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Rawls and Bleeding Heart Libertarianism

How Well Do They Mix?

— ◆ —
NICOLÁS MALOBERTI

Consequentialist concerns are altogether absent from the strictest strand of libertarianism, such as that of Murray Rothbard and Robert Nozick. It is only natural to wonder whether the appeal of this moral position would be the same if markets were to fail as frequently as their critics claim. The utilitarian strand's consequentialist concerns are, in contrast, too ubiquitous. In many important cases, individuals' rights do function as real constraints on the maximization of aggregate welfare. Distributive concerns, in turn, are present neither in the strictest strand of libertarianism nor in the utilitarian, classical liberal counterpart. Critics of capitalism might be factually mistaken in thinking that under such a system the rich get richer and the poor get poorer. But is their underlying concern morally irrelevant as those typical classical liberal positions would seem to imply? The novel research program of "bleeding heart libertarianism" is best understood as addressing these alleged deficiencies of the classical liberal tradition. In particular, bleeding heart libertarians believe that a convincing moral defense of free markets and minimal government, in addition to being grounded on a robust defense of individual sovereignty, must somehow also appeal to the benefits of those institutions for the worst-off members of society. John Tomasi's *Free Market Fairness* (2012) can be thought of as the most sophisticated formulation to date of the bleeding heart libertarian project.

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Gary Chartier (2013) notes in his review of *Free Market Fairness* that it is likely to play an important role in shaping discussions of the nature and future of the liberal tradition. In this paper, I focus on what I take to be Tomasi's most important positive contribution: his reformulation of John Rawls's conception of justice along free-market lines.

I argue that Tomasi's most fundamental bleeding heart libertarian insights are not adequately served by Rawls's lexical framework and idealized theory of institutional choice. Perhaps paradoxically, using Rawls's lexical framework to articulate Tomasi's declared concerns for both economic liberty and "social justice" gives the latter concern very little weight. For that reason, Tomasi's own objections against classical liberalism would ultimately apply to his own positive contribution as well: the satisfaction of a distributional adequacy condition is secured on purely contingent grounds. Furthermore, Tomasi's endorsement of Rawls's conception of the first tasks of political philosophy might render Tomasi's case for laissez-faire forms of capitalism immaterial. The problem is that Rawls fails to appreciate the very narrow theoretical relevance of identifying institutional arrangements purely as a matter of "ideal theory." Feasibility concerns have always been an important element in the classical liberal critique of interventionist and redistributive politics. Yet they have invariably failed to be featured in a theoretically prominent way within the most philosophically oriented defenses of the classical liberal order. A formulation of bleeding heart libertarianism along Rawlsian lines would be equally wanting in this regard.

Tomasi and the Case for Bleeding Heart Libertarianism

As a matter of empirical fact, it is certainly possible that the set of institutions favored by libertarians and classical liberals would best satisfy the moral commitments held by modern liberals. In other words, roughly put, it is possible that a limited government with minimal redistribution and regulatory oversight will fare better in terms of improving the living conditions of the poor than would a highly regulatory and redistributive state. Some authors have argued along these lines (e.g., Cowen 2002; Lomasky 2005; J. Brennan 2007; Shapiro 2007). Tomasi, however, wants to distance himself from such an undertaking. He thinks that vital moral insights from the classical liberal side are not given the proper place they deserve by such arguments. For example, the value of economic liberty is recognized only in instrumental terms. The recognition of strong economic rights is merely a means for realizing a desired distribution of income. Tomasi stresses that his intention is to combine insights from the classical and modern liberal traditions "at the level of moral foundations" (2012, 95, subsequently cited by page number only). His project is to bring the fundamental moral ideas of both traditions into a "coherent philosophical framework" (xix).

Tomasi argues that the most compelling liberal theory would be a genuine hybrid. It would combine, at the level of principles, key elements of both the

classical and the modern liberal traditions. The classical liberal tradition recognizes the fundamental value of economic liberty and appreciates the virtues of spontaneous orders in the pursuit of social goals. Yet, according to modern liberals, it fails to acknowledge “social justice” as the ultimate standard of political evaluation. Tomasi argues, however, that modern liberals’ interpretation of that standard is defective precisely for failing to account for the value of economic liberty. Once such a standard of social justice is reinterpreted when this value is taken into account, the institutions of classical liberalism will realize social justice in ways that modern liberals’ preferred institutions fail to do. *Free Market Fairness* is Tomasi’s attempt to argue for the initial plausibility of this synthesis as well as for one particular understanding of it constructed within a Rawlsian framework.¹

Tomasi understands economic liberty as including “powerful claims of freedom across the economic realms of working, consuming, and owning” (xxi). But social justice requires that “we seek social institutions that most improve the position of the poor” (xxi). Tomasi’s general case in support of a research program characterized by a twofold commitment to economic liberty and social justice is grounded on two basic claims. First, contrary to what modern liberals hold, there are no convincing reasons to exclude economic liberty from the set of fundamental or basic liberties—a set that includes, for example, freedom of conscience, freedom of association, and civil liberties. Second, contrary to what classical liberals suggest, the definition of property rights cannot be completely independent of its expected distributional consequences.

