

Taking Men as They Are:

*An essay defending John Rawls' deference to "human nature" from the
"concessionary criticism" of G.A. Cohen.*

By

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Abstract

G.A. Cohen argues that John Rawls' method of political philosophy--in particular his sensitivity to the facts of human nature--leads him inexorably to producing a nonideal conception of justice. In this thesis I defend Rawls against this accusation by demonstrating that the facts of human nature that he shows deference towards are a product of the "free development" of his ideal conception of the person. The result is that Rawls' conception of justice has the power and status that Rawls affords it, and that Cohen's critique fails to cause internal damage to Rawls' theory. My thesis is thus what the subtitle says it is: an essay in defence of John Rawls' deference to "human nature" from the "concessionary criticism" of G.A. Cohen.

'Men's propensity to injustice is not a permanent aspect of community life; it is greater or less depending in a large part on social institutions, and in particular on whether they are just or unjust. A well-ordered society tends to eliminate or at least to control men's inclinations to injustice.'

Rawls, J. 1999. *A Theory of Justice*, p215.

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Introduction

The thesis

This essay is a sustained argument about how we ought to conceive of a particular word in our political vocabulary given its use in everyday political discussions. There is a sub-category of political concepts called ideal concepts, the most important of which is justice, that have to be the product of a specific method of conception if we are going to have the words available to us that enable us to work towards better political communities. That method is John Rawls' 'realistic Utopia.'

In the course of the essay I shall demonstrate the strength of realistic Utopia. I shall begin doing so by explaining what it is, and outlining the qualities that Rawls believes it bestows upon the concepts it produces. In particular the 'reconciliatory' power that he believes it affords the ideal concept of justice. I then marshal the method through its strongest criticism—the 'concessionary criticism'—which was launched by G.A. Cohen throughout a series of essays¹ that culminated in a book length critique of the Rawlsian approach to political philosophy, his 2008 *Rescuing Justice and Equality*.² Cohen's criticisms can be overcome and Rawls' ideal conception of justice, Justice as Fairness, should not be understood as making the concessions that it is alleged to.³ However, I will

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The most important of which are: Cohen, G.A. 1991. 'Incentives, Inequality and Community,' Tanner Lectures: Stanford University; and Chapters 8-9 of Cohen, G.A. 2001. *If You're an Egalitarian How Come You're So Rich?*, Harvard University Press: Cambridge, Massachusetts.

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Cohen, G.A. 2008. *Rescuing Justice and Equality*, Harvard University Press: Cambridge, Massachusetts.

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Justice as Fairness shall be used in the text as a proper name for Rawls' conception of justice. When I refer to the essay that takes the same name I shall do so with italics and make it still clearer via footnotes.

demonstrate that overcoming Cohen's criticism requires considerable philosophical explanation that goes beyond the traditional objections to the concessionary criticism.

This is, I think, a defence of the first importance: nothing less than our having confidence in the power of the word justice to do what it needs to do depends upon it being done well. The rest of this introductory chapter shall begin to explain why the stakes are so high through a discussion of the relationship between political philosophy and our everyday political language,⁴ and it shall also offer a brief overview of how the argument in the rest of the thesis shall unfold. The usual set of acknowledgements and disclaimers attached to a work of this nature are included at the culmination of this introduction.

Ideal concepts and political language

Whatever else is going on in politics, the act of convincing others that society should be organised in any given way through the medium of language is omnipresent. It is our primary means of persuasion, influence and even coercion. In many instances it is our only means. Sometimes, it must be admitted, political language is merely a means for communicating physical and economic threats, or of offering incentives to others to lead them to behave as we wish them to. Political language, in these instances, is used as a descriptive medium of communicating an external and prior material reality. We have no problem in saying that explanations about politics must, in these circumstances, follow the same priority.

However, political language can be, and usually is, so much more than that. The language we have available to us not only describes the material circumstances

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An account of the full sense of what is at stake is developed across chapters 1 and 2 of this thesis.

that we find ourselves in, but helps to constitute our understanding of it.⁵ That is to say that we will understand the same set of objective circumstances in different ways depending upon the language that is available to us in our attempts to describe and interpret them. It is this *constitutive* power that puts language at the vanguard of political dispute. If, through conceptual and linguistic innovations, we change the way that individuals understand the world then we open up the possibility of them interacting with it differently. We open up the possibility of what political discussion, and indeed all political action, is ultimately aimed towards: changing the arrangements under which people live with each other.

To illustrate the constitutive power of political language we only have to remind ourselves of the astonishing success of the feminist movement in establishing the concept of gender in popular consciousness. Before the second half of the 20th century, the word gender was used almost exclusively as a grammatical device for categorising nouns.⁶ There was not a word that asserted what we now take for granted—thanks in no small part to the evolution in meaning of the word gender—that the differences between men and women are not merely the result of biological determinations but also the product of social norms and expectations of the way that two sexes ought to behave. When Simone De Beauvoir proposed that ‘one is not born a woman, one *becomes* one’⁷ she was

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Those of a certain ontological persuasion would add that our understanding of the world is the world. I hope that nothing I have to say in this thesis rests upon such controversial claims, and is read as such. I have sought to avoid these issues as the position I hold does not impact the truth status of my claims I make about the way that ideal concepts, and justice, ought to be conceived.

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Even here it is much less common in English than in other Germanic or Latin languages. Ships and Countries may be referred to by 'she' but nothing much, other than boys, are a 'he.'

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De Beauvoir, S. 1973(1949). *The Second Sex*, New York: Vintage Books, p301. Emphasis added.

making a claim that would come to be widely accepted: that we have to differentiate between those aspects of womanhood (and manhood) that are socially determined (gender) and those which are a product of biology (sex). Before the availability of the language of gender it was easier for those who gained from prevailing gender inequality to argue that different stations afforded to men and women were the product of natural and unalterable dispositions. Once the distinction between gender and sex established itself in popular consciousness the onerous and unpaid tasks with which women have traditionally been burdened with—house-keeping, childcare, care for the elderly—could no longer unthinkingly be claimed to be a part of a woman's nature. Those listening to such an argument finally had available to them a linguistic apparatus to challenge such claims on the basis that they rest upon a convenient conflation of sex and gender. Challenge them they did and do in one of the great and rare victories for the values of human liberty and equality.

The concepts that are available to us—that is the concepts that we can utter in a way that other people will be able to decipher our intended meaning—when we seek to describe how we organise our political communities are then a political matter of the greatest importance. The study of the avenues of persuasion available to political actors, given the linguistic context that they face, has thus always been at the forefront of the study of political philosophy. Most famously it was Aristotle who argued that logical persuasion was only possible if a political community shared a set *endoxos* that is a shared understanding of the meaning and reference of a set of words, which could act to form premises in valid arguments. In Aristotle's scheme rhetorical (and sophistical) arguments gain much of their force by using particular *endoxa* in a way that is subtly different to the established consensus, rhetoricians do so in order to convince their audience that they must accept the conclusion of an argument on the basis of the logic of beliefs that they only apparently hold. For example, a political community may be agreed that everyone has the right to a family life but yet oppose the extension of marriage to homosexuals. An Aristotelian rhetorician may react to these

circumstances by talking about the desire of homosexual couples to create a family life. In doing so the rhetorician appeals to conventional understandings of what a family is (that it involves marriage) whilst simultaneously subverting the previous meaning (that it involves a man and a woman), in order to capture her political audience into the new but logical conclusion that homosexual couples ought to be able to be married. The slightly changed understanding of the *endoxa* "family", in combination with the prior and existing commitment to a right to a family life, simply demands it.⁸ This process is why Aristotle described rhetorical reasoning as not just a counter-part of logical reasoning, but an outgrowth (*paraphues ti*).⁹ The Greeks knew that political contention lays first and foremost in the struggle to establish the meaning of words in popular consciousness.

The present state of political philosophy is sometimes presented as if there were a divide between those particularly fascinated by such questions, those who elevate 'hermeneutics'—that is the related field of how we interpret the statements of others—and 'language games,'¹⁰ to the centre of political study, and those who do their best to bracket them. It is said that 'analytic' political philosophy is instead more interested in teasing out the logical implications of a

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This very act of Aristollean rhetoric is performed by the US comedy show *Modern Family*. The show has a mainstream audience and shows a series of families with an unconventional make up (there is a gay couple and another with a young Latina woman and elder Caucasian male) engaged in family activities that couldn't hope to be more conventional. Its very conservatism is what allows it to be subversive.

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Aristotle. 1954. *Rhetoric*, (Trans, Rhys Roberts, W.) Random House: New York, I.2, 1356a.

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'Games' is used here in the Wittgensteinian sense of having to anticipate the way that the use of a word is going to be understood by other minds if we are to have access to language's full descriptive and persuasive force. See throughout Wittgenstein, L. 2009(1953). *Philosophical Investigation*, Trans. Anscombe, G.E.M, Hacker, P.M.S. Schulte, J, Blackwell: London.

given set of axioms and beliefs,¹¹ a contemporary proxy for Aristotelian *endoxa*. This position is either taken in the assumption that it is the work of the philosopher to bring clarity and coherence where there is confusion amongst those that already possess a shared set of beliefs, or more commonly out of a genuine scepticism of the more elaborate claims made about the constitutive, rather than descriptive, power of language. In a characteristic example of the latter thought, Phillip Pettit tells us that what defines analytic political philosophy is its commitment to the beliefs that there is a 'reality independent of human knowledge' and that we ought to be interested in recovering that external reality through the 'power of reason.' These founding beliefs, Pettit tells us, puts meaningful distance between analytical political philosophy and those who take more 'anthropological' approaches to questions of meaning, thanks to the prevailing (malign?) influence of Rousseau, Herder, Hegel and the early Marx.¹²

Despite the widespread belief that such a divide exists, I would insist that as a dichotomy it doesn't come close to describing where we are at. The subject of this essay is a dispute between two of the greatest minds in recent political philosophy, John Rawls and G.A. Cohen, both of whom are usually considered to be in the analytic camp. However their analytic dispute is, at its core, over the way which a political word, justice, is constructed and the possibilities this affords us in political communication and thought. It is a debate between two analytic

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Dan McDermott offers the clearest justification of this approach in his *Analytic Political Philosophy*. McDermott, D. 2008.

'Analytic Political Philosophy' in (Stears and Leopold Ed.) *Political Theory: Methods and Approaches*, Oxford University Press: Oxford.

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Pettit, P. 2012. 'Analytical Philosophy,' in (Goodman, R, Pettit, P & Pogge, T, eds.) *A Companion to Contemporary Political Philosophy*, Blackwell: Oxford, pp5-6.

political philosophers about the effect of the way that they practise their vocation on the *use* and *persuasive force* of a particular political word¹³

Ideal concepts

Ideal concepts are the product of what Rawls calls 'ideal theory.'¹⁴ That is a form of theorising that assumes unrealistic but favourable circumstances in order to offer an untrammelled depiction of the relevant concept.¹⁵ Political philosophers engage in ideal theory because they are primarily concerned with normative questions that ask the way the world *ought* to be, or the way that we *ought* to behave. By assuming favourable conditions when theorising, the philosopher is able to imagine how we would deal with political problems if we were not constrained by other needs and concerns. It is these prudential needs and concerns that ideal concepts are supposed to be untrammelled by. It is said that doing this is necessary to form a 'clear' picture of what we would ideally want, which we can have in mind as a goal when we re-introduce non-ideal

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I here use the terminology of J.L Austin's influential performative account of language. I do so in order to highlight the common ground between analytic political philosophy and those 'hermeneutic' thinkers who make explicitly their debt to Austin. Austin, J.L. 1962: *How To Do Things With Words*, Harvard University Press: Cambridge, Massachusetts; Skinner, Q. 1970. 'Conventions and the Understanding of Speech Acts,' *The Philosophical Quarterly*, 20(79).

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The claim that the ideal/non-ideal theory distinction is Rawls' own original innovation is accepted here as a result of a consensus in the secondary literature. See, for example, Simmons, J. 'Ideal and Non-Ideal Theory,' *Philosophy and Public Affairs*, 38(1); and Stemplowska, Z. 2008. 'What's Ideal About Ideal Theory?' *Social Theory and Practice*, 34(3).

