

The Virtuous Citizen:  
Rawls and Cohen on the Scope of Egalitarian Justice

by

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**Dedication:**

To my great grandfather, Abram Wiens: A champion of justice, a virtuous citizen.

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### **Abstract:**

My thesis responds to G. A. Cohen's criticism that Rawls' theory of justice arbitrarily limits its scope to political and social institutions. On Cohen's view, there is no reason why we should not demand the same principles stipulated by justice as fairness at the level of everyday decisions. By clarifying Rawls' position, in both justice as fairness and his conception of public reason, I will show how Cohen's arguments against Rawls can be defused. I argue that the scope of egalitarian justice rightly applies primarily to the main social and political institutions. However, taking people as they are—with their various preferences and attitudes—is limited by the principles of justice in organizing a fair scheme of cooperation. Furthermore, for Rawls, citizens who hold democratic values act from the criterion of reciprocity when deliberating on matters of political coercion. And this, so I argue, is the mark of a virtuous citizen.

### **List of Abbreviations Used:**

TJ	A Theory of Justice
JFR	Justice as Fairness: A Restatement
PL	Political Liberalism: Expanded Edition
LP	The Law of Peoples with “The Idea of Public Reason Revisited”
WAI	Where the Action Is: On the Site of Distributive Justice
IIC	Incentives, Inequality, and Community
FEO	Fair equality of opportunity
LAG	Least advantaged group
MAG	Most advantaged group

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## Chapter 1: Introduction

My thesis responds to G. A. Cohen's criticism that Rawls' theory of justice arbitrarily limits its scope to political and social institutions. For Rawls, the role of justice, and the principles it stipulates, is to organize the background social and political conditions—what Rawls calls the *basic structure*—in which citizens' interactions and cooperative efforts take place. Public and political institutions are shared by all citizens through the effective distribution of benefits and burdens of social cooperation. Given the important effect these institutions have on citizens' lives, Rawls takes justice and its principles to apply at the level of the basic structure. Rawls' political conception of justice, *justice as fairness*, identifies principles applying to the basic structure all citizens could reasonably agree to. They reasonably agree, says Rawls, because citizens endorse the common democratic idea that society is a fair scheme among free and equal people. The principles of justice give expression to this widely shared, and deeply held, conviction about fair social cooperation through the organization of public and political institutions.

Cohen, by contrast, believes peoples' attitudes and preferences in their everyday non-political decisions—what he calls the *personal ethos*—are also evaluable within the scope of egalitarian justice. If he is right, then Rawls ought to give up his liberal tolerance and accommodation of individuals' inegalitarian preferences within a just basic structure. I argue that Rawls' view does indeed limit the acceptable range of citizens' preferences and attitudes, but it does so in reference to the democratic ideals of reasonableness, reciprocity, and respect. Rawls' view leaves open the possibility for reasonable disagreement among citizens on the correct worldview—what Rawls refers to as *comprehensive moral doctrines*—while justifying social arrangements in ways that are reasonable to everyone as free and equal citizens.



Chapter 2 begins with a discussion of Rawls' political conception of justice, justice as fairness. Within democratic liberal societies, citizens face intractable disagreement on metaphysical, moral, and philosophical worldviews. Despite entrenched disagreement on comprehensive doctrines, there exist shared *political ideas*—as opposed to moral ideas—about how public and political rules and regulations ought to be arranged. Political ideas and values are, says Rawls, implicit in the shared background culture of a given society. So even though citizens disagree about the truth of the available moral doctrines, they can agree on basic organizing ideas about the arrangement of their shared public and political institutions. Working from the organizing political idea of society as a fair scheme of cooperation between free and equal citizens, we can construct a political conception of justice that offers fair terms of cooperation for everyone. Given the fundamental political ideas of a democratic society, the most reasonable conception, so Rawls holds, is justice as fairness.

Rawls suggests that principles of justice would be rationally agreed to under fair terms of negotiation. Here, “fair terms” are stipulated by the use of the *original position*, in which representatives of citizens are ignorant of social, biological, and historical features about themselves—for example, religious affiliation or social status. From this position of ignorance, representatives choose principles to organize the basic structure. These principles include the liberty principle, principle of fair equality of opportunity, and the difference principle (these will be explained below).<sup>1</sup> Once the basic structure is justly organized according to these principles, people are free to pursue their conception of the good life, however conceived.

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<sup>1</sup> My exegetical approach in delineating three principles of justice differs from Rawls' two, with the second divided into two sub principles. This is a purely aesthetic choice on my part, and nothing about justice as fairness hangs on it.

In chapter 3, I consider Cohen's criticism that Rawls cannot consistently sustain the view that the basic structure is the primary site of justice. First, it seems justice, as Rawls has it, requires accommodating inegalitarian preferences and attitudes. Cohen asks how persons who demand high rewards for their talents could concurrently endorse the difference principle, which asserts that worst off be as well off as under any alternative scheme reasonable to all. Surely the worst off would be even better off if those "high-flyers" would use their talents *and* not demand vast inequalities in wealth distribution. The worry for Cohen is that a just basic structure, as Rawls has it, accommodates attitudes and preferences at variance with the principles of justice. Given the important role the personal ethos plays in allowable inequalities within society, principles of justice should also apply at the level of preferences and attitudes.

Second, and relatedly, Cohen disagrees with the idea that social and political institutions are the primary site of justice. Rawls holds that the basic structure, from which social cooperation occurs, is of fundamental importance in the distribution of benefits and burdens in society. Cohen asks: if justice is concerned with the coercive and profound influence background social conditions have on peoples' opportunities, then why do these concerns not also refer to non-political patterns of behaviour, for these patterns of behaviour also influence the distribution of benefits and burdens of cooperation? Rawls' insistence on justice applying to the level of public institutions seems to make an arbitrary distinction between the basic structure and the ethos of individuals in reproducing inegalitarian patterns of behaviour over time.

This chapter concludes with the response, on Rawls' behalf, that the basic structure is not indifferent to the cultivation and preservation of an egalitarian ethos in society. Nothing on Rawls' view prevents organizing the basic structure in ways that

promote equality as feature of people's moral doctrines. Further, there are obvious limits to taking people's attitudes, preferences, and beliefs as fixed in a just society.

Inegalitarian preferences and attitudes do not override other peoples' rights and expectations to enjoy in their fair share of freedoms and opportunities with others. Where inegalitarian demands infringe on others' equal status as citizens, a just basic structure need not accommodate them. I conclude that if we grant Rawls his political conception of justice as fairness, we can defend against charges of inconsistency and arbitrariness.

Chapter 4 defends Rawls' view that there are some duties for people in their capacity as citizens to justify state coercion in ways others could reasonably accept. If this is true, then Cohen's criticism that Rawls ignores the personal ethos of citizens is false. On Rawls' view, citizens develop and act on comprehensive moral doctrines that affirm reasonable political conceptions of justice. In doing so they act from, what Rawls terms, the *criterion of reciprocity* when questions of political coercion arise. Reciprocity is a feature of the virtuous democratic citizen: whatever their own values, ideals, and conceptions of the good within their personal worldview, they bracket these considerations in favour of public reasons when arguing for the justification of political force. This is a moral, political doctrine followed by democratic citizens.

I will revisit Cohen's critique and suggest that he is right to claim that egalitarian justice is not limited in scope to the basic structure. However, his insistence on the principles of justice applying to people's everyday decisions is misguided. This view confines acceptable moral doctrines to those that agree with egalitarian principles. This unfairly restricts the basic rights of liberty of conscience and freedom of thought—two core liberal democratic values. Rawls, I argue, offers a more compelling view of egalitarian justice. His is a political conception of equality: persons as free and equal are

concerned with how social and political arrangements restrict their freedom. Given the equal status of other citizens, virtuous citizens willingly engage in public reasoning to justify the use of political force in ways all could accept. The scope of egalitarian justice includes the reasonable moral doctrines of citizens as those that endorse the value of reciprocity, respect, and legitimate political authority.

## **Chapter 2: Rawls and Justice as Fairness**

I begin with an explication of Rawls' theory of justice as fairness. This chapter will accomplish three tasks. First, I will outline Rawls' theory of justice as fairness in sufficient detail for a sufficiently robust critique to avoid misunderstanding Rawls' programme. Second, I want to articulate Rawls' moral concern for an egalitarian social arrangement. This will appeal to the political sphere as well as the personal. In the political sphere persons are viewed as sharing equally in the benefits and burdens of legally enforced rules and regulations of social cooperation. In the personal sphere, citizens are viewed as having an equal opportunity to pursue their own conception of a worthwhile life. Finally, I want to make explicit the possible consequences of Rawls' egalitarianism with a particular eye to showing how it is egalitarian at all. As Sen argues, any egalitarian theory will promote an important space for equality—for example equality of wealth, wellbeing, or liberty. In doing so, social arrangements that promote one area of equality will unavoidably allow concurrently justifiable inequality in other spaces. Because Rawls has come under criticism for allegedly justifying inequalities that are either unacceptable from some moral point of view or are inconsistent within his own theory, it is important that we see clearly the content of Rawlsian equality (and inequality) and the reasons for determining this area as a legitimate concern for a just society. If these reasons are acceptable and coherent, then we will have grounds to defend Rawls from such critiques.

The task of justice as fairness is to specify the most appropriate principles of justice that would organize society conceived as a fair system of cooperation among free and equal citizens from one generation to the next (JFR, p. 7). Justice as fairness asserts the idea that the basic structure is the primary subject of justice. As stated in Chapter 1

above, the basic structure is limited to the social, economic, and political institutions of society. They regulate through legal coercion the distribution of rights and responsibilities among citizens who share in those institutions. Next, the idea of the original position as a hypothetical contract will be explained and argued for as an instance of pure procedure of justice. The original position places representatives of citizens behind a veil of ignorance in which they know nothing of their social, biological, or philosophical dispositions. From this hypothetical position citizens negotiate for the organizing principles of background justice in their society. Three principles are arrived at: the liberty principle, fair equality of opportunity, and the difference principle. These will be explained in detail below.

I conclude with two further discussions and clarifications: the idea of an overlapping consensus and the defense of justice as fairness as an egalitarian theory. The first idea—the idea of an overlapping consensus—invokes the moral division of labour between personal conceptions of the good life and political conceptions of a just society. People can, and do, fundamentally disagree about philosophical, moral, and religious conceptions while agreeing to fair terms of social cooperation. The second idea—that justice as fairness is egalitarian—offers three important considerations of equality in justice as fairness. Importantly, the resultant inequalities are defended by considerations of citizens as having an equal share in political responsibility and as rational end-setting agents.

### **2.1 The Preliminary Ideas of a Fair System of Cooperation:**

Rawls identifies the central organizing idea of society as a “fair system of social cooperation over time from one generation to the next” (JFR, p. 5). Social cooperation suggests more than mere coordination. It implies a willingness to engage in public rules

and regulations as appropriate forms of conduct for individuals in that society. Citizens suppose that appropriate rules are reasonable for all members of society and add to each other's rational advantage through fair cooperation. The idea of society as a fair system of social cooperation is implicitly understood from the basic ideas within a democratic society's *public political culture*—where “public political culture” simply refers to the available and widely shared political ideas in society. Rawls, in identifying this central organizing idea, states, “This spelling out of the central organizing idea of social cooperation is not a deductive argument... All we need claim is that the idea of society as a fair system of cooperation is deeply embedded in that culture” (JFR, p. 25). This claim will be further explored in section 2.6 below. For now we can take this assumption as our starting point in developing justice as fairness as a political conception.

Two further fundamental ideas work in conjunction with the central idea of society as a fair system of cooperation. These are: the idea of citizens as free and equal, and the idea of society regulated by a public conception of justice<sup>2</sup> (JFR, p. 5). While these may not be explicit in the public political culture, working out what the idea of a fair and cooperative society could mean implies their acceptance within that culture. Given the idea of citizens as free and equal, fairness will have some connection with citizens conceived of as equal, morally autonomous agents. That is, each has their own moral, religious, or philosophical views that are not necessarily shared with others, and might even conflict. Importantly each has an interest in preserving their right and opportunity to pursue their own comprehensive doctrines. Rawls writes:

These fundamental intuitive ideas are viewed as being familiar from the public political culture of a democratic society... That a

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<sup>2</sup> A public conception of justice, as we will see, is separate from, but may be grounded in, peoples' moral, philosophical, or religious conceptions.

democratic society is often viewed as a system of social cooperation is suggested by the fact that from a political point of view... its citizens do not regard their social order as a fixed or natural order, or as an institutional structure justified by religious doctrines or hierarchical principles expressing aristocratic values. Nor do they think a political party may properly, as a matter of declared program, work to deny any recognized class or group its basic rights and liberties. (JFR, pp. 5-6)

What is clear is that social cooperation, however conceived, takes the distinction between individuals—with their component attitudes, preferences, and reasonable conceptions of the good—seriously as a condition of fairness. A feature of social cooperation is the idea that people in society pursue their own rational advantage. All have their own conception of the good that they want to see realized. Those engaged in social cooperation want to not only act from their conception of the right as a citizen but also from their conception of the good as an agent with her own ends.<sup>3</sup>

The latter idea—the idea that society is regulated by a public conception of justice—specifies the ideal of a *well-ordered society* where all citizens agree to, and act from, a conception of justice. Rules and regulations are not merely a *modus vivendi*. Citizens accept the rules as just and act in accordance with them because they regard them as just. Failure to offer reciprocal considerations on fair terms of social organization would be to reject the idea of society as a *fair* scheme of cooperation. Fair terms of cooperation are “terms each participant may reasonably accept, and sometimes should accept, provided that everyone else likewise accepts them” (JFR, p. 6). What may be *reasonably* accepted is a matter to be worked out by the shared political ideas, values and conceptions of justice within that society. In our case, we identify the idea of a fair scheme of cooperation among them.

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<sup>3</sup> This is not to be confused with the Kantian (moral) conception of the intrinsic value of individual rational agency.



## 2.2 The Basic Structure:

I turn now to the argument for the basic structure as the subject of justice. The basic structure is the “way in which the main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arise from social cooperation over time” (JFR, p. 10). Rawls’ focus is not on individual behaviour or disputes about religious, philosophical, or moral truths. His concern is for the principles and standards on which public institutions are organized and how the principles are evaluable from a public criterion of justice. Interactions, associations, and opportunities always occur within some background social and political framework. This framework refers to the regulatory institutions and practices in society that assigns the benefits and burdens of social cooperation for those within it. The main social and political institutions assign legally permissible activity and economic distribution within society, so are basic from the standpoint of social cooperation. Their just arrangement is considered fundamental to the background conditions from which cooperative social activity is conducted.<sup>4</sup> Justice as fairness, according to Rawls, applies to the basic structure as the primary subject of justice.

What is included in these institutions is only made clear (or at least clearer) once we see the argument for Rawls’ insistence on the application of justice to the basic structure.<sup>5</sup> The basic structure is the locus of concern for justice as fairness for two

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<sup>4</sup> I presume cooperative activity includes those interactions whereby people merely tolerate one another within a safe public space. This includes, among other things, freedom to practice one’s religion without interference from the state or other citizens.

<sup>5</sup> The scope of the basic structure is controversial. Okin (1989) has argued that the family falls under the scope of justice. Rawls agrees with this inclusion. He reasons, “The family is part of the basic structure, since one of its main roles is to be the basis of the orderly

reasons. First, people are inescapably connected to the social arrangements and background conditions in which they live their lives. This is apparent when we consider the structures from which people negotiate their social world as free and equal citizens. Institutions that place some people at a disadvantage while privileging others could not be said to be fair—given the initial assumption that persons are equal.<sup>6</sup> If persons bargain from a position of weakness, they may agree to terms freely, but they have not done so fairly. For example, a person may agree to give up half his possessions when threatened with injury. He can be said to freely agree to this transaction, but this hardly seems to cohere with our basic intuitions of fairness. It cannot be enough that persons exercise their freedom as individuals contracting with one another for mutual advantage; we also need to specify the background conditions that secure the possibility for fairness. Rawls writes, “The role of the institutions that belong to the basic structure is to secure just background conditions against which the actions of individuals and associations take place” (PL, p. 266). The idea here is that in society we find ourselves inescapably bound to the background conditions in which we are born, and leave only at death (JFR, p.55). The basic structure, as the background from which social interactions take place, is pervasive and unavoidable in making decisions, performing actions, and pursuing life

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production and reproduction of society and its culture from one generation to the next” (LP, p. 157). But, says Okin, Rawls fails to grasp the consequences of what this entails—that is, once the principles of justice are applied within family structures, the demands of justice condemn inequalities traceable to traditional gender roles. Any ascription of responsibility based on sex would not adhere with the FEO and difference principle (to be discussed below). In “The Idea of Public Reason Revisited” (1999) Rawls leaves open the possibility that women and men can freely engage in family life that divides domestic labour unevenly for reasons given by their own moral or religious conceptions. This is a difficult problem for Rawls’ conception of the basic structure—as well as a general problem for justice as fairness. I do not intend to address this problem here.