Modern Liberalism and Economic Liberty

Modern liberals do not deny the value of all economic liberties. The right of occupational choice and the right to own personal property are, for example, included in Rawls’s Liberty Principle. Rawls’s argument for the inclusion of such economic liberties among the basic liberties has to do, roughly, with the importance they have if individuals are to have the capacity to assess their life options and choose a course of life as their own. This is undeniable. A society that allocates occupations to each citizen and denies private ownership rights over personal property fails to shelter citizens from domination from others and deprives them of important sources of identity, as Tomasi notes. This society cannot be plausibly described as a liberal society because individuals are precluded in very significant ways from pursuing their own conception of the good. In Tomasi’s words, such a society “would truncate the ability of those people

1. “Market democracy” is Tomasi’s chosen label to refer to the liberal research program characterized both by a recognition of the fundamental importance of economic liberty and by a strong commitment to social justice (plus a “deliberative” view of political justification). “Free-market fairness” is Tomasi’s own “market democratic” view—that is, his preferred comprehensive articulation of the demands that arise from the fundamental commitment to economic liberty and social justice.

to be responsible authors of their own lives” (77). But Tomasi argues that “the same reasons high liberals offer in support of their preferred economic liberties apply with at least as much force to the aspects of economic freedom they wish to exclude” (76).²

If we agree that the right of occupation choice is essential to individuals’ ability to select and pursue a particular conception of the good life, “the freedom to sell, trade, and donate one’s labor looks equally essential for the same reasons” (77). If one is defined in important ways by the 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” (77, emphasis in original). Individuals’ capacity for “self-authorship” is thus truncated if such fuller freedoms of labor are not recognized. Similarly, attending to these same concerns, Tomasi claims that it is implausible to draw a distinction between personal property and productive property. If the ownership of personal property provides security, the same applies to the ownership of savings in the form of stocks and bonds, for example. It provides individuals and families with a measure of independence that might actually not be provided by the ownership of personal property alone. Ownership stakes in productive property is not, as critics of free markets believe, a privilege of economic elites: “it is a common experience of citizens in societies where such rights of ownership are affirmed” (78). A society where no private productive property is allowed also diminishes the range of projects that are available to citizens to pursue and deprives them of important sources of identity-casting relationships (77).

Some individuals will find private economic liberties more valuable than others in pursuing their own individual projects. Yet this is also true for religious liberties, and it does not disqualify them as proper components of a fully adequate scheme of liberal rights (81). A central liberal claim is that people have a fundamental interest in seeing themselves as central causes of the lives they are leading. This explains liberalism’s placing the individual, rather than the community, as the fundamental source of moral demands. A robust conception of economic liberty, Tomasi concludes, must then be part of an adequate liberal scheme of basic rights. In part due to the phenomenon of economic prosperity, the capacity to pursue personal projects in the economic realm is increasingly important for a great number of individuals, either through their own business or through their participation in collective economic enterprises. Whether individuals are granted such liberties cannot then be determined purely by how effective or ineffective these liberties are in securing social justice—that is, in securing a given distribution of resources that is particularly favorable to the worst-off members of society. Tomasi concludes that modern liberals’ attitude toward economic liberties is thus fundamentally mistaken.

2. Tomasi uses the term *high liberalism* to refer to modern liberalism.

Classical Liberalism and Social Justice

Facing classical liberalism's characteristic opposition to social justice, Tomasi's argumentative strategy is to show that, despite such an explicit rejection, virtually all classical liberal authors have implicitly endorsed "something very like it" (125). Classical liberals typically defend their preferred institutional forms "by predicting that these institutions will produce distributional patterns that benefit the poor" (125). Tomasi claims that in making these predictions, they accept an important normative idea: "a system of social and economic institutions is rightly applauded only if that system works to the benefit of the least well-off members of society. A system that does *not* work to the benefit of the working poor is defective from a moral point of view" (125). Tomasi calls this idea "the distributional adequacy condition": "a defense of any version of liberalism is adequate only if it includes the claim that the institutions being endorsed are deemed likely to bring about some desired distribution of material and social goods" (126). Tomasi explores the classical liberal and libertarian tradition and argues that this distributional concern is present in authors such as John Locke, Adam Smith, Bernard Mandeville, James Madison, Herbert Spencer, Ludwig von Mises, Friedrich Hayek, and even Ayn Rand, among others.³

The question Tomasi is ultimately posing to classical liberals is about principles: If, as a matter of empirical fact, classical liberals' beliefs about a free economy's capacity to improve the material conditions of the poor were disconfirmed, and it were shown that the benefits of economic growth are accrued almost exclusively by the most talented group of individuals, should not classical liberals support some form of redistributive scheme if it were regarded as an effective remedy against the perils that many individuals would otherwise face? If this is so, it could be argued that classical liberals are basically recognizing that the poor have a right to the assistance that they would receive under such a regime. In other words, it could be said that the poor are owed that assistance under those conditions as a matter of justice. What matters then is not that classical liberals implicitly accept a distributional adequacy condition. What matters is that a theory of justice would lack plausibility if it did not recognize such a condition. It is questionable, however, whether this line of argument shows that classical liberals must endorse "social justice" given the traditional, much broader understanding of such a notion. The argument does not establish, for example, any strong presumption for material equality.

Tomasi's basic challenges to both the modern and classical liberal traditions are powerful ones. He presents a strong case for liberal theories to include both a

3. Tomasi expectedly spends a significant number of pages dealing with Hayek's well-known argument against social justice. The key claim he makes is that Hayek's critique does not "give" us reason to object to social justice at the identificatory level of political philosophy" (156). In other words, Tomasi believes that Hayek's critique applies to the typical state efforts to secure social justice and not, despite what Hayek himself seems to believe, to the very concept of social justice.

commitment to a robust conception of economic liberty and to a distributional adequacy condition (what we might regard as a minimal conception of “social justice”). This, we might say, is what renders Tomasi a “bleeding heart libertarian” (Tomasi himself does not identify himself or his project as such). But Tomasi is also interested in including a particular view of political justification in his ideal synthesis of both liberal traditions. According to this “deliberative” or “democratic” approach, “[i]f a set of political and economic institutions is to be just and legitimate, those institutions must be justifiable to the citizens who are to live within them” (xiv). A more concrete characterization of this method stresses that political coercion is legitimate only if it is conducted on the basis of principles that reasonable parties would agree on, where being “reasonable” is understood as including a commitment to be guided by impartial considerations of justice. Regardless of whether we see any value or definitive content in this particular methodological approach, it is clear that the case for the importance of its adoption does not have the same force as Tomasi’s most basic bleeding heart libertarian challenges. Importantly, however, those challenges remain no matter what approach to political justification we happen to endorse.

