

## Chapter 5

### Rawls's Underestimation of the Importance of Economic Agency and Economic Rights

Jeppe von Platz

#### <1>1. Introduction: Rawls on Economic Rights

Rawls's list of basic rights leaves out economic liberties such as rights to own productive property and freedom of contract. Libertarians take issue with this exception, arguing that it reveals insufficient concern for economic agency, and that proper concern for economic agency would give such economic liberties high priority. I argue that, even if we accept Rawls's theory of basic rights, this libertarian complaint is true; economic agency is more important than Rawls makes it, and some economic rights *are* basic. However, I also argue that the libertarian critique is wrong about *how* we should care about economic agency and *which* economic rights are basic.

Rawls's theory of basic rights is complicated. The rights protected and given priority by the first principle are all and only the rights necessary for the adequate development and exercise of the moral powers of democratic citizenship.<sup>1</sup> Rawls conceives of democratic citizenship as social cooperation between free and equal persons; these powers, therefore, are those that enable citizens to participate in and benefit from this sort of cooperation. Rawls identifies two such powers:<sup>2</sup> First, the power to make up one's mind about and pursue a determinate conception of the good life, or the capacity for a conception of the good; second, the power to think about, pursue, offer, and abide by fair terms of cooperation, or the capacity for a sense of justice.

The capacity for a conception of the good is exercised in our ethical agency and explains *why* we cooperate, namely, to produce the many social goods that will allow us to pursue our conception of the good life, whatever it may be.<sup>3</sup> These goods include material goods such as

comfortable shelter, food, means of transportation and so on, but also, and more importantly, immaterial goods such as peace, social stability, the accumulation of knowledge and progressively more powerful technologies, vibrant and diverse cultural experiences, and so on. It is by and through cooperating that we create all of these things, to the benefit of all.

The sense of justice is exercised in our political agency and involves articulating, offering, and abiding by fair terms of social cooperation. It is an understanding of the norms that ought to govern cooperation and a willingness to take these norms as directive. The sense of justice explains *how* we cooperate; our cooperation is governed by justice both internally (by our willingness to cooperate on fair terms) and externally (by the rules we legislate that define the terms of fair cooperation).

To secure the development and exercise of these two sorts of agency, the first principle secures three sets of rights.<sup>4</sup> Ethical agency is protected and enabled by rights that protect the person, and by liberties of religion, thought, and association that allow people to freely make up their minds about and pursue their own conceptions of the good life.<sup>5</sup> Political agency is protected and enabled by a set of political rights – freedom of speech and assembly; rights to join, form, leave, and criticize political parties; rights to participate in regular, free, and fair elections; and so on. The political rights also enjoy a fair-value guarantee to ensure that similarly talented and motivated citizens have roughly equal prospects for influencing government policies and gaining political power.<sup>6</sup> Rawls's first principle also covers a set of supporting rights that secure background conditions for the rights established as basic in one of the first two ways. These include the rule of law, privacy, and security of personal property.<sup>7</sup>

Economic rights enable and protect the exercise of economic agency.<sup>8</sup> These rights include rights governing ownership of productive property, rights related to working and

contracting, rights related to transfer of goods and services, rights governing economic associations (corporations, unions, and so on), and rights to public supports for one's development and exercise of the powers of economic agency. Other than personal property (and perhaps free choice of occupation), Rawls does *not* include economic rights on the list of rights protected by the first principle.<sup>9</sup> Generally speaking, then, economic rights are not, by Rawls's theory, necessary for the development and exercise of the moral powers of democratic citizenship, and so do not serve the same role or enjoy the same priority as the basic rights.

There is a division of labor between the two principles of justice in Rawls's theory, and the place and role of economic rights can be understood in terms of this division. Justice divides into enabling and distributive justice. *Enabling justice* deals with the preconditions of social cooperation; it requires that we secure for all citizens the conditions necessary to empower them to participate in social cooperation as free and equal persons. In Rawls's theory, enabling justice is governed by the first principle and a sufficientarian guarantee that all have "adequate all-purpose means to make effective use of their liberties and opportunities."<sup>10</sup> Of course, the first principle has distributive implications, for example, through the aforementioned sufficientarian guarantee and the fair value requirement for political rights, but these requirements, again, aim to empower citizens to cooperate as free and equal. The distribution of the benefits and burdens of the social cooperation that takes place between citizens thus empowered is the subject of *distributive justice*. Distributive justice requires that these benefits and burdens are distributed fairly, which, in Rawls's theory, means subject to the requirements of the second principle of justice.

