Personal Choices, Institutions, and Justice: Defending Cohen's Position from Tan's Critique

By

Miriam Sabzevari

A thesis submitted to the Graduate Program in Philosophy in conformity with the requirements for the degree of Master of Arts

Queen’s University
Kingston, Ontario, Canada
September, 2014

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Abstract

This essay will defend, in light of Kok-Chor Tan's critique, G. A. Cohen's position that justice should be conceived as an extensive project, whose purview includes personal choices as well as institutional structures, and that its content should be expressed not just in rules or laws, but in a culture or ethos which would guide society’s interpersonal interactions. This is primarily achieved by clarifying various aspects of Cohen's position, proving it more attractive than Tan characterizes it as being.
Acknowledgements

Many thanks are due to my supervisor, Professor Christine Sypnowich, for her guidance, encouragement, criticism, wit, and golden heart. Thanks also to my readers, Professors Andrew Lister and Alistair Macleod for comments and insight into political philosophy throughout the year. Thanks this school year goes also to the faculty, staff, and peers in and around Watson Hall. Special thanks to the Justice League, the Toucan crew, my new friends, my old friends, and most of all my family.
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Chapter 1: Introduction

1.1 Introduction to Subject

Lin is a leading biological researcher. She has received a job offer of $60,000 at a corporation developing anti-balding technology, and a governmental grant offer of $30,000 for her proposal to research solutions to neglected diseases in impoverished areas. To some, there is no obligation from the point of view of social justice to take the government position over the corporate position; in her personal choices, she has complied with and supported just institutions, which is all that is needed. To others, there very well may be a social justice obligation. The issue that this divergence in opinion is about has amassed many names: Cohen calls it what the "eye of justice" focuses on (Rescuing 16), Tan "the site of justice" (Justice 34), and Rawls "the primary subject of justice" (Rawls 3). The issue is important theoretically, with respect to how we categorize what things are a subject of justice, and practically, with respect to how we are obligated in our personal choices.¹

G. A. Cohen argues that the subject of justice is not limited only to institutions (and the personal choices relevant to complying with them) but also to personal choices beyond them (Rescuing 116), such as how much effort one puts in at work or which occupation to choose.² In other words, we should apply the principles of justice to personal choices beyond institutions and their compliance (Rescuing 16). This importantly entails that a just society cannot be realized without a set of non-legal norms that facilitate the regulation of personal choices in alignment with what justice demands, or what Cohen calls a social "ethos of justice" (Rescuing 2). Cohen initially aimed his thesis at an apparent inconsistency in John Rawls's work on justice, arguing that Rawls should, according to his own views, endorse Cohen's thesis.

¹ The terms "justice", "social justice", "distributive justice", and "egalitarian justice" will be used interchangeably.
² Instead of "institutions" and "personal choices", Cohen uses the language of "legally coercive structures" and "the choices that people make within" them (Rescuing 116).
While Liam Murphy openly supports Cohen's thesis (Murphy 251), many have argued against parts or the whole of it (Williams, Scheffler, Pogge, etc.). Kok-Chor Tan's latest argument against Cohen's thesis (Justice, Institutions, and Luck: The Site, Ground, and Scope of Equality) clearly demarcates two possible answers to the question of what the subject of justice is: first, his own "institutional" approach, or the view that justice does not demand anything of persons in their personal choices except that they "establish, support, and maintain" just institutions (Justice 79); and the "trans-institutional" approach, Cohen's view that justice does (Justice 53).

In this essay, I aim to defend Cohen's thesis from Tan's critique. Tan's critique is not only formidable in its own right, but serves as an excellent platform to engage with other authors on this issue. I will find that Tan's arguments often mischaracterize Cohen's position and sometimes presuppose it, which requires me to clarify and develop Cohen's position. Because I cast doubt upon Tan's critique largely by way of "clarifying" Cohen's position, I do not so much reinforce the division Tan makes between his own position and Cohen's as much as highlight the ways in which Cohen's position is not so far from Tan's own.

1.2 Cohen on Personal Choice and the Social Ethos

Cohen's arguments for what Tan call the ‘trans-institutional approach’ are multiple and span almost two decades, starting with his 1991 Tanner Lecture, "Incentives, Inequality, and Community" and culminating in his 2008 book, Rescuing Justice and Equality, in which Cohen responds to a number of criticisms made in this twenty-year period. In what follows, I summarize Cohen's position briefly and with no respect to chronology. There are two main components to Cohen's argument that I wish to defend: (i) personal choices can be a subject of
justice (which means that we should apply the principles of justice to our personal choices when relevant); and (ii) in order for a society to make said personal choices more just, a social ethos of justice is required. In this essay, I will argue, following Cohen, that justice should be conceived as an extensive project, whose purview includes personal choices as well as institutional structures, and that its content should be expressed not just in rules or laws, but in a culture or ethos which would guide society’s interpersonal interactions.

How is it that Cohen claims personal choices can be a matter of justice? For Cohen, the distributive justice of society concerns "the pattern of benefits and burdens in society" (*Rescuing* 126). The pattern is "the upshot of structure and choices alike" (*Rescuing* 126). That is, the distributive justice of society is "not exclusively a function of its legislative structure....but also of the choices people make within those rules" (*Rescuing* 123). It is obvious the ways in which distributive justice is the function of the legislative structure, for example through government welfare programmes, but less obvious how it is the function of personal choices. Cohen has offered a number of examples over the years: the personal choice of a worker in society to work harder or not (and thereby produce more income to be taxed and redistributed or not) (*Rescuing* 120); the personal choice of a corporate executive to pursue a higher or lower salary (and thereby increase or decrease the wealth gap between herself and her workers) ("Where the Action is" 144); and the personal choice of a husband to implicitly expect or not expect his wife to do most of the household chores (and thereby increase or decrease domestic chore burdens for one sex over the other) (*Rescuing* 137).³ All of these personal choices are in perfect compliance with "just" institutional rules, at least within, for example, John Rawls's theory of justice. Yet, they

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³ Tan understands Cohen's argument from the worker working less hard as being a case in which a personal choice violates an institutional rule (i.e. the institutional wealth-pool from which a government can redistribute wealth), and goes on to argue that there is in fact no institutional rule being violated here (*Justice* 42); however, we can simply understand the example as a case of personal choices producing distributive inequalities -- whether it is "institutional" or not.
influence the distributive pattern just as well as institutions do. In Cohen's original argumentation, reference is made to Rawls’s famous *difference principle*, where inequalities are permitted so long as they benefit the worst off. Cohen argues that, although the difference principle is intended to apply to institutions, if it is not applied also to the personal choices of everyday persons, the result is inequalities unjustifiable by the principle (*Rescuing* 123). It is for this reason that Cohen is sympathetic to the "Christian social nostrum" that "for [distributive] inequality to be overcome, there needs to be a revolution in feeling or motivation, as opposed to *(just) in...structure*" ("Justice, Incentives, and Selfishness" 120); if personal choices are necessary to achieving distributive justice, and if personal choices are influenced by the feeling or motivation in a person's heart, then the heart of a person matters to justice.

Cohen argues that Rawls should be sympathetic to his argument given the Rawlsian view that a just society requires a sense of fraternity between members and that "its citizens themselves willingly submit to the standard of justice embodied in the difference principle" (*Rescuing* 123). However, Cohen also anticipates a major Rawlsian objection to his argument: "the basic structure objection" (*Rescuing* 116). This is the objection that the subject of justice is restricted to what Rawls calls "the basic structure", generally understood to be the "framework of rules within which choices are made, as opposed to a set of choices" (*Rescuing* 125). If true, even if personal choices do produce inequalities, these inequalities are irrelevant to justice. In response, Cohen argues that the basic structure objection faces a dilemma because there is a "fatal ambiguity" in what the basic structure, or the framework of rules, exactly consists of (*Rescuing* 132): if it only includes the coercive elements of society (such as institutional laws) and not non-coercive elements (such as informal norms within families), then it does so arbitrarily;⁴ but if it includes these non-coercive elements too, then the basic structure objection

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⁴ And the attempt to differentiate the two based on the claim that coercive elements produce more "profound effects"
towards Cohen's original argument collapses -- many of the non-coercive elements that frame society are, after all, set by personal choices.

This leads us to the second main component to Cohen's thesis: that, having established that personal choices can matter to justice, a social ethos of justice is required to make these personal choices just. A fully just society requires not "not simply just coercive rules, but also an ethos of justice that informs individuals choices" ("Justice, Incentives, and Selfishness" 128). The selfishness, laziness, sexism, individualism, and general lack of social solidarity exhibited in the personal choices described earlier ought to be curbed with a social ethos that promotes the opposite attitudes and norms.

1.3 Tan’s Critique of Cohen

In *Justice, Institutions, and Luck: The Site, Ground, and Scope of Equality*, Tan aims to determine what the subject of justice is. Tan pits two answers against each other: the first is exclusively institutions -- his own "institutional" approach which entails that justice does not demand anything of persons except to follow institutions rules (*Justice* 20) and to "establish, support, and maintain" institutions (*Justice* 79); and the second is institutions plus personal choices -- Cohen's "trans-institutional approach" (*Justice* 14) which entails that justice does demand certain actions from persons beyond establishing, supporting, and maintaining just institutions (*Justice* 53). In arguing for his institutional approach over the trans-institutional approach, Tan concludes that the Rawlsian basic structure restriction is indeed justified: "what it is about the basic structure that makes it a determinant subject of justice...is that it is the set of society's political, social, and economic institutions that are 'subject to public-political
regulation" (Justice 35). Tan engages with this debate in roughly the first half of the book, which ultimately leads to his project in the second half of the book: developing a global account of justice which limits its demands to remedy inequalities to those produced exclusively by institutions. His arguments build upon his 2004 article, "Justice and Personal Pursuits."

Tan produces several arguments for his conclusion in favour of the institutional approach. Tan's central argument in favour of his institutional approach stands out among the different critiques in the literature. He, like Cohen, is dissatisfied with explanations for "why we may focus exclusively on institutions" (Justice 23) that refer to the profound effect of institutions or the fact that institutional rules are important to securing "background justice" (Scheffler 105). This is because Tan acknowledges that the effect of persons' personal choices can be just as profound as some institutions and because the subject of justice should be greater than merely its "background", respectively (Justice 25; 26). Nor does Tan believe that we should limit the subject of justice to institutions because of concerns that justice would otherwise be overburdening on persons; he denies his approach in any way compromises justice (Justice 34). Rather, Tan says we should favour the institutional approach because it can accommodate value pluralism, while the trans-institutional approach cannot. This claim will be assessed in depth in Chapter 2. The general idea, however, is that justice should not be about trying to "maximize social equality across the board" (Justice 34); but about allowing "persons to live meaningful and worthwhile separate lives" (Justice 34). His institutional approach gets these priorities right while the trans-institutional approach does not.

Tan anticipates that the trans-institutional approach can, in one case, accommodate value pluralism -- by positing a personal prerogative -- and argues that it is up to Cohen to flesh out the details of that possibility. While in Chapter 2 I hope to reject Tan's values pluralism argument,
which motivates Tan's concern with Cohen's personal prerogative, I nevertheless spend Chapter 3 fleshing out the details of Cohen's personal prerogative, within the context of conflicting debate on the concept.

Tan further elaborates his institutional approach by posing a series of problems for the trans-institutional approach, namely: first, that it can only say something unique under ideal institutional conditions -- yet it still fares worse than the institutional approach there, given issues such as the fragility of justice, the mutual dependency of principles of justice, and educative effects; second, that it unfairly demands more, morally, from the talented than the less talented (Justice 68); third, that egalitarian theories, luck and reciprocity, do not require it; and fourth, that the luck egalitarian theory is in conflict with it. These will all be addressed in Chapter 4.
Chapter 2: Tan's Main Argument

2.1 Introduction

Tan's most powerful and fully developed argument in favour of the institutional approach and against the trans-institutional approach is that the former respects "value pluralism" (*Justice* 27), the standard presumption among philosophers, whereas the trans-institutional approach, in contrast, does not, and is instead in favour of "value monism" (*Justice* 32). A defense of the trans-institutional approach must therefore either eschew the connection with value monism, or explain why value pluralism should *not* be the standard presumption -- a task Tan contends is relegated to the field of "meta-ethics" (*Justice* 191). In this chapter, I will argue the latter, and suggest that, once we clarify the meaning of value pluralism, it is by no means obvious that it is the standard presumption. I hope to do this without undertaking the meta-ethical investigations warned against by Tan. Finally, I will suggest that later attempts to re-formulate Tan's underlying concern against the trans-institutional approach can be met with skepticism.