<sup>6</sup> I have not clarified yet what equality amongst citizens amounts to. The point here relies on the intuitively appealing assumption that arbitrary advantages used in contracting with others cannot entail the concept of “fair” agreements.

prospects available to those within it. The profound effect on peoples' lives is one reason, says Rawls, the basic structure is the primary subject of justice.

The second reason for the focus on the basic structure is the important influence it has on shaping peoples' conceptions of themselves within it. Rawls writes:

Now everyone recognizes that the institutional form of society affects its members and determines in large part the kind of persons they want to be as well as the kind of persons they are... [The] basic structure shapes the way the social system produces and reproduces over time a certain form of culture shared by persons with certain conceptions of their good. (PL, p. 69)

The basic structure is instrumental in profoundly shaping persons' conceptions of a good life and their idea of a just society. The basic structure determines to some extent the development of individuals' conception of themselves and their good. As will be discussed in the next chapter, the nature of these institutions is influential, not just in distributing the benefits and burdens of social cooperation, but also in cultivating and sustaining a social ethos.

The basic structure is coercive and inescapable. Its organization is profoundly influential on those within it. If we consider society as a fair scheme of cooperation between citizens, then the organizing principles for the basic structure must be reasonable from the standpoint of citizens who share in the burdens and benefits of society. Persons who share public institutions have a responsibility to justify the social order to each other on grounds that each could accept (at least given our assumptions about democratic societies). Rawls states,

While political power is always coercive... in a democratic regime it is also the power of the public, that is, the power of free and equal citizens as a corporate body. But if each citizen has an equal share in political power, then... political power should be exercised, at least when constitutional essentials and questions of

basic justice are at stake, in ways that all citizens can publicly endorse in light of their own reason. (JFR, pp. 90-91).

It is clear that the coercive influence of the basic structure is a reason for its being a concern to citizens' fundamental interests. Political authority exercised through the organization of public and social institutions is, in democratic regimes at least, a function of the citizens' own conception of the public good. (As we will see in Chapter 4 below, this is also the primary locus of justification for the organization of the basic structure.) For Rawls, insofar as the basic structure is regulative in just this way and for the profound effects it has on those within it, the basic structure is the primary site of justice.

### **2.3 The Original Position:**

Now that the role and site of justice have been identified, we must address how the terms of fair cooperation are to be specified. Justice as fairness holds that "fair terms of social cooperation are to be given by an agreement entered into by those engaged in it" (JFR, p. 15). We take a plurality of religious, philosophical, and moral views as given in democratic society. Given this fact of pluralism, citizens who share in the basic structure could not agree on any one of these "comprehensive doctrines" as the standard or moral authority for social arrangements. Therefore some other procedure for agreement is required that could be acceptable under conditions that are fair for all (JFR, p. 15). This section will show how the *original position*, as a hypothetical contract, can derive principles of justice all could reasonably agree to.<sup>7</sup>

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<sup>7</sup> The role of the original position changes between Rawls' early *Theory* and late *Political Liberalism*. The former sees the original position as a kind of master argument for reasonable principles of justice all could reasonably accept. Humans, being rational end-setting moral agents, seek to secure their greatest share of social goods in pursuit of these ends in ways that would be reasonable to other rational beings similarly constituted. The original position, as a hypothetical contract under fair conditions, ideally situates rational moral agents to choose principles that would be reasonable to all. This use of the original

The original position stipulates a hypothetical situation that sets fair terms on which people can agree to principles of justice. In the original position people are ignorant of particular facts about themselves—their race, gender, socioeconomic status, talents and abilities, comprehensive doctrines and so on. However, they do have access to general knowledge about human nature and social institutions. Behind this *veil of ignorance* rational persons would agree to principles of justice that best secure their portion of social primary goods (to be discussed in section 2.5 below) needed to live what they determine to be a worthwhile life. The original position is uniquely impartial—it removes unfair advantages in negotiations that would otherwise be historically and socially available. These arbitrarily distributed advantages would serve to disenfranchise some, while promoting the interests of others, in negotiations for the principles of justice. Rawls writes, “[These] conditions must situate free and equal persons fairly and must not allow some persons greater bargaining advantages than others. Further, such things as threats of force and coercion, deception and fraud must be excluded” (PL, p. 23). The assumption Rawls makes is that inequalities between persons that are historically, socially, or biologically conditioned unfairly advantage people when negotiating principles of justice.<sup>8</sup> The original position removes these conditions from representatives

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position came under heavy criticism because Rawls was “smuggling in” Kantian claims about moral agents that were resulting in Kantian principles. Because not everyone holds that agents are not reasonably motivated in this way, Rawls cannot use this as an argument for principles everyone could agree to. In *Political Liberalism*, Rawls sees the original position as playing a less prominent role in deriving principles of justice. As will be seen, the original position captures publicly available political values in restricting reasons for arguments for the principles of justice (Freeman, p. 143). I follow this conception of the original position from here on.

<sup>8</sup> Some writers have challenged Rawls’ assumption that contingent advantages are unfair (see Nozick, 1974). It is not my intention to defend Rawls from these arguments, even though I do think these criticisms have been sufficiently refuted (see G. A. Cohen’s

behind the veil of ignorance and so helps elicit what people would already agree to given their shared democratic political values (Freeman, pp. 144-145). Contracts made behind the veil of ignorance are considered reasonable because all would rationally endorse the principles of justice, and they would be endorsed from fair background conditions.

The original position is proposed as a representation of fair conditions for agreeing to principles of justice that organize the basic structure in society. Rawls states, “[The original position] models our considered convictions as reasonable persons by describing the parties (each of whom is responsible for the fundamental interests as a free and equal citizen) as fairly situated and as reaching an agreement subject to appropriate restrictions on reasons for favouring principles of political justice” (JFR, p. 18). The original position models two things: 1) fair conditions from which free and equal citizens agree to terms of social cooperation, and 2) acceptable restrictions on reasons parties can put forward in arguing for principles of justice. These are supported by the deeply held (political) idea that society is a scheme of fair cooperation among free and equal citizens and, *a fortiori*, that principles organizing the basic structure be reasonable to those they have coercive influence on.

The original position is unique in situating individuals engaged in deliberation over fair organizing principles with an intuitive gloss from the familiar trope: I cut, you pick. For example, two children must divide a cake between them but each wants as big a piece as she can get. They are told, “Sue cuts, Sam picks first”. Sue naturally would cut as evenly as possible knowing that Sam would take the biggest share. Similarly, citizens unaware of their position, rationally choose principles that would best secure their

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“Robert Nozick and Wilt Chamberlain: How patterns preserve liberty” in Self-Ownership, Freedom, and Equality (1995).

conception of the good once the veil is lifted; they would cut as evenly as possible so they get as much of the cake as they could. This intuitive example of fairness will be pursued in the following section.

#### **2.4 The Moral Powers:**

Two questions follow: what are citizens dividing, and what is their conception of the good? To the latter question, Rawls distinguishes two moral powers each and every citizen possesses to some degree. These powers, Rawls holds, are constitutive of the citizen as being both reasonable by acting from moral requirements, and rational in the pursuit of her own self-interest. Together these represent the person's conception of the good and provide for her a set of "higher order interests" as a free and equal moral person (Freeman, p. 475). The first moral power is the capacity to "understand, to apply, and to act from (not merely in accordance with) the principles of political justice that specify the fair terms of social cooperation" (JFR, pp. 18-19). Each person has a sense of how social interactions ought to be managed and what people should expect from each other. Given this sense of "fair play," citizens offer principles of justice they accept *qua* a conception of public reasonableness. Rawls offers, "Reasonable persons are ready to propose, or to acknowledge when proposed by others, the principles needed to specify what can be seen by all as fair terms of cooperation... even at the expense of their own interests, provided others likewise may be expected to honor them" (JFR, pp. 6-7). Citizens' sense of justice is logically entailed by this capacity, and its exercise is one kind of expression of the individuals' good.

The second moral power is:

[A] capacity for a conception of the good: it is the capacity to have, to revise, and rationally to pursue a conception of the good. Such a conception is an ordered family of final ends and aims

which specifies a person's conception of what is of value in human life or, alternatively, of what is regarded as a fully worthwhile life. (JFR, p. 19)

The second moral power is a personal commitment to some philosophical, religious, or moral worldview that determines and organizes meaningful activity in one's life. This is not to say that all persons' systems of ends are coherent, well-spelled out, or even static over time. It is, however, evident that persons who pursue life plans do so from background reasons that rely on some further comprehensive doctrine no matter how incompletely conceived.<sup>9</sup> This moral capacity is, in part, what it means to be free and rational. So this too is an expression of another kind of good for citizens. Namely, having these two moral powers to at least a minimal degree encompasses a person's conception of the good for herself and others. As such, the moral powers guide representatives in choosing rational and reasonable principles from the original position.

However, it is not enough that persons merely have the capacity for these moral powers, but that they have the genuine opportunity to exercise them in a just society. Rawls proposes five social primary goods that are necessary for the realization of the citizens' conceptions of the good. That is, they are the materials with which the moral powers are exercised. They are, says Rawls, "various social conditions and all-purpose means that are generally necessary to enable citizens adequately to develop and fully exercise their two moral powers, and to pursue their determinate conceptions of the good" (JFR, p. 57). Insofar as social primary goods are necessary all-purpose means to citizens' pursuit of their ends (or their determinate conceptions of the good), it is of fundamental

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<sup>9</sup> Rawls does not intend to provide a comprehensive theory of human psychology or theory of mind. The emphasis here is on the universal tendency of individual members of society to develop a capacity for some conception of what makes life worthwhile. Along with Rawls, I think this is fairly uncontroversial.



interest to secure a just distribution of them. Thus agents in the original position negotiate for principles that would secure for themselves their greatest share of the primary social goods. The answer to the first question above—what is divided? —is the social primary goods.

Rawls lists the social primary goods as follows: 1) basic rights and liberties, 2) freedom of movement and occupation, 3) powers and prerogatives of offices and positions of authority and responsibility, 4) income and wealth, and finally, 5) the social bases of self-respect (JFR, pp. 58-59). These will be discussed in more detail below.

### **2.5 Three Principles of Justice:**

According to Rawls' later formulations of the principles of justice, the three principles are to be applied in lexical priority beginning with the liberty principle, then fair equality of opportunity, and finally the difference principle. As we move from one principle to another the veil becomes thinner and people have more access to the facts of their society (JFR, p. 48). Because the first level of deliberation occurs under the full veil of ignorance, it produces reasonable considerations for the most basic essentials that protect peoples' fundamental interests. These, says Rawls, are to be constitutional essentials in just liberal societies. Next the parties deliberate on principles of distributive justice. These determine the fair distribution of social goods to the extent that inequalities are reasonably tolerated; their results will be less determinate and open to burdens of judgement.<sup>10</sup>

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<sup>10</sup> There may be a tension in Rawls' conception of the original position as a case providing fair conditions from which determinate principles of justice are selected. Consider his formulation of the distributive principle's application: "[The] second principle applies at the legislative stage and it bears on all kinds of social and economic legislation... Whether the aims of the second principle are realized is far more difficult to ascertain. To some degree these matters are open to reasonable differences of opinion..."

The first principle agreed to from the original position is:

*The Liberty Principle:* Each person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all. (JFR, p. 42).

The liberty principle effectively sets out the standard for public institutions not to restrict persons' basic liberty to pursue their conception of a worthwhile life so long as it does not limit the extent to which another can pursue her conception. That is, basic freedoms are protected against *all* freedoms. Rawls gives a list of basic liberties entailed by this principle. They include: freedom of thought and liberty of conscience; political liberties (the right to vote for example) and freedom of association; liberty and integrity of the person; rights and liberties under the rule of law (JFR, p. 44). They are not available for trade-offs in securing other goods like socioeconomic advantages (JFR, p. 46-47).

It is, however, not enough that people merely have these basic liberties, but that they have a meaningful effect in peoples' lives; equal liberty without the equal worth of liberty is empty. This suggests that some form of distribution is necessary to make rights worth something. For example, some form of law enforcement is required as a mechanism to protect persons' bodily integrity. It is not enough that they merely have this right, but that it is secured through a form of collective assurance like a police force. This suggests that there will be trade-offs between, for example economic liberty and other important rights. The unregulated acquisition of private property by some—even under initially fair conditions—would eventually undermine the liberty of others in their expectations of a full range of life plans. While all might still have the constitutional

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(JFR, p. 48). Rawls suggests that reasonableness is not sufficient in realizing the principles of justice in all cases. Persons' rational pursuits will reasonably conflict on matters of basic justice. I take up these problems in chapter 4.

guarantee of political and economic liberties, only some would be able to exercise them because political and economic influence would be concentrated in the hands of the few.<sup>11</sup> For Rawls economic freedoms are important but not basic. Wealth and income and the social bases of self-respect are two of several primary goods, the priority of which is not settled before hand. As we will see, Rawls does give a lexical priority to the liberty principle, but it will be important to keep in mind that this is not a case of maximizing liberty; rather it is maximizing the *fair value* of basic liberties. Only then will we derive a fully adequate scheme of basic liberties for all.<sup>12</sup>

In constitutional democracies, basic rights and liberties are enshrined as inviolable regardless of the good that denying these rights to some people might achieve. By guaranteeing the fair value of basic liberties as a constitutional essential, justice as fairness sets a basic social minimum. The social minimum is, according to Rawls, the basic needs necessary for the effective exercise of the fair value of basic liberties. It is not immediately clear what this would entail. We could assume it at least includes a minimum level of income, safety, access to political participation, and, perhaps, a minimum level of health care. It is clear that this is already a concern for distributive justice, but at this stage our concern is only meeting the needs of those not able to fully

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<sup>11</sup> This is not to mention that the rich have enormous influence in political decision-making. Vast income inequalities without strict regulation of political party funding, kickbacks, media censorship and so on would destabilize a society based on the principles of justice as fairness.

<sup>12</sup> I do not intend to leave the reader with the impression that the ranking of liberties in a just society is not problematic—it is (see Freeman’s (2008; Chapter 2) excellent discussion on this). I leave aside tensions between liberties limiting liberties that are best resolved elsewhere. For now I hope to motivate the idea that *basic* liberties and freedoms are the benchmark for persons’ fundamental interests in pursuing their idea of what makes life worthwhile (i.e. the development and exercise of their two moral powers over a complete life). What I have not shown is that some liberties are valuable in their own right. This would not be consistent with Rawls’ own view.

realize the fair value of political liberties and freedoms. One excellent example Rawls gives is the use of public funds to finance election campaigns. This would reduce the unfair advantages wealthy people have by “investing” in political influence. As a matter of constitutional justice, the value of political participation could not be concentrated in a few hands, as this would undermine the basic political liberty of others. The *fair value* of basic liberties therefore neutralizes the effects—in terms of equal political participation—of differences in political influence and social positions.

Next we have the *distributive principles of justice*. They are:

- i) Offices and positions open to all under conditions of *fair equality of opportunity* (FEO), and
- ii) *The Difference Principle*: inequalities are to be to the greater benefit of the least-advantaged members of society than under any alternative scheme that would be reasonable to all. (JFR, pp.42-43)

First, Rawls understands the FEO to embody equality in two ways: 1) discrimination is not acceptable in moderating the available political, economic and social positions open to all, and 2) the FEO corrects for social disadvantages due to inequalities between people (for example social class or disability). Rawls writes, “In all sectors of society there should be equal prospects of culture and achievement for everyone similarly motivated and endowed. The expectations of those with the same abilities and aspirations should not be affected by their social class” (TJR, p. 63). He adds that the FEO corrects “the defects of formal equality of opportunity... To this end, [FEO] is said to require not merely that public offices and social positions be open in the formal sense, but that all should have a fair chance to attain them” (JFR, p. 43). This could extend, for example, to resources for education being allocated in higher quantities to those who need more assistance.

Distributive benefits and burdens apply so long as people with similar aspirations but

unequal resources, talents and abilities exist. Of course there will be indeterminate conclusions in justice as fairness open to reasonable disagreements (see footnote 10 above). Indeed, the original position may end up being too indeterminate for procedural justice to resolve problems in non-ideal circumstances—for example, what is a just level of compensation for persons with learning or physical disabilities? For now I leave aside this difficult problem. The driving intuition, however, is that free and equal citizens should be equally situated in formulating and exercising their two moral powers. Any inequalities in the distribution of social primary goods that result are permitted only insofar as opportunities for one's relative advantage—for example, to earn a higher than average wage—is open to all under fair conditions, and do not infringe on the fair value of equal basic liberties for others.<sup>13</sup>

Finally, the difference principle distributes resources so that the worst off are as well off under this social arrangement as under any feasible alternative.<sup>14</sup> Take for example two competing economic arrangements: one allows the acquisition of private property through work and investment; the other pools community resources and distributes goods based on need. It is an empirical question whether the worst off would be better off in one of the two societies (provided, of course, that the constitutional essentials and FEO are equally secured as per Rawls' requirement for a lexical priority).

