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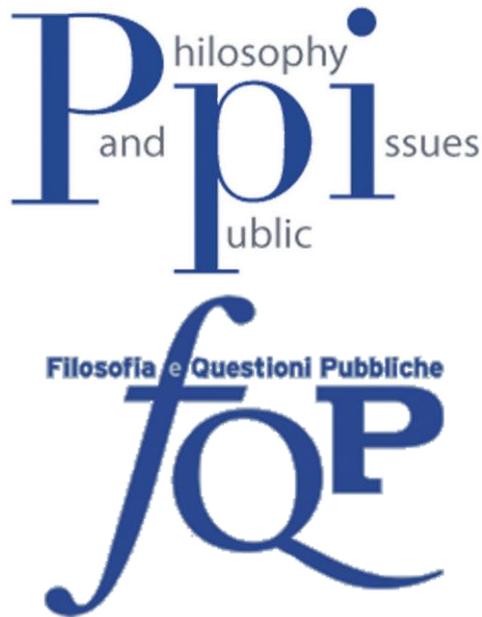
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SYMPOSIUM  
LIBERALISM AND SOCIAL JUSTICE



THE RAWLSIAN MIRROR OF JUSTICE

BY  
JESSICA FLANIGAN

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# The Rawlsian Mirror of Justice

Jessica Flanigan

**L**ibertarians (like me) generally disagree with orthodox Rawlsians (like Samuel Freeman) about whether Rawlsian principles of distributive justice are compatible with libertarianism.<sup>1</sup> In this essay, I set out to explain why. In section 1, I describe the problem, which is essentially that libertarians think the Rawlsian framework does not rule out anti-statist, capitalist, and broadly libertarian approaches to distributive justice and orthodox Rawlsians think that it does. I propose that this problem arises because the Rawlsian framework is underspecified in two ways. First, the Rawlsian framework has a lot of moving parts, so people with different pre-theoretical intuitions can use Rawls's theory, without error, to arrive at very different conclusions. I make this point in section 2. Second, orthodox Rawlsians advance justice as fairness at an intermediate level of idealization. In section 3, I argue that pitching the theory at this level inherits many of the problems with

<sup>1</sup> I'm using the term libertarian to refer to libertarians but also people who are classical liberals, and anarchists. I realize these terms are imperfect. Basically, I'm referring to political philosophers who are especially pro-market and anti-state. This term contrasts with what I'm calling Orthodox Rawlsians, who are comparatively less friendly to markets and more statist.

a non-ideal approach that addresses specific problems with the status quo as well as the problems with a purely ideal approach that addresses the motivating ideals and values. This approach also obscures more than it illuminates to the extent that it is often unclear whether arguments at this level of analysis are justified on principled or pragmatic grounds.

Together, these two kinds of under-specification result in a theory that is indeterminate between competing conceptions of distributive justice. Since the theory cannot specify which conception of distributive justice is preferable, then proponents of competing conceptions must either defend a more determinate interpretation of the theory or defend their conception of distributive justice on the grounds that do not rely on Rawlsian premises. In section 4, I argue that proponents of competing conceptions of distributive justice should defend their views without reference to the Rawlsian framework. I favor this approach because attempts at defending more determinate interpretations of the Rawlsian theory shift the terms of debate from a discussion about distributive justice to a discussion about Rawlsian exegesis and interpretation. But exegetical disputes often reflect substantive disagreements about what distributive justice requires, rather than the other way around. Since Rawlsian interpretation supervenes on underlying disagreements about distributive justice, Rawlsian scholars who disagree about Rawlsian distributive justice are more likely to identify the crux of their disagreement by talking about distributive justice than by talking about Rawls.

It is for these reasons that I view Rawlsian distributive justice as a mirror. When libertarians look at the framework, they can see their own values staring back at them. Liberal egalitarians take a look and assert that the picture they see is quite different. Both sides report what they see in the mirror without error. Yet, it would

be an error to suggest that the image in the mirror is fixed. And it is an even greater mistake to think that the image in the mirror can show us anything more than the world that it reflects.

## I

### The Disagreement

In *Liberalism and Distributive Justice*, Samuel Freeman situates the disagreement between libertarians and liberal egalitarians as primarily a disagreement about three things – the value of equality, the status of economic freedom, and the legitimacy of public power.<sup>2</sup> Yet most libertarians, classical liberals, and anarchists are as committed to equality as Rawlsians (if not more so), but they believe in a different interpretation of what equality requires. Libertarians reply that the same reasons for the non-basic status of economic freedom would also weigh against the basic status of core liberal freedoms, such as freedom of speech and association.<sup>3</sup> In response to Freeman’s concerns about private power, libertarians reply that the reasons Freeman gives for the illegitimacy of private law enforcement weigh with equal force against public power as it operates in most contexts.<sup>4</sup>

These debates are well-worn within the libertarian/orthodox Rawlsian egalitarian discourse. I am not the first to point out that

<sup>2</sup> By this I mean that Freeman argues against libertarianism, or a more general laissez-faire economic approach on the grounds that it does not account for distributional equality (Freeman 2018, 180-184) that it recognizes economic freedom as a basic liberty (*ibid.*, 170), and that it denies the legitimacy of public exercises of power while viewing private contracts as presumptively legitimate (*ibid.* 62-89).