2.2 Reconstruction of Tan's Argument

The terms value pluralism and value monism have varied uses in the history of political philosophy. For Tan, these terms refer to "a debate in meta-ethics" (*Justice* 191). Tan says his conception of value pluralism stems from Nagel's idea of the "fragmentation of value": the idea that "there are diverse moral values not all of which are reducible to or subsumable under a single dominant principle" (*Justice* 27). For example, it is possible that we value certain "personal commitments and ends" (*Justice* 28) though they can be in irresolvable tension with another value, egalitarian justice; a person's pursuit of an occupation in the arts is not reducible to, or inferior in moral worth to, the more egalitarian distributive scheme that could be brought
about by having her work as a doctor instead. The case of value pluralism Tan is most concerned with is between "personal pursuits" and "justice" (Justice 28).\(^5\) Value monism, on the contrary, offers "one unified account of what the good is" (Justice 58). Presumably, the tension in the example above would be explained away: for example, if we are value monistic about egalitarian justice, either personal pursuits are not actually a moral value, or if they are, they can be explained as lower in hierarchical relation to justice (Larmore 161).

Tan's value pluralism should be understood as different from the Rawlsian concept of "reasonable pluralism". First of all, the variables in each concept differ: reasonable pluralism is about a plurality of competing worldviews (such as an ascetic view versus a hedonistic view) whereas value pluralism is more specifically about a plurality of competing values (such as "the pursuit of conceptions of the good" versus egalitarian justice). Second of all, according to Charles Larmore and Samuel Freeman, Rawls's reasonable pluralism is a thesis about how it is possible for many reasonable persons to hold competing worldviews: it is "the recognition that reasonable people tend naturally to disagree about the comprehensive nature of the good life" (Larmore 153); and that there are diverse ways of living that are compatible with the demands of justice (Freeman 101). Value pluralism, on the other hand, bypasses reference to persons; it is a moral thesis about how there are multiple competing values (Freeman 100 f.20), or a thesis about the "the nature of the good" (Larmore 154). Tan does not himself make this distinction -- he seamlessly uses the fact of reasonable pluralism to articulate his view of value pluralism (Justice 27; 28); however, I do not believe he would disagree with such a distinction.

Tan's value pluralism must be understood as "modest" (Justice 29) insofar as there is a system for answering the question of how to balance values; it is not the view that there are

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\(^5\) Another way of putting this, Tan says, is to find competing and non-reducible value in both Rawls's 2 moral powers: the capacity for forming, pursuing, and revising conceptions of the good; and the capacity for a sense of justice ("Personal Pursuits" 331 f.1).
"irresolvable moral dilemmas" (*Justice* 29). In fact, Tan argues that his institutional approach offers the correct balancing procedure for the values, justice and personal pursuits. Balancing them involves recognizing that institutional justice has a certain "regulative primacy" (*Justice* 29) in that "conflicts between [institutional] justice and personal ends are resolved in favor of [institutional] justice" (*Justice* 29). That is, personal pursuits that come into conflict with just institutions or get in the way of the duty to establish, support, and maintain them (*Justice* 79) are not permitted (*Justice* 29). However, personal pursuits that do not interfere with just institutions are permitted; "persons may 'do as they wish' so long as the rules of institutional justice permit" (*Justice* 30). For example, since there is no institutional rule requiring persons to pursue occupations in medicine over the arts, persons may pursue the arts.

The trans-institutional approach, on the other hand, offers no such mechanism to balance the values within value pluralism. Whereas the institutional approach can draw the line of justice encroaching upon personal pursuits at institutional rules, the trans-institutional approach cannot. This is because the purview of justice in the trans-institutional account is by definition beyond institutional rules and includes personal choices. The extended purview not only gets in the way of offering a procedure to accommodate value pluralism, but implies value monism about justice; applying the principles of justice to personal choices interferes with many personal pursuits. Of course, Tan recognizes that Cohen himself does not deny value pluralism.\(^6\) However, "[e]ven though Cohen does not deny pluralism, Tan quotes Freeman in finding that Cohen seems to "underestimate the significance of 'the fact of reasonable [i.e. value] pluralism,'" and he consequently grants "undue priority to the position of the least advantaged over all other claims

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\(^6\) Cohen seems to concede a kind of value pluralism when discussing the conflicting values underlying the provision of civic education and social welfare (*Rescuing* 397), and in his admission that a personal prerogative to depart from egalitarian justice may be justified.
Tan is persuasive that the trans-institutional approach is not committed to value pluralism. However, it is not so obvious that this is inevitably a sign of defect or inadequacy. Why does it matter that the institutional approach can accommodate value pluralism while the trans-institutional approach cannot, and in fact, may be value monistic about justice? Tan states that value pluralism is the standard presumption among philosophers today, stating that: "[t]o the extent that many critics of the institutional approach do not explicitly disavow value pluralism, my...claim is not trivial" (Justice 31) and "[that] value monism is the default view of the nature of morality... of course is hardly the case" (Justice 190). For Tan, the force of this presumption entails that the onus is on value monists to argue against it. But Tan also fleshes out why the presumption might be held in the first place: ultimately, the point of any model of justice should be to secure conditions under which persons may engage in the personal pursuits of their choosing ("the aim of justice...is to secure the appropriate social conditions against which persons may pursue their various ends and conceptions of the good freely and fairly" (Justice 58)); therefore, an account of justice must espouse value pluralism. If this Rawlsian view on justice is in any way compelling, the importance of accommodating value pluralism is highlighted.

2.3 Moral and Legal Conflations

However, it is not obvious that value pluralism is the automatic presumption over value monism. I believe there are signs in Tan's work that indicate a conflation between value pluralism and another concept, what I will loosely call "legal pluralism", the latter being the undeniably standard presumption. Therefore, clarifying the meaning of value pluralism will
leave us skeptical about Tan's claim that value pluralism is the standard presumption.

We must draw a distinction between value pluralism (or believing in multiple irreconcilable moral values -- and specifically that personal pursuits at times are at odds with egalitarian justice), and accommodating multiple irreconcilable values through state institutions. That is, it is possible to believe that value monism is correct while at the same time instituting state mechanisms to allow multiple irreconcilable values. Cohen points out that it is perfectly reasonable for someone to believe that freedom of occupation (personal pursuits) flies in the face of a superior value, distributive equality (justice) yet decide *not* to toe the Stalinist line in restricting freedom of occupation. For example, restricting freedom of occupation for the purposes of justice would violate the Kantian duty to treat each other as ends rather than as mere means (*Rescuing* 220). Furthermore, legally restricting freedom of occupation may prove counterproductive to justice, in the same way that regulating promises to deter people from promise-breaking might result in a reluctance to make promises in the first place (*Rescuing* 218); for example, if we restrict freedom of occupation, Jon may feign incompetency in medicine so that he may pursue visual arts. If this distinction between value pluralism and what we might call legal pluralism is correct, then Tan's value pluralism can be heeded legally without claiming superiority morally.

This distinction between value pluralism and legal pluralism is not completely lost on Tan: "[t]o be sure, Cohen is explicit that the doctor–gardener is not to be forced to doctor at £20,000" (*Justice* 68). This is an acknowledgement that Cohen does not deny what I have called legal pluralism. Yet, Tan frequently speaks as if he is indeed conflating the two concepts -- and even if he is not, without his explicit clarification it is likely the reader will do so. For example,

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7 Would such a response suggest that Cohen is neither a value pluralist, nor a value monist about justice, but a value monist about Kantian duties? This is one reason why I do not find the discourse of value pluralism/value monism particularly helpful.
consider one of Tan's arguments against Cohen's trans-institutional approach, on the basis of a free speech analogy: just because some persons perpetuate hate speech under the umbrella of free speech laws, does not mean the free speech laws are less than ideally just. Likewise, just because some persons selfishly demand salary incentives under the loophole provided by the difference principle to allow for inequality, does not mean the difference principle is a less than ideal principle of justice; the difference principle correctly acknowledges the right of unselfish persons to their own personal pursuits (such as an occupation in the arts) and the wherewithal to ask for salary increases should they do something in the service of justice instead (such as become a surgeon) (Justice 59).

Now, Cohen, as a trans-institutionalist who grants some room for a personal prerogative (to be discussed in Ch. 3), wants to maintain that the acts of selfish persons are subject to justice, but not those of unselfish persons. Yet, concludes Tan, "it is hard to see by means of what incentive provision Cohen can criticize the selfish surgeon without also implicating the unselfish person" (Justice 63); there is no way to design the difference principle so that selfish persons are restricted from demanding incentives while unselfish persons are not (Justice 63). However, Cohen is not in the business of providing incentive provisions or any such institutional arrangement to distinguish between selfish and unselfish persons. The trans-institutional approach holds that justice concerns itself with personal choices that exist beyond institutional rules -- it does not claim to be able to provide institutional fixes to these personal choices. Cohen's criticism of selfish persons is precisely \textit{a normative judgment} on the basis of principles of justice. It is a judgement about where a person stands with regard to justice (contributing, neutral, inhibiting, etc.). In other words, Tan overlooks the distinction between designing institutional rules and passing normative judgements. This also implies a conflation between
legal pluralism (which is about institutional rules) with value pluralism (which is about normative judgments).

Tan does recognize that Cohen may "as a final retort" (*Justice* 63), if the trans-institutional approach cannot institutionally regulate personal pursuits, claim that the approach has the benefit of being able to call selfish persons unjust (*Justice* 63). However, had Tan made a clearer distinction between value pluralism and legal pluralism from the start, this idea would not be the "final" retort of the trans-institutional approach, but part of its package in the first place: being subject to justice under the trans-institutional approach does not necessarily imply being subject to institutional rules, but to normative judgements.

In sum, Tan's main argument in favour of his institutional approach and against Cohen's trans-institutional approach is that his approach is the only one of the two that can accommodate value pluralism, the given presumption among philosophers. However, after distinguishing value pluralism from legal pluralism, the latter principle being undeniable (and in no way disavowed by Cohen), accommodating value pluralism is not an obvious advantage. Admittedly, if Tan is right about how the point of justice should be to secure personal pursuits (*Justice* 58), then being value monistic about justice at the exclusion of personal pursuits is wrong. However, I think a more accurate statement about the point of justice is that it is to serve persons (the idea that "[m]orality is made for man, not man for morality"--("Personal Pursuits" 333 f.7)). This can be accommodated even when monistically valuing justice over personal pursuits, as will be explored in Ch. 3.

2.4 Implications for the Trans-Institutional Approach: Too Trivial?

This discussion prompts us to ask what the debate between the institutional approach and
the trans-institutional approach is really about. How is it that the trans-institutional approach can claim that "the eye of justice" focuses on personal choices, in addition to institutions, if it does not propose to legally or institutionally constrain personal choices? As I have said, what it means for something to be subject to "the eye of justice" does not necessarily equate to being subject to legal or institutional coercion; it is about being subject to normative judgement about that something's relation to justice (contributing, neutral, inhibiting, etc.). The trans-institutional approach considers personal choices a subject of justice in virtue of judging what relation these choices have to achieving justice.

However, this understanding of the trans-institutional approach could be criticized for being only trivially different from the institutional approach. Tan does not come to this criticism the way I have (i.e. acknowledging that the trans-institutional approach considers casting normative judgments on something sufficient for something to be a subject of justice) but rather by way of considering a "final retort" from Cohen (Justice 63): the trans-institutional approach can at least call people unjust "from the perspective of social justice" (Justice 63), if nothing else. But, the argument goes, the trans-institutional approach would only be trivially different from the institutional approach because it differs on the issue of a "semantic quibble" (Justice 64) about whether or not we can make normative judgements about persons "from the perspective of social justice" (Justice 63) as opposed to some other perspective, which the institutional approach could supply.