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Rawls offers two justifications for ideal theorising in *A Theory of Justice* which are substantively the same. Rawls, J. 1999. *A Theory of Justice: Revised Edition*, Harvard University Press: Cambridge, Massachusetts, p8, p216-217. From here on in referred to as 'Rawls, J. 1999. Theory.'

circumstances.¹⁶ To see why we might want to do this I think it is helpful to consider the following question: *should criminal defendants be afforded translators when on trial in a language that they themselves do not speak?*

For the sake of the example assume that the following fact is true: the Ministry of Justice is facing severe budget cuts and the cost of translators is a significant chunk of their budget. If we accept this fact we have a decision to make whether we think that the moral cost of not providing translators is greater than the moral cost of other alternative cuts, say for example to the legal aid bill or reducing the number of trials by jury. We can imagine that under these circumstances one might conclude with a heavy heart that the prudent thing to do, in light of the dire available options, is in fact to reduce the access that defendants have to translators.

However, there would surely be something wrong if we took from this prudential reasoning the following conclusion: defendants *ought* not to receive translators when on trial. This is because we have an answer to the question of whether people ought to receive such entitlements which is true independent of the difficult circumstances that we find ourselves in. That answer describes how we would treat each other in an ideal world. The conclusion would be particularly strange if before we were faced with the fact of budget cuts we believed that defendants *ought* to receive the funding. If political philosophers¹⁷ did not note that the claim ‘defendants should not receive translators’ was, in this instance at least, the product of non-ideal and prudential reasoning, one can imagine political actors with ulterior motives finding it easier to entrench the position once the

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Rawls, J. 1999. *Theory*, p216.

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By this I mean people who are asking fundamental political questions rather than a class of people employed by universities to research and teach ‘political philosophy.’

necessity of budget cuts have passed. “I don’t like having to cut this entitlement, but financial constraints compels me” can move easily to “we have now seen that fairness doesn’t demand we hand out this benefit” in the slippery hands of the political knave. It is this all too familiar knave that the ideal theorist guards us against.

We should note that it might be the case that, having experienced a judicial process with diminished access to translators, we do genuinely and sincerely come to realise that such entitlements are not necessary in order to treat people the way that we wish to. However, that is a question that we are better placed to judge if we remember that our change in attitude was once forced on to us by circumstance, rather than a reflection of our ideal beliefs. Without having that thought in mind we are in danger of behaving like the fox that, upon being unable to reach the grapes at the top of the vine and having to eat those at the bottom, convinced herself that those out of her grasp had gone sour.¹⁸ Without asking the question by assuming ideal circumstances we expose ourselves to the risk of irrationally conflating what we have with what we ideally want. We are in danger of being overcome by cognitive dissonance on matters vital to our moral interests.

The importance of our having different answers to the same question before and after we have access to a set of facts is intensified when we consider the effects of the concepts that political philosophers produce. As we political philosophers are concerned with answering ought questions, the concepts that we deal with

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For the importance of adaptive preference formation to normative theory and social science see Elster, J. 1983. *Sour Grapes*, Cambridge University Press: Cambridge. The relationship between Elster’s work and the ‘functionalist defence’ of ideal theory will be explored in more detail in chapter 1 of this thesis.

are inescapably *evaluative* as well as *descriptive*.¹⁹ They attach praise and condemnation to, as well as describe, their referents. Indeed there is a pool of words that political philosophers argue over the meaning and reference of (justice, equality, liberty and democracy to take but a sample), that political actors invariably use to describe the circumstances and arrangements that they approve of. It is hard to imagine that any political actor could argue persuasively in our political culture that we should accept a state of affairs without invoking these words. Caring about justice, equality, liberty and democracy are the *shibboleths* of contemporary liberal politics. If political philosophers do not conceive of these words from the point of view of ideal theory then it is possible that we will all be left, like women were before 20th century feminism, linguistically excluded from expressing our moral point of view: the words that should be reserved for describing the way that we want to organise the world, instead used and understood by others as the way that we have to organise it in light of contingent problems. If we think democracy demands the direct participation of the people, this line of argument goes, then it follows that we should not use the word democratic to describe representative systems brought into place to overcome problems of size and space. If we think that equality demands a distributive share that tracks only what we are responsible for, and not brute luck, then we should not call a system egalitarian that affords privilege to some in order to overcome problems of incentives and information in the productive process. If political philosophy is not done in this ideal way, then theorists lead us like our imagined community facing budget cuts, and the fox with a case of sour grapes, to a permanent state of cognitive dissonance about our political wants. Our capacity for criticism and yearning for a better world is dulled by the sully of our normative language.

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The important of words which have both an evaluative and descriptive meaning was first and influentially highlighted by Searle, J. 1964. 'How to derive "ought" from "is"' The Philosophical Review, 73(1).

Rawls and the concessionary criticism

John Rawls' 1971 *A Theory of Justice*, often regarded as the most important work in political philosophy since Hobbes' *Leviathan*, self-consciously offers a description of an *ideal* of justice appropriate to a community of free and equal persons.²⁰ His theory of what such an ideal demands, public institutions which guarantee that the major social institutions of a society are governed by the two principles that could be decided from an original position of fairness, is called 'Justice as Fairness.' It is rare that any particular work of political philosophy has the weight of influence that I have ascribed the field as having in this introduction. However, the work of Rawls is surely an exception. His ideas have been read by almost every politics undergraduate for the past 40 years. These are the men and women that go onto take many of the seats from which our public discussions are conducted: offices in politics, journalism, the media etc. Rawls's conception of social justice is, for better or worse, a presence in our political language however conscious most people are of it.

G.A. Cohen spent nearly twenty years of his career launching critiques of Justice as Fairness. His criticisms were far ranging and diverse: some focused on narrow 'internal' concerns about the soundness of particular moves made in arguments within Justice as Fairness; whereas at other points he critiques the entire framework under which Rawls conducts his theory, amounting to an 'external' criticism of the fundamentals of the project. I will touch upon both the 'internal' and 'external' elements of Cohen's assault, but our focus will be on one

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Appropriate is used here as it is by Rawls: to denominate that his theory is not universal, but instead restricted to those who possess a certain set of beliefs about how they want to treat each other.

particular claim that Cohen makes about the ideality, or lack of it, in Justice as Fairness: what I call the ‘concessionary criticism.’²¹

The concessionary criticism is the allegation that Rawls’ theory of justice does not produce an ideal concept— even by the standards that Rawls himself attaches to ideal theory—as Rawls’ method of conceiving of principles of justice accepts as facts the infirmities and moral failings of human nature. In doing so, Cohen claims, Rawls ‘leaves the very concept of justice behind.’²² What we are left with are mere prudential ‘rules of regulation,’ these rules may be wise and useful but they do not remind us how we *ought* to organise ourselves when we are at our best.²³ His claim is then that Rawls’ particular approach to political philosophy robs the concept of justice of the functional power that an ideal concept needs to have.

I will demonstrate that Cohen's concessionary criticism is ultimately unfair to Rawls. Justice as Fairness does not make the compromises with infirmities in human nature that Cohen imagines and his conception of justice has all the ‘reconciliatory’ power than Rawls believes it needs to have. However, in order to make this case this essay has a lot of work to do. The defences that have thus far been put in support of the *ideality* of Justice as Fairness shall be shown to be inadequate and in urgent need of reconstruction. It is to that reconstructive task which this thesis is ultimately dedicated. What follows will inevitably be rather technical. We will be going through disputes about how to interpret specific

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The word ‘ideality’ will be used throughout this thesis to as a signifier of the extent to which concepts purely reflect our ideals.

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Cohen, G.A. 2008. Rescuing, Justice and Equality, p180.

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Cohen, G.A. 2008. Rescuing, Justice and Equality, pp323-330.

passages, and—yes—footnotes, from various works by Rawls, Cohen and what is already an enormous body of secondary literature. We shall outline how slightly different interpretations of these passages lead to what might look like equally slight variations in the way we understand the logic of Rawls' and Cohen's arguments. This is all a way of saying that when we are deep in the forest of exegetical dispute it will be hard to see the wood for the trees. I will endeavour to keep the reader's focus on what is at stake throughout but it doesn't hurt to start with a clear statement on what it is: *a dispute about what is necessary for us to possess a conception of justice that allows us to successfully criticise the moral failings of our political arrangements.* Without getting these things right our hope of using political language as a means to living better lives are sure to be dashed.

Outline of the project

I offer here a brief outline of the structure of the thesis. It is unavoidable that without the context provided by the core text this will be difficult to follow. My argument is a sustained one whereby each chapter rests upon the claims established in the former chapters. What is more, it is my belief that the claims made in each individual chapter are original. This means that a description of an argument that rests upon the claims made in the chapters of this thesis—such as what is about to follow—may be obscure even to those well versed in the academic literature. Nevertheless, I hope that it still proves useful for a reader looking to orientate themselves as to the structure of my argument.

The ***first two chapters*** of this thesis shall establish Rawls' conception of how political philosophy ought to be done, a method which he calls 'realistic Utopia.' I go on to outline the potential benefits of doing political philosophy in this manner. Rawls claims of realistic Utopia that it produces ideal principles that—if we were to live in a society that was governed by those principles—we are able to autonomously reconcile ourselves with. It will also be shown that Rawls practised

what he preached: his own theory of justice, Justice as Fairness, is demonstrably conceived of, and is, a realistic Utopia appropriate for free and equal persons.

Chapter three introduces the concessionary criticism levied by G.A. Cohen, to which this essay is a response. As already briefly outlined, the fundamental claim of the concessionary criticism is that Rawls' theory produces a conception of justice that is not ideal as it compromises with whatever infirmities there are within human nature. The chapter demonstrates that the importance of Cohen's critique is that, if sound, then Rawls' principles of justice will not have the virtues that Rawls himself claims of principles produced by the method of realistic Utopia. This is important as it demonstrates that Cohen's criticism does not 'speak past' the concerns of Rawlsian political philosophy by relying upon a meta-philosophy that Rawls himself rejects. The concessionary criticism is instead an internal, direct and potentially fatally damaging critique.

Having established both Rawls' claims for his political philosophy, and Cohen's arguments against these same claims, I go on to introduce the most important objection to Cohen's critique: the liberty objection. Proponents of the liberty objection claim that Cohen is wrong to describe Rawls' deference to certain freedoms, in particular freedom of occupational choice, as concessions to human infirmities, but suggest that instead they ought to be considered a reflection of liberal ideals. Though this thesis will come to affirm a version of the liberty objection, **Chapter four** will show that it has, as of yet, not been properly demonstrated. I do so by arguing that what is usually understood by the term 'freedom of occupational choice' cannot straightforwardly be asserted as a basic liberty.

Having cast doubt on the way that the liberty objection has previously been put forward the **Fifth and Sixth Chapters** recast it in such a way that deals with my concerns. In order to do this I make the case that the freedoms that Rawls prioritises in the labour market can be seen as a necessary response to

something that I call 'the fact of uneven attachment,' i.e. the fact that we are emotionally more attached to some persons than we are to others. I then go on to claim that the fact of uneven attachment is, like Rawls' 'fact of reasonable pluralism,' not simply an observation about the way the world is, but a logical implication of the ideal of autonomy. As a result, the liberties that respond to the fact of uneven attachment are defensible on the same grounds that Rawls defended the priority he affords to stable consensus in his response to criticisms from Jürgen Habermas and Brian Barry. Prioritising the liberties highlighted by the liberty objection is a reflection of Rawls' commitment to the ideal of autonomy, and its relationship with justice, rather than a compromise with any infirmities in human nature. This is precisely the same way that Rawls' priority of consensus in *Political Liberalism* is not, as Habermas and Barry wrongly allege, a compromise between justice and order.

The essay **concludes** with a summary of the arguments made throughout the thesis and some brief thoughts on the implications for contemporary ideal theory. The virtue of doing political philosophy in the way that Rawls encouraged us to—through the method of realistic Utopia—will be affirmed. Rawls' fidelity to that method shall be demonstrated and his ideal conception of justice marshalled through its greatest critique. This is my contribution to the ongoing theoretical discussion about how we should think about a specific and vital sub-category of political language, ideal concepts and to the ever growing literature concerning Cohen's critiques of Rawlsian justice. More importantly it is my contribution to our shared and on-going battle to preserve a conception of justice that reflects our ideals, the penalty for collective failure in this vital endeavour is linguistic exclusion from expressing our deepest hopes for ourselves and our communities. This is a battle we must always fight, and must never accept defeat. The consequences of surrender are just to dire to tolerate.