<sup>3</sup> Cf. Flanigan 2018.

<sup>4</sup> Cf. Freiman 2017.

a great deal of the Rawlsian architecture does not necessarily rule out libertarianism, despite the claims of most orthodox Rawlsians. Tomasi's argument that economic liberties should be considered basic liberties is perhaps the most influential entry in this genre. Tomasi argues that economic liberties, like other basic liberties, are important for the development of citizens' moral powers. The moral powers refer to the capacity for citizens to develop and pursue a conception of the good and to recognize others' entitlements to do the same.<sup>5</sup> Jason Brennan argues that, empirically, societies with high levels of economic freedom also seem to promote Rawlsian aims better than societies that restrict economic freedom.<sup>6</sup> In policy circles, many libertarians make the case capitalism is generally to the benefit of the least advantaged relative to other economic systems, and that restrictions on economic freedom are counter-productive.<sup>7</sup> Chris Freiman argues that Rawlsians should either be more skeptical of political liberty or more open to economic freedom because, in non-ideal contexts, both fail to promote justice for similar reasons.<sup>8</sup> Loren Lomaski re-imagines to the Rawlsian framework to show that it could plausibly support fairly Nozickian conclusions.<sup>9</sup> And I've argued elsewhere that orthodox Rawlsians should uphold seemingly illiberal unconscionable for egalitarian reasons—to avoid black markets and governmental paternalism.<sup>10</sup>

Whatever one thinks of the merits of these arguments, they are clearly granting the premises of Rawlsian liberalism. So why do proponents Rawlsian accounts of distributive justice, like Freeman,

<sup>5</sup> Cf. Tomasi 2013.

<sup>6</sup> Cf. Brennan 2012.

<sup>7</sup> See e.g. [humanprogress.org](http://humanprogress.org), which describes the benefits of economic liberalism.

<sup>8</sup> Cf. Freiman 2017.

<sup>9</sup> Cf. Lomasky 2005.

<sup>10</sup> Cf. Flanigan 2017.

persist in rejecting libertarianism as an admissible theory of justice? And why have libertarians, like me, failed to see why the Rawlsian account of distributive justice rules out their views? The answer to both questions is that the Rawlsian framework is under-specified and intractable, despite Rawls and Rawlsian's considerable efforts at clarifying, defining, and defending the view. Actually, the fact that clarifying, defining, and defending the view has occupied so much of the twentieth, and now twenty-first-century political philosophy is further evidence of the under-specification and intractability of the framework.

## II

### **Extensional Adequacy, Parsimony, and Specification**

Justice as fairness, like all philosophical models of justice, is a model.<sup>11</sup> Models make it easier to understand complex processes by representing the world in a simpler way. For example, models in science and social science help people understand why things happen the way they do, or they predict what might happen under certain conditions.<sup>12</sup> In philosophy, a good model can help people

<sup>11</sup> Rawls 1971, 52.

<sup>12</sup> For example, good separation-of-powers models are similar to the governmental institutions they represent. They include the most relevant participants in policymaking but not all stakeholders or influencers. They represent participants' preferences over policy outcomes as convex preferences for an ideal point on a scale of possible policies, even though such scales rarely represent any actual policy, and participants' preferences over alternatives may not be symmetrical or convex. They describe the rules that participants must follow to pass policy but fail to capture informal social norms. Yet even though these models do not include all the information about policymaking that could be relevant, they are very informative at predicting policy outcomes and

understand how concepts hang together and how different views have different tradeoffs.<sup>13</sup> As Williamson writes, models are especially helpful in branches of philosophy that deal with “the human world in all its complexity and mess,” where we are unlikely to discover exceptionless general principles but where we can still learn about underlying human phenomena by developing better models.<sup>14</sup> Since political philosophy is exceptionally focused on the human world in all its complexity, model building is an especially promising approach for political philosophers. Rawls, who was very influenced by economic modeling, models justice through the mechanism of the original position.<sup>15</sup>

Principles of good modeling provide several methodological desiderata for political philosophers who are interested in building models to discover the truth about justice.<sup>16</sup> For our purposes, let’s focus on three—extensional adequacy, parsimony, and specification. Consider first extensional adequacy or intuitive plausibility. Intuitions play a central role in ethical theorizing.<sup>17</sup> Some philosophers suggest that people cannot avoid using intuitions about cases when answering questions about

understanding why public officials make the choices they do. Cf. Krehbiel 1998; Cameron 2000.

<sup>13</sup> Cf. Sellars 1963.

<sup>14</sup> Cf. Williamson forthcoming.

<sup>15</sup> Cf. Forrester 2019, Wolff 2015.

<sup>16</sup> For a more comprehensive discussion of theoretical virtues in explanatory models, see Schindler 2018.

