

## Cohen's Rescue

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**Abstract** G. A. Cohen's *Rescuing Justice and Equality* proposes that both concepts need rescuing from the work of John Rawls. Especially, it is concerned with Rawls' famous second principle of justice according to which social primary goods should be distributed equally unless an unequal distribution is to the benefit of the worst off. The question is why this would ever be necessary if all parties are just. Cohen and I agree that Rawls cannot really justify inequalities on the basis given. But he also thinks equality is the correct analysis of justice, though he provides no actual direct arguments for this. He does, however, provide a striking analytical argument claiming that fundamental principles of justice must be fact insensitive, and that Rawls's view of justice violates this requirement. I argue that the requirement is itself misconceived and that principles of justice cannot possibly be fact insensitive in the sense developed by Cohen. Few philosophers share this view of Cohen's—which I argue is due to several conceptual mistakes. With these ironed out, the contractarian view, broadly speaking, is seen to be plausible and powerful. Meanwhile Cohen appears to embrace intuitionism, a stance that cannot possibly be acceptable in social philosophy. In the end, Cohen is successful in arguing that Rawls cannot have what he wants, but neither is Cohen successful in claiming that justice is equality.

**Keywords** Basic structure · G. A. Cohen · Constructivism · Difference principle · Egalitarian/egalitarianism/equality · *Ethos* of justice · Fact-sensitive/fact-insensitive · Free market · Incentive argument · Incentive(s) · Intuitionism · Justice · Libertarian · Pareto/Paretian · Principles · John Rawls · Rules of regulation · Social contract

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G. A. Cohen died suddenly, unexpectedly, and lamentably early, on August 5, 2009, aged 68, having not long before retired from the Chichele Professorship of Politics at Oxford University. Over the course of many years, he had running disagreements with many people, among them myself—as well as much pleasant, often hilarious, exchange of a more social kind. We benefited from both, and will miss him, and regret, enormously, that his energetic and immensely able contributions to political and moral discussion have come to an end. With my recent reading of his last sizable book, *Rescuing Justice and Equality*,<sup>1</sup> he in effect hugely adds to his side of a main argument between us (many others will have similar records on various important matters, I am sure). The appearance of this book enables me now to extend my side of the controversy—but I am in the melancholy position of lobbing my rejoinders into an empty court. Nevertheless, these things need to be argued, and in this rather lengthy treatment, I will try to argue them as best I can.

## 1 Introduction: Cohen's Statement of His Main Concerns

Rescuing justice and equality from what? G. A. Cohen's answer, which sets the background for this book, is—the clutches of John Rawls, at least on a certain understanding—widely held, to be sure—of his views, which are by now the views of a great many sympathizers, disciples, and generally like-minded philosophers. This will come as a surprise to many of us who think of Rawls as plenty egalitarian enough, thank you. Our problem with Rawls, in brief, is that he is much too egalitarian. For us, there is a real need to ask of Cohen, “What's *your* problem?” Cohen's answer is as follows:

In the ideal socialist society [which he specifically contrasts in this respect with the “ideal liberal society”] equal respect and concern are not projected out of society and restricted to the ambit of an alien superstructural power, the state. If the right principles are, as Marx thought, the ones that are right for real, everyday, material life, and if they are practiced in everyday life ... then the state can wither away. (1)<sup>2</sup>

In my ellipsis, there was the phrase, “as the socialist ideal utopianly envisages that they will be.” But we ultraliberal libertarians—libertarians of anarchist proclivities—could agree with the latter entirely. We too—along with David Hume,<sup>3</sup> for example—think that if everybody has the right principles and acts on them, then the state will be unnecessary. It is just that we disagree with Cohen, apparently, on what those principles are.

Or do we? Just previously, Cohen refers generally to his ideal conception with the words “freedom and equality.” We of libertarian inclination think that the word

<sup>1</sup> Cohen (2008).

<sup>2</sup> All parenthetical otherwise unattributed numbers are to pages in Cohen, *Rescuing Justice and Equality*.

<sup>3</sup> “Were all men possessed of so inflexible a regard to justice that, of themselves, they would totally abstain from the properties of others; they had for ever remained in a state of absolute liberty, without subjection to any magistrate or political society. But this is a state of perfection, of which human nature is justly deemed incapable.” (Hume 1985, p. 474)

“equality” is either redundant, or expresses a notion that is sharply incompatible with the other one. For the general domain of justice is (I say—but much more on this below) what it is morally acceptable to *enforce*, and enforcement, of course, restricts freedom so far as it goes. So: we libertarians think that we may restrict freedom only in the interests of protecting others, which (we think) is the same as to say, of preserving or enhancing freedom. We think that the freedom of *all* is what is in need of protecting. But using force against A in order, somehow, to *equalize* him with his entirely different neighbor B, does not do that. On the contrary, it defeats it. So in our view, we must take our choice: freedom *or* equality—not both. *Unless*, perhaps, what is said to be required to be equal is freedom itself?—but more about that anon.

Cohen also—perplexingly in my view—continues, “And that means more than that coercive power can wither away. In the Marxist hope, it is the *separation* of state and society, the duality itself, that goes. There is not, on the one hand, as there is in Rawlsian perception, an economic structure that is organized to achieve a certain form of justice, and, on the other, a set of individual economic choices that need show no respect for that justice.” (2) But, as the B-westerns put it, “them’s fightin’ words!” For surely we do not think that anyone, ever, may “show no respect for justice.” We certainly think, however, that people need not respect what most egalitarians evidently mean to support under the label “equality.” We deny, in short, that justice is equality, in the sense that Cohen wants to claim that. This point will be reiterated often enough in what follows. We must not lose track of the fact that equality *needs an argument*. It *needs justifying*. Cohen, as we will see often enough, claims that justice “is” equality. He is not to be allowed to get away with making that claim. We will see!

Cohen goes on to state that “Liberally minded economists take for granted that economic agents are self-seeking ... and then they want people as political agents to act against the grain of their self-interest: pile up your earthly goods on the mundane plane of civil society but be a saint in the heaven of politics.” (2) But this passage, though phrased with characteristic charm, is question-begging at a very high level. For we insist that there is nothing wrong with those who “pile up earthly goods,” and certainly not anything particularly saintly about those who use political power to invade and despoil those accumulators. Quite the contrary.

He now states the “egalitarian thesis that in a society in which distributive justice prevails, people’s material prospects are roughly equal: distributive justice does not tolerate the deep inequality, driven by the provision of economic incentives to well-placed people, that John Rawls and his followers think a just society displays.” (2) The claim is, in a sense, tolerably clear, or so it seems: socialist justice, Cohen seems to be saying, will compel people to have at least very approximately equal incomes (to put it in economically more or less intelligible terms). But notice the implicit insinuation: that in liberal society, the *state provides* those incentives to those “well-placed people.” That idea, however, is utterly contrary to the idea of freedom, in the view of many of us. States that “provide” high incomes to their agents, or to their friends, are in our view acting contrary to the principles of a free society. In a free society, each of us deals with others as legitimate wielders of their native or acquired abilities and powers—we do not as such deal with a centralized self-proclaimed “authority” to oversee economic matters. Individual people are

entitled to make the best use they can of their abilities and options—be they rich or poor, brilliantly endowed or miserably so.

Thus, an apparently eligible example of a relation that Cohen holds to be illegitimate is this: I buy what I see to be a really excellent computer, recently designed, manufactured, and marketed by some very bright and hardworking people. In so doing, I do provide incentive to them to go out and make more of same, and for that matter to improve their designs. And they do that, in spades, thus attracting many more to their remarkable wares, who are willing to pay the prices proposed—so many that the purveyors and makers of them become far wealthier than you or I. Yet, we think, these myriad transactions are perfectly just, and what makes them so is simply that all parties to it acted in complete freedom. No one was compelled to manufacture those desirable devices, nor to buy them. Anyone who sees “injustice” in this is, we think, showing not merely apparent ignorance of human nature, but also enormous disrespect for normal human beings.

Cohen goes on to explain that he is concerned to “rescue” two things: the egalitarian thesis, and the *concept* of justice. (2) The latter is to be rescued, especially, from “constructivism,” a metaethical orientation which he takes to be averse to egalitarian justice. “On the constructivist view, the content of justice is identified by the rules for social living, the rules of regulation that would be chosen in a privileged choosing situation ...” (3) I am not clear whether the comma in that sentence is intended to have the effect of *identifying* those two things, but of course they should not be identified. Conceptually, the rules of morals are *of course*, by definition, the “rules for social living.” Whether those rules are arrived at by some kind of contractarian process, or some other kind of general choice, is discussable, in turn, and not to be just assumed. Further, the content of *justice* must not be identified with rules for social living either, just like that: for while some rules are rules of justice, some are not. The rules of etiquette, for example—what Thomas Hobbes calls “small morals”—are not rules of justice, though they are rules for social living, among the possibly quite small set of persons who pay attention to those rules (Hobbes 1950, p. 79).

Cohen goes on to state, strangely, that “To the extent that justice is distinguished from other values, the case for the thesis that justice requires equality is strengthened, because values other than justice tend against equality.” (3) That sentence prejudges the question about justice, of course; but additionally, it seems not obviously true. Consider charity, which is devoted perhaps most of all to making and approving transfers from the comparatively better off to the comparatively worse off. Justice and charity, indeed, are often enough cited as the two great generic moral ideas. Given the nature of charity, what Cohen argues here therefore seems to be quite wide of the mark: charity as such is not compulsive, whereas justice, as such, *is*. Justice is about what we may be required to do, while charity has to do with the goodness of our hearts. Thus the separating of these two things does not at all do what he goes on to suggest: that, “Accordingly, the rescue of justice that distinguishes it both from other values and from implementable rules of regulation supports ( $\neq$  establishes) the claim that justice requires equality.” (3) So if we hold up as our paradigm exploration of justice Robert Nozick rather than Rawls—or for that matter, Hume rather than Brian Barry—we shall think precisely

the reverse. Justice, many claim, is distinctively concerned not with equality but with entitlement; but charity is at least considerably and perhaps largely concerned, very distinctively, with what amounts to action in the general direction of equality.

Cohen goes on to state that he criticizes constructivism “in particular for systematically conflating other questions with the question of justice” (3)—the very charge I tend to level against most moral theorists of the day, and socialists in particular—including, as we shall see, Cohen himself. It will be interesting to see how he proposes to press this line of argument.

## 2 Methodological Concerns

There is a further note in Cohen's Introduction about methodological matters. Here he makes a generic distinction between the Americans (or anyway, those who emerge on to the scene via Harvard<sup>4</sup>) and the British, in respect of their willingness to depend on their “intuitions” as they are usually called—that is, their “pertinent prephilosophical judgment.” (3) Rawls, as Cohen notes, rejects what he calls “intuitionism,” which in his characterization could be called “radical pluralism”—fair enough. But Cohen states,

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, and while we allow that principles that are extensively supported by a wide range of individual judgments can override outlier judgments that contradict those principles, individual judgments retain a certain sovereignty. (4)

That passage was worth quoting in full, because especially of two things: first, that Rawls, so far as I can see, agrees with it, down the line, and also, because reliance on such things, as so many have pointed out and as I have made something of a career of pointing out, is conspicuously subject to the problem that people will surely differ, greatly, in their deliverances on particular cases. In such cases, the problem of who is right simply cannot be settled by sheer appeals to intuition, on the face of it. And when our subject is *social* morality, that is a pretty serious problem—possibly fatal.

Of course, as Onora O'Neill has recently reminded us,<sup>5</sup> these “particular cases” are, in the literature, not really such at all. Rather, they are general specifications of types of cases bearing various features, these being made the bearers of weight in what are essentially abstract discussions. It is true, I am sure, that people can be and often are highly influenced by *genuinely* particular cases—scenes from childhood, encounters with acquaintances or strangers or whatever. But, as is surely obvious, even so, different people will carry away different recollections of these encounters and will be influenced in various ways by various aspects of them. The literally,

<sup>4</sup> I am, to be sure, a graduate of that institution, but not many will dispute that I am a rather atypical Harvardian!

<sup>5</sup> O'Neill (2009, p. 225).

absolutely particular, is beyond the pale; but the *fairly specific* is laden with the descriptions that the theorist wants to emphasize. From particulars just as such, no generalization is possible. From particulars viewed as exemplars of this or that significant feature, generalization goes on apace, with all the hazards that that entails.

And, having stated all that, I think it obvious that *Cohen's* intuitions are, and could be expected to be, atypical. If intuitive support is sought for an egalitarianism of the strength and level that Cohen's description at the outset implies, then very few people's intuitions are going to support it. Most of us find it impossible to believe that John Dillinger and Mahatma Ghandi, Andrew Carnegie and the nice lady down at the local Burger King, really are entitled to "material prospects (that) are roughly equal." We do not think that employers who advance some of their very capable and productive employees well above others, arranging salaries that are much higher than those of the more ordinary employees (think of the great racing driver Michael Schumacher, who at his peak was earning about \$50 million per year) are somehow doing something wrong, nor that those who earn them do wrong in buying the occasional Rolls Royce or eating at restaurants with bills for one evening reaching levels exceeding the annual incomes of many of a large minority of the world's people.

But now it turns out, rather to our surprise, that apparently Cohen does not really think this either. He himself was advanced, as we all know, to the Chichele Chair at Oxford, a chair in which his "material prospects" were markedly unequal to that of typical Britons, let alone typical denizens of Bangladesh or Mozambique—and, even more important, in which his *nonmaterial* "prospects" were quite spectacularly and irretrievably unequal to those of more ordinary people. I do not think that Cohen thought himself undeserving of that advancement, as also did not the Fellows who elected him to that position. All of which raises a puzzling question, one that infects egalitarianism from start to finish: *If* there is a considerable amount of agreement on the justice of these fairly detailed cases of inequality, then what intuitive support does the "egalitarian" thesis come to have, in the end? Or perhaps we should instead say: what, in face of such examples, *is* the egalitarian thesis, anyway? That is a question to which I have seen little in the way of plausible answers by serious egalitarians, nor of course in any of Cohen's previous works. We will see whether he does better in this large book.

As is by now pretty widely understood, intuition in moral matters, on the face of it, is an extremely weak reed on which to lean.<sup>6</sup> I share the viewpoint that moral intuitions cannot be allowed to have the status of self-standing "data" on which all theory basically depends. They do have the status that they need to be considered, and their possible bases considered and expounded with care. That is quite different from refusing to depart from them. I say this in the face of Cohen's further statements, that

In my philosophically conservative view, that is the only way to go. And when we go that way, we refine, and we thereby reach, our deepest normative convictions, which, being our deepest, we find it difficult to defend ..."

<sup>6</sup> As is argued, at some length and with, I hope, some precision, Narveson (2001, 2010b).

“We expect to find, moreover, ... that the normative requirements that we recognize present themselves in competitive array: they cannot all be satisfied all the time ... Discursively indefensible tradeoffs are our fate. I do not say that such an intellectual predicament is satisfactory. But I do say that it is the predicament we are in. There are many attempts to escape it in the literature, and as many failures to do so.” (4)

This last point brings up the question whether Cohen may not be fixated on “intuitions” that indeed have been effectively rejected in the literature, and that he is blind to the actual successes which he labels “failures.”

But, then—given this kind of methodological orientation, *how could he tell?*

Cohen in fact offers a very instructive thought on the matter in the ensuing discussion:

Let me illustrate how people seek in moral matters a level of precision and certainty that they would not expect to find in matters that fall within personal preference.

“People say that they’d like to give to charity, but that they are so bewildered as to be paralyzed by the multitude of good causes and would-be servers of good causes that they don’t know to which charity to give. No similar paralysis affects them when they have a surfeit of restaurants to choose from. They simply choose one that they know or believe to be good, even if it is not the best, and they think that’s good enough.” (5) ... “The incommensurabilities that paralyze people in that context don’t bother them when it’s a matter of choosing the restaurant that offers the best combination of price, taste, decor, distance, and so on.” (6)

One may wonder to whom Cohen is referring here. For one thing, some people—especially, groups of academics at conventions—*do* torture themselves about the latter, and lots of people do *not* torture themselves about the former. I give to various charities myself, despite being perfectly aware that there is a multitude and without any claim to have done enough research or to have employed strong enough criteria, to justify me in saying that I have chosen the best that I could. It is exactly like the restaurants: some charities seem evidently oriented toward very good causes; I want to do my bit even though that is grossly underdefined; and I carry on, without severe doubts. But then, I hold, philosophically, that nobody has any business *compelling* me to give to any charities—as well as that the state has no business compelling us to contribute to this or that level of welfare, etc.—and once one is aware that one really does have one’s choice here, the sense that one might be into a hopelessly conflictual conceptual mess in so acting simply disappears. But Cohen, I think, has the sense that this cannot be claimed. If you think yourself to be under an obligation to maximize some kind of overall charitable variable, you will indeed have problems of the type he mentions. But that, I hold, is because his principles are mistaken. Cohen has a principle of justice that makes it *prima facie* embarrassing that he does not sacrifice most of his income to what others of us would consider charity. To quote one of his book titles, “If You’re an Egalitarian,

How Come You're So Rich?" For egalitarians, the problem of evidently strong and urgent inconsistency between the lifestyle of the Oxford professor and the Chinese peasant, say, is acute. But for us with more sensible views about what justice demands, there is no such problem.

Cohen writes, "I'm not saying that it's quite OK that things are vague ... Like everybody else, I would prefer something better. But unlike others, I don't think it's to be had." (6) But this is confusion. There *is* a principle, the principle of liberty, which clearly implies, as I put it, that we really do have our choice about these matters and that self-torture for getting it wrong is not appropriate. Cohen has been spending much of his mature academic life resisting that principle, but he cannot deny that it is a logical possibility and that it would have the "nice" properties he claims that no known other principles have. It does not, indeed, have the property that it tells you precisely how much you should donate to Charity A, how much to Charity B, and how much to your daughter's graduation from ballet school. But it does have the very desirable property of denying that any principle *of justice* should be *trying* to do any such thing.

Next Cohen moves to a general consideration of justice and fairness, beginning with some thoughts on the general notion of justice. He objects to any claim that he simply *must*, as he puts it, "say what I think justice is" but if he must, then he will have to merely "offer ... the ancient dictum that justice is giving each person her due." (7) (He is in pretty good company here—David Schmidtz has recently proposed the same thing.<sup>7</sup>) There are, according to Cohen, two opposed beliefs about the relationship between justice and what is due:

According to one ... a conception of justice is fashioned *out of* beliefs about what people are due; according to the other, beliefs about what people are due lie *downstream from* (independently identifiable) convictions about justice. I am not sure which view is more sound, but I do not think I need take a stand ... for the sake of defending any of the claims of this book. (7)

Can we accept this weak-kneed way with the concept? As I have pointed out above, as soon as we encounter real and substantial variability in the beliefs in question, we are in very deep trouble. We have to say which group is right, but we obviously cannot do that by simply appealing to one of their rivals' notions; so where does that leave us? There would seem to be no other possibility than his second one; which would force him to supply a decent account of justice of the type he rejects.

It is boring to have to constantly remind people of the hopeless conceptual weakness of intuition as a supposed source of truth in moral theory, and I am puzzled that a man of Cohen's abilities should not have faced this squarely. But he does not—with unfortunate consequences for his theoretical work, as will be seen later in this discussion. Below, I will argue that his principal theoretical foray on this matter is completely incapable of doing what he claims for it (see below, on the notion of "fact-independence").

Cohen immediately goes on to argue that his "own animating conviction in political philosophy ... is a conviction about distributive justice ... It is that an

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<sup>7</sup> Schmidtz (2006).

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 that nothing can remove that particular injustice.” (7) This has the oracular ring to it of the opening sentence of Nozick’s celebrated *Anarchy, State, and Utopia*: “Individuals have rights, and there are things no person or group may do to them (without violating their rights).”<sup>8</sup> If it were not so oracular sounding, it would be recognized that it is actually without content. That we ought not to violate people’s rights is built into the very idea of something’s *being* a right. Similarly, that unjustifiable acts (whether they are inequalities or not) are—hey, what do you know!?!—unjustified. Is Cohen saying anything more than that justice requires an equal division, except where it does not? I am sure that he thinks that he is. But let us bear in mind the celebrated example of the labor theory of value, which can (and, to remain plausible, must) be watered down to the point where it merely states that one of the relevant factors in a thing’s economic value is the amount of work it took to produce it. That relevant factor could be close to zero (and sometimes is, as we know). The same is true for equality. Perhaps the point is that an unequal division needs vindicating. But this could be true in the same sense as that *any* division, if made in the supposed interests of justice, “needs vindicating” including equalities, which are often out of place. The question is, how much and what counts? If in some cases it is entirely enough to say, “Well, that is the way Jones wanted to do it!”—as it quite often is—then the semblance of toothmarks in the Cohen proclamation become close to indiscernible.

Cohen goes on in that section to state that he will find Rawls’ difference principle wanting in that it “tolerates a certain form of injustice,” as he will argue in Chapter 4. We shall get to that when we discuss those arguments in detail. Meanwhile, he goes on to state that he sympathizes with the view that has come to be known as “luck egalitarianism”—the thesis that unequal distributions can *only* be justified by “some choice or fault or desert” of relevant parties; adding that he is aware of many papers subjecting this principle to serious critique and does not claim to have good answers to all such. But let us right now just pull out our intuition on this matter, folks: do you *really* believe that if Jones just happens to have had a good rain on his crops lately while Smith in another continent has not, then Smith *has a claim in justice* on Jones’s crop? Or that if Rabinowitz was born brilliant while Simpson was born dull, then Simpson is “due” half of the difference between his and Rabinowitz’ lifetime earnings? While I think there are perfectly good and extremely strong arguments against that idea, here I am appealing simply to the same thing Cohen does: intuition. I am sure there are a few who share Cohen’s view on this, but also that the overwhelming majority do not. And I also point to the many examples cited in Cohen’s *If You’re an Egalitarian, How Come You’re So Rich?*<sup>9</sup> of well-heeled soi-disant socialists, many of them largely from inherited wealth, who nevertheless do not voluntarily turn over their much greater resources to the poor. I point to these as examples of the point that Cohen’s egalitarian intuitions do not sit well with people’s normal proclivities, including their perfectly peaceable ones. The

<sup>8</sup> Nozick (1974, p. ix).

<sup>9</sup> Cohen (2000).

egalitarian must either behave like a saint or devote a great deal of backpedalling and hemming and hawing to the project of reconciling the behavior of particular socialists with their principles. This is something that is no problem at all for most of us, who simply do not agree with the socialist maxim.<sup>10</sup> We do not have any serious trouble refraining from theft and murder, which is what our principles call for, and meanwhile we spend our money on all sorts of things, some of them very beneficial to other people, some not particularly so—but we can and do this without qualms. Why should we not count this as an advantage of our principles? (Perhaps it will be said that you do not really *have* a moral principle unless it calls for frequent donning of a hair shirt.)

In Section 5 of his “Introduction” in *Rescuing Justice and Equality*, Cohen writes of “The Two Standpoints”—“an impersonal standpoint on the one hand, to which the state responds, and a personal standpoint on the other, to which the individual, other than in her capacity as a law-abiding citizen, may rightly be dedicated.” (8–9) Cohen’s assertion here is that liberalism calls for such a split, assigning justice to the state and other values to the individual. And he wants to “reject the conclusion that impersonal justice is a matter for the state only...” (9) A little in Rawls may provide some excuse for attributing such a view to him and his followers, but attributing it to liberalism as such is simply wrong. On the contrary: it is precisely the libertarian who insists that the state should be held to the same standard as all individuals: to refrain from using force against the innocent, using people as nothing more than means to one’s own ends. So we agree entirely that we cannot justify “a division of labor between a justice-seeking state and justice-indifferent (save insofar as they are willingly obedient citizens) individuals.” (10) It is puzzling that this point—surely quite obvious, and which I made often enough to him in personal conversation, seems to get no shrift at all in his writings.