Acknowledgements

I would like to thank Robert Lamb for his supervision of this project. A Ph.D. student, a student of any stripe in fact, can only hope for a supervisor that combines intellectual criticism and encouragement so effectively. It has been a pleasure. I am also enormously grateful to the help given to me by colleagues and friends at the University of Exeter. I have received helpful guidance from many people, but I would like to register in writing my great thanks to the following by name: Iain Hampsher-Monk, Kate Beresford, Laura Mauralee, Andy Schaap, Robin Douglass, Chris Fear and Chris Nathan. You have all read drafts of varying degrees of barbaric disorganisation, your feedback and comments helped bring some clarity and cohesion. The confusions and errors which remain are, of course, all my own.

I dedicate this essay to Evelyn Pauls, and Roger and Sharon Ingham. It goes without saying, which is no reason that it shouldn't be said, that without your encouragement and support it would not have been possible.

Stuart Ingham
Oxford, 2014

Chapter 1: Justice as Fairness and The Facts

Let us start, as all literary works should, with a great opening sentence. I do not immodestly mean a line from my own pen but that of the 18th-century Genevan philosopher Jean-Jacques Rousseau. In the first strokes of his *The Social Contract* Rousseau outlines the problem to which that seminal essay responds, and, most importantly for the purposes of this thesis, the assumptions he will make in the course of overcoming it. He famously writes:

'I want to inquire whether in the civil order there can be some legitimate and sure rule of administration, *taking men as they are, and the laws as they can be.*'²⁴

We start here, and find inspiration for our title, because Rousseau's resolution to 'take men as they are' and 'laws as they can be' amount to a recommendation about how we ought to do political philosophy that was both affirmed and practised by John Rawls.²⁵ The idea encapsulated in Rousseau's remarks, as Rawls understands it, is simple. Political philosophers should look for the best possible solution to the problems of politics, that is to say it should be Utopian, but when doing so should be simultaneously realistic in that they take human nature as it is (men as they are) and accept the constraints this places on possible institutional and legal design (laws as they can be). It is only these facts,

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Rousseau, J.J. 1997(1762). 'The Social Contract' in (Gourevitch, V, ed. and trans.) *The Social Contract and other Later Political Writings* (here on in LPW), 1.1, p41. Emphasis added.

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Rawls' affirmation of Rousseau's method is to be found in the introduction and first chapter of his 1999, *Law of Peoples*. (Rawls, J. 1999b. *Law of Peoples*, Harvard University Press: Cambridge, Massachusetts, p12) Though in this text Rawls is dealing with the problem of extending his theory to the sphere of international relations he makes it clear that his more famous 'domestic' theories are also to be considered as realistic Utopias. Rawls, J. 1999b. *Law of Peoples*, p14.

and not, for example, prudential considerations about what can actually be achieved in a reasonable time-frame, that should constitute the bounds of the possible in our search for the best solutions to our political problems. This is the idea that Rawls called 'realistic Utopia'.¹²⁶

As I made clear in my introduction, it is my intention in this thesis to defend Rawls' conception of political philosophy by way of marshalling it through its most powerful critique: the 'concessionary criticism' of G.A. Cohen. In a series of articles synthesised together into a single sustained argument in his 2008 *Rescuing Justice and Equality* Cohen argues that Rawls' methodological commitments lead him to offering a nonideal theory of justice that is **1)** in contradiction with its own moral commitments, and subsequently **2)** unable perform the 'reconciliatory' task Rawls demands of it. It does so, Cohen alleges, because it makes concessions to 'infirmities' in human nature, which are, by Rawls' own conception of political philosophy, not what we wish to express in the concepts we have available to us when we describe our political ideals. Cohen's critique is powerful enough that Rawls' own realistic Utopia²⁷—a democratic community of free and equal persons governed by the principles of Justice as Fairness—cannot be left unscathed, but the virtue of *taking men as they are and*

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The phrase had previously been used by Frank Manuel to describe currents in 20th century French thinking in his influential 1956 collection of essays on Utopianism.: Manuel, F. 1973 (1956). 'Introduction' in *Utopias and Utopian Thought*, Souvenir Press: London. Of particular note is that one of the contributions to the collection was made by Rawls' Harvard colleague Judith Shklar. Shklar, J. 1973. 'Political Theory of Utopia' in (Manuel, F. ed.) *Utopias and Utopian Thought*, Souvenir Press: London.

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Here the term 'realistic Utopia' is used to signify the result of the process or method that I have also previously called 'realistic Utopia.' This conforms to the way that a vision of a perfect society is called a 'Utopia' which is a product of 'Utopianism.' Utopia is capitalised throughout the thesis in recognition that a Utopia is a place (topos meaning as much in Greek), an imaginary place depicted by human hope and aspiration.

laws as they can be, and Rawls' fidelity to this great method, is, so I shall argue, only reinforced.

In this, the first part of the argument, we shall explain in more detail what the method of realistic Utopia is, and the virtues that Rawls claims for it. We do so because Cohen's criticism of Rawls' method will not be intelligible until we understand why it is that Rawls thought political philosophy *must* be practised in this way.

I say *must* very deliberately. Realistic Utopia is not thought of by Rawls as just one 'perspective' or 'approach' to political philosophy amongst equals, but rather the way that political philosophy has to be done if the language that we have at our disposal is to provide the ideal concepts necessary for us to criticise unjust societies and, importantly for Rawls, to be *reconciled* with just ones. It is the way that political philosophy has to be done.

Our explanation of realistic Utopia is made across two chapters. This first chapter explains more precisely the relationship between this method of political philosophy and 'the facts,' and then introduces some basic criticisms of how Rawls understands that relationship. We shall see that Rawls has been criticised on both of his flanks—he simultaneously stands accused of showing too little attention to facts about the world to offer action-guiding principles, and too greater deference to facts about the world to offer genuinely ideal concepts. The next chapter gives a more detailed explanation of the qualities that Rawls thinks a set of ideal concepts must have, and in doing so offers a partial defence of the criticisms levied against him in this chapter. We come to see that Rawls introduces and excludes the facts that he does in order to satisfy his understanding of what the concept must be able to do. That is to say what function in our language it ought to have.

Justice as Fairness and the facts of human nature

We have observed that in his explanation of realistic Utopia Rawls suggests that it is a method explained by which facts it is, and is not, deferential towards. In particular he suggests the only social facts that we ought to be interested in are those which are a product of human nature. In Rawls' most comprehensive account of Justice as Fairness, *A Theory of Justice*, the deference of his theory to the facts of human nature is not hidden. The parties that decide upon the principles of justice are assumed to **1)** 'know the general facts about human society' and **2)** 'rest... the(ir) choice of principles upon the general facts of economics and psychology.'¹²⁸ More widely he states that 'contract theory..hold(s) that the fundamental principles of justice 'quite properly depend upon the *natural* facts about men and society.'¹²⁹

Rawls has here introduced two terms interchangeably that need explaining: 'natural' and 'general' facts. 'Natural' is usually understood in contradistinction to 'artificial.' What is natural is not a product of human design or creativity—that would be artifices—but is something that we simply discover about ourselves or the world. We very obviously use natural objects to create artifices, from simple tools to complex political institutions, but in doing so we must respond to—and are constrained by—the given properties of nature. That we all receive these properties in the same way, that gravity is a force that confronts all men and women alike, means that natural facts are true for, and potentially known to be true by, all. They are *general* and not *particular* facts and thus potentially produce what Rawls calls 'general knowledge.'¹³⁰ For a social fact, that is one about human

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Rawls, J. 1999. Theory, p137.

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Rawls, J. 1999. Theory, p137. Emphasis added.

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Rawls, J. 1999. Theory, p137.

interaction, to be 'general' it must then also be true and have the potential to be known to be true by all persons.³¹ One of the most obvious sources of such generality is for the social facts to be a product of universal features of human nature. Rawls' interchangeable use of 'natural' and 'general' suggests that this is exactly what he has in mind.

Before I move on a little more clarificatory work needs to be done. To say that a feature of human nature is universal is not to say that it manifests itself in immutable human behaviour (i.e. claims like "men always seek to maximise their own utility"). It is much more usefully seen as a basic framework that, in any given set of circumstances, can flourish or indeed degenerate into a large but constrained number of potential behavioural patterns. We shall call this a "developmental" rather than "fixed" account of human nature. To explain what I mean I will use an example that will be of interest later on in the thesis: Rawls' understanding of Rousseau.

In Rousseau's *A Discourse on The Origin of Inequality Amongst Mankind*, man is depicted as having three basic characteristics that are fundamental to his nature.³² In Rousseau's narrative about the development of civil society these basic characteristics of human nature develop under various social circumstances, and shape the way that we interact with each other. The basic characteristics are: our love of our own good (*amour de soi*); our sense of pain at the suffering of others (*pity*) and a somewhat latent desire and skill to develop our capacities (*perfectibility*). Rousseau believes that our self-love (*amour de soi*)

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This is the qualification that Rawls puts on the sorts of facts that can be brought into consideration in the use of public reason. They must be 'public.'

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Rousseau, J-J.R. 1997(1755). 'Discourse on the Origin of Inequality Amongst Mankind' in (Gourevitch, V. ed.) *Discourses and Other Early Political Writings*, Cambridge University Press: Cambridge.

had, at the time of his writing, become inflamed by the essentially competitive environment of civil society, and has thus manifested itself in an irrational desire to better and overcome the other (inflamed *amour propre*). If man is governed by inflamed *amour propre* then the possibility of achieving a just political order that goes beyond a mere Hobbesian *modus vivendi* is clearly going to be very difficult. Any appeals to the interests of others, or the goodness of moral behaviour, are likely to fall foul of the requirement not to theorise in a way that fails to pay deference to our motivational capacities. It would seemingly not, as Rousseau vowed to do, take men as they are.

However, Rousseau's methodological commitment does not require him to accept the present manifestation of human self-love as a given. It only requires him to not offer principles which do not go beyond the way that man can *potentially* motivate himself. In *The Social Contract* Rousseau offers a story about how man's basic capacities (self-love, pity and perfectibility) can be transformed into a moral nature given the right institutional circumstances.³³ As every man has these natural capacities, it is generally true for every man that they could develop such motivation even though presently few of them do.³⁴

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The idea that Rousseau's view of how *amour-propre* can be transformed into something that supports just politics has become popular amongst Rousseau scholars since the seminal work of N.J.H. Dent. Dent, N.J.H. 2005(1988). Rousseau, Routledge: Abingdon. This is an interpretation of Rousseau that Rawls accepts and follows. Rawls, J. 2007. Lectures in the History of Political Philosophy, Harvard University Press: Cambridge Massachusetts. From here on in referred to as Rawls, J. 2007. Lectures.

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The notion of using the human's natural capacity for goodness, if developed in the right circumstances, as grounding for moral theory of course pre-dates Rousseau. It is at least as old as Aristotle. As he says in *Nicomachean Ethics*, 'a stone that naturally falls downwards could not be made by habituation to rise upwards, not even if one tried to habituate it by throwing it up ten thousand times; nor can fire be habituated to burn downwards, nor anything else that naturally behaves in one way be habituated to behave differently. So virtues arise in us neither by nature nor contrary to nature, but nature gives us the capacity to acquire them,

The evidence that Rawls is using a developmental rather than a fixed account of human nature is two-fold. Firstly we have the fact that Rawls is explicit that he believes himself to be realistically Utopian in the way that Rousseau is. There are many problems with Rawls' interpretation of Rousseau, but he was a deep and perceptive reader and offered compelling and detailed lectures to his students at Harvard on the relationship between Rousseau's developmental account of human nature and *The Social Contract*. We have then no reason to imagine that when Rawls claimed Rousseauian inspiration for his approach to political philosophy that he did so without an acute understanding of this aspect of the Genevan's thought. The second piece of evidence available to us is that in the only part of *Theory* where Rawls does offer an account of human nature, Part 3 on 'Ends,' he uses a manifestly developmental account. In particular his account about why we would find a just society to be congruent with our good is based upon the contextualised 'development' of our intellectual capacities. Rawls argues that, 'acquiring a morality of association rests upon the development of the intellectual skills required to regard things from a variety of points of view and to think of these together as aspects of one system of co-operation.'³⁵ Given that this is how he understands human nature, as it is how his self-professed inspiration does, it would seem strange to conclude that Rawls meant anything other than a "developmental" set of facts when he said that his citizens ought to be endowed with knowledge of the general facts of human nature.