For Rawls, the system of economic rights that regulate economic agency is part of distributive justice. This leaves open the choice between capitalist and socialist systems, and it

allows society to design property rights, labor laws, and the laws that define contracts to serve social concerns for efficiency and distributive justice.<sup>11</sup> The Rawlsian view of the role and (low) priority of economic rights thus leaves democratic governments free to design the economic system, subject only to the requirements of fairness stated by the second principle.

In the following section I sketch three libertarian critiques of Rawls's theory of economic rights. In section 3, I discuss the critique I believe is most worrying for Rawlsians, i.e., the critique offered by Tomasi and like-minded thinkers. This critique is most worrying because it accepts the Rawlsian approach to thinking about justice, but aims to show that this approach leads to a libertarian system of economic rights. If sound, Tomasi's argument shows that Rawlsians should be libertarians. In section 4, I argue that while Tomasi's argument fails in the detail, the general version of the libertarian complaint hits home, for some (non-libertarian) economic rights are basic. In section 5, I indicate how economic agency and economic rights should be appreciated in justice as fairness.

## <1>2. Three Libertarian Critiques

A straightforward critique of Rawls's theory of economic rights can be built on the assumption that economic rights are natural rights that must be protected and respected by the state; a state serving the principles of justice as fairness does neither. Nozick, for example, begins *Anarchy, State, and Utopia* with the claim that "individuals have rights [...] So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do."<sup>12</sup> In particular, the state may not interfere with property or contract, except to protect rights; "any state more extensive violates people's rights."<sup>13</sup>

To Nozickean libertarians, the most important economic rights are original: they are powers to acquire rights either by original acquisition of something previously unowned or by contracting with other persons. By exercising these powers, persons acquire property rights and rights to the services of other people.

The moral powers that this sort of libertarian theory cares about are thus not Rawls's two moral powers, but rather the powers that enable acquisition and transfer of property and other contractual obligations. Moreover, the basic rights are not those that *enable* the exercise of these powers; instead they simply *are* the rights to exercise these powers. Economic agency is the source of all interpersonally acquired rights, and is, accordingly, a central concern of justice. The economic rights, including property rights that persons can acquire by dealing with each other, are thus theoretically and normatively prior to the authority of the state – to secure these rights is the source, end, and limit of state authority.

Theft, breach of contract, violence, and other forms of aggression are impermissible, but any exchange that exercises the relevant powers without violating the rights of other persons is permissible, and the distribution of acquired rights that results from permissible acquisitions and exchanges is just, no matter what else is true about it: “a distribution is just if it arose from another just distribution by legitimate means.”<sup>14</sup> So, when Rawlsians delegate the design of the system of economic rights to second-principle concerns, they commit the state to gross rights violations on a massive scale. For the pursuit of fairness through regulations or taxation violates basic economic rights: “holdings to which these people are entitled may not be seized, even to provide equality of opportunity for others.”<sup>15</sup> Indeed, Nozick says that taxation is “on par with forced labor,”<sup>16</sup> for people need to work, and so have no alternative to working and paying taxes; they are forced to work and pay taxes.

Rawlsians need not worry much about this sort of libertarian critique, for it assumes a theory of the nature and sources of rights and political authority that Rawlsians reject. Rawlsians start from an idea of democratic society as a system of fair social cooperation between free and equal citizens and construct justice as fairness from the resources this idea makes available (social cooperation, fairness, free and equal citizens). The question is how we can enable social cooperation and distribute its burdens and fruits fairly among citizens. The Nozickean libertarian critique of Rawls amounts to a wholesale rejection of this starting point, and the particular critiques of distributive justice as rights-violating assumes that distributive justice is satisfied by the permissible exercise of the powers of property and contract. Since Rawlsians reject this assumption, they remain unconcerned by the critique levelled from it.