<sup>17</sup> For example, Rawls’s influential method of reflective equilibrium is generally applied in a way that gives a great deal of weight to whether a premise of an argument or its conclusion is intuitively plausible. I discuss this method in more detail in section 4.

ethics.<sup>18</sup> According to Rawls, intuitions that represent earnest and stable *considered judgments* are of central importance when evaluating a theory of justice.<sup>19</sup> If a coherent theory, such as utilitarianism, clashes with people’s case-based intuitions about what justice requires, Rawls views this class of intuitions as a reason to reject the theory, despite its other theoretical virtues.<sup>20</sup>

A model of justice is extensionally adequate if it brings people’s theoretical intuitions into coherence with their specific intuitions about how just distribution would look. Rawls claims his model of justice as fairness is “a better match with our considered judgments on reflection” than competing models.<sup>21</sup> He then writes, “Thus, justice as fairness moves us closer to the philosophical ideal; it does not, of course, achieve it” (Rawls 1971, 50). After all, Rawls acknowledges, it is unclear whether reflective equilibrium converges on a unique answer. “It would be useless, however, to speculate about these matters,” Rawls writes, going on to say that if nothing else “if we should be able to characterize one (educated) person’s sense of justice, we should have a good beginning toward a theory of justice” in the same way that understanding one person’s sense of grammar is likely to reveal the general structure of a language (*ibid.*).

Another desideratum for models is parsimony. Parsimonious models are more useful because it is easier to see how the model

<sup>18</sup> See, e.g., Kagan 2001, Harman 2014. Other philosophers question whether there is a single thing that we could call ‘intuitions,’ and if so, if they can be considered as evidence in conceptual analysis or moral theorizing.

<sup>19</sup> For a further discussion of the distinction (if any) between intuitions and considered judgments see Daniels 2003.

<sup>20</sup> Freeman 2007, 33. Cf. Rawls 1971, 47-53

<sup>21</sup> For Rawls, these “traditional doctrines” were utilitarianism and what he called perfectionism. Rawls 1971, 123.

generates predictions, explanations, or justifications and to identify points of disagreement. And as Williamson writes,

the more adjustable parts a model has, the more opportunities it offers the model-builder to rig the results, to gerrymander the model by setting parameters and arranging structure in *ad hoc* ways to fit preconceived prejudices. Simplicity, elegance, symmetry, naturalness, and similar virtues are indications that the results have not been so rigged. Such virtues may thus ease us into making unexpected discoveries and alert us to our errors.<sup>22</sup>

The temptation to rig the results is strong in political philosophy, where people have very strong normative intuitions about justice, and there is reason to suspect that those intuitions may be unreliable, driven by identitarian or partisan biases.<sup>23</sup> A model of justice is parsimonious if it is simple and precise. A model of justice is simple if it does not contain so many parameters that it becomes unclear which considerations explain the models' implications about a just distribution of resources. A model of justice is precise if each parameter is described in a way that is clear and observable. For example, anyone adapting or applying the model should be able to easily know what each parameter entails and what it would mean for that parameter to change.

The temptation to rig the results is *even stronger* in political philosophy where people evaluate theories partly based on whether they get the "right" results. For this reason, the value of parsimony weighs against the value of extensional adequacy. More parsimonious models present fewer opportunities for the theorist to deliver her preferred conclusions about particular cases. A very parsimonious model is more likely to deliver results that are

<sup>22</sup> Cf. Williamson, forthcoming.

<sup>23</sup> Cf. Ivengar and Westwood 2015.

extensionally inadequate because it is unlikely to offer many opportunities for adjustment and accommodation to people's intuitions. In contrast, a perfectly extensionally adequate model would simply be a report of the modeler's observations and intuitions, and it would not have independent explanatory or predictive power.

A third virtue is specification. A model is under-specified if it does not generate a determinate, specific outcome. A model of distributive justice is under-specified if people can use it to support a very broad range of distributive principles. On the face of it, Rawls's theory doesn't appear under-specified because the theory supports two fairly explicit principles, and Rawls defends a specific interpretation of those principles. Yet the same theory, in other hands, has deployed Rawls's two principles to support greatly divergent principles. If the purpose of a theory of distributive justice is to represent or explain the conditions when some distribution of resources is just, then the model is under-specified if it marks out a range of conditions that could be just, even if Rawls and Rawlsians don't see it that way. Under-specification for models of distributive justice is especially objectionable if it marks out conditions that are inconsistent with each other. Sometimes, libertarians argue that their interpretation of justice as fairness is entirely with the standard account (e.g., when they argue that, empirically, libertarian policies are the best route to Rawlsian justice).

If a model is under-specified, it may seem more likely to be extensionally adequate to the extent that people can adapt it to fit with their considered judgments. But if a model is under-specified, it is extensionally inadequate in a different sense—when people disagree about which adaptation or interpretation of the model is the correct one. In these cases, the model itself cannot adjudicate these disputes because people could deploy the model and get

different results without misinterpreting the model in any way.<sup>24</sup> And then, if people must appeal to other values to defend the version of the model that yields their favored specification, the model is less informative and, therefore, less functional.

### III

#### **Moving Parts**

Justice as fairness has a lot of moving parts. Rawls's view of reflective equilibrium allows 'extensional adequacy' to outweigh theoretical parsimony.<sup>25</sup> Justice as fairness is not parsimonious. So Rawlsians can pull the levers and turn the gears of the theory at many different points, which creates problems of specification. For this reason, the model can support a range of different conclusions, which reflect the different dispositions of the people who deploy it. This feature of Rawls's model makes it difficult to make progress in debates about distributive justice because theorists who take on the theory from different starting points can use the same Rawlsian premises to deliver conclusions from democratic socialism to market democracy.