A further complication with regards to facts about human nature needs to be mentioned. The developmental account of human nature that Rawls uses is bound up in epistemic difficulties. How do we know how persons will react to

and completion comes through habituation.' Aristotle, 2000. *Nicomachean Ethics*, Trans: Crisp, R, Oxford University Press, Oxford. II.1,

p23.

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Rawls, J. 1999. *Theory*, p410.

different social arrangements and pressures given that we haven't had the opportunity to observe the development of human nature in all of the circumstances we are speculating about? Indeed, this is a particularly acute problem for Rawls, as he understands a state of justice as a goal to be achieved that we are presently far from realising. Rawls' response is to act in the face of the inevitability of these complications. The philosopher must make a best estimate of our understanding of the limits of human nature, and the general laws that it produces, on the basis of the available to evidence, whilst always aware that our understanding is subject to revision.

It finally needs to be noted that Rawls is explicit that, despite his deference to these general and natural facts about human nature, his theory is otherwise 'ideal.' By this he means that his theory is conducted using the sort of ideal abstracting process that was discussed in our introduction: favourable yet unrealistic circumstances are assumed in order to isolate our ideal response to a given problem. The result is that matters that he accepts as 'urgent and pressing' to practical politics are ignored in favour of depicting 'the nature aims of a perfectly just society.'³⁶ We will see in a moment exactly why Rawls is interested in such 'ideality' but for now we have shown what we wanted to: to the extent that a realistic Utopia is identifiable by its relationship to the facts that Rawls highlights, there is little controversy in describing Justice as Fairness as one.

Finally, this view about the relationship between "facts" and "normative theory" is one that Rawls held fairly consistently throughout his intellectual development. For example, let us look at the social facts he thinks are necessary for consideration during the constructive process portrayed in one of his later works, *the 1993 Political Liberalism*. Rawls endows his decision makers with the knowledge that 'slavery... allows some persons to own others as their property

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Rawls, J. 1999. Theory, p8. For an account of the relationship between ideal and non-ideal theory in Rawls' philosophy see Simmons, J. 2010. A. 'Ideal and Non-Ideal Theory,' Philosophy and Public Affairs, 38(1).

and thus to control and own the product of their labour.³⁷ This, Rawls implicitly believes, is a fact that we need to know if we are able to pass judgement on different arrangements of property and liberties in a political community. It is indeed hard to imagine making a decision about how to organise the basic economic structure of a society without some understanding of the power dynamics implied by different economic relations. However, what is striking is the facts about slavery that Rawls denies his decision makers with. Other questions, such as where slavery arose historically, Rawls invites us to accept, are not relevant.³⁸ This off the cuff and ignored remark from Rawls is telling. Questions about the origins of slavery, and recognition of its role in a system of racist exploitation of imperialist possibilities, are clearly vital to pressing matters of how to deal with the ongoing fall out of this historic injustice. For example, affirmative action arguments are often supported by reference to the need to rectify past atrocities.³⁹ By inviting us to ignore these things in our prior search for a conception of justice, Rawls demonstrates that his commitment to a strict approach of limited 'fact-sensitivity' holds in even the most emotive of circumstances and where historical facts are vital to the normative problems of contemporary politics.

Fact-sensitivity and the aims of political philosophy

Although Rawls' description of his theory as a realistic Utopia may not be controversial, the legitimacy of that approach to political philosophy certainly is. His claim that we should accept human nature—and the limitations this places on

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Rawls, J. 1993. *Political Liberalism*, Columbia University Press: New York, p122.

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Rawls, J. 1993. *Political Liberalism*, p122.

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Robinson, R. 2000. *The Debt: What Americans Owe to Blacks*, Penguin: New York.

the possible conceptions of justice—as facts when doing political philosophy has sparked a debate about how "fact-sensitive" political theory should be.⁴⁰ To be sensitive to a fact means to accept the existence of, and thus the constraints posed by, features of the external world. An entirely fact-insensitive theory would not even be constrained by the laws of physics, making the task of political philosophy indistinguishable from that of fantasy,⁴¹ whereas an entirely fact-sensitive theory would limit the role of political philosophy to describing the given nature of politics. When assessing whether Rawls—and his method of realistic Utopia—takes too many or too few, or the right or wrong, facts into account, we must then also speak of the task and aims of political philosophy. If you think the role of political philosophy is to be descriptive then you are going to recommend a different level of fact-sensitivity than those who think it should draw impossible but inspiring futures.

If political philosophy is to offer immediately useful advice to pressing political issues, and that is certainly a common understanding of our task, then it is often thought that we must pay close attention to the circumstances that men actually find themselves in. For example, an account of the best way to distribute goods in circumstances of abundance, where there are more goods than wants, may, we can only hope, be a useful intellectual exercise that allows us to predict the shape of future political arrangements. However, it is of little use to the distributive questions that we presently face in the prevailing circumstance of scarcity. Rawls does in fact claim that Justice as Fairness responds to the

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For a topography of the various positions taken in this debate see Valentini, L, 2012: 'Ideal Vs Non-ideal Theory: A Conceptual Map' *Philosophy Compass*, Vol7, No.9.

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Or as Rawls says, perhaps with more respect for theology than I have expressed, political philosophy would become a 'study of the ethics of creation: an examination of the reflections an omnipotent deity might entertain in determining which is the best of all possible worlds.' Rawls, J. 1999. *Theory*, p136.

circumstance of scarcity,⁴² but in doing so he does not have to leave his commitment to only accepting social facts that are implications of human nature. The condition of there being more wants than available goods could, after all, be seen as a perennial feature of the human condition thanks to the boundless nature of our wants. Whatever is scarce we will covet, and our capacity to produce new desires will always create scarcity even when all of our fundamental needs are satisfied. What is not in doubt is that Rawls' theory does 'assume away' many of the other problems of politics if they are not, in his estimation, a necessary implication of human nature or unalterable features about the world. It is here where controversy arises.

Justice as Fairness assumes 'strict compliance,' such that all the parties involved in choosing principles assume that once the principles are selected they will be complied with.⁴³ When combined with another assumption that Rawls makes when trying to demonstrate which principles of justice would be decided from an initial position of fairness—that his decision makers are self-interested—strict-compliance has a strong influence on the principles eventually decided upon. If individuals fear the existence of thieves and fraudsters their self-interest is less likely to lay upon the existence of wealth-redistributing institutions that makes such nefarious acts more likely. Such individuals would even have to take into account the possibility that they themselves may have Artful Dodgeresque thieving skills and take joy in practising their illicit talents. Behind the veil of ignorance—which cloak knowledge of who possesses such talents and conceptions of the good—it would be wise, without the vital assumption of strict

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Rawls, J. 1999. Theory, p109.

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Rawls, J. 1999, Theory, p8.

compliance, to guarantee that a possessor of this skill and conception of the good has a quality existence in case you discovered yourself to be such a thief.⁴⁴

Rawls does not think that the assumption of strict compliance is a feature of societies as he finds them.⁴⁵ It is, as a matter of fact, untrue. It is instead an assumption that he thinks that we have to make if we want to describe the *ideal* of justice, or to describe 'what a perfectly just society would be like.'⁴⁶ If we were to describe the best principles of justice for a society without strict compliance we would be, by way of implication, describing an imperfect form of justice and the principles appropriate only for an unjust society. Our example of the Artful Dodger hopefully brings to life why Rawls thinks this to be the case, we surely ideally wish for a distributive principles to be reflective of those aspects of the self that are not prone to undermining the community through trickery and criminality. It is a wider truth that without the assumption of favourable circumstances the decision making process which Rawls builds is unlikely to isolate our judgements about how we want to organise ourselves. It is Rawls' willingness to assume benign but unrealistic conditions when practising political philosophy that has seen him labelled as an 'ideal theorist' who is not 'fact-sensitive'⁴⁷ to the actual

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The fullest account of why the assumption of strict-compliance is necessary for the 'ideal' part of Rawls' theory see Simmons, AJ. 2010. 'Ideal and NonIdeal Theory,' *Philosophy and Public Affairs*, 38(1).

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Rawls makes clear that the assumptions he makes about the rationality of the parties is not a description of men as he actually finds them when discussing the 'mutual disinterest' of the parties in the original position. Rawls, J, 1999. *Theory*, p128.

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Rawls, J.1999. *Theory*, p8.

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Valentini, L. 2009. 'The Apparent Paradox of Ideal Theory,' *The Journal of Political Philosophy*, 17(3), p332.

circumstances that men find themselves in, and it is what he had in mind when ascribing himself the 'Utopian' half of the realistic Utopia label.⁴⁸

Too few facts to be realistic?

The assumption of strict compliance, and others that place his theory in an ideal setting, has been criticised on the grounds that it renders Rawls' theory impotent for the practical purposes of political philosophy. When philosophers, armed with Rawls' principles, are confronted with pressing political matters the assumptions that constitute ideal theory do not hold. In the real world not everybody sincerely wishes to comply with just institutions. It is thus necessary to adapt and change the recommendations of ideal theory to work with difficulties posed by nonideal circumstances. The need to adapt ideal theory is not disputed by those who think Rawls' principles can, with some work, guide action. It is said that works like Rawls' theory answer the first-order question about what our perfect conception of justice is, which then provides a yardstick against which we can measure our attempts to implement our ideals—even if we know we will achieve at best an approximation of, or a step towards to, the ultimate goal.

This explanation of the relationship between ideal and nonideal theory is advanced by Rawls himself. We are told that our having a 'systemic grasp' of problems of non-compliance, criminality, and other barriers to justice, depends

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It should be noted that my interpretation of Rawls is consistent with the claim made by Zofia Stemplowska and Alan Hamlin that ideal-theory is identifiable by 4 separate practices: 1) the use of the assumption of full-compliance 2) the use of simplifying abstractions, 3) the willingness to be fact-insensitive and 4) a search for perfect justice. Ideal theory is not just a method, it is a goal. (Hamlin, A & Stemplowska, Z. 2012. 'Theory, Ideal Theory and the Theory of Ideals,' *Political Studies Review*, 10, pp-4849.) More generally the approach of this thesis is consistent with the view put forward in that paper that the differences in opinion about the utility of assumptions 1-3 rest upon different conceptions of 'the ideal.' I say that as my defence of Rawls ultimately rests upon demonstrating his sincere and consistent commitment to his own conception of the ideal.

upon our having a prior and clear picture of the 'nature and aims of a perfectly just society.'⁴⁹ For one thing, ideal theory gives us a workable priority system of how to go about dealing with multiple injustices that can't all be dealt with at the same time. The most 'grievous' injustices, Rawls tells us, can be identified by their 'extent of deviation from perfect justice.'⁵⁰ Erik Olin-Wright, though not a Rawlsian, provides a metaphor in his *Envisioning Realistic Utopias* that captures this prevailing view about the relationship between ideal theory and political action. Creating political change, Olin-Wright claims, requires compass points so that we know where we want to go, even if we don't presently know how to get there. Ideal concepts provides the point on the map to which the compass directs us even if we will have to continuously traverse around various barriers and obstacles to get there.⁵¹ If Olin-Wright continues the tradition of realistic Utopia, we can also see that the idea of something like the compass metaphor predates Rawls's adoption of the realistic Utopian label. In 1956 the French bureaucrat François Bloch-Lainé contributed to a series of essays on the role of Utopia in the study and practice of politics. Bloch-Lainé argued that reformers, such as himself, act in order to manage the difficulties of feasibility and political constraint, however, they are only able to do so if they act with an idea of the best possible world clearly in their mind.⁵² Rawls stands in the middle of a tradition that says reform and progress is not possible without first having the guidance of realistic Utopia.

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Rawls, J. 1999. *Theory*, p8.

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Rawls, J. 1999. *Theory*, p216.

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Olin-Wright, E. 2010. *Envisioning Real Utopias*, Verso: London.

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Bloche-Laine F. 1973. 'The Utility of of Utopias for Reformers' in *Utopias and Utopian Thought*, Ed Manuel, F, Souvenir

Press: London.