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<sup>13</sup> This has the (arguably) unfavourable consequence that those worse off are somehow responsible for their lot. Of course in an ideally just society this may not be controversial given the responsibility people have for their ends and the just arrangement to make those ends realizable. I leave aside this issue but it seems on a charitable reading of Rawls we can accept this view as a valid justification for permissible inequality.

<sup>14</sup> For Rawls, the “best” and “worst” off refer to the distribution of primary goods (as discussed above in section 2.4), not as some have confused, to their well-being or happiness. These conceptions are likely to overlap a great deal. However, where expectations for satisfaction differ (e.g. expensive tastes), Rawls does not consider distributions for the equality of well-being just.

Rawls takes it that some economic inequalities could be allowable and, indeed, desirable. In market economies, the worst off can, it is supposed, expect a higher quality of life and a fuller range of life plans when some people work harder and produce more for a greater economic advantage. This would be a case in which economic inequality is to the benefit of the worst off. (That is, to the degree that the worst off are not trading on other primary goods like the social bases of self-respect and the basic political liberties and freedoms.)

This formulation is not to be confused with the maximin rule in decision-making. The maximin rule suggests a conservative approach to decision-making under uncertain circumstances. It recommends choosing the principle that has the best outcome in the worst possible case. Rawls, on the other hand, suggests that the difference principle be used as public criterion of reciprocity in justifying legislative decisions. At the level of social and economic justice (and after the constitutional essentials are settled), legislative bodies refer to the difference principle to organize public institutions. In doing so, inequalities are reasonable for the worst off because they are as well off as they could be. In anticipation of Cohen's argument, it is not clear whether the worst off are truly better off under an unequal economic regime where the best off could produce more without economic incentives but do not. This will be discussed in greater detail in chapter 3.

In conclusion, the principles of justice as fairness situate people first and foremost as equal citizens in a fair system of cooperation. They protect, regulate, and distribute the all-purpose goods in a fair basic structure that all would find reasonable from the original position.<sup>15</sup> The three principles make reference to citizens' two moral powers in justifying the principles' regulative role and, when disagreements occur, offer grounds for

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<sup>15</sup> Here the original position is seen as a hypothetical contract and thought of as a case of procedural justice, if not always "pure" as Rawls initially contends.

reasonable public deliberation within the boundaries of justice as fairness. As Rawls writes, “The basic structure is arranged so that when everyone follows the publicly recognized rules of cooperation, and honours the claims the rules specify, the particular distributions of goods that result are acceptable as just (or at least not unjust) whatever these distributions turn out to be” (JFR, p. 50). While the principles are lexically prioritized, they work in tandem distributing social primary goods and regulating self-interested pursuits of individuals for the just and stable conditions of a democratic regime within the basic structure.

## **2.6 An Overlapping Consensus:**

I turn now to the idea of justice as fairness as a freestanding political conception. A feature of democratic societies is the *fact of reasonable pluralism*: the co-existence of a plurality of worldviews—or comprehensive doctrines—that endorse competing conceptions of the good. By *comprehensive doctrine* Rawls means any philosophical, moral, or religious conception of “what is of value in human life or, alternatively, of what is regarded as a fully worthwhile life... in light of which [persons’] various ends and aims are ordered and understood” (JF, p. 19). The fundamental differences between various comprehensive doctrines in a given society cannot yield a basis for consensus on their own terms for the justification of a particular political organization. For this reason, Rawls seeks a political conception of justice that does not rely on its justification from any particular comprehensive doctrine. Justice as fairness, as a political conception founded on the fundamental political ideas shared by reasonable comprehensive doctrines, is a freestanding political conception that a plurality of comprehensive doctrines could reasonably endorse.

Justice as fairness divides the moral labour of citizens between their political values and those of comprehensive moral, philosophical, or religious worldviews. The former, as we have said, apply to the basic structure, and identify reasonable principles for the fair distribution of the benefits and burdens of social cooperation. The level of inequality of social primary goods measures the benefits and burdens carried by individuals within any given social political scheme. Of the second moral power, comprehensive worldviews specify the aims individuals pursue as a conception of their good. These are likely to be in theoretical conflict with other doctrines in society and the disagreement, we suppose, is intractable.

Nevertheless, people still affirm shared political values and ideas regardless of their irreconcilable moral doctrines. Political ideas are supported by persons' shared political conception of a just social arrangement and found within the broader public political culture (section 2.1). We call these ideas *political values*. Political values, says Rawls, "govern the basic framework of social life—the very groundwork of our existence—and specify the fundamental terms of political and social cooperation" (PL, p. 139). Some political values that obtain in democratic societies have already been identified. They include the social primary goods, respect for fellow citizens, the liberty and equality of citizens, society as a fair scheme of cooperation, and perhaps many others. These values, it is supposed, are widely shared within the broader political culture and are held by persons who do not share the same comprehensive doctrines.

Rawls writes, "A political conception of justice is formulated so far as possible solely in terms of fundamental ideas familiar from, or implicit in, the public political culture of a democratic society... That there are such ideas in their public culture is taken as a fact about democratic societies" (JFR, p. 27). Recall from section 2.1 the shared



political conception within a given society is constructed out of the widely held and deeply considered political ideas. In justice as fairness the original position represents citizens as free and equal in choosing the organizing political principles. This procedure preserves the fundamental political ideas and values implicit in that society. The principles are also justified because citizens endorse them as fair.

This conception of justice is said to obtain an *overlapping consensus* because citizens converge on shared political ideas and values even if they do not share moral, religious, or philosophical worldviews. Citizens endorse shared political ideas but “we do not assume they do so for all of the same reasons, all the way down” (JFR, p. 32). Citizens’ reasons for valuing a political conception like justice as fairness will be different depending on their doctrines and the truths they affirm. But, again, this does not preclude the possibility that various doctrines can affirm the same political values. We have, then, two distinct conceptions of the moral good for citizens: the political conception and the comprehensive doctrine. In democratic societies the organization of the basic structure appeals to the freestanding political conception that enjoys a status of wide acceptance from a variety of moral doctrines (as opposed to a mere *modus vivendi*).

This is not to say that well-organized societies *ought* to assert these political values. In constitutional democracies, says Rawls, the idea of society as a mutually cooperative scheme among free and equal citizens seems to obtain overlapping consensus amongst a diverse and dominant range of reasonable comprehensive doctrines. He suggests that there may be other political values in other places and times that could differ from what we have here and now. This is an important feature of Rawls’ constructivism that he emphasizes throughout. Rawls believes an overlapping consensus of political values is “the most reasonable basis of political and social unity available to citizens in a

democratic society” (JFR, p. 32). So long as this overlapping consensus endures, justice as fairness (or any other dominant political conception) remains stable, and its organizing principles justified.

### **2.7 Rawls’ Egalitarianism:**

In what way then is justice as fairness egalitarian? There are at least three ways in which justice as fairness qualifies as a liberal *egalitarian* theory. First, constitutional essentials provide for a basic material and social minimum in society. All citizens are equally secured their most urgent and fundamental needs as a matter of *political* equality. This idea is expressed in Rawls’ notion of the fair value of political liberties and freedoms discussed above. Second, justice as fairness neutralizes (so far as justly possible) the social and economic inequalities that would sway political influence to a dominant group. The stability of a democratic society cannot abide the control of legislative power by a few (or the many) to the exclusion of others. This would make many people’s political, social, and personal expectations worse off than they might be, giving them legitimate concern for the injustice of their society. This also violates the ideas of equality of citizenship, society as a fair scheme, and the freedom citizens have as moral agents to pursue their conception of the good. The example frequently used by Rawls is the ability of rich industrialists to purchase the influence of policy-makers, thereby making their own interests flourish at the expense of other citizens’ ability to pursue a full range of life plans that would otherwise be available; hence, those disadvantaged in their political liberties are being unjustly constrained. I refer to the above two considerations as forms of political equality.

Third, Rawls holds that inequality can in some cases be bad in itself (JFR, pp. 131-132). One form of inequality gives some indication as to why citizens in a society

organized by justice as fairness might object to differences in income and wealth. Namely, the position of someone in a higher social status necessarily entails others in a lower one. It would be rational for people to achieve a higher status and so climb over others to get there, and keep others down once on top. This hierarchy should seem repugnant insofar as public institutions promote expectations of citizens to compete with one another. However, Rawls allows certain inequalities—social status among them—because “we like to think that those with higher status normally earn or achieve their position in appropriate ways that yield compensating benefits for the general good” (JFR, p. 131).<sup>16</sup> On matters of basic justice, it would be reasonable to accept public institutions that allowed for inequalities so long as they are consistent with the FEO and the difference principle. Procedural justice is egalitarian in justifying the basic structure to citizens who could accept the social arrangements (and the resultant inequalities) as reasonable. People, being end-setting agents, are due moral consideration in restricting their pursuits—particularly when those restrictions make reference to the good (or ill) of others. Economic and social inequalities are justifiable when citizens’ preferences and beliefs are *equally* considered in developing public policy.

The original position offers a reasonable and fair process for choosing organizing principles of a just society. Once institutions are justly organized, citizens have an equal opportunity to rationally develop and pursue their own good. Rawls suggests:

Citizens are equal at the highest level and in the most fundamental respects. Equality is present at the highest level in that citizens recognize and view one another as equals. Their being what they are—citizens—includes their being related as equals... *Their social bond is their public political commitment to preserve the conditions their equal relation requires* (JFR, p. 132, emphasis added).

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<sup>16</sup> I presume this quotation from Rawls is only accurate under fully just conditions.

As citizens we agree that reasonable political authority, as a coercive force in organizing social arrangements and persons' expectations, is fair when that force is justifiable to the people whom it constrains—the citizens themselves. In order for the use of political force—as it is exercised through the basic structure—to be fair we use the idea of the original position to choose reasonable principles. Once these are in place, we rationally and self-interestedly pursue our conception of the good life, secure in the knowledge that the basic structure will distribute the advantages and disadvantages justly. The resulting inequalities—social, economic, or otherwise—are justifiable from the idea that each citizen could reasonably endorse the principles that regulate the benefits and burdens of society. In this way division of moral labour is apparent: a freestanding shared political conception organizes the fair background conditions of social cooperation, while providing people the space and materials to pursue their own conception of a worthwhile life. All this is to say that liberty and equality are inextricably linked. As Rousseau writes, “If we ask precisely wherein consists the greatest good of all, which ought to be the aim of every system of legislation, we shall find that it is summed up in two principle objects, liberty and equality—liberty, because any individual dependence is so much force withdrawn from the body of the State; equality, because liberty cannot subsist without it.”

### **Chapter 3: Cohen and the Site of Justice: Is the Personal Political?**

This chapter discusses and responds (in part) to two of G. A. Cohen's criticisms of justice as fairness. First, given the difference principle as a principle of basic justice, we cannot abide great economic inequalities between persons where these inequalities are justified by the basic structure to incentivize productive and talented labour. Cohen believes that the affirmation of the difference principle as a principle of justice requires "(virtually) unqualified equality itself" (WAI, p. 6). As will be argued, financial inequalities justified by one's holding her work "ransom" unless paid more, is to the detriment of the worst off. Citizens whose conception of justice affirms the difference principle would not tolerate a personal ethos that sustains inequalities for incentive reasons. Cohen concludes that people's personal ethos must also be an evaluable subject of justice. I will then outline Cohen's argument against the basic structure as the only appropriate subject of justice. Cohen suggests that Rawls' insistence that justice applies to the level of the basic structure is unsustainable. His argument shows that interpersonal, non-legislative relations are profound in shaping the opportunities available to citizens in the same way that the basic structure is. Cohen suggests that Rawls cannot depend solely on the organization of the basic structure to ensure the principles of justice are secured in a just society. These arguments support Cohen's familiar trope: The personal is political.<sup>17</sup> The

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<sup>17</sup> Cohen adopts this phrase from the feminist tradition. He uses it in a unique sense, stating: "That slogan [the personal is political], as it stands, is vague, but I shall mean something reasonably precise by it here, to wit, that principles of distributive justice, principles, that is, about the just distribution of benefits and burdens in society, apply, wherever else they do, to people's legally unconstrained choices. Those principles, so I claim, apply to the choices that people make within the legally coercive structures to which, so everyone would agree, principles of justice (also) apply." The personal ethos, he claims, is outside the bounds of the basic structure but nevertheless evaluable as a subject of justice.

kinds of preferences and attitudes people hold will in part determine the extent of allowable inequality justified by the difference principle. Furthermore, the patterns of peoples' behaviour profoundly influence the distribution of the benefits and burdens of society. Thus, the personal ethos is also a concern for justice in the same way the basic structure is.

I reject both of these criticisms. I argue that Cohen misunderstands an important feature of the basic structure in addressing an unjust public political culture. The basic structure can, and arguably does, promote a more egalitarian background culture than Cohen presumes. Second, the range of acceptable inequalities can be defended within a just society from one generation to the next when they occur within fair background conditions as stipulated by justice as fairness. This includes tolerating an acceptable range of reasonable attitudes and preferences in protecting the basic liberties and equality of opportunity. Where these preferences are unreasonable, justice as fairness need not acquiesce to their demands.

### **3.1 The Incentive Argument and Injustice:**

Cohen argues that Rawls' insistence on the application of justice as fairness to the basic structure alone is unsustainable. He holds that, in addition to the basic structure, justice ought to be incorporated as an "ethos" in citizens' everyday choices. In Chapter 2, much was made of the division of moral labour between the political values and the rational pursuits of individuals in their everyday lives. The question at issue here is whether this division can be realized consistently in a society that justifies economic inequalities on the grounds that those inequalities make the worst off as well off as possible. Contrary to Rawls, Cohen argues that, "choices not regulated by the law fall

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within the primary purview of justice” (WAI, p. 4). How we resolve Cohen’s concerns will have a fundamental impact on our understanding of the requirements of justice, specifically Rawls’ methodological claims of political justice as the ground of justifiable rules and regulations for public and social institutions.

The difference principle states that inequalities are justifiable so long as they improve the lot of the worst off, or they at least do not hurt the worst off (IIC, p.266).<sup>18</sup> Rawls suggests that it would be a legitimate use of incentive-based reasoning to justify economic inequalities for those talented, productive people who, through their talents and productivity, create social conditions that make the worst off better off.<sup>19</sup> But, says Cohen, incentivizing persons to work harder because they *would not* (as opposed to *could not*) otherwise work harder is not consistent with a coherent commitment to the difference principle. Therefore, citizens who rely on incentives for their labour could not justify the resulting inequalities to be truly to the benefit of the worst off—for the worst off would be *even better off* if the talented worked hard and did not demand higher wages. Cohen’s thesis is as follows: “The difference principle can be used to justify paying incentives that induce inequalities only when the attitude of talented people runs counter to the spirit of the difference principle itself: they would not need special incentives if they were themselves unambivalently committed to the principle.” (IIC, pp. 268-269).

The argument needs some unpacking. First, Cohen is not concerned with desert or

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<sup>18</sup> What is meant by “worst off” is vague and deserving of clarification. Cohen, in his multiple iterations of the incentive argument, seems to have in mind a general conception of economic holdings as an all-purpose resource to well-being. This is not Rawls’ conception of the “worst/best off”. Wealth is only one of the primary social goods. The argument at present does not hinge on this matter so I leave it aside for now. In section 3.5 I present an alternative account to Cohen’s that does take this distinction seriously.

<sup>19</sup> Rawls does not hold that a just society *must* be a property-owning democracy (JFR, p. 178). He leaves open the possibility that a liberal socialist society could meet the three principles of justice better than property-owning democracies.

entitlement as a basis of claims on behalf of the best off. Desert and entitlement as possible grounds for allowing inequalities do not face the criticism Cohen focuses on—namely, the unwillingness of some well-placed people to do more for less than they could otherwise get.<sup>20</sup> Second, by “the talented”, Cohen means something like well-placed people who have the ability for high market earnings, and these do not need to be special or valuable talents at all. He says, “[They] are so positioned that, happily, for them, they do command a high salary and they can vary their productivity according to exactly how high it is” (RJE, p. 120). Third, it is not a constitutive feature of incentives for unpleasant jobs that they produce inequalities (IIC, p. 272). There are possible legitimate trade-offs people might make that sacrifice some things (like time and effort) for others (like resource intensive leisure). Cohen’s critique of the incentive argument is only concerned with inequalities justified by the argument that incentives make the worst off better off than they would be under any other feasible alternative scheme that could be reasonable to all. By way of illustration, the incentive argument justifies a tax rate of 40% instead of 60% because the talented rich produce more when their net return is greater. Because the poor benefit from greater production by the talented rich, the tax rate should be 40%. Cohen’s target is the normative conclusion that the lower tax rate is justified by the difference principle.