<sup>24</sup> Rawls makes a similar point, not about justice as fairness, but about metaphysical views of the self, epistemology, and scientific knowledge. As I am using the term, Rawls thought these theories were underspecified in that they did not mark out a specific moral theory or conception of justice as the right one. For example, against Hare, Rawls argued that a conceptual analysis of moral terms could not itself justify utilitarianism on the grounds that moral terms contain certain formal properties. My claim is that Rawls's view is underspecified in a similar way, in that a range of views are, in principle, compatible with the principles Rawls defends (Freeman 2007, 312).

<sup>25</sup> Freeman 2007, 32.

This point is related to, but distinct, from more general critiques of reflective equilibrium that suggest that the method is too conservative because it privileges widely shared judgments over revisionary claims.<sup>26</sup> A substantial challenge to reflective equilibrium in political philosophy is that it is especially sensitive to the speaker or audience's pre-philosophical intuitions about cases or theories, and people using the method could arrive at different conclusions without misapplying the method in any way.<sup>27</sup> An added challenge for arguments about justice as fairness is that they not only rely on reflective equilibrium, but the Rawlsian theoretical architecture presents so many opportunities for good faith interpretive disagreements that the theory rules out very few conclusions at the outset.

Here is an example of how justice as fairness is unable to adjudicate disputes between competing interpretations of the model. Rawlsians claim that justice as fairness requires protecting basic liberties and promoting distributive justice. Libertarians grant these principles but interpret the first principle of justice in a way that includes economic liberty is one of the basic liberties worth protecting. Orthodox Rawlsians reject this interpretation of the basic liberties.

Here is another example. Freeman argues that public officials should enforce limits on freedom of contract because unlimited freedom of contract would entail that people could voluntarily sell themselves into slavery, and officials would be required to uphold those contracts.<sup>28</sup> Presumably, Freeman presents the fact that

<sup>26</sup> Cf. Cath 2016.

<sup>27</sup> Cf. Kelly and McGrath 2010.

<sup>28</sup> It is also worth noting that many libertarians, including Murray Rothbard, endorse a conception of freedom of contract that is very similar to Freeman's. So endorsement of voluntary servitude agreements is surely not essential to libertarianism. For an overview of these arguments see Block 2003.

protecting economic liberty as basic would, in practice, make people complicit in upholding voluntary servitude agreements as a *reductio* of libertarianism. At the same time, I imagine that the fact that protecting freedom of expression as basic would make people at public universities complicit in protecting illiberal and offensive speech is not a *reductio* of liberalism. This aspect of the argument illustrates the earlier point about reflective equilibrium. The outcome of Rawls's theory of justice is very sensitive to people's pre-theoretic intuitions people view a counterintuitive implication of freedom of contract as disqualifying for economic liberty but do not take a similarly counterintuitive implication of freedom of speech as disqualifying that liberty.

More generally, Rawlsians agree that public officials should tolerate some illiberal behavior, such as illiberal speech in public spaces. And they agree that officials should accommodate some illiberal acts, such as hierarchical and illiberal marriages, or illiberal religious practices that require public accommodation. Libertarians may interpret this case for accommodation to support accommodation for some illiberal economic arrangements as well.<sup>29</sup> On behalf of orthodox Rawlsians, Freeman rejects this interpretation, on the grounds that economic contracts are importantly different from private social and cultural agreements.<sup>30</sup> On this point, Freeman introduces a distinction between economic and non-economic contracts and then deploys that distinction to justify limits on economic contracts. Similarly, Rawls and Freeman distinguish personal property from productive property. Libertarians deny the assertion that these distinctions track qualitatively difficult activities. They argue that to the extent that

<sup>29</sup> Flanigan 2017.

<sup>30</sup> As an aside, it's unclear why educational contracts and nonprofits would be non-economic here. Freeman 2018, 182.

institutions uphold freedom of association, religious liberty, occupational freedom, and the right to personal property, they should also uphold economic liberty that includes the right to own productive property and make contracts.<sup>31</sup> So Libertarians arrive at substantially different conclusions by denying a single distinction while accepting the rest of the view. Or, they could deny a different part of the model, such as Freeman’s suggestion that freedom of contract and the right to own productive property is not essential to the development of the moral powers. Because the model has so many moving parts, motivated reasoners in all corners can adjust and interpret various distinctions to arrive very divergent conclusions about justice.

Another example. Rawlsians support the difference principle, which requires that social and economic inequalities should be arranged to the benefit of the least advantaged. Libertarians argue that the difference principle supports welfare state capitalism, which requires protections for freedom of contract and property rights because this system is the most likely to support long-run growth, which maximally benefits the least advantaged.<sup>32</sup> Proponents of property-owning democracy argue that this claim results from a misinterpretation of the difference principle, which “should not be interpreted to require maximizing *long-run* income growth” but should focus instead on those who are currently the least advantaged.<sup>33</sup> Or they argue that the institution of freedom of contract should ensure that economic contracts are to the benefit of the least advantaged, in addition to a broadly progressive approach to taxation and property.<sup>34</sup>

<sup>31</sup> Freiman and Thrasher 2019, 33.

<sup>32</sup> Tomasi 2013; Brennan 2007.

<sup>33</sup> Lister 2018.

<sup>34</sup> Freeman 2018, 167-194.

