

**JUSTICE BEYOND EQUALITY\*****A review essay of G.A. Cohen's *Rescuing Justice and Equality***(Forthcoming in *Social Theory and Practice*)

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In his brilliant book, *Rescuing Justice and Equality*, G.A. Cohen endeavors to correct two confusions that he detects at the heart of the Rawlsian picture of social justice.<sup>1</sup> First, Cohen argues that Rawls's well-known difference principle, which permits incentive-based inequalities that work to benefit the least-advantaged, confuses distributive justice with other moral imperatives, most notably, Pareto efficiency. Distributive justice, Cohen insists, requires equality, but the difference principle sacrifices equality in the name of Pareto gains. The difference principle is thus not a fundamental principle of justice, but a compromise between justice and other values. The first part of the book thus seeks to rescue equality from various Rawlsian arguments which purport to explain why justice does not in fact require equality. In the second part of the book Cohen aims to rescue the more general concept of justice from the more general Rawlsian constructivist methodology. In declaring that fundamental principles of justice can be derived by asking what rules parties in the original position would agree to, Cohen believes Rawls (and Rawlsians) are guilty of confusing rules of regulation with fundamental principles of justice. Even if a constructivist device like the original position is the right way to uncover the optimal rules for social organization, these rules are not pure principles of justice since the optimal rules for social living must be sensitive to facts about the way the world is, and to values other than justice.

As I said, the book is brilliant, which should come as no surprise to anyone. It is, I think, Cohen's deepest, and most important contribution to political philosophy, and it should be required reading for everyone working in our field.<sup>2</sup> It is certainly the most insightful and powerful critique of Rawlsian political philosophy ever written. That said,

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<sup>1</sup> G.A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008). All references in brackets in the text are to this book.

<sup>2</sup> Everyone familiar with Cohen's body of work will understand the size of the compliment I intend by saying this book is his deepest and most important contribution.

I don't agree with Cohen about either the content or the concept of justice. Unlike Cohen, I don't think the content of distributive justice is reducible to a particular luck egalitarian conception of equality: I think distributive justice includes many other considerations such as freedom, reciprocity, and certain deontic injunctions against treating persons in particular ways. Because I disagree with Cohen about the content of justice, I also think he's mistaken regarding how we should reason about justice, and so I think Rawlsian constructivism is much more plausible than he does.

No single review essay could do justice to the whole book, and this essay is no exception. Section I of the essay provides a brief summary of chapters 1-3. The aim of these chapters is to rescue equality from three Rawlsian arguments: the incentives argument, the Pareto argument, and the basic structure objection. Since these chapters have all been previously published, and each is already the subject of a substantial literature, I'll not say much about them here. Chapters 4 and 5 of the book, however, offer new material. In chapter 4 Cohen attempts to rescue equality from the difference principle directly, and in chapter 5 he responds to a freedom-based objection to his proposal in which equality and Pareto efficiency are effectively combined by an ethos which governs individual salary and career choices. I believe there are serious objections to what Cohen has to say in both these chapters, and sections II and III of this essay present my objections to chapters 4 and 5 respectively. Section IV of the essay then summarizes the second part of the book, where Cohen rescues the concept of justice from: the facts (chapter 6), constructivism (chapter 7), and publicity (chapter 8). In section V I argue that even if everything Cohen says in chapter 6 about facts and principles is sound, this need not undermine the view that constructivism is a sound (maybe even the best) method for deriving fundamental principles of justice, since those principles may need to be sensitive to a plurality of political values.<sup>3</sup>

### **I. Rescuing the Difference Principle from Itself**

Rawlsian justice famously tells us that inequalities between persons (with regard to the distribution of social primary goods) are unjust unless they are necessary to benefit the least-advantaged members of society, in which case those inequalities are just.<sup>4</sup> If we

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<sup>3</sup> The book also contains an appendix which offers replies to some of Cohen's many critics, but I won't be able to discuss the material from the appendix in this essay.

<sup>4</sup> This represents a version of what Cohen refers to as the 'familiar noncanonical difference principle,' that is, a principle that prohibits inequalities unless they benefit the least-advantaged (p. 165). In chapter 4 Cohen presses the claim that this noncanonical formulation of the difference principle cannot be squared

further assume that some inequalities are necessary to benefit the least-advantaged because additional incentives need to be paid to talented or productive people to induce them to work in a way that will increase the overall social product, then we get the conclusion that incentive-based inequalities can be just. The central aim of chapters 1-3 is to challenge the second premise of this argument, that is, to rebut the claim that unequalizing incentives are in fact necessary to benefit the least-advantaged (p. 19). Cohen does not, in these chapters, deny that if inequalities were necessary to benefit the least-advantaged, those inequalities would be just. He rather rejects what he refers to as the lax interpretation of the difference principle: an interpretation which construes the difference principle as sensitive to people's employment and income preferences (p. 69).

To fix ideas, suppose we have Albert, who has two different career options available to him: he could be gardener or an entrepreneur.<sup>5</sup> Suppose income and wealth is distributed equally so that both careers offer the same salary (say \$30,000/year). Both careers would be of approximately equal arduousness, and would require the same number of working hours per week.<sup>6</sup> Under these conditions Albert would prefer to be a gardener. But the least-advantaged (in this case everyone since we begin from an equal distribution) would be better off if Albert chooses to become an entrepreneur since Albert will do more to increase the overall social product in this occupation, and thus there will be a greater amount of wealth to be distributed equally. Now suppose Albert would be willing to choose the occupation of entrepreneur if the salary for this option was substantially higher, say \$60,000. If this increase in Albert's salary would still leave us with an overall increase in the total social product, that is, if Albert's change from gardener to entrepreneur produces noticeably more than \$30,000 of additional value, then it is in the least-advantaged's interest to offer Albert the necessary incentive to become an entrepreneur. Of course the least-advantaged would be even better off if Albert chose to be an entrepreneur at \$30,000, but Albert doesn't want to do this. The least-advantaged will, however, be better off under the unequal distribution than they would be if income were equally distributed and Albert chooses to garden. From this

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with the canonical or lexical formulation of the principle, which permits inequalities so long as they do not harm anyone.

<sup>5</sup> Cohen uses the contrast between being a gardener and a doctor but I have used entrepreneur since I think the reference to a doctor invokes certain intuitions about health care and needs that ought to be irrelevant to the dispute between Cohen and Rawls.

<sup>6</sup> These two conditions are required to preclude the thought that some version of equality of welfare (or equal access to advantage) demands an unequal amount of income to be paid to people with different occupations. Cohen, of course, is happy to agree that when occupations are differentially burdensome, equality itself requires differential payments.

point forward, people in Albert's position will be described as 'talented', purely as a technical term, implying nothing about the intrinsic value of occupations or persons.

The lax interpretation of the difference principle says we must take Albert's preferences regarding employment/income trade-offs as fixed when deciding whether or not some inequality is necessary to benefit the least-advantaged. The relevant question for Cohen is whether this interpretation of the difference principle is defensible on Rawlsian grounds. In chapter 1 Cohen considers and rejects what he refers to as the 'naked' or 'unadorned' version of the incentives argument (p. 47). On this account, when we ask why unequalizing incentives are necessary to improve the position of the least-advantaged, we imagine someone (who the 'someone' is becomes important) saying the following: 'if you don't offer unequalizing payments to the talented, they won't be as productive, and so if you want to benefit the least-advantaged it is necessary to offer the unequalizing incentives'. Cohen's objection to this naked appeal to incentives is simple: the reason such incentives are necessary is because the talented are demanding these incentives – if they didn't demand the incentives, then the incentives wouldn't be necessary. Furthermore, the idea that the incentives are necessary only seems plausible if we treat talented persons as external objects to which we must respond, rather than as persons from whom justifications can be demanded. If a talented person were to say, 'I won't be as productive unless I get an unequalizing incentive payment, so if you want to benefit the least-advantaged, it is necessary to offer me the unequalizing incentive', we can plausibly ask the talented person, 'but why won't you be as productive?'