In an important contribution to the 'fact-sensitivity' debate, Colin Farrelly claims that this process cannot work and that the fact-insensitivity of Rawls' theory means that it is unable to guide action even in the indirect manner described. To make his point Farrelly returns to the issue of strict compliance. Rawls' assumption of strict compliance has a direct effect on the costs of rights. If there is no reason to imagine that individuals will seek to undermine a system of rights and liberties through crime, fraud and coercion—as there isn't under the assumption of strict compliance—then there are no policing costs to assigning rights to each member of a society. However, as soon as the strict compliance assumption is lifted 'rights have costs.'⁵³ For example, the right to free speech carries with it a cost of policing political marches in a world, like our own, where large public gatherings have the potential to descend into actions that violate other principles and institutions that we value such as public safety. In this realistic scenario there is a trade-off to be had between institutions that allow for the form of economic equality that Rawls advocates in his second principle of justice and the liberties that he gives priority over them in his first. When assigning priorities without the assumptions of ideal theory we face an entirely different set of choices to the ones that Rawls and other ideal theorists depict.

Farrelly's claim is not just that the relaxing of assumptions makes applying Rawls' principles a difficult task. It is that the principles themselves are not action guiding once the assumptions are relaxed. How can, the example provocatively asks, an answer to the question of how we would prioritise goods that do not have costs be used to advise us on the pressing political matter of how much attention to

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Farrelly, C. 2007. 'Justice in Ideal Theory' in *Political Studies*, 55, p 55. The observation that the costlessness of rights in Rawls' theory is a product of his assumptions is much older than this: it is central to Brian Barry's critique in Barry, B. 1973. *The Liberal Theory of Justice*, Oxford University Press: Oxford. The originality in the Farrelly article is to use this observation to make a wider point about the disutility of ideal theory.

pay to those costs when they actually arrive? Farelly's is but one of many criticisms that have emerged claiming that the assumptions of ideal theory take political philosophy away from its core task of offering action guiding advice on political questions.⁵⁴ The question of how we would organise ourselves in congruent and favourable circumstances potentially misleads us when having to deal with the actual dilemmas and trade-offs that characterises everyday political decision making.

Too many facts to be ideal?

Rawls' realistically Utopian approach has also been subject to the opposite criticism of the one thus far presented. Whilst for the realist critics of ideal theory he is not 'fact-sensitive' enough to offer action-guiding advice, there have been criticisms that Rawls' approach is too deferential to facts to be an ideal at all. Andrew Mason⁵⁵ and G.A. Cohen⁵⁶ have advanced arguments suggesting that our understanding of the limits of human nature should not impose any limits on our understanding of what justice is and more widely that ideal-theory should not be in any way fact-sensitive.

Cohen's primary and influential argument against 'fact-sensitivity' in political philosophy is that any fact-sensitive normative principle must imply a commitment to a further fact-insensitive principle. Stressing that he is articulating a logical imperative true of all normative beliefs, he puts his thesis as: 'a principle

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Miller, D. 2008. 'Political Philosophy for Earthlings' in Leopold, D & Stears, M (eds.) Political Theory: Methods and Approaches, Oxford University Press: Oxford; Waldron, J, 2012: Political Political Philosophy: An Oxford Inaugural Lecture.

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Mason, A. 2004. 'Just Constraints,' British Journal of Political Science, 34(2).

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Cohen, G.A. 2005. 'Facts and Principles,' Philosophy and Public Affairs, 31(3).

can reflect or respond to a fact only because it is also a response to a principle that is not a response to a fact.⁵⁷ The idea behind this argument is simple. If one makes a principled statement, for example that *we should keep our promises*,⁵⁸ when one is pressed to justify the statement we are prone to offering facts that seemingly 'ground' our claim, in this instance we might say that *only in a society where the institution of promises is respected can we hope to live good lives*. However, this fact is only relevant to the question of whether we should keep our promises because we hold a further principled belief that *we ought to help people live good lives*. The principle that *we should keep our promises* would not be true if it were not true that promise keeping allows people to live good lives. It is a fact-sensitive claim. However, the grounding principle that *we ought to help people live good lives* is not altered by this change in the facts, only its practical ramifications.

The previous example is supposed to show that what makes principles fact-sensitive is the existence of deeper fact-insensitive principles. Cohen calls these deeper 'fact-insensitive' principles 'fundamental' and posits their discovery as the central task of political philosophy. Our lust for truth demands we explore them, the only way to do so is to peel away all the hypothetical imperatives brought about by facts, including facts about human nature, until we rest upon the grounding principle. This is Cohen's vision of what fact-insensitive ideal theory should look like. With reference to justice he puts it thus:

'Until we unearth the fact-free principle that governs our fact-loaded particular judgements about justice, we don't know why we think what we think just is just. And we have to retreat to (what we consider to be)

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Cohen, G.A. 2008. *Rescuing Justice and Equality*, p233.

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This is the example that Cohen first uses to illustrate his thesis. Cohen, G.A. 2008. *Rescuing Justice and Equality*, p234.

justice in its purity to figure out how to institute as much justice as possible inside the cave.’⁵⁹

My presentation of Cohen's argument in favour of fact-insensitive philosophy has the far depended upon a singular illustrative example. I have taken a common way of justifying a particular normative principle and shown how, despite its apparent sensitivity to facts, it depends upon the existence of a further fact-insensitive principle. Cohen also offers an argument for why we should think that this pattern is not idiosyncratic to a particular chosen example, but is rather part of the structure of all utterances of normative principles. I shall briefly present it:⁶⁰

- 1) Whenever a fact is offered as support for a principle, there is explanation *why* the fact supports the principle.
- 2) Explanation of why a fact supports a principle must invoke a deeper principle.⁶¹

In support of these two premises, the meaning of which has already been captured in our illustration, Cohen offers that they are both theoretically

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Cohen, G.A. 2008. *Rescuing Justice and Equality*, p291. The reference to the cave is a nod to Plato's famous analogy whereby philosophers have to transcend the usual epistemological condition of man (the cave) in order to explore the true nature of forms. Cohen's joke is that Plato wrestles with the question of whether philosophers are under obligation to 'retreat' to the cave and explain their wisdom, where as Cohen perceives the contemporary philosopher to be so wedded to the concern of everyday life that they need to take the reverse journey. Plato. 1993 (380bc). *Republic*, (Waterfield, R, trans.) Oxford University Press: Oxford.

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The basic definitions used for my analytic presentation of Cohen's argument can be found here: Cohen, G.A. 2008. *Rescuing Justice and Equality*, p236.

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Note that at this point Cohen is not saying that they must invoke a 'fundamental principle' which is itself fact-insensitive. It may be the case that they invoke a further fact-sensitive principle and the process continues.

falsifiable. All that one would have to do to show that either premise is not true would be to come up with a single example of a principled claim that did not have the structure presented. As he is satisfied that no one has thus far been able to do so he moves on. For the sake of presenting Cohen's argument we shall do the same.

In order to show that at the root of this process are fact-insensitive principles Cohen must deal with the possibility of infinite regress—the danger that whenever we invoke a deeper principle it also rests upon facts which themselves are only relevant given a further deeper, but itself fact-sensitive, principle. So on *ad infinitum*. If our moral convictions are subject to such an infinite regress, then it is not clear that we can identify the grounds for our moral principles through the sort of logical deduction Cohen is using: an ambiguous result of the analysis of the structure of moral language would leave the matter unresolved, or perhaps even provide support for view that nothing grounds our moral reasoning and it is thus inevitably circular.

Cohen offers three minor arguments as to why there is no danger of infinite regress. The first is simply to raise the challenge of falsification once more. He suggests that no one would be able to stretch the process beyond five principles.⁶² Perhaps aware that this falsification challenge is not as insurmountable as his previous two he offers two further arguments. The weakest of those arguments is Cohen's qualification that this process is only true of persons who 'have a clear grasp of what their principles are and why she holds them.'⁶³ This does stop the possibility of an infinite regress but only by suggesting that this process is only true for people with settled convictions. If, as is plausibly

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Cohen, G.A. 2008. *Rescuing Justice and Equality*, p237.

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Cohen, G.A. 2008. *Rescuing Justice and Equality*, p237.

the case, a great number of people do not have settled convictions then Cohen's argument will have only a limited applicability and will fall short of its universalist aspirations.

In the second and much stronger argument Cohen highlights the commitments implied in believing that this process could go on indefinitely. For the regress to be infinite it must be the case that there is an infinite number of principles that humans can appeal to, else at some point the regress would run out of deeper principles to 'ground' fact-sensitive principled claims upon. Cohen is surely right that 'few would think there exist an infinite number of principles' and thus in order for an objector to consistently pose the threat of an infinite regress they would have to adopt a further, philosophically unpopular, position about the boundless nature of human principles. Satisfied that his three minor arguments have shown that there is no danger of the movement between fact-sensitive principles, facts and deeper 'grounding' principles going on indefinitely he is able to state his third premise.

- 3) Our moral thinking is not prone to infinite regress.

Once we have accepted that every fact-sensitive normative principle invokes a deeper principle and that this process comes to a rest at the point of our deepest convictions we are ready to accept Cohen's conclusion. The chain of reasoning demanded by the justification of any fact-sensitive principled claim leads inexorably to an ultimate and fundamental fact-insensitive principle.

- 4) Every fact insensitive principle ultimately rests upon a fact-insensitive 'fundamental' principle.

Fact-insensitive principles and Cohen's critique

In Chapter 3 on this thesis we shall demonstrate that Cohen's critique of Justice as Fairness does not rest upon Rawls accepting the meta-philosophical claims that Cohen makes about the relationship between facts and principles. This is important, because Rawls does not in fact share Cohen's belief that such fundamental principles exist in any objective form.⁶⁴ Despite this, it is worth outlining the challenge that Cohen's meta-philosophy poses to the realistic Utopianism of Justice as Fairness. In doing so we can get a clearer idea of the apparent alternatives, within the framework of ideal-theory, to Rawls' limited fact-sensitivity. The rest of this chapter is dedicated to that task.

We have seen that Rawls assumes that any principle of justice must be in conformity with the facts of human nature. If, however, we conceive of justice as a fundamental principle then the claim that “justice commands we ought to do *x* given *y* facts about human nature” must imply a commitment to a deeper principle which is not sensitive to those facts about human nature. By setting the bounds of the possible in your philosophical inquiry at the limits imposed by human nature, one immediately cuts oneself off from an inquiry into the deeper principles that must, Cohen believes himself to have demonstrated, ultimately ground our beliefs about justice and other moral problems. Cohen makes a secondary argument that also follows from what he has said about the nature of fundamental principles. By setting the limits of a conceptual inquiry in accordance with human nature one automatically assumes that justice is something that humans are capable of. That is to question-beg against the possible thought that there is something unjust about humans themselves. Justice might be a virtue fit for the angels and not for us mere sinners. Whilst this might initially sounds like a strange and morose thought, it is one that has a long tradition in Western belief systems. The Catholic notion that each individual *must* seek redemption for their

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Rawls does not think that moral principles have objective form outside of an attempt to construct agreement between political subjects. See, for example, Rawls, J. 1980. 'Kantian Constructivism in Moral Theory,' *The Journal of Philosophy*, 77(9), p519.

sins implies that perfectly morality is something beyond the capacities of any actual men and women. The doctrine of Original Sin is at least in part a metaphor for the idea that evil and injustice are an inherent component of human nature. To be good is to recognise that one can only overcome their inherent flaws by transcending the inevitably flawed human self through God. Within the confines of contemporary analytic philosophy we can also see that it is not a criticism of Rawls that is unique to Cohen. For example, David Estlund writes:

'Rawls's doctrine... silences concerns about whether some motivational structures—however much they might be part of our natures—might be justice-tainting.'⁶⁵

Cohen's criticism of fact-sensitive ideal theory, it should be noted, implicitly rejects the claims made by Farrelly and others about the purpose of political philosophy. If one believes that we ought to be describing moral concepts even if they are beyond the capacities of human nature, then it is clear that you are not committed to offering moral concepts that are directly action guiding. For what we cannot motivate ourselves to do is sure to amount to poor practical advice on what we should do in the here and now. Imagine that all the available evidence suggests that I can only bring myself to write ten references in a weekend. I know this because I have accepted more in the past and every time I have done so I have run out of energy and, whilst I have sincerely and honestly willed to produce more work, I have been unable to produce it. If twenty students ask me to write a reference one weekend, and they have no chance of getting the job unless I or a colleague do it that weekend, it would surely be wrong for me to accept the tasks.

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Estlund, D. 2011. 'Human Nature and the limits (if any) on political philosophy,' *Philosophy and Public Affairs*, 39(3), pp

21-22.