Bleeding heart libertarians, however, face a challenge of their own. How exactly should the demands imposed by the twofold commitment to economic liberty and distributive justice be articulated such that they yield a theoretically coherent framework? Tomasi argues that, properly reconstructed, Rawls’s theory of justice, “justice as fairness,” constitutes an appealing articulation of such demands.

Economic Liberty as a Rawlsian Basic Liberty

As is well known, John Rawls’s theory of justice—“justice as fairness”—comprises two main principles that are supposed to apply to “the basic structure of society” (not to the choices that individuals or public officials can make within such a structure). The first principle is the Liberty Principle. In Rawls’s latest formulation of the principle, it holds that “each person has an equal claim to a fully adequate scheme of equal basic rights and liberties” (2005, 5). The second principle is the Equality Principle, which is subdivided into the Fair Equality of Opportunity Principle and the Difference Principle. The latter two components of Rawls’s theory are supposed to establish distributive justice: they establish the conditions under which social and economic inequalities are justified. Fair Equality of Opportunity requires that social and economic inequalities are to be attached to offices and positions that are open to all. In Rawls’s view, this requirement demands more than “formal” equality. It demands that an individual should have an effectively equal chance to access offices and positions as another person of similar natural ability. The Difference Principle, in turn, requires that social and economic inequalities are to produce the greatest benefit to the least-advantaged members of society.

Rawls arranges these three principles in “lexical priority.” The Liberty Principle cannot be violated in order to guarantee either fair equality of opportunity or to

create a distribution that produces the greatest benefit for the least advantaged. Neither can a society arrange inequalities to maximize the share given to the least advantaged by not allowing equality of access to certain offices or positions. One of the key claims in support of justice as fairness is that it would be the conception of justice chosen in the “original position,” an imaginary choice in which the parties behind a “veil of ignorance” select principles that will determine the basic structure of the society in which they will live. This veil prevents them from knowing their own particular characteristics and the social positions they will occupy once the principles are selected, forcing them to select those principles in a rational and impartial manner.⁴ Tomasi provides us with an initially compelling reconstruction of all these main elements of Rawls’s theory. Yet it is questionable whether the end result embodies the bleeding heart libertarian’s concerns.

The Principle of Liberty

Rawls argues that the Principle of Liberty that the parties in the original position will select includes the basic liberties of thought and conscience, political liberties, freedom of association, freedom of movement, freedoms specified by the liberty and integrity of the person, and the rights and liberties covered by the rule of law. As already mentioned, Rawls believes that the Principle of Liberty includes a “thin” conception of economic liberty, covering merely “the right to hold and to have the exclusive use of personal property” (2005, 298) and freedom of occupational choice.

Rawls’s criterion for choosing that particular list of basic liberties is that they are all “essential social conditions for the adequate development and full exercise of the two powers of moral personality over a complete life” (2005, 293). The two moral powers Rawls refers to are individuals’ capacity for a sense of justice, which is “a willingness . . . to act in relation to others on terms that they also can publicly endorse” (19), and their capacity for a conception of the good, which is

4. The original position should not be understood as the basic argument in favor of justice as fairness. As Rawls himself later noted, the original position might not yield a unique set of principles (2001, 133–34). More importantly, the very construction of such an imaginary choice situation is guided by a host of normative considerations. The desirability of the principles selected in the original position will thus not ultimately be grounded on the resulting hypothetical choice but rather on those normative considerations that structure the problem in such a way as to yield the choice in question. Important among those considerations is the idea that natural endowments and the social circumstances under which one is born are undeserved. Because these features of persons are arbitrary from a moral point of view, individuals should not be seen as having any sort of entitlement to the advantages that they can derive from them. The veil of ignorance is supposed to force the parties in the original position to treat such advantages as they are supposed to be treated: as a common asset from which all, not just those who are undeservedly fortunate, should benefit. From a classical liberal perspective, this is perhaps the most problematic premise of the Rawlsian approach because it seems to contradict the Lockean principle of self-ownership: that each person enjoys over himself his powers and full rights of control and use of the fruits thereof. Yet Tomasi claims to fully endorse the Rawlsian egalitarian premise. He claims, “[U]ndeserved inequalities can generate moral claims within politics” (89). As noted later, however, those claims’ reach is greatly weakened by placing a robust conception of economic liberty within the scope of the Liberty Principle.

their conception of what is valuable in human life and includes “a more or less determinate scheme of final ends, that is, ends that we want to realize for their own sake, as well as attachments to other persons and loyalties to various groups and associations” (19).

Rawls argues that political liberties and liberties of thought and speech, for example, are necessary mainly for the adequate development of the sense of justice, the first of the two moral powers. Liberty of conscience and freedom of association are necessary mainly to adequately develop and exercise the capacity for a conception of the good. If individuals are to be able to exercise and develop the capacity to have and pursue a conception of the good life, they will not choose to live in a society that blocks their ability to think for themselves, associate with other like-minded citizens, or fall into error and make mistakes.