The talented person is then left in a very awkward position. They cannot appeal to self-ownership or pre-institutional desert or any of the other more right-wing arguments that Rawlsians and liberal egalitarians will reject. And they cannot treat their own preferences (the preference not to be as productive unless they are offered an additional incentive) as features beyond their own control without alienating themselves from their own agency, that is, without treating their choices or intentions as some unalterable feature of the universe (p. 66). Under these conditions there is what Cohen calls a lack of community between the talented and the other members of society. Society will be responding to the talented not as fellow citizens who must be able to justify their actions and preferences when those actions or preferences form premises in arguments about distributive justice, but rather as alien forces which we must deal with, but with whom we cannot reason. If we strive to live in what Cohen calls a justificatory community, then we must aim at the comprehensive justification of our rules and

institutions (p. 43). Comprehensive justification requires that 'if what certain people are disposed to do when a policy is in force is part of the justification of that policy, it is considered appropriate to ask them to justify the relevant behaviour, and it detracts from justificatory community when they cannot do so' (pp. 43-44). Because the talented cannot justify their preference not to work as productively without unequalizing incentives, the incentives argument violates the idea of justificatory community.

Chapter 2 considers what Cohen calls the Pareto argument for inequality, an argument that has a Rawlsian flavour, though as Cohen notes, it has been most explicitly developed by Brian Barry (p. 88). The Pareto argument, as Cohen presents it, has two main stages. The first stage begins with the idea of equality of opportunity, which contains two thoughts according to Cohen: first, equality of opportunity is only realized when all arbitrary causes of inequality are eliminated; and second, there are no causes of inequality that are not arbitrary in the morally relevant sense (p. 89). So equality of opportunity apparently requires equality of outcome. But, according to the second stage of the Pareto argument, it would be irrational to prefer an equal state of affairs if there was an unequal state of affairs where everyone (including the least-advantaged) was better off. And so inequalities are justified when, and only when, they are necessary to make everyone better off than they would be under an equal distribution.

Cohen's objection to the Pareto argument is relatively simple: the first stage of the argument is in tension with the second stage (pp. 89-90). If arbitrary inequalities are unjust because they undermine equality of opportunity, then those inequalities continue to be unjust even if it's true that they make everyone better off than they would be under an equal distribution. It's just arbitrary that some people are more talented than others, and thus even if paying those talented persons more does make everyone better off, the resulting inequality is unjust. Furthermore, it's not strictly true that unequalizing incentives are necessary to benefit the least-advantaged since the talented could choose to be optimally productive at an average salary, thus allowing whatever income would have been devoted to their incentive payments to be spread equally. So, contra what proponents of the Pareto argument claim, there is no reason to suppose that the initially equal distribution, justified by stage one of the argument, will not already be Pareto optimal, and if it is, that is, if in the initially equal distribution the talented are choosing to work optimally at an average wage, then no inequalities can be justified by the Pareto argument.

Chapter 3 presents Cohen's now well-known reply to what he calls the basic structure objection. The arguments Cohen mounts in chapters 1 and 2 depend, crucially, on the thought that individuals could and should internalize the demands of the difference principle in their daily lives, and thus the employment/income preferences of talented individuals are legitimate targets of scrutiny when we assess various arguments that purport to justify inequality. If talented citizens really internalized the difference principle, they would recognize that any demands for unequalizing incentive payments are unjust because the least-advantaged would be better off if talented persons were optimally productive for an average wage. The basic structure objection targets this move in Cohen's argument. The objection states that Cohen has misunderstood the site at which Rawlsian principles of distributive justice apply: they apply to the rules and institutions that regulate the basic structure of society but they do not apply to permissible individual behaviour that takes place within those rules and institutions. It is thus wrong to think that the difference principle applies directly to individual decisions about employment options and salary demands.

Cohen's main reply to the basic structure objection is to insist that there is no non-arbitrary definition of the basic structure that can justify excluding people's "personal" economic choices.<sup>7</sup> As Cohen notes, Rawls tells us 'the basic structure is the primary subject of justice because its effects are so profound and pervasive from the start'.<sup>8</sup> Rawls also, however, appears to claim that the basic structure is defined as the legally coercive set of institutions that regulate society (pp. 132-133). But legally coercive institutions are not the only institutions whose effects are profound and pervasive from the start. The family need not be coercive to have these features, and similarly, the pattern of people's employment and salary choices are not coercive, but they can also have a profound and pervasive influence on individuals' entitlements and opportunities. So Rawls can exclude personal economic choices from the basic structure by sticking to the legally coercive interpretation, but this comes at the cost of appearing arbitrary. Alternatively, Rawls can concede that the appropriate account of the basic structure can include individual choices that occur within rules and institutions given how important these choices can be, in which case there is no longer a justification for excluding individuals' career and salary choices from the demands of justice. Either way, the basic structure objection fails to undermine Cohen's insistence on a strict version of the

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<sup>7</sup> Cohen also offers a different, preliminary, reply to the objection, which focuses on some remarks Rawls makes about dignity, fraternity, and acting from a sense of justice (pp. 129-132).

<sup>8</sup> Rawls as quoted by Cohen (p. 136).

difference principle which subjects individuals' salary and career choices to judgements of justice.

Since so much has already been written in response to the earlier published versions of chapters 1-3, I won't say anything further about them here.<sup>9</sup>

## II. Equality Versus the Difference Principle

The first three chapters of the book assume for the sake of argument that the difference principle is roughly correct, but they dispute the standard view that the difference principle permits incentive-based inequalities. Chapter 4, previously unpublished, presents a different objection. In this chapter Cohen argues against the difference principle directly. Cohen's main argument is straightforward:<sup>10</sup>

1. Inequalities caused by morally arbitrary factors are unfair and unjust.
2. Unequalizing incentive payments to the talented will create arbitrary inequalities.
3. Unfairness and injustice are not dissolved or eliminated by Pareto improvements which contain arbitrary inequalities.
4. Therefore, unequalizing incentives, even if they render the least-advantaged better off than they would be under an equal distribution, are pro tanto unfair and unjust.

Cohen insists that this conclusion applies even in cases where the talented are literally incapable of being more productive without the incentive payments, that is, even in cases where the talented are physically or psychologically incapable of producing more without incentives (p. 153-154). Even when there is no individual choice that can be condemned as inconsistent with the demands of the difference principle, there remain arbitrary inequalities, and arbitrary inequalities are unjust regardless of whether they are caused by human choices or natural features of the world.

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<sup>9</sup> See for example David Estlund, 'Liberty, Equality, and Fraternity in Cohen's Critique of Rawls,' *Journal of Political Philosophy* 6 (1998), 99-112; Andrew Williams, 'Incentives, Inequality, and Publicity,' *Philosophy & Public Affairs* 27 (1998), 225-247; Thomas W. Pogge, 'On the Site of Distributive Justice: Reflections on Cohen and Murphy,' *Philosophy & Public Affairs* 29 (2000), 137-169; Joshua Cohen, 'Taking People as They Are?' *Philosophy & Public Affairs* 30 (2001), 363-386; A.J. Julius, 'Basic Structure and the Value of Equality,' *Philosophy & Public Affairs* 31 (2003), 321-355; Norman Daniels, 'Democratic Equality: Rawls's Complex Egalitarianism,' in *The Cambridge Companion to Rawls*, Samuel Freeman ed. (Cambridge: Cambridge University Press, 2003), 263-270; Kok-Chor Tan, 'Justice and Personal Pursuits,' *Journal of Philosophy* CI (2004), 331-362; and Michael Titelbaum, 'What Would a Rawlsian Ethos of Justice Look Like?,' *Philosophy & Public Affairs* 36 (2008), 289-322.