Just as Karl Marx praised capitalism, so Cohen praises Rawls, whose *A Theory of Justice* he ranks along with Plato’s *Republic* and Hobbes’ *Leviathan* as the greatest works of political philosophy. “All responsible contemporary political philosophy must cope with both sides of the truth about capitalism, its dark truth and its brighter truth. The Rawlsian endorsement of inequality as just when and because it delivers the goods to everyone is a way of coping that, so I think, masks the conflict it seeks to resolve.” (13) Whatever we may think of his classification of Rawls’ book, conflict there is. (I have explored what seems to me the major problem in Rawls, a problem that destroys the structure, as I see it.<sup>11</sup> Cohen later came to see the same problem,

<sup>10</sup> It has become fashionable of late to claim that libertarians have the same problem, the claim drawing on Nozick’s somewhat ill-considered ponderings in *Anarchy, State, and Utopia*. The claim is that today’s patterns of holdings in wealthy countries lean, over centuries, on violence and fraud in earlier transactions, infecting all subsequent transfers down to the present. Or it is even alleged that Nozick calls upon a “Lockean Proviso” that calls for some measure of equalization of holdings got from “initial acquisition.” Both are wrong, not to mention that virtually all great wealth today is not at all dependent on transfers from the past, being a result of ingenious transaction by entrepreneurs who started out near penniless. (The first American black billionaire, whose remote ancestors were slaves, came on stream a few years back, for example.) See Narveson (2002, 2009). Meanwhile, this problem as it affects egalitarianism is intrinsic, so long as the proclaimed equality is such that many are well above the level the theory entitles them to.

<sup>11</sup> Narveson (2002, Chap. 2).

though he proposes the wrong resolution, in my judgment. *Rescuing Justice and Equality* is almost entirely an exploration of that very problem.) To anticipate, Cohen, I think, fails to appreciate that the fundamental problem that theories of justice are addressing is that there are other people in the world, people who differ from each other, whose differences often enough lead to conflict, and therefore there are problems about how they are to work things out among themselves. Capitalism copes with this; socialism, I think, attempts to undo it. Socialism's identification of justice with equality is untenable because it requires *trampling* on our differences, not *reconciling* them. So I shall be arguing in the ensuing pages.

### 3 Chapter 1: "The Incentive Argument"

Cohen opens this chapter with a quotation from my much earlier article, "Rawls on Equal Distribution of Wealth" (1978). The quotation serves perfectly for an opener, and is worth quoting in full:

Well-Off: Look here, fellow citizen, I'll work hard and make both you and me better off, provided I get a bigger share than you.

Worse-Off: Well, that's rather good, but I thought you were agreeing that justice requires equality?

Well-Off: Yes, but that's only as a benchmark, you see. To do still better, both of us, you understand, may require differential incentive payments to people like me.

Worse-Off: Oh. Well, what makes them necessary?

Well-Off: What makes them necessary is that I won't work as hard if I don't get more than you.

Worse-Off: Well, why not?

Well-Off: I dunno ... I guess that's just the way I'm built.

Worse-Off: Meaning, you don't really care all that much about justice, eh?

Well-Off: Er, no, I guess not." (quoted in Cohen, p. 27)<sup>12</sup>

The passage is misleading in one very important respect. My little dialogue was modeled more or less after the *locus classicus* in Nozick's *Anarchy, State, and Utopia*. Because Nozick's original is so seminal in this discussion, it is worth recalling it here. The dialogue takes place between the "better-endowed" and the "worse-endowed" and concerns the general terms of social cooperation. The worse-endowed

say something like the following: 'Look, better endowed: you gain by cooperating with us. If you want our cooperation, you'll have to accept reasonable terms. We suggest these terms: We'll cooperate with you only if we get *as much as possible*. That is, the terms of our cooperation should give us that maximal share such that, if it was tried to give us more, we'd end up with less.'<sup>13</sup>

<sup>12</sup> Narveson (1978, p. 288).

<sup>13</sup> Nozick (1974, p. 195).

Nozick comments:

How generous these proposed terms are might be seen by imagining that the better endowed make the almost symmetrical opposite proposal:

Look, worse endowed: you gain by cooperating with *us*. If you want our cooperation you'll have to accept reasonable terms. We propose these terms: We'll cooperate with you so long as *we* get as much as possible. That is, the terms of our cooperation should give us the maximal share such that, if it was tried to give us more, we'd end up with less.

If these terms seems outrageous, as they are, why don't the terms proposed by those worse endowed seem the same?. (Nozick 1974, p. 195)

The misleading point about this dialogue is this. As I take care to state the first rejoinder by worse-off, well-off is said to be *agreeing that justice requires equality*. The point of the dialogue was to show where this is going to take him: namely, to having to admit to “not caring much about justice,” if he prefers a higher share for himself as a condition of his producing more for others. But of course the alternative route for well-off is to point out that the premise is false: that justice does *not* require equality in any sense that would support worse-off's inference. What well-off does not care that much about is *equality*—not *justice*. He may well think, as do I, and most people, including most poor people, that justice allows people who produce more to have more. (In Cohen's words, it is their “due.”) And in the case where the worse-off have actually produced *nothing*, well-off's observation that his own efforts will in fact improve worse-off's situation are, one would think, extremely relevant. From the point of view of the poor, well-off's proposal is a good one, and they will take it. No doubt they would even more prefer the equal share that well-off could conceivably offer them too—if he were willing to offer it. But they will hardly be surprised if he does not.

An important note has to be made covering almost all of these discussions: any egalitarian has the job of telling us just what it is that he thinks ought to be equalized. Cohen is apparently not advocating equal incomes across the board, regardless—“though the heavens fall,” as we might say. Just how extensive are the inequalities he would allow and precisely why is a large subject that I do not propose to explore here. That is because Cohen himself represents his position as equating equality and justice, and throughout he speaks as though there is a real and very substantial difference between the way things are now and the way he thinks they ought to be insofar as justice is the relevant factor. Therefore, I ask the reader to set aside issues of relative detail about what constitutes the equality that Cohen advocates as essential to justice—relative in that they do not, in Cohen's view, affect the basic issue of principle, not because they are unimportant or easily managed. [We later learn that Cohen has sympathy for what has come to be called “luck egalitarianism.” See especially his reply to Paul Hurley (403–406). At an appropriate place, I do propose to comment on that particular view. But in general, Cohen's focus is on the specific argument, used (he supposes) by Rawls, that *incentive* justifies inequalities].

To return, then, to the main issue: I claim that the poor would be happy to accept the incentive idea, and so far as I can see, Cohen's "intuition" is the opposite. So let us see where he goes from here. The chapter starts off with a recounting of an action of the British government, 1988, in which the maximal rate of income tax for Britons was reduced from 60 to 40%. The cut, states Cohen, "enlarged the incomes of those whose incomes were already large ..." (27) It might, however, have been characterized differently: what the cut did was to reduce the degree to which those with high incomes were being plundered<sup>14</sup> by the state from a whopping 60% to a "mere" 40% of those incomes. The cut did *not* "increase the income" of the rich. Those incomes remained, so far as the tax's immediate object is concerned, precisely what they were. It is just that now those who earned them retain control over more of it—were able to decide what they would do with more of it—than they were previously allowed to. What we could say, then, is that the British Government would be restoring, to some extent, the incomes of higher income earners to their rightful earners and therefore owners.

These are oppositely tendentious ways of describing the same thing. Obviously what matters is the status of those incomes. Were they, indeed, *earned* by those who got them? Or not? If the incomes of the rich are, as many leftists are wont to say, in effect stolen from the poor, then Cohen's description is certainly to be preferred, for in that case, the state was engaged in a kind of rectification, and after these reductions was—alas!—doing less of it than it ought to. But if the rich were in fact *creating* the wealth they claimed to be earning, it becomes altogether less clear how others could think they were *entitled* to a lot of it, or even to any of it at all. Cohen summarizes the main relevant options: "We hear from the political right that rich people are entitled to their wealth ... because they produced it themselves or got it from others who also produced it or got it legitimately, etc. by voluntary transfers." (28) Those who make such arguments are tagged "the political right"—without discussion of the question whether the entitlement of persons to what they make by their own efforts has anything to do with political labels. After all, if they are, it is because the right fundamental principles have that effect, and if not, then not—whatever current politics may be doing. Cohen, I think, would probably agree with this last idea. He clearly does not think, really, that there *is no truth of the matter* and that whatever there is to say is inherently and arbitrarily partisan. Of course—as I will rub in frequently enough in this lengthy discussion—if political and moral views are just deliverances of intuition and not subject to further reasoning, then that view of the matter may seem the right one. We shall return often enough to that issue. But for the present, let us just remember that it *is* an issue and that there is a very real danger that the terms of the discussion will in fact be biased, in the literal, nonpartisan sense of that word—in which to be biased is to have one's arguments affected by a logically extraneous point to which the biased person is attached owing to, perhaps, his upbringing. (As Cohen discusses the possible bearing of his own upbringing in *If You're an Egalitarian, How Come You're So Rich?*)

Rawls entered this fray, so it is thought by almost all—including Rawls—with a new idea, one that offers the prospect of uniting "right" and "left" perhaps. This

<sup>14</sup> To use the expression memorably deployed by Frederic Bastiat in his terse libertarian classic (2004).

new idea was his “difference principle” which has it that what justifies larger shares of income/wealth is that they contribute to the well-being of those on the bottom. The interesting further twist is that they are to do so “*maximally*.” If that word were omitted, we would have a rather vague principle, according to which the worst off are to be in some way, to at least some degree, however minimal, better off by virtue of the activities of the better-endowed. It is, I think, easy to defend the free-enterprise economy by just such a criterion. (But there are those who would deny it, apparently.) But that is not Rawls’ original intent. He clearly thought that he had a real principle, one that could be used to justify such things as high marginal income tax rates. And certainly his innumerable followers or fellow “liberals” (in the by-now too-nearly universal sense of the term in which an advocacy of high marginal tax rates is what is expected of “liberals”) have thought so.

The point of my article, “Rawls on Equal Distribution of Wealth” from which Cohen quotes, is that this is simply not so. The reason it is not is pretty easy to expound. Saying that the worse off should benefit, literally, *maximally* from redistribution from the better off surely appears to imply that all should be equal, *if* all relevant goods are commensurable and capable of being redistributed and there are no further constraints on that process. For if someone has less than someone else and what that someone else has *can* be divided up in such a way that the person with less is given more, then *if* our “benchmark” is equality, equality is what justice will require us to reach. But Rawls’ difference principle is put forth in such a way as to insinuate, at least, that this will not happen. And why will it not?

Rawls gives us only two ways to “justicize” inequalities: costs of training, and incentives.<sup>15</sup> But costs of training are not primary goods at all—they are not strictly parts of someone’s “income” in the relevant sense. It is incentives of the latter kind only—more or less what Rawls was after in his list of “primary goods”—that create the problem (and the occasion for Cohen’s *Rescuing Justice and Equality*). Are differentials of *that* kind legitimate, or not? If equality is required by *justice*, I argued, then *prima facie* they are *not*. For justice is supposed to override mere desire or wants—that is quite generally what *morality* is all about: it is concerned to correct the behavioral tendencies that bring us into conflict (in the liberal view, interpersonal conflict). So *if* we insist on equality as a matter of *justice*, then incentive is not available for this purpose. And since it is all Rawls has, we are left with the Cohen position, and communism should be the order of the day.

Cohen puts the point in a way that might be regarded as different:

The difference principle can be used to justify paying incentives that induce inequalities only when the attitude of talented people runs counter to the spirit of the difference principle itself: they would not need special incentives if they were themselves unambivalently committed to the principle. Accordingly, they must be thought of as outside the community upholding the principle when it is used to justify incentive payments to them. (32)

If it is different from my way of putting it, it would be in that it makes reference, not simpliciter to *community*, but to “the community upholding the principle”—which,

<sup>15</sup> Rawls (1971, p. 151).

I am sure, not all communities do. Thus in a footnote Cohen states that he “need not deny that enormous inequalities coexisted with community in premarket societies ...” (32) But he does claim that the fact “that community can go with inequality when people believe things that liberals regard as false does not show that they can go together in a society possessed of a modern consciousness.” (32) To tax the reader's patience yet more, I will of course here object to his imperialistic allocation of the word “liberal” to stand for what might better be termed “left-liberal”; classical liberals, of course, would dissent utterly from his claim here, as do I.

There is, as many (beginning with Nozick) have observed, an ambiguity in Rawls' understanding of the idea of making the worst off “better off”: does he literally mean, *improving* their lot? Or does he only mean, *not worsening* it? In principle, there is a very large difference between these two. On the face of it, almost everything that almost any of us ever does has no effect whatever on almost everybody in the world, and so meets the difference principle if the permissible minimum benefit to them is zero. On the other hand, almost everything we do would have to be regarded as *unjust* if it is literally required that whatever we do *benefits* the worst off to however small a degree, so long as that degree is even discernible.

Perhaps it would be argued that not everything *counts*, and that it is only our workaday activities that have to meet the criterion, or some such thing. This would invoke a version of the view that Cohen imputes to liberals, that justice is only a matter of what the *state* does and leaves us free to run our personal lives as we wish. I agree with Cohen, as I stated above: we are never “safe” from justice. But I disagree very sharply with him on the matter of equality. I do not think we have any general duty toward the poor, or toward anyone other than those with whom we take up various special relations, apart from the duty to refrain from harming them—a duty we have toward everyone—of whatever level of income, social status, race, or whatever, with “harm” being itself construed in liberal terms. And in consequence, I think, that almost all of us almost all of the time would meet a difference principle that actually embraced liberty as a constraint on redistribution.

Construing the difference principle in that way, as I argued in those earlier articles, would make it redundant: we could just stick with the liberty principle and be done with it, so far as justice is concerned. (I argued further in those articles<sup>16</sup> that Rawls arbitrarily construes his liberty principle in such a way that *economic* liberty was not included. If I am right in that, the liberty principle should be so understood, and my conclusion would then follow.)

I also remind the reader of my frequently made point that if we take as our baseline in social philosophy the situation of total amorality—no one with any moral inhibitions about anything—then the libertarian principle (if fulfilled) *does* improve things for everyone. We do not need to “do” anything for others in order to benefit them in that respect, for your not being killed by me is a benefit to you by comparison with the situation in which you are killed by me—or even, for that matter, over the situation in which you *might* be killed by me if it should happen only to serve my perceived interests or if I happened to feel like it.<sup>17</sup> Adding a real

<sup>16</sup> See Narveson (1976), later republished in Narveson (2002, pp. 13–34).

<sup>17</sup> I so argue, for example, in Narveson (2007, pp 13–20).

moral inhibition to this list makes a lot of difference. But Cohen, and most who dabbled in contract terminology without really entering into the conceptual spirit of it, think we are free to entertain just any old baselines we like, in which case, of course, things would be entirely different. But we will table that for the present, as it will loom very large as we go on.

Thus everything depends on the status of equality. Cohen and I, I believe, agree on that. What we disagree about is equality itself. Cohen thinks that it is a principle of justice, construed in such a way as to have this strong implication about such things as income and wealth. I deny that, holding instead that justice requires general respect for liberty—and *only* that. (In a treatment that would be even more extensive than this one already is, I would take up the burden of showing just what I take “general respect for liberty” to imply.<sup>18</sup>)

All that said, let us now return to his argument. There are, to be sure, various questions to pursue, some of which are more or less practical, others more nearly theoretical. Cohen claims of the difference principle—which he accepts in the form, “make the badly off well off, or if that is not possible, make them as well off as possible.” To which he adds that “on a modestly demanding interpretation of what it means to be well off, and on a realistic view of the world’s foreseeable resources prospects, the practical consequences of the complex maxim are those of the difference principle.” (32) This is vague—to put the point rather mildly—but in any case what Cohen especially wants is to “question its application in defense of special money incentives to talented people.” He is certainly right to contend, as he goes on to do, that “the idea that an inequality is justified if, through the familiar incentive mechanism, it benefits the badly off is more problematic than Rawlsians suppose...” (32)

We have seen that what, in Cohen’s view, renders it problematic is that those who refuse to do *more* for the badly off than whatever they do that benefits them in the way of ordinary business transactions leading to high incomes for themselves “... must be thought of as outside the community upholding the principle when it is used to justify incentive payments to them.” (32)

But the question now arises: suppose you are a spokesperson for the badly off, and you get into a discussion with some of these well-off persons who might perfectly well agree with Cohen’s assessment—they are indeed “outside” that particular community—the community of True Egalitarians, as we might call it. And to this they reply, “Right! We are indeed not members of *that* community. But we *are* ready to do business with you if you are ready to do it with us.” So, for example: a quite poor person sets to work in a low-paying job, and ere long he is sporting a cell phone, whose existence at a price low enough to be manageable by someone with an income of that modest level is certainly due to the activities of a lot of very bright and very hardworking people—nerds and others, the least of whom makes several times in income what our sample person does. OK: does this poor person have a complaint of the form that on Cohen’s view he should have? Is it in any way plausible for him to say, following Rawls, “Hey, I was not born with your brains or initiative—and *therefore* you should be giving me half of your high

<sup>18</sup> I have a go at it in Narveson (2001).

income!”? Not very many people will have “intuitions” at the Cohen level when contemplating this question.

Cohen claims that “Speaking more generally ... I want to record here my doubt that the difference principle justifies *any* significant inequality, in an unqualified way...” (33) He states this, apparently, by virtue of being a member of the Community of True Egalitarians, in the sense he has defined. But what is he going to state to all the members, in perfectly good standing, of the *other* communities? What, that is to say, is he going to argue that does not amount to sheer nagging?

Thus, for example, I would be prepared to argue that Rawls' difference principle actually justifies *no* egalitarian measures *at all*: that the principle in fact is incapable, as it stands, of resisting the arguments of out-and-out libertarians who insist that we *owe* the poor *nothing* in the way of positive benefits, even though the operation of the market will tend toward benefiting the poor very substantially anyway. We do owe each other respect for their freedom, and if freedom leads, as it in fact generally does, to better lives for the badly off, then it is a consequence of justice in society that they so benefit. I do not think reason calls for anything further.

But now Cohen goes on to state something quite else, without warning, as I would put it: “The further back one goes, temporally and causally, ... the more one encounters open possibilities that were closed by human choice, and the harder it is to identify inequalities that do not harm the badly off.” (33)—*Harm* the badly off? How did that slip in? I suspect that the answer to that extremely important question is found in the next sentence: “... I conjecture that social inequalities will appear beneficial to or neutral toward the interest of those at the bottom only when we take as given structures and/or inequality-endorsing attitudes that no one who affirms the difference principle should unprotestingly accept.” (33) In what mode are we communicating here? Surely it should not be a question that requires some or other moral attitude whether or not a certain action of person A *harms* a certain other person, B, in ordinary understandings of that familiar term. You stomp on my toes, and it hurts like hell—you have harmed me. You deal with a lot of other people I have never seen or met, and make a billion dollars thereby; in the process, you do nothing to the air or the climate or anything else in my environment, nor to my income for that matter. How, then, have you *harmed* me? The question is not answered, nor even addressed, by Cohen in the remainder of that section. Evidently the fact that egalitarians *do not like it* that there are people who conceivably could have been benefited in some further way by inventors and the companies who, together with their employees, create all sorts of useful things that do in fact benefit these people—is taken as sufficient reason for attributing *harm* to those activities. This, of course, is utterly question-begging. One might have hoped that Cohen, who is surely capable of spotting a fallacy when he sees one, would do better than that. We shall, I fear, seek further in vain.

In the ensuing section, Cohen appeals to our sense of justice by listing some example, such as: “our ordinary self-serving reasons for not giving much (we need a new roof, I'm saving for my holidays ...) sound remarkably lame when we imagine them being presented to those for whom our lack of charity means misery and death.” (46) Really? We may doubt that they would sound “lame”; but whatever, the example does nothing to make a case for the view that the uncharitable rich

*harm* those poor persons by not helping them. But is that not what was supposed to be being argued for?

When the news of the great tsunami wave in Southeast Asia hit the media in the Christmas holiday period in 2004, a great many people (including me) went immediately to their computers, located a web site enabling us to give money toward the relief of its victims, and sent on a hundred, two hundred dollars, or so. If we had instead been invited to support sending out a committee with tommy guns to extract under threat of death contributions to the same cause, we would not, I daresay, have been quite so forthcoming. But Cohen is in context arguing for something more like the latter than the former. He knew, I am sure, that it was the *capitalist* world that responded, with enormous generosity and astonishing alacrity, to this situation—voluntarily. And also, by the way, that nowhere near that amount of money would have been raised had we had to fill out a form and a cheque and bring it down to the mailbox (those are rare in Canada, by the way) to send it on its uncertain way. Nor should it be lost on him that Cohen's much-vilified ultra-rich geniuses who set up the World Wide Web and the many super-handly intermediate devices enabling technological challenged persons such as myself to give money quickly and effectively to worthy causes, had a great deal to do with this huge and rapid charitable response to the situation.

A final example of Cohen's (37) cited an advertisement for purchasing war bonds during the World War II. The advertisement invites us to write to G. I. Joe who languishes in a Japanese prison cell, or shivers in a fox hole, to explain why you do not give more. Here, of course, Joe is in fact endangering his life in order to prevent our country from being conquered by people whom we believe would enslave us. Where is the comparison between Joe's case and the ordinary poor in peacetime? What Cohen claims is this: "The examples show that arguments vary in their power to persuade because of variations in people's epistemic ... or moral... or social ... position, or because of issues of tact and embarrassment ... or because being generous is more attractive than being grabby..." (38) Just so. What they do *not* show, however, is the only thing that matters here: namely, that our inaction *harms* people simply by virtue of not improving their situations relatively to us when they could have done so.

Next we have the interesting case of the kidnapper who demands a sum from the victim's unfortunate parents as the condition for returning their child to them. Imagine the kidnapers themselves spelling out, in syllogistic form, the reasons why a parent, in those conditions, should be willing to pay the demanded sum. Can this be any justification for making the premise—that the child is in captive hands—true when it would not have been but for your actions? Of course not. But again the question is: well, so what? *We* have *not* kidnapped the poor nor held them to any sort of ransom. Cohen writes, "the incentives argument has something in common with the kidnapper argument, even though there are major differences between withholding a hostage and withholding labor until one gets the money one desires." (41) Well, is there? He should, after all, actually explain what they have in common, instead of just asserting this. For on the face of it, they have *nothing at all* in common that is *relevant to the issue*. And on the other hand, the modern poor would have been very much worse off than they are in the absence of the many commercial

activities that enable them to have—to take some examples from the U.S. case—more square feet of housing than the typical middle-income person anywhere else in the world, more cars, more air conditioners, more indoor plumbing, and so on.<sup>19</sup>

If Cohen instead meant to include the very interesting cases of, say, marginal farmers in central Africa, persons who, by and large, had no relation whatever with most wealthy persons in the G8 countries, he might have tried to explain how it is that these people with whom we have had nothing to do are like the victims of kidnapers.

