirement of the egalitarian element that Cohen has recognized, for the sake of developing our two moral powers as persons—to adhere to the terms of fair social cooperation, and to develop a conception of the good. This element resembles Cohen's prerogative, including Estlund's refinements.

But these revisions don't go far enough. Further consideration of the point of liberty will show us that we need to include another element, an ethos of liberty that is more analogous to the principle of liberty than what Titelbaum suggests. The point of liberty is the development of the two moral powers, particularly the capacity to form a conception of the good. Concern with the development and exercise of the moral powers motivates a concern for the worth of liberty, not just formal liberties. As it is possible, even in the Rawlsian well-ordered society, for individuals' choices to affect the worth of liberty of others, individuals will have to be concerned with the worth of liberty of others. Just as Cohen's element of the ethos is a commitment to promote equality, this new element will be a motivation to promote or respect liberty.

## 2. Cohen's Egalitarian Ethos

Cohen argues that "citizens do not qualify as fully committed to the difference principle unless that principle influences not only their voting behavior but also some of their behavior within the

structure that their vote creates.”<sup>6</sup> Unless citizens employ in their personal choices the principle that all benefits that increase the level of inequality must also benefit the least well-off, they don’t count as having “acquire[d] the corresponding sense of justice and develop[ed] a desire to act in accordance with its principles” as Rawls claims happens with principles of social justice embedded in the basic structure.<sup>7</sup> For this reason, among others, Cohen believes that personal choice must be regulated by the difference principle. He doesn’t, however, believe that this is the exclusive consideration of members of Rawls’s well-ordered society. They are additionally permitted a personal prerogative to pursue private interests, to a reasonable extent.<sup>8</sup>

Estlund objects that once Cohen includes a personal prerogative, he then must include three additional prerogatives.<sup>9</sup> First is a prerogative of affection, where one is permitted to advance the interests of her family or friends at the expense of greater equality. This extension is motivated by it being arbitrary to permit a person to fulfill her own interests but not those of the people she cares about. Second is a moral requirement prerogative, where there is an individual moral obligation to meet (that outweighs an obligation to equality), when doing so diminishes a person’s ability to promote equality. The reasoning here is that if it would be immoral to refuse to meet the more demanding consideration, it must be permissible to disregard equality to meet it. The last is a weak moral prerogative, where a citizen is permitted to act in ways that decrease equality if doing so allows her to attend to a moral issue that she isn’t obligated by and isn’t of greater weight than the issue of equality. This should be included because if self-interest is permitted to override the requirements of social justice, it would be bizarre if morally significant purposes (that don’t morally outweigh equality) do not. Furthermore, Estlund claims the four prerogatives in combination likely permit the same degree

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<sup>6</sup> Cohen, *Rescuing Justice and Equality*, p. 16.

<sup>7</sup> Rawls, *A Theory of Justice*, p. 119.

<sup>8</sup> Cohen, *Rescuing Justice and Equality*, p. 61.

<sup>9</sup> Estlund, “Debate: Liberalism, Equality, and Fraternity in Cohen’s Critique of Rawls,” p. 101f.

of inequality as results from unfettered self-interested market behavior.<sup>10</sup>

Cohen's responds that the mistake wasn't failing to include these other prerogatives, but in mischaracterizing the prerogative as being merely self-interested.<sup>11</sup> Instead, he ought to have recognized these further aspects of the prerogative. Furthermore, it isn't clear that the expansion of the prerogative justifies additional departure from equality, or if it permits additional ways to direct the same degree of departure.<sup>12</sup> However, Cohen concedes that it is plausible that the truth is found somewhere between these two options.<sup>13</sup>

This all seems right. The personal prerogative should be understood to be the permission to pursue, to some reasonable degree, one's own interests that might be in conflict with the pursuit of equality. But one's own interests should be taken as Gautier does when he claims that "it is not the interests *in* the self, that take oneself as object, but interest *of* the self, held by oneself as subject, that provide the basis for rational choice and action."<sup>14</sup> This immediately subsumes Estlund's additional prerogatives. This clarifies Cohen's question about whether "you have *one* prerogative, which is to depart from equality to a specified extent, regardless of how you use it" or separate prerogatives that justify additional departure.<sup>15</sup> If a personal prerogative is to pursue the interests of the self, broadly construed, then there is only one justification for some specific amount of departure. The prerogative does include more than Cohen acknowledged, but it isn't the case that Cohen failed to acknowledge further justifications for inequality.

3. Titelbaum makes a different argument that Cohen's ethos is inadequate. The primary

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<sup>10</sup> Estlund, "Debate: Liberalism, Equality, and Fraternity in Cohen's Critique of Rawls," p. 107.