<sup>10</sup> This formulation of Cohen's argument is my own, but I believe it accurately conveys the position he describes on pp. 154-155.

Much of the chapter is then taken up with showing that Rawls and others disposed to defend the difference principle cannot consistently deny the premises of this argument, in particular the first premise, and thus Rawls and Rawlsians will find it hard to deny Cohen's wider point: justice demands the elimination of arbitrary inequalities and since the difference principle fails to aim at this target, it is to that extent a failure as a principle of justice. The difference principle is, at best, a compromise between considerations of egalitarian justice and considerations of economic efficiency. As we will see in later chapters, this might mean the difference principle represents a sound piece of social policy, but it does not constitute a pure principle of justice since it permits pro tanto unjust outcomes.

There are a number of questions one can ask about Cohen's rejection of the difference principle, but I'll focus on two questions here. First, what does Rawls explicitly say about the premises of the above argument? Consider the following extended passage from section 17 of *A Theory of Justice*:

The difference principle gives some weight to the considerations singled out by the principle of redress. This is the principle that undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are to be somehow compensated for...The idea is to redress the biases of contingency in the direction of equality...Now the principle of redress has not to my knowledge been proposed as the sole criterion of justice, as the single aim of the social order. It is plausible as most such principles are only as a prima facie principle, one that is to be weighed in the balance with others...Now the difference principle is not of course the principle of redress. It does not require society to try and even out handicaps as if all were expected to compete on a fair basis in the same race...Although the difference principle is not the same as that of redress, it does achieve some of the same intent of the latter principle. It transforms the aims of the basic structure so that the total scheme of institutions no longer emphasizes social efficiency and technocratic values. The difference principle represents, in effect, an agreement to regard the distribution of natural talents as in some respects a common asset and to share in the greater social



and economic benefits made possible by the complementarities of this distribution.<sup>11</sup>

I have quoted this lengthy passage because it clearly shows the way in which Rawls rejects both premises 1 and 3 above. The principle of redress is, roughly, the type of luck egalitarian principle expressed in premise 1. Rawls is clear that the principle of redress cannot be considered the sole criterion of justice; that at most it must be weighed against other considerations. Thus, for Rawls it cannot be true that whenever there is an inequality between persons caused by arbitrary differences, this inequality is necessarily unjust. On Rawls's account, in order to know whether an inequality is unjust we would need to take all the relevant considerations into account, and this would include more than the principle of redress and its focus on arbitrariness. Rawls also does not endorse premise 3, since in the quoted passage he clearly does countenance the idea that other considerations might outweigh or nullify the prima facie considerations highlighted by the principle of redress.<sup>12</sup>

This discussion is of more than merely exegetical interest. It helps illuminate the wider disagreement between Cohen and Rawls about the nature of justice. It shows that Rawls does not believe justice (or at least distributive justice) is comprised by a single principle or consideration, but is rather achieved by balancing or weighing several different considerations. Cohen appears to endorse a different position, one where distributive justice is captured by a single consideration, one that expresses a particular conception of equality or fairness, and which Cohen describes as follows: 'an unequal distribution whose inequality cannot be vindicated by some choice or fault or desert on the part of (some of) the relevant affected agents is unfair, and therefore, pro tanto, unjust, and...nothing can remove that particular injustice'. As Cohen goes on to say, 'it does not follow, and I do not say, that such unjust inequality cannot be part of a package of policy that is, all things considered, superior to any other...but it does follow that any package that contains that kind of unfairness cannot be through-and-through just' (p. 7).

This wider disagreement about the nature of distributive justice is the focus of chapter 7 of the book, and so I'll postpone further discussion of this for a bit. Instead,

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<sup>11</sup> John Rawls, *A Theory of Justice: Revised Edition* (Oxford: Oxford University Press, 1999), 86-87.

<sup>12</sup> Samuel Freeman and Samuel Scheffler have also advanced arguments which aim, among other things, to dispel the claim that Rawls is in some way committed to a strongly luck egalitarian conception of justice. See Samuel Freeman, 'Rawls and Luck Egalitarianism,' in *Justice and the Social Contract: Essays on Rawlsian Political Philosophy* (Oxford: Oxford University Press, 2007), 111-142; and Samuel Scheffler, 'What is Egalitarianism?,' *Philosophy & Public Affairs* 31 (2003), 5-39.

let's turn to another question: setting exegetical issues aside, is Cohen correct that lurking behind most Rawlsian arguments for the difference principle is in fact a commitment to the sort of strongly egalitarian thesis, expressed in premise 1, that would condemn the difference principle as a principle that permits injustice? That is, despite whatever Rawls may say, is it nevertheless true that he (and others) who defend the difference principle can't really avoid the sort of incoherence Cohen points to?

On this issue I am in broad agreement with recent comments made by Richard Arneson.<sup>13</sup> I think there is a clear and plausible argument to be found in *A Theory of Justice* which is not guilty of the internal incoherence which Cohen claims to find there. Suppose we believe people are moral equals, and thus when they engage in social cooperation for mutual benefit, there should be a presumption that the fruits of social cooperation should be distributed equally. Equality thus provides a benchmark from which departures must be justified, but this commitment to equality does not imply that unequal distributions (not vindicated by choice or fault) are pro tanto unjust. Equality is only the prima facie just distribution, but departures might be fully justified by appeal to relevant considerations. What might those relevant considerations be? Suppose that one of the other morally relevant features about persons (in addition to their equality) is that they are free, in the sense they have the capacity to form, revise and pursue their own conceptions of the good life. Certain goods are essential to exercise this sort of freedom, and, other things being equal, increasing the overall stock of the relevant goods is taken as a valid justification for departing from the presumptive baseline of equality when it will give everyone a larger share of the relevant goods than they would receive under an equal distribution.

This argument, of course, is simply a brief and informal presentation of the contractualist argument Rawls and others have advanced in favour of the difference principle. The argument does not presuppose that all arbitrary inequalities are pro tanto unjust, and so it does not entail that arbitrary inequalities that involve Pareto improvements must be unjust in some way. Whether or not it is a sufficient argument to justify the difference principle is not something I want to worry about here. I only want to defend the more minimal claim that it is a plausible argument, and one that is not guilty of the incoherence Cohen claims to find in various arguments for the difference principle. The argument asserts equality as the benchmark not because all arbitrary inequalities are unjust, but rather to signal that people are moral equal and thus

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<sup>13</sup> Richard Arneson, 'Justice is Not Equality,' *Ratio* XXI (2008), 382-384.

presumptively have equal claims to the fruits of cooperation absent valid reasons to depart from this benchmark.

Cohen might offer three objections in reply. First, he will complain that there is no good reason to accept that the unanimity of parties to a social contract can make the shift from equality to inequality just as opposed to merely legitimate (p. 165).<sup>14</sup> The mere fact that everyone (including the worst-off) might accept the inequality does not eliminate the unfairness that some get more than others due to arbitrary differences. But this objection presupposes a non-contractualist view of justice, and then objects that what the parties to a social contract might accept does not serve to make those distributions just. But this simply begs the question against contractualists. Of course, Cohen provides independent arguments against the contractualist account of justice in the second half of the book, but until we can assess those arguments, this particular objection can be set aside.