Rawls, after all, does not deny that we can make judgments of justice about persons: 
"[m]any different kinds of things are said to be just and unjust: not only laws, institutions, and social systems, but also particular actions of many kinds including decisions, judgments, and imputations. We also call the attitudes and dispositions of persons, and persons themselves, just
or unjust " (Rawls 1971:7)" (Justice 63). Rawls concerns himself with passing judgments of justice on institutions, but that does not therefore negate the possibility of passing judgments of justice on persons. In other words, while political philosophy may not make judgments of justice about persons, Rawls does not deny that there may be "some criteria of personal as opposed to social justice" (Justice 64) from which to do it.8 9

So for the trans-institutional approach to offer the difference of judging persons unjust "from the perspective of social justice" (Justice 63) is trivial; in either approach, we can and do make judgements about persons -- whether the judgement is one of social justice or justice from some moral/personal perspective boils down to mere words. My aim is not so much to distance the institutional and trans-instructional approaches but rather to defend the trans-institutional approach's claim that personal choices are a subject of social justice. Whatever the relations are between social justice and other normative perspectives, I agree with Cohen when he says that social justice is concerned with the distribution that is "the pattern of benefits and burdens in society" (Rescuing 126). What, though, might this entail in terms of a difference between social justice and other normative perspectives?

Tan dismisses the difference between perspectives as a semantic one. However, Tan does not do this without first entertaining the possibility that the difference is more substantial than that. Tan says that perhaps judgements from social justice have a "normative primacy" over other kinds of judgements (Justice 64). But he dismisses this consideration soon thereafter because "there can be moral reasons for overriding the demands of egalitarian justice (thereby

8 Presumably, some such criteria judges persons just or unjust not unlike the way we judge just or unjust someone who cheats on her life partner; we can say she is unjust, but not from the perspective of social justice (provided that in this example social justice does not aim to redistribute the diminished welfare of the betrayed partner).
9 Tan also says that the fact that trans-institutional approach can at least call people unjust "from the perspective of social justice" (Justice 63) is besides the point: "the key point is not how we describe our moral disapproval of...[a persons' conduct] but whether it is appropriate to evaluate her conduct by reference to principles the institutional egalitarians take to be specific to institutions" (Justice 64). However, it is not clear that Cohen denies the latter.
opposing the primacy claim)" (Justice 64); Cohen himself admits that there are moral reasons why we should not force occupational choice on persons despite the benefits for egalitarian justice (Justice 64 f.9). Presumably, Tan means to say that judgements from a social justice perspective are not consistently more normatively important than judgements from a moral/personal perspective. However, the very fact that we can question their comparative normative weights in this way of "overriding" (Justice 64) each other indicates that we need to distinguish the two kinds of judgments from each other. Therefore, the difference between them cannot be merely semantic.

Tan also entertains the idea that "demands of social justice are demands that are [importantly] subject to social enforcement of some kind of principle" (Justice 64). He dismisses this on the grounds that "Cohen himself is in fact reluctant to conclude that the egalitarian ethos is one that the state can try to enforce even in principle" (Justice 64). But here, Tan demonstrates a failure to clearly distinguish between what is legally enforceable and what is socially enforceable. It is true that Cohen is reluctant to have state enforcement of a social ethos: it would be "grotesque to try to enforce it coercively" (Rescuing 219). But this in no way precludes "social enforcement" (Justice 64) of the ethos, for example, by being subjected to criticism from neighbours, family members, and friends, or bearing social costs as a result of others’ disapproval. That is, social enforcement is possible through individuals fostering and maintaining a social ethos, the norms of which are first articulated and followed by "moral pioneers" (Rescuing 142), but then spread through and across generations.\textsuperscript{10} Cohen denies state enforcement but not social enforcement -- indeed, he endorses social enforcement as what is

\textsuperscript{10}Moral pioneers are individuals who are the first to stray from the trodden path of conventional morality and follow new ones, such as sexist husbands who are the first to become receptive to feminist critique. As the path "becomes easier and easier to follow as more and more people follow it...social pressures are so altered that it becomes harder to stick to sexist ways than to abandon them" (Rescuing 142).
entailed by an egalitarian social ethos.

However, it could be argued that the fact that personal choices evaluated from a social justice perspective are liable to social enforcement does not adequately differentiate the social justice perspective from the moral/personal perspective. After all, the personal choice to cheat on one's partner is evaluated negatively by the moral/personal perspective, and socially enforced through the social norms of honesty and monogamy. We must note, though, that there is something uniquely legitimately public in the social norms enforced through a social justice perspective. The social enforcement of evaluations from a social justice perspective are uniquely tied to our being citizens of the same political society. It is in our capacities as fellow citizens that we make evaluations upon personal choices concerning social justice, in the same way that citizens in democratic societies expect some degree of political participation from each other.\textsuperscript{11}

It is also important not to completely cross out state enforcement of a egalitarian social ethos. Evaluations from a social justice perspective regarding personal choices that affect distributive outcomes may be "proper object[s] of (non-coercive) government intervention" (Matthew 98). While I have said that a social ethos can be socially enforced and thrive without any government involvement, a government's "non-coercive" push can also go a long way. For example, governments would have it within their right to propagate educational materials in support of the aims of an egalitarian social ethos and to orient teaching practices to evaluate and influence selfish behaviour.

Tan's effort to reject possible reasons why evaluating personal choices from a perspective of social justice may be more than semantically different from evaluating them from a moral/personal perspective may in fact undermine itself: even if the normative primacy of a social justice perspective is not here established, it is certainly theoretically distinct from other

\textsuperscript{11} None of this is to deny that evaluations from social justice and moral/personal perspectives may overlap.
perspectives, and furthermore, the social justice perspective uniquely legitimizes social enforcement between citizens in a political society, as well as non-coercive government intervention. There are, then, a few ways in which evaluations from a social justice perspective are not quite the same as evaluations from other normative perspectives. Perhaps Tan would still maintain that there is only a trivial difference between the institutional and trans-institutional approaches, but this is of no concern if it does not threaten the trans-institutional claim that personal choices are subjects of social justice.

2.5 Social Ethos: Too Oppressive?

I have been stressing how the trans-institutional approach does not improperly constrain personal pursuits given the non-coercive nature of many of its requirements. However, the social ethos might nonetheless be deemed unduly restrictive. While Tan does not directly comment on the nature or necessity of a social ethos as proposed by Cohen, Tan can be said to find the social ethos requirement too oppressive. I will attempt to flesh out why Tan holds that for justice to require a social ethos is too constraining, in light of certain ideas about liberty and human agency found in Tan’s work.

But first, what is the social ethos requirement? Cohen posits that a fully just society cannot be established without an "ethos of justice" (Rescuing 2) helping to regulate personal choices. To clarify, an ethos is "a set of underlying values, which may be explicit or implicit, interpreted as a set of maxims, slogans, or principles, which are then applied in practice" (Wolff 105). These values, once applied in practice in society, come to make up a society's "normal practices, and informal pressures" ("Where the Action is" 145). An "egalitarian" social ethos would feature values such as equality and solidarity, and would manifest in social interaction that
acts upon these values. For example, Cohen claims that post-WWII Britain experienced "a social ethos of reconstruction...an ethos of a common project, that restrained desire for personal gain" (*Rescuing* 143). In such circumstances, British executives did not bother to press for higher salaries to match the salaries of those in the U.S. (*Rescuing* 143). Another example is the social ethos of ecology, where persons reduce, re-use, and recycle due to the prevailing norms of "ecological consciousness" (*Rescuing* 142).

The social ethos can be criticised for constraining individual agency to the point of being oppressive. The main idea here is that the trans-institutional approach places a large burden on the consciences of persons, regulating every potential act by placing it under judgment and thereby eliminating the possibility of going about life under one's own self-direction, whimsically, playfully, or spontaneously. In Tan's words, the trans-institutional approach does not "make it possible for persons to live meaningful and worthwhile separate lives" (*Justice* 34) nor permit for "the personal projects and outcomes, as well as the pleasures and frivolities, that are essential to a decent and rewarding life" (Dworkin 1992...) (*Justice* 81).

This burden, as I am formulating it, is distinct from the alleged burden that the trans-institutional approach institutionally or legally denies personal pursuits. Rather, it is the burden where one is constantly evaluating one's relation to justice and calculating the moves one can make to be in a position of contributing to justice; it is "the burden of asking at every instance whether a given personal transaction or decision is consistent with the requirements of social justice" (*Justice* 24). And, given that humans frequently fail in their efforts to orient themselves at all times in a healthy relationship with justice, there is a subsequent burden of feeling guilty or ashamed. As Tan says, "there are costs to the...personal pursuits" of those who choose to forgo personal actions that would benefit justice, such as becoming a doctor: "society can feel that this
person has let the disadvantaged down, or if she has a deep egalitarian conscience she may feel that she has let society down. She will suffer some egalitarian angst, so to speak, at the very least" (Justice 68).

On Tan's model of value pluralism, what may be at issue here, then, is "justice vs. freedom from surveillance judgment (FSJ)". This burden sub-branches into burdens such as "freedom from surveillance judgment by neighbours", which may come with its own strand of problems when collectivities undertake vigilante social sanctions on others, and "freedom from self-surveillance judgment". Take the case of Darlena Cunha who writes to the Washington Post. Cunha explains how, in addition to the distress of the newfound poverty in which her family found themselves, she was thoroughly embarrassed for driving her Mercedes to pick up her food stamps. A social ethos of "taking only what you need" may demand that only people who are seriously in poverty make use of food stamps: "I had so internalised the message of what poor people should or should not have that I felt ashamed to be there, with that car, getting food. As if I were not allowed the food because of the car. As if I were a bad person". This is probably too constraining: "When you lose a job, your first thought isn't, 'Oh my God, I'm poor. I'd better sell all my nice stuff!' It's 'I need another job. Now.' When you're scrambling, you hang on to

12 From Modern Family, "Under Pressure":
Hey, there, neighbour.
   Oh, hey. It's Asher, right?
Yeah. Um, I just wanted to let you know -- I think there might be something wrong with your air conditioner.
   Oh, really?
Yeah, I mean, it just seems to be running a lot, even when it's, uh, kind of cool outside.
   Oh. No, no. Um, my partner runs a little hot.
Not as hot as our planet. Sorry. I don't mean to be that guy. It's just, um, we're all in this together.
Yeah, I drive a Prius, so --
And that's a nice little gesture. My car runs on reclaimed cooking oil. I have some literature, if you want it.
   That's okay. Save the paper.
I haven't printed anything since 2004. I was gonna e-mail you.
   On your power-hungry computer? My entire house is solar-powered.
I sell energy back to the grid and use that money to save polar bears.
   I'm an environmental lawyer, so, you know, I'm pretty green.
Mm. So is your lawn.
the things that work, that bring you some comfort. That Mercedes was the one reliable, trustworthy thing in our lives" (Cunha).

Finally, this criticism from FSJ is not a claim that the trans-institutional approach is legitimate yet too costly: Tan says his "special and limited focus on institutions is not meant to...make the move toward equality less demanding on individual agents" nor is it "in order to ease the burdens of justice on persons. [Rather, t]he division marks the boundary of justice and its proper demands, rather than a compromise of justice for the sake of individual ends" (Justice 34).

There are various ways to respond to this objection. Joshua Cohen believes worries about "political regulation of private social attitudes" are misguided; what is "private" cannot be determined prior to determining what the purview of justice is, but after it (J. Cohen 385). Furthermore, a social ethos need not be a top-down government operation, but an assault on existing injustices "through cultural criticism" of the powerful (J. Cohen 386). While no doubt cultural criticism of the powerful can do some of the work of a social ethos, neither of these responses assuage what I believe is a legitimate criticism from FSJ. Cohen also seems to dismiss these kinds of concerns: to objections from an "unreasonable burden on the will" (Rescuing 203) or "the private space objection" ("If You're an Egalitarian", 25), he "conjecture[s] that the reason why people judge otherwise [than him] in the case of occupational choice is that they do not really believe in an egalitarian principle...and therefore find the prospect of complying with such a principle particularly oppressive" (Rescuing 204).