<sup>11</sup> Cohen, *Rescuing Justice and Equality*, p. 390.

<sup>12</sup> Cohen, *Rescuing Justice and Equality*, p. 391.

<sup>13</sup> Cohen, *Rescuing Justice and Equality*, p. 392.

<sup>14</sup> David Gauthier, *Morals by Agreement*, (New York: Oxford University Press, 1986), p. 7.

<sup>15</sup> Cohen, *Rescuing Justice and Equality*, p. 391.

objection is that Cohen's ethos is incomplete for neglecting an ethos correlate to the first principle of justice. The secondary objection is that he doesn't provide enough argument for the inclusion of the egalitarian ethos. In order to determine what a complete ethos would look like, Titelbaum suggests that we must consider the reasons for including an ethos into Rawls's theory, how it is structured, and where it fits into Rawls' theory.<sup>16</sup>

The first reason for including an ethos is that without one, the well-ordered society wouldn't demonstrate the stability necessary for it to maintain over time.<sup>17</sup> When there is a dramatic divergence between private attitudes and the values endorsed by the state, and the state is maintained by public participation, this state will change in structure over time (or it will fail to be endorsed by some portion of the population). Rawls already accounts for this to some degree. He suggests the internalized sense of justice that he already posits, allows people to act in institutional capacities consistent with the principles of justice, while privately advocating contrary moral principles, such as utilitarianism.<sup>18</sup> And if we can do this in our institutional capacities, we could also do this in our voting practices.<sup>19</sup> But Titelbaum finds the sense of justice to be insufficiently strong for this to be the case. Or at least it is implausible to suppose that one could realistically maintain two such radically divergent attitudes as support for the difference principle on the institutional level and the appropriateness of being a "wholly self-interested maximizer" in one's private life.<sup>20</sup> To truly foster the kind of attitudes it takes to consistently support the Rawlsian social structure in one's public behavior, the sense of justice must be expanded into "a broader set of attitudes that would generate an individual ethos governing private behavior as well."<sup>21</sup>

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<sup>16</sup> Titelbaum, "What Would a Rawlsian Ethos of Justice Look Like?", p. 296. Again, this paper will not assess the arguments for the inclusion of an ethos of justice, but only evaluate the alternative conceptions of the ethos, on the assumption that one is required.

<sup>17</sup> This is a key role for the first moral power, to abide by the terms of social cooperation.

<sup>18</sup> Rawls, *A Theory of Justice*, p. 295.

<sup>19</sup> Rawls, *A Theory of Justice*, p. 294.

<sup>20</sup> Titelbaum, "What Would a Rawlsian Ethos of Justice Look Like?", p. 298.

<sup>21</sup> Titelbaum, "What Would a Rawlsian Ethos of Justice Look Like?", p. 299.

The second reason that there must be an ethos of justice is that, following Cohen, it's required to instill the senses of mutual respect and fraternity that Rawls posits would be present in the well-ordered society. For Rawls, mutual respect and fraternity are supposed to be evidenced in the difference principle. "By arranging inequalities for reciprocal advantage and by abstaining from the exploitation of the contingencies of nature and social circumstance within a framework of equal liberties, persons express their respect for one another in the very constitution of society."<sup>22</sup> But Cohen points out that the difference principle actually allows people to exploit their natural and social advantages when they demand incentives to produce at a higher rate.<sup>23</sup> If such exploitation is incompatible with mutual respect, then mutual respect would only be fostered in a society where the population cultivates an egalitarian ethos. A similar argument works for fraternity. The difference principle resembles "a natural meaning of fraternity: namely, to the idea of not wanting to have greater advantages unless this is to the benefit of others who are less well-off."<sup>24</sup> But, Cohen counters that fraternity found in social institutions would be undermined by private decisions to seek personal benefits.<sup>25</sup> Again, an egalitarian ethos seems necessary to maintain the kind of fraternity pervasive in the well-ordered society.<sup>26</sup>

While this seems to establish that some ethos is required, and that this ethos must be egalitarian at a minimum, Titelbaum isn't satisfied that this is the whole story. A truly Rawlsian ethos would additionally have motivations to act in accordance with (correlates of) the rest of the two principles of justice.<sup>27</sup> As such, there should be elements of the ethos corresponding to the principle of liberty, and to each part of the principle of equality. Titelbaum suggests that, like the principles, these

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<sup>22</sup> Rawls, *A Theory of Justice*, p. 156.

<sup>23</sup> Cohen, *Rescuing Justice and Equality*, p. 76.

<sup>24</sup> Rawls, *A Theory of Justice*, p. 90.