Cohen offers a unique and interesting way of evaluating the cogency of the incentive argument. He suggests placing the person offering the incentive argument and the person hearing it in different positions of power and means. In doing so, we see how *who the person is* determines the truth condition of the premises of an argument. Cohen

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<sup>20</sup> For Rawls there is no legitimacy to pre-institutional claims of desert or entitlement. These arise within a conception of justice so are justifiable in reference to it.



holds that who the interlocutors are can make a premise(s) true by their choices. A compelling example is that of a kidnapper who states:

- i) Children should be with their parents,
- ii) In order for this child to be with her parents, the parents must pay a ransom,
- iii) Therefore, the parents should pay the ransom. (IIC, p. 276).

We can assume the premises are true and the argument valid. It seems this argument is acceptable as a justification for paying the kidnapper. However, when uttered by the kidnapper (who makes premise (ii) true), the argument loses its justificatory force; the kidnapper violates premise (i) by presenting a barrier to its realization (premise (ii)). If he really believed that children should be with their parents, then he would not make premise ii true, *and* it is in his power to make premise (ii) false. Cohen concludes, “[What] is (mainly) bad about the kidnapper is not his voicing the argument, but his making its minor premise [premise (ii)] true, he should still be ashamed to voice the argument, just because he makes that premise true” (IIC, p. 278).

There is, Cohen claims, a significant parallel between the incentive argument and the kidnapper case. The incentive argument runs as follows:

- i) Inequalities are justifiable insofar as they make the worst off as well off as under any alternative scheme (the difference principle),
- ii) Economic incentives make the talented more productive,
- iii) Therefore, economic incentives justify inequality because the worst off are better off than they would be under any other feasible (and reasonable) alternative scheme.

Not surprisingly we are taken aback when the talented rich utter this argument. They make premise (ii) true by holding their talents and wealth ransom. It could not be true that they believe both that the worst off should be as well off as possible and that greater

economic benefits will make them more productive. The latter, it is presumed, is made true by the talented's choice regarding how hard to work and how much time they want to spend in non-economically productive ways.<sup>21</sup> Nevertheless, the poor would be much better off still if incentives were not necessary to incite productivity. Therefore, inequalities of the kind "necessary" for productivity are not justifiable.<sup>22</sup>

Cohen takes it that people who offer arguments like the incentive argument could not use their preferences as a justification when the argument relies on that preference as a condition of its being sound. The preference for incentives is not necessary to make the worst off better off because the talented could hold preferences that do not require greater rewards for their work.<sup>23</sup> The community who are supposed to accept the argument as sound can call people's behaviour into question. Because the worst off can reject the idea that incentives are necessary for well-placed people to use their talents (since it is a necessary premise for the suspect argument), the incentive argument is not justifiable within a *justificatory community*. Cohen writes:

A justificatory community is a set of people among whom there prevails a norm (which need not always be satisfied) of comprehensive justification. If what certain people are disposed to do when a policy is in force is part of the justification of that

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<sup>21</sup> Cohen differentiates between a "lax" and "strict" reading of the difference principle. The lax reading suggests that incentives are necessary—*given* that the talented are only motivated by incentives—to making the worst off as well off as possible. On the strict reading, incentives are necessary apart from peoples chosen incentives (IIC, p. 311). Cohen suggests that Rawls implies the strict reading in justice as fairness. For now, I take this line as well.

<sup>22</sup> The quotation here denotes the ability but unwillingness of the talented rich to more generously help the poor without further financial reparations.

<sup>23</sup> That is, the talented *could* do otherwise *if* they changed their preferences. This statement presumes a level of self-mastery in developing and revising the preferences one has (or at least, what they do with them). This ability is taken for granted by Cohen and Rawls. Therefore, I take this otherwise controversial psychological fact about people as given.

policy, it is considered appropriate to ask them to justify the relevant behavior, and it detracts from justificatory community when they cannot do so. (IIC, p. 282).

Acceptable policies in justificatory communities must be reasonable to those within them. When these policies refer to the dispositions of people, these dispositions are in need of justification themselves. For example, a family can have a norm of silent obedience when a father arrives home after work, lest he lose his temper. This norm loses justificatory force within the family when the father's mood is called into question. Indeed, he could resign himself to not becoming agitated and therefore undermining the necessity for the norm. The attitudes and preferences of those within a justificatory community are in need of justification along with the policies that refer to them.

According to Cohen, if persons refuse to justify their attitudes and preferences in reference to policies—and, in particular, the arguments for those policies—within a justificatory community, then they regard themselves as beyond the need for justification from that community, and, *a fortiori*, not a member of that community. These people, says Cohen, fail the *interpersonal test* because they cannot, or will not, justify their behaviour to the relevant stakeholders. In regards to the incentive argument, Cohen states, “the talented do not share community with the rest: their behaviour is then taken as fixed or parametric, a datum vis-a-vis a principle applied to it from without, rather than as itself answerable to that principle” (WAI, p. 8). The talented, like the father in the above example, do not see a need to justify their own behaviour to those they present their normative arguments to. They fail the interpersonal test so find themselves outside the

justificatory community that affirms the difference principle as a matter of justice.<sup>24</sup>

The proponent of the incentive argument has two options: he can reject premise (i) and thereby find himself outside the justificatory community that affirms the difference principle as a principle of justice, or he can reject premise (ii) and affirm a much more egalitarian distribution of income on pain of self-contradiction. Cohen suggests the former—rejecting the difference principle—is not available to citizens in a society organized by justice as fairness. There are at least two reasons why the talented rich cannot reject premise (i). First, it is a fundamental political value in democratic societies that reasons for political policies be justifiable (or at least reasonable) to everyone who shares in that political scheme. Those who reject the difference principle, for whatever reason, could not do so in ways that would be reasonable to the worst off. Cohen states, “If, *because* of who is presenting it, and/or to whom it is presented, the argument cannot serve as a justification of the policy, then whether or not it passes as such under other dialogical conditions, it fails (*tout court*) to provide a comprehensive justification of the policy” (IIC, p. 280, Cohen’s emphasis). In other words, an incentive policy would not be justifiable because the worst off would reject the incentive argument as unreasonable. Economic rewards are necessary only because the personal ethos of talented people is not appropriately informed by the difference principle (WAI, p. 9).

The second reason the incentive argument fails is because those affirming it do not genuinely view society as a cooperative scheme. Rather, their self-interested pursuits

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<sup>24</sup> Compare this conception of community with Rawls’: “A political society is a community if we now mean by a community a society, including a political society, the members which—in this case citizens—share certain final ends to which they give very high priority, so much so that in stating before themselves the kind of person they want to be they count their having these ends as essential” (JFR, pp. 199-200). Rawls understands “community” to be a group of persons appropriating deep and important shared ends.

trump concerns for the worst off. They lack a coherent moral stance since they would be required, from the stance of a democratic citizen, to endorse the difference principle in organizing the basic structure, but act in their everyday lives in ways that disregard the plight of the worst off. As a consequence, the talented rich find themselves outside the community to whom they are to justify their behaviour. But this is unsustainable from the idea of society as a cooperative scheme of free and equal citizens since there fails to be an overlapping consensus of a conception of justice.

The incoherence of the talented rich *citizen* motivated by economic incentive challenges the consistency of the division of moral labour in Rawls' architectonic—and, indeed, the internal coherence of justice as fairness. Cohen offers:

If lack of community is displayed when the rich present the incentive argument, then the argument itself (irrespective of who affirms it) represents relations between rich and poor as at variance with community. It follows, if I am right, that the incentive argument can justify inequality only in a society where interpersonal relations lack a communal character, in the specified sense. (IIC, p. 285)

Cohen concludes that the person *qua* citizen in a justificatory community cannot, as a personal motivation or endorsement of a policy, affirm the incentive argument.

Cohen summarizes his argument as follows:

1. The talented rich cannot justify the truth of the incentive argument because they make the second premise—incentives make the talented more productive—true.
2. The second premise need not be true—the talented hold their resources ransom for self-interested gain.
3. If the incentive argument cannot be justified, then it cannot be used to justify inequality.
4. If it cannot justify inequality, then it cannot be used as a

justification within a community.

5. If it cannot be used as a justification within the community, then anyone who uses it represents society as at variance with community when he does so. (IIC, pp. 286-287)

The target of Cohen's argument is Rawls' justification of the incentive principle as a matter of expediency in a basic structure that complies with the difference principle. For Rawls, to achieve distributive justice requires giving in to *incentive preferences*—the desire for higher rewards for more or different work—for some. The expediency of the difference principle in allowing inequalities (rather than demanding changes in one's ethos) is not the realization of the ideal moral nature of citizens who hold both the commitment to a just basic structure and the truth of the incentive argument. Cohen writes, "My principle contention about Rawls is that (potential) high-fliers would forgo incentives properly so-called in a full-compliance society governed by the difference principle and characterized by fraternity and universal dignity" (IIC, pp. 327-328). The necessity of incentivizing the talented to produce more for the benefit of others is to satisfy the claim that the talented are (at best) indifferent to the status of the worst off. What matters to them is not producing more, but getting more for their efforts. Within a justificatory community where presumably everyone agrees with the difference principle,<sup>25</sup> those in a position to command higher wages for greater productivity would

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<sup>25</sup> This is admittedly imprecise. Cohen writes, "The difference principle can justify inequality only in a society where not everyone *accepts* that very principle" (1997, p. 9, emphasis added). This, I presume, is Cohen's understanding of the purpose of an overlapping consensus in Rawls' *Political Liberalism*: that a conception of justice is valid only in achieving wide agreement in a given society. Of course this glosses an important distinction Rawls makes between agents' political and comprehensive doctrines. We should say that everyone accepts that principle *as a political conception*. What this amounts to is still uncertain. I only flag this so as not to unfairly make a straw man of Rawls' arguments.

not, so Cohen holds, produce less if they could not make more. Surely citizens in a just society cannot sustain inequalities justified by the incentive argument without internal contradictions. A lax interpretation of the difference principle that allows incentive policies for the reasons mentioned, is not a basic principle of justice but a principle for managing peoples' injustice (IIC, p. 326).

On this argument it is clear that the personal is indeed political. The personal ethos affects to some degree the limits of distributive justice. The fair distribution of social primary goods—in our case wealth and income—is in many ways dependent on the attitudes and preferences of people within a political structure, who together affirm a political conception of justice. It seems, therefore, that justice limits the range of consistent and reasonable personal motivations, preferences, and expectations. Cohen holds that the principles of justice also apply to our everyday choices within the legally coercive basic structure—that is, our everyday choices left open by the principles of justice as they apply to the basic structure. Cohen concludes, “A society that is just within the terms of the difference principle... requires not simply just coercive rules, but also an ethos of justice that informs individual choices” (WAI, p. 10).

### **3.2 The Basic Structure as the Site of Justice?**

In response, Rawls can appeal to the application of justice at the level of the basic structure, not everyday personal decisions. This response to Cohen's objection goes: If the basic structure is just, then any decisions made within it and in compliance with it are also just. Cohen calls this the “basic structure objection” (WAI, p. 5). He states:

The objection is that my focus on the posture of talented producers in daily economic life is inappropriate, since their behaviour occurs within, and does not determine, the basic

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structure of society, and it is only to the latter that the difference principle applies. Whatever peoples' choices within it may be, the basic structure is just provided that it satisfies the [three] principles of justice. (WAI, pp. 10-11)

The basic structure objection defeats Cohen's argument—that one cannot use the incentive argument within a justificatory community—because people can at one and the same time endorse the difference principle as a criterion of just institutions (that is, as a matter of procedural justice) and endorse the incentive argument as a matter of personal prerogative, so long as choices do not disrupt the just organization of the basic structure.<sup>26</sup> The scope of the difference principle does not, and for Rawls *should* not, reach the level of one's "ethos"—or, loosely understood, moral doctrine—so long as that ethos recommends conforming to the rules of a just basic structure “because the [difference] principle requires those rules” (Cohen, 1997, p. 11).

In response to the basic structure objection, Cohen argues that, insofar as justice is concerned with the distribution of benefits and burdens within social arrangements (which neither I, nor Rawls, contests), there is no principled reason why those arrangements are strictly limited to the basic structure. This is because there are many non-structural influences on the distribution of social primary goods in society as well. Distributive justice cannot be achieved by purely structural means alone (WAI, p. 13).

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<sup>26</sup> Another way of putting the basic structure objection is to focus on the perspective of the individual at various levels of decision-making. In distinguishing the different perspectives, Rawls writes, “[There] are three points of view in justice as fairness that is essential to distinguish: The point of view of the parties in the original position, the point of view of citizens in a well-ordered society, and the point of view of you and me who are setting up justice as fairness as a political conception and trying to use it to organize into one coherent view our considered judgments at all levels of generality” (JFR, p. 45 footnote). The parties behind the veil of ignorance are withheld information as a part of the fair procedure in the construction of the conception of justice as fairness. This does not presume that, once the veil is lifted, full information (for example, the use of talent for relative advantage) cannot be used within a just system.



Rawls gives at least three indications that call into question his commitment to the basic structure as the primary site of justice (WAI, pp. 16-17). First, for Rawls, the idea of fraternity corresponds to the difference principle as “the idea of not wanting to have greater advantages unless this is to the benefit of others who are less well off” (TJR, p. 90). This suggests that a political virtue of citizens is to develop a sense of responsibility for our advantages in ways that do not, on the whole, disadvantage others. This seems very much like the kind of ethos that is incompatible with the incentive argument. When the talented propose the incentive argument, they cannot want to have greater advantages so long as it makes the worst off better off. This is, as we have seen, an argument based on a premise that the talented make true. If they changed their preferences (i.e. if the talented really did want the worst off to be as well off as possible), then the incentive argument would not be necessary.

Second, for Rawls, the worst off in a just society can reasonably accept their lot with dignity because they know that they are as well off as they could be than in any other social arrangement (that is, ideally and in conformity with the lexical priority of the principles of justice). But, as we saw above, they are not as well off as they could be given others’ disregard for the difference principle by demanding incentives for increasing productivity. It is conceivable that the worst off do not have dignity as fellow citizens in the eyes of the talented rich—so long, that is, as economic policy favours tax incentives or the like to improve the productivity of the well placed.<sup>27</sup> For Rawls the dignity of the worst off as free and equal citizens is preserved in a just basic structure by

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<sup>27</sup> This idea is reinforced when we consider the difference between tax redistribution and charity. The former preserves the dignity of citizens as equal, whereas the later treats the worst off as inferior and deserving of pity. Even if the distributive effects were similar, motivations for charity could not sustain the dignity of worst off (Anderson, 2004).

ensuring fair terms of cooperation between citizens. In some cases, like the pursuit for incentives by the talented rich, the non-institutional everyday decisions of others do not support the equal dignity of all.

Third, the just citizens are those who have “a normally effective sense of justice, that is, one that enables them to understand and to apply the principles of justice, and for the most part to act from them as their circumstances require” (JFR, p. 199). As discussed in Chapter 2 above, the realization of one’s full moral nature includes acting from a sense of justice. Cohen questions this formulation because it is not imperative of citizens in a just society to act from their sense of justice but only in ways that satisfy their own self-interest without disturbing—or calling into question—the just basic structure. Rawls, says Cohen, is inconsistent in his position that justice applies primarily at the level of the basic structure while also holding that individuals act from a sense of justice. Bribing politicians is wrong, we could say, but pricing pharmaceuticals outside the accessible range of the poor is not. The former undermines the liberty principle, which is prohibited by law; the latter justifies the structures “necessary” to stimulate ingenuity.<sup>28</sup> Indeed, why *should* individuals adopt a sense of justice in their everyday lives so long as the rules and regulations of public institutions ensure the continuation of justice and a just society? It is

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<sup>28</sup> This example is particularly apt because the worse off are presumably no worse off if others have access to new medications that the worst off would not have access to either way (assuming, that is, that this inequality has some bearing on the distribution of social primary goods like the social bases of self-respect and wealth and income). How we sort out whether this complies with the difference principle is an open question. For example, is it just if there are greater inequalities between the best and worst off when the worst off are made no better off? The very indeterminacy of this example hints at a problem of the difference principle applied exclusively to the basic structure: the worst off clearly could be better off, but justice at the basic structure alone seems to impede this possibility. One way of viewing the problem is to distinguish the kinds of non-ideal attitudes and preferences available in a society and determine an acceptable range for a just structural arrangement to accommodate them. I discuss this further in section 3.4.

not obvious, on Cohen's reading anyways, that Rawls has a response to this question.

