

## Rescuing Justice and Equality

Gerald Allan Cohen

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John Rawls has been fortunate in his critics, benefiting from the attentions of the foremost philosophers in this and the previous century. And on that distinguished list, G. A. Cohen can claim precedence. In his contribution to the theorizing of justice reviewed here, Cohen deploys a critical razor honed on the works of Karl Marx, Robert Nozick and Ronald Dworkin.<sup>1</sup> As a result, *Rescuing Justice & Equality* is, 'Easily the deepest and most sophisticated critical work on Rawls's theory'.<sup>2</sup>

Although focussed on Rawls, the critique of *Rescuing* embraces the philosophical method known as constructivism (I say more about this below). Readers interested in that general theoretical approach will find that *Rescuing* repays close attention. But be warned. Readers who are not habituated to Rawlsian theory, and in particular Rawls's substantive work on justice, may find much of *Rescuing* difficult to follow (as they will this review). Both works assume familiarity with *A Theory of Justice*.<sup>3</sup> Moreover, *Rescuing* includes a large amount of previously published material. However, even the Rawlsian cognoscente will appreciate *Rescuing's* redeployment of familiar ideas alongside Cohen's more recent work in metaethics.<sup>4</sup> It is wonderful how *Rescuing* provides longstanding and distinct arguments with a common grounding in a comprehensive critical analysis of constructivist theory.

*Rescuing* is split into two main parts followed by a minor third. The first part concerns the 'rescue of equality' and largely concerns the

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<sup>1</sup> Jerry died last year. I was lucky to know him as a friend and teacher. Without Jerry, the world is a poorer place.

<sup>2</sup> From the dustjacket puff by Arthur Ripstein.

<sup>3</sup> Readers who are not yet initiates may be put off by the large amount of 'backstory' to many of the arguments. On page 379, Cohen describes one argument (and I can imagine him chuckling as he wrote the description) as a 'response to Joshua Cohen's criticism of my reply to Ronald Dworkin's defence of Rawls's emphasis on the basic structure'. One anticipates a round of 'denunciations' of the 'response to the criticism of the reply to the defence of the emphasis'. Perhaps Rawlsian adepts might consider adopting a formal system of reference to help keep track?

<sup>4</sup> G. A. Cohen, 'Facts and Principles', (2003) 31 *Philosophy and Public Affairs* 211.

Rawlsian justification for the difference principle (DP). The second part is a 'rescue of justice' criticizing the constructivist identification of justice with principles sufficient to ground rules for regulating the basic structure of society. The second part of *Rescuing* deepens the argument of the first by suggesting how the content of 'justice as fairness', rests on suspicious metatheoretic grounds. The third part offers a series of 'replies to critics'. This last section is the least developed. Nevertheless, and perhaps by reason of its immaturity, the final section will interest readers who wish to continue the argument. In the remainder of this review, I will set out Cohen's main points and suggest a few ways in which defenders of Rawls might respond.

Part one of *Rescuing* suggests reasons why 'Rawlsians' might disagree with Rawls. Cohen's primary concern is the difference principle (DP). Recall the core Rawlsian argument that if the 'talented' producers command inequality-creating incentives that nevertheless do no disservice to the worst off (who are as least as well off as they would be in the absence of such inequality), then the 'worse off' need not thereby suffer an injustice. It would be reasonable for parties in the Original Position (OP) to accept a principle permitting inequalities of wealth and income when restricted by the conditions imposed by lexically-prior demands of Rawlsian justice. In the leximin version of the DP, (which Cohen argues is the canonical formulation) the greater shares of the talented are justified by the benefits so derived, combined with an absence of disadvantage for the untalented.<sup>5</sup>

The most prominent Rawlsian argument for the claim as to the justifiability of the DP rests on the provision of incentives-for-the-talented. It is because incentives are necessary to induce greater productivity from the talented that the DP countenances inequality. But Cohen offers a neat counterargument.<sup>6</sup> Given the equal distribution of D1, the DP recommends a move to a less equal D2 if D2's inequality improves the lot of some without disservice to the lot of those worse off. In the standard case,<sup>7</sup> D2 is

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<sup>5</sup> The leximin version of DP differs from the better known maximin version. The maximin version suggests that inequalities are justified if and only if these are 'greatest benefit of the least advantaged members of society'. Cohen provides evidence that leximin is Rawls's preferred version (and indeed is a more plausible outcome of the Original Position), but Cohen's arguments do not, on the whole, depend on this less-equalizing construal of Rawlsian theory.