Second, Cohen will protest that the reason why we favour equality as the presumptive baseline is because we recognize that arbitrary inequalities are unjust, and we cannot ignore this truth when we consider whether departures from equality can be justified. This objection, however, also begs the question in favour of Cohen's account of the nature of justice. If distributive justice is really comprised by a single principle, then it will appear inconsistent to affirm a presumption in favour of equality, but then also claim departures from equality can be just by appealing to other considerations. But if we embrace a different conception of justice, one where different prima facie considerations are weighed or balanced against one another, then there need be nothing inconsistent about affirming the following two Rawlsian thoughts:

- R1     People are moral equals and thus justice makes equality the benchmark from which departures must be justified.
- R2     Making everyone better off is a consideration that can make departures from equality fully just.

The two thoughts only look inconsistent if one holds the particular 'single consideration' conception of justice that Cohen insists upon. But Cohen offers no argument why we must see justice in this way, and unless we do, there's nothing obviously problematic

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<sup>14</sup> Also see Cohen's similar remarks in his essay 'Fairness and Legitimacy in Justice, And: Does Option Luck Ever Preserve Justice?', in *Hillel Steiner and the Anatomy of Justice*, Stephen de Wijnze, Matthew H. Kramer, and Ian Carter eds. (New York: Routledge, 2009), 3-21.

about a conception of justice that balances multiple considerations to reach an all things considered judgement about what justice permits or requires.

Consider a different example. Two people are drowning and I can only save one of them. We might begin by saying that since people are moral equals, the default position should be equal treatment or, when this proves impossible, equal chances. But departures from this norm might be justified by other considerations. Suppose one of the drowning people is my wife. This seems like the sort of relevant consideration which means justice at the very least permits me to save my wife without giving the other person an equal chance at being saved. The default is equal chances, but the all things considered judgement is that justice permits me to save my wife without giving the other person an equal chance at rescue. It is true that there is (in one sense) an arbitrary inequality in this outcome (since it is just bad brute luck for the person whom I do not rescue), but only a very particular and peculiar conception of justice would insist that there is therefore a pro tanto injustice in this result.<sup>15</sup>

The third objection Cohen will offer in response to the informal argument for the difference principle is the one already developed in chapters 1-3: that inequality is not in fact necessary to improve everyone's situation. The Rawlsian argument sketched above assumes Pareto gains constitute a justification for departing from equality, but this mistakenly assumes that there is some necessary conflict between equality and Pareto. The talented people to whom incentives would be offered under the lax interpretation of the difference principle could instead choose to be optimally productive for an average wage, thus realizing a distribution that is both Pareto optimal and egalitarian. There is, however, an obvious Rawlsian objection to this reconciliation between Pareto and equality, and this objection, as well as Cohen's rebuttal, are the subjects of chapter 5.

### III. The Freedom Objection and a New Trilemma

Thus far Cohen has argued that Rawls and Rawlsians are guilty of at least two important errors. First, they wrongly assume there is a choice to be made between equal distributions and Pareto gains. Second, they compound this mistake by wrongly assuming that choosing Pareto gains somehow eliminates the unfairness and injustice that results

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<sup>15</sup> Note that because I do not act unjustly in rescuing my wife, if one were to insist there is nevertheless a pro tanto injustice in this outcome, one would be committed to a particular account of justice where states of affairs, as opposed to human choices, are the subjects of judgements of justice. Cohen, of course, would likely accept this view, but Rawls and many others do not, and this is further evidence that Rawls's argument for the difference principle, which involves weighing a number of considerations, only looks inconsistent if we adopt a non-Rawlsian conception of what justice is. I say more about this in section V.

from arbitrarily unequal distributions. In the previous section I expressed my doubts about the latter accusation: it only sticks if we assume a fundamentally different account of the nature of justice than the one Rawls and Rawlsians rely on. But what about the first accusation? Is Cohen right to claim that we can reconcile the requirements of equality and Pareto optimality?

In chapter 5 Cohen considers the following objection to his apparent reconciliation: Pareto and equality can, under realistic conditions, only be achieved by sacrificing freedom, specifically, freedom of occupational choice. Recall the example of Albert from section I. Albert had to choose between being a gardener and being an entrepreneur. If both jobs offer the same egalitarian salary of \$30,000/year, then Albert would prefer to garden, but he would be more socially useful if he deployed his talents as an entrepreneur. If offered a sufficient incentive, an extra \$30,000/year, Albert would take the job of entrepreneur, and this would result in a gain for the least-advantaged relative to the world where Albert chooses gardening. Cohen's solution is to say that Albert should be an entrepreneur at the average wage of \$30,000/year, thus achieving a Pareto optimal situation that retains an egalitarian distributive pattern. But, says the imagined critic, this resolution only works by restricting Albert's freedom of occupational choice: it only works if Albert is forced to choose the career of entrepreneur. Cohen thus faces a trilemma: he cannot have equality, Pareto, and freedom of occupational choice.

In response Cohen proposes what he calls 'the ethical solution' to the trilemma. The ethical solution dissolves the trilemma by showing that we can have all three provided Albert freely chooses to be an entrepreneur 'as a result of some combination...of principled commitment and fellow-feeling' (p. 189). If talented people were moved by an appropriate 'egalitarian ethos' (p. 203), then 'Stalinist' forcing (p. 186) of the talented into particular occupations is unnecessary, and freedom of occupational choice is preserved along with equality and Pareto.

In the chapter Cohen considers two possible objections to his ethical solution. The first Rawlsian objection states that Cohen's ethical solution violates the lexical priority which Rawls attaches to freedom of occupational choice over the difference principle. But, Cohen replies, there is no violation of lexical priority since Cohen does not advocate coercing individuals into particular occupations – which is what freedom of occupational choice forbids – he only advocates a view where talented persons are morally motivated to choose socially optimal occupations, and it is implausible to assume freedom of occupational choice is violated if people are 'noncoercively induced to act

upon...an egalitarian duty that restrains their market seeking' (p. 198). The second objection reformulates the trilemma by focusing on freedom qua self-realization within one's occupation. In response Cohen insists that either such self-realization can be incorporated within a metric of egalitarian justice, or else it is incommensurable with other goods, and thus it makes no sense to appeal to self-realization to explain why talented persons can demand extra income as compensation for selecting particular occupations (pp. 205-214).

I believe there is a serious problem with Cohen's ethical solution to the trilemma, a flaw that is unrelated to either of the objections Cohen considers. The flaw is exposed when we enquire more closely into the specific content of the moral motivation that lies at the heart of the ethical solution. Cohen describes this moral motivation in different ways throughout the chapter. As we saw above, he refers to talented persons being moved by 'principled commitment and fellow feeling', (p. 189), by 'an egalitarian ethos' (p. 203), and also by 'an egalitarian duty' (p. 198). In the sizable literature that has developed in response to Cohen's early papers on this topic, his position is also frequently referred to as involving an egalitarian ethos. There is thus a strong suggestion that the talented are moved, or should be moved, to exercise their right of occupational choice in particular ways out of a commitment to equality.