Rawls' use of "acting from" the principles of justice seems vacuous if the basic structure is the primary subject of justice.

The above discussion is not a decisive argument against Rawls' application of the principles to the exclusive organization of the basic structure. Indeed, as Cohen suggests, he could forgo or weaken the commitment to fraternity, dignity, and a "sense of justice" that citizens in a well-ordered society are said to possess. But this comes at a cost: namely, that the insistence on the basic structure as the site of justice perpetuates a stark division between, on the one hand, reasonable citizens conceived of as free and equal, and on the other, individuals as rationally self-interested—and never the two shall meet.<sup>29</sup>

Cohen's final argument against the basic structure as the site of justice is, he claims, a decisive argument for justice that goes beyond obedience to just rules. Cohen writes:

For there is a fatal ambiguity in Rawls's specification of the basic structure, and an associated discrepancy between his criterion for what justice judges and his desire to exclude the effects of structure-consistent personal choice from the purview of its judgment. (WAI, p. 18)

The first part suggests that what falls under the basic structure is helplessly indeterminate. In section 2.2 above we defined the basic structure as the "way in which the main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties that regulate the division of

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<sup>29</sup> Of course this does not imply that all members of society are egomaniacs. Duties of care towards others would, presumably, be worked out in their respective comprehensive doctrines. It does imply that nothing about a just society makes reference to individual motivations—other than a commitment to the basic structure—in pursuing their conception of the good. In other words, the relationship between citizens and the principles of justice are at best underdetermined.

advantages that arises from social cooperation over time” (JFR, p. 10). One way of interpreting this definition is to delineate those institutions that are included in the basic structure by focusing on their coercive nature in distributing the benefits and burdens of society. This would make sense because of the fundamental interest citizens have in the fairness of social arrangements. But Cohen has been persistent in showing us that justice is not exhausted by the just arrangement of the basic structure. No doubt there are customary practices, for example practices within a family, which are non-coercive (in a legal sense) yet have profound effects on the individual—both in distributing social primary goods and in exerting pressure to conform to norms in the absence of legally enforced rules.<sup>30</sup> So why are the other non-coercive but nevertheless profound effects of features of society not included in the purview of justice? Cohen responds, “It is false that only the coercive structure causes profound effects... Accordingly, if Rawls retreats to coercive structure, he contradicts his own criterion for what justice judges, and he lands himself with an arbitrarily narrow definition of his subject matter” (WAI, p. 22). Patterns of behaviour exert pressure on others to behave likewise (or at least cope within the prevailing norms), and the effects of that behaviour distribute social benefits and burdens in just as profound ways as the formal, coercive structures of the political, legal, and economic institutions in society. Peoples’ behaviour within the basic structure, but outside its regulative influence, sustains inequalities too. Therefore, Cohen argues, Rawls

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<sup>30</sup> Rawls does at times include the family in the basic structure (LP, pp. 156-164). But this of course leaves open a wide range of informal structures that profoundly affect the just distribution of social primary goods. We could take the example of the informal education of children in developing conceptions of the good life that reinforce hierarchical definitions of success. This non-coercive norm remains profoundly influential in people’s decision-making within the basic structure. The perpetuation of this norm provides the justification of inequalities through, for Cohen at least, suspect arguments like the incentive argument. As Cohen states, “Expectations determine behaviour, behaviour determines expectations, which determine behaviour, and so on” (1997, p. 26).

should not limit justice to the “main” coercive institutions of society on pain of making an arbitrary, but important, distinction. This distinction ignores important features about society and the people within it that ought to be included within the purview of justice.

To summarize the argument so far: The basic structure objection rejects the conclusion that the incentive argument places its claimant outside her justificatory community because she offers it within, and in conformity with, a just basic structure. She can endorse the principles of justice as applied to the basic structure but need not act on them in her everyday choices. This objection fails, says Cohen, because the basic structure is at best (and, perhaps, at worst) underdetermined. Rawls gives some indication of individual citizens’ commitments to the principles of justice in their everyday dealings. This, however, is not consistent with his claim that the basic structure is the primary site of justice. Cohen argues that if justice is concerned with the fair arrangement of benefits and burdens in society, there is no principled reason why this should exclude patterns of behaviour outside legally coercive structures. Indeed, the norms that perpetuate expectations, and in turn behaviour, have a profound effect on citizens’ expectations of a just arrangement. Examples like the division of labour and resources within families and the expectations of profiteers in economic pursuits highlight the ways in which informal structures distribute benefits and burdens not included in society’s main institutions.

### **3.3 Is No One Worse Off Than They “Need To Be”?**

Cohen asks us to seriously consider the scope of justice by reflecting on how our own preferences and attitudes are acceptable from within a justificatory community. According to the difference principle a society is just, if and only if, no one is worse off than she needs to be. The deep disagreement between Rawls and Cohen here is between interpretations of the phrase “needs to be”. Recall that, for Cohen, a justificatory

community asks whether a person's preferences and attitudes can be justified within a shared conception of justice. People who hold their talents ransom for personal gain cannot agree from within the community that the worst off are no worse off than they need to be. Indeed, should the preferences and attitudes change, the worst off would be much better off. The extent to which we take peoples' preferences and attitudes as given will affect the resulting conception of justice. For Cohen taking people's personal ethos as is—that is, as we find people within society with their already established preferences and attitudes—affects the allowable degree of inequality in society. This feature about the interconnection between peoples' personal ethos and conceptions of justice is, according to Cohen, demanding of justification within the scope of egalitarian justice. In short, people, insofar as they care about a just arrangement, cannot ignore the role the personal ethos plays in shaping acceptable conceptions of justice. People do not need to be as poorly off as they are if we challenge the inegalitarian preferences of others.

For Rawls, if a society can manage a just arrangement according to justice as fairness, no one can reasonably protest the social order because all are as well off—in terms of their share of social primary goods—as they can be, than under any alternative scheme *that is also reasonable to others*. More specifically, the liberty principle and, to some degree the FEO, ensure an equal scheme of the fair value of basic liberties and freedoms and prerogatives of occupation. This includes the freedom to develop and pursue one's own conception of the good. For the high-flyer, these basic rights protect a desire for greater rewards. The distributive principles (the FEO and difference principle) ensure the social bases of self-respect<sup>31</sup> and the fair distribution of socio-economic

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<sup>31</sup> The social bases of self-respect are indirectly included under the first principle as well because each is secured an equal scheme of basic liberties as a constitutional guarantee.

advantages. Accordingly, if socio-economic inequalities improve the expectations of the worst off more than some other distributive scheme, then some inequalities would be more just.<sup>32</sup>

The question remains: How does justice as fairness interpret the contentious phrase “needs to be”? This question demonstrates the indeterminate content of the distributive principle—particularly the role of the social ethos and patterns of non-coercive behaviour in contributing to the distribution of the socio-economic advantages. One way of parsing the disagreement between Rawls and Cohen is to highlight the disagreement between what a justificatory community is and the role it plays in justifying reasonable comprehensive doctrines. Rawls asserts that there is an intractable plurality of reasonable doctrines that obtain in a democratic society. An important feature of justice as fairness is that it secures liberty of conscience. In effect, so long as these doctrines assert (or at least tolerate) reasonable political conceptions of justice, they are admissible in a just society. Therefore, in a community organized by justice as fairness there may very well be a high degree of (reasonable) disagreement between attitudes and preferences among citizens. Cohen would, as discussed above, disagree that such a community is a “justificatory” community. The extent to which we take people as they are—with their own aspirations, beliefs, and general conceptions of the good—will determine, in part,

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<sup>32</sup> The unequal economic scheme is more just so long as the lexical priority of the basic liberties and FEO is protected. This conclusion also dismisses the idea that there is some intrinsic good to socio-economic equality. For a discussion on this see Parfit’s “Equality and Priority” (1997). For our purposes Cohen does not give a separate argument for considering equality in itself as valuable. His egalitarianism, in this argument, is the result of the “proper” application of the difference principle. Similarly, Rawls seeks an egalitarian distribution of social primary goods that does not prioritize equal material wealth. His reasons for this were discussed in chapter 2 above. Socioeconomic equality is valuable insofar as it: 1) protects the fair value of basic liberties and opportunities, and 2) distributes the benefits and burdens of social cooperation in publicly justifiable ways.

how we understand the resulting conception of justice.

It is important to note that incentives are not the only reasons available for justifying inequalities. Placing greater resources in the hands of those who can do more with them improves efficiency and, hence, the aggregate social advantages through inequality. While Cohen does suggest that a perfectly just society would tolerate very little, if any, inequality, he cannot, on the argument above, reject inequalities for reasons that *would be* acceptable from within his preferred understanding of a justificatory community. Some inequalities do not make reference to the incentive argument and are—or at least could be—acceptable as an unequal just distribution.<sup>33</sup> This comment is by way of showing the limits of Cohen’s argument against unequal socioeconomic distributions.

I propose two approaches to rescuing Rawls from Cohen’s criticisms. First, I appeal to Joshua Cohen’s (J. Cohen from here on) analysis of taking peoples’ attitudes and beliefs as fixed in arranging a just political order. This analysis will reveal some ambiguities in Cohen’s own discussion. Second, Rawls has a substantial view of the exercise of public reason of ordinary citizens. Understanding how public reason operates within a well-ordered society will, as I will argue, re-establish a connection between citizens’ own comprehensive views and their commitment to a conception of justice. The first argument is offered in this chapter while the latter is pursued in the next.

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<sup>33</sup> Cohen, in other publications, defends luck egalitarianism as his preferred conception of distributive justice. This view holds that “brute” inequalities—socioeconomic status, talents, tastes, and other contingent features about people—should be mitigated through redistribution of resources to compensate those who are disadvantaged. While “option luck”—outcomes from poor or imprudent decisions, investments, and the like—are consequences that justice offers no moral imperative to compensate for. So Cohen does, in fact, conceive of an unequal just distribution. This differs from Rawls’ view on many fronts. The details of this need not detain us here (See Anderson (2004) for an excellent discussion on this).



### **3.4 Towards a *More Just Basic Structure*:**

Justice, as Rawls conceives it, addresses the arrangement of public and social institutions in their regulation and distribution of social primary goods. The role of justice has been called into question by Cohen's arguments for the consideration of personal preferences and attitudes, as well as non-coercive social structures, under the purview of justice. We have not yet clarified how the organization of institutions affects the social ethos. If, as I believe, we can establish a causal connection between the public institutions and the social ethos, then we can in part defuse the stark division between the role of the basic structure and that of individual preferences, attitudes and behaviour. People obviously do have their own preferences and attitudes that shape their behaviour and inform their conceptions of the good life. We take this feature of moral agents as given. However, taking people as they are does not imply an acceptance of their ethos—whatever it might be—as a permanent and necessary feature within a just society.

I begin with a discussion of J. Cohen's analysis of the difference principle and the role of pre-existent attitudes and preferences. My aim in this section is to defuse Cohen's assertion that the basic structure as the primary subject of justice makes for a clear division of moral labour between one's political commitments and one's everyday decisions. I will argue that the public and social institutions do make a difference to the prevailing ethos. If this is true, then institutions have role in shaping a social ethos as a matter of basic justice.

Cohen offers two readings of the difference principle. The lax reading takes preferences and attitudes as fixed. The principles of justice evaluate and inform social arrangements as well as they can, so to speak, given a less than ideal social ethos. If, for example, people are motivated by incentive demands, then economic arrangements

should offer these incentives in the interest of the worst off. We can also read the difference principle in a strict way: “we maximize the well-being of the least advantaged without taking preferences as given but treating the preferences instead as assessable by our norms of justice” (J. Cohen, 2002, p. 368). To some extent this is Cohen’s view.<sup>34</sup>

Cohen goes on to argue that preferences and attitudes—including patterns of behaviour and non-coercive structures—have profound effects on distribution of social advantages. Therefore, these should also be evaluable from within the scope of justice. But these two proposed subjects of justice are not unrelated. Consider two distribution curves:

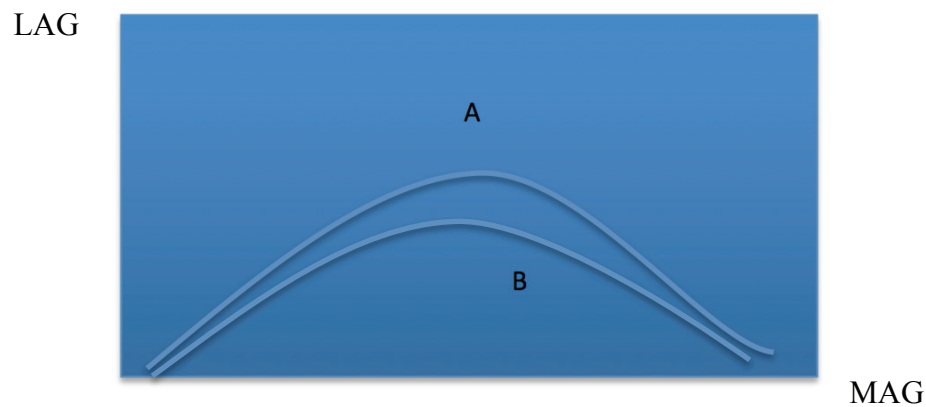


Figure 1 Comparison of two social arrangements. Lines A and B represent two different social ethos. Line A has a more egalitarian ethos than B.

Moving upwards and to the right represents each group’s share in the distribution of the social primary goods. Curve A is represented as being more egalitarian than B on each point of its line because the least advantaged group (LAG) shares in a more dispersed

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<sup>34</sup> Of course he does allow for intuitively permissible incentives for unpleasant, demanding, and difficult work. On this relaxed view we can take some preferences as given but not others. Some intuitively objectionable preferences might be the demand for high rewards at the expense of another’s minimally decent share in the social primary goods, even if those rewards would make the worst off better off (but still, in absolute terms, terribly situated). The problem on this view is determining how much incentive is unreasonable. I presume, along with Cohen, that this could somehow be resolved. I leave aside the details of this account here.

portion of the social primary goods relative to the most advantaged group (MAG). If we consider each curve to represent a social ethos, Cohen would hold that Rawls does not recommend A over B—the basic structure must arrange itself within the existent ethos. Justice requires a distribution at the peak of the B curve but not a change to the more egalitarian A curve.<sup>35</sup>

However, it is by no means clear that this conclusion should hold for Rawls. J.

Cohen writes,

Surely it could not be that principles of justice that require us to adopt the institutions and policies that make the greatest contribution to the least advantaged instruct us not to make the changes when the effects on the least advantaged come from changes in the social ethos that result from institutional changes. (2002, p. 377)

Indeed, the arrangement of public institutions that foster a more egalitarian ethos would be recommended. Nothing in Rawls' argument rejects the idea of using public institutions to foster a social ethic of cohesiveness, equality, and fraternity. After all, institutional organization that promotes a just distribution—whether through an ethos or otherwise—would be recommended by the principles of justice. The following examples are provided to show how this might be possible.

Take public broadcasting as an example. The content of culture-promoting programming can have a profound effect on public opinion. Its national reach and non-partisan programming can be a venue for reasonable public debate. One aim of this public institution is to provide information unfiltered by economic or ideological interests that might sway the public to support one view over another. It is (arguably) important, as a consensus building effort, to engage the public as equal citizens sharing in the discussion

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<sup>35</sup> The representation is proposed by Joshua Cohen (2002, p. 376).

and outcomes of the political questions of the day. As a matter of political and distributive justice, public broadcasting could (and perhaps should) promote the ideal of open and reasoned public debate. The outcome, not implausibly, would contribute to a more informed and cohesive citizenry. Compared with the divisive media outlets championing their respective interest groups, a publically instituted broadcast or news agency would serve to change the ethos to a more egalitarian A-like curve.<sup>36</sup>

Another example is the organization of healthcare. Delivery models that use a single-payer-public system, like that in Canada, tend to have better health outcomes at lower costs than private-insurance based systems like that found in the United States.<sup>37</sup> One rationale for moving to a single-payer system is to distribute individual costs for the greater collective benefit. That is, the up-front cost through taxation and distribution will have a greater benefit to the overall health of the population, provide healthcare to those who cannot afford insurance, and achieve a level of financial stability over the long run. None of these benefits requires a particularly acute sense of egalitarian justice. While these benefits are, perhaps, controversial, it is at least plausible that a sustainable, publicly financed system is desirable for the minimal moral commitment of responsible governance. Yet if the effect of a publically financed healthcare system does produce a public sense of egalitarian values, then this too would be a strong reason for preferring it to a private insurance scheme. While this connection may be tenuous, there is some evidence that a public healthcare system does have this effect. According the Romanow

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<sup>36</sup> This is by no means promoting the idea of a state “censored” media. I merely use public broadcasting as one example of how offering a forum of free public debate could lead to a more distributively just society.