Still, there is enough in Cohen's description of his vision for a social ethos to fashion some response to the FSJ criticism. First, Cohen agrees that "it would severely compromise liberty if people were required forever to [consciously] consult such rules, even supposing that
appropriate applicable rules could be formulated" (*Rescuing* 123). That is why it is important to understand a social ethos as taking up little space in one's mind: "people internalize, and -- in the normal case -- unreflectively live by, principles that restrain the pursuit of self-interest" (*Rescuing* 73). That is, a social ethos is constitutive of social norms; social norms are those norms one follows in virtue of being part of a particular society; following norms is habitual; and habits are what one does without much thought. We might say that it is only during periods of transition, such as changing or adopting norms for a socially just society, that the FSJ criticism takes its toll: the point is that future generations follow these norms as readily as they would norms popular today like arriving to work on time, recycling one's juice boxes, and caring for others. It then "becomes not only difficult not to do it but easy to do it" (*Rescuing* 142). As Cohen puts it in an analogy, there is a family norm that a person who does house repair as a living, respects, without thought, when she fixes her cousin's toilet without asking for payment; just as unreflective should be the social justice norm of contributing what one can to the community’s distributive shares. To demand payment in the first case, or to demand incentives in the second -- "that's not how you treat relatives, and it's not how you treat fellow citizens, in a communist society" (*Rescuing* 225).

Second, Cohen says that the demands of a social ethos are not so much precise rules exacted from outside as rough and ready prescriptions, the contours of which are self-prescribed. Cohen claims that the parameters of, for example, cutting back on luxury goods like wine or donating to charity are based on "rough and ready" (*Rescuing* 219) principles, not exacting ones, and also that "we cannot say where the limit...lies: with regard to that, everyone must make her or his own principled decision" (*Rescuing* 220).
Third, Cohen denies that the judgements underlying a social ethos need to be condemnatory or appraising. He considers the "everyone must do his or her bit' principle" (Rescuing 219), that was the social norm in Britain post-World War II, an example of a social ethos; and this principle had no explicit target -- indeed there was an "inevitable uncertainty as to whom it commended and condemned" (Rescuing 219). Cohen also distances himself from having to "have a persecuting attitude" (Rescuing 142) to those who do not abide by the social ethos. So there is perhaps a relevant distinction to be made between judgements that are condemnatory/appraising and the judgments the trans-institutional approach makes. The egalitarian person who wishes to go on painting instead of doctoring, then, if she is not already granted a personal prerogative (Ch. 3), need not experience self-surveillance judgment and subsequent existential angst so much as a judgment that there is a disconnect between her beliefs and action.

This point is developed in an interesting way in the domain of global justice. Jessica Payson states that Thomas Pogge, at one point, defends the view that persons are not responsible for eradicating global injustice on the basis that they cannot be held responsible for their minimal causal impact. Payson argues that Pogge's view is wrong because he relies on a mistaken model of responsibility (Payson, 651). In cases of "structural injustice" -- that is, injustices that are not readily caused by one particular agent’s malevolent action but by many seemingly benign actions (such as the injustice of gentrification, developed by the actions of richer persons moving into poorer regions), the model of responsibility should, she argues, resemble Iris Marion Young's "social connections theory" model.

For Young, the traditional "liability model" of responsibility (i) isolates individuals in order to hold them up for scrutiny, (ii) belies the possibility of shared responsibility, (iii) sets the
individual's actions up as a deviation from the just norm, (iv) ascribes individuals credit or blame for their actions, and (v) focuses backwards on the committed deed in order to assign that credit or blame. Young contrasts this with her alternative model which recognizes that many people are involved in shared responsibility of actions that are not deviations from the norm but consistent with background conditions, and de-emphasizes the laying of credit or blame in favour of looking forward at future acts for improvement (Payson, 658). For example, when a person who believes in labour conditions congenial to workers critically examines her economic choice to purchase clothing produced in sweat-shops, responsibility does not consist in her judging her own actions in isolation as a blameworthy and odd case to be punished; rather, responsibility consists in recognizing that her actions are one of many consumers’ normal actions that would be best improved with forward-looking actions such as organizing for better labour conditions. The traditional liability model may be suitable for holding criminals responsible to criminal injustices, for instance, but Young's model of responsibility is meant to hold responsible the contributors to structural injustices.

Given this new model of responsibility, Payson argues against Pogge that individuals can be held responsible for mitigating injustice despite the negligible causal impact they might have on their own. For our purposes, Young's new model of responsibility illuminates the process of making judgements of justice about personal choices according to the trans-institutional approach. Making judgments of justice should not, need not, play a psychologically surveilling and traumatizing role in the process of achieving egalitarian justice, as is it might occur in the liability model of responsibility. Making judgements of justice about personal choices according to the trans-institutional approach should follow Young’s model of responsibility. The point is not to surveil and highlight the doctor-gone-painter's decision not to doctor as an example of a
misdeed contra egalitarian justice that ought to be blamed; but rather, to raise awareness or raise consciousness of the everyday personal choices we make that impede achieving egalitarian justice so that we can better address them. Even if the doctor-painter chooses to forgo doctoring, making judgements of justice does not entail surveilling her and blaming her.

Finally, as mentioned in passing, Cohen concedes to Samuel Scheffler the possibility of a "personal prerogative", or the freedom to pursue one's interests apart from the demands of justice (Rescuing 61). The FSJ criticism, whatever its worth now may be, cannot apply insofar as persons are granted some freedom from the demands of justice in the form of a personal prerogative. The personal prerogative move is developed further in Ch. 3.

2.6 Conclusion

In the first part of this chapter, I argued that the trans-institutional approach is not a failed approach for not accommodating value pluralism. Value pluralism, unravelled from legal pluralism, is by no means the standard presumption. What is the standard presumption is that we do not want to legally regulate all personal pursuits (legal pluralism) even if they affect the distributive outcome. Cohen and the trans-institutional approach can be committed to legal pluralism without any internal contradiction.

However, Tan offers a related argument worth considering. One of Tan's most interesting claims is that the debate between the institutional approach and the trans-institutional approach "reflects...a deeper disagreement as to what political philosophy aims at" (Justice 82). The trans-institutional approach operates according to the view that political philosophy takes an interest in "personal interaction and potentially even personal conscience or character" (Justice 82), rendering it "indistinguishable from other matters of morality, such as personal ethics
On the other hand, the institutional approach operates according to the view that political philosophy does not venture into morality beyond institutions, rendering it distinct from other matters of morality. That is, Rawls's view of political philosophy is "modern" (Justice 82) in that it depends on Kant's characteristic discontinuity between duties of virtue and duties of right: "justice is possible even in a nation of devils" (Justice 83). Cohen's view of political philosophy is more "ancient" (Justice 83); justice is not achievable without "right character, i.e. just individuals" (Justice 83). For Cohen, the question of "how we ought to live together?" requires answering "how ought I to live my life?" ("Personal Pursuits" 362). That is, justice demands not only basic "political virtues" for "citizenship" but "good persons" ("Personal Pursuits" 362). Cohen admits justice requires such a "revolution in the human soul" (Cohen 2000:3)" (Justice 83 f.22).

Tan claims that "one cannot return to the ancient conception without rejecting the idea of individual freedom" (Justice 83). This is because the philosophy of the ancients concerns itself with the private minds, characters, and lives of persons, at the expense of "the legitimate plurality of personal ends" (Justice, 83). By analogy, so does the trans-institutional approach; it must be rejected on the grounds of value pluralism.

It is possible to again raise the point that legal pluralism, and not value pluralism, is doing most of the normative work in Tan's argument; and that the trans-institutional approach can be committed to said legal pluralism without internal contradiction. But there are also other reasons to distance Cohen's trans-institutional approach from the philosophy of the ancients. For example, it is a mistake, I think, to say that Cohen's style of political philosophy takes an interest in private minds, characters, and lives in themselves; rather, it is because minds, characters and lives influence, through personal choices, distributive outcomes, that they are given
consideration. That is, recall that Cohen claims that his "own fundamental concern is neither the basic structure of society, in any sense, nor people's individual choices, but the pattern of benefits and burden in society...[i.e.] the upshot of structure and choices alike" (*Rescuing* 126). If his political philosophy extends its concern to personal minds, characters, and lives, it is only instrumentally, insofar as they connect to the patterns of benefits and burdens in society.

Furthermore, it should be made explicit that although Cohen's style of political philosophy shares with "other matters of morality, such as personal ethics" (*Justice* 82) a concern with private minds, characters, and lives, it does not necessarily collapse into these other matters of morality. For example, there are matters of morality that the trans-institutional approach to egalitarian justice need not necessarily concern itself with, such as an individual cheating on her romantic partner (unless, incidentally, the theory of egalitarian justice in question is, for example, a welfarist theory which focuses on happiness, satisfaction or the meeting of preferences that would take into account in its distributive calculations the unhappiness a romantic partner feels about being cheated on). The trans-institutional approach to egalitarian justice can be applied to non-welfare based theories. So, although Tan's historical insight is interesting and may shed light onto Rawlsian and ancient political philosophy, the analogy with the institutional and trans-institutional approaches does not fit well enough to toss the trans-institutional approach out with the ancients.

In the second part of this chapter, my aim was to shift the discussion from the proposal that there is a meta-ethical divide about value pluralism at the heart of the debate between the two approaches, to what it means to be a "subject of justice" (Rawls 3), or to apply principles of justice, in the first place. I argued that the trans-institutional approach understood as applying, through normative judgements and not necessarily institutional rules, principles of justice to
persons, is not merely semantically different from the institutional approach: being able to
normatively judge persons from the perspective of social justice is different from judging them
from some other moral/personal perspective (a perspective which Rawls does not rule out).
Finally, I have tried to assuage the criticism that a social ethos involves constant surveillance
judgment, by sketching out what a social ethos is meant to look like and the different ways we
can think about judgment.
Chapter 3: Cohen and the Personal Prerogative

3.1 Introduction

In the last chapter, I argued that the trans-institutional approach cannot claim superiority over the institutional approach on the basis that it exclusively can accommodate value pluralism because there is in fact no standard presumption towards value pluralism as opposed to value monism. This was not to deny that trans-institutionalists like Cohen can be value pluralists to some degree. That is, if Cohen accepts an "agent-centered prerogative" (Scheffler 120) to depart from the demands of egalitarian justice, as he does, this may mean that egalitarian justice is not the only basis for the good; we morally value personal prerogatives, too. If the trans-institutional approach does adopt a personal prerogative, principles of justice still apply to persons as well as institutions, but persons are sometimes granted a pass.

However, Cohen's acceptance of a personal prerogative faces a number of criticisms. For Tan, given value pluralism, there is a need to know how to balance multiple values, yet Cohen's move fails to tell us "how to balance the demands of egalitarian...[justice] with the demands of [the] personal prerogative" (Justice 31). Merely positing the possibility of a personal prerogative "does not answer the basic question: how do we determine in a principled manner legitimate personal prerogatives?" (Justice 31) or "[how do we] determine and identify the space of prerogatives to deviate from justice [?]" (Justice 193). Without an answer, persons will not know how to act in accordance with the demands of justice. The institutional approach attempts to answer these questions: the principle is that one is granted a personal prerogative in the space beyond what just institutional rules require (Justice 31).

While Tan may be right to push for a developed account of personal prerogatives and their interaction with justice, it is not so clear whether the institutional approach's own account is
justified. The institutional approach claims that, in light of the argument from value pluralism, the appropriate space for personal pursuits is that which is beyond institutional rules and the need for their support, establishment, and compliance. Yet, if I have argued persuasively so far in defending the trans-institutional approach from the value pluralism argument, it is not clear that the appropriate space for personal pursuits is as the institutional approach suggests. Without the argument from value pluralism, drawing the boundary for the appropriate space of personal pursuits at institutions is in need of explanation. Therefore, it is not clear to me that Tan's challenge to Cohen here is so pressing in the context of the debate between the two approaches to justice.