But this widely held interpretation of Cohen's proposed ethos is clearly incorrect. Equality, on its own, does not require talented people to choose any particular occupation – it merely forbids talented people (subject to a limited agent-centred prerogative) from accepting unequalizing incentives for taking on socially optimal jobs. The world where Albert chooses to be an entrepreneur at the egalitarian wage \$30,000/year is not a more egalitarian world than the one where he chooses gardening at the same wage, it is rather a Pareto superior world. In both cases (entrepreneurship and gardening) income and welfare should be distributed equally (or distributed in a way that yields overall equal access to advantage), it's just that in the case where Albert chooses to be an entrepreneur, there will be more income and welfare to be distributed equally.<sup>16</sup> If

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<sup>16</sup> Assuming for simplicity, as we have been throughout, that jobs are of roughly equal burdensomeness. Cohen in fact drops this assumption in his presentation of a similar example, stipulating that the relevant talented person would be 'much better off than most in job satisfaction' even when he works at the job he does not prefer (p. 185). This stipulation seems to me to be seriously problematic since Cohen is committed to the view that people should be financially compensated in accordance with the burdensomeness of the job they hold to achieve overall equal access to advantage (pp. 180, 200). That is, people should be equal when we compare their total bundles of resources and welfare. In order to properly consider whether Cohen's ethos can succeed in reconciling equality, Pareto, and freedom of occupational choice we must therefore consider a case where people start from an overall equal position (resources and welfare) and are then moved by the ethos to choose occupations that yield Pareto gains while preserving

Albert chooses the Pareto sub-optimal occupation of gardening at the average wage of \$30,000/year, there is no inequality in this result. It therefore cannot be an egalitarian ethos that directs Albert to choose the occupation of entrepreneur. So Cohen's proposed ethical solution to the trilemma does not, properly construed, rely only on an egalitarian ethos prevailing amongst talented persons. Rather, it relies both on an egalitarian ethos (which precludes unequalizing incentives) and on what we can call a Paretian ethos (which directs talented people to choose jobs where they will contribute the most to the overall social product). The dual nature of the ethos that is necessary for Cohen's ethical solution to succeed is important, but this importance has largely been overlooked due to the widespread assumption that Cohen advocates an 'egalitarian ethos'.<sup>17</sup>

Why does it matter what motivates the talented persons in Cohen's ethical solution? It matters because once we realize the ethos directing people to make certain occupational choices is not required as a matter of equality, then Cohen cannot claim the ethos is a matter of justice. Throughout the book Cohen is adamant that equality and efficiency are fundamentally different considerations: justice requires equality, and when we sacrifice equality in the name of Pareto improvements, we are making a trade-off between what justice requires (equality) and a different value. So if Cohen's ethical solution requires a Paretian ethos, then it requires talented people to do more than they are required to as a matter of egalitarian justice. I believe, and I will shortly do more to support this claim, that Cohen's Paretian ethos is in fact a supererogatory ethos, that is, it requires talented people to go beyond not only what justice requires, but what morality more generally could reasonably require (by morality I mean to refer to any moral duties we might owe to others, even if they are not duties of justice). If this claim is right then Cohen's ethical solution faces a different trilemma to any of those considered in chapter 5. Cohen's ethical solution cannot have all the following (The Altruism Trilemma):

1. Equality
2. Pareto
3. Non-supererogatory behaviour

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equality. To assume the talented person is already much better off than others is to assume a non-egalitarian distribution. Whether individual job preferences can count within Cohen's metric of overall advantage is something that causes additional problems for his ethical solution. I explore the way in which it is problematic in my 'Contractualism, Reciprocity, and Egalitarian Justice,' *Politics, Philosophy, & Economics* 6 (2007), 84-87.

<sup>17</sup> I am one of the people who inaccurately adopted the label 'egalitarian ethos' to describe Cohen's position. See my 'Contractualism, Reciprocity, and Egalitarian Justice,' 83.

1 and 2 can be combined, but not without violating 3 by requiring a Paretian ethos. 2 and 3 can be had together, but only by offering unequalizing incentives which violates 1. And 1 and 3 can be had together, but only at the expense of 2 by allowing a Pareto sub-optimal distribution where everyone works at an equal wage and everyone chooses whatever occupation they like unconstrained by any Paretian ethos.

I think there are three main ways Cohen could respond to this trilemma. First, Cohen could simply declare that he is untroubled by the trilemma. If his ethical solution requires morally supererogatory choices on the part of the talented, then so be it. This response is unsatisfying for two reasons. First, it doesn't fit with the moralized rhetoric Cohen frequently uses when describing the ethos. Cohen makes the ethos seem like a moral requirement, or at least as something that we have strong moral reasons to accept. Second, this reply concedes that the ethical solution only succeeds by relying on utopian assumptions about persons. It is utopian in the sense that it assumes talented people will be willing to constrain their occupational choices even though this is not something that justice or morality requires. Insofar as we think any solution to the original trilemma should succeed without asking people to be more than perfectly just and moral, then it seems unsatisfying to ignore the Altruism Trilemma.

The second possible Cohenite reply is to insist that the Paretian ethos does reflect a moral duty all persons are under, even if it is not a duty of justice. Talented people who refuse to choose socially optimal occupations are failing to do what they owe to the least-advantaged, and thus the ethical solution does not require supererogation at the bar of morality.

This reply, however, is deeply implausible (and it's notable that Cohen never explicitly defends this claim). Suppose Albert has accepted Cohen's view that it would be unjust for him to ask for unequalizing incentives to become an entrepreneur rather than a gardener. So Albert is left with the choice of being an entrepreneur at an average wage or a gardener at an average wage. Albert decides to be a gardener, and egalitarian justice permits him to make this choice. But then along comes someone, Barry, who tells Albert it would be morally wrong, though not unjust, for him to choose the Pareto sub-optimal occupation of gardening. Albert, surprised, asks why this choice is morally wrong, and in particular, Albert wants to know whom he would be wronging if he makes this occupational choice? Barry replies that Albert owes it to Barry to choose the job of entrepreneur since this will result in an increase in the overall social product which will then get redistributed equally across the population, and this will result in Barry getting



slightly more income than he otherwise would. This claim of Barry's is easy to reject. It seems hard to believe that morality can require Albert to make a substantial sacrifice in terms of his career ambitions and choice of occupation – that Albert must restrict himself to his Pareto optimal occupation – merely so that in an already egalitarian society Barry can gain a small increase in annual income. It's simply not credible to suppose that the extra \$20/year (or any similar amount) that Barry gains as a result of Albert's being an entrepreneur can justify imposing a moral duty on Albert to restrict his occupational choice.<sup>18</sup>

At this point, sensing defeat, Barry might change tack, and claim instead that Albert owes it to Barry and everyone else in society to choose the Pareto optimal occupation. That is, Barry might concede that his interests, taken on their own, don't suffice to put Albert under any kind of moral duty to restrict his career choice, but the aggregate interests of everyone in society are sufficient to do so. This argument, however, involves an objectionable form of interpersonal aggregation. Though some consequentialists may be untroubled by this move, I deny, along with most non-consequentialists, that small or trivial benefits to individuals can be aggregated in this way to impose a substantial burden on a single individual. I provisionally conclude that there is not a plausible case, consistent with Cohen's own views, which might explain how the Paretian ethos could be construed as a moral duty that talented persons owe to other members of society.

The third and final Cohenite reply to the trilemma is to claim that the Paretian ethos is no mere moral duty, but it is in fact a duty of justice that talented persons owe to other members of society. If this was true, then the trilemma is easily dissolved since the ethos does not require altruism, it rather reflects a requirement of justice.

There are however, several obvious difficulties with this proposed reply on Cohen's behalf. First, it is inconsistent with almost everything Cohen has to say in the book about the difference between justice and other values. One of the central arguments in the book is that Rawls and Rawlsians are guilty of conflating justice with other values, specifically with the value of efficiency. In chapters 4 and 7 in particular, Cohen argues at great length that while improving everyone's position via unequalizing

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<sup>18</sup> Note that this leaves open the possibility that if Albert's occupational choice was going to deliver a sufficiently large benefit to Barry (assuming the benefits of the choice are equally divided across the population) then Albert might be under a moral duty, or even a duty of justice, to make that choice. For example, if Albert is the only person in society capable of being a doctor, and by choosing to be a doctor he will eventually save every person's life in his society, then the moral calculus is clearly very different. But these type of examples are not, I think, the sort Cohen has in mind.

incentives might be a wise thing to do, its wisdom is not explicable in terms of fairness or justice (see especially pp. 319-320). Justice requires equality, and Pareto improvements have nothing to do with equality, and thus nothing to do with justice.