The second sort of libertarian critique assumes an indirect utilitarian framework. While Hayek did not target Rawls's theory directly, his discussion of distributive justice offers a clear illustration of this sort of critique. The argument starts from the view that the aim of society is social prosperity, and justice is the set of norms that best achieves this aim.

This indirect utilitarian view of the nature of justice turns libertarian once it is combined with the view that the best tool for creating maximal social prosperity is to unleash what Hayek calls the "creative powers of a free civilization,"<sup>17</sup> that is, to allow individuals as much economic liberty as possible, while preventing market failures and providing for public goods. Any limitation of economic agency beyond this tends to frustrate or destroy the productive powers of society at the expense of social prosperity, and is, therefore, unjust. Justice consists in the marriage of economic liberty and social utility: the free exercise of economic agency is the primary means of utility and we should, therefore, take the economic liberties of a *laissez-faire* economy as basic requirements of justice.

In this perspective, the Rawlsian pursuit of distributive justice is counterproductive and inefficient, and, therefore, unjust.<sup>18</sup> The pursuit of equality of opportunity requires government interference with liberty and lead to less opportunities for the average person. The pursuit of a fair distribution of the benefits and burdens of cooperation requires micromanagement of resources and individual choices, thus, “Within the limits set by the rule of law, a great deal can be done to make the market work more effectively and smoothly; but within these limits, what people now regard as distributive justice can never be achieved.”<sup>19</sup>

Justice, accordingly, permits (and legitimates) whatever distribution arises from the free market working its productive magic; not, as Nozick thought, because justice is concerned exclusively with transactions, or because economic liberties are basic rights, but because economic liberty produces the best overall outcome.<sup>20</sup> In a free society the distribution of wealth and income is the result of everybody playing the same economic game in accordance with the rules of liberty, and “there is no need morally to justify specific distributions (of income or wealth) which have not been brought about deliberately but are the outcome of a game that is played because it improves the chances of all.”<sup>21</sup>

As with the first sort of libertarian critique, this Hayekian critique is of limited concern to Rawlsians. The point of justice as fairness is to offer a contractualist alternative to utilitarian theories of justice, so the fact that those who assume a utilitarian framework for thinking about justice find fault with justice as fairness is unsurprising and un concerning.

These critiques derive from fundamental disagreements about the subject and role of justice. They are, at bottom, *inter*-framework disagreements; disagreements about how we should think about justice in the first place. Nozickean libertarians believe that justice is about natural rights; Hayekians believe that justice is about social prosperity; Rawlsians believe that

justice is about fair social cooperation. Because they disagree about this choice of framework, they disagree about what justice requires. Rawlsians are comfortable with their choice of framework and thus have little to fear from those who attack them based on the assumptions of other frameworks.

The third sort of libertarian critique accepts the Rawlsian framework for thinking about justice, but argues that this framework supports libertarian conclusions about the status and priority of economic liberties. Here, then, is an *intra*-framework disagreement that should worry Rawlsians, for if the charge is true, then Rawlsians should be libertarians.

Tomasi offers one version of this critique. He argues, first, that Rawls fails to provide justification for excepting the economic liberties of classical liberalism from protection by the first principle of justice.<sup>22</sup> This omission is puzzling, for including or omitting these liberties in the first principle has dramatic implications for what the state is required to do in terms of enabling justice, and what it is permitted to do in pursuit of distributive justice. Moreover, the economic liberties were central to the history of liberalism; given Rawls's insistence that he is working from and within this history, one would expect him to include them.

The second part of Tomasi's critique aims to show that economic liberties of property and contract should be basic rights, by Rawls's own criterion, for these economic liberties are no less important for the development and exercise of the moral powers than the liberties Rawls includes in the list. Take, for example, the rights of work and freedom of contract for work. Rawls allows for free choice of occupation, but:

[O]ne is defined by one's workplace experience not simply by *what* profession one pursues. One is also defined by *where* one chooses to work, by the *terms* that one seeks



and accepts for one's work, by the *number of hours* that one devotes to one's work, and much more besides. [...] The particular pattern of decisions one makes in response to these questions about working often goes a long way to defining what makes one person's life distinct.<sup>23</sup>

Similarly, with the activities of ownership; for many, their identity as owners of productive property is crucial to their conception of the good life.<sup>24</sup> More generally, economic identity is no less essential to who we are than our religious or political identities, and so should enjoy no less protection than these.<sup>25</sup> Thus, the economic liberties are basic for the same reason that liberties of conscience and the political rights are basic.