<sup>37</sup> In 2012, the US spent \$8895 per capita on health care. Their average life expectancy was 76/81 years old for males and females respectively. Canada spent \$4676 per capita for an average life expectancy of 80/84 years old (WHO, 2014).

Report (2002):

Canadians have been clear that they still strongly support the core values on which our health care system is premised – equity, fairness and solidarity. *These values are tied to their understanding of citizenship...* They want and expect their governments to work together to ensure that the policies and programs that define medicare remain true to these values. (p. xvi, emphasis added)

Citizens see public institutions as reflecting their political values. How institutions are arranged will, or at least could, affect how citizens view their relation to each other. The argument then is that a more just distribution of healthcare favours the single payer model, yet in organizing the system in this way, a general sense of social responsibility and commonality result. If organizing public institutions is responsive to the principles of justice, there is no reason why we should not consider the significant effect of such an organization in shaping the “core values” of individuals and associations within that system.<sup>38</sup>

Attitudes and beliefs—particularly of citizenship and conceptions of justice—within publicly accepted normative standards can be motivated by the organization of public institutions. Rawls was correct in stating, “The basic structure shapes the way the social system produces and reproduces over time a certain form of culture shared by persons with certain conceptions of their good” (PL, p. 269). And again, “Given certain assumptions specifying a reasonable human psychology and the normal conditions of human life, those who grow up under just basic institutions... acquire a reasoned and

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<sup>38</sup> For example, the Canadian Medical Association (CMA) was a strong opponent to the Hospital and Diagnostics Act of 1957 and the Medical Care Act of 1966. Their reasons were largely tied to concerns over physician pay and professional autonomy within a publicly financed health insurance scheme. The CMA now acts as a public advocate and lobbyist for strong universal health care in Canada (Naylor, 1986).

informed allegiance to those institutions sufficient to render them stable” (JFR, p. 185).

The examples of a public media and models of healthcare delivery have shown how this might be possible.

### **3.5 Rescuing Rawls:**

The above examples show the interconnectedness of the basic structure with the social ethos. Even if this argument is successful, however, I have not sufficiently refuted Cohen’s criticisms against taking the basic structure as the *primary* subject of justice. Indeed, I have only shown how, when public institutions can foster a more egalitarian social ethos, justice requires organizing the basic structure in a way that does foster a more egalitarian social ethos. It remains to be argued that individual attitudes and preferences, and non-coercive patterns of behaviour, are not within the *direct* purview of justice. (The emphasis here is on the term “direct” because, as we saw, developing an appropriate ethos is an important feature of background justice.)

The incentive argument is a compelling example of how economic institutions might be arranged in ways that satisfy the difference principle given people’s “less than just” attitudes and preferences. That is, taking people as they are, so Cohen holds, requires a basic structure that tolerates the expedience of incentives to the detriment of the worst off. However, this example becomes far less objectionable when we consider the fair conditions under which the talented hold their abilities “ransom”. First, we assume that constitutional essentials and matters of basic justice secure the basic liberties and fair equality of opportunity for all citizens. This would eliminate the kinds of highly contentious inequalities that would leave some desperately worse off. Kinds of contentious inequalities might include: the establishment of monopolies for the purpose of artificially inflating prices; racist preferences; attitudes of domination within, for

example, the family; selective recruitment for military service in low income communities; and a tax redistribution policy that fails to adequately address a basic social minimum. These examples show the range and extent of the kinds of preferences and attitudes *not* accommodated by a just basic structure. Therefore some kinds of objectionable attitudes and preferences are already eliminated from the start. Rawls acknowledges these restrictions when he writes, “Once the division of labour [between the basic structure and particular transactions between people] is set up, individuals and associations are then left free to advance their (permissible) ends within the framework of the basic structure...” (JFR, p. 54). The use of “permissible” here is telling because the basic structure restricts the toleration of certain attitudes and preferences. Where people do support kinds of non-liberal, non-egalitarian policies, they would indeed be, to borrow Cohen’s notion, outside the justificatory community. But here the community is a democratic community that endorses the fundamental political idea of society as a cooperative scheme between free and equal citizens. These objectionable doctrines are not accommodated at the level of the basic structure on the grounds that they offer unreasonable comprehensive moral views within a democratic justificatory community.<sup>39</sup>

Second, the contractualist argument from the original position shows that representatives would agree to principles that secure their best share of the social primary goods under fair conditions. Recall that in the original position the representatives’ rationale is to secure the all-purpose goods to “advance the good of those they represent” (JFR, p. 82). The good of individuals, here and now, cannot be known beforehand but

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<sup>39</sup> It is on these grounds that Rawls speaks of the fact of *reasonable* pluralism in modern democratic societies. There may indeed be unreasonable doctrines, but political liberalism need not tolerate or accommodate them. This feature of political liberalism in general, and justice as fairness in particular, will be taken up again in chapter 4.

only in light of their historical conditions, culture, experiences, opportunities and so on. If, for example, a person conceives of her relative economic advantage as worthy of a demanding pursuit—like medical training, a particularly dangerous trade, or athletic greatness—there is nothing *ipso facto* unjust in her choosing that career if her conception of the good includes the financial benefits incurred by her choice—so long, that is, as other citizens have a fair opportunity for pursuing the same career should they want to. Rawls writes, “[Justice as fairness] supposes that citizens have at least an intuitive plan of life in the light of which they schedule their more important endeavours and allocate their various resources so as rationally to pursue their conceptions of the good over a complete life... Rationality is a basic principle of political and social organization” (JFR, p. 141). We must allow for an acceptable range of incentives on pain of placing too high a burden in constricting individuals’ pursuit of their good in the name of justice. It is the work of justice as fairness to set (or reasonably accommodate) the acceptable range of attitudes and preferences within a democratic justificatory community.

This argument in some ways parallels Rawls’ initial claim that political justice must take the fact of reasonable pluralism as given in a democratic society. People are expected to present competing conceptions of the good to their fellow citizens. This is not to be eliminated as a matter of doctrinal consensus or political domination, but rather worked out through and within common conceptions of political justice. It may be morally objectionable for some that other people desire high-flying lifestyles and do not take the betterment of the worst off as a part of their moral doctrine, but it is not *ipso facto* unjust that they do.

My position, then, is to dismiss Cohen’s concern for repugnant economic inequalities in justice as fairness as rhetorical and inflationary. First, social and public



institutions are not indifferent to the social ethos. The just basic structure distributes the burdens and benefits of cooperation to the advantage of the worst off and, where possible, promotes civil cohesion and egalitarian values. Second, the basic structure is limited in what attitudes and preferences are accommodated as a matter of basic justice and constitutional essentials. People in pursuit of their conception of a worthwhile life engage with their fellow citizens on terms they can all reasonably agree to. These terms do not necessitate the accommodation of unreasonable preferences and attitudes. Finally, free citizens disagree about conceptions of the worthwhile life. Just institutions must balance the range of acceptable attitudes and preferences within allowable limits of inequality. These limits are stipulated within a basic structure that gives concrete expression to people as free and equal without giving up the core liberal value of freedom of conscience. Justice cannot, as a matter of political morality in the face of a pluralistic demography, demand an economic egalitarian ethos.

The charge of inconsistency in holding a political conception of justice as fairness and arguing for the permissibility of economic incentives loses its force when we reflect on the background structures from which these arguments are made. If someone holds strong objections to a just and reasonable distributive scheme, he very well might find himself outside the democratic community. However, this is not a reason for a just basic structure to expedite distributive justice by yielding to these demands. Racist, greedy, dominating, and many other kinds of attitudes are not liable to shape the organization of institutions in particularly damning non-ideal ways. Where these do obtain, it is within the purview of a just basic structure to change, suppress, and eliminate them where possible.

### 3.6 How the Personal is Political:

Political values obviously do not just hang above and separate from one's personal worldview. The political view is informed by the comprehensive doctrines citizens endorse. This is not a mere *modus vivendi*, as we saw in chapter 2. Indeed, the very stability of a political society, as the continuity of an overlapping consensus, relies on a shared political conception of justice—whether it is justice as fairness or some other reasonable conception (to be discussed in chapter 4). These conceptions of justice are rooted in the moral doctrines one holds. Rawls writes:

A society is well ordered by justice as fairness so long as, first, citizens who affirm reasonable comprehensive doctrines generally endorse justice as fairness as giving the content of their political judgments; and second, unreasonable comprehensive doctrines do not gain enough currency to compromise the essential justice of basic institutions. (JFR, p. 187)

Because moral doctrines inform and justify one's political conception, they too become a subject of political concern. Martha Nussbaum (2011a) suggests that it is within the scope of liberal egalitarian justice to development moral sensibilities—like a sense of cohesiveness, friendship, and tolerance (among other political values)—that cohere with the political values of that society. These values are part of a well-ordered society's moral education. Within a background culture, people develop common moral sympathies of fairness and equality through education, shared histories and narratives, songs, poetry, literature, and much more. There is no reason to think that the personal doctrines found within a well-ordered society are absent the content of egalitarian justice. Indeed, it is instrumental to its stability as a constitutional democracy. J. S. Mill states somewhat hyperbolically: “The deep-rooted selfishness which forms the general character of the existing state of society is so deeply rooted only because the whole course of the existing

institutions tends to foster it” (pp. 168-169). This same general thought can be turned around to suggest that the basic structure also has the influence to inform a background culture that has a much more egalitarian flavour. This would, as suggested in section 3.4 above, be within the bounds of justice as fairness. We might further stipulate that the stability of democracies that look to the public political culture to justify political values and principles must attempt to cultivate in citizens a sense of respect, reciprocity and equality.

However, the idea of public institutions informing citizens’ political values must stop short of infringing on political liberties of freedom of speech and liberty of conscience. Nussbaum (2011a) offers:

Education would surely be enjoined to focus on robust criticism and the respectful expression of dissent. But those foci are not at all incompatible with the fostering of values of respect and mutuality in education—for example in the ways in which the histories of the religions, and the races, are portrayed in textbooks and in other public materials. I see no reason why political liberalism cannot take on this psychological task, and I believe that it must, if societies based on ideas of respect and reciprocity are to remain stable. (p. 23)

This view is, of course, controversial in offering a program for the education of citizens within a liberal society. But I do not think it goes this far. Rather, Nussbaum only makes explicit the important connections between the ethos, the background culture, and the basic structure. To ignore these connections is to ignore the important ways in which the personal is political. By this I mean that political structures are instrumental in shaping people’s sensibilities about justice, and in turn, people act from their sense of justice as an idea rooted in their conception of the good.

This differs from Cohen’s original contention that the personal ethos is itself subject to the principles of justice. Rather, on my account (*via* Nussbaum and Rawls)

political structures inform to some extent the *political* values of citizens. Citizens develop their own personal ethos in living their separate lives, but do so with the idea that their individual pursuits are embedded in a social context. How one's ethos affects the expectations of others is a feature of the person's moral conception. (This idea will be taken up in greater detail in the following chapter). Despite Cohen's insistence that Rawls' moral division of labour is absolute, we see that Rawls is not committed to an indifferent division between the basic structure and the citizen's self-interest. Rawls writes, "The spheres of the political and the public, of the nonpublic and the private, fall out from the content and application of the conception of justice and its principles. If the so-called private sphere is alleged to be a space exempt from justice, then there is no such thing" (LP, p. 161).

This leads us to at least two further questions: How does a political conception of justice inform the comprehensive doctrines of citizens when this conception is primarily realized through the organization of institutions? And do citizens have an obligation to construct their ethos in ways consistent with a political conception? The answer to these questions will further clarify my response to Cohen regarding Rawls' understanding of the scope of egalitarian justice. I argue that the duty of civility requires that citizens suspend their moral doctrines when these conflict with reasonable political coercion. This is a unique moral feature of the virtuous citizen in her commitment to the flourishing of a political conception of egalitarian justice. I turn to this discussion next.

#### **Chapter 4: The Virtuous Citizen: Public Reason and the Scope of Egalitarian Justice**

This chapter responds to Cohen's criticism of Rawls' claim that the individual, in the society organized by justice as fairness, is free to develop and act on her preferences and attitudes, so long as she complies with the rules and regulations of a just basic structure. Just institutions regulate the coercive power of public and social institutions according to the principles of justice, but they do so taking people as they are—that is, with a broad range of preferences and attitudes, egalitarian or not. Cohen suggests that this conception of justice is far from the egalitarian ideal; distributive justice on Rawls' view does not make the worst off as well off as possible so long as people demand incentive inequality for the use of their talents.

Above I suggested that social and political institutions are not indifferent to preferences and attitudes in Rawls' conception of a just basic structure. In this chapter I show how an overlapping consensus of democratic political conceptions of justice, values, and ideals imposes *political duties* on citizens. The exercise of legitimate political authority in democratic regimes requires justification of its use of power as reasonable to citizens on whom that power is effective. This is accomplished through the use of public reason: offering justificatory public reasons shared by reasonable citizens in settling fundamental political questions. Public reason with its criterion of reciprocity “is characteristic of a democratic people: it is the reason of its citizens, of those sharing the status of equal citizenship” (PL, p. 213). When publicly available arguments have been offered for the use of political power, reasonable citizens accept these terms even if they do not fully agree with them.

Assuming this conception of public reason as a criterion of a democratic people,<sup>40</sup> Cohen is correct to suggest that the basic structure alone does not secure egalitarian justice. But his insistence that the principles of justice as fairness apply at the level of everyday decisions—including the attitudes and preferences of citizens that inform those decisions—is misplaced. Rather, democratic citizens, with their commitment to political equality and fairness, act from the ideal of reciprocity and the duty of civility: they bracket their own comprehensive moral doctrines in favour of publicly justifiable reasons for the use of political force. The commitment to the duty of civility and the value of reciprocity is a moral, political doctrine held by democratic citizens. I conclude that the market capitalist is not unjust in holding incentive demands for her talents, as Cohen would have it. But she is morally culpable in promoting, advocating, and securing a basic structure that permits tax incentives based on her own preferences and attitudes without regard for the consequences on others. Therefore, the proper assessment of the injustice of attitudes and preferences looks at how one’s ethos fits into the complete moral conception of the agent as reasonable and rational.

#### **4.1 The Idea of Public Reason:**

This section briefly outlines Rawls’ idea of public reason. There are many forms of public reason, and it is not my intention to give an argument for Rawls’ view over

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<sup>40</sup> In *The Law of Peoples* (1999), Rawls suggests that non-liberal, non-democratic decent hierarchical people participate in public reason. This is because they, as a people, view themselves as equal in the society of peoples. But they may not necessarily exercise public reason—at least public reason as I conceive it here—to justify their own domestic institutions to their citizens (LP, pp. 121-122). This seems to suggest that decent hierarchical societies are not legitimate. This is a contentious claim that needs further clarification. In this chapter my concern is only with the legitimacy of domestic institutions in constitutional democratic societies. I follow Rawls’ own limited idea of domestic public reason as belonging “to a conception of a well-ordered constitutional democratic society” (LP, p. 131).

others.<sup>41</sup> My aim is much more modest. I take his view as at least plausible and show how this view affords a more thorough response to Cohen's criticism of Rawls' limiting the scope of egalitarian justice. For Rawls, public reason can effectively navigate intractable disagreement among reasonable citizens in exercising legitimate political authority, so long as citizens endorse the criterion of reciprocity. More specifically, respect for citizens as free and equal is a fundamental political value in justifying political coercion in ways each could reasonably accept. Thus, public reason is concerned with distinctively public solutions to political questions. This discussion will illuminate the role of public reason in limiting the reasonable range of comprehensive doctrines available for settling matters of basic justice to those that endorse the principle of reciprocity. In turn, special political duties obtain for citizens when questions of political coercion arise. These duties will be further examined in the following section.

Rawls claims that among reasonable people certain burdens of judgment obtain that make agreement difficult (if not impossible) even under reasonably favourable epistemic conditions. For Rawls, the kinds of burdens that make reasonable agreement difficult include the complexity of evidence, reasonable disagreement over the weight of relevant values, the vagueness of concepts (especially in hard cases), the fact that experiences people have over their life determine to some extent how evidence is assessed, the possibility for normative deadlock when two opposing positions each offers good moral reasons for its case, and finally, the fact that social institutions admit of a limited range of value considerations and so must select the appropriate values in each particular case (PL, pp. 56-57). The problem, then, is how the coercive power of the state

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<sup>41</sup> See Gaus (2011) as one alternative conception to Rawls' public reason.

can be justified when matters of moral and political disagreement cannot be settled even under reasonable conditions.