Cohen's model of the incentive argument is this: If we raise the tax rate from 40% to 60% we offer the rich a disincentive to produce more, to which they will respond by in fact producing less, and in the end the poor will be worse off. There is, of course, an interesting question whether or not such an argument's premises might be true. But Cohen claims he is looking for a *comprehensive justification*, and to do this, he needs to ask why there is *any tax at all*, whatever it might do to the level of production of those afflicted by it. There is, after all, a real question of principle here. Cohen mentions without pause to discuss the issue the argument, uttered by "right-wingers" (such as the author, of course) that what is produced by hardworking, ingenious, and risk-taking entrepreneurs is actually *produced* by them, in the sense that had they not in fact so acted, the wealth in question would not have *existed*, in which case the question of how to distribute *it* could not even arise. That is in fact a plausible argument. If correct, it must surely raise the question how it is that egalitarians should think the question *what to do with it* is altogether up for grabs by political institutions.

The other large question is of a different kind, and is what tends to be at the forefront of current debates: is it true that a government grab from the rich will do more for the less-well-off than letting them continue to invest that money as they would otherwise do? While Cohen probably differs from me, say, on that question as well, it is not at issue here.

In the event, Cohen leans very heavily on his notion of a "justificatory community," in connection with which he formulates an "Interpersonal Test": He proposes—perfectly correctly—that a given policy or action is justified only if the principles that justify it could be employed by anyone in relation to anyone, impersonally. So far, so good: this is a *sine qua non* of ethics, after all. But we keep finding it implied that our "community" has all begun by wholeheartedly accepting the egalitarian idea, instead of insisting on a justification of it.

Pending further action on that question, these appeals to community are completely unhelpful to Cohen's case. A community in which everyone, rich and poor alike, agrees that the immediate benefits of production should go to those whose cooperation leads to it, rather than dissipated to the community in general, is perfectly conceivable. Indeed, much more than merely conceivable: for we do in fact live in something not too far from such a community, so far as I can see—or at least, we used to!—and not in Cohen's implicit community of socialists. But the point is, nothing he states in this development produces *any argument at all* for egalitarianism, and that, one would have thought, is what is at issue.

<sup>19</sup> See Rector (1995, pp. 241–256). See esp. pp. 246–247.

It does, as usual, involve a lot of begging of the main question. Cohen continually writes about people justifying their conduct to each other, which of course raises the question, what *does* justify conduct? Suppose that I am feeble, incapable, not very bright, and can see that you by contrast are the opposite of those things, to a very high degree. It will not surprise me if you have a nice car and house, for example, and can afford to fly off to Milan or Tokyo now and then to see the sights or enjoy the opera. It will not surprise me that I am unlikely ever to be able to do any such thing, unless luck befalls me, or perhaps somebody like you has enough sympathy with me to offer to underwrite one or two of my desired but to me unaffordable pursuits. But am I going to *blame* you if you do not? Why? Nor does any of that make us nonmembers of the “same community.” If the hurricane comes along and blows down the rich man’s house, I will likely pitch in and help, and if it blows down my shack, he will likely pitch in, similarly, and help restore my situation. That happens in communities, and persons who would refuse to participate to any degree in such matters of community cooperation would indeed be looked down upon. But again, there is no move in the direction of Cohenian egalitarianism here.

In an effort to produce some plausible examples, he devises two. There was, I guess, a “policy argument that rates of pay to British academics should be raised, since otherwise they will succumb to the lure of high foreign salaries.” (45–46) But *should* they? Whether they should, he says, is “pertinent to the policy argument when they are regarded as fellow members of community who owe the rest a justification for decisions that affect the welfare of the country. And many British academics ... contrive to avoid that issue by casting the minor premise of the argument in the third person. They say: “Lots of *academics* will go abroad,” not: “Lots of *us* will go abroad.” (46—emphasis provided) Alright, and how many of us will *blame* a colleague who takes a better-paying job with more opportunities in some other country, or city, or for that matter some other university? Is that not what is at issue? Did Cohen actually have the temerity to think that *justice requires* that people continue to work in job X when they prefer job Y, all things considered?

His other example raises an interesting question. The Soviet generals address their Lithuanian independence movement leaders as follows: “widespread bloodshed is to be avoided. If you persist in your drive for independence, we shall intervene forcefully, and there will be widespread bloodshed as a result. You should therefore abandon your drive for independence.” (46) The fact that it was those very Soviet generals who would be *causing* the bloodshed is, of course, what gives the lie to their argument as an argument of principle. And the question, again, is: how could Cohen possibly have thought that these were examples on the same plane? We can perhaps imagine jobs in which A’s leaving it to take a better one elsewhere really would somehow endanger many lives. There are very few such, of course; and even regarding those, there will be a question of just how much this fact really obligates those who do the jobs: have no alternatives been assembled? Why are we allowing the situation to develop in such a way that it is either Smith or the flood? Moreover, a doctor practicing out in some remote area where he is the only provider of medical service, but decides he really wants to retire back in the city, etc., will not thereby be *killing* anyone; he will only not be saving their lives as he did before. But in any case, the Soviet generals were not desperately holding their fingers

against the safety catch, against the eventuality that the first calls for independence will fatally loosen their grip, alas. They were, instead, simply threatening to shoot the protesters, and so their arguments were in that respect disingenuous.

In short, the two cases are altogether dissimilar in the respect that would matter, and how he could have thought otherwise is mysterious—were it not that there is that nagging possibility of real bias operating, clouding his vision so that they appear much more similar than they are. (One weak reed leaned on by many of his inclination is to deny the distinction between killing and not saving lives (letting die). Readers of this may possibly sympathize with those who think the distinction ill-taken. To discuss this argument at length here would take us even farther afield than I already am in this lengthy discussion, and I rest content to refer readers to a discussion of it in another of my writings.<sup>20</sup>)

In the next section, Cohen argues that the incentives argument does not pass this kind of test. I have already voiced my suspicion that they do pass it, and with flying colors, but let us see how he pursues the matter. First, then, Cohen quite correctly points to the fact that those who hold out for high differential payment to perform useful tasks “*make it true that they will not work as hard at 60% tax as at 40%.*” I take this to be obvious, and am puzzled that Cohen should think it necessary to devote several pages of labored text to support what I should have thought was absolutely obvious. The question is: well, so what? That will show that those people—wholly typical people, should think—do not share Cohen's egalitarianism. They will hardly show that what they do is in any way unjust, which is what is in question here.

Cohen distinguishes two versions of what we may think of as the major premise of an argument whose minor premise would be the one just mentioned—that is, that it is *possible* for the talented (etc.) to work for less, and so it is a matter of choice that they hold out for more. The two versions of the first premise seem to be (1) an appeal to “entitlement” or perhaps “desert” (two notions that need to be distinguished, certainly, and would get us into two rather different arguments. But never mind); and (2) a “naked” version, in which the more talented are saying, as in the slightly amended version of my little dialogue, not that they do not care about *justice*, but that they simply do not *care* (enough) about making other people better off so as to motivate them to work for less pay in order to enable them to be so. Now, Cohen has been working on the assumption that we *have* the Rawlsian egalitarian principle as our major premise. But, wait a minute! Is he not supposed to be trying to *argue for* that premise?

We are indeed assuming, and attributing to our talented people a similar belief, that they have no right to actually *harm* other people. We are, however, asking whether they might not entertain the view that they have no enforceable duty to *help* other people. The argument as it applies to the real world is complicated by a fact to which Cohen pays virtually no attention: that what the well-to-do who earn their incomes in the standard free-market approved ways, namely as either payment for their personal services (“work”) or as income from (voluntary) investment, is *in fact* good for other people. That it *must* be so is guaranteed by the fact that those with

<sup>20</sup> Narveson (2010a, pp. 19–20).

whom they interact in business contexts are all acting voluntarily, and thus may be presumed to be acting in their own interests. Any standard market exchange leaves both parties to it better off, in the view of the persons concerned, and it is a constraint of the free market philosophy that they may *not* make deals which injure third parties.<sup>21</sup> (They may, of course, make deals the result of which will be that some third parties are now out of a job or will be paid less for doing what they used to do, e.g., if the deal involves improving the technology for producing the things those people had previously produced. Those who think that this shows that my non-harm premise has been violated after all need to think a bit further. It does not. It is characteristic of Marxists and more generally those of socialist inclination to argue that way, and a separate chapter or so would need to be devoted to showing them the error of their ways. In very brief: free market exchanges have to benefit *both* parties. A will not continue to employ B if B's work no longer enables A to sell his products at a profit. Previously the salary paid by A to B sustained B; now B will have to try something else or suffer a decline in living standard. True. But if A had not been employing him, he would *already have been* at that lower level, so the effect of A's cooperation has been to improve B's situation, and what happens now is that he ceases to improve it in those ways—it is *not* that A has slipped B a poison or “stabbed him in the back”. B is free to peddle his wares, or promote his talents, elsewhere, or to come up with a new idea of how he can interact to A's or someone else's advantage as well as his own.)

So all that said, the situation is this: talented A says, “Here: I'll do x, provided I get 90 and you get 10. The alternative is that I go somewhere else and get 80 (or whatever), and you get nothing. It sounds like a good deal for you: what do you say? On Cohen's view, B says, “Well, you *owe* me 50–50, so that is all you get.” To which A, who is a *free man*, says, “Tsk tsk—well, good luck with whoever else you can get to deal with you on those terms, but it will not be me. ‘Bye!’”

In this little dialogue, no premise about justice has been used, or needed, by A. He does not need to contend, and certainly does not believe, that B *owes* A 90%. All he needs to say is what he does say: that B could make a good thing at 10, which is better than if he insists on a lower return for A, who will not take it. He is in a position to insist because, we are supposing, nobody else can equal his offer, and he does not, from his point of view, have any reason to make one more favorable to B. Of course he *would* have such a reason *if* he swallowed the premise that justice requires an equal distribution of the maximal output of his own abilities. But, of course, we are not supposed to be *assuming* that. We are supposed to be trying to *prove* it—to prove it on the assumption of the “interpersonal test.” My point is that this test obviously does not thus prove it. Cohen at this point gushes with socialist umbrage. But he is supposed to be supplying a *rational argument*. (Perhaps it will be said that he need not be doing that. See below for my discussion of his apparent intuitionism.)

A bit startlingly, Cohen now goes on to write that “only an extreme moral rigorist could deny that *every person has a right to pursue self-interest to some reasonable*

<sup>21</sup> Narveson (2003).

*extent* (even when that makes things worse than they need be for badly off people.)” (61) And he states:

I do not wish to reject the italicized principles ... But a modern right of self-interest seems insufficient to justify the range of inequality, the extremes of wealth and poverty, that actually obtain in the society under discussion. Entitlement or desert might justify vast differences between rich and poor: no limit to the inequality they might endorse is inscribed in them. This is particularly clear in the case of the entitlement principle that I am absolute owner of my own labor power. (61)

But the sentence immediately following those is significant: “When my power to produce is conceived as fully private property, I may do with it as I will and demand what I may for its use.” (61–62) Note that nothing follows about what you will be able to *get* with your “demands.” (63) The fact that those whom you deal with are in a position to make their own “demands,” whatever their level of productive power, is ignored here: like Marx before him, Cohen acts as though money were a unit of absolute despotic power over others. But it is nothing of the sort. The possession of large amounts of money enables you to make credible offers to many people which you would not otherwise be able to make. Would you be interested in the Brooklyn Bridge for a mere million dollars?... But, as it happens, I do not own that facility, and so the offer is worthless, not mine to legitimately make. Warren Buffet, on the other hand, could offer to buy my house for a ridiculously high price. He cannot, however, compel me to accept the offer. Whether or not they take those offers is *up to them*: and if they do, it is to *their benefit*—not just that of the wealthy person making the offers.

Nor is there any analysis of the implications of this kind of liberty. Bill Gates and his wife have set up a foundation devoted mainly to curing readily curable diseases in Africa, with a capitalization at some thirty *billions* of dollars. Andrew Carnegie acquired something like a half-billion dollars in his very successful business career, and he gave away about 80% of it, leaving almost all towns and cities of any size in North America equipped with a free public library. And those who do not do such things with their money but instead invest it or spend it on luxury goods employ huge numbers of people thereby. It is very likely that they would not otherwise have happened. Do not such things count?<sup>22</sup>

Apparently not, argues Cohen: “Where the worst off are not too badly off, it looks more fanatical to assign absolute priority to their claims. But the stronger the case for ameliorating the situation of the badly off is, the more discreditable (if I am right) the incentives argument is on the lips of the rich. So the argument is most shameful where, at first sight, it is most apt.” (62) And why is this? Cohen has thus

<sup>22</sup> In Europe, classical musicians are accustomed to having their fees much increased by large subsidies from their governments. I wonder what the egalitarian in Cohen thinks about that. In the United States—until recently at any rate—by contrast, most artists are paid by sale of services to willing buyers and willing private patrons. Why should Cohen not think that the U.S. system is more just—seeing that the taxes devoted to the subsidy of high culture in countries that do that are considerably paid by the poor-to-middle classes, while the cultural institutions thus supported are patronized by very few of them.

far been “setting aside” appeals to entitlement and desert. But how could his view *not* be construed as ascribing to the untalented unproductive a level of entitlement against those of greater ability, energy, and ingenuity? It is one thing to say that Jones is in very bad shape; it is another, altogether, to say that someone else, who possibly could do something about it, deserves to be threatened with violence if he does not do so. And it is that that Cohen is supposed to be defending—although the fact is not often up front in his discussions. (More intriguing is that, as it turns out, he apparently is not defending that at all, as we shall see later, in discussion of the “Freedom Objection.”)

Cohen goes on to write that “a society that implements John Rawls’ two principles of justice will not display the degree of inequality that characterizes contemporary Britain.” (62) But Cohen does not *know* that, nor does anyone: for I have shown that the principles in question, as we have now seen, are, as they lie in the Rawlsian texts, *completely indeterminate* in this regard.

In attempting to defend his claims, Cohen again invokes a comparison between kidnapers who argue that parents should love their children and should therefore be prepared to pay a large sum of money to enable those children to be united with them—and then use that to justify threatening the children with the very harm that the money would be used to prevent; and on the other hand, very wealthy people who argue that their activities are useful to others and therefore those others should be willing to pay for their services on terms that greatly benefit the providers of those services. But this is a quite unjustified comparison. For the robbers are prepared to inflict great harm on people unless innocent possessors of wealth part with some of that wealth; whereas entrepreneurs are prepared merely to leave the potential beneficiaries no worse off than they would otherwise have been, unless others pay for their services on terms profitable to them. That is to say: Cohen assumes that killing—more generally, positively harming—is morally identical with letting die (or be harmed). It is not, of course: or at least, one would like to have seen some argument for that claim.<sup>23</sup>

Kidnapers propose to reduce social wealth, by making their livings at others’ expense. Free-market business persons add to social wealth, by making their livings to others’ benefit. If this is a difference that does not interest socialists, one is surely entitled to wonder about their level of real interest in the good of people in general. “... the poor know that the rich are persons, and they may regard them as fellow members of a community who can be asked, face to face, for justification.” (65) Agreed. And what Cohen is (apparently) proposing to the poor is that they should get together to forcibly deprive the rich of earnings in order to get themselves out of great need. Had the rich not been around at all, the poor would be without this kind of recourse altogether, of course. What the rich do, insofar as their riches are made in free market business activities, is all benefit (to themselves and to many others, their customers and other business associates), and no harm. If kidnapers were not around, on the other hand, the supposed benefit to one’s children coming from making payments to malevolent “suppliers” of those “benefits” would be wholly

<sup>23</sup> Perhaps Cohen implicitly relies on the well-known arguments of Rachels [(1991, pp. 176–186), see especially pp. 180–182] and others to this end. In that connection, see footnote 16 above.

unnecessary. There is only as much difference between the two cases as night and day. Apparently that is not enough for Cohen.

#### 4 Taking (or Not) Interest in Others' Interests

Turning to Rawls's own account of his views, Cohen focuses on an interesting passage, in which Rawls draws on the idea that in the "original position" people "do not take an interest in one another's interests." "One might think that ideally individuals should want to serve one another. But since the parties are assumed not to take an interest in one another's interests, their acceptance of those inequalities is only the acceptance of the relation in which men stand in the circumstances of justice. They have no grounds for complaining of one another's motives."<sup>24</sup>

About this Cohen complains that

that line of thought seems to me untenable. For it wrongly attributes to people in the achieved, just society the mutual indifference that characterizes the specially tailored persons of Rawls original position ... In the original position mutual indifference is assumed for methodological reasons to derive justice from rational self-interest under a veil of ignorance constraint. But it does not follow that the principles chosen by the mutually indifferent parties of the original position are consistent with mutual indifference when they operate as rules of interactions in a functioning society. And to attribute mutual indifference to people in the realized society is surely to contradict the idea that their relations partake of fraternity, as Rawls describes that condition ... People who, like "members of a family," "do not wish to gain unless they can do so in ways that further the interests of the rest" are not people who take no interest in one another's interests. How could a person who takes no interest in the interests of others want advantages for himself only if his enjoyment of them benefits the less well off...?) (81)

And there the passage ends! Apparently Cohen thinks he has disposed of the argument Rawls makes. Now, I concede immediately that Rawls elsewhere goes far too fast in claiming that behind the veil of ignorance we would take the "benchmark" to be equality, as he does. However, that is part and parcel of the force of his point here. The assumption of mutual indifference is *not* "merely methodological" in the hollow sense Cohen apparently assumes it to be. We assume indifference in the sense that we are *not* allowed to assume *nonindifference*—even though, no doubt, almost all of us are not in fact indifferent to others, either in particular cases or in general. But these are facts about how people feel about each other. Philosophically, we are not entitled to assume that facts which, clearly, could be either one way or another are in fact one way rather than the other. We are not entitled to assume that all humans are by nature models of, say, the notion of Christian universal love, any more than that they are all as selfish as Simon Legree. The challenge of the social contract is to find important results, calling for mutual

<sup>24</sup> Rawls (1971, p. 151).

adoption of constraints on our behavior, *without* relying on such special assumptions. And, of course, it is even worse to make assumptions that are manifestly false. If Rawls meant to assume that no actual people are kindly, sympathetic, and benevolent, he of course would stand refuted on the face of it. But it is equally flying in the face of fact to assume that *everyone* is kindly, sympathetic, and benevolent—especially to the degree they would have to be in order to be out-and-out egalitarians in practice.

So to see whether we would get a result more like Cohen's or more like Nozick's, we must ask what *all* persons, given the range of interests from totally self-absorbed (rare) to totally altruistic (also rare) would be expected to agree on in the way of socially imposed constraints—rules to which all are to be held, by their governments or by others in a position to compel performance. And it is impossible to see how we could think that Cohen's proposed egalitarianism is where we would end up. I have no business insisting that you change your very personality, your emotional make-up, for my sake, nor vice-versa: given the way we are, it is simply not reasonable to ask such a thing. If we are to deal with others as individuals, therefore, we had better confine ourselves to enforcing compliance with deals that it is in the interests of *both* parties—not just one of them, such as the poorer—to make. As Nozick points out, the argument that the poor should say to the rich, "O.K., I agree that we should make ourselves into doormats for you superior people" would be laughable, ridiculous. But then, Nozick's point is that the symmetrically opposite one should be seen in the same way. I will not expect agreement from a rational, self-interested person who does not already particularly care about me to the principle that he is to work as hard as possible on my behalf, whatever the result for him. But that is what Cohen is asking here, though at this particular stage in the argument he seems to have overlooked that point.

Instead of leaping directly from the plausible observation that initially indifferent persons would, given the facts of social life, agree to refrain from violence against each other, and beyond that to be downright civil and generally disposed to be in favor of people helping each other, to the wildly implausible conclusion that they would absolutely treat each other as if they were emotional identical twins, or deeply loving spouses, Cohen should have paid a bit more attention to reality. Again, his egalitarian sympathies prove to be biases, rather than sound inferences from plausible premises.

Near the end of this chapter of Cohen's *Rescuing Justice and Equality* there is a rather chilling reference to the notorious starvation and murders of the kulaks by the Soviet regime in the 1930s:

Along with Nikolay Bukharin, I would have said to the kulaks: Enrich yourselves!, without supposing (any more than Bukharin did) that I was thereby voicing a demand of justice. If we are concerned about the badly off, then we should sometimes concede incentives, just as we should sometimes satisfy even a kidnapper's demands. We are not then acting on the difference principle in its strict interpretation ... (83)

Of course, if you think just justice is a special, unique non-natural property fit to be apprehended by professors at Oxford, it will not be surprising that you can write

this way. However, it is not that. It is about what to enforce in a society. The Soviets were, so far as I can see on Cohen's view, acting justly in murdering all those people, who insisted on trading with others—even though those activities left other people, those who dealt with them, rather better off than those others were before. For after all, Cohen is defending a view that on the “strict interpretation” it is *just* to divide the products of your labors among all equally, and *unjust not to do so*. We can compel unjust people to behave justly, after all—if necessary, to shoot them, no? One supposes, or at least hopes, that Cohen would recoil from such an inference. But he should use the fact that he would recoil as evidence that these activities may *not* be regarded in that way.<sup>25</sup>

The idea that justice requires his kind of egalitarianism is, I think, wholly misguided. As a former colleague of mine once said, “I used to think that equality was the geometry of justice—but now I see that it is only the arithmetic of envy.”<sup>26</sup> What is being argued here is only the narrower thesis that Cohen has produced no arguments at all for his contrary claims.

## 5 Pareto

The next chapter of Cohen's *Rescuing Justice and Equality* discusses the Pareto argument. As one who has invoked what I called “The Gospel According to Saint Pareto,” his discussion is certainly of great interest to this author.<sup>27</sup>

Before we look at Cohen's text in detail, let us ask what the Pareto principle is all about. For one thing, there is not exactly a “Pareto principle,” though many of us (certainly including myself) have been inclined to write as though there were. But Pareto merely defines certain concepts. A social configuration is said to be “superior” to another if it is such that at least one person is “better off” and nobody is worse off. Pareto says nothing about which prior states are normatively proper. Where, then, do we apply this principle? On the one hand, it could be anywhere. In the concentration camp, for example, suppose that the guards beat up on C slightly less than before, treating everyone else just as previously: then this new configuration is Pareto superior, even though it is awful. Then consider another case: everyone is making at least \$100,000 annually; then a change happens: all but one are now making \$200,000, but Mr. A is making only \$99,000. Now the new configuration is *not* Pareto superior. Not very many of us, though, are ready to assert that the change in the concentration camp situation is *better* than the change in the upper-middle-class situation in the U.S..<sup>28</sup>

<sup>25</sup> As noted above, Cohen later in *Rescuing Justice and Equality* appears to be almost entirely renouncing those familiar implications of claims about what is required by justice. See below.

<sup>26</sup> The colleague was J. Minas; I do not remember where he got it, though he did, he said, get it from somewhere.

<sup>27</sup> Narveson (1988/2001, pp. 184 ff).

<sup>28</sup> All such real-world examples need to be taken with many grains of salt and interpreted with much caution.

So there are many questions to ask of Paretian notions as applied to various social states. But one thing is clear: his concepts themselves are absolutely independent, logically, of the initial conditions in which they are applied. This being so, we must be cautious about supposing that a Pareto argument, *all by itself*, would establish *anything* in this area—either the inegalitarian situations that Cohen claims that Rawls defends, *or* the egalitarian ones Cohen wants to defend. And indeed, as in the previous chapter, Cohen takes Rawls at his (misguided, as I think) word: equality is taken to be the “benchmark” (in Rawls’ unfortunate expression).