By ignoring the facts of what I can and cannot motivate myself to do I would be liable to leaving students in an awkward and harmful situation.⁶⁶

What we have just hit upon is the intuitive idea behind one of the few accepted truths in moral philosophy: that any "ought" statements implies than the subject "can" do whatever it is they "ought" to do. If they cannot do it, then it cannot be the case that they ought to do it. The only wrinkle added by the case is that we have accepted that human motivation may be the sort of thing that makes an act impossible. Cohen does not wish to deny this famous tautology; he does, however, deny that it has any sanction on fundamental principles. Cohen tell us that our fundamental principles are left untouched as the "ought" implies "can" injunction applies to our practical, rather than ideal, reasoning. I shall very briefly present the argument. Firstly Cohen offers a formal version of a standard "ought" implies "can" argument:

- 1) Normative Judgements are "ought" statements.
 - 2) "Ought" statements imply corresponding "can" statements.
- Therefore...
- 3) Normative judgements imply "can" statements.

His next move is to introduce his characterisation of our commitments to an impossible ideal, such as a professor should do references whenever his students ask him to do it. Even if we reject this statement as a piece of practical reasoning, because one cannot motivate themselves or find the time, then by that very act of practical reasoning we give rise to the following piece of ideal reasoning

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This is the example of Professor Procrastinate developed by Jackson and Pargetter. It's relevance to contemporary political philosophy was noted by David Estlund. Jackson, F & Pargetter, R. 1986. 'Oughts, Options and Actualism,' *Philosophical Review* 95(2).

- 4) One ought to do A (references) if it is possible to do A.

The crucial move in the argument is to point out that if 4) is considered to be an "ought" statement, then it follows that the argument from premises 1) and 2) through to conclusion 3) does not hold. That is because 4), by the way that it is framed, is not responsive to "can" statements. It states that *if we could* then this would generate an ought. Ideal reasoning, Cohen conjectures, is aimed at these *if we could* statements that are by definition not constrained by the ought implies can injunction. This argument, distinguishing as it does between practical and ideal reasoning, is what allows Cohen to make statements dismissing the importance of the famous injunction: 'What's true in "ought" implies "can," does not show that fundamental normative truth is constrained by what it is possible for people to do.'⁶⁷

The function of ideal theory

If, as Cohen suggests it is, the role of ideal theory is to uncover a set of fact-insensitive principles which ground our beliefs, what I have described as *if we could* statements, then it may make political philosophy appear to be a task of somewhat remote importance. Our practical reasoning, it seems, is always deeply embedded in the facts and the way that we respond to them. It is also seems true that how we deal with imperfections and demands for compromise has a far greater impact on our decision making than the precise nature of the ideal that ultimately underpins our thought. Why then spend your time on precision in moral philosophy that has little or no effect of normative decision making? Indeed, Cohen is sometimes prone to accepting the fundamental disutility of moral philosophy to our immediate needs. For example, he

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occasionally says things like: 'the question of political philosophy *is not what we should do* but what we should think, even if what we should think makes no practical difference.'⁶⁸

I think, however, that we should regard these statements as *bravado*. By vowing to be unconcerned with the practical difference made by his work, Cohen is able to emphasise the purity of his commitment to discovering what he perceives to be the truth. However, we find elsewhere that he thinks that there is in fact great and important utility in keeping our focus on fact-insensitive principles. This is what I shall call the functional argument for ideal theory.

The functional argument for ideal and Utopian theory rests upon how fallible our knowledge is of what we are, and what we are not, capable of. Take the case of our professor who cannot bring himself to do more than ten references over a weekend. He might sincerely believe it to be the case that there is no way that he could possibly do more. However, our estimates of what we are and are not capable of are frequently shown to be wrong. Who is to know that some advances in nutrition will not significantly improve the amount of time we can spend working in a single session? Perhaps we will find a way to train ourselves to be much more efficient at writing and be able to breeze through what now takes an arduous amount of time. With these sorts of changes, *if we could* statements could very easily become realisable. However, if we do not remind ourselves of what we would do, if we could do, then we are liable to forgetting. We certainly have less reason to strive for better. By talking about what we would do, *if we could*, we give ourselves the motivation necessary to aim for better.

It is in resistance to this potentially conservative affect of practical reasoning that Utopian and ideal approaches to political philosophy have traditionally been

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Cohen, G.A. 2008. Rescuing Justice and Equality, p268 . Emphasis added.

defined. Utopian visions, by offering a depiction of how we would live in an ideal world, remind us of how imperfect whatever political settlements we actually have are and, it is hoped, inspire us to do better. The very idea of Utopia has its origins in a political philosophy of this description. Thomas More invented the word by amalgamating the Greek words for good (eu) and place (topos) and by depicting an island nation of that name which was constituted by a perfect Commonwealth, *in doing so* he provided a pointed contrast to his own native 16th Century England: and started a genre and method of doing political philosophy.⁶⁹ In her history of the concept of Utopia, Ruth Levitas picked out the following quotation from Oscar Wilde as owing its popularity amongst Utopians for perfectly capturing this fundamentally functional character of Utopia:

'A map of the world that does not include Utopia is not even worth glaring at, for it leaves out the one country at which humanity is always landing. And when Humanity lands there, it looks out, and seeing better country, sets sail. Progress is the realisation of Utopias.'⁷⁰

The functionalist defense of ideal theory survives in the literature through Cohen and Mason.⁷¹ It is they who argue for fact-insensitive ideal theory on the grounds that it is necessary to prevent 'Sour Grapes'—the phenomena whereby individuals ascribe negative attributes to what is out of reach in order to convince

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The claim that Moore invented the term, and the wider thesis that Utopia is a method of political theory, are defended by Ruth Levitas in her recent book. Levitas, R. 2013. *Utopia as Method: The Imaginary Reconstruction of Society*, Palmgrave MacMillan: London.

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Levitas, R. 1990. *The Concept of Utopia*, p6.

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Mason, A . 2004. Just Constraints, *British Journal Of Political Science*, 34, p254; G.A. Cohen. 1995. *Self-Ownership, Freedom and Equality*, Cambridge University Press: Cambridge, pp250-254.

themselves what they do have is the best.⁷² Cohen asks if the present infeasibility of socialism is treated as reason enough not to call it a system of justice: are we to come to think of the compromises of capitalism as perfections even though we previously preferred another ideal? If we are like the fox who 'when (he) succeeds in convincing himself that the grapes are sour,... does not build the ladder that might enable him to get them' we need to be stubbornly reminded by Utopian theorists of our present failings if we are to keep building for a better future. Fact-insensitive ideal theory, Cohen tells us, stubbornly reminds us of our ideals and does not allow us to become settled in accepting that what we have is what we want.

We have seen earlier that Rawls clearly shares with Cohen the belief that a degree of fact-insensitivity is necessary if we are to develop ideal concepts free of cognitive dissonance about what we want in our moral and political concepts. However, the second part of this chapter has developed Cohen's reasons for stressing why it is not implausible to stretch the fact-insensitivity of ideal-theory to cover human nature itself. How else are we to be sure that we are not merely settling for the best we can presently muster from ourselves, rather than the way that our moral beliefs indicate we would truly like to be?

Conclusion

The result of the outlined debate is that, on the matter of fact-sensitivity, there is something of a pincer movement against realistic Utopia. On one flank Rawls is faced by those who, like Farrelly, believe the approach to be insufficiently sensitive to the actual facts of politics to offer any guidance for our very real political problems. On the other flank Rawls faces those, like Cohen, who make the opposite claim—that by introducing any facts political philosophy separates

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Elster, J. 1983. *Sour Grapes*, Cambridge University Press: Cambridge.

itself from real 'ideal' theory and its truth discovering task. Rawls' approach is left looking rather like a compromised and unprincipled Clintonian triangulation. It pays too much attention to the facts to count as ideal theory, but too little to be of the action guiding use that realistic theories aspire to. By placing itself in the centre ground of a fact-sensitivity spectrum⁷³ realistic Utopia stands accused of showing none of the virtues of the approaches to its left and right. In the next chapter we will challenge that negative depiction of realistic Utopia by being more exact in our description of Rawls' aims and intentions. Only once we have done so will the relationship between facts and ideals in Rawls' theory be properly understood and the criticisms of realists and, more importantly from the point of view of this thesis, idealists, become assessable.

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The idea of there being fact-sensitivity spectrum in which Rawls inhabits the centre-ground is captured most clearly by the following quotation from Andrew Mason: 'Political theorists disagree about the extent to which issues of feasibility, stability, institutional design and human nature can be bracketed in analysing the concept of justice. At one end of the spectrum some argue that no analysis of justice can be adequate in the absence of an account of how it could be implemented, whereas at the other end there are those who argue that principles of justice are logically independent of issues of feasibility. Influenced by the work of John Rawls, many theorists occupy the middle ground, maintaining that analyses of justice must be realistic, that is, realizable under the best of foreseeable conditions.' Mason, A. 2004. *Just Constraints*, p251. Farrelly is also explicit in understanding Rawls' position in this way. Farrelly, C. 2007. *Justice in Ideal Theory: A Refutation*, pp846-847.

Chapter 2: The Function of Realistic Utopia

In the previous chapter we saw Rawls define realistic Utopia by its fact-sensitivity. That is by what facts the approach to political philosophy is and is not deferential towards whilst conceiving of ideal normative concepts. Rawls offers a second definition of realistic Utopia which, rather than describing the conditions of that type of theorising, sets out what he wants those normative concepts to do. It is a *functional* definition to go along with the criteria-based definition already outlined in Chapter 1. This is appropriate as we have seen that those who have criticised the fact-sensitivity of Rawls' approach have done so on the basis of contrasting claims about the aims and purpose of political philosophy. If we want to know whether Rawls is right or wrong to include and exclude the facts that he does then we are going to have to know precisely what he thinks his ideal concepts ought to be able to do. Are ideal concepts, as Cohen suggests, perfectly pure *if we could* statements that exist to remind us of what we, when free from cognitive dissonance, take to be moral truth? Or are they concepts which, as Farrelly demands, give us immediate advice on what we should do in the here and now? The answer, I shall argue, is neither. They are instead, for Rawls, ideal responses to a given problem. In the case of justice this problem is the need for mutually acceptable rules, and thus potentially "reconciliatory" principles, that determine the distribution of benefits of burdens within a society.

The function of realistic Utopia

To start to make this case we turn to Rawls' functional definition of realistic Utopia:

'Political philosophy is realistically Utopian when it extends what are ordinarily thought to be the limits of the practically politically possible and, *in doing so*, reconciles us to our political and social condition.'⁷⁴

Rawls here makes two claims about the effect of practising political philosophy in the manner of realistic Utopia. That it 'extends our thought to the limits of the practically possible,' the meaning of which we have seen is that which is possible given 'natural' facts, and '*in doing so*' reconciles us to our political and social condition.' I have *italicised* the bridge of 'in doing so' to highlight an important claim. These are not two distinct effects but it is *by* extending our thoughts to the limits of the practically possible that we are able to reconcile ourselves to our political arrangements.

To say that political philosophy has the capacity to reconcile us to our social and political condition assumes an antagonism between the individual and their collective arrangements. If there is no division there is nothing to reconcile. As an observation about the human condition this might appear a rather banal claim. Without further clarification it is little more than an observation of the existence of politics: if there were no tensions between the individuals that constitute the collective, there would be no need to form institutions and practices that manage their interaction. However, for Rawls, the antagonism that political philosophy has the capacity to reconcile has a definite and distinct form. The antagonism is between **1)** principles and laws that we have to obey and **2)** our own moral convictions.

We know this to be the case because Rawls offers a precise account of the features and virtues of a reconciled society. He calls a reconciled society 'well-

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Rawls, J. 1999. Law of Peoples, p12. Emphasis added.

ordered' when it meets two conditions: **1)** 'everyone accepts and knows that the others accept the same principles of justice' and **2)** 'the basic social institutions generally satisfy and are generally known to satisfy these principles.'¹⁷⁵ The virtue of such a society is explained by Rawls in Chapter 9 of *Theory* where it is stated that by living under the law of such a well-ordered society 'persons are acting autonomously.'¹⁷⁶ The reason it is appropriate to ascribe the value of autonomy to citizens of a well-ordered society is, according to Rawls, that 'they are acting from principles that they would acknowledge under conditions that best express their nature as free and equal rational beings.'¹⁷⁷

In this chapter we will set out the relationship within this conception of autonomy between the idea of reconciliatory principles and Rawls' centrist approach to fact-sensitivity. Our argument is a simple one. Rawls' understanding of what normative principles need to do—that is to allow us to be autonomously reconciled with our political arrangements—recommends the position that he takes on the fact-insensitive spectrum. It is the ideal goal of normative principles that allow for political autonomy that suggests we *take men as they are and laws as they can be*.