As Jeppe von Platz (2014) has noted, Rawls leaves the majority of economic liberties off the list of basic rights because he thinks they are necessary neither for the adequate development and exercise of either one of the moral powers nor for the protection of the basic liberties that are immediately necessary for the development and exercise of the moral powers. The economic liberties that are part of Rawls’s Liberty Principle are included on this latter ground. They are not justified in terms of the effect they themselves immediately have on the development of the moral powers (by broadening the evaluative horizons or increasing citizens’ life options), but on the ground that they are needed for protecting the other basic liberties. For von Platz, Tomasi is thus mistaken in accusing Rawls of “economic exceptionalism” (von Platz 2014, 29). Perhaps this charge would be justified if Rawls had argued for such a limited conception of economic liberty by appealing to its immediate effect on the development of the moral powers.⁵

Yet Tomasi’s central point seems to hold. Economic liberties do increase citizens’ life options in a very significant manner. They possibly also broaden their evaluative horizons. Furthermore, as the experience of socialism shows, ownership of productive property does seem to be necessary for protecting the basic liberties that Rawls regards as immediately necessary for the development and exercise of the moral powers. Tomasi convincingly argues that it is simply incompatible with individuals’ moral interests to claim, as Rawls does, that the Liberty Principle does not include “certain rights of acquisition and bequest, as well as the right to own means of production and natural resources” (298).⁶ The capacity to pursue personal

5. Furthermore, von Platz also argues that Tomasi is also mistaken in reading Rawls’s argument as working with a maximizing modality. What matters for Rawls is reaching a threshold of an adequate, rather than full, exercise and development of the moral powers. The claim that the full set of economic liberties should be regarded as basic liberties because they are necessary for the full development and exercise of the moral powers would then be beside the point. Von Platz does recognize, however, that a maximizing modality is more appropriate for Tomasi’s own interpretation of the moral powers along the open-ended notion of “responsible self-authorship.”

6. Political liberties are especially important in Rawls’s account. His theory allows different people to experience various liberties, such as freedom of association or of religious practices, at different degrees.

projects in the economic realm is unquestionably important for great numbers of individuals. The personal meaning that such individuals derive from exercising that capacity is, in many cases, much greater than what they can experience through the exercise of their basic civil liberties. Tomasi thus argues that according to Rawls's own criteria, a robust conception of economic liberty should count as a basic liberty.

Basic liberties, it must be noted, are not absolute rights. They can be limited. But, in contrast to nonbasic liberties, they can be limited only for the sake of securing other basic liberties. They cannot be limited or regulated for the sake of other values, such as efficiency or distributive justice. This very important feature of the Rawlsian framework must be kept in mind in analyzing Tomasi's reinterpretation of Rawls's Principle of Equality.

The Principle of Equality

According to Rawls, the Fair Equality of Opportunity Principle requires, in addition to formal protections against legal discrimination, the breaking up of large concentrations of wealth by imposing steeply progressive taxes on transfers of wealth between generations. It also requires strong public funding for schooling as a way of guaranteeing equal educational opportunities. Finally, because citizens' ability to make the most of opportunities is significantly affected by their health, the government is required to guarantee the provision of basic health care. These principles are all principles of institutional design that Rawls regards as the most adequate to realize equality of opportunity properly understood.

Tomasi disagrees with most of these recommendations. His disagreement is grounded on his different understanding of the relative value of economic liberty. Tomasi argues that fair equality of opportunity implies that "every citizen, regardless of birth status or economic class, is owed high quality health care and education as a matter of justice" (242). Yet because he has placed a robust set of economic liberties in the set of basic liberties, that universal provision of education and health care has to be achieved within new constraints. The demands imposed on governments are thus limited to providing funding for education or health care through vouchers or, alternatively, to offering tax breaks for money spent on

This is permissible because an enhancement of the worth of one of these liberties does not diminish the worth of the liberty of others. When it comes to political liberty, however, the greater the value of some individuals' political liberty, the lesser the worth of others' liberty. Thus, this special status of political liberties calls for a rough equalization of their value among different individuals. Rawls claims that the first principle of justice must be understood as guaranteeing their "fair value." He suggests that in order to achieve this, productive property should be widely owned and state agencies should be empowered to control the financing of political speech. But Tomasi seems to be right that "this very approach exposes individual citizens to dangers of domination" (251). For Tomasi, the principle of the fair value of political liberty should be understood as demanding not an equalization of political influence by an equalization of wealth and the spending capacity of different groups, but rather a limit on the range of issues that as a matter of constitutional right can be incorporated into the legislative agenda. Christopher Freiman (2012) argues along the same lines, claiming that attempts to decrease individuals' means to capture political power will systematically increase their motives to capture political power.

education and health care or to giving tax incentives to education or health-care providers. Tomasi further argues that if we are really concerned about maximizing the opportunities of the worst-off class of citizens over time, what is crucial is not to break up large concentrations of wealth but rather to embrace the ideal of economic growth.

This latter point is rather crucial to assess the viability of Tomasi's idea of free-market fairness. The embracing of economic growth seems initially to constitute a very appropriate and effective response to the demands of equality and distributive justice. After all, economic growth is what modern liberals invariably fail to account for. Yet what does it mean, in theoretical terms, to claim that we should embrace the ideal of economic growth? Tomasi makes this suggestion as an alternative to Rawls's institutional suggestion of breaking up large concentrations of wealth. It should be clear, however, that the choice between breaking up large concentrations of wealth and embracing economic growth is not really an available choice in Tomasi's theory. The former option—that is, to break up large concentrations of wealth—is morally closed due to the inclusion of a robust conception of economic liberty within the Liberty Principle.