Further to add perspective: if we ask what the intentions of the “contractarians” are, the answer is quite clear: contractarians do *not* assume an initial state of *equality* in any very interesting respects (with the very important exception of the Hobbesian assumption of rough equality of *vulnerability*, of which much more anon). They suppose, instead, an initial situation of *whatever we have got*. From that situation, a Pareto improvement is taken to be an improvement, simpliciter: that is, an improvement that no rational person could deny to be an improvement. Cohen, however, being a priori wedded to equality, is ready to regard *any* change from equality as a change for the worse, even if, in the terms that Pareto thought to be perfectly clear, some people were better off and no one worse off. You can see it coming before he really begins the chapter. Thus,

The set of socially possible worlds will, moreover, usually contain a Pareto-optimal equal distribution that is also Pareto superior to the initial equality, and that must be preferred to the recommended unequal distribution, on pain of abandoning the rationale of the initial equality... I claim that the particular type of Pareto improvement picked by Rawls contradicts the rationale of the original move from equality of opportunity to equality. (90)

Why bother to write a lengthy chapter about this, one must wonder? After all, if we are required to start with equality, *and* to do so on the ground that *justice* requires it, then Cohen’s previous chapter tells it all: persons holding out for a greater share are unjust, and cannot think they can justify the inequality in which they get the greater share by using Pareto considerations. Indeed, the *only* thing you could use them for in Cohen’s conceptual world is in arguing for socially equal states in which *everyone* is better off than in some *other* socially equal state.

That this is simply question-begging in regard to the fundamental question is obvious. If, instead of simply assuming (in the guise of “intuiting”) the answer, ahead of time, to the question “What is just?” we ask instead for an analysis that addresses the situation of social man *as he is*, and then consider whether improvements might be possible relative to *that* condition—the one in which people act without any constraints on their initial modes of behavior—we may well get an entirely different outcome. That we will end up with Cohenian equality as a social ideal is, to put it very mildly, extremely unobvious. For who, if not emotionally concerned for their fellows to some quite astonishing degree, would surrender a markedly better life for themselves for the sake of equality for all others?

Rawls started all this difficulty when he declared equality to be the “benchmark,” as in: “the parties start with a principle establishing equal liberty for all including equality of opportunity, as well as an equal distribution of income and wealth. But

there is no reason why this acknowledgment should be final. If there are inequalities in the basic structure that work to make everyone better off in comparison with the benchmark of initial equality, then why not permit them? ..."<sup>29</sup> But if justice is indeed the first virtue of community, then one can see why Cohen would object to the statement that there is "no reason" why that acknowledgment should be "final." The reason is that equality has been asserted to be the benchmark of *justice*, not just the specified starting point, without normative specification, from which society carries on as best it can.

Rawls does specify that the equality is to be one of "equal liberty"—*as well as* equal opportunity and equal distribution of income and wealth. The trouble is, these things cannot all be and remain equal. Equal liberty, as Hume so long ago pointed out, will very soon lead to unequal income and of course opportunity.<sup>30</sup> We will have to choose between these things. But *if* you specify that equal income, etc., is *just*, then liberty does not have a chance. You cannot have liberty, for example, about whom you will decide to benefit by your voluntary exertions, for there will be a tax of about 99% as you divide those benefits among all others.<sup>31</sup>

Rawls notoriously argued that the possession of superior talents is morally arbitrary and inferred from that that it cannot be a basis for differential just "rewards." As Cohen writes, "what the well endowed already have counts as benefit in virtue of a comparison of their endowment with that of others..." (97) This is supposedly taken for granted, and then it is the results of their use of those endowments that is supposed to be up for discussion about how to distribute them. The idea is that there is this initial distribution D1 in which *those* benefits are *equal*—however that is to be appraised, a matter about which Cohen (as well as Rawls) worries, I think, not nearly enough. Then we are to move to a new distribution D2 in which everyone is better off, but the talented are still better off than the untalented. Well, says Cohen, *now* consider another "logically possible" distribution D3 in which the talented (or more generally, all the producers) produce just as much as in D2, but now all these produced benefits are distributed equally. It is stipulated (that is, hypothesized) that these talented people "are willing to produce at  $W_e$  what they do at  $W_t$ " (101) Thus both the talented and the untalented are better off in D3 than in D1. And so, "Rawls' claim about the irrationality of insisting on equality in the face of the possibility of a Pareto-superior inequality would lose its force, since a Pareto-improving *equality-preserving* move, in which no one is as badly off as some are in D2, would now also be available." (101)

Furthermore, what if—as will certainly always be the case in the real world—the talented are *not* willing to do all that stuff under that condition, and therefore these alternative distributions are *not* available? Then they are guilty of *injustice*, claims

<sup>29</sup> Rawls (1971, p. 151), quoted by Cohen (2008, p. 95).

<sup>30</sup> Hume (1985, Section III, Part II): "Render possessions ever so equal, men's different degrees of art, care, and industry will immediately break that equality. Or if you check these virtues, you reduce society to the most extreme indigence and, instead of preventing want and beggary in a few, render it unavoidable to the whole community."

<sup>31</sup> Which others? That is another vexed issue. Cohen very likely thinks, like Rawls, in terms of fellow members of their respective political communities—but not, I suspect, the other nearly 7 billions of humans who, nevertheless, should be subjects of justice—should they not?

Cohen, because Rawls has decreed that in his veil-of-ignorance condition that is what people would stick themselves with; or, in Cohen's case, because his intuition tells us that that is what justice demands.<sup>32</sup> He now considers the arguments that might be employed to justify D2 as compared with D3. There is a question about this: Cohen investigates D3 on the supposition that people are *willing* to do that. Does this mean willingness in the sense that this is what people simply *want* to do? If so, he does not need any complicated arguments, because in that case, D3 is ipso facto Pareto superior not only to D1 but *also to D2*. For by hypothesis, in D3 the talented are just as happy with the way things are as they would be in D2, but the untalented, presumably, are happier. This means, by definition, that D3 is Pareto superior to D2, and that, therefore, is the end of the matter: there is no further justifying to do. But that is not interesting.

Things get interesting if, as I say, the talented are *not* willing to put up with this situation of what must look to them very much like slave labor (because, after all, that is what it *is*?) Justice is what we may insist upon—what we may *compel*. Cohen is required to think that compulsion is justified to get us to a D3 situation minus the willingness of the talented to realize it as compared with the D2 situation in which everyone works willingly, though the untalented, of course, come out less well. Does he really think that? Perhaps—his discussion of taxation back in Chapter 1 suggests this, after all.<sup>33</sup>

Let us go back to D1, the situation *ex ante* in which some are more talented than others. This Cohen, perhaps following Rawls (who argues, correctly, that they are “morally arbitrary”) seems to want to regard as a possibly *unfair* distribution. In considering possible Rawlsian arguments about the move from D1 to D2, he states, “The first answer to be considered is that, by contrast with D2, D3 would be unfair to talented people, who produce in D3 more than others do and yet get no more than others do by way of reward. But that was already true of, but because of Rawls egalitarian argument no objection to D1, so it cannot, in all consistency, be pressed against D3.” (101–102)

Really? Rawls writes, felicitously, of the *natural lottery* as the basis of D1. Now, D1 is *not* a “distribution” at all. No one is responsible for it: we are who we are, we could not conceivably have had any choice in the matter, and *therefore*, considerations of fairness *simply do not apply*. Cohen evidently thinks we get to play god at this stage, but we do not. Rawls, as J. R. Lucas puts it, “yearns for a theodicy.”<sup>34</sup> We may, I think, make the same comment on Cohen. There is no unfairness about it, and thus a comparison between D2 and D1 in *that* respect is out of order. But the complaint that those who do more are *not allowed to* improve themselves by their efforts, as compared with those who made no such efforts (in some cases because they could not, in others perhaps because they did not feel like it) *is* a relevant complaint: the more talented are being beaten into submission in the interests of those who did nothing, even if the latter perhaps *could* do nothing in the

<sup>32</sup> Cohen's intuition on this point diverges sharply from just about everyone else's, so far as I know.

<sup>33</sup> But, as I have noted twice, in a later section in his book, astonishingly, he seems to take it all back. See my discussion of Chapter 5 of Cohen's *Rescuing Justice and Equality*, below.

<sup>34</sup> Lucas (1980, p. 191).

way of producing such improvements. If Cohen thinks that that *does not matter*, because after all it is *only just*, then he has a sense of justice which we should want to do without, thanks. More to the point, it is a sense of justice that we will not be able to retrieve by a rational procedure—and that, after all, should be the bottom line in a philosophical investigation. Or at the very least, once again, we need an argument for his view rather than sheer reiteration.

Later Cohen refers again to this argument, writing, “What is startling is that Rawls recommends a rate of pay,  $W_t$ , that is higher than that of others, a rate they secure by virtue of the disposition of the market to reward superior talent, when that superior talent was originally, in the construction of D1, said to justify no superior reward.” (104) Here Cohen reproduces his mistake. Rawls is *not* recommending more pay for the talented *because they are talented*. He *is* envisaging greater rates of pay *because they will thereby produce more* of what is wanted. This is economically rational behavior, whereas the first is not. I make you a better offer if you do more of what I want done—not just because I admire your talents, whether or not you will use them in my service. In Cohen's social world, however, I would not be allowed to do that. I would have to try to get you to do more by offering you an indiscernibly tiny increment in reward. With normal people, this is not likely to work.<sup>35</sup>

Rawls, of course, is not able to appeal to fairness at this level, the level of the “natural lottery.” Yet Cohen complains, “We cannot have one metric for judging whether the baseline is just and another for judging the justice of departures from it.” (108) But as I have just observed, there is no relevant metric of justice applicable to the genetic lottery. Must we be fair to squirrels? Was it *unfair* that A should be a squirrel, while B is a human born with a genetic capability of coming to master ideas in quantum mechanics? Cohen, one notes, like Rawls, does not apply the idea to that case. But why not, after all? If the idea actually made sense, where is the limit? Confining the ambit of justice to fellow humans is just as “morally arbitrary” as confining it to fellow Aryans, or whatever, on this line of reasoning. Whereas the line of reasoning that begins with us humans as we are, with our problems and our potential solutions to them, leaves us free to say that the squirrels simply are not in this picture. Dealing with the squirrels via a fair social contract is not among real solutions to our problems. Dealing with people in such a way, quite possibly, is.

## 6 Cohen and Pareto

Can Rawls appeal to Pareto? Yes, in the sense in which Pareto intended his concepts to be applicable. For Pareto is an economist, and he assumes, as most of us do, that we measure benefit, etc., in terms of *what we want*. Cohen, on the other hand, is measuring it terms of what he thinks we *should* want. In the former procedure, we take our subjects as they are, and see where we can go from there. In the latter, of

<sup>35</sup> I do not think it would, or did, work with Cohen himself, whose salary and perks as the holder of a chair at Oxford were certainly very far above what an ordinary English factory worker was paid—or for that matter, your typical British academic.

course, the sky is the limit. Others might have opposite intuitions to Cohen's, and think that the talented, say, should be rewarded *not* because they do produce more, but merely because they have those talents, and having those is simply a better *way to be*: the best should get the most, not because they have produced it but because they are *better people*. Will Cohen's intuition do any better than that one—abhorrent as it may be to many of us? But then, his is abhorrent as well, with the additional disadvantage, as I would think it is, that its adherents are generally quite uninterested in acting justly on their own view of what that is.<sup>36</sup>

Note that my description just given captures the grain of truth in Rawls' description of “a conception of justice that, in significant degree ... weights men's share in the benefits and burdens of social cooperation according to their social fortune or their luck in the natural lottery.” (104)<sup>37</sup> But the idea as Rawls seems to state it is a monstrous distortion. What we get in the natural lottery is a bunch of genes, and a set of parents in various circumstances. Distribution “in accordance with” that would on any plausible look around be very, very different from the “distributions” that result from the recipients of these genetic endowments going forth and using their talents, and dealing with freely acting others—that is to say, *cooperating*—in the productive activities in question. It is the latter, not the former, that justice calls for, insofar as it calls for anything along this line.<sup>38</sup>

Now, to argue that what people get is unfairly or unjustly got when it is got in *those* ways is to fly in the face of normal intuitions about justice, unlike the “distribution”—aristocracy in action, as we might call it—in which people are “rewarded” for their genetic characteristics as such. It is significant, by the way, that Cohen inserted in the above passage, after the words ‘in significant degree’, this: “(albeit, to be sure, not in the same degree as *laissez-faire* does.)” The insertion is significant, because it shows that Cohen, like most of leftist orientation (and perhaps most others too) simply does not face the fact that government action, now running to perhaps 50% of economic activity in the “advanced” countries, is so extensive that it is impossible to say how much of current “distributions” are due to those activities rather than to *laissez-faire*, with the further corollary that we have a dimmer idea what a real *laissez-faire* “distribution” would look like, other than that it would not surely be in the least like the aristocratic distribution to which Rawls's animadversions are properly addressed. But we can expect that they would look a lot more fair and just, since they would all be achieved with the voluntary consent of all concerned—unlike the distributions resulting from huge amounts of government action.

Cohen next considers the argument that D3 is “objectively unfeasible,” by which he means not what I have just been discussing about, but rather that it is *impossible, independently* of considerations of what people are willing to do—that “the talented *could not* produce at We as much as they do at Wt. “But that is hardly likely, for

<sup>36</sup> That is the problem Cohen wrestled with—to my view unsatisfactorily—in his earlier book, *If You're an Egalitarian, How Come You're So Rich?*

<sup>37</sup> Cohen quotes from Rawls (1971, p. 75).

<sup>38</sup> Even there, we must be narrower: justice is getting what is due, which is usually what comes to us by virtue of agreements freely made. Those do indeed have a rough correspondence to natural talent, but that correspondence is not what makes them just. It is the relation to freely made agreements that does that.

realistic assignments of  $W_t$  and  $W_e$ ,” argues Cohen. (102) But consider for example the production of BMWs—something Cohen is probably loath to do. Equal distribution of BMWs among 7 billion interested persons is not what I would think to be objectively feasible under any reasonable notion of feasibility. Either BMWs are produced, and their distribution is highly unequal, or they are not, and it is then questionable just what sort of thing is to be included in the equal distribution envisaged under D3. Experience of aspiring socialisms back in the bad old days does not conduce to cheer at the prospects of all under D3 distributions. Cohen blithely pronounces D3 to be feasible, enabling him to argue, incredibly, that it is “not irrational, here, in the sense Rawls intended, ... to express a preference for the equality-preserving D3” (102)—though he does not add that it is similarly not irrational to express a preference for any of the indefinitely many non-equality preserving distributions that might otherwise be available, and which would certainly be Pareto superior to any D3 that would be possible.<sup>39</sup>

Cohen now remarks that “Had we begun with D3, D2 would have been seen for what it is: an unjustifiable (on the assumptions that lead to D1) alternative to an objectively feasible equal condition, namely, D3.” (105) But he has not made the crucial distinction between those hypothetical D3s that are genuinely voluntary, the result of a strange enthusiasm on the part of all for equal distributions, and those D3s that are brought about by extensive compulsion. Claiming that the *latter* “would be seen as” fair and just is, I think, astronomically implausible. But those would be, as I pointed out, the only really relevant comparisons to make, since the fanciful voluntary D3s, as pointed out, would by definition be Pareto optimal and thus there would be no need for the arguments Cohen is looking at. On the other hand, D3s brought about by extensive coercion—as all realistic ones would be and would have to be—are another matter altogether. To maintain that *they* are Pareto preferable to D2 is simply to fail to appreciate what is involved in such comparisons. The Gospel According to St. Pareto is far clearer than what Cohen's arguments get us into; and properly understood, it leaves Cohen with no argument at all.

Next he addresses the question of the baseline. He observes, correctly I think, that

it is, indeed, the contractarian (in the Gauthier rather than the Scanlon sense) strain, a view (this being what is here meant by ‘impartial’) that ignores the happenstance bargaining advantages and disadvantages of differently situated people. If a rigorously contractarian approach, purged of all elements of impartiality, in the stated sense, had been adopted at the outset, then D1 would not have withstood scrutiny: the talented people who make D3 impossible by insisting on D2 would hardly have agreed to the initial inequality in D1. (110)

<sup>39</sup> Preferences as such—that is, *intrinsic* preferences such as Cohen's for equality appears to be, are not irrational, but nor are they rational. If we are going to classify some preferences as “rational,” that should be because *there is a good reason for having them—even if you do not already have them or do have their contraries*. Reasoned preferences can indeed differ in rationality—and I am claiming here that “preferences” for theories of social moralities should be of that kind. As well, I think that the preference for a libertarian social morality is more rational than that for an egalitarian one.

Again, Cohen seems to think that we get to play god in social philosophy. But we do not. We do not have a choice about D1: it is the “natural lottery” in the sense of being altogether beyond the purview of social philosophy—which is about people, and therefore people as they are, not about whatever a favored god might have done in the way of creating such things. The temptation to think one is god is rather strong in philosophy, but it really does need to be resisted, especially in the specifically social parts of the subject.

Brian Barry is noted for contrasting what he claims to be “the standpoint of impartiality” with “the contractarian standpoint of mutual advantage.” Cohen states, “To see, quickly, the difference between those standpoints, consider the case of an infirm person who cannot contribute anything to the social product. From a contractarian point of view, no one owes him anything: he cannot enter relations of mutual advantage. From an impartial point of view, however, his plight warrants our assistance.” (111) In so arguing, Cohen again betrays a bias. Impartiality calls for treating all alike, applying the same rules to everyone. It does *not* call for giving the same amounts of good things to everyone, regardless of how those goods came to be. Under a regime in which productive people are harnessed to a welfarist cart, something like Cohen’s result might be forthcoming. But such a regime is not as such impartial. In a regime in which each is able to be what he or she is, provided that he not impede the efforts of others, the outcome Cohen specifies is precisely what impartiality does call for: the incapable are, as such, not *owed* anything at all. The rest are owed whatever the agreements they have made with other producers call for their getting. And all are, of course, free to award the results of their productive efforts to whomsoever else they may feel inclined to do so—including, no doubt, the incapable.

Barry’s use of the term “warrants” is also objectionable. For we may think that someone in tough shape is such that his shape “warrants” out help even while denying that we may be compelled to do that helping, as the State will do if it gets into the act. So the mutual-advantage view, which is about what is and is not *owed*, is compatible with the “warrants our assistance” view—to which we should add that people in considerably free-market societies, notably the U.S., are in fact very much inclined to assist their needy neighbors (and those much farther afield).

“When the Pareto argument is expounded, whether by Rawls or by Barry, too little is said in explanation why, to use my nomenclature, D2 rather than D3 presents itself as the improving alternative. ... In this chapter I have asked whether those expectations and insistences are defensible within the scope of the egalitarian premises that lead to D1.” (111) But that involves a misunderstanding: it is *not* egalitarian premises that *lead to* D1. It is, simply, nature. To remind, Cohen has written, “So we start with equality in social primary goods and inequality in the (nonsocial primary) good of talent, a state of affairs that I shall label D1.” (97) The specification of starting with equality in social primary goods is intended to mimic Nozick’s famous Wilt Chamberlain example, where Nozick asks us to start with whatever favored egalitarian distribution we like, and then consider whether a departure from the stipulated equality via fans’ preferences for watching Mr. Chamberlain play basketball are just. Similarly, Cohen proposes to ask how Pareto will apply. But if his construction is to be relevant to adjudicating between

contractarianism and egalitarianism, then the initial condition D1 cannot have been the result of applying the latter at the expense of the former. Rather, we need a common starting point. In the natural lottery, there are, in effect, no primary goods, and so everyone is equal in those respects—equal at *zero*. If Cohen meant to start us equally at, say, the current U.S. specified “poverty level” the question would, of course, be raised why on earth we should think that a sensible place to start. Starting, on the other hand, at the equality of condition that will prevail prior to human social arrangements surely does make sense for purposes of expounding *social* principles.<sup>40</sup> But of course when so used, it will not be permissible to describe it as “fair” in a sense in which it contrasts with “unfair.” If it is said to be fair, it will have to be in a sense that really implies that it is, simply, *not unfair*, because the notion of fairness does not as yet apply. So if it is not fair, it is not unfair either, but simply *the way things are*.<sup>41</sup> So understood, there is no purchase for the Cohenian argument, that after all *unfairness*, in the sense in which the unfair is *unjust*, is “tolerated” in D1. D1 contains *differences* among persons, thus qualifying it as moderately realistic. Its lack of distributed inequalities is due to its lack of distribution of *anything*, rather than some arbitrary temporary tolerance of injustice, as implied by Cohen.

Here, then, is the answer to Cohen’s question, “Why is a protest by the more productive that they should have to pay more than others [be]<sup>42</sup> disallowed at D1, but certified when they reject D3 in favor of D2?” (112) It is because D1 was not a result of human social institution, whereas D3 and D2 are. The difference between them is that D2 accommodates people’s interests and desires, while D3 does not: it is the difference between freedom and compulsion—a difference that does not (in these chapters) seem to matter to Cohen, however much it does to most of us (and to him, apparently, when he gets to Chapter 6, on freedom).

And so there is a perfectly good reply to Cohen’s question, why we contemplate the D2 change from D1 rather than his D3 change. It is that social justice is to consist of principles that people are *willing* to accept. In Cohen’s D3, as specified, the more talented were, for some reason, *willing* to play those roles, in consequence of which there was in fact no difference, in Pareto-relevant respects, between it and D2: D2 = D3. But in the real world, a D3 in which all remain equal despite the much greater productions of some as compared with others, would require massive compulsion, and thus would not be available for consideration in Pareto terms. Thus the relevant state of affairs is that in which some are better off by virtue of accepting terms on which they are better paid (since money is the relevant comparison dimension used by Cohen), but in which none are made worse off by the distributive

<sup>40</sup> It makes sense, but of course assessing actual “initial conditions” in the farthest-out sense of “initial” may be beyond the reach of anthropological science. In any case, it will only be equal in that everyone’s real income will be close to zero.

<sup>41</sup> Rawls’ appreciation of this point is not clear to me. He notes that the “distribution” of talents and so forth via the “natural lottery” is “morally arbitrary”; but “morally arbitrary” does *not* mean *unfair*, and I am unclear whether Rawls really does think that nature is unfair rather than merely arbitrary—though obviously, he is entitled to think only the latter.

<sup>42</sup> In the text the word “do” occurs instead of “be”; I assume this is a typographical error, as “do” makes no grammatical sense in the sentence in which it is used.

activities under consideration. Here Pareto comes into its own: those less well off than others might, of course, be envious of those with more, but that is irrelevant. What is relevant is that they are no worse off in self-regarding economic terms: their real income is the same, not lower.

Moving to the real world, we must of course ask whether it is possible for those who get more to get it without in some way actually worsening the lot of those with less—that is, their real incomes. When we do consider this, we need to take into account the much greater opportunities that the poor will have available to them on account of the superior productivity of others, even if they do not, at least immediately, take advantage of those opportunities. In the state of nature there will be no park benches for the homeless to stretch out on, and no generous bourgeoisie emerging from subways and capable of tossing a sympathetic dollar in their outstretched hands. This sort of thing *is* relevant to the argument, and makes it plausible to suppose, as does Rawls in so many places, that *all* are better off by virtue of the “inequalities” of the free market. My overall real income is higher even when my *salary* is not, when such things are taken into account.

By making this signal error, Cohen pronounces that “Thereby, so I believe, the Pareto argument is demolished.” (115) It is clear from the preceding that it is nothing of the sort. Confining your list of options to those meeting the egalitarian specification before you invoke Pareto is hardly to the point. But he agrees that he needs to address this matter of freedom, absent discussion of which the argument is very far indeed from “demolished.” It will take him three more chapters.