This critique should worry Rawlsians. If it is true that the economic liberties are basic rights, then justice as fairness prescribes an economy along the *laissez-faire* capitalist lines that Hayek envisioned. In the next section, I offer an incomplete reply to Tomasi. My reply is incomplete, for it shows that we may doubt that the economic liberties are basic rights, but it also agrees with Tomasi's charge of unjustified exceptionalism. The libertarians are right about this: economic agency is no less central to justice than ethical and political agency, and Rawls should include economic rights on the list of rights protected by the first principle.

### <1>3. A Partial Defense of Rawls

Tomasi argues that the economic liberties of classical liberalism are basic rights, since the exercise of economic agency for many people involves engaging in economic activities that require private property as the means of production or unrestricted freedom of contract. Such economic activities express who they are as persons, and government regulation of them hinders

their expression of who they are and frustrates their ability to develop as “responsible self-authors”.<sup>26</sup>

However, even if we grant that economic activities are central to persons’ identities in this manner, it is unclear that this has the desired implication for the rights that would protect these activities.<sup>27</sup> To establish that it does not, I will distinguish between two versions of Tomasi’s argument and show why neither of these yields the conclusion he draws.

The first version focuses on the criterion of basic rights that aim to secure the *exercise* of the capacity for a conception of the good. Here Tomasi’s argument is that the first principle aims to secure people in the pursuit of their determinate conceptions of the good; since people have or could have conceptions of the good that cannot be exercised without, say, property rights in productive property, this right should be protected as a basic liberty.<sup>28</sup> However, Rawls’s theory of basic rights is unconcerned with the expression of personal identities or determinate conceptions of the good as these are or could be found in this or that society. The first principle’s concern is for the capacity for developing and exercising the moral powers, including the capacity for a conception of the good. Freedom of religion, for example, is not protected because people are religious or to protect people in the exercise of the religion they may happen to have, but because freedom of religion is necessary for people to make up their own minds about religious matters. The same cannot be said for, say ownership of productive property (or, maybe it could, but it hasn’t).

Relatedly, the Rawlsian theory of basic rights does not aim to maximize the set of determinate conceptions of the good that people could pursue, nor to minimize the legal hindrances to pursuing such conceptions. What matters is not the size of the choice set of conceptions of the good that members of society can choose from, but that they are empowered

to choose freely. Of course, the choice set cannot be zero or one (or some low numbers), but Rawls argues that there will be a plurality of ways of life available in a society that secures the liberties of conscience.<sup>29</sup>

Tomasi might object that the moral power of ethical agency is the capacity to design and *pursue* a conception of the good, and the economic liberties are necessary to enable this pursuit. This objection misunderstands Rawls's criterion. For Rawls, the capacity to pursue a conception of the good is the capacity to order one's preferences into a coherent scheme, lay plans, and make choices based on one's conception of the good.<sup>30</sup> Exercising one's conception of the good thus requires rationality and strength of will so that one can act prudently in light of one's material and legal circumstances; it does not require that the material or legal circumstances are hospitable to one's pursuits.

The second version focuses on the *development* of the moral powers. In this version, Tomasi argues that the first principle aims to secure optimal conditions for the development of the powers of responsible self-authorship and that security of economic liberties is part of these optimal conditions.<sup>31</sup> Yet, there are no maximizing tendencies in the first principle, but only the satisficing concern for the development of the moral powers *adequate* to enable free and equal cooperation. Of course, society may (and perhaps should) aim to provide the most hospitable environment for responsible self-authorship, but this is not the aim sought by the first principle.

Each of Tomasi's renditions of the two aims of the first principle are sensible, but neither is Rawls's. Rawlsians are thus off the hook; Tomasi's argument does not show that Rawlsians must be libertarians.