Political autonomy

Without referring to section 40 of *Theory*, *The Kantian Interpretation of Justice as Fairness*, the description of the virtues of a well-ordered society can appear to

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Rawls, J, 1999.*Theory*, p4. Note once again the appeal to 'general knowledge:' knowledge which is not only everyone has the capacity to know to be true.

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Rawls, J, 1999.*Theory*, p 452.

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Rawls, J, 1999.*Theory*, p 452.

rest upon a somewhat obscure characterisation of autonomy. What does it mean for a set of conditions to *express* an individual's nature as free and equal, rational being? Rawls explains in these passages how he believes Justice as Fairness to offer a form of autonomy that is similar in kind to the autonomy that is granted to moral persons in Immanuel Kant's philosophy of ethics. This part of the chapter will offer an exegesis of that section of *Theory*, and Rawls' Kantian analogy, as a first step towards explaining the form of reconciliation that his principles are supposed to achieve.

Kant defined autonomy as 'the property of will being a law to itself,'⁷⁸ a state of affairs that can only be achieved when we are moved by our moral will—and the duties it perceives—rather than any other source of desires or interests. Kant's reasons for doing so stemmed from his sharp metaphysical dualism between 'phenomena' and 'noumena.' In Kantian metaphysics, every object that we experience is a phenomenon and, as such, is subject to the laws of nature. Noumenon, or things-in-themselves, must exist for us to be capable of experiencing objects but by our very nature, in particular our epistemic limitations, they lay beyond the explanations we can offer of phenomenon. One of the laws of nature is that every phenomenal event is explicable by a prior and necessary cause. To mix modern parlance with Kantian language, every object of experience is causally determined. As this is true of all objects of experience it is also true of human behaviour to the extent we are phenomenal beings. If all human behaviour is explicable by prior and necessary causes then, as the chain of causality extends, it will ultimately be the product of a cause heteronomous to the individual. They will act for reasons other than their own choices.⁷⁹

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Kant, I. 2012(1785). *Groundwork on the Metaphysics of Morals*, (Timmermann, G ed.) Cambridge University Press: Cambridge, 4:447, p.56.

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You will recognise this as something like the problem of free will. How do can we ascribe agency to human behaviour if it

What grants us the possibility of autonomy in the Kantian system is that the phenomenal chains of determined causality do not continue indefinitely. At the end of a phenomenal chain we are presented with objects that cannot be explained by any prior cause. This is true, Kant thinks, both logically in the sense that there must have been an original cause at the onset of a chain of causality to prevent an infinite regress—thus making room for a deity in Kant's system—and empirically given that we are confronted with human 'wills'⁸⁰ that appear as such original causes.⁸¹ As we cannot observe these 'things-in-themselves' they are not part of the phenomenal world at all and are rather noumenon, things that human understanding can only grasp the existence of but not the workings. It is only by acting solely out of our will—and not desires which are subject to phenomenal laws—that we have any possibility of being the determinate cause of our own moral decision making. This is why for Kant an autonomous act is one whereby the will is a law to itself. As Kant put it himself:

is subject to causal determinism? Kant's solution to the problem of free will is to deny the universalism of causal determinism by saying that it only has purview over the phenomenal world of human experiences. Notice that as a characterisation of the free will problem it does not rely upon the need for 'alternative possibilities' and is instead as 'source' based concern. As such Kant's concern with the problem of free will is invulnerable to the classic counter-examples that Harry Frankfurt developed to the notion that free will depends upon an agent having alternative possibilities to the actions they do in fact take. Frankfurt, H. 1969. 'Alternative Possibilities and Moral Responsibility', *The Journal of Philosophy*, 66(3). For a much fuller explanation of the relationship Kant's metaphysics and the free will debate see Wood. A. 1984. 'Kant's Compatibilism' in *Self and Nature in Kant's Philosophy*, Cornell University Press: New York.

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Kant means by will something thicker than Hobbes' analytic definition of a man's final volition. Kant instead wishes to suggest that the will is a part of the self which is distinct from, and governed by different laws if any at all, than anything which we directly experience.

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The human possession of free will can also be argued theologically from the idea that there is a creator with such capacities who made man in his own image. 1) God has free will, 2) God made man in his own image, ergo 3) man has free will.

'Natural necessity was a heteronomy of efficient causes; for every effect was possible only according to the law that something else determines the efficient cause to causality; what else, then, can freedom of the will be but autonomy, i.e. the property of the will being a law to itself?'⁸²

It is quite clear that Rawls' political philosophy does not carry the same metaphysical commitments as Kant's. This is not least because Rawls expressly disavows himself of the 'deep dualisms' of the transcendental idealism I have just described.⁸³ However, there is a more important point to be made about why Rawls cannot embrace the details of Kant's commitment to willful autonomy. Even if Rawls were himself committed to a Kantian metaphysics it would not provide a good justification for the political, and therefore public, account of autonomy he is trying to develop here. Allow me to briefly explain why. It is inevitably the case that there will be others in a political community who do not accept the propositions of transcendental idealism as a part of a body of general knowledge. In any plausible and attractive world there will be non-Kantians. If there are people who, after plenty of reflection, do not and cannot comprehend the existence of a noumenal⁸⁴ will then they are unlikely to be convinced they are acting for their own reasons, and therefore autonomously, because a philosopher

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Kant, I. 2012. Groundwork on the Metaphysics of Morals, p56.

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Rawls, J, 1999.Theory, p 226.

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There is a much longer discussion of the Rawls' rejection of the use of comprehensive philosophical doctrines in ideal political reasoning in chapter 5 of this thesis. In Rawls' language he is interested in 'political' rather than 'ethical' autonomy in that it is essential that each citizen, so long as they are committed to settling they deep fair and appropriate. That is reasons that they deem appropriate to the political sphere. See Rawls, J. 1993. Political Liberalism, p77-79 for a full elaboration of this distinction.

claims that a particular normative principle conforms to what that will affirms. When Rawls says that Justice as Fairness grants 'Kantian' autonomy he cannot be making an identity based claim but rather one of partial but notable resemblance.⁸⁵

How do we reconcile the thought that politics ought to express our nature as free and equal persons with Rawls' necessary rejection of Kant's metaphysics, and indeed any appeal to comprehensive philosophical doctrines? The most plausible interpretation runs something like the following: that Rawls does not share Kant's thick view about why a special dignity needs to be afforded to acts of the moral will does not mean that there is not something significant in their both believing that we act autonomously when we express those aspects of ourselves that we consider morally significant, rather than those things that we consider morally irrelevant, in our engagements with others. For, if we are forced to act out of what we consider morally irrelevant reasons in our dealings with others, Rawls says deliberately channeling Kant, we act 'heteronomously.'⁸⁶ We act in accordance with reasons other than those of our choosing. However, as Rawls is acting under the assumption that there is no shared moral framework that each member of the political community can appeal to, we cannot achieve autonomy by relying upon such a thick moral framework. Instead, what we have to do is to find a way of constructing political principles which each can accept for reasons independent of their own personal religious and philosophical beliefs. This is

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Rawls justifies his use of the word Kantian as one of 'analogy and not identity' in reference to his Kantian constructivism. (Rawls, J. 1980. 'Kantian Constructivism in Moral Theory,' *The Journal of Philosophy* 77(99), p517) We should interpret his use of it as a descriptor of his conception of autonomy in the same way. The essay is from here on in referred to as: Rawls. J. 1980. Kantian Constructivism.

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Rawls, J, 1999.Theory, p222.

what Rawls calls *public* reason and it is necessary for autonomy in diverse *political* communities.

In this account of *political* autonomy the individual's particular understanding of what is morally significant cannot be the governing reason across the whole political community. However, each individual's understanding of moral significance must not be offended by whatever reasons the public does collectively use. One individual may think that to act out of morally significant reasons it is required that we conform to a particular religious precepts (the believer), another may instead rely upon their own secular system of deontological ethics (the secularist) and yet another think that morality is but a matter of subjective taste (the emotivist). For all three of these individuals to be acting autonomously all that is necessary is that there is a principle or rule which they can find a moral reason to support, even if it is the case that all three individuals are only able to affirm the principle for distinct and personal reasons.⁸⁷ For example, our believer, our secularist and our emotivist may all be committed to the idea of equality of persons for different reasons. Perhaps the respective reasons are for the believer that we are all the creations of God, for the secularist it is because we are all in possession of the same faculties of reason and for the emotivist because equality is the most agreeable mode of being. When we construct our principles and discuss them in public we make use of this consensus and make appeal to the shared commitment to equality rather than any of the reasons that each of them have for supporting it. If we wish to achieve autonomy we cannot tell the emotivist that an egalitarian principle is in place

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Note how Rawls' notion of political autonomy deliberately seeks to remain neutral in the most significant debates in moral philosophy. The persons inside of his political community may have external or internal reasons for being moral, a polity that cares about their autonomy must find a set of principles that an adherent to either approach can affirm. For an account of the distinction between different sources of moral reasons that I have just used see Williams, B. 1981. 'Internal and External Reasons' in *Moral Luck*, Cambridge University Press: Cambridge.

because we are all God's creation but we can tell him, and the two other members of this micro-political-community, that it is in place because they have a shared commitment to equality. This way each member can affirm political principles on the basis of reasons that they themselves find significant.

How would extending our thoughts 'to the limits of the practically possible'—that is, remember, theorising in a way that only accepts those facts about ourselves which are naturally determined—overcome the danger of heteronomy so defined? Only the full account of Justice as Fairness that unfolds in this thesis can properly answer that particular question but by suggesting some possible barriers to autonomy the outline of Rawls' response, and the idea of realistic Utopia having *reconciliatory* power, will become clearer. It is to that task that we now turn, starting with an explanation of some of the implications of having a concern for political autonomy. It is, as we shall see, a problem which demands a certain type of ideal principles.

The problem of Justice as Fairness

The problem of political autonomy, as it has been presented, is one that only arises in societies where individuals want to treat each other in a certain way.⁸⁸ If you are indifferent to the way that you treat others then you will not be acting heteronomously in a set of political arrangements that encourages you to take advantage of the vulnerability of others.⁸⁹ Your understanding of your moral

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Rawls would say that this means his moral principles are conception-dependent. If there is no conception of the self as possessing moral reasons then there is no justice to begin with. This is a position he attributes in his *Lectures On The History of Moral Philosophy* to both Hume and Kant. Rawls, J. 2000. *Lectures on the History of Moral Philosophy*, Harvard University Press: Cambridge, Massachusetts, p148.

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Note that in the full Kantian sense this would not be an autonomous political arrangement because the content of

nature would be *expressed* in the political arrangements and thus your autonomy, defined as acting in accordance with reasons of your choosing, could remain intact when you act in the exploitative framework of interaction it encourages.

Rawls is surely right to believe that this is not the sort of society that we find ourselves in. Moreover, to be more loyal to my interpretation of Rawls' relationship with 'facts,' it is not the sort of society that could or would develop given the free development of what we are—persons who, whilst self-interested, have a natural desire to treat other persons as equals. In free societies Rawls believes that there inevitably develops a mutual understanding of the moral equality of individuals and their desire for freedom, and we want this to be recognised in our political arrangements.⁹⁰ That is why in his most systematic explanation of his method Rawls puts the problem to which Justice as Fairness is a solution as: to find the basis of 'agreement on the way basic social institutions should be arranged if they are to conform to the freedom and equality of citizens

autonomous acts is set by the logic of what we can and cannot will universally. This is independent of the particularities of human desire or culture. Rawls' political autonomy only requires that we express ourselves in a way that expresses our moral natures and thus could theoretically describe such a settlement as autonomous if there were such a morally indifferent polis. This is why Onora O'Neill describes Rawls' account of public reason as genuinely contractualist and insists that Kant is rather an obligationist. O'Neill, O. 1997. *Political Liberalism and Public Reason*, pp 427-428.