### 7 Chapter 3: The Basic Structure Objection

In his discussion of what he calls the “basic structure objection” Cohen defends a version of a “now familiar slogan: *the personal is political.*” He goes on to explain, that by this “I mean something reasonably precise ... to wit, that principles of distributive justice, principles, that is, about the just distribution of benefits and burdens in society, apply, wherever else they do, to people’s legally unconstrained choices.” (116) Or as he states a bit later, after detaching his use of the idea from its initially feminist origins, “choices not regulated by the law fall within the primary purview of justice...” (117) In these clarifications it will be noted, Cohen has not distinguished between law *de jure* and law *de facto*. And that brings up a major question. Most of us understand justice to be concerned with, as J. S. Mill put it, what *ought to be law*. That is: we distinguish between matters which would *properly* be subject to coercion, whether or not they actually are so, and matters which would not. Obviously that could deviate by any amount from what the law in a given state or other legal entity prescribes. Cohen maintains that justice requires equality in his special way, of equalizing outcomes in terms of overall life prospects. But we, or at least most of us (including, certainly, this author) take this to mean that it requires, or at the least permits, *coercively achieved* equalization *if* voluntary equalization will not do the trick. Or as Mill puts it, “... (T)he *idee mere*, the primitive element in the formation of notions of justice, was conformity to law—but only of such law as *ought to exist*.” Mill, to be sure, thought that moral obligation included the idea

of enforcement by conscience: "if not by law, then by the opinion of his fellow creatures, if not by opinion, then by the reproaches of his own conscience."<sup>43</sup> The question to ask Cohen, then, is which notion of justice is the one to which he refers: justice in the usual narrower sense in which if something is unjust, then we may contemplate making an actual law against it, with coercive type penalties; or does he mean only to express a view, active in his own conscience if not in anyone else's, which he recommends that others adopt as well but which he agrees we should not be enforcing by law? His willingness to criticize relaxations in levels of income tax on the basis of his egalitarian ideas strongly suggests the former, and that is what we would normally be taking him to be referring to here.

But if so, then the distinction between law as it is and law as it ought to be becomes paramount. The personal is *not* political, *by definition*: the "merely personal" is what law ought to leave us alone with respect to, whereas the political is what it not only may but presumptively should incorporate into law. This casts into question Cohen's further statement: "Because I believe that the personal is political, in the specified sense, I reject Rawls' view that principles of justice apply only to what he calls the "basic structure" of society ... "and thus, "I shall show ... that Rawls cannot admit the family into the basic structure of society without abandoning his insistence that it is to the basic structure only that principles of distributive justice apply." (117–118)

Unfortunately, this attempted clarification really does not help much. In the first place, the notion of "basic structure" is itself rather unclear, and so the question whether considerations of justice within the family belong to it is not one with an obvious answer, though Cohen seems to think it is, and that the answer is that the family does not belong in that category. But why not? It is not clear to me what more "basic" structure a society can have than the family—after all, it is the family that produces all of its members, in the end. And in any case, it is perfectly clear that our actual societies have no hesitation whatever about legal interferences with family matters. Cohen may have a quite different view about just *which* "distributions" within families we should claim to be just or unjust, but that *some* view on the matter can be understood to be matters of justice in the standard, Millian/everyday sense of the word, is manifestly true. One might argue that law goes too far, of course—that is surely discussable. But even those who think it goes too far will do so, not on the basis of an idea that it is logically out of court for the law to get into such things, but because of a substantive view about it.

All of this means that we are likely to find the whole subject of Chapter 3 of Cohen's *Rescuing Justice and Equality* rather puzzling. It helps matters even less when Cohen summarizes his preceding results as follows: "I restate a criticism that I have made elsewhere of John Rawls' application of his difference principle, to wit, that he does not apply it in censure of the self-seeking choices of high-flying marketeers, which induce an inequality that, so I claim, is harmful to the badly off." (118) But of course neither the difference principle nor the free market allow actions, be they conducive to inequalities or not, that are *harmful* to the badly off.

<sup>43</sup> Mill (1910, pp. 44–45).

Cohen's restatement here crosses his own line between factual questions and theoretical ones. Rawls, free marketeers like myself, and Cohen are all *agreed* that *harm* to others, including of course the badly off, is unjust.

So if he wants to describe his differences with Rawls in the way we have just quoted, we would have to suppose that he wants to argue that differences, or at least large differences, of earnings are *as such* harmful to the badly off, rather than that, as his wording suggests, he objects to those differences *if* they should happen to have that unfortunate side effect, though it is logically distinct from a supposed "harm" done by virtue simply of difference as such. But what Cohen apparently should have stated, to be perfectly clear, is that he objects to those large differences *just because* they are large differences, whereas Rawls does not. He would then have joined what I should think everyone would recognize to be a real difference among us, instead of a supposed difference artificially generated by stipulation.<sup>44</sup>

The upshot is that, as I have indicated at the outset of this discussion, there is no real quarrel at this level. We cannot defend substantial pay differentials by insisting that they are "not part of the basic structure" because the claim that they are not is normative and would need to be defended by some prior independent argument. On that point, I think, Cohen and I agree. Where we disagree—sharply—is on the justice of people acting in their own interests. On that point, as I see it, Cohen appears, on close inspection, to have literally no argument—merely an intuition, though much supplemented, so far as I can see, by confusion, more of which we will be seeing shortly.

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<sup>44</sup> Cohen does address the question of basic structure in his Appendix I to this chapter of *Rescuing Justice and Equality*. Alas, it makes things no clearer. In it he observes that Rawls characterizes a notion of a "well-ordered society" as one in which "everyone accepts and knows that the others accept the same principles of justice." (147) [Quoted from Rawls (1971, p. 4)]. This prompts Cohen to observe that it is hard to see why any coercion should be necessary in such a society. Or maybe the idea is that there will still be a few deviants who need punishing and so for *that* reason some coercion may be envisaged, but still, it would not have entered into the notion of a basic structure.

This, alas, seems to avoid the issue. What everyone could be accepting is that *if* anyone were tempted to do something other than what the accepted principles permit, then it *would* be in order to use coercion either by way of punishment or deterrence. The essential reference to coercion would thus be retained, but retained where it belongs: namely, hypothetically, in constructing the *normative* theory—not in constructing the local police force, which seems to be what Cohen thinks Rawls is discussing. On p. 148, Cohen appears to anticipate this. But he leaves it hanging: "Perhaps one could argue that the question of what it would be right to coerce, if necessary, is the appropriate question to ask in determining what justice is even if, in the achieved society, nothing needs to be coerced either for miscreant or for assurance reasons. We might say that justice is what warrants coercive imposition where coercion is necessary for it to be observed." Since this seems to undo most of what he has written on this subject previously, one must wonder why it is not given a bit more attention. It seems to be given none, which makes one wonder what he thinks he is doing in this chapter.

The source of this unfortunate confusion, I suspect, lies in an ambiguity similar to one indulged, with similarly unfortunate conceptual effects, by David Gauthier when he defines the "market" as a "morality-free" zone (Gauthier 1986, pp. 83–112). But all he meant by this was that *if* we had what he calls a market, with all actors in it sticking to the defining strictures, then everything done in it *would be morally permitted*—not that no moral notions of any sort can even be applied to those actions. And similarly, when Rawls states (if he does) that the family is not part of the basic structure, he means that what goes on in it is *morally alright*, not that it is impossible even to raise the question *whether* it is. Presumably Rawls would agree that if a man murders his wife, the officers of the law may nevertheless be appropriately called in.

Of course, I also disagree with Rawls, very likely, regarding the force of the notion of equality. As I have elsewhere argued, Rawls is misled by his metaphor of the “veil of ignorance.” Putting people behind a veil is done to insure impartiality. It is not done in order to ensure that the interests of justice are the interests of people who have no idea who they are. The principles of justice are to be the same for all, and to be accepted by all—real people, not imaginary philosophical constructions—provided that others accept them as well. Whether you think they obtain needs to be independent of your specific talents or position in society, just as Rawls states. But that this makes equality a presumptive “bench mark” in any very serious sense is another question entirely. However, Cohen’s *Rescuing Justice and Equality* is an examination of the proposed “difference principle” which calls for justification of distributions other than equal ones, given that equality is what is *prima facie* required. The question is whether these are justified by virtue of the differential interests, abilities, and situations of various individuals. Whether they “are justified” means, whether rational principles about justice, principles that make sense to all and would be embraced by all for the purpose of general regulation of our interactions, would permit the actions in question. So with reference to this issue, it is whether (and why) those principles would permit people to deviate from “equal distribution.” To my mind, this is absurdly easy: it permits them because there is no reason to prohibit them. Rawls treats the issue as if inequalities needed some kind of very strong and special argument; and Cohen agrees with Rawls, and then proceeds, at length, to show that the arguments, given the very strong status of the egalitarian idea, will not actually justify what Rawls claims they will. I think he is right about that. If justice requires us to ignore ourselves and bestow the products of our labors to all and sundry indifferently, then the claim that it is *necessary* that these inequalities exist, irrespective of what those who produce the greater wealth in question want, in order for the greater overall product that would enable all to do better (equally) to be produced, then you cannot justify inequalities.

But justice, I think, is not like that. We do not *start with* a heavy-handed egalitarian requirement. We start, instead, with individual people, varying in all sorts of ways, acting in light of their own desires and interests and information, and we ask whether such people, in their dealings with each other, should accept a Cohen-type requirement or, instead, a requirement that we treat all others as having rights just as we do, rights that begin with respect for the lives, integreties, and freedom of those others—and perhaps go no further. If it is claimed, *a la* Cohen and Rawls, that we need to go much further, we need a very strong argument to sustain that conclusion. Thus far there has been no such argument from either of them.<sup>45</sup>

Meanwhile, that everyone benefits, *enormously*, from the general acceptance of liberty as I have described it above, is beyond any reasonable doubt. The general intent of the difference principle is fulfilled as a slam-dunk by the free society. That societies may be conceivable in which Cohen-type equality is enforced throughout

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<sup>45</sup> And there is, after all, a very strong argument against the idea. People simply have no interest, as such, in equality. They do have an interest in keeping themselves alive, in promoting their own comforts and projects, and for this reason have a great interest in others’ not intervening to undo their efforts. How an interest in equality as such is supposed to emerge is the question. The answer, I believe, is: by some serious confusions.

may hypothetically be granted. That such societies exemplify *justice* is another matter entirely and not something to be accepted without serious arguments. But we do not advance serious arguments by begging the question.

Cohen parenthetically asserts his idea once again when he claims, of a society in which there is a tax function on income that maximizes the income return to the worst off people, with the constraint that, because of the self-seeking motivation of the talented, a fully equalizing taxation system would make everyone worse off than one that is less than fully equalizing, that “this double-minded modeling of the implementation of the difference principle ... is wholly out of accord with the (sound) Rawlsian requirement on a just society that its citizens themselves willingly submit to the standard of justice embodied in the difference principle.” (123) But it is *not* “sound”—it is preposterous to suppose that people would in general agree to any such thing.

Cohen also reintroduces his “communitarian” argument in this chapter, pointing out that “The difference principle might be appealed to in justification of a government’s toleration, or promotion, of inequality in a society in which the talented do not themselves accept it, but it then justifies a public policy of inequality in a society some members of which—the talented—do not share community with the rest ...” (121) There is no advance here from his first invocation of this claim, and the answer is the same: sharing community with others in this respect is sharing the *same* principles of justice, *not* sharing *egalitarian* principles, unless it can be shown, independently, that the principles of justice are as such principles calling for the Cohenian sort of equality. And, to repeat: we all, or nearly all, do in fact share the principle that individual achievement in a free society is justly regarded as a basis for higher income, or what is too casually referred to as “reward.”<sup>46</sup>

“Rawls says that when the difference principle is satisfied, society displays *fraternity* in a particularly strong sense: Its citizens do not want “to have greater advantages unless this is to the benefit of others, who are less well off ...” (130) To which Cohen, again instantiating familiar leftist distortions of the free market view, asserts,

But fraternity of that strong kind is not realized when all the justice delivered by the difference principle comes from the basic structure, and, therefore, whatever people’s motivation in economic interaction may be. Wanting not ‘to gain unless they can do so in ways that further the interests of the rest’ is incompatible with the self-interested motivation of market maximizers... (130)

But this is a confusion. Market maximizers are not as such *interested* in promoting the fortunes of the badly off, true; but they *are* constrained not to act against those

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<sup>46</sup> We should cavil at this term, since what you get from me in payment for services rendered is not a “reward” for those services, as if I were a kindergarten teacher handing out gold stars to my hardworking little charges, but rather, it is a *payment* for them, rendered *due* by the fact that this is what we *agreed* I would do for you given that you do that service for me. The idea that what we get from each other in commerce is a bunch of rewards and incentives is off the mark; what we get are the things we *agreed on*, in the circumstances. Those do, to be sure, have the effect of incentives. But what makes them part and parcel of justice is their agreed character, not the psychological effects of them as such.

interests, and as I pointed out, what they do is very much *in* those interests. (And, of course, many maximizers include among the things they would like to maximize, the real incomes of poor persons. Nothing prevents this.)

Rawls' second claim is that those in inferior positions can "bear their inferior positions with dignity" since, by hypothesis under the difference principle, they could not do better. To this Cohen reasonably responds that, after all, the only reason they "cannot" do better is that the talented do not *want* to contribute any more than they do to their situations. We may agree with that. On the other hand, it can be argued that in the longer run, they actually cannot do better, because diverting productive capacity to the unproductive means that society does not advance as far and fast as it might. If the pie is very much larger in the society with no welfare state, then it might also be true that the worst-off in it are actually better off than the worst-off would have been in a welfare state over that same lengthy period. There will, of course, be the familiar distinction between size of cut as a proportion of the gross domestic product, and absolute real income. It is the latter that would be expectedly maximized. Again, Cohen does not consider this possibility; but he should.

Finally, Rawls states that in a just society, people "act with a sense of justice from the principles of justice in their daily lives," (131) because they "have a desire to express their nature as free and equal moral persons..."<sup>47</sup> This strikes me as perfectly reasonable, and to reflect what real people do actually think, pretty much; but Cohen argues, "... how can they, without a redolence of hypocrisy, celebrate the full realization of their natures as moral persons when they know they are out for the most they can get in the market?" To which the obvious retort is: well, why not? People have desires, as individuals; they want to do the best they can given those; and market society does in fact let them do this, to the maximum possible degree compatible with everyone else doing the same. Cohen refers to this as one of Rawls' "inconsistencies"; it is pretty clear that his claim of inconsistency is a socialist prejudice, not a real finding of logical problems with the free-market view.

Cohen sums up his case by claiming that Rawls can preserve his theory in this form at a "cost": it means that the ideals of dignity, fraternity, and full realization of people's moral natures can no longer be said to be delivered by Rawlsian justice." (131–132) To which one must comment that only a warped view of all those things—especially the last—could justify such an assessment. Justice as the "arithmetic of envy" has asserted itself at full volume in these passages.

We are moving, slowly, in the direction of Cohen's consideration of the subject of liberty, which is discussed in Chapter 5 of Cohen's book, *Rescuing Justice and Equality*. But there is an intervening Chapter 4 entitled, simply, "The Difference Principle" (pp. 151–180), the burden of which seems to be to restate the previous material in a slightly different way. "The incapacity of the talented would explain, but not supply a morally nonarbitrary justification of, incentive inequality. And that puts a taint on the difference principle itself: the principle permits inequalities that are morally arbitrary." (154) We already know that Cohen thinks this, and that Rawls' original argument for equality is based on objections to moral arbitrariness.

<sup>47</sup> Rawls (1971, p. 528.

Moreover, we should not, by this time, accept the expression “morally arbitrary” without comment.

It is perhaps useful here to point out, once again, that both Rawls and Cohen are simply wrong about moral arbitrariness. Any principle that ruled differences to be unjust because they were morally arbitrary would be trading on an ambiguity. Moral arbitrariness is a reasonable objection, and at home, against actions that treat some worse than others against the *background* of a reasonable rule or principle calling for equal (or unequal!) treatment of the relevant kind to that set of persons in those respects. That rule needs to be previously established before charges of moral arbitrariness can be relevant. That I take chocolate instead of vanilla is morally arbitrary, but that I *may* take either chocolate or vanilla as I choose is *not*. Moral arbitrariness is not a reasonable across-the-board objection to responding differentially to genetic and many other differences, despite their having come about by means that have nothing at all to do with morality, one way or another, as have genetic differences. The tall, well-coordinated candidate for a position on the basketball team is preferred to the short uncoordinated one, and that is not arbitrary at all, but perfectly reasonable. I prefer an intelligent pleasant person for companionship, even though she perhaps cannot help being either, while the intellectually challenged and unpleasant person whom I avoid probably cannot help being the way he is either. It is absurd to castigate choices like this as being morally arbitrary (which they are) as if that were a relevant objection to them (it is not). The reasonable, and entirely non-arbitrary *rule* about such things is freedom, and those who attempt to compel such choices are the ones to whom one should morally object.

To be serious about egalitarianism of the type and in the way that Cohen advocates it, we would have to contend that it is unjust to settle for a worse level of income for cows, say, as compared with people, since the fact that *x* is a cow and *y* is a person has to do with factors over which *x* and *y* could not conceivably have had any control and must therefore be accounted “morally arbitrary.” That cows and people should therefore be treated “equally” could reasonably be described as a cockamammy conclusion, and there is no good reason for not saying the same thing about egalitarianism as between one human and another when advanced just for the same reason. *Of course* we may refuse Elmer the position of left-tackle on our National Football League team on the ground that, alas, he is an 87-pound weakling, despite the fact that this difference is due to his genetic endowment. Still, there is no injustice whatever about this. Nor is there any injustice exhibited by fans who are happy to pay high prices to see that team perform.

Rawls’ theory of justice, and Cohen’s after it, are thus nonstarters, logically defective at the base. What is really sad is that nevertheless, the U.S. government, and many others, make the same sort of mistake, continually. They impose on individual citizens, in effect, a variety of duties of equalizing people who are in various perfectly relevant respects unequal, and are so in such a way as to make differential treatment absolutely reasonable. If, like Cohen (as we will be seeing) you think that justice is a unique nonnatural property in no need of analysis or explanation, you will claim that they are not reasonable. But no ordinary person would think them so, including probably Cohen in his private economic life. Only

an egregious confusion could persuade someone that justice required that everybody who produces anything is in principle obliged to share his products equally with everyone on earth, nor that the genetically shortchanged are done an injustice by others when they fail to try to equip those people with the same trappings of modern life as most others have. At one point, Cohen writes, “*Of course* there is a case for equality.” (168) I am not clear what he meant by his use of the term “case” here, since neither Rawls nor he has done anything that one could call “making a case for” equality.<sup>48</sup>

## 8 The Wilt Chamberlain Argument

Cohen takes up this famous argument in Chapter 4.7 of *Rescuing Justice and Equality*. It is especially noteworthy that he argues,

Now several criticisms may be made of Nozick's argument, but one that is common in the literature, and that Rawlsians are disposed to affirm, says that he fails to see that the principles that enjoin D1 also prohibit the move to D2: Nozick takes D1 as established, and he succeeds in disestablishing it only because he ignores what established it. ... You cannot begin with equality because all inequalities are morally arbitrary in origin, and therefore unjust, and then treat an unequalizing Pareto-improvement as lacking all stain of injustice. (170)

This would be perfectly true if it is what Nozick claimed to be doing. But it is not. Nozick, to begin with, does *not* “begin with D1.” Rather, he begins by asking the reader to assume *whatever* distribution he thinks to be just to be prevailing at  $t_1$ . He then asserts, in effect, “Each of these people is *perfectly willing* to spend his money watching Chamberlain play, even though he or she knows full well that Wilt is getting it all. How, then, *can* they reasonably complain about the result?” The idea is to lean on the familiar intuition that people may use their own resources as they please, and because they may, are also very likely to use them in a way quite different from what egalitarians (especially) presume to insist on, thus upsetting the patterns posited as just by the believers who are being queried here. Now, it may well be that many among the hard-core Marxists among whom Cohen grew up would not go to see Chamberlain (or anybody) play at the prices asked. But those people are insisting that the *other* people, who would be perfectly willing to spend *their* money that way, are doing something wrong. Nozick's argument is an appeal to the plausibility of freedom. It is a Paretian argument as originally intended: leaning on liberalism. Start where you like, and suppose that someone, of his own

<sup>48</sup> I have elsewhere catalogued a number of confusions in which people have engaged in the course of attempting to justify equality (see Narveson 2002, pp. 49–62). Cohen seems to have indulged in a couple of these: confusion of the notion of impartiality with that of equality, and the above noted confusion, between arbitrariness as a relevant criticism of a modest set of relevantly possible actions as identified by previously accepted principles, versus “moral arbitrariness” as a property of the universe. Obviously the universe is morally arbitrary, but it is not on that account immoral. But mostly, he insists that justice is equality and that this cannot be argued for.

free will, wants to do something that will benefit someone more than someone else. The action in question makes someone better off, in the sense of getting more of what he or she wants, while making no one worse off than he or she was in that status quo. But Nozick's argument, as I have also argued before, is useless against someone who has no use for what people think, even about their own actions—who, for example, adheres to egalitarianism as a fundamentalist intuition, overriding people's wants and interests. But for most people, Nozick's argument has great power. Thus, again, we have to address his exploration of freedom to complete this survey of Cohen's arguments. And when we arrive there, the perceptive reader will discover a completely astonishing thing.

## 9 The Freedom Objection

All this time Cohen has been refusing to identify the subject of justice with *what can be properly compelled*—even though he seems to be all for heavy taxation in order to bring about his favored equality. Yet in the chapter on freedom, we suddenly find that he is *really not* in favor of compulsion in order to bring about equality. He is against using compulsion to get us to help old ladies across the street or even to get people to save someone's life, even if they could do so at small cost to themselves! (195) The “fact” that something is just, it seems, not only is not enough to justify compulsion, but can quite comfortably be set aside by all sorts of people in all sorts of circumstances. The plot thickens!

Or does it, actually, *thin*? For if he goes far in this direction, he could turn out to be a libertarian who happens to have a penchant for equal distribution of some things. I read in this morning's paper about the recent Russian reassessment of the bloody dictator Stalin: 11th-grade Russian histories now put him down as one of Russia's greatest leaders, and dismisses all those killings (estimated at over twenty million) as “necessary” for realizing socialism. Acquaintances tell me that there was a time when Cohen was inclined to take some such line about such things, but somewhere along the line, he seems—happily!—to have changed his mind. More importantly, what he states here makes it clear that no such excuses are forthcoming at the theoretical level.

As an interesting case in point, consider this statement by Cohen: “... I sometimes think that philosophers who believe in believing in equality misname it “slavery” only because they recoil (as I do, too: what reasonably well-heeled person with a fulfilling job would not?) at the thought of the lot that they themselves would have in a more equal society.” (208) A great many people, apparently including himself, are considerably influenced by the prospect of higher pay as well as more interesting work, the combination of the two being still more attractive than either separately. A considerable fraction of the prosperity of the relatively affluent countries is probably due to just that. Now, Cohen argues in a strongly theoretical vein that for all that, we can think that the more equal, or the “absolutely” equal society would be morally better, but apparently that is not enough to make him personally choose situations of greater equality that are, after all, entirely possible right now (e.g., he could give away most of his high income). And—more to the

present point—he is dead set against using any strictly coercive power to compel the kind of equality he claims justice consists in.

Cohen is famous for strongly objecting to keeping the moral and the political in separate compartments. This being so, one surely should infer that he ought to be opposed to using the power of the state for those purposes as well. It is hard to say whether Cohen is speaking for egalitarians generally in holding this combination of views and personal characteristics, but if he is, then socialism is not what we all supposed it was, and Marxian revolutions, for example, in their violent versions at least, are not on. For notice that in *our* more familiar language, Cohen is agreeing with us that neither the state nor anyone has the *right to compel* people to work at low-paying jobs, or high-paying ones that they hate, or, so far as I can see, to refrain from the usual kinds of capitalistic activity.