Nevertheless, many philosophers have noted how Cohen leaves his personal prerogative undeveloped (Macleod 183; Titelbaum 322). Providing some clarification and development on the role of the personal prerogative and its interaction with justice would prove fruitful in understanding what Cohen's trans-institutional society looks like. In this chapter, I lay out a number of ways in which we can answer Tan's question of what the proper size of a personal prerogative is. In particular, I will consider Cohen's own contextualist views and Michael Otsuka's work on personal prerogatives. In this process, I will also be able to comment on one other criticism of Cohen on personal prerogatives, and the implications for the trans-institutional approach: those of David Estlund in his essay, "Liberalism, Equality, and Fraternity in Cohen's Critique of Rawls". I will find that we are probably best equipped to answer Tan's question with Cohen's contextualist approach coupled with a prescription to reduce the size of Cohen's personal prerogative.
3.2 Cohen on the Personal Prerogative

Cohen accepts that "only an extreme moral rigorist would deny" (Rescuing 61) a Schefflerian "agent-centered prerogative" (Scheffler 120): that is, the idea that "every person has a right to pursue self-interest to some reasonable extent" (Rescuing 61), which precludes the necessity for "full self-sacrificing restraint in favor of the worst off" (Rescuing 10). Pushed by Estlund, Cohen includes in the personal prerogative not only the pursuit of self-interest but other-directed interests too (such as pursuing a loved one's well-being) (Rescuing 390). Cohen qualifies the prerogative as being "modest" (Rescuing 61) such that there is no prerogative to incur great inequalities in society. The personal prerogative should be distinguished from compensation for persons under "special burdens" (Rescuing 55): there, persons who undertake especially difficult tasks to contribute to justice (such as 24-hour working doctors) ought to be compensated in way that departs from equal distribution of goods to all. The personal prerogative, on the other hand, grants all persons the licence to depart from equal distribution of goods.

It is not exactly clear how Cohen understands the personal prerogative: whether it is accepted as an intrinsically morally valuable good consistent with or even part of "fundamental normative principles" (Rescuing 253) (such as we might see in a value pluralist who values both the personal prerogative and justice), or whether it is accepted as a "rule...of regulation" (Rescuing 253) (a rule that is not ideally just but practical to implement given the facts of the situation, such as the improbability that persons will conduct self-sacrificing restraint on all their actions). Freeman claims in passing that Cohen understands it as the latter, and that this is particularly egregious; we should not speak of personal prerogatives as excuses from applying justice but rather as inherently valuable in themselves (Freeman 100 f.22). Freeman may be
right to characterize Cohen's personal prerogative as an excuse from justice: Cohen frames the personal prerogative as a "right to" (Rescuing 10) depart from justice; and as we have learned from the last chapter, such a right, though granted, is not free from evaluative scrutiny in its exercise. Yet there is no obvious indication that Cohen sees the personal prerogative as an excuse from justice, or in other words, as reducing his theory of justice to "rules of regulation" theorizing: he frequently refers to it as a "principle" (Rescuing 63) and he "does not aim to impugn the integrity of a conception of justice that allows" (Rescuing 71) for it. It is also not exactly clear why Cohen concedes the personal prerogative point to Scheffler. Cohen's original formulation of the personal prerogative "grants each person the right to be something other than an engine of the welfare of other people: we are not nothing but slaves to social justice" (Rescuing 10). It remains unclear whether this phrasing indicates Cohen accepts the personal prerogative due to a commitment, as we have previously noted, to the Kantian principle not to treat persons as mere means (Rescuing 220), or a commitment to value pluralism because of the inherent value in the personal prerogative, or both.

Tan's question, though, is what the size or scope of a personal prerogative is. Cohen's answers are resoundingly contextualist. They are contextualist in the sense that they refuse to prescribe standardized rules of what is right in any given situation. Andrew Williams argues that Cohen's social ethos, in failing to publicly articulate the exact demands of justice, cannot be required by justice because "justice must be seen in order to be done" (Williams, 246). Cohen’s reply is that justice "doesn't require precision of application" (Rescuing 354); "it can be unclear what justice requires in certain context, but it doesn't follow that justice can't be fulfilled, or violated, in that context" (Rescuing 357). In his example of the communal camping trip, one does not know the exact rules for how much one ought to share and take from the camping stock
of resources, yet one can readily manage to be a good camping mate regardless (Rescuing 371). Likewise, the size to personal prerogatives cannot be determined by a systematic answer but will differ from context to context. And from person to person: it is up to everyone to decide for themselves their own prerogative (Rescuing 220).

### 3.3 Rules of Thumb

Even on Cohen's contextualist view, general patterns may be discerned. Alan Thomas, for instance, proposes the following general rule of thumb: "the greater the relative gap between a worst off person and a better off person, the less justification the better off person has in fully exercising his or her prerogative" (Thomas 1114). That is, the size of one's personal prerogative expands and contracts depending on the severity of injustice in the milieu.

One might also look to Cohen's work on inter-personal tests and justificatory communities. Cohen argues that in a "justificatory community" (Rescuing 43), or a community of people who follow the norm of justifying their actions to one another, actions can be tested for justification via the "interpersonal test" (Rescuing 42). The inter-personal test is the test of the action-taker uttering the justification for her actions to those whom it will affect. If the action-taker cannot successfully justify her actions, the action does not pass the test and ought not to be taken. For example, though the statement shared among the poor, "we ought to lower taxes so that the rich do not emigrate with their investments" may be justified, the rich uttering "lower the taxes or else I will emigrate with my investments" to the poor is hardly justifiable. We may consider the inter-personal test a general rule of thumb in determining the size of our personal prerogatives. Presumably, each human being will want or at least understand the want for his or her own prerogative to depart from egalitarian justice; therefore, the inter-personal test will likely
grant a personal prerogative and give guidance as to how large that prerogative ought to be. The inter-personal test is not totally foreign to the Rawlsian tradition of providing public reasons acceptable by all for proposed policy.

But this mechanism is not as helpful as it may seem. This is because relying on the inter-personal test to demarcate the scope of personal prerogatives is circular. That is, if we are wondering what constitutes a just social ethos, in terms of the space allocated for a personal prerogative, we cannot refer to the existing social ethos in order to find our answer. The inter-personal test will count at least some phrases as justified or unjustified on the basis of the existing social ethos: with a social ethos of communal self-sacrifice, there will be little to no prerogative granted, and with a social ethos in the liberal individualist tradition, the prerogative granted may be larger. Cohen especially would resist a "constructivist" (Rescuing 272) answer to the question of the size of personal prerogatives; the principles of justice, and presumably also its limitations, should not be determined by "a sound selection procedure" (Rescuing 274) like the inter-personal test, but what is acceptable from "the point of view of justice alone" (Rescuing 275). I imagine, then, that Cohen's inter-personal test is meant to pick out what is just or unjust independently of the test, and can do this successfully even in a society with an imperfect social ethos such as ours.

3.4 Otsuka and Estlund on Personal Prerogatives

One prominent alternative to determining the size of one's personal prerogative is to do away with the notion of a personal prerogative altogether. Whereas David Estlund seeks to undermine the trans-institutional approach by way of the personal prerogative, Michael Otsuka argues that egalitarians are misguided in accepting exceptions to the norms of justice in this way.
I will question Estlund's argument, and argue, against Otsuka, that a personal prerogative should be dismissed altogether. Cohen mentions that there is promise in Otsuka's argument but that he is not himself convinced (*Rescuing* 389). In this section, I hope to explain why that might be.

In his 1998 paper, David Estlund argues that the size of the personal prerogative expands dramatically if we recognize that the personal prerogative should not be limited to pursuing self-interests but also other-directed interests (Estlund 101). There are moral obligations arising out of inter-personal relationships that override the demands of social justice, such as obligations of affection to loved ones and obligations to redress certain moral harms. For example, Paul has an obligation to negotiate for a higher government salary in order to pay for his wife Pauline's fashion school tuition fees that trumps the demand of social justice to accept a lower government salary (and leave Pauline an accountant against her dreams) (Estlund 104). Estlund does not only limit the personal prerogative to cases where the moral obligations to one's inter-personal circle override social justice concerns; the personal prerogative should allow all actions "of a moral nature even though their moral weight is not greater" (Estlund 102) than social justice. After all, Cohen's personal prerogative was originally formulated in order to allow room for a person to pursue self-interest -- Cohen could hardly object to it including helping others. The bigger the size of the personal prerogative, the less social justice demands of us. If the trans-institutional approach is about persons being obligated to fulfill the same principles of justice as those exacted of institutions, it is in fact undermined because there are so few cases where social justice cannot be excused with the personal prerogative. In this way, Estlund does not completely deny the trans-institutional claim but greatly undermines its applicability and relevance (Estlund 112).13

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13 With this argument, Estlund also happens to prove that justice allows for more inequalities than Cohen would admit.
Cohen blocks the force of Estlund's argument in his 2008 book: he admits that while the number of actions that may count as a personal prerogative increases, the size of the personal prerogative does not necessarily increase by that much, as persons can choose what to fit into their personal prerogative (Rescuing 392), as if it were a mildly elastic compartment with only so much space. So, he doubts that the personal prerogative has become so large as to render void the trans-institutional claim that persons are subject to the demands of justice. We might ask Cohen why it is that the personal prerogative is only granted so much space, however. If, as Estlund argues, there are many actions that qualify as personal prerogatives, why is there a limit to how many such actions persons are permitted to pursue? Presumably, the answer will tie into the reason for Cohen granting a personal prerogative in the first place: to preserve "the right to be something other than an engine of the welfare of other people: we are not nothing but slaves to social justice" (Rescuing 10). It seems that a social justice-free compartment for each is enough to preserve the right not to be a slave to social justice.

Michael Otsuka provides a different response. Otsuka argues that the trend to posit personal prerogatives is altogether misguided. If right, Otsuka manages to block Estlund's argument, but at the cost of negating Cohen's statement that a personal prerogative may be justified. With regard to the Paul and Pauline example, Otsuka demands clarification: is Paul negotiating for a higher salary in order to simply lift Pauline from below average-level distribution of goods (Otsuka presumes the good to be distributed is welfare) or it is to increase her position to above the average (Otsuka 98)? If the former, then it is misguided to posit a personal prerogative "to depart from a welfarist version of equality" (Otsuka 99) -- Paul is only securing the equal share of goods Pauline deserves (although it may not be as great "a move in the direction of greater equality" (Otsuka 99) as it would be if he did not demand more from the
government budget).\textsuperscript{14} If the latter, egalitarians are not justified in asserting a personal prerogative: there is no justification for a personal prerogative to depart from equality. Here, Otsuka employs a number of arguments: first, given a hypothetical government distributing goods, "it would make no sense for the government to give the one person more land than the other on the grounds that this is licensed by the one persons' agent-relative prerogative to favour his own interests over those of strangers" (Otsuka 101); likewise, when two persons come across a plot of land, "it is clear that the one person ought to leave...as good" for the other person (Otsuka 101). And personal prerogatives that are other-directed are no more justified those that are self-directed: most egalitarians would agree that, even if basketball-goers choose to give away their share of an equal distribution to Nozick's Wilt Chamberlain character, Chamberlain ought to be taxed his extra goods (Otsuka 102); justice ought to reverse any so-called personal prerogative to better the position of others beyond equality.\textsuperscript{15} Therefore, in the case where Paul's action is to increase Pauline's share of goods to the average, positing a personal prerogative is misleading, and in the case where Paul's action is to increase Pauline's share of goods to above the average, positing a personal prerogative is unjustified.