However, while Tomasi's critique fails in this particular regard, the general challenge to Rawls's view on economic rights is intact. Rawls offers no argument for why economic rights are excluded from protection by the first principle. Even worse, Rawls treats the development and exercise of economic agency as a matter of distributive rather than of enabling justice; but economic agency is no less central to social cooperation than the ethical and political forms of agency that the first principle protects and enables. In the following I elaborate on this concern.

#### <1>4. Enabling Economic Agency

Enabling justice, the first principle, aims to provide the necessary institutional conditions for the development and exercise of the moral powers and, thereby, to enable all citizens to participate freely and equally in social cooperation. Distributive justice, the second principle, sets the basic terms by which the burdens and benefits of cooperation are distributed. For social cooperation is burdensome as well as beneficial – it involves *work*, the investment of time and effort, and the distribution of that work is as central a subject of distributive justice as is the distribution of benefits produced by the work of society as a whole.

Rawls deals with the exercise of economic agency – its opportunities for exercise, burdens, and benefits – as a matter of distributive rather than enabling justice; a matter for the second rather than the first principle of justice. This is odd, and not only for the reasons articulated by Tomasi; for our economic agency, and the development and exercise of the moral powers of economic agency, seem no less essential to participating in social cooperation as free and equal persons than the powers of ethical and political agency that are Rawls's focus. Though the first principle secures the conditions for developing the capacity for a conception of the good and the sense of justice, this interest and willingness are insufficient to empower members of

society to participate in the cooperative relationship as free and equal, for that requires also an ability to perform productive work – the ability to carry one’s fair share of the burden in the production and distribution of the benefits of social cooperation. If the capacity for a conception of the good explains why we cooperate, and the sense of justice explains how we cooperate, we still must posit a further capacity to explain our cooperation; our capacity to work productively with others.

There is, then, a third moral power that I claim is missing from Rawls’s theory of justice: the capacity to *work*, to be a productive participant in social cooperation.<sup>32</sup> This too is not a power we are born with, but one that we develop over time, and the adequate development and full exercise of this power is no less institutionally preconditioned than are the other two moral powers.

Why and in what sense do I claim that the power to work is *fundamental*?<sup>33</sup> The power to work is fundamental for the same reason and in the same sense that the other two moral powers are fundamental; without it, citizens cannot cooperate as free and equal citizens. Rawls at times describes the moral powers as the capacities necessary to engage in, benefit from, and comply with fair terms of cooperation.<sup>34</sup> The capacity for a conception of the good explains how we *benefit from* cooperation, for cooperation allows us to access the various means that we might need to pursue our conceptions of the good (recall, the products of social cooperation are immaterial as well as material goods). The sense of justice explains our capacity to *comply with* fair terms of cooperation, for it allows us to cooperate on terms that all could reasonably agree to from a situation of freedom and equality. The capacity for working explains how we *engage in* cooperation, for cooperation consists in *working together* on fair terms.

The moral powers are also fundamental in the sense that they are the bases of equal citizenship.<sup>35</sup> This invites the worry that adding the capacity to work to the list of moral powers exacerbates the degree to which justice as fairness implies that persons with disabilities are denied equal standing as citizens.<sup>36</sup> To answer this worry would take a separate essay, and I am unsure that an adequate answer is readily available. This problem is general to any theory of justice that takes the notion of cooperation between free and equal persons as its starting point. I believe that this is the right starting point, but it might carry costly commitments.

Another worry is that my proposal turns justice as fairness into a liberal perfectionism.<sup>37</sup> I do not believe that it does. I am not arguing with Marx that work is essential to the human existence (I don't mean to deny that it is, but my argument does not take this as premise nor try to establish it as conclusion), nor that conceptions of the good that do not include working are inferior. Recall that my focus is on enabling justice. The idea, again, is that the first principle requires that all citizens are institutionally empowered to cooperate as free and equal persons. My claim is simply that to be thus empowered, citizens must enjoy the institutional preconditions for the development and exercise of their capacity to work no less than the other two moral powers. The capacity for a conception of the good makes social cooperation meaningful (or rational), the sense of justice makes fair cooperation possible, and the capacity for work enables us to share in the burden of producing all the good things. There is no perfectionism in my argument not already present in justice as fairness.