What, then, are we arguing about here? Possibly this: Cohen cites in a footnote a remark of my own from the paper in which I claim that Rawls faces a dilemma, in which I refer to “the inequalities which we ... hold dear, namely inequalities of wealth” and says that this is “amusing (to me)” adding “Whether ‘we’ hold them dear rather depends on who we are and where we are on the wealth scale.”—further adding “but if Narveson means his (or my) typical readers, then what he says is excusable.” (206) Cohen’s amusement is apparently meant to be self-deprecating, since he too, I believe, is among those who hold those inequalities “dear” in the sense I meant—namely, that those inequalities are a major reason for our general affluence, and also for making our society as relatively interesting as it is. He might not share a different reason I had in mind: namely, that large variations in wealth make the social environment interesting. Great poverty is not, of course, “interesting” in a good way, but it is also true that many very poor people are nevertheless interesting—possibly more so than they would be if they were not so poor; while the converse, I should think, is also true: some wealthy people are less interesting because they are wealthy. But with others, greater wealth enables them to be more interesting, and they are. Some of the very wealthy cause interesting art to be produced that probably would not otherwise be produced, fine (as well as awful) architecture to be built that would not otherwise be built, and so on. I suspect that Cohen, with his taste in great visual art—an inherently very expensive taste—would be hard-put to disagree with this latter judgment. Of course, we can always insist that *theoretically* we could have all these good things in a highly egalitarian society too. To which the reply, surely, is: not one that is feasible in today’s or any readily foreseeable societies. (The Hermitage, which flourished during the Communist era, got virtually all of its fine art from pre-revolutionary times.) Egalitarianism for the foreseeable future will have the Humean implication: poverty for all. Were we all multimillionaires, things would indeed be incredibly different, and I should not think that theories of justice like those of contemporary egalitarianism would be the least bit interesting to anyone in such circumstances.<sup>49</sup>

<sup>49</sup> I add that from the point of view of a typical European bottom-class person in the year 835, the situation of people in the G8 countries today probably would look rather like just that—we are all, including the park-bench occupants, wealthy by their standards... There is perhaps a moral there.

In a long and difficult section of *Rescuing Justice and Equality* (205–214) Cohen states, for example, “(you do not have to doctor, but if you doctor, you must doctor to serve society, at £20,000, not to make yourself rich, at £50,000.)” (212) What does “must” mean here, one has to ask? Normally, it would tend to have the coercive implication: we *may not* offer the candidate that much, on pain of some kind of significant penalty; yet apparently, in light of what he has written, we would not be allowed to *compel* the doctor to doctor at the lower salary. But why would anyone be allowed to *compel* us to *offer* a maximum of the lower figure to a doctor whose services we need and want and would be perfectly *willing* to pay more for, should it come to that?<sup>50</sup>

In any case, given what he has argued, Cohen cannot, so far as I can see, accept any of those compulsions. In that case, he is reduced to cussing out those talented enough to be doctors but selfish enough to be willing to serve only at a high salary. Now, obviously we are allowed, in the libertarian format, to cuss out whomever we please for whatever reason; we are not, however, allowed to impose harms on, e.g., by forcibly restricting the freedoms of, persons who fail to comply with *our* egalitarian ideas (“our” referring to Cohen and his ideological friends, and those of the Central Committee...) But then, so far as I can see from what he here states, Cohen has to agree with that.

Cohen often appears to treat income as some kind of very narrow and special good. It is not such, of course. A dollar’s value is its exchange-value: a very wide variety of services or goods can be purchased with it. The more dollars, the more of this immensely wide variety of services you will be able, on a purely voluntary basis, to avail yourself of. When Rawls argues that income (and wealth) is a “primary good,” by which he means, something a rational being can be expected to want *whatever he wants*, he has a strong case. Income for person A might translate into erecting a huge and well-equipped house for his family; for person B, into supporting the local opera; for person C into endowing a chair in Marxist studies, and so on. In treating income as a good that is wholly distinct from “self-realization” as he more or less appears to do, and something that people should not be desirous of in quantities greater than those earned by some others, he does no service either to the kind of good income is, or, especially, to *people*. It is neither surprising nor the least bit objectionable, morally, that people desire high incomes and are willing to do a lot to earn them. The case for egalitarianism as a theory of justice in the ordinary sense, rather than Cohen’s (whatever it is!), is close to non-existent, but it is all the more remarkable that, after 200 pages, we should discover that Cohen does not make it either. How he can think that taxation is unobjectionable in light of the things he does say are objectionable is, it seems to me, puzzling.

“Egalitarianism,” writes Cohen, “cannot demand that the doctor-gardener live a particularly bleak life (compared with other people’s lives).” (213) But if we leave

<sup>50</sup> We think here of Canadians going to the U.S. for medical treatment that they either cannot get in social-democratic Canada, where it is “free” if provided, or else they can get it faster (almost certainly) or, they think, better (sometimes, probably) at substantial cost to themselves. While political writers in Canada tend to decry the need to do this, few deny that people should be allowed to do this if they want to.

off the last clause, then egalitarianism certainly *could*, and on the fade of it characteristically *does*, “ask” doctors and other talented persons to live a “particularly bleak life”—if not by comparison with the others in their community, yet definitely by comparison with what they themselves *could have* if they were able to take offers made by others who are perfectly willing to pay them much more for their obviously valuable services. Now, there *are* doctors (“Physicians without Borders,” for example) who do in fact work hard for very low comparative incomes (next to none, I believe) in various parts of the world, and many more doctors who earn much higher incomes than those ones, and than most people in the communities they work in. Cohen wants to cuss the latter out. But many of the rest of us would want to send them flowers, in addition to their (let us suppose) high fees when they save the lives of our loved ones, or make our own lives comparatively much more comfortable or efficient than otherwise.<sup>51</sup> And Cohen is on record as objecting to the use of coercion to bring it about that the latter are brought down to the level of the former.

So what *are* we arguing about, anyway? In *Rescuing Justice and Equality*, Cohen incessantly addresses himself to those very few of us who accept the supposedly Rawlsian thesis that equality is the benchmark of justice, and asks *those* people how they can hold out for higher salaries, given their acceptance of *prima facie* egalitarianism. Earlier on he argues, as I did much earlier, that you cannot “justicize” a departure from what justice *prima facie* requires by simply asserting that you *want* to do the thing in question. But in my—which I think is the normal—view, justice is enforceable. An egalitarian, on my view, is in the business of continually overriding liberty by forcibly (if need be) pushing people into more equal configurations, whatever they may have wanted. And in my view liberty is worth that status, but equality is not: we may coerce would-be coercers into ceasing their bullying, but we may not coerce would-be capitalist multimillionaires into doing something less lucrative or turning over a large percentage of their earnings to “the public,” etc. But now Cohen turns out to award to liberty a status basically much like the one we libertarians award to it. On his view, we now find, we may *not* coerce people into more equal configurations.

## 10 The “Unequal Income Inference”

Now, the nub of the issue after all this seems to be as follows: Cohen is prepared to insist on freedom of occupational choice. But he thinks that we are not thereby also allowed to earn high incomes. He discusses what he calls “The *unequal income inference*,” which “proceeds from the premise that A should not be forced to work as a doctor to the conclusion that anything goes, morally speaking, about the terms she sets for being a doctor, is invalid.” (215) In a revealing footnote referring us to an article by Richard Arneson,<sup>52</sup> Cohen describes the “more general form” of the

<sup>51</sup> I think of an acquaintance who paid \$50,000 to have a state-of-the art artificial knee installation in New York, New York instead of waiting a year or so to get it “free” in Ontario, Canada.

<sup>52</sup> Arneson (1990).

inference as follows: “because X should be free to decide whether or not to do A, there is nothing wrong in X’s charging whatever she can get to do A.” (215) But anyone who holds such an inference (like myself, say) would certainly exclude from the range of permissible choices all of those which are *antecedently unjust*. And if we think, as Cohen does, that coercion is wrong, then obviously the inference does not extend to criminal actions (of the usual interpersonally injurious type—not, of course, in the sense in which just anything illegal is to be so classified). So Arneson’s refutation is beside the point, as is Cohen’s. The real question is this: given a range of *non-injurious* options, if X ought to be free to do anything within that range, then X ought to be free to choose which value he will select on the basis, at least in part, of what his potential employers are ready to offer him in the way of income from it. We are assuming the free market environment here: people engage in exchanges that are entirely voluntary on the part of all concerned. Thus if we are to hold, as Cohen seems to want to do, that it is perfectly alright for Jones to pick job x rather than job y simply because he likes x better, even though y, perhaps, would do more good for more people, then it is going to be difficult for him to hold that potential employer B is *not* free to avail himself of A’s valuable services by offering him a higher salary than (say) most people enjoy (which, of course, would also “do more good for more people” if we allow doing good for A to count—as why should we not?). For after all, to do what Cohen seems to be plumping for here is certainly to merit Nozick’s wonderful description, that the socialist is forbidding “capitalist acts between consenting adults.”<sup>53</sup> You do not test *that* idea by pointing out that murder is not one of the allowable options. And Cohen ought to have seen that, surely. He appears not to, or at least not to be sensitive to the point. But the charge of question-begging, which I have laid so often above, is plainly applicable here.

## 11 Self-Realization

The discussion of this matter has been interwoven with a consideration of the idea that work (for instance) may be “self-realizing.” Whatever the intellectual credentials of that notion may be, we may agree with Cohen that we could look at it in two ways. First, we could think of “self-realization” (SR) as having the status of just one more variable among several to take into account in reaching a decision: here, option x would realize my self better than y, but y offers a higher income, and on balance, I might think the package of <less SR + more \$> is preferable to that with <more SR and less \$> (or the reverse, as the case may be). Or, second, we could give it a special status such that you cannot do that, and self-realization is to be lexically preferred to other variables. In the latter event, Cohen argues, “a doctor who asks for a premium is misusing the freedom she asks us to grant her: it is wrong for her to use a freedom that is justified on the relevant high-minded grounds to bargain her way into wealth.” (216) But again: this *presupposes* that justice insists on equality. However, whatever we may think of that, clearly *self-realization* does not. It is perfectly possible that doctor X, who also perhaps admires

<sup>53</sup> The famous remark is from Nozick (1974, p. 163).

the sorts of paintings that Cohen did, would find himself *more self-realized* if in addition to treating patients in the particular ways he is good at, he *also* has a fine painting or two in his living room, to admire when he gets home after a day's work in the hospital. The notion of self-realization cannot be claimed to be clearly antithetical to such applications. We might well conjecture that many of us have ideals of life such that we cannot *afford* to realize ourselves fully, and we envy—but also congratulate and admire, and at least envy—the some who manage to earn enough to do just that. It is, we might also say, a decent measure of the real value of their work that it enables their exertions for others to translate into original Goyas, or perhaps Lamborghinis. The socialist, in preventing transactions having those side effects, compels people to settle for a lower level of self-realization, and of course he diminishes the value of many people's work. Since all this is by stipulation harmless to others, the conclusion follows straightforwardly: the “unequal income inference” is perfectly valid so long as we do not question-beggingly impose egalitarianism from the start. Cohen, in consistency, should recognize that.

## 12 The “Ethos of Justice”

This still leaves Cohen with a thesis, if not the one we thought he was pressing: “I reject both Stalinist force and Rawlsian inducement, in favor of an ethos of justice.” (220–221) However, that formulation is tendentious, since we may question (as most of us do) egalitarianism's equation with justice. What Cohen is arguing is this: no Stalinist force, no capitalist monetary inducement, but instead, an *ethos of egalitarianism*. Cohenites will hold that those who hold out for higher-than-normal incomes for useful services should feel guilty about it—though not necessarily to the point of actually *acting* on their convictions. This is indeed some sort of an ethical thesis—if not, I would say, a very attractive one. A social world in which everyone respects everyone else's freedom, *including* their freedom to reward people at high levels (as well as low ones), is to my mind immensely more attractive; and, at the risk of boring with repetition, it is not only much more nearly the world in which Cohen and you and I actually live, but also one that Cohen, as far as I know, did find attractive in innumerable ways. Is a social world rendered more attractive by having inhabitants who inwardly harbor unattractive theses about what themselves and a great many others should be doing, even though what they actually are doing looks pretty good and in some cases downright terrific?

“In a truly just society, with full compliance, taxation on behalf of equality would not need to be coerced.” (221) That is, in a society in which everyone happened to be a wholehearted egalitarian, this would be so; *from the point of view of such a theorist*, we could characterize lesser real-world approximations as follows: “a wholeheartedly egalitarian government rules over a halfheartedly egalitarian electorate that voted for that government because the only alternative to it was a party that sought to promote *laissez-faire*.” (221) But a society of persons who did not succumb to the rhetoric of Marxists and which had some tolerable idea of economics would vote for a government that was maximally permissive of *laissez-faire*, and indeed which, in the end, might even proceed to eliminate itself in

favor of voluntary cooperation at all levels.<sup>54</sup> The question here is whether Cohen's egalitarian intuitions are compatible with his intuitions about freedom. The short answer, it seems to me, is in the negative. And it seems that his intuitions about freedom really trump the ones about equality, in the following sense: that if equality had to be bought at the expense of heavy coercion, then Cohen would oppose that. So far, we have seen, all of the proffered arguments for his stated egalitarian position are circular, and when the question is no longer begged, it is hard to see why egalitarianism would win. It is hard, even, to see that Cohen thinks it would, when the question is posed in the familiar terms of a theory of justice as a theory about what society *may rightly compel us all to do*. Cohen, I think, is simply changing the subject.

### 13 The Facts

The second half of Cohen's *Rescuing Justice and Equality* is concerned with essentially metaethical matters, in which he proposes to rescue the notion of justice from, especially, the hands of constructivists (Rawls, especially). This is fascinating stuff and will raise (and has raised) much discussion, I am sure.

Chapter 6 is entitled "The Facts," but it is not about what you might expect—that is, whether the facts somehow are favorable to equality. Rather, the argument is metaethical. The thesis in this chapter rest on a distinction between *facts* and *principles*: "A normative principle, here, is a general directive that tells agents what (they ought, or ought not) to do, and a fact is, or corresponds to, any truth, *other than (if any principles are truths) a principle*, of a kind that someone might reasonably think supports a principle." (229) Most philosophers, he claims, if they address the question whether principles are grounded in facts, "say that (sound) normative principles as such ... are ... grounded in the facts of human nature and of the human situation." (229) Cohen wants to deny this. His view is that "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, then the principles at the summit of our conviction are grounded in no facts whatsoever." (229) Cohen claims that this thesis is independent of any specific theory about what a fact is, and for that matter about most metaethical controversies, such as those about "the objectivity of principles, the relationship between facts and values, and the "is-ought" question, and let me add for good measure, the realism/antirealism/quasi-realism (etc.)." (230) And despite the relative rarefiedness of this principle, he claims that it is enough to refute Rawlsian constructivism.

However, the whole discussion insofar as it bears on Rawls leans heavily on Cohen's distinction between *principles*, specified above as normative and fact-independent, and *rules of (social) regulation*:

On the constructivist view, the content of justice is identified by the rules for social living, the rules of regulation that would be chosen in a privileged

<sup>54</sup> My flirtations with anarchist theory are exemplified recently in Narveson (2008, especially Chapter 8).

choosing situation ... My rescue of justice denies the mooted identification (of justice with chosen rules for social living) on two grounds: if rules for social living are soundly based, they will reflect both values other than justice and practical constraints that restrict the extent to which justice can be applied. That being so, justice, itself, could not be what is specified by such rules. ... (3)

I presume that the two grounds intended are (1) that rules involve values other than justice and (2) that they are made against a background of practical constraints. But suppose that theorist A thinks that F is a reason for affirming P. Question: *why*? If A has an answer to that question, it will be in the nature of affirming some "more ultimate principle (call it P1), a principle that would survive denial of P itself, a principle, moreover, that holds whether or not F is true and that explains *why* F is a reason for affirming P: it is always a further principle that confers on a fact its principle-grounding and reason-providing power." (234) Cohen's argument for this has three premises:

1. Whenever a fact F confers support on a principle P, there is an explanation *why* F supports P, an explanation of how, that is, F represents a reason to endorse P. That first premise rests upon the more general claim that there is always an explanation *why* any ground grounds what it grounds. (236)
2. The explanation mentioned above "invokes or implies a more ultimate principle, commitment to which would survive denial of F ..."
3. And the progression possibly generated by the above must be finite.

Why? First, because it is just implausible that it should go on indefinitely; next because "an indefinitely continuing sequence would require something like an infinite nesting of principles, and few will think that there exist a relevantly infinite number of principles." (237) Finally (and, I think, *mainly*, as far as Cohen is concerned) the unending sequence in question would run up against the requirement that the affirmer of P "has a clear grasp of what her principles are and of why she holds them..." (237) This last point is notional, of course. Cohen would surely agree that most ordinary people could not cite precisely what they think, could not itemize their own principles, and so on. So we are talking here rather abstractly. We will have to consider how this affects matters.

Meanwhile, Cohen claims that his argument does not fall afoul of Lewis Carroll's problem. The tortoise claims that  $q$  does not follow from the two premises (1)  $p$  and (2)  $p \rightarrow q$  unless we added, (3) If  $p \rightarrow q$  and  $p$ , then  $q$ , as a further premise. Carroll's argument would set up an infinite regress. Why not Cohen's? Well, because any such sequence ends when you get to a principle that is completely fact-insensitive. By definition, no more facts will change one of those.

Cohen's argument must remind any reader familiar with the classics of Aristotle's argument about desiring things for their own sakes versus desiring them for themselves, leading to the conclusion that there must be some of the latter, else the former would make no sense.<sup>55</sup> And as with Aristotle's, the question is,

<sup>55</sup> Aristotle (1941, p. 935).

what does it prove? Cohen thinks it proves quite a bit. He does *not* think it settles most of the familiar questions of meta-ethics: the thesis, he thinks, is neutral as between cognitivism and noncognitivism, for example, or even naturalism vs. nonnaturalism. Indeed, he thinks it does not even affect the is/ought problem (249)—a bit of a surprise, considering that it is usually stated in terms of the nonderivability of values from facts, which surely is what his principle looks to be affirming.

What about ought and can? Agreed, if you *cannot* do something, then it is not true, simpliciter, that you *ought* to do it (or even try to?). But that does not undercut “you ought to do x *if* it is possible to do x.” (251) And, he argues, if we have to choose between several injunctions, some of which fail the ought-implies-can test, then “it is wise to cross out” any of those. But still, “Our picture (of justice) is incomplete unless we can say of rejected injunctions whether they are rejected *solely because* of their infeasibility.” (252) For there will be more fundamental statements of the form just noted, i.e., that tell us we ought to do something if it is possible to do it.

There is considerable question how important this result is, and here, I think, we get into very deep waters. Cohen does claim that his finding does it for Rawls’ constructivism. To begin with, while it is a good reason to withdraw a directive that it cannot be followed, so too it is often a good reason to modify a rule if in fact it *will not* be followed, even though it *can*. “And that shows the normative non-ultimacy of the rules of regulation with which ... Rawlsians and others misidentify fundamental justice.” (253, and argued “in depth” in Chapter 7 of *Rescuing Justice and Equality*)

But Cohen, I think, mistakes the place of justice in the ultimate scheme of things. Justice is *not* fundamentally an “ultimate” value in the sense he defines, and it *is* a complex rule for the regulation of human interactions. Such a rule cannot possibly be of the kind Cohen continually assumes it is. Cohen’s formula is a method for arriving at ultimate principles, indeed. But principles of that kind are not, as such, and absolutely cannot be moral principles at all. Unless and until they make a fundamental reference to society, they remain *personal* principles, which we might call “ethical,” or perhaps “moral” in some other than the familiar sense in which familiar moral rules are moral. And justice *is* in the area of those “familiar moral rules”—so I shall argue.

The ultimacy Cohen intends for principles of justice belongs, rather, to *values*—a very different thing. Principles of the type we are interested in here tell *all* of us what to do. Suppose that there are no other people at all—a matter of fact, presumably. The individual remaining will still have sentences about what he supposes to be good for no further reason. But the ones about justice will have to include the clause, “if there were other people, then ...” Nor is that all. Sentences proclaiming the preference that other people do x rather than y are of *no interest at all* so far as the project of identifying and supporting a morality, and specifically the part of morality having to do with justice. But what you get from Cohen’s procedure will be nothing more than that. Unless and until *some* reason is put in place why those and not other principles are suitable, relevant, for the interpersonal governance of our behavior, they are just arbitrary preferences. The *facts* that there are other

people and that they have minds of their own, perhaps principles that they are concerned about, and many and various interests and concerns, plus independently controllable powers to do something in pursuit of their aims, are prerequisites for a theory of justice's being such *at all*. In what ways and how such facts contribute to the structure and the substance of moral theory remains to be seen, but that theory cannot be even intelligible, let alone plausible, in ignorance of those facts. Whether Cohen means his very abstract thesis in such a way that these latter points are incompatible with it is what remains to be seen. At first glance, anyway, it surely looks like it.

## 14 Chapter 7: Constructivism

Chapter 7 of *Rescuing Justice and Equality* is devoted to constructivism, which he defines, as it applies to the specific subject of justice, as the theory that justice is the set of rules which ought to be adopted for our common social life. As we have already seen, Cohen believes that his argument advanced in the previous chapter is itself enough to disprove constructivism as so understood. He argues in the present chapter that “the constructivist approach to social justice mischaracterizes justice both because it treats justice as sensitive to certain sorts of fact and because it fails to distinguish between justice and other virtues.” (275) I think Cohen is wrong in this, and will argue that in fact his own procedure—or, as perhaps might be better to put it, his own lack of a procedure—is guilty of precisely that sin—that is, of not distinguishing, or being able to distinguish, between justice and other values.

The trouble with constructivism, he claims, is that the question put to those in the hypothetical original position is the wrong one. “They are not asked to say what justice is: it is we who ask that question, and the constructivist doctrine is that the answer to our question is the answer to the different question that is put to constructivism’s specially designed selectors, which is, what are the optimal rules of social regulation?” (275) Now, to begin with, this, from the start, is *not* what they claim. They claim, rather, that the question is, what rules for social regulation are appropriately enforceable *by compulsion*. Other parts of morals are addressed by the more general questions about regulation, but justice is distinctive in addressing what society may or should do in the way of literally *controlling* (or anyway, attempting to control) the behavior of its members. Law, as Aquinas points out, is not advice: it is marching orders for the community.<sup>56</sup>

Cohen insists that he is not addressing the fundamental distinction, between the view that “what it *is* for a principle to be valid, is that it is a product of some favored constructivist procedure; and a view according to which the constructivist procedure merely makes the principles valid, but that does not say that their having been produced by the favored procedure is what it *is* for them to be valid.” (275–6) For he denies the former and a fortiori the latter. “My question is whether its being the

<sup>56</sup> Thomas Aquinas writes: “I answer that ... a law is imposed on others by way of a rule and measure.” (Aquinas 1988, p. 17). In the preceding pages, it is made clear that what the law directs is all members of the community.

product of a favored procedure for choosing the general rules of social existence establishes that a principle is one of justice” (276) *regardless* of the answer to the preceding question. “Our fundamental principles represent our convictions. they are not things that we *decide* to have ... We do not decide what to believe ... in the light of what we expect the effect of believing it to be. ... It is our principled convictions that justify what we do ...” (277) This argument on the face of it simply cannot do what he thinks it does. Yes, we can have “fundamental convictions” about justice: but what are these fundamental convictions *about*? There is no reason why they cannot be about what society ought to be doing in the way of regulating behavior, specifically in the way of applying compulsion, wielding force. And there is much reason why we *need* to have ideas, convictions, about just that. As I have argued earlier in response to his objections to the claim that justice is “only” concerned with the “fundamental structure,” as Rawls would have it, my point here cuts across the distinction between politics and morals, in the sense that whether the compulsion in question is wielded by official agencies known as the state, or simply by our fellow men, is not what is in question. What is in question is whether it is appropriate to use force, by whoever uses it, for the particular purposes proposed. Now Cohen has gone on record as insisting that justice is equality. But just what is his conviction that that is so? It cannot be that  $A = A$ ; and it cannot be that all we mean by “justice” is “equality” so that in effect the conviction is of the form that  $A$  is  $A$ . But what, then? Cohen in effect refuses to answer. But what he really is arguing should be that it is indeed alright for society to be compelling people to do what makes them more nearly equal. That is what we understand him to be arguing if he is discussing *our* subject, the usual subject of justice. And that subject can perfectly well be what he denies it is: *viz.*, what it would be rational for people to do, thinking about what to do about the problems that arise in their social existence, and in particular, whether it would be rational for them to support certain general rules, such as the rules of equality, *and* to support them not only by advocating various kind of behavior, but also by supporting the compulsory enforcement of such behavior. What is astonishing about this is that Cohen, as it turns out, answers this latter question, addressed to the proposal to equalize everybody in the respects he is concerned about—but *in the negative*.