One last example-- this time with socialists. Cohen argues that the difference principle should apply to individual attitudes and choices as well as institutions. Freeman replies that “these arguments misinterpret the nature and role of Rawls’s principles of justice, especially the difference principle,” because the difference principle is correctly understood as a non-consequentialist representation of what “democratic reciprocity at the deepest level” would look like in a society. A proponent of Cohen’s position may reply that this either begs the question against his view by defining the difference principle in a way that only applies to institutions, or that the “democratic reciprocity at the deepest level” would inform individual attitudes as well as the structure of institutions. And so on.

Many of these debates take a similar form. Orthodox Rawlsians claim that the correct interpretation of some aspect of the Rawlsian model (M) rules out libertarianism, or socialism, or whatever. Proponents of these views reply that such an interpretation M either begs the question against their view by ruling it out via definition, or they offer an alternative interpretation of M. Orthodox Rawlsians come back with the claim that the unorthodox interpretation of M conflicts with their considered judgments, and so they reject that the best version of the theory supports unorthodox conclusions. The unorthodox reply that the orthodox interpretation conflicts with *their* considered judgments, and so they reject the orthodox interpretation.<sup>35</sup>

The Rawlsian framework is flexible enough for libertarians to agree with orthodox Rawlsian premises while adapting them to deliver libertarian conclusions. This aspect of the view is only a limitation to the extent that justice as fairness aspires to give general, determinate guidance about how the basic structure of

<sup>35</sup> Some press a parallel claim in the philosophy of religion. See Draper and Nichols 2013.

society should look. It's not clear that it must, though. In the original version of *A Theory of Justice*, Rawls writes, “reflective equilibrium . . . is a notion characteristic of the study of principles which govern actions shaped by self-examination” (Rawls 1971, 48). But Rawls’s framework aspires to more than self-reflection. Orthodox Rawlsians present justice as fairness as a framework that can tell us all how to live together. This is why they assert that libertarians are mistaken, rather than just different, when they read the Rawlsian project to have different implications than the standard interpretation.

## IV

### Intermediate Idealization

Just as models must make tradeoffs between parsimony and extensional adequacy, models also must make tradeoffs between degrees of idealization and degrees of realism. All models are, to varying degrees, idealizations. In moral and political philosophy, all models of justice make tradeoffs between realism and idealism. Justice as fairness is a model of a “realistic utopia” that aims to take people as they are by assuming that people respond to incentives and act in their self-interest (realism) while also telling what they should aim for (idealism).<sup>36</sup> The best case for this intermediate level of idealization is that the theory can be psychologically convincing

<sup>36</sup> This is why, on the one hand, Freeman responds to Sen's argument that the Rawlsian project is excessively idealized, by pointing out that political communities need ideals by which they can judge current policies. But on the other hand, Freeman also rejects the utopianism of anarchists like GA Cohen and libertarians like Jason Brennan on the grounds that principles of justice must be psychologically realistic and engaged with public concerns.

without entrenching injustice.<sup>37</sup> The best case against this intermediate level of idealization is that it describes a conception of citizens that is idealized in a way that makes the theory inapplicable to existing people and institutions while also failing to describe a vision of society that really is morally best.<sup>38</sup>

David Enoch makes a similar point about idealization in arguing against public reason liberalism. Enoch's point generalizes to other aspects of Rawls's framework that appeal to an intermediate level of idealization. Enoch begins with a theory of when idealization is appropriate. He argues that it is appropriate to idealize when the reason for idealization is consistent with the

<sup>37</sup> In a way, this problem is similar to three other criticisms of the Rawlsian project – criticisms of the concept of legitimacy, the original position, and public reason. Against the concept of legitimacy, critics ask why a society should tolerate unjust policies (entrenching injustice) simply because they meet some procedural criterion, which is, by stipulation, not a criterion related to justice but some other value? On the other hand, rejecting procedural constraints seemingly undermines the stability of the liberal project because people are unlikely to support or comply with political decisions they didn't have any opportunity to influence (failing to take people as they are). Or, against the original position, critics argue that Rawls's model idealizes away most of what matters for political disagreement (failing to take people as they are) or that it entrenches too many of people's unjust dispositions (entrenching injustice). Against public reason, critics allege that orthodox Rawlsians cannot defend an intermediate level of idealization about who counts as 'reasonable' because the reasons in favor of excluding the unreasonable are also seemingly reasons to exclude the reasonable but unjust (failing to take people as they are). Yet any reason to include unjust or illiberal views is also a reason to include unreasonable views (entrenching injustice). Freeman 2018.

<sup>38</sup> Note that this objection is distinct from the worry that ideal theory does not deliver achievable and desirable solutions to institutional failures. (See Stemplowska 2008) I grant that a theory can be valuable even if it does not deliver these results. My claim is that any reason to idealize to the point that Rawls does is a reason to idealize further or to favor a theory that does deliver an achievable and desirable solution.

underlying motivation for the view and not introduced as an ad-hoc way of avoiding obvious counterexamples.<sup>39</sup> There must be a rationale for idealization that explains why *this kind* and *this level* of idealization is informative for explaining the underlying phenomenon.