In summary, economic agency is as central to Rawls's theory of justice as are ethical and political agency; and that the moral power corresponding to the exercise of economic agency, the power to work, is as important as it is to develop the capacity for a conception of the good and the sense of justice. It follows that the first-principle concern for enabling justice extends to

economic agency, and that the first principle ought to secure the institutional preconditions for its adequate development.

#### <1>5. Appreciating Economic Agency

One might question the significance of this conclusion. What, exactly, would be the changes a Rawlsian should make, if she accepts the argument so far? Would not the system of economic rights be the same as that favored by Rawls?

I believe that my proposed amendment has important implications for both the theory and pursuit of justice as fairness. First, and most obviously, my proposed amendment will add to the list of rights covered by the first principle, insofar as there are institutional preconditions for the development and exercise of the capacity for working. Such rights could include rights to access to productive work, to the education required in order to engage in such work, and to the healthcare and other supports adequate to maintain one's productive powers throughout one's adult life.

Though the concern for economic agency as a matter of distributive justice could yield similar rights, it could not give them priority as *basic* rights. It is a very different thing to care for, say, job training, work-place conditions, and healthcare as second-principle concerns, and to care for them as first-principle concerns. Suppose, for example, a conflict between freedom of association and providing adequate access to productive work for all. If the concern for adequate access to productive work is a second-principle concern, then the concern for freedom of association should get priority, and we should sacrifice access to work. If access to work is a first-principle concern, then we should try to find a compromise or balance where we fit both rights into a coherent scheme of rights. For the same reasons, a first-principle concern makes the

relevant economic rights a constitutional matter that defines and restricts what democratic legislation must and may do, rather than a legislative matter that can be left for determination through the democratic process.

In justice as fairness, the basic needs that must be met for all citizens are defined as the means adequate to develop and exercise the moral powers. Since my proposed amendment adds rights to the list of basic rights, it also adds content to the sufficientarian basic needs principle of justice as fairness. Adding a moral power and the corresponding rights thus defines an additional set of basic needs that must be met; needs for the means required to engage in productive work.

The different kinds of concerns also have implications for what the rights require (i.e., to their content in addition to their status and level of priority). If, as I propose, all have a right to access to productive work, then this right would impose limits on how we should distribute ownership of productive property. A distribution of productive property that would make access to productive work for some members of society a matter left to the discretion of others would be prohibited (for a *right* to productive work corresponds to *duties* to provide access to productive work, and the satisfaction of such entitlements cannot then depend on the discretion of capitalists). So, certain types of capitalism would be impermissible, since they do not provide adequate access to the development and exercise of the productive powers of all.<sup>38</sup>

Of course, Rawls also thought that such types of capitalism were impermissible, but he never fully explained why. Rawls favored two regimes, property-owning democracy and liberal socialism – presumably because both prevent the accumulation of productive property in the hands of a few capitalists; the first by dispersing ownership of productive property into the hands of producers, the second by maintaining public ownership of productive property. Yet Rawls does not, I think, explain why the accumulation of productive property in the hands of the few is



so worrisome. It might be that such accumulation is unfair, because it makes it harder to provide fair equality of opportunity or to satisfy the difference principle, or because it undermines the fair value of political rights, but I am unsure why we should think this would be true in general. It seems possible that accumulated capital can exist without undermining the fair value of political rights or fair equality of opportunity. The amended theory I have proposed offers a straightforward and, I think, intuitive complaint about capitalist accumulation (which need not serve instead of, but can serve alongside, worries about fairness); that the accumulation of capital in the hands of a few means unequal access to the conditions for the adequate development and exercise of the economic agency of all. This is, I think, the deeper Marxist and social democratic worry about capitalism – that it fails to provide access to all to participate as free and equal persons in the productive and distributive functions of society – a worry that Rawls seems to share.

Note how easy it is to state the preceding worry about capitalism in terms of freedom and equality, once we include economic agency as one of the dimensions of democratic citizenship. Since we ought to enable citizens to cooperate as free and equal, we ought to create an economic environment where all have access to a free and equal cooperative relationship; to assume their role as equal and productive members of society. Once they are in that relationship there are, of course, further questions about how the benefits and burdens of their cooperation should be distributed – questions of distributive justice proper – and to ensure a fair distribution presumably requires careful design of the rights and opportunities attendant upon economic agency. But the more basic concern with economic agency is that of enabling justice; namely, that all citizens enjoy access to the preconditions for the development and exercise of economic agency itself.