<sup>6</sup> G. A. Cohen, *Rescuing Justice and Equality* (2008), 38f.

<sup>7</sup> The 'standard case' concerns rent-seeking by the talented when they would be less productive if they were denied unequal benefits. This case is Cohen's target. It is distinct from 'special burden cases', in which a heavy burden imposed by productive work justifies unequal distribution of other goods and 'bluff/threat cases' in which the talented would be no less productive if

unequal because the talented acquire greater primary goods through incentives. Those incentives are necessary because the talented require them to produce the goods that permit improvement. Absent the necessity of incentives, Cohen posits the world of D3: D3 is a possible world in which the talented produce goods that improve someone's lot, but do not require the incentives which create inequality.

Cohen is not saying that the talented of D1 and D2 are 'pulling a fast one' over the untalented. It may well be true that many/most people are built so that their productivity increases when this garners them (additional) inequality-creating goods. Instead, Cohen's point is that Rawlsian argument portrays the talented's incentives as a necessary evil. It would be better if the talented could be more productive without needing incentives. Lacking the 'necessary evil' of self-seeking incentives, D3 appears more just than D2. With this argument, Cohen suggests he has demolished the incentive-justification for the DP.

But why should Rawlsians believe that D3 is more just than D2? Cohen suggests that Rawlsians agree that 'less arbitrary inequality' equals 'more justice'. Recall the Rawlsian stipulation that the distribution of talent is morally arbitrary. If the talented really affirmed this, they would be, in Cohen's eyes, 'true egalitarians'. As 'true egalitarians' they would see each other as equals regarding claims upon the world's resources, both natural and social. Each would accept the need to be able to justify her holdings in a world in which all have equal standing to claim, they would affirm an egalitarian *ethos*. Given this viewpoint, the talented would not say to the others, 'Give me more because, then (and only then) I shall make someone better off'. They would not think that their capacity to benefit others grounds a claim to a greater share. There is no morally nonarbitrary justification for the greater share the talented demand, therefore, such a demand would violate the presupposition of 'true egalitarianism' (the need to be able to mutually justify claims). If Rawls is committed to the argument that arbitrary facts do not justify a distribution, the DP's accommodation of incentives is an accommodation between justice and something that is unjustified. Hence, Cohen argues that the DP, insofar as it depends on the incentives argument, does not deserve recognition as a principle of justice.

To be clear, Cohen's arguments in the first part of *Rescuing* extend to a general attack on the inequality-accepting DP. But the power of the attack is strongest when aimed at the incentive justification. This argument is, as

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not inequitably remunerated, but they say that they would so as to garner advantage.

Cohen states, the ‘heart’ of his objection.<sup>8</sup> Nevertheless *Rescuing* approaches the DP from a variety of angles, including argument in terms of the basic structure (and against justice as a personal ethos), in terms of Pareto-superiority, and in terms of personal freedom. In each case, Cohen attacks the inequality permitted by the DP. However, Cohen does countenance inequalities derived from what he refers to as a ‘personal-prerogative’. This prerogative appears to involve the permissibility of self-seeking behaviour with implications for equality, but *Rescuing* does not systematically link this prerogative to an overarching defence of egalitarianism. Of course, *Rescuing* does not offer a defence of egalitarianism.

To conclude the review of *Rescuing*’s first section, Cohen is not saying that, all things considered, incentives for the talented ought to be condemned. Justice is not the only thing that matters.<sup>9</sup> Cohen is a value pluralist. Sometimes there are reasons to act less justly or institute suboptimally just institutions when these actions or institutions would promote other values. If humans are constituted in such a way that prevents them from acting in ideally just ways, then good public regulation will account for these failings. It is probable that the best regulative theory may embrace the predilections of bakers’ and butchers’ to pursue private interest. Given such predilections, the best regulative theory may permit, perhaps even laud, the provision of incentives. But one should not dignify demands for incentives or social structures that permit them, with the name of justice.