<sup>25</sup> Cohen, *Rescuing Justice and Equality*, p. 78.

<sup>26</sup> Titelbaum notes that both these arguments rely on empirical premises about human psychology, and as such, they may turn out to be unsound. However, the premises are plausible, and so we will accept them pending investigation, "What Would a Rawlsian Ethos of Justice Look Like?", p. 302.

<sup>27</sup> Titelbaum, "What Would a Rawlsian Ethos of Justice Look Like?", p. 304.

motivations would have a lexical priority. Additionally, this expanded ethos better accounts for the psychological plausibility that Cohen found in incorporating his more limited ethos.<sup>28</sup>

If the sense of justice expands into a more inclusive ethos of justice, then it should fill the same roles for Rawls's theory. So, the parties in the original position are told that the members of the just society will act in accordance with the principles they select, both in their public roles and in their private lives. Therefore, the parties must approve of principles that would be psychologically plausible to act in accordance with in daily life. Considering this, the parties would have to wonder about the psychological stability of the ethos. But since the ethos is modeled on the two principles, we won't encounter the same problems as the sense of justice did from permitting commitment to incompatible principles. Furthermore, Titelbaum believes he has an advantage over the egalitarian ethos in this respect, since the "full ethos" better mirrors the values behind the two principles of justice.

He also takes the full ethos to have advantage when considering fraternity and mutual respect. We can see this by considering why the parties select the principles they do. The focus, especially regarding the principle of liberty, is on the development of the moral powers of a person.<sup>29</sup> Because this is the underlying value for the principles of justice, it would also ground the principles behind the ethos of justice. But the development of the moral powers of a person requires freedom to engage in projects other than maximizing the condition of the least well-off, and so the parties would endorse an exception to the personal duty to do so.<sup>30</sup> After all, Titelbaum says, it would be weird if the parties protected the basic liberties from government restrictions, but denied themselves the exercise of those liberties.<sup>31</sup> We can read this as a response to the distinction between liberty and worth of liberty (discussed in detail below). It would be weird for the parties to protect their formal liberties, if they

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<sup>28</sup> Titelbaum, "What Would a Rawlsian Ethos of Justice Look Like?", p. 306

<sup>29</sup> Titelbaum adds that *this* is the motivation for the lexical ordering of the principles, "What Would a Rawlsian Ethos of Justice Look Like?", p. 312, but this is not obvious. See note 2 above.

<sup>30</sup> Titelbaum, "What Would a Rawlsian Ethos of Justice Look Like?", p. 313.

<sup>31</sup> Titelbaum, "What Would a Rawlsian Ethos of Justice Look Like?", p. 311.

were going to box themselves in and undermine the worth of those liberties. So, the ethos of justice includes the permissibility of advancing personal projects at the expense of distributive concerns. Furthermore, the least well-off see this as permissible, because they share the ethos of justice.<sup>32</sup> Because the least well-off value the development of the moral powers of a person, they will not feel wronged by someone doing so. Thus, there won't be conflict between defecting from the difference principle, and the values of fraternity and mutual respect.

An attentive reader will have noticed that Titelbaum's ethos of liberty resembles in certain respects Cohen's personal prerogative discussed earlier, especially when explicitly including the elements discussed by Estlund. What Estlund seems to add, albeit not under this guise, is the exercise and development of the moral powers, rather than just pursuit of economic gain.<sup>33</sup> Titelbaum's discussion has advantages over Cohen's here too. Cohen didn't provide principled motivation for the prerogative, beyond the platitude that "we are not nothing but slaves to social justice."<sup>34</sup> Titelbaum, on the other hand, locates the prerogative in the values driving the principles of justice. Cohen didn't provide guidance for the extent of reasonable exercise of the personal prerogative. Titelbaum, however, has something to say to this as well. Since the point of the prerogative is the development of the two moral powers (particularly the development of a conception of the good), the extent that it is reasonable to exercise productive latitude is the extent to which is necessary for reasonable development of the moral powers, and to pursue one's conception of the good.<sup>35</sup> This may not be a complete characterization of the limit, but it is certainly a strong step forward.

4. While Titelbaum's considerations are compelling, his ethos still exhibits a lack. Titelbaum's

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<sup>32</sup> Titelbaum, "What Would a Rawlsian Ethos of Justice Look Like?", p. 314.

<sup>33</sup> Though we can easily see the connection between the interest of the self as a subject, and the development and exercise of the moral powers of a person.

<sup>34</sup> Cohen, *Rescuing Justice and Equality*, p. 10.