## <1>6. Conclusion

The libertarian critique is true: Rawls underestimates the importance of economic agency and, therefore, fails to give economic rights their proper role and priority. However, the problem is not, as Nozick thought, that economic rights are natural rights that determine and constrain the role of political authority; nor, as Hayek thought, that economic liberties are the basic tools of prosperity. The problem rather is, as Tomasi argues, that economic rights are basic rights by Rawls's own understanding of the role and justification of basic rights. I have argued, however, that Tomasi's argument justifying the economic rights of classical liberalism as basic rights fails; Rawlsians need not be libertarians. Rather, Rawlsians might be a bit more Marxist, in that they should take the development and exercise of the powers of economic agency, understood as the powers involved in productive work, as a primary concern of justice. Amended accordingly, justice as fairness would stand stronger as alternative to both libertarianism and Marxism – defending a clear alternative to both capitalism and socialism.

---

<sup>1</sup> For the full story see John Rawls, *Political Liberalism, with a New Introduction and "Reply to Habermas"* (New York: Columbia University Press, 1996), lecture IX. For my attempts to clarify Rawls's theory of basic rights see "Are Economic Liberties Basic Rights?", *Politics, Philosophy, and Economics*, Vol. 13 (1), 2014, 23-44; "Social Cooperation and Basic Economic Rights: A Rawlsian Route to Social Democracy", *Journal of Social Philosophy*, Vol. 47 (3), 2016, 288-308.

<sup>2</sup> E.g. *Justice as Fairness, A Restatement*, edited by E. Kelly (Cambridge, MA: Harvard University Press, 2001), 18-24; *Political Liberalism*, 18-20, 73-5, 81-2, 302.

---

<sup>3</sup> I here use the term ‘ethical’ in the broad sense of ‘concerning the good life’ rather than the narrow sense of ‘morally permissible’.

<sup>4</sup> Rawls, *Political Liberalism*, 310-24, 334-5, 409-19; *Justice as Fairness*, 45, 112-3. See also James W. Nickel “Rethinking Rawls’s Theory of Liberty and Rights”, *Chicago-Kent Law Review*, Vol. 69, Is. 3, 763-785, esp. sections 2 and 3.

<sup>5</sup> Rawls, *Political Liberalism*, 310-14.

<sup>6</sup> Rawls, *Political Liberalism*, 358.

<sup>7</sup> Rawls, *Political Liberalism*, 291; *Justice as Fairness*, 112-3.

<sup>8</sup> The following list builds on James W. Nickel “Economic Liberties”, in Davion V. and Wolf C. (eds.) *The Idea of Political Liberalism: Essays on Rawls* (Rowman & Littlefield, 2000), chapter 8, esp. 156-7.

<sup>9</sup> John Rawls, *A Theory of Justice, Revised Edition* (Cambridge, MA: Harvard University Press, 1999), 42, 43, 82; *Political Liberalism*, 228, 232, 298, 335, 338, 363; *Justice as Fairness*, 114. Notably, Rawls often sets freedom of occupation apart from the list of basic liberties (e.g. *Political Liberalism*, 181, 308).

<sup>10</sup> Rawls, *Political Liberalism*, 6; see also *Lectures on the History of Political Philosophy*, edited by S. Freeman (Cambridge, MA: Harvard University Press, 2008), 12; “The Idea of Public Reason Revisited” in *The Law of Peoples: with “The Idea of Public Reason Revisited”* (Cambridge, MA: Harvard University Press, 2001), 141.

<sup>11</sup> There is substantial disagreement about how open Rawls’s theory leaves this choice of economic systems. See Alan Thomas’s entry in this volume for an overview and discussion of this site of disagreement.

<sup>12</sup> Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974), ix.