As an example of intermediate idealization, consider Enoch's case of public reason theories of legitimacy. If legitimacy requires justifying state power to the actual people who are subject to them, then no actual states are legitimate. Rawlsians are not anarchists. They seek a theory that can explain how states can be legitimate while accounting for the idea that legitimacy does require some kind of justification. Rawlsians then argue that states are legitimate if they can be justified to people under some idealized conditions—either if they can be justified to everyone except the unreasonable or if they can be justified by considering what people would endorse under hypothetical conditions. Enoch replies that these idealized conditions are not related to the underlying motivation for the view (justifying state action to those who are actually subject to it) and that they are also ad hoc because they define unreasonable people or idealized conditions a way that is not theoretically motivated, but which neatly rules out any counterexamples that would be a challenge to the view.

A similar dynamic plays out in Rawlsian discussions of distributive justice. Say that motivation for Rawls's theory of distributive justice is to describe an economic order that respects every person's status as a free and equal member of society. The original position achieves this by describing the economic institutions that people would support under conditions that prompt them to consider the economic order impartially.<sup>40</sup> But the

<sup>39</sup> See Enoch 2015.

<sup>40</sup> Freeman 2007, 126.

difference principle describes institutions that would be supported under conditions of full compliance, or what Rawls sometimes describes as “nearly full compliance”.<sup>41</sup> This is the level of idealization that encounters a problem like the one Enoch identifies with public reason theories. The justification for the idealization to full compliance is not motivated by the theory's aspiration to model what people would choose under impartial conditions. Rather, the idea is that it is necessary to know what principles people would support in ideal conditions of full compliance in order to know what principles people should support in non-ideal conditions that fell short of full compliance.<sup>42</sup>

But idealizing on the dimension of compliance, rather than some other dimension, potentially stacks the deck in favor of the difference principle by building into the concept of full compliance a level of compliance that rules out compliance with a more robust egalitarian or altruistic ethos but rules in compliance that exceeds the levels of compliance in existing societies. As in the case of public reason then, the idealization of full compliance is unrelated to the underlying motivation for the view (modeling what people would choose under impartial conditions) and idealizing in this way is also potentially ad hoc, because it defines a level of compliance in a way that rules out alternative conceptions of distributive justice that would be a challenge to the difference principle.

This intermediate level of idealization on the dimension of compliance results in a kind of intractability that is similar to what Enoch observes in discussions of public reason. When libertarians discuss distributive justice in ideal theory, they claim that ideally, people who complied with principles of just acquisition and transfer would comply with property rules that enabled them to

<sup>41</sup> For a further discussion of this point see Freiman 2017, 13.

<sup>42</sup> Freeman 2007, 472.

arrive at non-statist solutions to public goods problems, and the best society would be a capitalist one.<sup>43</sup>

Rawlsian critics reply that such an argument is unrealistic and that capitalism is structured in a way that *necessarily* causes vast concentrations of wealth and persistent inequality – no amount of compliance with principles of justice can solve these structural problems.<sup>44</sup> So at the other end of the idealization spectrum, economists and libertarians may acknowledge that inequalities of class and wealth are a consequence of people acting in their own self-interest rather than complying with the rules of just institutions. But they then argue that the disadvantages of self-interested behavior weigh *against* governmental solutions because non-compliant people would capture the coercive power of the state for their own advantage.<sup>45</sup> On this view, the fact that people are not immune from self-interest and free-riding is a reason to avoid concentrating power in political institutions where monopoly power is even more destructive than monopoly power in the marketplace.<sup>46</sup>

Either way, at the level of ideal theory or at the level of non-ideal theory, libertarians argue that the difference principle is not supported. To deliver the difference principle, the idealization of full or nearly full compliance must be interpreted in a way that is

<sup>43</sup> Cf. Brennan 2014; Freiman 2017.

<sup>44</sup> Property owning democracy and liberal socialism, Freeman writes, are more likely to achieve the Difference Principle than capitalism because capitalism “by nature” creates substantial inequalities and a privileged class of people who control most of the productive wealth. Freeman 2018, 127

<sup>45</sup> Freiman calls this the behavioral symmetry standard. Freiman 2017.

<sup>46</sup> Freiman’s point is that if some other system could, at its best, be superior to capitalism, it must be compared to capitalism at its best as well. If capitalism fails because of individual corruption, free-riding, weakness of will, or inefficiency, these factors are also likely to weigh against alternative political and economic arrangements with equal force.

controversial to libertarian interlocutors. When libertarians disagree with the claim that the economic order would resemble the difference principle in ideal theory, they needn't reject the Rawlsian aspiration to understand justice by modeling what people would choose under impartial conditions where everyone complied with justice. Rather, they deny the intermediate level of idealization involved in the Rawlsian interpretation of compliance.

A similar move occurs in Rawlsian discussions of economic freedom. Consider Freeman's claim that distributive justice "would not permit the *laissez-faire* doctrine of *caveat emptor*" and that the difference principle would support implied warranties in contracts that ensured consumer protection, laws against predatory lending, and the unconscionability doctrine in contract law.<sup>47</sup> On Freeman's view, the *laissez-faire* doctrine of *caveat emptor* would be incompatible with promoting a fair distribution of advantage, even if it included the standard protections that proponents of a *laissez-faire* system endorse, such as laws against fraud and misbranding. But here again, it's unclear what level of idealization to apply to this claim. In practice, limiting the public enforcement of contracts can be counter-productive because it limits the options of the least-advantaged and may cause some people to resort to privately enforced lending and labor agreements, which are not subject to democratic oversight and which potentially riskier than public enforcement.<sup>48</sup> In principle, laws against fraud and misbranding should be sufficient to ensure consumer protection, and restrictions on people's ability to freely negotiate the terms of their labor or to decide what to buy would be paternalistic.