Cohen writes: “The question ... ‘What rules of regulation ought to govern society?’ is a sociological question ... The question ‘What is justice?’ is a philosophical question, and there is no coherent question of the form, ‘What ought justice, or the principles of justice, to be?’ The incoherence of that question reflects the status of justice as something that transcends rules of regulation.” (277) But this last point, in the sense in which it is true, simply does not establish what he apparently thinks it does. If justice is indeed the set of principles which it is rationally best for society to be governed by, then what we choose is not what justice is: what we choose is *those principles*, and the fact that we would do so, if we would, is what makes them (would make them) the principles of what we mean by “justice.” We do not, then, choose what Cohen denies that we can coherently choose. We are not Humpty Dumpty, making words in a social language mean whatever we please. But we are, hopefully, rational people facing some problems, and the word appointed for a certain segment of those problems is the word

“justice”—that’s the word designating whatever it is that goes into that segment. It can nevertheless be true, and contract theorists think *is* true, that the only reasonable way to deal with those problems—the ones to which what we call “principles of justice” are to respond—is via certain general principles which reflect the relevant features of ourselves and our interactions. It is obvious that the egalitarian principle of Cohen is such a response, even if it is not quite what it appears to be. It is, that is to say, a normative claim, addressed to everyone, and meant to be somehow acceptable, plausible, to all. It is hardly possible that Cohen does not care whether this claim has any appeal to everyone to whom it is addressed, or whether it can claim to be rational. And clearly it *cannot help* being a principle for the regulation of social behavior—it would be unrecognizable as a normative social principle otherwise. So it is simply not true that “in thus identifying justice with optimal rules of regulation, Rawlsians breach both of the distinctions that were drawn above.” (277)

Rawls, it should be noted, does envisage a multistage procedure that distinguishes the generation of the absolutely fundamental principles from the sorts of things that could fairly be called “rules of regulation.” Thus the specification of political procedures—voting, etc.—would certainly fall under the latter heading. But Rawls’s general account of justice, as a general, distributive principle catering to the worse-off, is intended as and could be in the former category. For it is intended to be a fundamental response to the problems to which I refer: that is, the presence of a lot of interacting people in what he calls the “circumstances of justice.” It is those circumstances that generate the problems to which theories of justice are a response.

Fundamental principles are fundamental in that they “are not derived from other principles.” Of course that is so, for it is so *by definition*. But fundamentality is relative to purpose. The fundamental principles of tennis have virtually nothing at all to do with the fundamental principles of knitting, or nuclear physics. Cohen also states, and has argued at length as we have seen, that fundamental principles are not derived from facts, misleadingly putting the point by saying that they are “wholly fact-insensitive.” (278) But the principles of justice would be unintelligible in the absence of the general facts that create social problems. The deepest one could go with such a claim would be to show that one’s proposed principles make sense given the way people are, just qua people. That takes in a lot, of course. Why are not squirrels within the reach of such principles? (Indeed, some animal rights enthusiasts appear to think that they are!) And why is it that people *are* within that reach? That cannot be accidental. So when Cohen argues that principles of justice are to be “fact-insensitive,” he presumably means that they are independent of *variable* facts about people. Thus it is a fact about a lot of people that they are rather self-interested in the specific sense that they will prefer more for themselves and less for most other people, in a considerable range of cases where it would be *possible*, as he claims, for them to be different. And indeed some of them (quite a few, probably) no doubt are. He thinks that the fundamental principles of justice are capable of being such that they declare the first sort of persons to be acting wrongly. But suppose that he was wrong about this—suppose it was literally impossible, even nonsensical to suppose that people *could* be impartial in the specific way Cohen

wants them to be. In that case, I do not see how he could maintain that his principle *was* the fundamental principle of justice. Of course, we should not make such an assumption. But neither can he make the contrary assumption—that people will be inclined to reign in their own pursuit of their own desires in the interests of equal outcomes for all.

So what has human nature to do with all this? Cohen misleadingly seems to argue that it is nothing. “I believe that, whatever their content may be, fundamental principles of justice are in no way dependent on the character of any facts, or, indeed, ... on any considerations of values or principles that are not considerations of justice ... I thereby affirm that constructivism miscasts applied principles of justice in the role of fundamental ones.” (281) What can he mean by this? Suppose somebody claims that all molecules ought to be equal. Presumably Cohen would reject this as nonsense. But why? Is it not because justice has to have something to do with people, and especially with their wills, their ideas about action? And how could we “know” that, if not by being at least slightly conversant with the term in our language? Until we know what justice is, in the sense of which subject justice is concerned with and how it is concerned with it, we cannot claim that Cohen’s meta-principle here does imply what he claims, viz., that constructivism is impossible or will not do. Justice may be *essentially* the sort of thing that *must* be “constructed” in the relevant sense.

Cohen argues that persons in an “original position” trying to agree on principles for the regulation of their common life would have to rely on *both* justice itself *and* “values and principles that call for a compromise with justice.” (283) But since we do not know what justice is as yet, on his own account, he is not in fact in any position to argue this. He adds, “attention must be paid, either expressly or in effect, to considerations that do not reflect the content of justice itself ...” (283) But what if justice *as such* actually *requires* attention to certain considerations, even though those considerations in turn call for empirical knowledge of something or other? Cohen has no way of blocking that possibility—unless, as may be, he is coming on as a classic metaethical intuitionist, detaching the notion of justice from everything in this world. I presume he does not want to do that (and he claims he is not).

We may be sure, for example, that Cohen is leaning strongly here on his previous arguments about the difference principle. *If* justice calls for equality of the peculiar kind Cohen thinks it does, *then*—sure enough—persons of great ability cannot *justly* withhold their efforts on that basis. But what if it does not? And how do we know whether it does or does not? Alas, Cohen’s contributions on that subject have, so far (p. 285) amounted to zero—we have, literally, *no* argument *at all* that is designed to explain or persuade any who might disagree that *that*, and not something else, is what justice is. That his view goes very far against the grain of most thinkers on the subject, and almost all ordinary people, perhaps does not count for everything—but it is suggestive.

“To discriminate principles of justice within the set of constructively selected principles, we need a contentful conception of justice that isn’t constructed.” (286) Very true—at least, if by the term “conception” is intended what some want to make a narrower notion, “concept.” And where are we to get *that* from? How shall we know whether the content in question is the right content or not, or even an

eligible contender for that status? So far, we appear to have to take it that Cohen thinks that (a) this content is equality (etc.), and that (b) he needs, indeed *can* have, no reason whatever for claiming that.

Against Cohen, I want to assert the following: A claim that X is a notion of justice that has the properties just described is *utterly unacceptable*. It is not a notion of justice at all, but something more like a fixation. Notions of justice need to be reasonable, *because* they are aimed at adjudicating among parties to significant conflicts of various sorts, parties with minds of their own, and they must do so somehow on the basis of reason, not intuition. Without principles of the kind we seek, we say, what rational people will be inclined to do will get them into serious trouble with each other. To avoid these troubles, we will need ways of deciding who is in the right and who is not, who has to back down and who does not. But in order to be successful in that project, we will need to find procedures that all parties can rationally accept. Their only basis of rational acceptance or rejection of anything along this line is *their interests* (understood to include their beliefs and goals and commitments.) And so we have to find principles which are in the *common* interest—principles that can promote the good lives of all, as they see it, in the context of interaction with others who are likewise pursuing their separate versions of the good life.

It would be disastrous if the basis for such adjudication were nothing but various people's intuitions about what is just and unjust. For, being intuitions, those views have no power to persuade others who differ. And since they lack that power, they are simply unacceptable. The man who says, "justice is *doing things my way*" is ruled out of court. An egalitarian of Cohen's particular stripe, so far as I can see, is in *exactly* that position. We have, from his work, exactly *no* reason to accept egalitarianism other than *Cohen's opinion*. Yet that is no way to get at justice.

Cohen addresses one objection to what he calls his "strong" thesis, according to which "constructivism's fact-infested principles of justice presuppose fact-insensitive principles of justice which constructivism fails to expose." (287) This objection he describes as follows: "Consider the right to freedom of speech; the principle conferring that right is one that we would normally regard as being a principle of justice. According to the objector, that right, like the set of democratic rights to which it belongs, is geared to promoting human flourishing. It is justified in the light of a principle that is not a principle of justice and that directs the promotion of human flourishing. ..." (287) On this Cohen comments as follows: "The objection succeeds only if we can sustain in tandem both the view that democratic rights are requirements of justice and the view that the foundation of those rights is that they promote the general welfare (where that promotion is not seen as in turn required by justice)." (287) However, that comment has two problems. First, he is quite wrong in thinking that the objection presupposes democracy. Instead, it claims that democracy is *another* example of the very same thing. And secondly, he supposes that the argument is carried, incoherently, in a claim that the general welfare principle is not a principle of justice at all, but yet that the injustice of something is established by its being contrary to the general welfare. But that is surely not what such an objector should be understood to be claiming. Rather, he is claiming something like this: (1) justice requires that the basic ends served by laws

(etc.) be ones that all humans, as such, are rationally concerned to promote, and (2) the general welfare is such a thing. I would deny the latter—depending on how we construe the notion of “general welfare”—but that is beside the point here. What is in point here is that justice could be calling upon us to pursue certain ends, the connection between which and the general welfare is a matter of further argument rather than (more) principle. The *principle* need not be pursuit of the general welfare. But it could still be true that a good argument can be found, showing that the ends of justice are necessarily promoted by promoting the general welfare, and so that is why free speech, or whatever, gets the nod. Such a construction of the argument would not violate the Cohenian specifications.

He also comments on a rather different kind of argument from Joseph Raz, who holds that “a person has a right when an interest of his is a sufficient reason for holding other people to be under a duty.” (289) Passing over the point that Raz’s definition has no content on the crucial question, we still have the question, when *is* an interest of A’s such a reason? One can hardly say, as Cohen does, that “the justification of the right by the interest is so immediate on this different and nonaggregative view that it would seem bizarre to say that honoring the right is a matter of justice but satisfying the interest is not.” (290) For plainly the Razian formula envisaged that *some* interests *would* generate such a duty and some not, and so, *all* the work is done by something not at all entailed by the formula. What Cohen could reply, and what we can certainly agree with, is that this formula of Raz’s would tempt some to contend that what makes the interests that do have that property distinct from others that do not is that the former are just and the latter not—which would, of course, take us around in a circle once again. Whether some better way could be found is another question; the social contract theorist thinks it can, in effect.

## 15 Five Questions

In Section 3 of this chapter of *Rescuing Justice and Equality*, Cohen lists five questions “that may have exercised some readers” and then proceeds to detail his answers to each. This essay is long already, and to consider each of his replies in detail would certainly lengthen it a good deal. But I believe there is no alternative to devote at least some consideration to two such questions he raises, for each reply shows a problem that, I think, implies the general wrongheadedness of Cohen’s approach. One of Cohen’s questions reads as follows:

- (i) “What facts ground the choice of principles in the original position, and what fact-free principles explain why those facts do so?”

Cohen argues that there are two “sites within the Rawlsian architectonic” in which this supposedly happens. “First, fact-free principles underlie ... the principles chosen in the original position. That first claim has been demonstrated.” (292) Moreover, he writes: “they are hidden within the unstated content of the “conception” of human beings as free and equal that justifies the original position itself.” (292–293) Cohen then adds,

On what factual information does the general conception *itself* ... depend? One strategic fact is that there exist goods with which people need to be provided to pursue their life plans. Those help to yield the general conception, together with the unstated fact-insensitive principle that, so far as possible, everyone should be equipped with what, if anything, she needs to pursue her life plan, if she has one, which in turn rests on the principle that *one ought to promote fulfilling lives...* (293)

Cohen here commits what I am tempted to tag the “British fallacy.” There is no such principle assumed. What is assumed is that individual people will *think*—unsurprisingly—that they ought to lead fulfilling lives. But that is because of the location of the word “fulfilling,” which makes it look as though it has an independently specifiable content. The correct way to put it is this: individual people will have ideas about how they want to live, and will tend to characterize these as ways in which lives will be “fulfilling.” There is no presumed norm that A ought to be helping B fulfill his life in some way or other, or supply any of the means that might enable him to do what he would so characterize.

Cohen makes this the occasion for departing into another discussion, in which he claims that many humans are “*not* focused on the provision of primary goods, but on the facilitation of a fulfilling life.” (293) Now, Rawls does think that income and wealth are among the primary goods, and there is a sense in which he is wrong about that. It is difficult but not impossible to imagine someone taking up a vow of poverty so stringent that no possible course of engaging in economic transactions, hence in promoting income or wealth of *any* extent, nor of other primary goods, are what *that* person wants *no matter what he wants*. Finding things that really do fulfill that description is very difficult, but there is, I believe, only one plausible candidate: liberty, in the sense of the absence of whatever conditions would make it impossible for one to achieve one's aims (in social philosophy, it is such conditions as are constituted by the actions of others that are the object of concern.) No matter what we *want*, it is impossible not to want *to be able to achieve it*, insofar forth, and thus not to be disenabled from achieving it. That does not entail the list of liberties that Rawlsians came to identify with that interest, but rather, simply, the absence of what sufficiently would disenable that person from achieving what he wants, *whatever it is*. In the case of the strongly suicidal, one might think, nothing answers to this description, but even that's not true: it is quite possible to prevent someone, forcibly, from killing himself. And it is literally inconceivable that someone should have a notion that something or other *that he could possibly do or choose* would be “fulfilling” and yet *also* be indifferent to whether he was prevented from doing *those things*. Cohen, I think, is brainwashed by socialist objections to wealth, which really is not what is in question here. And of course Rawls freely uses expressions like “conceptions of the good” for what individual people are taken to be spending their lives attempting to promote. There is nothing necessarily bourgeois about that, and Cohen should, I think, have seen that.

He goes on to state that “as things are, primary goods are of course needed to fulfill life plans”—this being true *by definition*, it's hardly a matter of “as things are”—and then objecting to their being used as the “metric of just distribution.”

(294) Now, there is too much objectionable about Rawls' language along these lines to make it profitable to pursue Cohen's particular line of objection, except in one important respect. This is as follows: Rawls elects primary goods because they are supposed to be more "publicly visible" than satisfactions, which are inherently subjective. And this he makes the occasion for again invoking his objection that "to rest any claims about fundamental justice on practical obstacles to publicity is a serious one." (294) Here I remind the reader that Cohen has in fact no basis for making that claim in any substantial way. For he does not know whether justice is the sort of concept which makes *some* "practical obstacles" *necessarily* relevant, and others not. There is certainly no reason, just from the sheer logic of his construction, why there cannot be.

Another of Cohen's questions in this context is:

- (ii) "How do the claims of Sections 1 and 2 bear on non-Rawlsian constructivisms?"

Cohen's answer: "If I am right, constructivism about justice is mistaken because the procedure that it recommends cannot yield fundamental principles of justice ... The anti-Rawlsian claims set out above also bear ... on a number of non-Rawlsian constructivisms." And "if the procedure [specified by the particular constructivist in question] works as it is supposed to, then what it delivers can't be *justice* as such." (295) As we have already seen, this general answer is misguided. The output of these procedures is not intended to be "justice as such" because the procedures in question are devised by the theorist in response to a previous answer to the question of what justice as such is: namely, action in accordance with the principles that are called for in the way of in-principle enforceable settlement of human differences. Constructivists then set about listing the aspects of persons that cause the quarrels in question, and the sort of principles that would be rationally called in to settle them in ways satisfactory to all. So what is constructed or produced is not *justice as such*, but rather, the *principles of justice*, and those are, of course, regulatory in the most abstract way. But nor, however, are they *rules of regulation*, which are down a floor or more from that level.

Cohen discusses an example from taxation practice. British councils tax property holdings in seven bands. So those from 90 to 90,999 thousand pounds pay the same, and those in the preceding bands less, those in the following more. The general principle of justice is that the more you have the more you pay, but the bands make this "lumpy." Cohen argues that it is somewhat *unjust* that those throughout the band pay the same tax, since within the band, some have more than others and accordingly should in principle pay more. But he supposes that considerations of administrative feasibility plus Pareto optimality tell in favor of the band scheme. The bottom line argument would be that if we had more bands, then, administratively speaking, "the only way to eliminate such injustice would be by designing a more fine-grained scheme that would impose so much extra administrative cost that everyone, including Mr. 90,000, would lose." (314) Cohen observes that if we had absolutely precise property valuations—which we do not—and supercomputers that all but costlessly calculate all values with precision etc., and no transaction costs, then the resulting scheme, with no "bands" would be *more just* than the one we

have. "I conclude that ... the examples shows that rules of regulations can run counter to the very principle of justice by which they are inspired, because of the legitimate influence on the formation of rules of regulation of considerations other than justice." (315)

But does it show *that*? Or does it show that justice *permits* the use of considerations of practicality, etc., as well as equality of burden? The question here is this: can it really be *justice* that is done "though the heavens fall"? Or is ignoring the fact that they will fall if we do X a consideration *of justice*—that *justice* requires us to take due account of such possible consequences and act accordingly? If Cohen were not fanatically (as I would put it) attached to the idea that justice is equality, he could accept that the distinction between the equitable and the practicable in his example is not the distinction between justice *and other considerations*, but rather, a set of considerations that is shown by justice itself to be relevant in some circumstances.

A more abstract and perhaps interesting example: in a certain community, manna falls, and is shared absolutely equally by all. But one fine day some manna falls on the land of one person, Jane, and it is irremovable, though destructible. Jane thinks she should destroy that piece even though no one at all will benefit in anyway therefrom, and she will slightly suffer since more manna (we will presume) is better. Let us ignore the point that, after all, even though she cannot redistribute *those* lumps, she could redistribute her *other* lot (it was, after all, distributed, on Cohen's description, in the first place.) But now: should we say that Jane has a keen sense of justice by proposing to destroy her excess (if that is what it is)? Cohen thinks so: "I would think she is simply a remarkably just person, and I think we should commend her for being one, and perhaps reward her with the extra manna." (318) What he states here does raise, again, some fundamental questions about egalitarianism. One is that if Jane is praised for this extraordinary act of purported justice, that praise will be a reward to her and she is now slightly better off than the rest even if she does not keep the manna. Is not psychic income of that kind another of the things subject to the supposed requirement of equal distribution?

Cohen argues that he is "far more convinced that legislating for an inequality that incorporates this sort of brute luck produces an injustice than that either the Rawlsian or the Scanlonian procedure for determining what is just is sound." (318) Well, what if we disagree with him on that point? What if we think that any society that massively legislated out all brute inequalities was being, not merely stupid, but *unjust* in the process—and, unjust *because* stupid in a way that works to the detriment of innocent individuals? Like cutting the tall down to size, or stupefying the natively intelligent, depriving people of the providential benefits of good luck is unjust. It is not something the just community should be trying to do.<sup>57</sup>

Cohen asks, "Why should the very many of us who have the intuition school ourselves out of it in deference to the fact that certain sorts, or even *any* sort, of chooser would choose to implement Pareto?" (319) There is an excellent answer to this, and it is Hume's. Those with Cohen's intuitions work against humanity, given the way humanity is—namely, various. If that does not count with Cohen, it shows

<sup>57</sup> This is reinforced by the fact that, after all, fundamentally our entire natural environment is a matter of luck, so that to remove all luck-induced "advantages" would be to destroy the human race.

that he (or rather, his intuition) is inhumane. It does not show what justice is. Cohen's intuitions have the effect of ungluing justice from practice, even though he denies this. For they permit him to assert that even though it is unjust to do X, yet X is, all things considered, what we really ought to do—ought, to the point that it might be “daft” not to do it. I should have thought that this is not something one should be able to believe about so basic a concept as justice.

Cohen's section on the “Circumstances of Justice” (331f.) may well be the most important in the whole book. Confronting people who argue that the various facts collected under the heading “circumstances of justice” are surely relevant to the theory of justice, Cohen distinguishes four questions: (1) Under what circumstances is (the achievement of) justice possible and/or necessary? (2) Under what circumstances do questions of justice arise? When are judgments of justice (and injustice) appropriate, or in place? (3) What is justice? and (4) Does the answer to (3) depend on the answers to questions (1) and (2)? Cohen answers question 4 resoundingly in the negative; and he claims that “Far from the answer to the question, what is justice? depending on the answers to questions (1) and (2), their answers depend on the answer to that prior question.” (331)

Hume, he observes, is mainly concerned to answer question 1, noting also that for him justice is “a virtue of persons rather than ... a virtue of the basic structure of a society.” Cohen brilliantly suggests a comparison with craftsmanship, which would be impossible in extremely adverse conditions and so pointless as to be no virtue at all in conditions of natural superabundance. And he adds, significantly, “But all of that *follows* from what craftsmanship is and has no bearing on *what* it is, just as Hume's circumstances of justice *follow* from what (he thinks) justice is and have no bearing on what *it* is.” (332)

Cohen, also significantly, has Hume identifying justice with “a disposition to observe rules of promising and property.” (332) In this he is exactly as wrong as he accuses Rawlsians of being. The two named dispositions are rules of regulation in Cohen's sense, and they are based on a more general virtue of the exclusively social virtue of benevolence, which in turn emanates from Hume's general analysis of virtue as “mental qualities, *useful* or *agreeable* to the *person himself* or to *others*.” (Hume 1985, Section IX, Conclusion, Part I) It is “to others” that generates (among other things) the idea of justice. Now Cohen may argue at this point that what is so generated is the recognition of others as equals. But that is not what Hume thinks nor is it true in the ways that Cohen needs it to be if he is to have a significant thesis. What he needs it to be is a principle supporting equalization of something both *substantive*, and *good*: welfare is perhaps the most plausible candidate, among all persons. Cohen has taken this through many hoops and made it out to be compatible with a rather substantial range of inequalities. But at some point he needs to diverge sharply from the Aristotelian idea, that what is to be equalized, in justice, is the ratio of goods to merits (and of bads to demerits). If Cohen means his theory of justice to be compatible with merititarianism, then there is no interesting argument with anybody and we can all go home. But if it is incompatible with it, then his arguments and appeals to intuition, I think, get him nowhere.

Cohen's continued opposition to the idea that justice is essentially coercive, in the sense that if X is a just distribution among persons A ... N, then it would be

acceptable to use coercion to bring this about, if it should be necessary for that purpose. Where coercion is not a part of justice, then “even under scarcity a set of unusually just people might willingly conform to just rules, and everyone could do so painlessly under abundance.” But *would* those people be “unusually just”? They would be unusually egalitarian, to be sure. The person who rolls dice to determine who gets the last life preserver would certainly be remarkable, but would he be remarkably *just*? Or, is it only remarkably, and foolishly, egalitarian?