Tomasi claims that some parts of the range of application of economic liberties may be more essentially linked to self-authorship than are other parts (91). In other words, there are basic and nonbasic economic liberties. It is then only when it comes to the regulation of nonbasic economic liberties that we might conceivably face a choice between arrangements that would generate rapid growth and those that would sacrifice growth for the sake of some other value. Tomasi should be understood as arguing that fair equality of opportunity requires that we always choose the former option. This is a sensible claim, but Tomasi seems to exaggerate the significance that economic growth and the resulting increased access to resources has in his own theory. The justification of a thoroughly capitalist society is already provided by Tomasi's own version of the Liberty Principle, which contains no moral consideration of how respecting it might affect the process of wealth creation.⁷

Rawls understands the Difference Principle as demanding that social and economic inequalities are to be arranged such that they produce the greatest benefit for the least advantaged members of society. Tomasi claims that he disagrees with Rawls regarding not only the mechanism of distribution (commercial exchange rather than state-based service programs) but also regarding the nature of the *distribuendum* with which the Difference Principle is concerned. Along with income and wealth, the Rawlsian interpretation places special weight on the experience of democratic control of the workplace and of economic assets more generally. Some reduction of wealth may thus be justified for the sake of the greater control that workers might gain. The justification, in turn, has to do with the idea

7. For a criticism along these same lines, see Wall 2013.

that those citizens' self-respect is importantly linked not only to the goods they have access to but also to the position they hold. Tomasi provides a different account: we should prioritize "the production of goods, opportunities, and experiences that those citizens find valuable" (231). If we take the ideal of citizens as free, independent, and self-governing agents, Tomasi argues that they must have the capacity "to determine for themselves what it is they want" (233). It is through rapid-growth policies that the least well-off will be able to maximize that capacity due to the greater resources they will be able to control.⁸

In the case of the Difference Principle, as was the case with the reinterpretation of the Fair Equality of Opportunity Principle, Tomasi seems to underappreciate the constraining effect of placing economic liberty among the set of basic liberties. In other words, he might be failing to appreciate how his placing of robust economic liberties within the Liberty Principle limits in very significant ways the range of options that both the Fair Equality of Opportunity and the Difference Principles will regulate. Tomasi claims that social democratic regimes are defective because they "do not seek to maximize the wealth of the poor" (237). Yet this is not completely accurate. According to Tomasi's own theory, social democratic regimes would be defective insofar as they do not recognize a wider set of economic liberties irrespective of the impact such liberties have in the holdings of the poor. In understanding the demands of fair equality of opportunity, the choice suggested by Tomasi between breaking up large concentrations of wealth and embracing the ideal of economic growth is not really available once a robust conception of economic liberty is placed in the set of basic liberties. Similarly, in understanding the Difference Principle's demands, the choice between democratic control of the workplace and economic growth is not available either, contrary to what Tomasi suggests. Economic-growth issues would come into play only when considering the regulation of *nonbasic* economic liberties. By Tomasi's own admission, the liberty to own productive resources is not among those liberties.⁹

Tomasi expresses his commitment to social justice by declaring: "Basic rights and liberties in place, a set of institutions is just only if it works over time to improve the condition of the least well-off citizens" (87). He also states: "[W]hen considering a variety of institutional forms, social justice requires that we prefer the one that, while fully respecting the basic rights and liberties common to all

8. Tomasi describes this difference in understanding in terms of the emphasis given either to *agency* in his own interpretation and to *status* in the Rawlsian one. In very rough terms, the former prioritizes the power of personal independence that comes through the access to material resources, whereas the latter prioritizes the power that comes from having "a vote or voice in a committee meeting" (191). Tomasi seems to be right in claiming that most of us would not choose to forego greater wealth for greater political control of our workplaces. A reduction in wages, after all, "amounts to a reduction in people's effective power to use their rights in pursuit of projects that are central to their lives" (191).

9. See Wall 2013 for the suggestion that Tomasi fails to consider alternative conceptions of "thick" economic liberty, such as those that incorporate the experience of democratic control of the workplace as one of its main elements.

citizens, brings about the greatest benefits to the poor” (xx). However, by adopting the Rawlsian framework of lexical priority and by including a robust set of economic liberties among the basic set of liberties, such “variety” of institutional forms turns out to be extremely limited.¹⁰

Tomasi’s objection against classical liberal theories is, ultimately, that they lack plausibility because they cannot recognize, as a matter of principle, the importance of the distributional adequacy condition. As noted earlier, he argues that “any version of liberalism is adequate only if it includes the claim that the institutions being endorsed are deemed likely to bring about some desired distribution of material and social goods” (126). Yet if as a matter of empirical fact Tomasi’s implicit beliefs about the capacity of a regime that has the power to regulate only the realm of nonbasic economic liberties were disconfirmed, and if it were shown that such regimes do not meet the distributional adequacy condition, Tomasi’s free-market fairness would fail in those same terms. In other words, it might fail to capture adequately one of bleeding heart libertarianism’s central concerns.