In *Rescuing*’s second section, Cohen moves the attack to the Rawlsian foundations. What Rawlsians understand as principles of ‘justice’ are not ‘justice’, but are instead plausible principles of public policy. Cohen identifies justice itself with equality, but that is not his primary argument (although it is more than mere background). His target is the methodology of constructivism.

The constructivist method creates/recognizes principles of social regulation through the use of an idealized agreement procedure. Norms of

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<sup>8</sup> Cohen, above n 6, 388.

<sup>9</sup> Indeed Cohen might accept the necessary suboptimality of justice in any realistically utopian world. Even in a world of perfect compliance, one could imagine how Cohen’s positive theory of justice (luck egalitarianism), in his preferred metric of justice (‘opportunity for advantage’) unconfined to the basic structure could have totalitarian implications. (One imagines the state monitoring toothpaste consumption to help ensure everyone gets an equal opportunity to their share of toothpaste). But Cohen need not accept that result as an argument against the justice of his position. Justice is a value among others.

justice or morality or ethics (or whatever) *are* what a set of choosers would agree to when choosing the norms by which the domain in question is to be governed. As the history of social contract thinking suggests, different circumstances of choice generate different agreements. Rousseau suggests the origins of inequality lie with the crafty rich who bamboozle the foolish poor. Hobbes's frightened brutes will do whatever it takes to secure their lives. Rawls's original position reflects an ideal of fairness. The OP is ideally fair; it is a situation in which certain facts about humans are carefully situated so as to enable the choice of appropriate principles. In the OP, one of the more important facts about the choice is that parties prefer more as opposed to less primary resources — in Rawls's terms, they are rational. For Rawls, such facts about humanity affect what justice is. Justice is a relationship between '*les hommes tels 'qu'ils sont, et les lois telles qu'elles peuvent être*'.<sup>10</sup>

Cohen rejects the methodological presupposition that justice can be 'read' off facts about the human condition in the way Rawls suggests. His reasoning depends upon a metatheoretic argument that ultimate principles of justice do not depend upon facts.<sup>11</sup> If a normative principle includes a fact, it must be possible to say why that fact is relevant. The inclusion of any fact must be justifiable. Cohen argues that any justifying fact is only a justifying fact because that fact is in turn justifiable by reference to a 'more ultimate' principle. And since justifications need to stop, they must stop with 'fact-insensitive' principles.

Cohen offers an illustration.<sup>12</sup> Suppose someone suggests principle *P* viz. — 'people should keep promises' because 'only when promises are kept can people succeed in pursuing projects'. The justifying phrase beginning with 'only' refers to a fact, call it *F*. But why should one think *F* is a justification? Cohen suggests (and it doesn't really matter what the plausible answer is), that one might bring forward principle *P1* — 'we should help people to pursue their projects'. *P1* explains why *F* supports *P*. But one does not need to think that *F* is true to affirm *P1*. The affirmation of *P1* is independent of (insensitive to) the truth of *F*. But support for *P1* might depend on other facts. One might affirm *P1* because of *F2* — 'people can achieve happiness only if they are able to pursue their projects'. And, in turn, *F2* requires grounding in a further principle (*P3*) calling for happiness promotion. Cohen suggests that, at the end of any justification chain, when

<sup>10</sup> The quote is from Book 1 of Rousseau's *Du contract social*. Explicit discussion of the role of this assumption occurs in John Rawls, *The Law of Peoples With 'The Idea of Public Reason Revisited'* (1999), 13.

<sup>11</sup> This a restatement of the argument in Cohen, 'Facts and Principles'.

<sup>12</sup> Cohen, above n 6, 234.

one reaches the final ground of justice, it will be constituted by fact-insensitive principles.