<sup>35</sup> Titelbaum, "What Would a Rawlsian Ethos of Justice Look Like?", p. 316*ff.*



strategy was to consider what the basic liberties are for in order to provide insight into what ethos they would commit us to. If we take a closer look at his tests, we'll see that a truly complete ethos of justice would also include a concern for the promotion of liberty (or the worth of liberty), not just its exercise. When we explore the how the worth of liberty is variable, and how actions of individuals can seriously impact this variation, we will see (for similar reasons to those Titelbaum raised) that the members of the well-ordered society must be motivated by an ethos of promoting or respecting liberty.<sup>36</sup>

The first principle of justice says that “each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.”<sup>37</sup> This limits the kinds of laws and arrangements of social institutions allowed. Adherence to this principle is foundational to the well-ordered society. So, there is no question about whether there is equal liberty for all in the Rawlsian society, in the way that there is a question about how equally the resources are distributed. However, this is merely equality of formal liberties. There can't be laws preventing anyone from exercising their basic liberties, though there may be other impediments that affect not whether or not you have some liberty, but the worth of that liberty (or how useful it is to you). In regard to distinction, Rawls says:

The inability to take advantage of one's rights and opportunities as a result of poverty and ignorance, and a lack of means generally, is sometimes counted among the constraints definitive of liberty. I shall not, however, say this, but rather I shall think of these things as

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<sup>36</sup> Colin Hickey prompted me to change phrasing from “promoting” to “promoting or respecting.” He pointed out that making any choice closes off other options, and closing off options for others is the central feature in motivating the need for the ethos of liberty. If “promoting” means maximizing, then making any choice about our own conception of the good fails to promote the worth of our liberty: we have fewer options, and so we have less worth of liberty. This violates the previous express of the ethos of liberty, and shows that it's inadequate. But if we shift language to talk about *respecting* liberty and the worth of liberty, making choices for oneself and settling on a conception of the good *does not* go against the ethos of liberty as described here. “Diminishing” one's own worth of liberty by developing a conception of the good is precisely what it takes to respect liberty.

<sup>37</sup> Rawls, *A Theory of Justice*, p. 47.

affecting the worth of liberty, the value to the individuals of the rights that the first principle defines.... Thus liberty and the worth of liberty are distinguished as follows: liberty is represented by the complete system of the liberties of equal citizenship, while the worth of liberty to persons and groups depends upon their capacity to advance their ends within the framework the system defines.<sup>38</sup>

He believes that lack of worth of liberty (presumably due to economic position) is legitimized by the fact that the difference principle guarantees as high a worth of liberty for the least well-off as possible. But this doesn't, he insists, compensate for any actual lack of liberty (which would be ruled out by the priority rule of liberty over economy).

Besides improvements in the worth of liberty due to the difference principle, the legislative phase of the original position could protect the disadvantaged's worth of liberty. Knowing facts about distribution of resources, and what skills it takes to get and make use of primary social goods, the legislators should be able to compensate for a good part of the disparity. Increased funding for schools to compensate for a disadvantaged starting point is just one obvious example. This solution obviously relates to the second part of the principle of equality, that the inequalities in society be attached to offices and positions open to all under conditions of fair equality of opportunity.<sup>39</sup> This ensures that worth of liberty isn't a systemic feature, inherited with one's initial social position.

This isn't enough. Daniels points out that under certain conditions, such as if large inequalities are permitted by the difference principle, there could be very dramatic inequalities of worth of liberty despite equal formal liberty.<sup>40</sup> There are many ways for one to have equal formal liberty that is

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<sup>38</sup> Rawls, *A Theory of Justice*, p. 179.

<sup>39</sup> Rawls, *A Theory of Justice*, p. 266.

<sup>40</sup> Norman Daniels, "Equal Liberty and Unequal Worth of Liberty," in *Reading Rawls*, ed. Norman Daniels (Basic Books INC, New York:1989) pp: 253-281. Daniels also makes other objections, such as there can be no principled distinction between liberty and worth of liberty. But I will grant to Rawls for the sake of argument that such a distinction is possible and sensible, as it makes my task harder. If there is no good distinction here, so much the better for my position as the choices of individuals would then be able to affect the amount rather than merely the worth of liberty of others.

comparatively worthless. There is equality before the law, though the best off may have superior private lawyers; there is equal freedom of speech, though the best off may have greater and easier access to and control over the media.<sup>41</sup>

This second possibility is particularly salient in the US at the present. With the Supreme Court recently establishing precedents that money is speech and thereby deeming many campaign finance regulations unconstitutional violations of the First Amendment, we see larger disparities in the worth of free speech between individuals. The few immensely rich can spend large amounts of money to influence ballot initiatives and elections. The amount of money that these people can devote to their causes and interests swamps what nearly everyone else can spend, effectively muting the speech of the least well-off. Therefore, by contrast, the least well-off have merely formal equal right to free speech. Legally, there is nothing preventing them from spending just as much to get their voices heard too. But there is a practical impediment: they don't have that amount of money to spend.