For our purposes, I make two assumptions. First, the fact of reasonable pluralism is a permanent feature of democratic societies. This idea was explained in sections 2.4 and 2.6 above. Basically, people will disagree about moral and metaphysical conceptions of the world and people's place within it. But despite these differences they (could) still come to agree on certain political arrangements that are acceptable to all. Second, I assume a constitutional democratic regime seeks to justify the form of its public and political institutions and the subsequent coercive power those institutions exercise over all citizens. The second assumption is not, I think, a controversial claim given fundamental political values in democratic societies—namely, the idea of society as a fair cooperative scheme between free and equal citizens. The argument presented in Chapter 2 assumed these values obtain within a well-ordered, public political culture and support an overlapping consensus of a political conception of justice (or, at least, a family of reasonable liberal political conceptions). I take it that the organizing idea of a constitutional democratic regime is one in which “political power is at the same time the power of free and equal citizens as a collective body. Thus political power is citizens’ power, which they impose on themselves and one another as free and equal” (JFR, p.40). This idea preserves the fundamental political value of citizens’ equal political autonomy, an idea implicit in my (and Rawls’) understanding of democracy. Therefore, legitimate political power must be justifiable to citizens as legislators of that power.

Rawls asks, “By what ideals and principles, then, are citizens who share equally in ultimate political power to exercise that power so that each can reasonable justify his or her political decisions to everyone?” (LP, p.136). Given the fact of reasonable pluralism,



legitimate political authority cannot appeal to reasons not everyone could reasonably accept. These “unacceptable” reasons are, says Rawls, reasons appealing to the values and ideas of wholly or partially comprehensive doctrines. For example, the prohibition of equal marriage rights for homosexuals cannot rely on divine ordinance because some could reasonably reject that metaphysical, normative claim as false. Some other *shared* reason is demanded if the law is to be legitimate. Ideals and principles used to argue for, and justify, political decisions are those that each citizen, with his or her reasonable comprehensive worldviews, could accept. It is the role of public reason to offer a space for shared reasoning about matters of political power between people who fundamentally disagree about the truth of religious, moral, and philosophical ideas. In political liberalism, the requirement of legitimate political authority is satisfied when “citizens and government officials exercise political power... [and] citizens may reasonably be expected to endorse [the use of that power] *in light of principles and ideals acceptable to them as reasonable and rational citizens*” (Freeman, p. 474, emphasis added). Public reason, then, is used to justify political decisions—particularly those concerning constitutional essentials and matters of basic justice<sup>42</sup>—among citizens who disagree about comprehensive doctrines but share, through an overlapping consensus, common liberal political conceptions of justice.<sup>43</sup>

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<sup>42</sup> Rawls takes it that the scope of public reason is limited to constitutional essentials and matters of basic justice. This is controversial because political coercion can be exercised outside of these limits. Why is it that Rawls only takes public reason to apply to constitutional essentials and matters of basic justice and not to all uses of political force? Is this even a coherent distinction? I do not take a position on these questions in this section. Instead I use the term “political force” and “coercion” to cover what I take to be the necessary feature of the scope of public reason: legally enforced public rules. This is consistent with my remarks on the scope of the basic structure in section 2.2 above.

<sup>43</sup> At minimum they share liberal democratic political values like respect, tolerance and equal opportunity for all. Martha Nussbaum (2011b) argues that political liberalism does

In specifying the terms of reasonable agreement on questions of political force, we must clarify what could be *reasonably* expected and how it might be possible to justify exercising legitimate political authority in the face of disagreement. First, it is clear that those who reject the idea of political legitimacy endorsed by constitutional democracies would not seek to justify political decisions to the citizenry. There is no need for them to offer reasons for political coercion that others could reasonably accept. On Rawls' view, people operating under these non-democratic political values are unreasonable because they do not offer publicly shared reasons for the use of political force (LP, p. 144). They are despots, corporatists, fundamentalists, fascists and so on.<sup>44</sup>

Second, by distinguishing the reasonable moral doctrines (and the people who hold them) from the unreasonable, public reason proceeds from the political value of reciprocity. *Reciprocity*, in Rawls' sense, requires that citizens reasonably believe that others could accept the terms of cooperation proposed, so long as others are likewise

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not require limiting the range of reasonable citizens to the reasonable doctrines they hold. She writes: "Equal respect is a political, not a comprehensive, value; thus one might in principle accept it while continuing to believe that persons do not deserve equal respect in religious or metaphysical respects" (pp. 18-19). If this is right, then holding political values contrary to one's own religious or metaphysical views would be acceptable within a democratic society—that is, of course, so long as they hold democratic political values when engaging in public deliberation. Admittedly, this would be a difficult psychology to understand. I leave aside the possibility for this kind of internal contradiction. What is important is the idea that political values are the focus of public reason, not comprehensive ones.

However, Rawls allows for a "proviso" in public political discourse: one may offer comprehensive reasons in the public forum so long as a public justification is forthcoming (see section 4 of "The Idea of Public Reason Revisited" (LP, 1999)). The details of the proviso do not concern my argument here so I leave this discussion aside.

<sup>44</sup> Another way of characterizing unreasonable citizens is to show that they reject the basic rights and liberties—i.e. the liberal constitutional essentials—stipulated by justice as fairness or other political liberal conceptions of justice. For example, they disregard the right to liberty of conscience and freedom of speech. For example, legally enforced limitations on religious freedom could not be acceptable to citizens who hold different metaphysical views.

reasonable (LP, p. 14). This is opposed to the idea that citizens are manipulated or coerced into accepting political force. Reciprocity is the basis for political legitimacy in a democratic regime. When reciprocity is exercised and publicly recognized as such, all (reasonable) citizens could accept the legislative and judicial decisions as *reasonable* and *legitimate*: reasonable, because the decision is justified by public reasons each could accept based on their common commitment to liberal conceptions of political justice, and legitimate because citizens are regarded equally in the decision-making process. Rawls states, “Our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions... are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons” (LP, p. 137).

Rawls takes the criterion of reciprocity to be fundamental in delineating and representing the “family” of reasonable conceptions of political justice. Justice as fairness is one example of a reasonable political conception. This view stipulates an original position from which principles of justice would be rationally agreed to under fair conditions. The difference principle identifies publicly available reasons for considering one policy over another. Taxation policy under justice as fairness would collect and distribute wealth with an eye to the benefit of the worst off. In a well-ordered society citizens could reasonably agree to policies of this kind based, in part, on the available political principles and values stipulated by this reasonable conception of justice.<sup>45</sup>

But it may be that other reasonable political conceptions obtain. That is, other political conceptions that value reciprocity in public deliberation offer competing but reasonable views for political legitimacy. Rawls writes, “Differences about the most

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<sup>45</sup> I say “in part” because civic virtues (such as reasonableness and respect), available evidence, and principles of reasoning also make up the content of public reason. Civic virtues are discussed in the following section, the latter two I leave aside here.

appropriate principles of justice... and the ideals that underlie them, can be adjudicated... within the existing political framework” (JFR, p. 49). When in opposition, parties deliberate from competing but reasonable views, offering what they take to be appropriate public reasons everyone could accept given their shared political ideas and values. In this way, the content of public reason is not fixed but open to competing ideas, values, and principles—so long as they are offered with a commitment for respect, reciprocity, and political legitimacy. Rawls summarizes:

Citizens are reasonable when, viewing one another as free and equal in a system of social cooperation over generations, they are prepared to offer one another fair terms of cooperation according to what they consider the most reasonable conception of political justice; and when they agree to act on those terms, even at the cost of their own interests in particular situations, provided that other citizens also accept those terms. (LP, p. 136)

Public reason, on this account, is idealized in the constituency (who the reasonable are) and the content (what reasons count as public). In the following section I pursue a further inquiry into the consequences and challenges of this feature of Rawls’ idea of public reason. However at this point in my exegesis further clarification is needed. The limiting feature of public reason is the acceptability of political conceptions that are “reasonable”. Reasonable political conceptions—and the comprehensive views that endorse them—are characterized by three features: 1) they contain a list of basic rights, liberties and opportunities, 2) they prioritize these rights and liberties, and 3) they contain certain measures to ensure adequate, all-purpose means to all citizens for effective use of their basic rights, liberties, and opportunities (LP, p. 141). These are necessary conditions for the exercise of reciprocity implicit in any reasonable conception of justice. The absence of rights and liberties, or of the exercisability of those rights and liberties, would

not, *a priori*, be acceptable to citizens as free and equal. Therefore, any reasonable conception of justice recognizes the fundamental concern for the liberty of individuals as moral agents with their own conception of a worthwhile life. The liberal idea of taking people as they are was introduced in sections 3.3-3.5 above. Similarly, public reason does not seek to unduly restrict different and potentially conflicting worldviews. Therefore Rawls' conception of public reason accommodates reasonable comprehensive doctrines through the security of the basic rights and liberties.

Since justice as fairness protects basic rights and liberties, we can stipulate that the acceptable range of reasonable conceptions of justice would also meet the criteria for a *political* conception of justice. First, principles of justice apply to the basic structure. Second, political reasons are presented independently of comprehensive doctrines. Finally, reasonable political conceptions can be worked out from “fundamental ideas seen as implicit in the public political culture of a constitutional regime” (LP, p. 143). To engage in public reason is, among other things, to invoke conceptions of justice—and their “ideals and principles, standards and values” (LP, p. 144)—that meet these criteria. Failure to offer a conception of justice on these grounds—i.e. as both consistent with the criterion of reciprocity and applying to the basic structure—is a failure to justify a conception of justice acceptable within the limits of a liberal democratic society.

Two important features of the criterion of reciprocity need clarification. First, Rawls takes it to be a moral, not legal, requirement. This is a feature of the well-ordered society in which citizens and government officials have a sense of justice and willingness to comply with these terms (Freeman, p. 484). They *want* to act in accordance with public reason as a requirement of their own deeply held convictions about political justice. Rawls writes, “[Citizens] have a capacity to accept reasonable political principles of

justice and a desire to act on these principles; when citizens believe that political institutions and procedures are just (as these principles specify), they are ready to do their part in those arrangements when assured others will do theirs” (PL, p. 163). This is a feature of a stable democratic society: citizens agree with reasonable political principles not as a mere *modus vivendi*, but as a conception of the good for their society. If citizens agree to principles out of self-interest or self-preservation, then should political power swing in their favour, they would not offer publicly acceptable reasons, but would dominate their political opponents should they get the chance. Acting from a disposition of reciprocity safeguards the legitimacy of their political institutions over time. Should this political value fail to gain consensus within a political background culture, then the idea of democracy itself is at risk of collapsing.<sup>46</sup>

Second, the criterion of reciprocity is invoked only in the *public political forum*. The scope of public reason consists of three parts: discourse among the judiciary, discourse among legislators and chief executives, and discourse among candidates for public office (LP, pp. 133-134). As for the role of citizens, Rawls says they “are to think of themselves *as if* they were legislators and ask themselves what statutes, supported by what reasons satisfying the criterion of reciprocity, they would think it most reasonable to enact” (LP, p. 135, author’s emphasis). It is not clear how far this duty of reasonableness extends for the everyday citizen. It at least extends to voting, and possibly to political advocacy but otherwise is concerned only in regards to law-making and, in particular, to

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<sup>46</sup> Recall from chapter 2 that the organizing idea of society as a cooperative scheme between free and equal persons obtains an overlapping consensus. This is similar to the value of reciprocity in organizing public justification for political coercion. Should this value not obtain an overlapping consensus, it lacks moral justification within that society. Also, see section 3.6 on the role of the basic structure in developing liberal moral values and principles in persons.

holding governments accountable.<sup>47</sup> Clearly, Rawls has in mind a particular role for public reason in proposing, legislating and interpreting laws. The public political forum is distinct from the background culture where “many and diverse agencies and associations” are protected by the basic rights of free speech, and the liberty of conscience and association (LP, p. 134).

Another feature of public reason is that it is entered into in good faith. Public reasons are proposed, and positions argued for, with an open commitment to revising one’s position should the opposing view present good reasons to do so. Rawls states:

When citizens deliberate, they exchange views and debate their supporting reasons concerning public political questions. They suppose that their political opinions may be revised by discussion with other citizens; and therefore these opinions are not simply a fixed outcome of their existing private or nonpolitical interests.  
(LP, pp. 138-139)

When following public reason in the political forum, a person cannot hold fast to a political decision she takes to be deeply important merely because it is important to *her*. It is a virtue of the interlocutor to bracket these deep (personal) commitments in public deliberation about matters of basic justice and constitutional essentials. To the extent that this is satisfied, public reason remains truly public: personal comprehensive doctrines and other (non-public) commitments play no role (or at least a marginal role) in settling disputes about the legitimate use of political force.

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<sup>47</sup> Rawls’ brief comment on this matter: “When firm and widespread, the disposition of citizens to view themselves as ideal legislators, and to repudiate government officials and candidates for public office who violate public reason, is one of the political and social roots of democracy, and is vital to its enduring strength and vigor. Thus citizens fulfill their duty of civility and support the idea of public reason by doing what they can to hold government officials to it” (LP, pp. 135-136).

To summarize: Rawls' formulation of public reason is "a view about the kind of reasons on which citizens are to rest their political cases in making their political justifications to one another when they support laws and policies that invoke the coercive powers of government concerning fundamental political questions" (LP, pp. 165-166). Public reason is exercised in the public political forum through the criterion of reciprocity. This is a fundamental political value of public reason, necessary for: 1) specifying the terms of appropriate (acceptable) public reasons within a range of acceptable political conceptions of justice, and 2) determining the legitimacy of political force—as an organizing feature of the basic structure—for a democratic society whose citizens share in the benefits and burdens of that force.

#### **4.2 The *Ideal of Public Reason*:**

Rawls' formulation of public reason is both epistemically and normatively ideal. It is epistemically ideal because people are assumed to offer rational arguments when debating the use of state coercion. When agreement cannot be reached, we presume this is a consequence of the burdens of judgment and not irrationality, dogmatism, or ignorance. Public reason is normatively ideal because it is inclusive of a certain set of liberal democratic values and accompanying virtues. These values are stipulated in part by the content of political conceptions that fit the criteria for reasonableness. Political values include but are not limited to reciprocity, respect for citizens as free and equal, equality of opportunity, and the social bases of mutual respect (PL, p. 139). We assume that to some degree these political values achieve overlapping consensus in constitutional democracies, even though they may be expressed in reasonably conflicting ways. These reasonable disagreements about political principles, values and ideals provide the content of public reason.



The political virtues of respect, reasonableness, and fair-mindedness are also included here as necessary features of public reason: by acting from a sense of justice citizens offer what they believe to be the most reasonable terms for public justification. Rawls calls this the *duty of civility*. It requires that citizens “explain to one another... how the principles and policies they advocate and vote for can be supported by the political values of public reason” (PL, p. 217). He continues, “This duty also involves a willingness to listen to others and a fair-mindedness in deciding when accommodations to their views should reasonably be made” (PL, p. 217). The duty of civility is the commitment citizens, lawmakers, and judges have when exercising the criterion of reciprocity concerning matters of political authority. This is ideal because it is expressed by the idea of public reason and the criterion of legitimacy: citizens seek to justify their arguments for political coercion to other reasonable citizens.

How do public reason and the criterion of legitimacy impose the duty of civility on citizens? Through the following series of quotes, Rawls makes explicit the priority of the criterion of reciprocity in limiting the scope of reasonable moral doctrines for the purposes of public reasoning about fundamental political issues. Rawls offers:

In public reason ideas of truth or right based on comprehensive doctrines are replaced by an idea of the politically reasonable addressed to citizens as citizens. This step is necessary to establish a basis of political reasoning that all can share as free and equal citizens. (LP, p. 171)

And again:

When political liberalism speaks of a reasonable overlapping consensus of comprehensive doctrines, it means that all of these doctrines... support a political conception of justice underwriting a constitutional democratic society whose principles, ideals, and standards satisfy the criterion of reciprocity. ... Moreover, a true

judgment in a reasonable comprehensive doctrine never conflicts with a reasonable judgment in its related political conception. *A reasonable judgment of the political conception must still be confirmed as true, or right, by the comprehensive doctrine.* (LP, pp. 172-173, emphasis added)

Together the above quotes offer the following premises:

- 1) Public reason does not affirm the truth of moral doctrines,
- 2) Public reason does, however, affirm the reasonableness of those doctrines,
- 3) Comprehensive doctrines are reasonable if and only if they support (confirm as true) the criterion of reciprocity.

Rawls continues:

Their doctrines may override or count for naught the political values of a constitutional democratic society. But then the citizens cannot claim that such doctrines are reasonable. Since the criterion of reciprocity is an essential ingredient specifying public reason and its content, political liberalism rejects as unreasonable all such doctrines. (LP, p. 173)

We can conclude that the idea of political liberalism<sup>48</sup> implies the truth claim that reasonable comprehensive doctrines observe the criterion of reciprocity on pain of becoming unreasonable.<sup>49</sup> This, I believe, is an important clarification about the standards for truth among reasonable political conceptions. We do not assert the bold claim that liberalism is a true doctrine about political morality. However, given certain assumptions

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<sup>48</sup> I use this term interchangeably with the set or family of reasonable liberal democratic conceptions of justice.