There is, however, a short passage in chapter 7 that suggests a way in which Cohen could formulate the justice-based reply to the Altruistic Trilemma. Having largely insisted that justice is a comparative value, Cohen briefly considers the suggestion that justice may also have a non-comparative element. Wouldn't it be unjust, someone might ask, if a distributor could realize an equality preserving Pareto improvement, but chooses not to do so? Similarly wouldn't it be unjust of a distributor to depress everyone's material condition equally? Cohen concedes that the distributor may be behaving unjustly in these cases, and if so, this would entail that justice 'compares not only what a person gets with what another gets, but also what a person gets with what she might otherwise have got' (p. 322). Suppose we take Cohen's hesitant statement here as his considered view. This would then seem to furnish Cohen with the resources he needs to deal with the Altruism Trilemma. Cohen could say the following:

I believe that distributive justice is, for the most part, concerned with equal treatment, and is thus largely a comparative value. But I concede justice also has a non-comparative element, and part of what this non-comparative element entails is the view that it is sometimes unjust to make someone worse-off than they need to be, or fail to improve someone's situation, even when this involves no comparative unfairness. One of the situations in which this latter claim applies is the situation talented persons find themselves in when making occupational choices. It is unjust for talented persons not to benefit others in society when they could do so in an equality preserving fashion. Thus, the Altruism Trilemma is dissolved because the talented do have a duty of justice to adhere to the Paretian ethos.

I don't say this argument should be attributed to Cohen, since his remarks about non-comparative justice are very tentative. But setting the interpretive question aside, the argument still faces two substantial objections. First, it's hard to believe that Albert's occupational choice would not be protected by Cohen's own 'personal prerogative'. This prerogative 'grants each person the right to be something other than an engine for the

welfare of other people' (p. 10), and this means that 'every person has a right to pursue self-interest to some reasonable extent (even when that makes things worse than they need to be for badly off people)' (p. 61). If the personal prerogative protects anything, surely it protects an individual's choice to make Pareto sub-optimal occupational decisions? Doing so is not inconsistent with the demands of egalitarian justice, it does not deprive any other individual person of very much in terms of income, and the alternative would in effect turn each individual talented person's occupational decision into an engine for the welfare of other people.

Second, if Cohen were to insist that the Paretian ethos was a requirement of justice, then his argument no longer escapes a modified version of the freedom of occupational choice trilemma. Cohen would be asserting that talented persons must, as a matter of justice, make socially optimal occupational choices. Although Cohen does not envision talented people being coerced or forced into this making these decisions, this construal of the Paretian ethos does nevertheless represent a restriction on talented persons' right of occupational choice. This is true because talented persons no longer have the right to choose whatever occupation they like. Regardless of whether our principles of justice are backed by coercion, those principles nevertheless place limits on what we may each justly do, and thus there is a real sense in which those principles place moral limits on our freedom.

In his discussion of this issue, Cohen points out that one can still have a right to do what it is wrong to do, and thus he concludes that one can still be at liberty to choose one's occupation even if a moral ethos directs one to make a particular choice (p. 199). But this response only works if following the ethos is considered to be a duty of morality and not of justice. If Albert is under a duty of justice to choose the career of entrepreneur, then it must be true that he owes this duty to others. We can thus say that those people (to whom Albert owes the duty of justice) have a right against Albert that he choose the career of entrepreneur.<sup>19</sup> But if others have a right against Albert that he choose the occupation of entrepreneur, then Albert is not at liberty to choose gardening, even if he will not be coercively prevented from choosing gardening. Albert's freedom of occupational choice, measured in terms of what he has a right to do, is thus restricted if the Paretian ethos is a requirement of justice.<sup>20</sup> It's true that Albert's negative liberty –

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<sup>19</sup> I assume, without argument, that duties of justice correlate with claim-rights. This does not preclude the possibility that there can be moral duties which do not correlate with any claim-rights.

<sup>20</sup> One might suggest, in defence of Cohen, that rights can sometimes conflict, and thus perhaps Albert retains his right to occupational choice, and it simply conflicts with the right others have that he choose the career of entrepreneur. While I don't deny that rights can conflict, I think this reply fails since it

measured in the non-moralised sense of the extent he is free from the physical interference of others – may not be diminished, but this isn't the only type of freedom that we care about. In the modified version of the freedom of occupational choice trilemma that I am proposing, the question is whether equality and Pareto can be made consistent with each person having a right of occupational choice. If Cohen's ethos is construed in terms of a duty of justice, my claim is that talented individuals lack the required right since that right must be held by those to whom talented persons owe the duty of justice. In sum, if the Paretian ethos is a duty of justice, this will allow the ethos to avoid the Altruism Trilemma, but only at the cost of failing to avoid a version of the occupational choice trilemma.

I conclude that the Altruism Trilemma is real, and Cohen's ethical solution does not offer a satisfactory way of avoiding it.

#### **IV. Rescuing Justice from the Rawlsians**

In the second half of the book (chapter 6-8) Cohen attempts to rescue the concept of justice from the general constructivist account of this concept that Rawls presents. Chapter 6 is a slightly modified version of Cohen's already famous paper, 'Facts and Principles'. In this chapter Cohen defends the following position: 'a principle can respond to (that is, be grounded in) a fact only because it is also a response to a more ultimate principle that is not a response to a fact: accordingly, if principles respond to facts, the principles at the summit of our conviction are grounded in no facts whatsoever' (p. 229). Cohen thus defends the thesis that if there are fact-sensitive principles, then there must be ultimate fact-insensitive principles. Cohen supports this thesis with three premises (pp. 236-237):

- (1) Whenever a fact F supports a principle P, there is an explanation of why F supports P.
- (2) The explanation referred to in the first premise must invoke a more ultimate principle, commitment to which would survive the denial of F.

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implausibly presupposes that two parties can each possess the very same right, in this case, Albert's right of occupational choice. Denying the plausibility of these kinds of rights conflicts still leaves room for other kinds of rights conflicts, for example where my right to self-defence contingently conflicts with your right not to have your window smashed. For more on the issue of inter-right and intra-right conflicts see Jeremy Waldron, 'Rights in Conflict,' in *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993), 203-224.

- (3) The procedure of finding more ultimate principles which explain the initial grounding relation between F and P cannot proceed indefinitely, and thus will terminate in some ultimate fact-insensitive principle.

So, by way of illustration, we might affirm the principle (P) that one should keep one's promises, and we might affirm this principle by making reference to the fact (F) that keeping one's promises helps people pursue their projects (p. 234). We then ask why F supports P and we might decide the explanation is because (P1) we should help people pursue their projects. The affirmation of P1 does not hinge on the truth of F, and even if there is some further fact which grounds P1, this will only be because there is some more ultimate principle, P2 or P3, which is necessarily insensitive to all facts.