Or, return to Freeman's voluntary slavery argument.<sup>49</sup> Freeman argues that since "contract and property are matters of publicly

<sup>47</sup> Freeman 2018. 181

<sup>48</sup> Cf. Flanigan 2017.

<sup>49</sup> This view is similar to Seanna Shiffrin's (2000).

enforceable right,” upholding voluntary slavery contracts consists in imposing duties on all citizens that they respect their fellow citizens’ private agreements as valid, as long as people voluntarily agreed to the terms.<sup>50</sup> But in ideal theory, Jason Brennan argues that if people all complied with principles of justice, and all people had a substantial social safety net, then they would not engage in exploitation and voluntary slavery agreements would not be an issue. Or, Chris Freeman argues that public officials’ refusal to uphold such contracts is consistent with libertarianism since people’s rights to make contracts do not include rights to public enforcement.

At the other end of the spectrum of idealization, the closest thing to voluntary slavery agreements currently arise in circumstances where people’s institutions have failed them so much that they are willing to migrate and work in a different illiberal society where they lack legal rights and are obligated to work until the end of their labor agreement.<sup>51</sup> In these cases, Freeman’s objection that “society is called upon ... treat a person not as a being with rights due moral consideration and respect, but as property” doesn’t apply.<sup>52</sup> The presence of these labor agreements reflects a preexisting lack of moral consideration and respect for foreigners, which is embedded in public institutions, not the other way around. And because voluntary slavery agreements generally arise in conditions that are already illiberal, so they do not call upon liberal members of a society or liberal public officials to uphold and enforce agreements that are contrary to liberal values. Moreover, in these unfortunate circumstances, no

<sup>50</sup> Freeman 2018, 66.

<sup>51</sup> This may describe the experiences of migrants who work in Qatar, for example, where the legal system grants foreign workers very few legal rights and workers are very vulnerable to fraud and abuse. Cf. Morin 2013.

<sup>52</sup> Freeman 2018, 66.

one who is discussing distributive justice, including libertarians, would defend the fraudulent and abusive conditions that characterize most of these arrangements, even if libertarians would, in principle, support the enforcement of a truly consensual agreement that took this form. On the libertarian view, the problem with seemingly voluntary slavery agreements isn't that public officials and citizens are expected to uphold them. The problem is that too often, such agreements are not actually voluntary. So, at either end of the spectrum of institutional idealization, voluntary slavery agreements do not require public officials to uphold and enforce contracts that are inconsistent with liberal values.

Freeman does not direct his argument against libertarianism at the level of fully ideal theory or at the level of actual policy. The intermediate level of institutional idealization derives principles of justice by imagining that people are better than they are, but only in particular ways.

### **Conclusions**

So far, I introduced a problem – which is that libertarians and orthodox Rawlsians talk past each other because the theory is under-specified. Orthodox Rawlsians write as if the theory clearly delivers their preferred specification, but it can't be that clear if libertarians keep disagreeing! At this point, it may seem that the solution to the problem would be to refine and specify the Rawlsian framework even further, to make it even clearer so that it delivers more determinate results. Yet this exercise is what generated the problem in the first place. As philosophers refined their versions of orthodox and unorthodox Rawlsianism to deliver more determinate results, the theory became more specified

for those who were developing it but less plausible to people who disagreed.

Justice as fairness begins as a single path, but it cannot end in a single place. In order to know which theory of distributive justice is the right one, it's not enough to consult justice as fairness because it doesn't rule out much. Rather, the theorist must appeal to other values in order to explain why she chose to take the path of property-owning democracy, rather than market democracy, as she walked the Rawlsian path. But then, once we reach the intersection and it's time to make that choice and justice as fairness cannot help, it's unclear why we walked down the path in the first place. Rather than talking about justice as fairness, which can support a range of interpretations about distributive justice, the theorist of justice may as well just argue for her favored theory of distributive justice in its own right.<sup>53</sup>

The foregoing discussion of Rawlsian distributive justice illustrates the broader point. Libertarian proponents of freedom of contract argue that Freeman is holding the liberties he values (speech, expression) to lower justificatory standards than he applies to economic liberties, but that the Rawlsian framework should support the basic status of economic freedom, even if that would require revisions or reinterpretations of Rawls's theory of

<sup>53</sup> David Enoch makes a similar point about public reason liberalism. Rather than talking about whether a view is reasonable or whether public reason liberalism can support it, people should just debate the merits of a view straightforwardly. On Enoch's view, people should focus their disagreement on the content of what they disagree about, not on whether the parties to the disagreement are reasonable. Similarly, I am arguing that people should focus their conversations about justice on the considerations in favor of theory A or B, rather than focusing on whether the interpretation of justice as fairness that supports theory A or B is correct. Cf. Enoch 2013 and Enoch, *Against Public Reason*.

distributive justice. Orthodox Rawlsian reply that the Rawlsian framework does not support the basic status of economic freedom, because libertarians are misinterpreting what it means for a liberty to play a role in the development of citizens' moral powers, so no revisions to the Rawlsian theory of distributive justice are needed. The disagreement about freedom of contract shifts to a dispute about the meaning of terms like "moral powers" of "basic liberty" rather than addressing the substantive issue of whether public officials may permissibly limit citizens' ability to make legally binding contracts.<sup>54</sup> This is a methodological point, and a similar point might arise in discussions of the Rawlsian methodology itself. Methodological objections can be re-cast as misinterpretations of the procedure or of concepts like "considered judgment," rather than refuted with arguments about how to make tradeoffs between theoretical virtues.