Rawls is aware of this problem. In *Political Liberalism* he still endorses the idea that there is some permissible amount of inequality of worth of liberty, but he also introduces a requirement for the fair value of political liberties.<sup>42</sup> “This guarantee means that the worth of political liberties to all citizens, whatever their social or economic position, must be approximately equal...”<sup>43</sup> Certain liberties are protected against mere formality by the first principle, namely the ones regarding political participation and holding public office.

So to some extent, the principles of justice can solve the problem of unequal worth of liberty. Grcic argues that the provision in the principles isn't itself enough.<sup>44</sup> This needs to be supplemented, or articulated in the legislative phase. To have the interests of the least well-off recognized and

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<sup>41</sup> Daniels, “Equal Liberty and Unequal Worth of Liberty,” p. 256

<sup>42</sup> John Rawls, *Political Liberalism*, Expanded Edition, Columbia University Press, New York, p. 326ff.

<sup>43</sup> Rawls, *Political Liberalism*, p.327.

<sup>44</sup> Joseph Grcic, “Rawls and the Equal Worth of Liberty,” *Journal for Peace and Justice Studies* 9:2, 1998, pp: 17-29.

considered, certain active measures must be taken to ensure the possibility of their full participation. In particular: there must be public funding to the degree allowing for an adequate campaign for all political campaigns; private contributions must be anonymous;<sup>45</sup> personal funds may be used, if matched for the opponent from public funds; and finally, employees must have the right to “political leave.”<sup>46</sup> Political leave would function like parental leave, where leave is paid, with a guarantee to return to the same or equivalent job. Given these regulations, the well-ordered society could guarantee “approximately equal,” or fair value of political liberty.

However, there are still reasons for concern regarding the inequality of worth of liberty. First, it isn’t clear that political liberty is the most fundamental liberty, alone warranting assurance of fair value. Nor does it make sense to give political liberties primacy for the instrumental reason of enabling people to politically protect the worth of their other liberties. Second, laws are forced to deal with classes of people, and while this may improve the general worth of liberty for the worst-off class of people, it will inevitably leave out individuals, who won’t have fair worth of liberty. Finally, and most importantly, there are cases where the actions of individuals are most relevant to the worth of liberty of others. And some cases are compatible with the best laws, or are such that there shouldn’t be laws regarding these actions. In these cases, the need for an ethos of promoting or respecting liberty becomes apparent.

The kinds of cases to focus on are those where individuals are in a position to impact the worth of liberty of other particular individuals, particularly in a respect that need not involve political liberty. Additionally, this impact on the worth of liberty must not be due to illegal discrimination or any sort of legally prohibited violations of liberty—these are already ruled out by Rawls’s sense of justice, and so are *de facto* included in Titelbaum’s ethos of justice. I will offer multiple examples, but

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<sup>45</sup> Anonymous such that the recipient is unaware of who donated what, not the more limited anonymity of “dark money” such that the public is unaware of who donated what to whom.

<sup>46</sup> Grcic, “Rawls and the Equal Worth of Liberty,” p. 26.

one thing to notice is that it's not important how widespread the cases are or how often the libertarian ethos is acted on. The ethos is a motivation set, a list of priorities and commitments. If there can be any cases where individual actions significantly affect the worth of liberty for others, then the libertarian ethos is required.

A natural place to start would be to look at cases most similar to the Citizens United example discussed above. We might think that even given the best campaign finance laws, the permissible speech of the best off would be enough to effectively mute the speech of the least well-off. Or, at least, mute the speech of the least-well-of who are also ineloquent. But if this were so, it wouldn't be the right case to motivate a special ethos for promoting or respecting the worth of liberty for others. Equalizing the political speech of the extremes of society seems like a fairly achievable task (at least in ideal theory), and so given *the best laws* to do so, any disparity in worth of liberty would be prima facie acceptable. The problem with this example is that it explicitly focuses on (or involves) the macro level, features that are already the target of the principles of justice. We need cases that are more explicitly focused on the personal level.