<sup>49</sup> David Estlund argues that the truth of political liberalism must allow all *reasonable* comprehensive doctrines regardless of the truth or falsity of those doctrines; but political liberalism “must be both acceptable to all reasonable citizens and *true*” (Estlund, 1998, p. 266, italics added). If we grant political liberalism this epistemic idealization in organizing reasonable comprehensive views, we must also grant that who the reasonable people are might be no one at all. All we need to show is that “insularity” of the reasonable are hypothetical citizens that believe in, and act from, the criterion of reciprocity.

about the criteria for reasonableness, we do assert that it is obligatory that democratic citizens hold *a* reasonable political moral doctrine as true (but need not necessarily assert all, or any other, as true). This conclusion follows from the above quotations from Rawls: the truth of comprehensive doctrines does not affect their acceptability within the set of reasonable political conceptions. However, if they are reasonable, they must affirm the criterion of reciprocity in matters concerning political legitimacy. Therefore, reasonable democratic citizens endorse the criterion of reciprocity as a political value without exception. Those who fit this criterion are virtuous democratic citizens, and those who do not reject liberal egalitarian conceptions of justice.<sup>50</sup> What counts as reasonable, in other words, is normatively idealized.

This is how Rawls' conception of public reason is normatively ideal: Reasonable citizens bracket their own comprehensive view when deliberating on matters of political coercion. They seek to find reasonable terms of agreement from public reasons that all can accept grounded in their shared liberal democratic conceptions of justice. This is the duty of civility and operates as a kind of "meta-criterion" of political morality for citizens who affirm fundamental democratic political ideas and values. They want to, as a matter of their comprehensive doctrine (i.e. in their beliefs, attitudes, and preferences), act from the duty of civility when considering matters of political coercion. Persons who hold

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<sup>50</sup> This is not to be confused with perfectionist liberalism, which states that the idea of a (or any) monistic comprehensive doctrine is false and pluralism is true. It is "the doctrine that there exists a plurality of overall accounts of how one should live, all of which are valid or objectively correct" (Nussbaum, 2011, p. 11). The view I support need not say anything about the truth-value of comprehensive doctrines as such. What I do need to say is that *if* a doctrine is reasonable, *then* it affirms a political conception that also affirms the criterion of reciprocity. Whether this political conception and its supporting comprehensive doctrine are actually true is not philosophically interesting for my position. Indeed, for Rawls this is (merely) a contingent feature of the background political culture organized by the fundamental political idea of society as a cooperative scheme between free and equal citizens. I am happy to follow him on this front.

views that forgo public reason in matters of political authority reject democratic ideals. How unreasonable persons are treated in democratic societies varies, and it is not my intention to give an account of their fate. What is clear, however, is that their unwillingness or inability to engage in public reasoning effectively eliminates their participation in public deliberation about matters of fundamental political concern. Rawls writes, “Citizens affirm the ideal of public reason, not as result of political compromise, as in a *modus vivendi*, *but from within their own reasonable doctrines*” (PL, p. 218, emphasis added). How citizens realize the ideal of public reason will be explored by revisiting Cohen’s critique of Rawls.

#### **4.3 Revisiting the Scope of Egalitarian Justice:**

Recall that Cohen resists endorsing the liberal value of toleration because some preferences and attitudes are not, he thinks, acceptable (and so intolerable) within a justificatory community. The market capitalist cannot effectively propose the incentive argument to others because his preference for vast rewards undermines the difference principle—the very principle he uses to justify those rewards. For Cohen, recall, inequalitarian preferences and attitudes are culpable because they justify political oppression as a means of accommodating those preferences and attitudes. Because these preferences are part of a conception of justice, they are also evaluable within the purview of an acceptable conception of justice. On Rawls’ view, says Cohen, the non-ideal, non-egalitarian moral doctrines of some are covertly smuggled into an ideal theory. And this, so he holds, is not sustainable as an egalitarian conception of justice.

I responded on Rawls’ behalf in part by showing that the methodology of justice as fairness is not oblivious or indifferent to oppressive moral doctrines. Indeed, it is an imperative of a just basic structure to organize political and social institutions to protect

citizens against these threats. This is established through the constitutional priority of equal basic liberties and equality of opportunity as well as considerations of justifiable distribution through the difference principle. Further, there is a case to be made within justice as fairness to promote an egalitarian ethos. This is accomplished, in part, through socialization and equal political participation. The person is not taken as an isolated individual navigating a liberal network of rules and regulations. Instead, the person is a member of a social order that structures her relation to it in ways that are fair and reasonable for each. This involves—to a greater extent than Cohen allows—taking people as they are (with their preferences, attitudes, and beliefs) and protecting them from the oppressive ethos of those who seek to dominate them. This view sets the limits of legitimate authority in condemning moral doctrines that are otherwise reasonable.

In revisiting the dispute between Rawls and Cohen, the natural question to ask is: how does the scope of egalitarian justice impose duties on the individual to construct or revise her moral doctrine in ways consistent with justice as fairness or other liberal democratic conceptions? The answer to this question reflects a deep discrepancy between Rawls and Cohen. Is one's ethos also subject to the demands of egalitarian justice? If Rawls answers in the affirmative, he seems to lose his hard fought liberal tolerance of a plurality of moral doctrines—a plurality protected by the fundamental basic rights and liberties. This would be at risk of founding justice on a comprehensive moral doctrine. Thus, he could not consistently hold this view and political liberalism at one and the same time. If the ethos of citizens is not subject to justice, then it would seem that Cohen (and other critics of liberalism generally) have grounds to reject political liberalism as unduly inegalitarian and, *a fortiori*, oppressive. It is my view that Rawls can consistently accept

the former—that there *are* some moral requirements for democratic citizens—without asserting an infringement on the basic rights and liberties to which he is committed.

Returning to Cohen’s example of the market capitalist: What difference does taking seriously the idea of public reason—with its attendant duty of civility—make to evaluating the force of Cohen’s critique? I offer three responses to Cohen in light of the above discussion of public reason.

First it is useful to recall that the talented are incentivized financially as a matter of *personal motivation*. This is a feature of their comprehensive doctrine, not a natural or universal condition of human psychology (or at least this is not a settled matter). Thus, people have a variety of reasons for the decisions they make in their everyday lives. These reasons, we suppose, will not be reasons everyone shares because of philosophical, religious, or moral disagreement between them. Comprehensive doctrines are a space of deep and intractable disagreement between people who hold different worldviews. Recall that Cohen offers a conception of a justificatory community “among whom there prevails a norm... of comprehensive justification” (IIC, 282). Rawls does not think it is of fundamental importance to be able to justify one’s preferences to one’s interlocutors. The reason for this is that they will disagree about which personal preferences and attitudes should organize the norms of social cooperation. If we take the talented to be simply stating their preference for higher rewards, this is a feature of their personal moral doctrine and is not, for good reason, immediately evaluable within the scope of justice.

Second, having a preference to get a higher economic return on hard work (as opposed to the value of one’s leisure in the absence of economic benefits) is not, in itself, sufficient to make one’s comprehensive moral doctrine unreasonable. That is, an incentive for work does not reject outright the criterion of reciprocity. In order to claim

that the high-flyer is unreasonable, we must look at how this preference fits into her overall moral conception as a citizen. Rawls grants that people have two moral powers: 1) the ability to develop and revise a conception of the good for themselves as free moral agents, and 2) the capacity to develop and act from a conception of justice (see section 2.4). The duty of civility requires citizens to bracket (1) when it conflicts with their considered interest in a just society. The virtuous citizen recognizes that each may disagree with the moral doctrines of others, but that they still share in one another's fate by participating in their common institutions. Thus they offer reasons for social arrangements each could reasonably accept given their shared political (democratic) values and ideals.

What is on offer by the talented person—assuming for the sake of argument that she *is* reasonable—is how her personal values fit within the ideal of the democratic citizen. This means that her reasonable moral view is revealed in light of how that view coheres with her conception of justice. How *does* she perceive her demand for economic rewards within the broader context of social cooperation? Are her values consistent with her view of a just society? Do they conflict? These are questions the citizen asks herself when considering her civil duty as a reasonable and rational person. Further, it is not obviously unjust or impossible that a person's preference for hard work over leisure would be sensitive to diminishing personal benefit. Rawls writes, "Those who insist on imposing such principles on others, moved by greater power or stronger bargaining position, are being unreasonable, yet given their interests, they may be perfectly rational" (JFR, p. 191). We know the capitalist is rational, but her reasonableness is not yet established.

The incentive argument is suspect, Cohen says, by looking at who is offering it. When a market capitalist offers it, it appears as though she is strong-arming the legal apparatus into accepting her demands as a means to achieve (non-ideal) distributive justice. Rawls would respond that this is not acting from the duty of civility. Much more needs to be said about the incentive argument and its content before we could give an accurate account of its permissibility as reasonable. For example, does the capitalist sincerely believe that tax incentives are the best way to achieve egalitarian justice? If so then she also sincerely believes that others could reasonably accept these terms. Of course this does not settle the matter. Other proposals could be put forward that offer other means of achieving a just distribution, in which case the profiteer can either sit on her hands or pursue investments at a lower return. Again, assuming that she is reasonable, she could accept these terms as a matter of deliberative justice. The mark of political virtue in the case of the incentive argument is that the argument is presented in good faith and is consistent with the values of reciprocity and respect. Only from her political moral doctrine is the capitalist condemnable as unreasonable. Cohen does not consider the duty of civility when condemning the profiteer's personal preferences as unjust. As explained at length, this gap is not easily crossed without the assumption that people do fundamentally disagree about moral doctrines and the loss of the assumption that legitimate political coercion is reasonable to all (or most) citizens.

My third response to Cohen (on Rawls' behalf) is that the basic structure is supposed to organize the rules and regulations, like tax schemes, in ways that are fair and reasonable according to widely endorsed principles of justice. In the original position representatives rationally choose principles that secure their best share of the all-purpose social primary goods. These goods are necessary for pursuing the conception of the good



life, *however conceived*. This takes into account both the preferences of the market capitalist and those standing to gain from greater distribution. Principles are fair when everyone, with his or her reasonable doctrine, offers arguments for policies that appeal to principles each could reasonably accept.

The difference principle is one way to express reciprocity between those who want higher rewards and those who seek a more egalitarian distribution (JFR, p. 49, 133). It could be justifiable for the latter group to accept a level of inequality because the talented might not otherwise contribute to the advantage of the worst off—this is the thrust of the incentive argument. To suggest that those acting on incentives are unjust risks endorsing the ‘slavery of the talented’: regardless of the talented, well-placed people’s own preferences, they ought to work as hard as they can to benefit the least advantaged. This view, it seems, is *prima facie* objectionable. It could not be a reasonable conception of justice to condemn some to work for the advantage of others against their own conception of a worthwhile life. It would be good, we might say, if everyone developed a moral disposition to work towards a highly egalitarian society. But this is, again, a moral doctrine that some people are going to disagree with.<sup>51</sup>

Cohen fails to engage the critical methodology of justice as fairness as a *political* conception: accepting the fact of reasonable pluralism, supporters of a liberal egalitarian conception of justice ask what can reasonably be expected of citizens in a just democratic society. Cohen’s critique is worrisome because condemning the high-flyer for having financial motivations—without consideration of her political conception—risks endorsing principles of justice that are incompatible with otherwise reasonable moral doctrines. This

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<sup>51</sup> However, it is not beyond the purview of public institutions to cultivate liberal egalitarian dispositions in people (see section 3.6). But, so my argument goes, it cannot be a reasonable use of coercive force to compel or condemn these views.

may have profoundly negative effects because of the burdens of judgment and the plurality of worldviews found within a democratic society. When persons are regarded as morally suspect by an authority they reject as unreasonable, it may be that people will just dig in their heels and protest an infringement on their rights as free and equal persons. Indeed, this would be destructive to a well-ordered society. Recall that stability requires the adherence of citizens to the social and political institutions that regulate their expectations over a complete life. These institutions threaten deep divisions—of a stability-undermining sort—between people when they endorse a moral conception of justice which others find objectionable. Divisions based on moral doctrines once again find their way into the public political forum and assert claims that not all could reasonably accept. For this reason Rawls proposes a freestanding political conception of justice. People could reasonably disagree about the moral value of egalitarian distribution, but endorse a conception of justice that takes seriously the claims others have on the coercive nature of their shared institutions. The duty of citizens to engage in this kind of political reasoning is the appropriate scope of egalitarian justice. Cohen overlooks the possibility of reasonable pluralism in his condemnation of the market capitalist.

Taking people as they are may be an unfortunate circumstance limiting the aspirations of a theory of ideal distributive justice. Cohen wants to include in his condemnation of an unjust society the moral sensibilities of those who make the incentive argument sound.<sup>52</sup> But this, as we saw, is an intractable disagreement about what makes life worthwhile. Liberal egalitarian justice does not wait for these arguments to be resolved once and for all, but offers solutions for fair social arrangements in light of the non-ideal, pluralistic composition of democratic societies. More precisely, political

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<sup>52</sup> See section 3.1.

liberalism does not concern itself with the truth of moral or metaphysical views. Instead, it places the epistemic burden on the *reasonableness* of doctrines. And perhaps this is the best we can do given our divisions, disagreements, and, burdens of judgment.

State intervention reaches so far as to restrict unreasonable doctrines from justifying oppressive political force. These oppressive acts, we say, are illegitimate because they are inconsistent with the democratic values of a people who share in the fair distribution of the benefits and burdens of a society. But state intervention does not, and should not, go so far as to restrict reasonable moral conceptions of the good. So long as we respect reasonable differences between comprehensive views, there is no reason why we should hope for more than respectful disagreement among our fellow citizens. In liberal egalitarian justice, like the version described above, citizens are viewed as politically equal. This is, I believe, redeemable as a conception of justice in light of Cohen's criticisms.

Cohen does, however, correctly state that the personal ethos does not (and should not) entirely escape the concern of egalitarian justice. People are obligated as citizens to act from the duty of civility in the public political forum. But unlike Cohen and his insistence on one's material preferences as subject to justice, we locate the moral imperative for justice in light of citizens' two moral powers. People have different and competing interests in their pursuit of the good. But if they are willing to bracket their own interests in favour of publicly reasonable arguments based on what they take to be the most reasonable conception of justice, they act from the duty of civility. And this, so I hold, is the mark of the virtuous citizen.

## **Chapter 5: Conclusion**

This thesis has explored Rawls' theory of justice as fairness through Cohen's critique that Rawls inconsistently limits the principles of justice to the level of the basic structure. We began with a thorough explication of Rawls' theory of justice. This revealed an essential relationship between liberty and equality in democratic societies. Redistribution of social primary goods seeks to mitigate contingent differences between citizens in order to preserve a space for the free exercise of their conceptions of the good. This view makes substantial assumptions about an overlapping consensus of political values and the corresponding role of legitimate public and political institutions. First, people are committed to justifying political arrangements to each other given that they share in one another's fate through the coercive power of their common political and social institutions. Second, people will disagree about moral doctrines—the value of economic equality among them—but can still endorse a common political conception of justice (or at least one within the set of reasonable political conceptions).

Cohen holds that the basic structure cannot be the primary site of justice so long as an inegalitarian ethos affects our sense of what counts as an acceptable level of inequality. The incentive argument revealed deep tensions in the difference principle because taking people as they are involves justifying principles for the fair organization of public institutions on non-ideal preferences and attitudes. Rawls, says Cohen, is too tolerant of peoples' attitudes and preferences when patterns of behaviour establish inegalitarian principles of justice in an ideal liberal political conception. This is not tenable so long as we do care for the fair distribution of social primary goods.

I responded with three ways in which Rawls can defend against Cohen's criticisms. First, the basic structure is not indifferent to the prevailing background culture.

It is an imperative of justice as fairness to introduce, where possible, public institutions that foster a general commitment to the political ideas of fairness and respect among fellow citizens. Second, the basic structure limits acceptable preferences and attitudes according to the lexical priority of basic liberties and fair equality of opportunities. Finally, I presented a view of public reasoning that limits persons' own moral conceptions to those that affirm the duty of civility. This is a feature of the virtuous citizen in acting from her deeply embedded moral conception of the good. The duty of civility involves, in some cases, bracketing one's own moral doctrine when arguing for the legitimacy of state coercion. Prioritizing the values of fairness, legitimacy, and respect for fellow citizens is a political virtue—a virtue evaluable within the scope of egalitarian justice.

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