The thesis in this chapter is important, according to Cohen, because it is one that constructivists like Rawls deny. Rawls claims there is 'no objection to resting the choice of first principles upon the general facts of economics and psychology'.<sup>21</sup> Rawlsian constructivism depends on the view that we determine our fundamental principles by asking what rules contractors would or could all accept under certain conditions and in light of certain facts. Facts thus play an integral role in justifying the choice of the first principles of justice within Rawlsian constructivism. If Cohen is right, however, then Rawlsian constructivists must be mistaken in thinking that the principles which the constructivist procedure selects are indeed fundamental principles. Because they are fact-sensitive principles they must, according to Cohen, depend upon further, fact-insensitive principles. And because constructivists don't explicitly identify what those fundamental fact-insensitive principles are, they are liable to misunderstand what their ultimate normative commitments are.

Chapter 7 continues the critique of Rawlsian constructivism. Cohen argues that Rawlsian constructivism makes two crucial errors of misidentification regarding the nature of justice. First, Rawlsians confuse fundamental principles with what Cohen calls 'rules of regulation'. Fundamental principles are not derived from other normative principles, whereas rules of regulation are rules we choose to adopt 'in the light of what we expect the effect of adopting them to be' (p. 276). Thus, we might have a fundamental principle that declares arbitrary inequalities to be unjust, but this principle on its own cannot tell us what rule of regulation to adopt with regard to tax policy. In order to answer that question we will need to consider all the relevant principles, as well

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<sup>21</sup> Rawls as quoted by Cohen (p. 259).

as sociological facts regarding the projected effects of various taxation schemes. Second, Cohen argues that Rawlsians confuse principles that serve or express the value of justice with principles that express or serve other values (p. 277). So, as we've already seen, Cohen argues that Rawlsians confuse an egalitarian principle, which is a principle of justice, with a principle mandating certain Pareto improvements, which reflects the value of efficiency but not justice.

Why do Rawlsians make these two mistakes? Because 'constructivism is the view that a principle gains its normative credentials through being the product of a sound selection procedure' (p. 274). Parties in the original position are tasked with deciding what general rules to adopt to regulate the basic structure of society in light of certain limited facts about their own interests, and in light of limited facts about human behaviour. Cohen's complaint about this constructivist procedure is that the parties are tasked not with uncovering the fundamental principles of justice, but deciding upon rules of regulation. And deciding what the rules of regulation should be involves appealing to values other than justice, and it also involves appealing to facts which might affect the feasibility or desirability of implementing any proposed rule. Constructivists thus 'mistake applied principles of justice for fundamental ones,' where applied principles of justice are fundamental principles of justice that are compromised by some factual constraints and/or some other value or values (p. 282). The relevance of the arguments in this chapter to the first half of the book should hopefully be clear. We can now see why, according to Cohen, the flawed Rawlsian constructivist methodology facilitates the substantive errors regarding the difference principle that Cohen claimed to find in the earlier chapters.

The book's final chapter offers an extended response to Andrew Williams' important paper, 'Incentives, Inequality, and Publicity'.<sup>22</sup> In that paper Williams offers a reply to the argument Cohen mounted in response to the basic structure objection (chapter 3). Briefly, Williams argues that there is a way of characterizing the basic structure that avoids being arbitrary, excludes individuals' salary and career choices from the account of the basic structure, and thus excludes such choices as objects to which the principles of justice might directly apply. Williams argues that the basic structure is, among other things, constituted by the fact that its rules must be suitably public. Publicity is, one might think, an important feature of Rawlsian constructivism since part of the purpose of political constructivism, at least on many accounts, is to uncover

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<sup>22</sup> Andrew Williams, 'Incentives, Inequality and Publicity,' *Philosophy & Public Affairs* 27 (1998), 225-247.

principles that can be publicly justified to the diverse set of reasonable persons who will inhabit a liberal democratic society. Cohen's proposed ethos, Williams claims, fails to be suitably public.

In chapter 8 Cohen offers a detailed rebuttal of Williams' position. Cohen argues that publicity cannot be a constraint on principles of justice (or even a relevant consideration with regards to justice) for a number of reasons, one of which is simply that we can think of important counter examples to this thesis: for example, the principle that racial discrimination in employment is unjust. Discrimination is a question of motivation or intention, and as such, is not easily subject to the requirements of public checkability that Williams lays out, but this does not undermine the claim that it is unjust to discriminate on the basis of race when engaged in hiring employees (pp. 355-356).<sup>23</sup>

### V. Constructivism, Justice, and Political Philosophy

Cohen makes so many important and thought-provoking claims in the second half of the book that it's not possible to discuss them all here. The argument that has already attracted much attention is the argument about facts and principles. A small army of philosophers have already begun marshalling arguments in an attempt to show either that Cohen is wrong in claiming that all fact-sensitive normative principles must ultimately depend on fact-insensitive ones, or else to show that Cohen is wrong in thinking that this thesis can be as meta-ethically neutral as Cohen claims it can be.<sup>24</sup> My own view is that this army is unlikely to succeed in its mission: I think Cohen is right about facts and principles. The more interesting question, I think, is whether the truth of Cohen's thesis about facts and principles necessarily poses the sort of deep problems for Rawlsian constructivism that Cohen claims it does. I have my doubts about this, and in the remainder of the essay I will try to briefly articulate those doubts.

Let me begin by pointing out that Cohen's fact-insensitive principles thesis is only one of the ways in which he differs from Rawlsians regarding the nature of political philosophy. There are several other dimensions of disagreement, and each of these is, I

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<sup>23</sup> For his response to Cohen see Andrew Williams, 'Justice, Incentives, and Constructivism,' *Ratio* XXI (2008), 476-493.

<sup>24</sup> See for example Miriam Ronzoni and Laura Valentini, 'On the Meta-ethical Status of Constructivism: Reflections on G.A. Cohen's Facts and Principles,' *Politics, Philosophy, & Economics* 7 (2008), 403-422; David Miller, 'Political Philosophy for Earthlings,' in *Political Theory: Methods and Approaches*, David Leopold and Marc Stears eds. (Oxford: Oxford University Press, 2008), 29-48; Thomas Pogge, 'Cohen to the Rescue!,' *Ratio* 21 (2008), 454-475; and Samuel Freeman, 'Constructivism, Facts, and Moral Justification,' in *Contemporary Debates in Political Philosophy*, Thomas Christiano and John Christman eds. (Oxford: Blackwell, 2009), 41-60.

believe, at least as important as the dispute about fact-insensitivity to Cohen's rejection of constructivism. In the introduction of the book, Cohen says the following:

Beyond the disagreement between me and the Rawlsians with respect to both the form and substance of justice, there is a disagreement about how to do political philosophy, or indeed philosophy itself, a disagreement complexly explained by the fact that I am an Oxford man (of a certain vintage) and they are Harvard men and women. Oxford people of my vintage do not think that philosophy can move as far away as Harvard people think it can from pertinent prephilosophical judgment... *A Theory of Justice* sets itself against, and offered to replace, what Rawls called an "intuitionist" conception of moral and political philosophy... In this conception, one favored by many Oxford types like me, we determine the principles that we are willing to endorse through an investigation of our individual normative judgments on particular cases... We expect to find, moreover, as we approach the completion of our task, that the normative requirements that we recognize present themselves in a competing array: they cannot all be satisfied at the same time, nor do we have a method for systematically combining them. Discursively indefensible trade-offs are our fate. I do not say that such an intellectual predicament is satisfactory. But I do say it is the predicament we are in. There are many attempts to escape it in the literature, and as many failures to do so (p. 3-4).

So, in addition to the fact-insensitivity thesis, Cohen also endorses a form of radical pluralism (what Rawls calls intuitionism) that Rawls and Rawlsians reject (p. 4). There are two further ways in which Cohen's view of political philosophy differs significantly from the Rawlsian one.