Perhaps it's time to travel off the beaten paths. The Rawlsian model gave us a way of talking about the different ways that institutions affect our lives, and it clarified the terms of important debates about the value of freedom and extent that public officials should uphold particular property rules, create public services, and enforce protections for various liberties. But the Rawlsian model doesn't tell us what theory of distributive justice is correct. Because the model has many moving parts and because its standards of evaluation depend so much on whether the model yields "extensionally adequate conclusions," Rawlsian arguments may now tell us more about their Rawlsian authors than they tell us about justice.

Katrina Forrester recently arrived at a similar conclusion on different grounds. She writes,

<sup>54</sup> Cf. Chalmers 2011.

Perhaps it is time to see the dominant philosophical liberalism of the late twentieth century not as the primary resource for political philosophers but as one doctrine among many and to understand Rawls's theory as a discrete chapter in the history of political thought.<sup>55</sup>

How might political philosophy look going forward? My tentative suggestion is that the aforementioned concerns about reflective equilibrium and intermediate levels of idealization weigh in favor of a more piecemeal approach at the level of non-ideal theory and a simpler, more unified approach to theorizing about justice at the level of ideal theory.

To illustrate the more piecemeal approach, recent entries in libertarian political philosophy may be a helpful guide. When they are not addressing orthodox Rawlsianism directly, libertarians generally argue against specific policies from a pluralistic moral foundation. For example, they argue against existing restrictions on specific liberties, such as limits on the right to own a business, minimum wage laws, maximum hour laws, occupational licensing requirements, the right to hire immigrants, bans on payday lending, zoning regulations, and laws that criminalize entire occupations, e.g., sex work, and policies that empower public officials to seize people's property for the sake of public projects. Feminist critics of Rawls take up a similar strategy.<sup>56</sup> In contrast, Freeman does not discuss any of these policies at length—most go unmentioned. But if the foregoing arguments are right, the Rawlsian approach could

<sup>55</sup> Forrester 2019, 279.

<sup>56</sup> See e.g. Okin's discussion of Rawls. Jaggar expands on the methodological implications of Okin's critique. Cf. Okin 1989 and Jaggar 2015.

weigh in favor (or against) any of these policies in the right (or wrong) hands. If so, then the Rawlsian apparatus is unlikely to be especially helpful in informing specific policy debates or advancing revisionary, new positions.<sup>57</sup>

A disadvantage of the piecemeal approach is that it's difficult to know why the proposals on offer are the right ones without appealing to a general, theoretical model. For this reason, simple, abstract, theoretical frameworks are useful for identifying inconsistencies in people's beliefs and thereby challenging people's beliefs about public policy. These ideal theories can inform how we evaluate existing institutions, or they can simply serve as a vision of the truth.<sup>58</sup> Understood in this light, maybe the Rawlsian framework is one ideal theory among many.<sup>59</sup> But if orthodox Rawlsianism aims to serve as an ideal that informs existing institutions, then its indeterminacy undermines the usefulness of the theory even as a guiding ideal. And even if orthodox Rawlsianism could deliver a determinate vision of the truth of how we ought to live together, other ideals are seemingly more appealing.

<sup>57</sup> Hare makes a point like this. Hare 1973, 145 writes, "Since the theoretical structure is tailored at every point to fit Rawls' intuitions, it is hardly surprising that its normative consequences fit them too – if they did not, he would alter the theory ... and the fact that Rawls is a fairly typical man of his times and society, and will therefore have many adherents, does not make this a good way of doing philosophy."

<sup>58</sup> Estlund 2019.

<sup>59</sup> As Forrester writes, rejecting Rawls's model as the primary resource debates in political philosophy opens up new possibilities, where proponents can defend theories of justice on equal footing, each as one doctrine among many, on their own terms rather than on the contested and slippery terms that have evolved over the last half-century of Rawlsian discourse.

Catholics call Mary the Mirror of Justice because she is without sin, so she can perfectly represent an image of God’s goodness. The face of God is surely a compelling ideal. But Rawls was dismissive of a religious approach to justice.<sup>60</sup> So in justice as fairness, Rawls created his own mirror of justice, which aimed to present a secular image of how we could live together.<sup>61</sup> Like the image of Mary, justice as fairness is offered as a tool. But when we see things in Rawls’s mirror, we see them dimly. We see only part of what justice requires because we can’t see beyond our own distorted reflection. It’s time to put down the looking glass and see each other face to face.

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<sup>60</sup> Freeman 2018, 9-11

<sup>61</sup> For a further discussion of the claim that Rawls was still, in some way, engaged in a theological project, see Nelson 2019.

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