Suppose you're interested in using your freedom of speech to address the passing crowds in the quad, at the capital, or wherever. And suppose that I decide to use my freedom of speech to use a megaphone to drown you out anywhere you go. This seems like a problematic use of my speech to silence yours. Maybe that's a bad case too, because you could always demonstrate somewhere that amplified sound is prohibited.<sup>47</sup> But what if you're shyer and quieter than I am? I could still drown you out. Is this impermissible harassment? That could be legally prohibited. What if we all know that someone has had the bad luck of just so happening to always have been drowned out whenever they demonstrate. It is now our choice whether this person can exercise her liberty. That's one off,

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<sup>47</sup> It may also be a bad case because the past year has made it clear that no-platforming as counter-protest is at least a contested issue of freedom of speech.

so our intuitions may not be as strong. But it shows us how our otherwise Rawlsian-acceptable choices *can* affect the worth of liberty of others.

There has long been a literature on how socially established gender roles raise problems for Rawls' treatment of the family.<sup>48</sup> The general discussion focuses on the distribution of primary social goods and equality of opportunity. For example, Baehr writes:

The gendered family undermines equality of opportunity of wives primarily through the double burden of work outside the home and traditional women's work in the home. The daughter's equality of opportunity is jeopardized both by her taking on of a disproportionate amount of work in the home and by the traditional gendering to which she is subjected, gendering that predisposes her to enter a disadvantageous marriage.<sup>49</sup>

If the concern raised by the gendered family is primarily economic, then Cohen's egalitarian ethos would resolve it. But it also raises a concern for worth of liberty. Gendering engenders certain conceptions of the good, or at least circumscribes a range of available conceptions. Okin and Baehr discuss the implications of gendering in the context of a widely shared "background culture" that largely shares and promotes the same set of gender roles. But the concern for worth of liberty applies to societies with more pluralistic background cultures. For even in these societies, there can be isolated cases where families adopt conceptions of the good that involve raising their children to conform to certain gender roles. The children in these families will find the worth of their liberty diminished, just as much as children would find their formal liberties diminished in a society that has an institutionalized set of gender roles.<sup>50</sup>

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<sup>48</sup> See the following for a few notable examples:

Susan Okin, "Reason and Feeling in Thinking about Justice," *Ethics* 99:2, 1989, pp: 229-249.

Susan Okin, "Political Liberalism, Justice and Gender," *Ethics* 105:1, 1994, pp: 23-43.

Amy Baehr, "Toward a New Feminist Liberalism: Okin, Rawls, and Habermas," *Hypatia* 11:1, 1996, pp. 49-66.

<sup>49</sup> Baehr, "Toward a New Feminist Liberalism," p. 63, n. 4.

<sup>50</sup> Note that this doesn't entail that a Rawlsian society must reject gender roles entirely. Baehr gives a clear explanation of why ("Toward a New Feminist Liberalism," pp. 54-55). Rawlsian societies must reject gender as "institutionalization of sexual difference such that benefits and burdens are distributed according to sex," but are compatible with gender as

This same issue arises for the worth of freedom of conscience for any element of a conception of the good that parents might force on their children. Imagine a domineering parent with strong convictions in his worldview. His conception of the good includes raising children who share his ideology. Towards this end, he does whatever she can to limit his children's exposure to other worldviews. He lets them attend government sanctioned schools, and so isn't breaking any laws, but that is the most robust exposure to alternative views that they get. Additionally, he impresses upon them how important it is to him that they share his views, and how other views are inadequate. Of course, being raised like this significantly impacts the worth of freedom of conscience for the children: they are less able to cultivate their own conception of the good. (Depending on the nature of the worldview, it could similarly impact the value of equality of opportunity, by making only a few social positions seem acceptable to them.) While they have no legal or *broadly* social barrier to adopting whichever worldview they see fit, the other options aren't genuinely open to them, due their mother's influence. This case clearly illustrates how someone could impact the worth of liberty for another in a Rawlsian society. Because this isn't a systemic, or category-based influence, this isn't obviously something that the broad social structure or legislature could adequately address.

These two cases might fail to completely convince some readers, because they might think that parents have a stronger prerogative in shaping the conception of the good in their children than other people have. I used these examples because they illustrate how deep of an effect we can have on others' conceptions of the good, but the effects don't need to be so deep nor so potentially pervasive. While I do find these cases compelling, numerous other examples have been suggested to me. And it only takes one to show that citizens of the well-ordered society would need to have a

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"the psychosexual component of identity." The point here is that since the psychological component of identity is involved with or is an expression of a conception of the good, the worth of liberty is diminished for those for whom a diversity of genders are not available. And so, an ethos of liberty is required to protect the worth of liberty by keeping these options open.

motivation to respect the worth of liberty for others, whether this means promoting or refraining from diminishing the worth.