Otsuka denies that the first interpretation of the Paul-Pauline example is a case of a personal prerogative to depart from equality because Paul is in fact attempting to move towards the securing of equality. On the one hand, Otsuka is right that Paul's actions are not \textit{fundamentally} at odds with egalitarian justice, in the sense that Paul does not attempt to benefit Pauline beyond what she would get under ideal conditions of justice. On the other hand, this

\begin{itemize}
\item \textsuperscript{14} Of course, one of the difficulties with engaging with Otsuka is that he explicitly commits to a welfare metric of distributive goods. Whereas under a welfare metric we can measure the welfare Pauline gets by pursuing a new occupation, and compare it with the average distributive welfare share, it is less obvious on a non-welfare metric whether Pauline's pursuing a new occupation goes above an average share of distributive good.
\item \textsuperscript{15} Otsuka also argues that personal prerogatives posited to allow persons to pursue friendship and love and other seemingly very personal associative pursuits are "illusory" (Otsuka 103). For our purposes, Otsuka rightly draws attention to the fact that determining the scope of a personal prerogative will be incomplete without determining what exactly ought be distributed -- welfare, resources, etc.
\end{itemize}
argument seems somewhat disingenuous: equality, or egalitarian justice, should be implemented in an impartial fashion whenever possible. Not only would Paul's actions depart from justice as impartial equality, it would likely be a rather inefficient means of securing egalitarian justice; if everyone were to act like Paul, our society risks facing serious collective-action problems in achieving justice. Therefore, it is not completely accurate to say that since Paul's actions are consistent with justice, we need not grant a personal prerogative to depart from justice. I do not think that Otsuka can help Cohen combat Estlund's argument in this case.

However, Estlund's argument could be significantly countered if we can show that personal prerogatives that are fundamentally at odds with egalitarian justice should not be permitted. In the second interpretation of the Paul-Pauline example, where Paul secures Pauline's distributive goods to above the average, Otsuka denies a personal prerogative because it would be detrimental to an egalitarian distribution and would thus fail to be morally justifiable. I agree with Otsuka's argument that this case runs contrary to the bulk of egalitarian intuitions. However, it is not clear that either Cohen or Estlund think of personal prerogatives as "morally justifiable" to egalitarians -- the point of a personal prerogative is that it allows departure from egalitarian justice. Perhaps for both Estlund and Cohen, personal prerogatives are not meant to be morally justifiable, but morally excusable. This route would not be consistent with many value pluralists who take issue with the idea of personal prerogatives being "excuses" and not values in themselves, including Samuel Freeman (100 f.22), Paula Casal (13), and presumably Tan himself. But it is a way out for both Estlund and Cohen from Otsuka's argument to discard personal prerogatives like interpretation 2 of Paul and Pauline. When discussing whether actions like Paul's can count as morally excusable ones, the answer may even come down to value pluralism -- are there moral values beyond egalitarian justice?
In response to Tan's question (how big is the personal prerogative?), then, we are left with a rough picture. First, it is clear that Type 1 examples, where Paul's actions for Pauline (or Paul's actions for himself) are not fundamentally at odds with justice as they are in Type 2 examples, should count as personal prerogatives. Both Estlund and Cohen count them as such, and although Otsuka denies the concept "personal prerogative" for this type (which I have argued is misleading to do so), he does grant this type of action is acceptable insofar as it is in general alignment with the aims of justice. However, this kind of personal prerogative is a different breed from Type 2 examples, where Paul's actions for Pauline are fundamentally at odds with justice. It is up for grabs whether the personal prerogative should include those, or indeed, any examples that are simply not Type 1. As I have argued, Otsuka's argument against granting Type 2 examples as personal prerogatives does not succeed if Cohen and Estlund mean for the personal prerogative not to be morally justificatory but indeed morally excusable.

However, I think it would be wise for Cohen to shrink his personal prerogative so that it only includes Type 1 examples, plus, give or take, on a contextualist basis, other kinds of examples. Cohen's personal prerogative, then, would become narrower in size than he intended: Cohen's original acceptance was of a *self-directed* personal prerogative that was not qualified in any way except that it is to be "modest" so that it does not generate great inequalities; now, the personal prerogative would shrink to only those actions that are morally justifiable, such as in interpretation 1 of the Paul-Pauline example, give or take, on a contextualist basis, other kinds of examples. That is, I am inclined to think a personal prerogative is up to each person's determination with the general prescription that we ought to try not to pursue prerogatives that are fundamentally at odds with egalitarian justice; we should probably limit the prerogative well before it has the potential to cause great inequalities.¹⁶ This is in part because Cohen's original

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¹⁶ I imagine that one rule of thumb, in following this general prescription, is to prioritize negative duties to justice, or
intent in granting the personal prerogative was to allow that persons are not slaves to social justice; to not be a "slave" is not a tall order to meet (which would suggest a smaller rather than larger space for personal prerogatives), and it is likely a task a person can determine the boundaries of on her own.

Furthermore, if we are at all pressured by Estlund's argument that too large a personal prerogative undermines the trans-institutional claim (that principles of justice apply to personal choice), despite Cohen's own response to Estlund, it would be wise to ensure the personal prerogative does not bloat too much in size. My position leaves Cohen with a resoundingly monist-looking picture in favour of egalitarian justice. Although we started this chapter in the hopes that Cohen and Tan could reconcile over value pluralism, it seems that the trans-institutional approach does indeed favour egalitarian justice on most occasions. It is of course no great harm, seeing as value pluralism, as I have argued in Ch. 2, is not necessarily the standard presumption.

3.5 Conclusion

Given that Cohen had accepted that a personal prerogative to depart from the demands of egalitarian justice may be justified, Tan had posed the question of what the boundaries of such a personal prerogative would be under the trans-institutional approach. It is no real disadvantage to the trans-institutional approach if it refuses an answer, completely deferring to considerations of context -- after all, the institutional approach limits the personal prerogative without a justified explanation. Still, after engaging with a number of possibilities (Cohen's contextualist denial of a systematic answer, and Otsuka's argument that we should abandon personal prerogatives not resisting justice, over positive duties, or contributing to justice. And, as mentioned in Sec. 3, other rules of thumb include: Thomas's rule that duties decrease relative to decreased injustices; and Cohen's rule that we ought to pursue duties with some consideration as to what we can justify to others.
altogether), I am inclined to think a personal prerogative is up to each person's determination with the general prescription that we ought not to pursue prerogatives that are so fundamentally at odds with egalitarian justice. If not, if a personal prerogative were any more extensive, this leaves the trans-institutional approach susceptible to Estlund's argument that the demands of egalitarian justice on persons too often do not apply. My position leaves some room for values other than egalitarian justice at times, but not so much that the trans-institutional position is undermined.
Chapter 4: Tan's Other Arguments

4.1 Introduction

In the first chapter, I defended the trans-institutional approach from Tan's argument that it favours justice at the expense of personal pursuits. I argued that while the trans-institutional approach might not concede that personal pursuits are more valuable than egalitarian justice (value pluralism), it does not necessarily institutionally or legally restrict personal pursuits (which would be a violation of legal pluralism), which is the more important point. That was Tan's over-arching argument for the institutional approach and against the trans-institutional approach. In this chapter, I consider Tan's other arguments. Though they are brief, they are many and worth considering.

4.2 The Arguments from Non-Ideal and Ideal Institutional Conditions

Tan has frequently articulated his view that the trans-institutional approach entails a significant infringement on the personal pursuits of persons. However, Tan says that "the force of Cohen's criticism is really felt" (Justice 80) in "non-ideal conditions" (Justice 79). That is, this significant infringement is actually valid under non-ideal institutional conditions, or "when there are no just institutions and institutional rules to speak of, or when existing just institutions are under clear and present threat" (Justice 79). Personal pursuits indeed ought to be significantly curbed by justice.

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17 Which I more accurately label non-ideal institutional conditions.
18 Tan believes that Cohen's trans-institutional approach is not mainly directed at non-ideal institutional conditions but that he actually "takes himself to be making a conceptual point about ideal justice (ibid.: 68f.)" (Justice 80). I doubt this. It is perfectly true that Cohen speaks as if his trans-institutional approach applies under ideal institutional conditions: "My principal contention about Rawls is that high fliers would forgo incentives properly so-called in a full compliance society governed by the difference principle [my emphasis added]" (Rescuing 85). However, the ideal institutional conditions here described are according to Rawls's theory of justice which includes the difference principle. Cohen has, independent of his trans-institutional approach, argued that the difference principle cannot
As soon as Tan recognizes the virtue in his opponent's view, however, he argues that the institutional approach fares just as well under non-ideal institutional conditions: the institutional approach requires persons to "establish, support, and maintain just institutions" (Justice 79); and this requirement will naturally entail a more significant infringement on personal pursuits in conditions where those institutions are not established or under threat. Under non-ideal institutional conditions, the institutional approach could require persons "to forego personal pursuits that they would otherwise be free to enjoy" (Justice 79) and even be prepared to make "personal sacrifices" (Justice 80) in order to "secur[e] the basic preconditions of justice" (Justice 80). For example, during wartime, justice may require conscription of persons (Justice 79). And in a severely distributionally unequal societies, persons should not be as free to "pursue non-egalitarian ends" (Justice 80). Tan limits his understanding of non-ideal institutional conditions to those conditions that are fairly severe in nature: outlaw societies, states of medical emergencies, natural disasters, war, and "societies marked by severe distributional inequality" (Justice 80).

Tan therefore shows that the trans-institutional approach cannot claim that the institutional approach evades justice in non-ideal institutional conditions. Now, "in order to be on target, a criticism of the institutional approach has to fault it for allowing space for personal pursuits in the context of just institutional rules [i.e. ideal institutional conditions]" (Justice 49). I agree with Tan that there is a basis from within the institutional approach to encroach upon personal pursuits under non-ideal institutional conditions. It is perfectly reasonable that the institutional approach would demand more of persons under these conditions; according to the institutional approach, persons are given a pass from doing much for justice in their own actions count as a principle of justice (Rescuing 151). Therefore, it is by no means the case that Cohen takes himself to be primarily making a conceptual point about the trans-institutional approach applying to truly ideal institutional conditions.
because just institutions take care of injustices; but under non-ideal institutional conditions, the institutions otherwise responsible for dealing with injustice are under threat or not in place. On this point, the institutional approach and trans-institutional approach converge, and, importantly, the trans-institutional claim that principles of justice should apply to personal choices is confirmed.

But it would not be completely accurate to say that the two approaches fare the same, in terms of avoiding charges of evading justice, under non-ideal institutions. This is because Tan's definition of non-ideal institutional conditions is fairly narrow: where there are no institutions or else where there is extreme institutional breakdown or imminent threat to them (Justice 79). Tan is therefore relying on a dichotomy in the world between extremely non-ideal institutional conditions (where institutions require support, establishment and maintenance) and ideal institutional conditions (where they do not). In actual fact, there is a grey area of conditions in between the extremely non-ideal and the ideal that he does not address. Presumably, such conditions do not require the support, establishment and maintenance of institutions and therefore are not a matter of justice on the institutional approach. Therefore, the two approaches still differ on a great number of cases under an expanded notion of non-ideal institutional conditions. While I shall not argue directly that the trans-institutional approach should apply in such cases, it should be noted that Tan cannot claim convergence between the two approaches in these cases.

Tan, though, believes that the institutional approach has successfully dealt with any concern over evading justice in non-ideal institutional conditions, and goes on to argue that it can also deal with that concern under ideal institutional conditions. Tan argues that his approach has ways of detecting and remedying inequalities so that we do not have to make recourse to
investigating and regulating personal choices as the trans-institutional approach would: "[i]n short, institutional justice properly understood and properly secured need not succumb to excessive inequalities" ("Personal Pursuits" 345).

The first reason for this view is that justice on the institutional approach is purported to be sensitive to the fact of the "fragility of justice" (Justice 45): the fact that just institutions may become unjust or permit unjustified inequalities over time. Tan says that such "excessive and potentially unjustified inequalities...can arise through the just conduct of individuals" (Justice 44), presumably because an exclusively institutional approach to justice will allow persons to pursue personal choices that contribute to "cumulative disparit[ies]" (Justice 44). That is, "[e]ven when individuals act fairly, 'the invisible hand guides things in the wrong direction and favors an oligopolistic configuration of accumulations that succeeds in maintaining unjustified inequalities...' (Rawls 1993: 267, 266–7)" (Justice 44). The institutional approach is sensitive to the fragility of justice, in that it detects such inequalities and "can take care of" them (Justice 46) through institutional reform.