Cohen's argument is largely negative. His target is any constructivism that suggests that facts, particularly facts about human nature, offer independent justification for norms of justice. His point is only that facts can not, by themselves, form the ultimate principles of justice. His argument against constructivism is (formally) uncommitted with regard to the actual character of justice, although his positive theory, that justice is a matter of fact-insensitive principles of equality, plays a role in the critique. This positive theory appears in the description of a plausible alternative to the Rawlsian position. It suggests how facts are relevant. That is, facts are relevant to forming principles of good public regulation; these should take account of the way humans are. To return to substantive Rawlsian theory, the DP may be a good principle of public regulation. But if its justification necessarily depends on facts about the effects of incentives on productivity, then it is not an ultimate principle of justice. Rawls's erroneously identifies the DP as a principle of justice because his method (and metaethics) misidentifies an answer to the question 'What principles should we adopt to regulate our affairs?' with an answer to what philosophy wants to know — viz. 'What is justice?'<sup>13</sup>

Although primarily a critical text, *Rescuing* supports a number of unpopular, even counterintuitive propositions. Cohen rejects those who, and I take this to be a mainstream thought, believe that the philosophy pertaining to justice is properly concerned with answering 'what ought we to do?' For Cohen, practical matters of politics are secondary questions: information at this level does not say much about justice. Cohen suggests that justice lacks a fundamental basis in rationality, practicality, or indeed humanity. His ultimate principles of justice are real objects of moral intuition. He is a Platonist. Neither a matter of opinion, or communal agreement, or practical utility, Justice (and here it requires capitalization) is a domain of reason. One is tempted to call it a synthetic a priori.

In light of this character, *Rescuing* devotes a chapter to Andrew Williams's response to Cohen's critique. Williams advances the value of publicity in defence of the Rawlsian framework. If justice is a matter of norms for distributing benefits and burdens, then it must be possible, at least in principle, to determine if someone is following the norms. Given its *telos* of organizing 'a cooperative venture for mutual advantage', justice must be a public matter. Therefore, any theory of justice that violates 'a principle of publicity' cannot be a theory of justice. Cohen's location of justice as an

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Cohen, above n 6, 268-9.

ineffable Platonic form violates the principle of publicity and therefore, Cohen cannot be describing a theory of justice.

The force of Williams's critique applies to Cohen's argument with respect to his preferred metric of justice (access to advantage), his requirement of an 'egalitarian ethos' and Cohen's representation of justice as an ultimate value that is regulatively indeterminate. In response, Cohen offers multiple defences. The most telling is simply that it is not necessary for norms of justice to be determinate to define appropriate distributions of benefits and burdens. Cohen gives examples of vague norms, such as prohibitions on nepotism (mostly bad, but ok in small companies) or duties to not significantly degrade the environment (something is required of us, but we don't know precisely what). Cohen suggests these examples show how vague norms can perform important functions. But Cohen's argument depends on a more than the mere *possibility* of justice being indeterminate. For example, because he rejects the accommodation of facts within 'fundamental principles of justice' but nevertheless thinks that ascription of rights depends on facts, he is committed to rejecting the possibility of moving from questions of pure justice to the assignment of rights and responsibilities. Many readers will simply balk at that point. For example, there is little space left for 'natural rights'.

Turning to the third and final section, readers interested in continuing the argument will find Cohen's 'Replies to Critics' particularly interesting. I will not try to summarize the various lines of argument presented here. Note that this third part is profitably read in conjunction with the essays produced for *Justice, Equality and Constructivism: Essays on G. A. Cohen's Rescuing Justice and Equality* (2009) edited by Brian Feltman. Feltman's volume contains essays by a number of those authors whose work Cohen responds to in the 'Replies'.