We can grant that parents have a strong prerogative to shape the conception of the good in their minor children, but the examples can be redeployed to parents with adult children who have come to reevaluate the relevant element of their conception of the good. Parents can still wield significant emotional leverage, and thereby have significant impacts on the worth of liberty of their adult children. As another example, suppose I know that you that you won't be exposed to some particular conception of the good (perhaps one that I have reason to think you'd particularly take to) unless I tell you about it. In such a case I have robust control over the different possible avenues your life might take, and so my choices directly affect the worth of your liberty.<sup>51</sup> There may also be examples that involve some financial support for others' pursuits of their conceptions of the good, but without knowing exactly the degree of inequalities permitted or the means of the least well off, it would be impossible to articulate a concrete example. But so long as the least-well-off can have a level of primary social goods that enables them to lead decent lives, but is nevertheless insufficient for carrying out some extreme elements of some conceptions of the good, the best-off will be in a position to determine the worth of others' liberty to adopt such a conception of the good is worth.

Finally, there will be examples where individuals are in a position to make up for inevitable gaps in the assurances of worth of liberty that the social institutions can provide. I'll offer two examples here, but I think the relevant features can be extracted and used to generate many more cases. Laws can reasonably written with only a certain level of precision, and even the more specific policies used to implement those laws will have to deal in some level of generalities. Because of this, from time to time, some people who need it will nevertheless fail to get assistance in maintaining the

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<sup>51</sup> Thanks to Michael Titelbaum for suggesting this alternative.



worth of their liberty.<sup>52</sup> And when individuals are in a position to notice such institutional failure, and have the ability to help, their choices determine the worth of liberty of others. Suppose a bureaucrat is responsible for determining eligibility for some assistance program. She notices that, while this applicant is ineligible because of the technical parameters of the relevant laws and policies, the applicant is in the same type of general need that the law was supposed to address. If her decision is authoritative, and she has any discretion or ability to “make things work,” some degree of the applicant’s worth of liberty is in the bureaucrat’s hands.<sup>53</sup>

As a second example, take a case where a private citizen is the one in a position to make up for a gap in a law or its implementation. The right to vote is a central political liberty, and so the social institutions must take active measures to facilitate the ability to vote for those eligible. One way this might come up is in providing transportation to polling stations, particularly in low density population areas. Suppose you live in such an area and it is well-served with transportation assistance. But at the end of this voting period, you know I haven’t voted yet and notice that I have missed my last opportunity for the provided assistance. This doesn’t strike me as a social structure failure, since transportation resources will have to be finite.<sup>54</sup> If you are in a position to take me to the polls, you are in a position to determine to a degree the worth of my liberty. This example is easily modified to apply to any sort of public or political engagement, such as petitioning the City Council at a Town Hall, and probably to apply to other ways of pursuing one’s conception of the good. These examples should be sufficient to show that examples abound, and thereby show that the ethos of liberty is required to protect the worth of liberty for all members of the just society.

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<sup>52</sup> It strikes me as unrealistic, even in ideal theory, that laws are just only if they work correctly for 100% of the people 100% of the time.

<sup>53</sup> I’m assuming that if someone applies a just law according to its actual parameters, we cannot attribute a failure of justice to the social structure, even if bending the law would be a more just individual action or result in a more just outcome.

<sup>54</sup> Maybe I forgot the pick-up time. Maybe I didn’t like the driver. Maybe I thought there was one more round. Maybe the soundly-based estimates of need were off. Maybe all our other neighbors put off their voting too, and so there wasn’t space for everyone on that last round.

Now, return to the kinds of considerations that Titelbaum used to support the expansion of the ethos of justice. We test an ethos (or the sense of justice) for compatibility with social stability, mutual respect and fraternity. The better the fit, the stronger the case for the particular form of ethos. Titelbaum's ethos was a better fit than Cohen's more limited ethos. Additionally, a justification for an ethos is strong if it employs the same kinds of values as parties to the original position would use to select principles of justice. Titelbaum's ethos was stronger here too. By considering what the principle of liberty was for, he vindicated his addition of the prerogative. "It would be curious if, having gone to the trouble of endorsing that governments do not restrict individuals to a single religion for the sake for economic efficiency, the parties in the original position chose principles for individual duties that required to so restrict *themselves*."<sup>55</sup> Since the parties chose to prohibit governmental interference in certain domains, to promote the development of the two moral powers, it would be weird if those same parties chose principles for individuals to self-regulate, such that they dramatically inhibit the development of those moral powers. Because liberty is *for* the development of such powers, the ethos must be consistent with such pursuits.