Ideal Theory and Institutional Forms

Rawls argues that a socialist command economy endangers political equality and threatens basic liberties such as free choice of employment by allocating too much power in the hands of the state. The welfare state fails to guarantee the fair value of political liberties, and thus it can be taken to violate the first principle of justice. Furthermore, by allowing great disparity of income and wealth, it does not guarantee sufficiently equal opportunity, and it tends to generate a demoralized underclass. Laissez-faire capitalism fails in a more dramatic manner along these latter dimensions. According to Rawls, the parties in the original position would favor, according to the particularities of their respective societies, either “property-owning democracy” or democratic socialism. The aim of both systems is to enable all citizens to manage their own affairs within a context of significant social and economic equality. Property-owning democracy is characterized by the widespread ownership of productive assets and broad access to education and training. Democratic socialism is characterized by featuring worker-managed firms.

Rawls claims that only property-owning democracy and democratic socialism “realize” justice as fairness. It must be noted, however, that what he means by “realize” is not what we might initially think. For Rawls, the first task of political philosophy is the identification of principles of justice and those regime types that

10. Eric Mack claims that “[Rawls’s] strategy of rendering the two principles compatible by supplying each with its own rightful domain disintegrates with the insertion of robust economic liberties into the first principle” (2012). Of course, strictly speaking, there is no compatibility that we need to worry about in the context of a lexically prior relation. But Mack’s observation captures the fundamental problem that Tomasi faces: the extreme narrowing of the range of application of the lower principles by placing a robust conception of economic liberty in the higher principle.

will “realize” those principles under realistic but idealized conditions. To determine whether a regime type is successful in “realizing” any given conception of justice, we must put alleged compliance problems aside. We must judge the desirability of the regime only according to the regime’s announced intentions and ideals. Put differently, in Tomasi’s words, we must assume that “citizens and elected officials alike always behave as justice requires them to behave” (206). As Rawls puts it, we must imagine “how [an institutional system] works when it is working well, that is, in accordance with its public aims and principles of design” (2001, 137).

Thus, according to Rawls’s vision, political philosophy must be “realistically utopian.” Questions of feasibility are asked only at the most basic level: Are the demands imposed on people and institutions impossible to satisfy? If they are not impossible to satisfy, practical concerns about how people and institutions are likely to behave are not sufficient to discredit our ideal of how they should behave. As long as our principles of justice and institutions do not demand the impossible, feasibility considerations should not be allowed to lower our aspirations.

Tomasi endorses this conception of political philosophy. Neither his rejection of modern liberalism nor his endorsement of classical liberal institutions is grounded on feasibility concerns. He endorses Rawls’s conception of political philosophy but argues that the institutional choice at the level of ideal theory is not between democratic socialism and property-owning democracy. Under the market democratic interpretation of justice as fairness, Tomasi argues that the institutional choice should be between “democratic *laissez-faire*” and “democratic limited government.” Both regimes are “enthusiastically capitalist” (117). Their difference lies in the fact that the former “marks the high point of optimism about market mechanism (and skepticism about political decision-making)” (116). The latter is understood as bearing some similarity to the constitutionalism of the United States “prior to the revolution in jurisprudence that accompanied the New Deal” (117).

In following Rawls’s understanding of the role of political philosophy, Tomasi is immune to a likely form of criticism: that regardless of how attractive the intentions we can possibly attribute to classical liberal orders, they might fail to secure the intended sort of outcomes as a matter of practice primarily because they do not offer the sort of legal “guarantees” favored by modern liberals in their pursuit of social justice. Tomasi is right in claiming that legal guarantees might very well fail to bring about the desired outcomes as well. If those concerns are not deemed relevant in assessing the desirability of the modern liberal’s preferred regime ideals as such because what ultimately matters is the quality of their underlying intentions, they should not be deemed relevant in assessing the desirability of the classical liberal counterpart. But Tomasi gains this immunity at a high cost. His case for “enthusiastically capitalist” institutions turns out to be as immaterial as Rawls’s endorsement of democratic socialism and property-owning democracy.

How Feasibility Matters

David Estlund (2011) has recently defended the alleged idealism of modern liberal philosophers. His basic claim is initially persuasive. If a theory does not demand the impossible, the fact that people will not live up to that theory should not be taken as a defect of the theory. Political philosophy is an essentially normative enterprise: if anything, the fact that people will not live up to that theory would count as a defect of the people, not of the theory. Thus, Rawls and Tomasi are right in claiming that at some level we should refrain only from aspiring to the impossible. They are mistaken, however, in claiming that at that level we should select not only principles of justice but also institutional forms that would “realize” those principles.

Principles of justice might be best understood as standards that we regard ourselves obliged to meet as best we can. Standards are genuine ideals: they provide us with guidance, and such guidance is valuable even when we are aware of all the difficulties involved in the process. Every step in the right direction counts as progress even when the full realization of the standard is beyond our means. It would indeed be a mistake, as Rawls and Tomasi suggest, to let feasibility considerations lower our aspirations. Opportunities for progress would be missed.

When we enter the institutional realm, however, the previous line of reasoning has limited application. Does the fact that voters will likely keep voting for redistributive measures show that classical liberals should refrain from embracing an institutional system where virtually all exchanges are of a voluntary nature? If it is possible for voters to refrain from voting for redistributive measures, the fact that they keep doing it would show a defect of the people, not of the theory. Now, if we agree that such voting behavior does not discredit classical liberalism, we do so because we regard the issue as one of *political* feasibility. In this particular type of case, it does seem to make sense to posit “ideal” institutional systems. Political feasibility, after all, refers either to the properties of current states of public opinion or to the properties of current social and institutional arrangements more generally. Changes in those realms, although sometimes difficult, are not rare.