The second reason for the view that the institutional approach can deal with unjustified inequalities in ideal institutional conditions is that justice on the institutional approach runs according to a "mutual dependency of principles of justice" (Justice 45): no single principle of justice should be viewed alone but rather holistically in tandem with other principles. For example, the difference principle must be understood in tandem with other principles about redistributing wealth; although the difference principle can lead to "wealth accumulation over time and across generations that can possibly undermine egalitarian justice", other principles of justice may mandate higher taxes or a new estates tax (Justice 45).

And the third reason for the view that the institutional approach can deal with unjustified
inequalities in ideal institutional conditions is that just institutions will produce "educative effects" on persons (Justice 54). This is the empirical thesis that just institutions influence the attitudes, behaviour, and ethos of persons and societies to be more just, and namely to exhibit "strong mutuality and reciprocity among its members" and an "inculcated sense of solidarity for their fellow citizens" (Justice 54). That is, insofar as the institutional approach aims to render institutions just, it renders persons just, too, because the behaviour of persons may be rooted in institutions. If this is right, then we have no need for the trans-institutional approach to apply justice to personal choices.

We should note that all three of these reasons only apply in the most ideal of institutional conditions. That is, in the gray area between extremely non-ideal institutional conditions and extremely ideal institutional conditions, there are times when the fragility of justice goes unaddressed (for example, when cumulative inequalities linger), when principles cannot mutually depend on each other because one part of the holistic system is not perfectly implemented, and when the educative effects of just institutions do not kick in because not all institutions are just. Therefore the concern raised earlier about how the two approaches differ on this set of "gray" conditions stands.19 Furthermore, these three claims about what institutions do and look like under ideal institutional conditions are not without criticism. For example, the third reason, educative effects, relies on the hopeful if not also determinist empirical thesis that just institutions inculcate just personal behaviour. Joshua Cohen argues that this requires endorsing "a set of substantive assumptions about how social arrangements work, assumptions about the pervasive influence of social institutions on political-economic outcomes and on culture and identity" (J. Cohen 384).

19 It could be said that a social ethos, too, would fail under gray "non-ideal social ethos conditions" but the point is that the trans-institutional approach at least recognizes the injustice present in that.
However, let us presume that these are three good reasons to believe that the institutional approach can effectively deal with unjustified inequalities produced by personal choices under ideal institutional conditions and the unaccounted for ("gray") non-ideal institutional conditions alike. Even then, both reason 1 (sensitivity to the fragility of justice) and reason 2 (educative effects) effectively concede one of the two claims put forward by Cohen's trans-institutional thesis that I aimed to defend: that personal choices are a subject of justice. Both reason 1 and 2 attempt, through institutional means, to respond to and prevent, respectively, inequality-producing personal choices. Of course, Tan has already conceded from the start that personal choices can produce inequalities (*Justice 34*); however, with this argument, he is actively attempting to deal with these inequalities as if they matter to justice. So if Tan argues in this way, he is conceding almost half of the trans-institutional thesis. If the trans-institutional approach and institutional approach can be brought together in this way, the only question that remains is why Tan does not recognize the legitimacy of a social ethos in facilitating changes in personal choices.

To return to the argument with which we started in this section, Tan demonstrated that the institutional approach can deal with unjustified inequalities under (extreme) non-ideal institutional conditions. In so doing, he claims to have provided an alternative to the social ethos in regulating personal choices: "that...[the institutional approach] may require significant personal sacrifices under seriously unjust conditions... is still distinct from saying that persons will have to adopt an ethos of egalitarian justice as a way of life through and through" (*Justice 81*). Tan only requires that everyone put in "their fair share in restoring just institutions in their society" (*Justice 81*) not that "persons...forfeit all of their personal lives in the name of combating injustice" (*Justice 81*) as an egalitarian social ethos presumably would. As for this
claim, I have already argued that Tan mischaracterizes what a social ethos looks like and how much it demands of persons. In Ch. 2, I argued that we cannot say that justice does not require a social ethos on the basis that it is daunting or overbearing. Perhaps there are other reasons yet to hesitate on this front, but they must be formulated anew.

4.3 The Argument from the Slavery of the Talented

Tan’s refrain has been that the trans-institutional approach entails a significant infringement on the personal pursuits of persons. In this vein, Tan argues that the trans-institutional approach faces another problem: it unfairly demands more from some than others. For example, the trans-institutional approach would require a person who is highly talented at being a doctor to forgo being a poet; yet, another person only talented at being a poet faces no such demand to forgo their preferred occupation. While this "perhaps is not a case of the 'slavery of the talented' in a blatant form; it is nonetheless a slavery of the talented of a sort, one might say, for the talented is required to make sacrifices that the talentless are not" (Justice 68). The multi-talented person "is held to a higher moral standard" (Justice 69), and even if she does not forgo being a poet, she is unfairly left with "moral qualms" (Justice 69) that the mono-talented person is not.

From the points I have argued in previous chapters, it is important to remember that the unfair "burden" being distributed on the talented here if she chooses not to forgo poetry as an occupation, which is within her institutional right whether or not the act in question is within her personal prerogative, is not primarily meant to blame or judge her as a good or bad person. Admittedly, however, there is an imbalance in the distribution of the burden, moral qualms. But such imbalances in moral standards occur not only in personal economic choices, which the
trans-institutional approach happens to take an interest in, but also in complying with institutional rules. For example, a talented person might be a more efficient worker and therefore make more income, yet be taxed at the same or higher percentage as less efficient workers -- in a very real sense, she is held to a higher moral standard in that she contributes more, due to her skill set, to egalitarian justice than others.

We might think, though, that egalitarian thinkers sympathetic to Marx’s view, "from each according to her ability", would not lower the taxes on this efficient worker. Of course, if the efficient worker's well-being is degraded in some serious way, justice ought to compensate for such a "special burden" *(Rescuing 55)*; but likely neither the efficient worker nor the multi-talented person is saddled with so much or the right kind of moral burden so as to warrant compensation. But even if this assessment of both workers is incorrect, and they are both indeed unfairly held to higher moral standards, the analogy between the two kinds of workers stands; the problem of unequal moral standards is not unique to the trans-institutional approach, but to any theory of egalitarian justice, including the institutional approach.

It is for that reason that I believe the force of the argument here may be a result of the inherent value we consider there to be in the freedom of occupation, and our desire not to see it curbed by egalitarian justice. In Ch. 2, I argued that value pluralism is by no means the standard presumption, and specifically doubted the presumption that personal pursuits leftover after complying with and supporting just egalitarian institutions are more morally valuable than egalitarian justice. However, Paula Casal argues that there is at least one case of personal pursuits that we clearly must value over "egalitarian justice beyond institutions": freedom of occupation. If this is right, then the trans-institutional claim that principles of justice should apply to personal choices is undermined where the personal choice of freedom of occupation is
concerned. In this passage, Casal argues that freedom of occupation is without a doubt a moral value that we must affirm despite its tension with egalitarian justice:

There is perhaps no other question quite as important as the one we are often asked in childhood, ‘What do you want to be in life?’ Answering it involves reflecting on almost everything we know about ourselves: our character, talents, flaws, values, commitments and ambitions. It is a choice with far reaching consequences for our chances of self-realization and one that is intimately connected to the development of our potential, our personality and identity, our friends and social network (Williams 2006) and our conception of the good. It is a choice that can entirely change our life...[and] people [in developed societies]...will not see...pursuing one’s vocation as [a] mere example...of the selfishness that can be permitted only to a ‘modest’ degree. (Casal 13)

I agree that there is a strong case for valuing freedom of occupation. And although I have argued in Ch. 2 that freedom of occupation is under no threat of an institutional restriction according to the trans-institutional approach, but only critical normative judgment, this move is of no consolation to Casal. On her view, freedom of occupation morally trumps "egalitarian justice beyond just institutions"; freedom of occupation should be free from critical normative judgment. Nonetheless, my focus on non-legal disapprobation does lower the stakes of the debate somewhat, from the high stakes of debating whether freedom of occupation should be legally permissible, to the lower stakes of whether freedom of occupation is more morally valuable than egalitarian justice. In practice, then, Casal and the trans-institutional approach are not in conflict, strictly speaking.

The relative values of freedom of occupation and egalitarian justice is an interesting question. I believe that we would be mistaken, though, to so readily dichotomize the values into
two separate camps. Egalitarian justice in most incarnations involves tending to the equal well-being of all persons in a society. Egalitarian justice should not be perceived as merely an abstract equalization of something or other between persons, but as providing persons with concrete benefits in life. Some of the benefits will not only be comparable in value to the value of freedom of occupation, but they may in some cases alleviate circumstances that hinder freedom of occupation; in many ways, egalitarian justice is a pre-requisite for a meaningful selection in freedom of occupation. For example, being hired to work in one's preferred occupation in competitive markets requires opportunities in education and training, as well as material well-being, self-respect and social capital, which egalitarian justice aims to distribute in the most appropriate pattern. Therefore, if we are going to talk about clashes between freedom of occupation and egalitarian justice, we should be careful to emphasize the qualifier in Casal's own comments: "in developed societies" (Casal 13), where the well-being of all is already mostly secured. Then, and only then, could freedom of occupation possibly override egalitarian justice as a moral value, without treading on its own toes. This is consistent with Thomas's rule of thumb in Ch. 2 Sec. 3 that the more egalitarian the society, the larger the personal prerogative one is free to pursue.

It is not simply that egalitarian justice is too readily glossed over in Casal’s dichotomy, though, but also freedom of occupation itself. Freedom of occupation, as Titelbaum notes (317), comes in many forms: it is not just a matter of which career we choose, but multiple factors such as where (the country? the city?), for how long (a year? till what age?), when (as a youth? in seniority?) and with whom (this organization? those people?). Therefore, when we come down to weighing the relative moral values of freedom of occupation and egalitarian justice, we should recognize that we can value some factors of freedom of occupation sometimes over egalitarian
justice without being beholden to valuing all of its factors at all times. Indeed, under the trans-institutional approach, given the personal prerogative discussed in Ch. 3, at least some of the factors of freedom of occupation should be up to a person to decide free from considerations of egalitarian justice (otherwise, she risks being a slave to egalitarian justice); but this does not entail that all factors of freedom should override egalitarian justice. Ideally, on this view, everyone would put in their share into achieving egalitarian justice. This view, of limiting some factors of freedom of occupation, is not all that foreign; even in "developed societies" (Casal 13), all of the factors of freedom of occupation are not available for the choosing. For example, professional associations set limits to the number of licensees, and educational institutions cap enrolment on some vocations and offer scholarships with conditions as to where graduates may work. So, the best balancing act between freedom of occupation and egalitarian justice will make use of the fact that there are various factors that constitute freedom of occupation and that they pry apart.

I hope these thoughts move us a long way from the view that freedom of occupation is so valuable to us that it always trumps egalitarian justice, and therefore also from the view that the trans-institutional claim (that principles of justice should apply to personal choice) is under great threat. Tan's original concern here was that the multi-talented worker would be held to a higher moral standard, in being asked to replace her preferred occupation with an occupation more conducive to achieving egalitarian justice, or else suffer moral qualms about the dereliction of her egalitarian duties. I argued that this problem is not unique to the trans-institutional approach. I therefore briefly forayed into the comparative weights of freedom of occupation and

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20 Thanks to Christine Sypnowich for this point. She also notes that, at least in cases where persons change occupations after being trained with public resources, there is a sense of obligation to the public; Tan "discharges" this fact, however ("Personal Pursuits" 350 f.34).
"egalitarian justice beyond institutions" in order to debunk the idea that freedom of occupation is always more morally valuable.