But we can say the same thing regarding *worth* of liberty. What liberty is for is *use* towards the development of moral powers, not just to place nominal restrictions on governmental interference. It would be weird if the parties chose a principle of justice that protect against governmental intrusions into the development of moral powers, and a principle of justice that is designed to optimize the primary social goods, the basis for pursuing your good whatever it may be, for all members of society, if they wouldn't similarly prohibit intrusions from other members (decreasing the worth of liberty), and not expect members to increase the worth of liberty for others when possible.

For similar reasons, a further extended ethos that included a motivation to protect the worth of liberty for others would better account for stability, mutual respect, and fraternity. Recall the

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<sup>55</sup> Titelbaum, "What Would a Rawlsian Ethos of Justice Look Like?", p. 311.

domineering parent. his worldview had a definite streak of intolerance towards other worldviews. It didn't include overt discrimination or other presumably prohibited activities, but it does indicate some tension with the idea of a tolerant pluralistic society that Rawls had in mind. If he thinks that it is intolerable for his children to even be exposed to other worldviews, let alone adopt one, how is he expected to maintain the commitment to pluralism in his voting and public life? How is this any more plausible than the "wholly self-interested maximizers" supporting a fundamentally redistributive social structure, the case that supported inclusion of the egalitarian element? An ethos with an element involving the motivation to protect worth of liberty better supports stability than Titelbaum's.

Mutual respect and fraternity seem to require, not just that one refrain from benefitting at the expense of the other, but acceptance of the other's aims as valid. Titelbaum's addition relied on the members of the well-ordered society sharing the value for the development of moral powers with the parties to the original position. This is the reason the worst-off members wouldn't feel wronged by a well-off member using a personal prerogative to pursue her conception of the good. "The same values that make the lexical priority of the first principle acceptable to the worst-off individual despite some loss of reciprocal advantage make certain exercises of productive latitude acceptable to him as well."<sup>56</sup> These values are for the *development* of moral powers, not for the freedom from legal restriction against such development. So we should think that a merely formal liberty ensured by the first principle wouldn't be acceptable to the members of the Rawlsian society. If they are concerned with the development of the moral powers, this requires that liberty have sufficient worth. But since we saw that individuals can make choices that affect the worth of liberty of others, we need some element in the ethos to motivate them to make positive effects and refrain from negative ones. If this is lacking, then these negative impacts would occur. But this is just an inhibition of someone's development of their moral powers. If shared value in and respect for the development of moral powers was what

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<sup>56</sup> Titelbaum, "What Would a Rawlsian Ethos of Justice Look Like?", p. 314f.

helped establish fraternity and mutual respect (as Titelbaum suggested), then allowing members of society to inhibit other's developments is incompatible with mutual respect and fraternity. And here also, the addition of an element involving the motivation to protect worth of liberty is an improvement over Titelbaum's ethos of justice, by his own test.

5. We have seen a progressive development in how the Rawlsian ethos is conceived and justified. From Cohen's original thought that it just involved a commitment towards promoting equality (or at least accordance with the difference principle) and an unjustified prerogative to selfishly defect from those responsibilities, we moved with Estlund to a more robust conception of the prerogative, such that it included not just mere self-interest, but our other concerns as well. Then, Titelbaum showed us how to construct a Rawlsian framework to vindicate an element for inclusion in the ethos, and demonstrated that this is how to understand why there would be such a prerogative: it is part and parcel of valuing the development of the moral powers of persons. And beyond that, by employing Titelbaum's framework, we saw that a truly complete ethos should also include the inclination to, at the very least, not inhibit the development of the moral powers of others. In the end, we have a well rounded, internally coherent picture of the individual's proper place in social justice.

When thinking about social justice, it is easy to lose sight of the individual. It is easy to think only of policies, kinds of people, and social structure. In a way this kind of focus really lends itself to consequentialist thinking. There are just a bunch of units out there, and things will happen to them; we just have to make sure that things work out the best. This is the kind of view that Rawls was working against. His project was to reorient the focus of social justice to the moral importance of individuals, though in a systematic and coherent way. The guiding thread was a Kantian notion of respect for the autonomy, or moral powers, of persons. But even Rawls's focus downplayed the role of the individual. In terms of *social* justice, for Rawls, the focus is still on the social structure, with

individuals functioning primarily as patients to be treated in appropriate ways (though they also play a justificatory role, this is part of treating them the right way as patients).

But with this discussion of what a Rawlsian ethos of justice would look like, the individual plays an important and central role. In that this development highlights another way that the individual is important to social justice—not as a unit, not as a mere patient, but as an active participant—this seems to be strongly in the Rawlsian anti-consequentialist, individual-oriented, spirit. Identifying this concordance of spirit isn't to say that Rawls's theory actually requires an ethos (this question was tabled for this paper), but that there is an intuitive connection; this is the kind of view that he should be friendly towards.