Rawls believes that democratic socialism and property-owning democracy are ideal institutional forms (insofar as they “realize” justice as fairness). Tomasi believes that “democratic laissez-faire” and “democratic limited government” are ideal institutional forms (insofar as they “realize” free-market fairness). Now, if all feasibility issues were of the same nature as those we face in dealing with *political* feasibility, these ideals would be genuine. Assuming of course that we endorse either Rawls’s or Tomasi’s respective conceptions of justice, such institutional ideals would provide us with guidance. We would make progress insofar as we get closer to them because of changes either in the current state of public opinion or in the current institutional structures.

Yet not all feasibility issues are of such a “political” nature. Rawls and Tomasi select their ideal institutional arrangements merely by considering their aims and

intentions and whether their proper functioning is, in Tomasi's words, "sociologically possible" (213). So it does not matter how likely such proper functioning is in practice once we take into account even basic facts regarding human nature. What matters is how appealing the ideal in itself is. I believe this way of conceiving the main tasks of political philosophy rests on a misunderstanding.

Let's grant that democratic socialism is "sociologically possible." Should we move toward that institutional form and away from a welfare state if we also grant that justice as fairness is the most appealing conception of justice? This is not a reasonable position to take if we believe that democratic socialism has a much lower probability of success than a welfare state in materializing the values of justice as fairness and a much greater probability of producing particularly undesirable outcomes. Rawls admits that questions of feasibility still have to be faced (2001, 137). But what is then the point of addressing the "question of right" at the institutional level if we admit the possibility that the ideal system cannot be "effectively and workably maintained" (136)? Rawls has left this legitimate question unanswered. If we endorse Tomasi's conception of justice, should we consider all movements toward a minimal state as positive if, as a matter of fact, it were shown that such a regime is, although sociologically possible, highly unstable in securing individuals' economic rights compared to other alternatives? Again, this position would not be reasonable. Rawls and Tomasi seem to ignore the possibility that what they regard as nonideal institutional forms might, as a matter of fact, have greater success in materializing their own preferred standards of justice than what they regard as the ideal forms. If we admit this possibility, we must admit that their institutional "ideals" are rather peculiar. In themselves, they do not provide us with a reason to pursue them. They offer us no guidance; they are immaterial.¹¹

Political philosophy may stay at the pure level of principles. At that level, the questions we face are of an abstract, moral nature. Marx stayed at such a level when he claimed: "From each according to his abilities, to each according to his needs!" ([1875] 1994, 321). Robert Nozick did the same when he altered the Marxian slogan: "From each as they choose, to each as they are chosen" (1974, 160). Rawls also stayed at that level when arguing that some liberties should not be traded for the sake of material equality. At this level of theorizing, the questions are about the appropriateness of a variety of evaluative standards. Should the maximization of human happiness be our ultimate goal, as Jeremy Bentham thought? In evaluating such standards, considerations of feasibility are virtually absent because there is always something that can be done that would bring us

11. In this context, it is worth noting that Samuel Arnold argues that, at the level of ideal theory, property-owning democracy can be understood as realizing Tomasi's interpretation of the Difference Principle (2012, 399). Why, on ideal theory grounds, would we not be willing to grant market democracy's rate of economic growth to property-owning democracy? Moreover, Arnold argues that market democracy might not satisfy the market-democratic version of the difference principle because, although it does have the intention, it does not have "any plan at all, let alone a plausible one, for maximizing the income of the worst off" (399).

closer to the ideal than the available alternatives are able to do. At that level, it does not seem to matter how realistic our examples to test such standards are. Let's imagine that slavery would bring about a state of affairs in which human happiness is maximized despite the fact that those who are enslaved would be deprived of its enjoyment. Does it matter whether this is a genuine possibility? It does not. For our assessment of the correctness of a standard of evaluation itself, what matters is that we can conceive of such a possibility and that we tend to think that individuals and their morally innocent, private ends should not be sacrificed for the sake of others. For this reason, we might conclude that Bentham's proposed standard should be rejected.

Political philosophy may go further and provide justification for particular regimes or policies based on what are regarded as proper standards or ideals. But when it does so, matters of fact can no longer be ignored (or the risks of issuing immaterial recommendations would be too real). The problem becomes one of analyzing a potential choice between several alternative institutional prospects not in terms of the quality of some alleged attributable moral intention, but rather in terms of their effectiveness in bringing about the conditions that most resemble those of the ideal. In other words, the choice of institutional arrangements is a choice between the sets of possible outcomes that each institutional alternative is expected to yield with different probabilities. It is not a choice between intentions; it is a choice between the different expected degrees of realization of our normative standard that arise from considering *all* the possible outcomes of an institutional arrangement, not just those that are its intended outcomes.

As Geoffrey Brennan (2013) has recently noted, it is a mistake to think of feasibility as another element in a desirability calculus. We should not give every institutional choice we face a score in the desirability category and another in the feasibility category, then remove the choices that fare lower than a certain threshold in the latter (that is, what would be regarded as "sociologically impossible" in Tomasi's terms), and finally select the one with the greatest desirability score. Nor should we treat those feasibility scores as discounting the desirability values. The problem with these ways of understanding feasibility is that they focus only on how likely it is for the institutional choice to be successful. They ignore the normative significance of downside risks. The choice is never between alternative outcomes of varied degrees of desirability and feasibility. The choice is between alternative institutional schemes that will yield, with different probabilities, multiple outcomes of varied desirability.

Statements of Principle and Matters of Fact

To affirm both the central value of economic freedom and the importance of a distributive adequacy condition at the level of moral principles or ideals is a different question from what institutions should be implemented in practice given the reality

of the world in which we live. Tomasi's endorsement of Rawls's conception of political philosophy might obscure this important distinction.