- 
- <sup>13</sup> Nozick, *Anarchy, State, and Utopia*, 149.
- <sup>14</sup> Nozick, *Anarchy, State, and Utopia*, 150.
- <sup>15</sup> Nozick, *Anarchy, State, and Utopia*, 235.
- <sup>16</sup> Nozick, *Anarchy, State, and Utopia*, 169.
- <sup>17</sup> Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), 22.
- <sup>18</sup> Cf. Hayek, *The Constitution of Liberty*, 231-3; *Law, Legislation, and Liberty, Volume 2: The Mirage of Social Justice* (Chicago: University of Chicago Press, 1976), chapter 9.
- <sup>19</sup> Hayek, *The Constitution of Liberty*, 232-3.
- <sup>20</sup> Hayek, *Law, Legislation, and Liberty, Vol. 2*, 70, 140-1; *Law, Legislation, and Liberty, Volume 3: The Political Order of a Free People* (Chicago: University of Chicago Press, 1979), 141, 142.
- <sup>21</sup> Hayek, *Law, Legislation, and Liberty, Vol. 2*, 11; see also *Law, Legislation and Liberty, Vol. 2*, 33; 64-5, 69-70, 83, 96, 117; *The Constitution of Liberty*, 232-3.
- <sup>22</sup> John Tomasi, “Democratic Legitimacy and Economic Liberty”; *Free Market Fairness*, chapter 4.
- <sup>23</sup> Tomasi, *Free Market Fairness*, 77.
- <sup>24</sup> “[F]or many people the ownership of productive property plays a profound role in the formation and maintenance of self-authored lives.” Tomasi, *Free Market Fairness*, 78.
- <sup>25</sup> Tomasi, *Free Market Fairness*, 80.
- <sup>26</sup> Tomasi, *Free Market Fairness*, 82.
- <sup>27</sup> For extended discussions of Tomasi’s argument see Melenowsky and Bernstein discussing a variety of market democratic arguments in “Why Free Market Rights are not Basic Liberties”, *Journal of Value Inquiry*, 49 (1-2), pp 47-67; Alan Patten “Are Economic Liberties Basic?”

---

*Critical Review*, 26 (3-4), pp. 362-374. Jeppe von Platz “Are Economic Liberties Basic Rights?”; “Social Cooperation and Basic Economic Rights”.

<sup>28</sup> Cf. Tomasi’s example of Amy and her shop at *Free Market Fairness*, 81. Tomasi likewise suggests that the exercise of the liberties of the person as consumer are ingredient in the identities of many persons, *Free Market Fairness*, 79-81.

<sup>29</sup> This is, of course, the “fact of reasonable pluralism,” cf. Rawls, *Political Liberalism*, 36-7.

<sup>30</sup> For details, see Rawls’s account of deliberative rationality, *A Theory of Justice, Revised Edition.*, 361-72.

<sup>31</sup> “In seeking the most appropriate specification of the basic rights and liberties, we seek the specification that most fully allows citizens to develop themselves as responsible self-authors.” (Tomasi, *Free Market Fairness*, 82)

<sup>32</sup> For a more detailed argument that Rawlsians should recognize this moral power, see my “Social Cooperation and Basic Economic Rights.”

<sup>33</sup> I’m grateful to the editors for nudging me to respond directly to this question.

<sup>34</sup> E.g. Rawls, *Political Liberalism*, 18-20; *Justice as Fairness*, 18-9, 24, 169.

<sup>35</sup> Rawls, *Political Liberalism*, 79, 86, 183, 272n10, 301-3, 370.

<sup>36</sup> E.g. Gregory Kavka “Disability and the Right to Work” in Schaff ed. *Philosophy and the Problems of Work*, chapter 11; chapters 1 and 2 of Nussbaum’s *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2007). For a Rawlsian reply, see Samuel Freeman “Contractarianism vs. the Capabilities Approach: Review of Martha Nussbaum’s *Frontiers of Justice*”, *Texas Law Review*, 85, No. 2, December 2006, 385-430.

<sup>37</sup> Thomas in this volume. See also Thomas’ critique of Tomasi in *Republic of Equals: Predistribution and Property-Owning Democracy* (Oxford: Oxford University Press, 2017).

---

<sup>38</sup> In his contribution to the present volume Thomas suggests that this sort of reasoning actually rules out capitalism as such and not just some varieties of capitalism.