4.4 The Arguments from Luck and Reciprocity

In the Introduction, I reconstructed Cohen's trans-institutional approach as constituent of 2 claims. The first is that (i) personal choices can be a subject of justice (which means that we should apply the principles of justice to our personal choices when relevant), and the second that (ii) in order for a society to make said personal choices more just, a social ethos of justice is required. With regard to the first claim, it should be noted that there are times when Cohen speaks as if justice is not about a just distribution and more about the intent of persons. In an earlier incarnation of his ideas, Cohen distinguishes between "a just society" and "a just distribution" ("Justice, Incentives, and Selfishness" 131). In a just society, "citizens affirm and act upon the correct principles of justice" while a just distribution simply "consists in a certain egalitarian profile of rewards" ("Justice, Incentives, and Selfishness" 132). For example, a protestant society with a strong work ethic may produce a just distribution by applying the difference principle to their personal choices but it is not a just society because "agents ...would not be motivated by the difference principle ("Justice, Incentives, and Selfishness" 132). This society is "accidentally, but not constitutively just" ("Justice, Incentives, and Selfishness" 132). However, Cohen in 2008 clarifies that justice in motivation, as in the "just society", is a "necessary condition" but not a sufficient one (Rescuing 129). Therefore, "just distribution" matters to justice.

Tan requires even less of justice than a just distribution: "[w]hile a society...in the way Cohen describes is likely to have a more egalitarian distributive outcome than a society with only
egalitarian institutions, it is quite a different matter as to whether the latter is flawed from the point of view of justice" ("Personal Pursuits" 352). That is, justice can be fulfilled even without the most egalitarian distributive outcome. For example, although just persons in Cohen's society would likely produce more egalitarian distributive outcomes with their disposable income, it is not necessarily the case that a society that did not do this would not be as just ("Personal Pursuits" 352).

In order to assess whether egalitarian justice requires the maximal egalitarian distribution possible, we need to ask: "what is the purpose of equality?" ("Personal Pursuits" 353). Tan claims that there is "no immediate reason" why egalitarian theories, both of the luck and reciprocity varieties, should be concerned with more than institutions even though this does not result in maximal egalitarian distribution (Justice 75). Let us consider these different variants of egalitarianism in turn.

In the case of luck egalitarianism, justice demands we mitigate instances of "brute luck"; according to Tan, mitigating the instances of brute luck found in institutions "will come close to annuling the effects" of brute luck (Justice 75). This argument finds egalitarian justice sufficiently met when it "comes close" to dealing with brute luck i.e. short of dealing with brute luck inequalities produced by personal choices. It is not surprising that Tan should find a "close enough" egalitarian distribution sufficient for egalitarian justice, after the value pluralism argument addressed in Ch. 2 (where Tan argues that egalitarian justice should not be about trying to "maximize social equality across the board" (Justice 34) but to allow "persons to live meaningful and worthwhile separate lives" (Justice 34)). However, it remains that value pluralism is not a persuasive basis for qualifying egalitarianism, be it luck egalitarianism or any other variety; luck egalitarianism that does not tackle all instances of inequality as a result of bad
brute luck will not fully meet the criteria of egalitarian justice.\footnote{On the other hand, it could be argued that Tan finds "close enough" justice sufficient because he diverges from Cohen on the meta-ethical question (Rescuing 253) of whether a theory of justice should look to provide regulatory rules to implement or rather to provide an idea of what ideal justice really is in full. However, Tan has repeatedly said that he does not believe his institutional approach compromises justice (Justice 34). Furthermore, he argues against the trans-institutional approach on a number of grounds that that do not rely on this meta-ethical divergence, such as the argument from the meta-ethical fact of value pluralism.}

Tan goes on, though, to say that it is not simply that luck egalitarianism does not need the trans-institutional approach: it is in conflict with it. To the question, "[s]hould luck in the personal sphere [such as how 'some people may be luckier (perhaps due to their temperament, appearance, or simply timing) with respect to the ability to make meaningful friendships' (Justice 76)] not also be of concern to the luck egalitarian given her goal of mitigating the impact of luck on individuals' life prospects?" (Justice 76), Tan's answer is no, and argued in two parts (Justice 76). However, the question relies on a mischaracterization of the trans-institutional approach. The trans-institutional approach is unique as an approach in how it considers personal choices a subject of justice; but it is not necessarily beholden to taking into consideration every personal choice (Macleod 183), such as making friends and cheating on romantic partners. Which personal choices matter depends on what the content of the theory of distributive justice is -- a welfarist theory might take into account personal choices which a resource-based theory might not. In conclusion, there is a distinction that ought to be drawn between personal choices and personal matters. The trans-institutional approach is only necessarily committed to the former, so that any argument against it on the basis of its commitment to the latter is misguided.

The same response can be made for Tan's argument from reciprocity-based egalitarian theories of justice. Tan claims that in the case of reciprocity, the trans-institutional approach is unnecessary. Reciprocity-based egalitarian justice demands only what co-citizens in a society would demand of each other (Justice 73). Beyond institutions, "lingering inequalities need not
violate the principles of reciprocity" (Justice 74) because co-citizens would not demand of each other more than what the best institutions can muster. In this case, it is not that Tan is relying on his argument, refuted earlier, that a "close enough" egalitarian distributive outcome is sufficient for egalitarian justice. Rather, here he deploys a view of egalitarianism as grounded in demands of reciprocity, in which co-citizens’ obligations of “impartial egalitarianism” (Justice 74) do not demand anything of each other's personal choices beyond just institutions (and their establishment, support, and maintenance). Tan argues that insofar as co-citizens would remedy inequalities caused by personal choices, such as inequalities in the distribution of friendships and personal care, it would be on the basis, not of "impartial egalitarianism" (Justice 74) but by some other obligation of reciprocity. Therefore, reciprocity-based egalitarian justice finds the institutional approach sufficient for a full account of egalitarian justice.

Here again, the trans-institutional approach as the target of critique is mischaracterized to necessarily take an interest in personal matters such as friendship. Rather, we should focus on how reciprocity-based egalitarian justice could benefit from addressing, at least, less private inequalities in reciprocity that happened to be caused by personal choices. For example, Doctor Mona's decision not to temporarily doctor in rural regions may produce inequalities in healthcare that co-citizens find unacceptable, which makes her personal choice a subject of reciprocity-based egalitarian justice.

In sum, we have no reason yet as to why egalitarian theories based in luck or reciprocity should be satisfied with an institutional approach; the argument that egalitarian justice does not demand egalitarian distributive outcomes greater than those provided by institutions does not stand. But there is one other reason formulated only in Tan's 2004 paper for why Cohen's

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22 Interestingly, Tan notes that racist attitudes and personal relationships are an exception; they are a matter of egalitarian justice (Justice 74 f.17).
society with the most egalitarian distributive outcome would not be considered more just than his own: "[i]n Cohen's ideal society,...individual's minds have become 'so enlarged' that justice would be a redundant concept" ("Personal Pursuits" 360). As David Hume would say, justice in such a society would have no use as a concept because a just way of living would be so etched in citizens’ hearts "so replete with friendship and generosity", that presumably all their actions would already be just ("Personal Pursuits" 360). Therefore, although it would be a great society, it would "not be a society required as a matter of egalitarian justice" ("Personal Pursuits" 359); presumably, egalitarian justice does not demand that which it need not demand. But whether or not the need for egalitarian justice is discarded in societies where persons are fully just in their hearts and actions (a matter up for debate (Kymlicka 174)), for our purposes, Tan would agree that egalitarian justice is certainly not to be discarded in the present moment. Cohen's trans-institutional approach approximates a vision of egalitarian justice that, though ideal and detached from the present moment, is a goal to aspire towards from the present moment.

4.5 Conclusion

In this chapter, I have responded to three brief arguments by Tan in favour of his institutional approach: the arguments from non-ideal and ideal conditions are fraught with difficulties, but in any case effectively concede the trans-institutional claim that personal choices count as subjects of justice; the argument from the slavery of the talented cannot be shown to exclusively critique the trans-institutional approach and not the institutional approach but in any case is better formulated as Casal's argument from freedom of occupation, which is subject to some scrutiny itself for a misleading representation of the clashing values of freedom of occupation and egalitarian justice; and the arguments from luck and reciprocity rely on a
mischaracterized view of the trans-institutional approach that necessarily takes an interest in all personal choices, including those having to do with personal matters. Despite my defense of the trans-institutional approach on these fronts, it could be said this chapter perhaps highlights most of all the similarities between Tan's institutional approach and Cohen's trans-institutional approach and how narrow the gap is towards reconciliation of the views (but while confirming the trans-institutional claim that personal choices are subjects of justice).
Chapter 5: Conclusion

In defending Cohen's two claims, that (i) personal choices can be a subject of justice (which means that we should apply the principles of justice to our personal choices when relevant) and that (ii) in order for a society to make said personal choices more just, a social ethos of justice is required, I found that Tan's arguments often presupposed Cohen's position or else mischaracterized it.

For instance, in Ch. 2, Tan does not explicitly distinguish between value pluralism (in particular, that we must accommodate personal pursuits), and legal pluralism (in particular, that we must legally accommodate personal pursuits); this enables Tan to mischaracterize Cohen's position as lacking a commitment to the latter, which presents Cohen's position as bleaker than it actually is. In clarifying what Cohen's position actually entails, I have suggested that for a thing to be a "subject of justice", or what it means to "apply principles of justice to personal choices" to that thing, in the first place, does not necessarily have to do with being subject to legal measures; but it does necessarily have to do with casting a normative judgment about that thing's relation to justice. Also in that chapter, although Tan did not provide a direct argument against Cohen's social ethos, I said we could question the suggested characterization of it being too psychologically burdensome once we consider how it is meant to facilitate rule-following by making it less calculative, how it is largely based on rough and ready, self-prescribed norms, and how it can make use of I. M. Young's model of responsibility.

In Ch. 3, at Tan's bidding and in light of arguments by Estlund and Otsuka, I further developed Cohen's position with respect to his admission that a just society may include a personal prerogative, or a space to depart from the demands of egalitarian justice. Although my understanding of the personal prerogative is still largely undefined due to Cohen's contextualist
position, I have singled out what I consider to be the valid criticisms in Estlund and Otsuka's views and made it more receptive to both views than Cohen's original position did. In other words, the personal prerogative, instead of being the right to pursue one's self interest insofar as no great inequality is caused, is rather the right to pursue interests detached from egalitarian justice, with a general prescription to avoid actions that are fundamentally at odds with egalitarian justice.

In Ch. 4, as most recently recounted, I attempted to respond to a series of Tan's arguments, in part by arguing that they relied on previous or new mischaracterizations. For instance, in his argument from the egalitarian theories of luck and reciprocity, Tan conflates personal choices with personal matters, and then argues that Cohen's position overreaches into personal matters; however, Cohen's position only necessarily takes an interest in personal choices. Cohen's trans-institutional approach to justice offers a "fit-all" approach, where the particular content of a distributive theory of justice will determine the role that personal matters, or indeed, anything, play in justice. It is for this reason that adopting a trans-institutional approach in the context of global luck egalitarianism should not pose any problems for Tan. That is, Tan limits his theory to remedying only those brute luck inequalities in some way influenced by institutions (Justice 153), relieving the theory from having to remedy all cases of brute luck in "the natural order of the universe" (Justice 168) which would be "absurdly over demanding" (Justice 169). However, Tan does not have to give up this point in conceding to the trans-institutional approach; we could still distinguish between luck caused by "the natural order of the universe" and luck caused by "institutions plus personal choices". All that the trans-institutional approach would demand is that the luck caused by personal choices be counted just as well as institutions.23

23 That being said, we can agree with Tan in saying that Cohen's thesis is not merely a methodological one that can
These, along with other arguments, exposed the ways in which Tan presupposed or mischaracterized Cohen's position, requiring me to clarify what Cohen's trans-institutional approach really looks like. The final picture, I believe, is not too different from the institutional approach -- there is already some overlap due to presuppositions, and the differences are less drastic when Cohen's position is not mischaracterized. My arguments, then, should not be so much of a bother to Tan's theory of egalitarian justice than an addition that rounds it out. That being said, the difference between considering a society just when individuals are content doing just enough to follow the rules and when they are actively working towards justice in their personal choices should not be underestimated or forgotten in Cohen's wake.

graft onto just any theory of justice; *egalitarian* justice must be of prime importance.
References


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