I will suggest one general pro-Rawlsian defence to which Cohen gives inadequate attention. This concerns the argument that Rawls illicitly uses the value of equality in order to reject both utilitarianism and 'the principle of natural liberty' but then abandons it to argue for the DP. Cohen suggests that Rawls is inconsistent when equality is held to be a sufficient reason to reject other principles, but then carries no weight against the Pareto-improving DP. But are Rawlsians committed to this process? When addressing this point Cohen's discussion is not directly concerned with canonical text; he is addressing Barry's reconstruction of the Rawlsian argument.<sup>14</sup> And perhaps the DP responds to a trade-off within justice, rather than offer incoherence. The DP may instantiate the value of equality but trade it off against the value offered by constrained Pareto-

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<sup>14</sup> Cohen, above n 6, 87f.

improvement. No incoherence is necessary; if one doubts that justice is defined by egalitarian purity.

But I doubt that this is the best Rawlsian response. More strongly, the equality arising from the elimination of all claims based on morally arbitrary factors need not be seen as a positive argument in favour of equality. This form of equality may simply be what remains after Rawls disposes of certain inequality-producing justifications (arbitrary factors) and before further argument is adduced. So despite what Rawls actually says, Rawlsians need not be committed to believing that an equality of income and wealth has value in itself. And if he is not, then the DP may not be a trade-off at all.

But Cohen has a further argument, that the talents possessed by the talented are themselves morally arbitrary and therefore can provide no justification for claims. But Rawls need not appeal to 'an argument from talent'. Instead, his point is that it would be rational to accept a principle permitting inequality. It is interesting that when addressing this point, Cohen refutes it by reference to text in which Rawls claims that the moral equality of citizens justifies a baseline of resource equality. This text is taken from *Political Liberalism*, (not *A Theory of Justice*) and elsewhere Cohen affirms that *Political Liberalism* does not concern justice, but rather legitimacy.<sup>15</sup> Regardless of the accuracy of that claim (and I have my doubts), it is not obvious that Rawls is committed to a Cohen-approved egalitarian conception. It is only because Cohen assumes that distribution remaining after morally arbitrary influences have been removed is itself an instantiation of justice, offering a force of moral inertia weighted against any move away from equality, that Cohen can charge Rawls with incoherence.

I conclude with a strange gap in the argument. At the outset, Cohen notes that egalitarians care about inequality between the rich and the poor. It is the fact that some are badly off while others live in splendour that gets egalitarians 'going politically'.<sup>16</sup> But egalitarians 'have no strong opinion about inequality' among the rich.<sup>17</sup> The man who complains that his super-yacht isn't the equal of his neighbour's mega-yacht won't cut ice with the egalitarian crowd. And to my mind, Cohen is right. But as Cohen recognizes, the example suggests a problem with identifying equality with justice (in any substantive sense the value is accorded in the egalitarian literature). Cohen's provisional solution (stated on p.35) is that all social inequalities are harmful. But this is a claim that connects justice with harm,

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<sup>15</sup> Ibid 297-8.

<sup>16</sup> Ibid 30.

<sup>17</sup> Ibid 31.



not, at least fundamentally, or without further argument, with inequality. The point of the example is that the merely rich are not unjustly treated when compared to the super-rich. And if there is a sense in which the merely rich are disadvantaged as compared to the super rich, then justice can't merely be about equality. The obvious egalitarian solution consists in a nuanced theory of disadvantage such as Cohen began to develop in his 'expensive tastes' articles.<sup>18</sup> But this material does not reappear in *Rescuing* (to be fair *Rescuing* is a critique, not a theory). Instead Cohen suggests that once the harms done by inequitable social systems and attitudes are eliminated; only egalitarian outcomes will be justifiable. But this (another 'negative argument') is not a theory of justice as equality. And a lack of that theory makes it difficult to assess the superiority of Cohen's metaethical theory over that of Rawls.

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<sup>18</sup> G. A. Cohen, 'On the Currency of Egalitarian Justice' (1989) 99 *Ethics* 906; 'Expensive Tastes and Multiculturalism', in Rajeev Bhargava, Amiya Kumar Bagchi, and R. Sudarshan (eds.), *Multiculturalism, Liberalism, and Democracy* (1999); G. A. Cohen, 'Expensive Taste Rides Again', in Justine Burley (ed.), *Dworkin and His Critics: With Replies by Dworkin* (2004).