Cohen explains “fact-sensitively” as follows: “if it depends, for example, upon views about the effectiveness of deterrence, and fact-insensitively if it depends on no such factual views but, for example, on a certain conception of desert.” (335) How fact-insensitive is it possible to be? In order for there to be penalties or other ways of responding to “offenses,” it must be possible for people to offend, and so there must be restrictions against which people can react in such a way as to violate those. Hobbes claimed that his “Laws of Nature” were “immutable and eternal,” glossing this as follows: “for Injustice, Ingratitude, Arrogance, Pride, Inequity, Acceptation of persons, and the rest, can never be made lawful. For it can never be that War shall preserve life, and Peace destroy it...<sup>58</sup> But of course, A could very well be justified in making war against B in order to preserve his or someone's life. Similarly Cohen sanctions many apparent inequalities on the basis of equality. His thesis is that there are no facts whatever such that they would bring it about that justice no longer was to be had via equality, complications of the just-noted type notwithstanding. Is this a thesis that can be both plausible and interesting? That is our question, to which I think the answer is in the negative.

But at this point we really do need to bear in mind that “equal” is a concept that intrinsically requires some or other metric, but the range of metrics under which it can be applied is inconceivably vast. Anthony de Jasay observes that, “... the elusiveness and inconsistencies of social justice owe much to the all-encompassing capacity of the vast family of equalities, all of which cannot be squared with one another at any one time.”<sup>59</sup> That what A owes to B is whatever will somehow equalize the real incomes of the two offends against equal treatment of the productive relative to the unproductive, if treatment that equalizes the ratio of merit to reward along Aristotelian lines is desired. But of course you cannot have both, if merit is allowed to count at all. And if it is not, we are not treating humans as humans and hence not treating humans *equally* along another dimension in which they can be so treated (or not). We make egalitarianism uninteresting if we simply assert that justice requires equality of *something or other*. We make it, I claim, false if, like Cohen, we insist on the equalization of income (even allowing all the actual deviations he actually does allow anyway).

An Appendix to this chapter of *Rescuing Justice and Equality* concerns contractarian theory. In contractarianism, “the individual's obligation to obey or comply rests on *her own* undertaking, be it actual or hypothetical. True, that the undertaking induces the obligation may, as it goes (at least) in Hobbes, depend on others making a similar undertaking, but that does not deprive her own self-binding

<sup>58</sup> Hobbes (1950, p. 131).

<sup>59</sup> de Jasay (2010, pp. 121–122).

of its pivotal role in explaining the individual's obligation." (338–339) But that also gets matters importantly wrong. Self-bindingness as such is *not* the essence of the matter. People can bind themselves to do horrendous things, and that does not make those things just.

Moving to Rawls, Cohen suggests that on his view, "I am bound by them not because I (in particular) would have agreed to them, but because we would all have agreed to them." But he then adds, "And *we* are obliged not (directly) because we would have agreed to the principles, but because the fact that we would all have agreed to them in this position of supposed impartiality makes them principles of justice." (340) But this reverses the direction of analysis. The social contract is to be a genuine *analysis* of justice, in the sense that we *explain* justice by the concepts of rational agreement with others in the relevant circumstances. Cohen, on the other hand, wants to keep justice an unanalyzed, independent term. Rawls, of course, eschews analysis, which does not help matters. Whether he would accept Cohen's interpretation is an interesting question, but if he would, then Rawls is indeed not a classic contractarian.

"The thing to say to me if I resist the principles is not that I would have agreed to them, but that everyone would have done so in the original position, and that they are therefore principles of justice. There is nothing that we are obliged to do precisely because not doing it would violate an agreement, whether actual or hypothetical." (340). This would seem to border on the perverse, and not just because the last clause is so obviously false (in real-life contracts, it is of course often and obviously true that you were obligated *because you agreed*). What is missing can best be brought out when we ask how it is that others, as it were, come into the affair at all. On Cohen's explanation, it could just be happenstance: what do you know, we all agree! But that is *not the point at all*.

What is the point, then? Here are diverse people, with diverse and more or less conflicting interests. We perceive that we will all *do better*, in our own views of what better consists in, if we all accept certain general restrictions on our behavior. Now we get going in society and people by and large do observe these restrictions, and that is what *enables* me to do as well as I do. I *owe* my well-being, even my life, to the restraint of others, and they owe theirs (in part) to me. We agreed, each of us, out of *our own* (pre-moral) *interests*, and the role played by others is absolutely essential, not dispensable in any way. A million separate Robinson Crusoes each agreeing that water is wet or that fish taste good is irrelevant. A million socially relating Robinson Crusoes whose interaction along lines that constrain their modes of activity *is* relevant, if we are to talk of justice. Justice *matters*, to each and every one, and the internal disposition of each person in the course of his interactions with others is what makes it matter. But more specifically, it is what *makes it a matter of justice* rather than something else.

Now Cohen sketches an idea that he thinks is powerful. Consider Hobbes' argument for the sovereign: absent a sovereign life would be awful; you prefer *any* sovereign to a state of nature—you *do* prefer it, so that the fact that you *would* prefer it reflects a real disposition, not just a possibility. Given this, Cohen agrees, it is not in point for me to object that the state is one to whose coercive rule I would not have consented. Of course, as both Cohen and I agree (I take it), we should reject

Hobbes' premise here—we do *not* agree to obey the sovereign no matter what he commands. *But* if he *were* right, it *would* have a lot of clout. And it is such a premise that Cohen now ascribes to Rawls, so that “While ... the original position device does not make Rawls a contractarian, the larger framework within which he sets recourse to the original position is indeed contractarian.” (343) So far, that now seems right. But Cohen again continues, “The original position device is conceived as settling the principles for a society of cooperators who wish to deal with each other justly and who *actually* agree that the original position is the way to determine what is just.” However, the society of cooperators are people pursuing, not *justice*, but *their interests*, and in the circumstances—especially, that they act among others who are also endowed with interests, reason, and powers to pursue those interests in the light of their reasoning—realizing that those interests require that others be ready to curtail their tendencies to act in ways inimical to one's success, and vice-versa. The others would not so act if you did not as well, and so we are bound together in such a way that complaint against the principles that do bind us in just those ways is totally unreasonable. The robber does not deny the reasonableness of the rules against which he has acted, and so cannot reasonably complain about his jail sentence, as a matter of general principle. And *that* is what makes it a matter of *justice* rather than something else—especially, rather than an indefinable intuition. Notice here that it does not matter in the least whether the robber professes to have agreed either to the particular laws about property he offends against, nor even to be interested in pursuing justice. His conduct is unjust because the principles which it is rational for all, including him, to agree to if all others do also, call upon all to refrain from the sort of actions he engages in. If he claims not to agree with that, fine: we will shoot him, and that will be that. And we will be perfectly justified in doing so. The “condition of war” is the alternative to peace, and any who do not choose and abide by peace ipso facto are going to have to accept war as the outcome.

Cohen concludes his section on contract theory with this claim: “So, to conclude, on my understanding of the form of Rawls's and Scanlon's arguments, it runs as follows: everybody (under the veil of ignorance, or who is reasonable) would agree to these rules, therefore they are the right rules, therefore everybody is obliged to comply with them.” (343) Since one of the major issues in the field is whether “reasonable people” *would* accept that they must reason from behind that particular veil, and just what that commits them to, this is not a very helpful summary. It is sad, and I think significant, that the chapter ends like that. The reader should take note that we do not actually even know whether Cohen accepts contractarianism, by the time he concludes!

## 16 The Publicity Requirement

Chapter 10 of Cohen's *Rescuing Justice and Equality* is devoted to “the publicity requirement”—one of those obvious-seeming ideas that is very difficult to formulate clearly without seeming to say something quite different from what was intended. The chapter focuses specifically on a formulation by Andrew

Williams. According to Williams, the rules of justice must be public in the following senses: “individuals are able to attain common knowledge of the rules’ (1) general applicability, (2) their particular requirements, and (3) the extent to which individuals conform to those requirements.” (346) Predictably, Cohen will quarrel with the second and third, in interesting ways.

Cohen believes that Williams intends the third condition in such a way that in order for me to be bound by the requirements of justice, it must be possible for me to know of *everybody* whether *that* person conforms, and how much. Thus, “if 98% conform but I do not know *which* 98%, I am not bound.

I am puzzled by this interpretation. The problem is this: there are two variables here: who does the knowing (has the knowledge), and who does the conforming or lack of same? We can agree that the knowledge in question is individual at the first variable: *I* am not bound if *I* know that individual B does not conform, and *I* am if he does—that is, *I* am bound in my relations *with B*. But why should the general applicability of justice be contingent on knowing that about *everybody*? If there are cases in which *I* deal with everybody, then it would matter. (Maybe Global Warming is a case in point: should the people in region A be bound if they know that very few others in the world will conform to the treaty requirements? There is a good deal to be said for a negative answer to that, by the way, but it is not an easy question.) But the point is, we are very often—indeed, almost always—dealing with *particular* other individuals. Now, of *those* it is surely plausible to hold that my owing the general obligations of justice *toward them* depends on being able to be reasonably confident that *they* will fulfill them in relation *to me*. I do not have to refrain from killing you if I know that you are about to shoot *me*. But I *do* have to refrain from killing you if I know that you will reliably refrain from killing *me*—unless, of course, I also know that you will kill some other innocent person, and I am in a position to prevent your doing so by this means (and maybe some disputable other conditions, such as that I am in some way “authorized” to do this). Justice is in that sense individual, and Williams’ proposed conditions, so interpreted, seem eminently reasonable. Cohen seems to be dealing with a straw man here, or else has made an elementary quantificational error.

Now suppose that egalitarianism is proposed as a theory of justice. Williams argues that it is essentially impossible to know just what egalitarianism requires of us, a point argued for, cogently, by many writers (including this one). Cohen’s own discussions in this very book attest to the point. Now, suppose your income is quite unequal to mine—much higher, say. At what point do I, a fellow egalitarian (let us suppose!), get to start complaining that you have not split your income with me? Cohen’s previous book, *If You’re an Egalitarian, How Come You’re So Rich?* seems to allow some very wealthy Marxists to hang on to their cash nevertheless. Would it not be reasonable for a fellow Marxist reading Cohen’s work to conclude that he, a person of sizable but modest income, gets to hang on to his as well? It is unclear whether Cohen agrees with that.

Cohen sets forth the Williams argument more elaborately, and he thinks there is a counterexample to the clause, writing “An individual is not obliged by a (putative) demand of justice unless others in general are disposed to observe that demand.” (348) Well—he argues—racism is surely something justice calls upon us to avoid.

“But I am obliged by justice to eschew racism even when I know that the majority of my fellows are racist.” (348) But this runs into just the same problem. Williams’ claim is not, or at least should not be, that we owe obligations to people in general provided that most people observe them. There is indeed a good deal of question precisely what racism is and precisely what it is about it that justice requires us to avoid—contrary to what Cohen implies here, though not to what a great many contemporary writers seem to think. But in any case, the problem is that if I know individual George, a member of some other race, and I know that *he* is not “racist” in relation to me, then it is plausible to say that I should not be racist to *him*, whatever may be the situation of the millions of others around. If however, the purple people in my community are highly racist in relation to us pink people, then why would not we, who are frozen out of housing developments they build and run, be entitled to freeze them out of ours too, while we are at it? Here I appeal to a widely held idea that is recognizably one of justice: you *may* do unto others as they do unto you. Indeed, the fact *that* you may is a major reason why they ought *not* to “do unto you” in various imaginably evil ways.

More plausibly, Cohen suggests that if, for instance, I “may have to choose between exploiting, or practicing racist hiring, and otherwise going bankrupt” (349) then, however excusably, I am still being unjust to them, as are the rest of us. Here I think Cohen is right. But those who see widespread practices make this necessary, if it ever is, are the exploiters of the “exploited” race, and of all those who would seek to engage them, as in black persons in the U.S. south for many years; and if we are forced to go along on pain of impoverishment, there have to be other restrictions on exchanges, not mentioned in Cohen’s example. For otherwise it is hard to see how I would have to make that choice. (Thus, in the U.S. in the decades after civil rights activity began, southern employers began hiring black people in quantity. They were previously forced by local laws to discriminate, and it would not otherwise have been necessary, nor justified—nor, we should add, profitable.<sup>60</sup> If obeying the law is regarded as just, even though what the law requires us to do is unjust, then life is dialectically pretty difficult.)

The seventh point in the reconstructed Williams argument is that “One cannot be assured that others are observing a demand unless (ii) the implications of the demand are clear in particular cases, and (iii) one can tell whether or not given individuals are observing the demand.” That condition rides in tandem with this one: that “Nothing *is* a demand of justice unless one can be *assured* that others are observing it.” (348) Cohen believes that both are wrong. Plenty of low-level principles of justice are rough. In World War II Britain, people were expected to sacrifice personal interests for the sake of the war effort, but how do you measure sacrifice? “It is absurd to suppose that someone could have stated precisely what amount of sacrifice that injunction required” yet “the sacrifice ethos *was* amendable to sufficient sub-Williamsian rough-and-ready public checkability for social assurance.” (353) But it is not clear that this engages Williams’ point. Many rough and vague things are knowable, and this, let us concede, is a case in point; but then, if it is roughly knowable, then it meets Williams’ requirement that it be knowable, if

<sup>60</sup> See Narveson (2002, pp. 203–224).

(of course) only roughly. Why not? On the other hand, there is a serious charge of this sort against egalitarianism: we really do not know just what it requires, and that makes it useless. But if someone claims that it does make very specific requirements—the government, perhaps, institutes some onerous types of equality, say—then we are likely to have cases where our intuitions conflict, rather sharply, with Cohen's.

Unfortunately, a good deal of his discussion from here rests heavily on the assumption that we know that racism, in some clearly definable sense, is unjust. This is an assumption I reject. Some of what is called racism—lynching black people because they are black, say—is clearly unjust, but not because it discriminates against black people, but because it *kills* them, and they did not do anything to deserve that. But it is unobvious that if I discriminate against white, or black, or female, or whatever employees in my firm that I am thereby being unjust. I am, quite likely, being *stupid*, but that is another matter.<sup>61</sup> Cohen thinks that the same goes for economic justice, and here too I think he is wrong. He claims he sees “no *relevant* difference, with respect to publicity, between racial justice and economic justice.” He agrees that there are some matters of economic justice “that the law cannot or should not regulate, for various reasons” and the same is true of racism: “some forms of clearly unjust racism cannot be legally forbidden, and others that can be should not be.” (356) However, Cohen seems to me to overstate the Williams argument. Publicity, in the realm of justice theory, is a matter of *publicness*. It is not a matter of everyone's having done all the homework needed to tell exactly what is required *and* exactly whether others are living up to their requirements. It *is* a matter that if there simply is no conceivable way to tell, or that the application of the alleged requirements is necessarily arbitrary, then publicness becomes important. It seems often to be held that if the law states that X is “too much,” then X *is* too much. I say that unless criteria that are reasonably clear and defensible are laid down, and that in particular cases it be shown that they apply in this case against citizen M, then M has been had—an injustice against M has been committed by the officials purporting to apply that law in that case.

Cohen, not surprisingly, turns to the Rawlsian difference principle which—surprisingly—Williams apparently supports, writing “consider the extraordinary (and surely unobtainable) knowledge that a government would need to have to enable it to satisfy the difference principle... that would enable government to select an economic policy that is optimal with respect to enhancing the lifetime primary goods prospects of the least well off. ... (and he goes on to refer to) “the fantasyland where such an index is at hand?” But Cohen continues, “if citizens can't be bound by the difference principle because its message to them is unclear, neither, by that criterion, is the government bound by it—which is a *reductio ad absurdum* of the Williams position.” (362) But why is it not a *reductio* of the whole idea?

Cohen adds a significant discussion of occupational choice and justice. “How could it fail to be a matter of concern for justice that some people's jobs (usually ... those of the less well paid) are far less fulfilling than those of others, however difficult it may be to be precise about that difference, especially in individual cases,

<sup>61</sup> See the item referred to in the previous footnote.

but also in an average sense?" (369) I find it fascinating that Cohen can express this as a concern. It is, of course, pretty obvious that no one has a precise or even much of an "index" of "fulfillment." But more to the point, it is obviously not a matter of concern for justice because there is no rational rule requiring anybody to see to it that somebody else's job is "fulfilling," however you slice it or indeed, come to that, to provide anybody with a job in the first place. Certainly it is nice if people's jobs are fulfilling, and if I can make yours more fulfilling, without cutting into my profits, say, then maybe I should do that. But that I *owe* you this is what seems to me quite deniable.

A final Appendix has replies to critics. Many of these replies, given the precise criticisms at which they are directed, seem to me effective. There is an interesting example of a point on which Cohen and Rawls and various others were wrong. Discussing critics of his incentive arguments, he states, "So we can ask: 'If you think the distribution of talent is morally arbitrary, how can you think it consistent with justice for you to take advantage of your place in it?' They cannot reply by saying: 'Oh, well, our taking advantage of that won't lead to very *much* inequality, given the full set of constraints that lie upon us.'" (382) His point against whomever would say that is certainly correct. But there is a clear answer to his question. If *everything* is morally arbitrary, then there is no justice to be worrying our heads about. Certainly that we are who we are is morally arbitrary, in the obvious sense that we had no responsibility whatever for being what we were born as, or for being born in the circumstances into which we were born. But this has no tendency to imply that we should not use our talents, or whatever, to our own best advantage. The only way it could have any such implication would be if someone back there is pulling all the strings, *and* that someone lay, somehow, under an obligation to pull strings equally rather than the way "he" (or "she") has. But that would be an implication for the universal genie, not for us. That we should do our best with what we have is perfectly reasonable. That we should be unhappy that we do not have more, or that others do not have more, or whatever, is a separate, and not very interesting, subject; it certainly is not the subject of justice. That we all ought to be the same, somehow, is not an available thesis for a rational theory of justice. That we all *are* the same is, as Cohen agrees, false. The difference between Cohen and me in this regard is that I think there is no rational basis for that normative thesis, and that this *matters*; whereas Cohen, who apparently agrees with me that there is no rational *basis* for the normative thesis, apparently thinks that this lack does not matter. I find this incomprehensible, and of course I agree with him that his view has political implications. I think these implications in general evil, and he apparently comes fairly close to agreeing with me about that. It is all very puzzling.

I am naturally interested in Cohen's discussion, at the very end of the book, of my own argument against Rawls' supposing that his "difference principle" actually justifies any inequality. He writes, "Narveson anticipated much of the substance of what I myself argued in Chapter 1." Details apart, I am not clear what is left over after the "much." However, it is gratifying to see that he recognizes that we are on the same track as against Rawls. Where we differ, as he realizes, is which way to bounce. In my view, we should throw out equality as having anything like the status that Rawls and, even more so, Cohen attribute to it, and should instead stick with the

free market view, with its prohibition on interpersonal harming and its non-prohibition of anything else. At several points in the text, it seems that Cohen is tacitly or perhaps more than tacitly agreeing with me that the primary locus of legitimate public action against individuals is when those individuals inflict harms on others, whereas bringing about his type of equality is not something public agencies should be using the heavy-handed tools of government to bring about. If so, we would appear to agree so substantially that there is not all that much left.

## 17 Conclusion

So where are we, after all this? It is clear that Cohen thinks that very unequal wealth and/or income is at least *prima facie*, and usually all things considered, unjust. I deny both. Unequal wealth, *if* earned on the free market, is, I think, paradigmatically just. My employees, my customers and I (say) made free choices to exchange various services, and the net result is that we are all better off, in our own view, than if they had not been permitted to make those choices, and I am better off than if I had not been permitted to make mine. What is to complain about (on the score of *justice*, anyway)?

Now, in my pretty normal view there is also a definitional connection between justice and enforcement. If justice *requires* that people do X, then we are rationally *permitted* (not required) to *make* them do X, if there is some way to make them do it that can work without counterproductive side effects. Cohen, startlingly, seems to deny this. Indeed, he denies it to the point that he apparently *agrees* with us libertarians that people are *not* entitled to use force to bring about just results, merely as such. He supplies, in *Rescuing Justice and Equality* at least, no theory at all about when we *are* entitled to use it, but one presumes that he is ready, again, to agree with us libertarians that we are at least allowed to use it to defend ourselves and others from the aggressions of still others against persons who are innocent of such aggressions themselves. (It is difficult to find a non-awkward way of incorporating the latter obvious restriction, but that does not mean that Cohen would reject it.)

Given this, we now have to ask why Cohen is so leftish in his strictly political views, notably about redistributive *taxation*. For I do not see how it can be denied that taxation is, at least *prima facie*, coercive, and a harm to the person taxed. Taxation appears to be an aggression against those who do not agree with the proposal to use money that we thought was ours, in the usual ways in which things can become ours, for the purposes the taxers propose to use it for. The taxers take it anyway, and that surely looks like a violation of my liberty, and an aggressive one in the sense in which Cohen—surprisingly—appears to agree that we have no right to be aggressive. In the absence of a clear argument for distinguishing between my rights to use my individual powers in other peaceable ways and my rights to use them in profitable ways, it seems to me that the ball is, as it always has been, in Cohen's court. Alas, that ball can no longer be carried by him, and that is a terrible shame, because I would think that no one would be more capable than he of mounting the needed argument if it were possible to do so.

But that brings us to a certain aura, as I think we might reasonably call it, that pervades Cohen's *Rescuing Justice and Equality*, to an extent far greater than any of his previous works. This is the aura of *moral intuitionism*, in the sense that there are basic moral assertions that are beyond argument (and hence, beyond rational argument). He takes his interesting and important distinction between "fact-sensitive" and "fact-insensitive" moral claims to have the effect, really, of enabling a demonstration that fundamental moral principles are beyond argument on the basis of any sort of facts. I have argued—I think conclusively—that this is a fundamental mistake. The status he attributes to *moral* principles cannot possibly be enjoyed by them, though it can, perhaps, on the part of various aesthetic judgments and perhaps some others. Sheer preferences we presumably have—at least, I have no inclination to think otherwise, though I agree that what we think are sheer preferences are often more amenable to reflection and argument than we supposed. But morals and politics are not matters of sheer preference. Of course, they *can* be, no doubt, in the sense that there are plenty of opinions about what is morally and politically right or wrong, in a wide range of cases. But in morals and politics, to retreat to sheer preference, as if that were the final word on the matter, is an admission of failure. An indefensible moral or political principle is not one that we are entitled to have despite its indefensibility. Rather, it is an incentive to try to find good reasons for it, and if we fail, we certainly have no business imposing it on others.

And I see no way around the conclusion that imposition is precisely what we can expect from egalitarians. If you think that it is *unjust* that George has a lot more than Samantha, then you will think that the government should tax away the difference, give or take a few practical obstacles, etc. And I do not particularly see why opponents of egalitarianism should not say that this is a totalitarian abuse. Cohen's stated opposition to using force against individuals for many things that he appears to think justice calls for is baffling. How can he favor state violence and oppose individual violence about these things—especially given his strong adherence to the thesis that the personal is the political?

Over the years I have claimed that the few arguments put forward by egalitarians on behalf of their position are fallacious or otherwise unsound. Cohen's new book, however much progress it makes by comparison with fellow egalitarians, does nothing at all to advance the cause of egalitarianism. It is important that the writings of so gifted an intellect should move us so little in the direction he would have seen us go. It is certainly not for lack of trying on his part. We will all learn enormously from his effort, even if we also fail to be persuaded.

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