Tomasi argues that respect for self-authorship requires wide economic liberties. He also claims that it might also require some form of redistribution toward those who lack access to resources through no fault of their own. Tomasi argues that there is a "range of self-authorship" (94) and that market democracy identifies just institutions as those that fall within that range. There is a lower end that the state may assist individuals to achieve. But in assisting such individuals, there is also an upper end that works as a constraint on what the state can do to those individuals who have reached it. Poverty and lack of education may render people incapable of achieving the lower end. Redistribution might assist them to reach it. However, tax rates as well as economic regulation must remain limited so as to not impinge upon the authorship of others at the upper end. The state might intrude "so little in the economic realm that the conditions needed for the exercise of self-authorship are not achieved" (94), but the state might intrude "so much that it truncates the activities of self-authorship" (94).

It should be clear that these statements are statements of principle. The claim is that it would be permissible for the state to intervene in the economic realm *if* necessary to provide the conditions for self-authorship. But Tomasi should certainly be open to the possibility that it might not be necessary for the state to do so because voluntary organizations might perform such functions well, for example, or because the political pressures on such interventions will tend to make them perpetuate the conditions that they were intended to alleviate. Tomasi later adds, "The very status of people as responsible self-authors may be threatened by conditions of extreme need. The state must be empowered to act to protect people's moral status as self-authors" (99). But he fails to account for the negative potential consequences of "empowering" the state in that particular way. Tomasi also claims, "Social justice requires more than the protection of the formal rights of citizens" (xiv). Is this true even if such extended protection were detrimental in bringing about the outcomes that benefit the poor? It is then a mistake for him to claim that the ideal form of a market democratic regime needs to include a safety net. For similar reasons, it is a mistake to claim that economic liberty is a fundamental right if by that it is understood, as Tomasi does, that no institutional arrangement that infringes upon such a right can ever be justified. After all, it is conceivable that we might find such infringements justified if the most radical critics of capitalism were right as a matter of fact in their claim that a system of economic liberty will produce only human misery for the majority of the population.

Again, to affirm both the central value of economic freedom and the importance of a distributive adequacy condition at the level of moral principles or ideals is a different question from one about the institutions that should be implemented in practice given the reality of the world in which we live. On the one hand, the circumstances of reality might force us to make hard choices, so we should be

cautious in declaring that some trade-offs are never justified. On the other hand, the circumstances of reality might be more felicitous. For example, it might be the case that economic liberty does not need to be infringed upon in order to satisfy a distributive adequacy condition. In fact, it might be the case that the only reliable institutional arrangement for meeting such a condition involves granting economic liberty the legal status of inviolable right.

Conclusion

There is a clear value in individuals pursuing all sorts of personal projects that are made possible because of the existence of economic liberties. A society that constrains such economic liberties deprives those individuals of important sources of meaning and self-realization. Modern liberals have accepted this conclusion only reluctantly. If we recognize that individuals have a fundamental interest in seeing themselves as central causes of the lives they are leading, Tomasi is right in claiming that modern liberals “owe us a moral explanation of how . . . [the] narrowing of private economic liberty enhances the status of persons as responsible self-authors” (82). He also seems to be right in arguing that a distributive adequacy condition must be a feature of any plausible theory of justice (although it is debatable whether including this condition amounts to recognizing “social justice” as the ultimate standard of political evaluation). If strict observance of property rights is of great importance, it must be because of, among other things, the positive effects that such observance has on the lives of all, perhaps especially on the lives of the poor. If strict observance of property rights would inevitably lead toward sudden states of “momentary barbarism” of increasing severity, as Marx and Engels ([1848] 1994, 163) claimed, then little can be argued on moral grounds for such strict observance.

It is questionable, however, whether the Rawlsian framework is an adequate form of articulating these “bleeding heart libertarian” insights because placing a robust conception of economic liberty within the lexically prior Liberty Principle entails that only nonbasic economic liberties are in principle subject to regulation (for purposes other than securing other basic liberties). Under certain conceivable conditions—for example, those imagined by Marx and Engels—such principled limitation of government powers might turn out to be incompatible with the satisfaction of the distributive adequacy condition.¹²

12. It must be noted that the issue of whether critics of capitalism are right or wrong in holding such factual beliefs is not here at all relevant. Bleeding heart libertarians do not necessarily disagree on the desirability of the institutional structures defended by more traditional forms of classical liberalism. They disagree mainly on the principles upon which such structures are justified. Tomasi’s main criticism toward classical liberalism is precisely of such a nature: it is not that a classical liberal order cannot satisfy, as a matter of fact, a distributive adequacy condition, but that classical liberalism, understood as a normative theory regarding the legitimate scope of government, does not provide fully convincing answers to an array of possible factual scenarios. Tomasi’s own positive contribution is subject to this very same criticism, however, and on the same grounds.

Conceiving economic liberty as a basic, inviolable liberty (as a matter of principle rather than as a matter of institutional design) is not the only difficulty we would face in articulating the bleeding heart libertarian project along Rawlsian lines. Reflecting on the virtues of classical liberal institutional forms without considering how they are likely to perform in practice relative to all other institutional forms is not an inspiring case of idealism. It is, I believe, a fundamentally misconceived approach. The case for a classical order partially based on feasibility grounds need not fail to capture vital moral insights, as Tomasi seems to suggest. On the contrary, philosophical premises that are not capable of capturing the normative significance of certain feasibility concerns might fail to articulate in a convincing way one of the central insights behind the intriguing project of bleeding heart libertarianism: it is morally relevant that, as a matter of practice, the long-term prospects of the poor might be best served not by the welfare state favored by modern liberals, but rather by some form of the limited, night-watchman state favored by their classical counterparts.

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