First, there is a disagreement between Cohen and Rawls as to whether justice is a simple or complex value (my terms). Simple values incorporate a single normative consideration, whereas complex values incorporate more than one such consideration. Cohen believes distributive justice is a simple value because he believes 'equality constitutes distributive justice' (p. 279). No consideration other than equality is relevant when we assess the justice of a distribution. For Rawls, justice is a complex value, one



that incorporates a number of different normative considerations, including (at least) equality of opportunity, absolute levels of advantage, self-respect, and the treatment owed to beings who possess the two moral powers.

Second, Cohen and Rawls seem to disagree about the appropriate objects of judgements of justice. Cohen tells us that ‘the question for political philosophy is not what we should do but what we should think, even when what we should think makes no practical difference’ (p. 268). And what Cohen argues we should think, of course, is that any arbitrary inequality between persons is *pro tanto* unjust, even if that inequality has not been caused by human choice, and even if there is nothing we can do to remove the inequality (p. 7). As Andrew Williams has noted, Cohen’s view of justice is in this way, axiological: it appears to be a version of telic egalitarianism where states of affairs are the relevant objects of our judgements of justice, regardless of whether those states of affairs have been or could be affected by human choices.<sup>25</sup> Rawlsians do not hold this view of justice. For Rawls and Rawlsians, judgements of distributive or social justice apply only to practical questions about what we must do (and what we have done) regarding the fair distribution of the burdens and benefits of social cooperation.<sup>26</sup> There is no suggestion in the Rawlsian project that judgements of justice pertain to states of affairs generally.

So, we have four main methodological or metaethical axes of disagreement between Cohen and Rawls:

1. Fact-(In)sensitivity of Fundamental Principles
2. Radical Pluralism vs. Lexically-Ordered Principles
3. Justice: Simple vs. Complex Value
4. Justice: Axiological vs. Practical

Here is my, tentative, suggestion: even if Cohen is right about 1 (and I think he is), this is far from sufficient to show that constructivists are fundamentally mistaken regarding what justice is, or about how we should decide what principles of justice there are. Consider the following issue which Cohen uses to drive home his point that Rawlsian constructivism misidentifies rules of regulation with principles of justice (pp. 269-270). Suppose we face a choice: we could torture two or three terrorist suspects in order to save tens of thousands of innocent lives. Cohen asks: what is the right thing to

<sup>25</sup> Williams, ‘Justice, Incentives, and Constructivism,’ 491-492.

<sup>26</sup> John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), 5-6.

do? Some philosophers might tell us that we should adopt a rule that prohibits torture under any circumstances, but we should break this rule in rare and compelling circumstances of the kind just described. This may be, Cohen argues, the right answer to a different question, namely, what is the right rule for society to adopt? But it is not an appropriate answer, he maintains, to the question initially posed: what is the right thing to do? Because constructivists focus on rules of regulation, they necessarily must take facts into account when formulating those rules, and thus they inevitably misidentify the fundamental considerations at stake in the torture case.

I think, however, that the torture case provides support for a very different conclusion than the one Cohen is pressing. Suppose we do focus solely on the question: what is the right thing to do? We appear torn by conflicting considerations: on the one hand, the value in saving many innocent lives, and on the other hand, the moral importance of not treating persons in certain ways. What should we do? Cohen's approach to political philosophy may not yield an answer to this question. This is because radical pluralism tells us that there are incommensurable or incomparable considerations at stake here, and thus there may be no single defensible way to rank or weigh them. So there's something distinctly odd about Cohen using the torture example as a means of demonstrating a fundamental flaw in Rawlsian constructivism, since Cohen's preferred methodology declares that political philosophy cannot provide a systematic theory that will answer practical questions about what to do when we face conflicting normative considerations: we just have to rely on our intuitions. On Cohen's view political philosophy can clarify the nature of the conflict, and in doing so it can issue conditional ought statements of the form, 'all else being equal, a world with less arbitrary inequality between persons ought to be preferred as a matter of justice to world with greater arbitrary inequality'. But these kind of conditional ought statements do not provide an answer to the what-should-we-do question whenever that question involves competing normative considerations.

Now consider the Rawlsian view of political philosophy. On this account, political philosophy is meant to help us answer difficult practical questions where different considerations seem to pull us in different directions. Should we torture terrorist suspects under such-and-such circumstances? The answer will presumably depend on what kind of individual rights people possess, how many lives could be saved, and what implications this act would have on other values that we care about. Because Rawlsians conceive of justice as a complex value, incorporating a number of different

considerations, they will necessarily need to be alert to how any proposed action might affect all the relevant considerations, and thus they will need to be sensitive to a wide array of factual matters. This is not because Rawlsians are necessarily committed to rejecting Cohen's thesis about fact-insensitive ultimate principles, but rather because Rawlsians are trying to do something Cohen believes is impossible: make discursively or rationally defensible decisions about how different considerations should be weighed in an overall assessment about what we must do.<sup>27</sup> If this is what political philosophy is supposed to be about, then justice will always be fact-sensitive, even if Cohen is right that fundamental normative principles are fact-insensitive.<sup>28</sup>

Suppose, for the sake of simplicity, that we assume that some taxation policy question involves three main considerations: freedom of occupational choice, efficiency, and equality. Cohen will insist that each of these might represent fact-insensitive ultimate principles, but that any attempt to combine them into some overall judgement is necessarily a non-fundamental (i.e. fact-sensitive) and impure (i.e. melding of different values) rule of regulation, and thus not a proper principle of justice. But Cohen's claim is only accurate if we accept his position on points 2-4 above. Provided we take the Rawlsian view on these points, we might insist that any decision on the tax policy question which incorporates all three considerations is a possible fundamental principle of justice, since principles of justice are answers to practical questions, and thus are bound to be both fact-sensitive and 'impure'. Earlier I quoted Cohen's claim that 'the question for political philosophy is not what we should do but what we should think, even when what we should think makes no practical difference' (p. 268). What I've said in this section should hopefully suggest the form of a possible Rawlsian reply:

Cohen says political philosophy is about what we should think, but this is too vague. What does political philosophy direct us to think about? About the efficiency of vacuum cleaners, or the aesthetics of Magritte paintings? No, of course not. Justice is about what we

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<sup>27</sup> Because justice is about what we must do, it is a sub-set of that broader normative category: what we should do. I borrow this way of distinguishing justice from Dan McDermott's brilliant unpublished paper, 'Desert, Rights, and Justice'.

<sup>28</sup> Although I don't want to defend this claim here, it seems to me that Rawlsians could plausibly insist that fundamental reasons or considerations must be fact-insensitive in the way Cohen identifies, but that principles of justice by their nature must address practical questions, and thus will be fact-sensitive statements which incorporate multiple fact-insensitive fundamental considerations. Cohen does consider the proposal that first principles of justice might be fact-sensitive even though other ultimate normative principles are not. He rejects this view and provides one critique of a particular argument in its favour (pp. 287-290).

should think about what we must do,<sup>29</sup> and distributive justice is specifically about what we must do regarding the distribution of the burdens and benefits of social cooperation. In order to answer this practical question, we must consider the various normative considerations that bear on the question, and thus we must also be sensitive to how different proposals will reflect the relevant normative considerations in different ways.

I don't have space to consider the case here (and I'm uncertain about the merits of the case), but it may well be that some version of constructivism is the right way to think about justice if we accept the Rawlsian, and not the Cohenite, picture of what justice is. If we think questions of justice go beyond considerations of equality, then Cohen's radical pluralist methodology can't help us very much. Rawlsian constructivism may offer us a better chance of figuring out what to think about what we must do to achieve the best balance or blend of all the normative considerations that constitute the complex value of justice.

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<sup>29</sup> I owe this way of putting the point to Joanna Firth.