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The idea that Rawls is committed to the doctrine of 'natural goodness,' that humans have the capacity and desire to be just, is self-evident in the congruence argument of Part 3 of Theory. Samuel Freeman stresses that the doctrine's importance to Rawls' intellectual development should not be underestimated. (Freeman, S. 2007. *Rawls*, Routledge: Oxford. pp 8-12. The Holocaust had led Rawls to become deeply disaffected with the Christian doctrine of Original Sin, believing it hideous to think that the 'miserable and distorted' puppets that carried out such evil could glorify God. Building a philosophy on the basis of human goodness then took on a great moral urgency.

as moral persons.⁹¹ Justice as Fairness is, Rawls makes very clear, an ideal response to this problem.⁹²

For the sake of analytic clarity we shall present the problem formally. Firstly there is the premise that we want to treat each other in a certain way.

Free Societies Premise: In democratic and liberal societies people want to treat each other as free and equal persons.

When we confront each other we may have differences of opinion, clashing interests and uneven emotional attachments but we recognise that we want to be treated in a certain way and, because we see other persons as moral equals, we want to treat others likewise.⁹³ That we hold these beliefs about ourselves and others means that we do not want to act out of reasons that ignore or violate them. We shall delay commenting upon the details of what precisely it is that Rawls thinks we wish to express in our political life. At this stage I want to present

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Rawls, J. 1980. Kantian Constructivism, p517.

92

Rawls makes this clear in a footnote responding to Ronald Dworkin's interpretation of Justice as Fairness as a 'rights based view.' Dworkin, R. 1977. Taking Rights Seriously, Harvard University Press: Cambridge, Massachusetts. i.e. one that articulates the foundation and implication of natural rights. Dworkin proceeds from a process of elimination that assumes that theories of justice are either rights based, 'duty based' or 'goal based.' Rawls rejects this interpretation, and the idea that Dworkin's list is exhaustive, and insists that he is offering an ideal response to the problem of autonomy between free and equal persons. Rawls, J. 1985. Justice as Fairness: Political Not Metaphysical, Philosophy and Public Affairs, 14(3), p236f. As a result this footnote is an important source of clarification for Rawls scholars and a source of evidence for the interpretation developed in this chapter.

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This is made clear by Rawls from the off when he attributes man a 'general desire for justice' in the opening pages of Theory. Rawls, J. 1999. Theory. p5.

a single idea that we might think follows from Rawls' observation about the way that we view each other:

Acceptable Principles Premise: Forcing people to live under arrangements that are not acceptable to them is inconsistent with treating them as free and equal persons.

This premise simply states that to treat people as free and equal it is necessary to not want to coerce them through laws and principles that they do not find acceptable. If autonomy requires living in accordance with laws and principles that one finds acceptable, and we are equally concerned for everyone, then to do so would be to fail to express our respect for other individual's interest in being autonomous. Or as Rawls says whilst outlining the similarity between his theory of autonomy and Kant's: 'the force of the self's being equal is that the principles chosen must be acceptable to other selves.'⁹⁴

If both the *acceptable principles premise* and the *free societies premise* are true—we have seen that Rawls certainly held them to be—then we know that:

The Problem of Justice: persons must find a set of principles and political arrangements that are mutually acceptable so that they can treat each other as free and equal.

It is no co-incidence that this is precisely the way that Rawls frames the problem of Justice as Fairness in his most complete essay on philosophical method, *Kantian Constructivism*.⁹⁵ This in turn closely resembles the account of political

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Rawls, J, 1999.Theory, p226.

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Given this the reader may ask what the purpose is of such a long-winded demonstration. My reply is to note that whilst

autonomy that Rawls develops in *Political Liberalism*. To achieve political autonomy, Rawls tells us in that work, we must enjoy a 'shared political life on terms acceptable to others as free and equal.'⁹⁶ Justice is then, for Rawls, a concept that we need in politics if we are going to interact with each other in a way that is appropriate to the standing we hold each other in. Without it our political life would deny us the capacity to act out of reasons of our own choosing and thus be barrier to autonomous living.

The need for reconciliation

In the previous section we saw how Rawls understood the problem of justice to be the discovery of principles that allowed for political autonomy: that is, principles that reflected reasons that each member of a political society can simultaneously affirm as reflecting their own moral point of view. To see how such a conception of the problem of justice calls for reconciliatory philosophy let us build up an example of a society with some fairly minimal beliefs. We shall see that even in conditions favorable to autonomy the need for reconciliatory principles is clear.

There is a world where:

Rawls is clear what his problem is, it hasn't stopped more learned readers than I from presenting them as otherwise. See, for example, Burton Dreben's claim that Theory and Political Liberalism deal with 'different themes.' Whilst Theory is interested in Justice, Dreben tells us, Political Liberalism is interested in legitimacy. Legitimacy means for Dreben, 'conditions under which someone will properly accept the law.' However, given the centrality of the acceptable principles premise, we can see that these two questions are quite inseparable. Dreben B. 2003. 'On Rawls and Political Liberalism,' *The Cambridge Companion to Rawls*, Cambridge University Press: Cambridge, p317.

- 1) Everybody accepts that justice means giving each her due and what we are due constitutes our rights.
- 2) Everybody wishes to be just.

These first two assumptions establish that there is a generic understanding of what justice is and that everybody wishes to act justly. If the principles that govern their social interaction do not give others their due then their political arrangements would force them to act heteronomously in that they would be ruled by principles which do not express what they wish them to. The next two assumptions refer to some of the basic convictions about the content of what we are due, or to put the same thing another way, what justice demands. Note that both claims are couched in terms of what it is to respect the freedom and equality of persons.

- 3) Everybody accepts that we have a *right* to show preference for those we are most emotionally attached to. (Commitment to partiality as an aspect of freedom)
- 4) Everybody accepts that access to opportunities should, *by right*, not be determined by morally arbitrary factors such as social class. (Commitment to impartiality as an aspect of equality)

In this imagined society there is a universal desire to act justly, and unanimous agreement about some features of what justice demands. These are by design favorable conditions for setting up political arrangements that allow individuals to act autonomously. However, even in these benign conditions the need for reconciliatory philosophy is imminent and clear. The third assumption, which allows individuals to show preference to those that they love, and the fourth assumption, which states that opportunities should not be distributed according to social class, have the potential to conflict even when they are universally

held.⁹⁷ Situations inevitably arise whereby the rightful desire to show preference for those that you love come into conflict with the equally rightful desire to ensure that opportunities are not distributed according to social class. In recent philosophical discussion this potential conflict has manifested itself in debate about the extent to which parents can legitimately use their social capital to give educational advantage to their own off-spring.⁹⁸ If it is agreed that public institutions should be impartial between the chances of children whereas in private behavior it is right for parents to prioritise the education of their own children, how is it that we deal with cases where the line between public institution and private behaviour is blurred? Should a musically trained parent avoid offering free piano classes at their child's local school in the knowledge that the school will not be able to offer that advantage to all of their pupils?

The collision between legitimate parental preference for their offspring and the principle of equality of opportunity is just one example of the clash between the 3rd and 4th principles expressed in our imagined moral society. Without some sort of agreed principles that mediate between these *clashes of right* there is no way for the individual to sense that they are treating other individuals in the way that they wish to, that is to say justly and as free and equal persons. Our example thus illustrates the pervasiveness of the problem to which Rawls tells us that Justice as Fairness is the solution. Even in societies with favorable circumstances towards achieving justice there is likely to be, without some sort of

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The two moral convictions under consideration give rise to what Hegel called a 'collision of right.' Hegel, GWF. 1991(1820). *Elements of the Philosophy of Right*, (Wood, A., ed.) Cambridge University Press: Cambridge, ss84, p117. It is the existence of division even in a perfectly just society that has allowed readers to perceive Rawls' project as Hegelian despite the aforementioned 'strict compliance assumption' meaning that Justice as Fairness ignores the causes of 'wrong' (unrecht) that give rise to Hegel's reconciliatory philosophy.

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Brighouse, H & Swift. A. 2008. 'Legitimate Parental Partiality,' *Philosophy and Public Affairs*, 37(1).

ordering and organisation of claims, a disharmony and unsettled collision between notions of what is right. That is why Rawls tells us, in some of the earliest moments of *Theory*, that ‘a measure of agreement in conceptions of justice is...(a) perquisite for a viable human community.’⁹⁹

We may note that the problem for which ideal concepts must be produced is one in which conflict—between different conceptions of the good and claims of rights—is already accepted. This is because, for Rawls, conflict is the inevitable product of the part of our nature that we want to express in our political arrangements. To wit, such conflicts arise from the very ideal of autonomous persons.¹⁰⁰ The result is that the ideal concept of justice is, for Rawls, the one that best expresses our convictions about how to deal with such conflicts rather than one that assumes away the problem of conflict. As Burton Dreben¹⁰¹ put it, Justice as Fairness is ‘not an (ideal) theory about non-conflict, but an ideal theory of conflict.’¹⁰²

The original position and autonomy

Now that we have understood the problem that Rawls thinks principles of justice must overcome we are ready to explain the relationship between the *functional* role of principles of justice and the method under which they are constructed. It is

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Rawls, J. 1999. *Theory*, p4.

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Once again the full account of the necessity of ‘reasonable pluralism’ is not explored here, but in chapter 5.

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Rawls dedicated *Justice as Fairness: A Restatement* to Dreben, who he called a ‘cherished friend and colleague.’ Rawls, J.

2003. *Justice as Fairness: A Restatement*, Harvard University Press: Cambridge Massachusetts.

102

Dreben, B. 2003. *On Rawls and Political Liberalism*, p323.

here where we are able to connect the fact-sensitivity that characterises Rawls' method and the ideal goal of reconciliatory principles.

Justice as Fairness argues that the outlined problem is best answered through a constructed decision procedure: a specifically designed mechanism for deciding those principles which are appropriate for a community that wants to treat each other as free and equal persons. It is hoped that such a mechanism can bring clarity to what claims we really care about, what priority they ought to be afforded in any collisions of right, and how they can be organised in such a way as to make them acceptable to the entire community: that is to say in a way that can overcome the problem of Justice as Fairness. The term constructivism shall generally be used for the rest of this thesis to identify the belief that principles of justice are to be discovered by such a device.¹⁰³

The decision procedure used in Justice as Fairness is that of the original position. It is in the design of the original position that Rawls aims to *take men as they are* and thus offer *laws as they can be*. In particular it is here where he deliberately endows his decision makers with knowledge of the general laws of psychology and economics that flow from natural facts about human nature.¹⁰⁴ The next section of this chapter shall outline precisely what it is that grants the original position epistemic privilege in our attempts to solve the problem of Justice as Fairness and thus how Rawls' fact-sensitivity is necessary to overcome his problem.

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This is in-keeping with both Cohen and Rawls' use of the word. It is, however, not universal. Brian Barry, for example, would identify by definition as constructivism as too particular in that it assumes a moral purpose of the process of construction. Barry, B. 1989. *A Treatise on Social Justice, Vol.1: Theories of Justice*, University of California Press: Berkeley, California, p226.

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Rawls, J. 1999. *Theory*, p137.

The construction

Rawls makes clear the basic framework that Justice as Fairness uses to draw up its conditions of a fair procedure in his 1980 account of *Kantian Constructivism*¹⁰⁵, the form of moral theory that he takes Justice as Fairness to be a strand. Note that Rawls claims that any changes to his position in these lectures are little more than a 'shift in emphasis' designed to give greater clarity to ideas that are already in Justice as Fairness as it is expressed in *Theory*.¹⁰⁶ We take Rawls' claims of continuity seriously and treat any apparent changes to the substance of Justice as Fairness as primarily correcting failures of expression and clarity unless otherwise stated.

In identifying what is distinctive about the tradition of Kantian constructivism Rawls states that:

'(Kantian Constructivism)... specifies a particular conception of the person as an element in a reasonable procedure of construction, the outcome of which determines the content of the first principles of justice. Expressed another way: this kind of view sets up a certain procedure of construction which answers to certain reasonable requirements, and within this procedure persons characterised as rational agents of construction specify, through their agreements, the first principles of justice.'¹⁰⁷

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Rawls, J. 1980. *Kantian Constructivism*.

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Rawls, J. 1985. *Justice as Fairness: Political not Metaphysical*, p224f.

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Rawls, J. 1980. *Kantian Constructivism*, p516.

This is an important passage as it identifies clearly the three basic components of Justice as Fairness in the first sentence. In the second it specifies how these basic components are related to one another.

The three basic components are:

- 1) A conception of the person.
 - 2) A procedure for those persons to interact.
- And
- 3) Principles of Justice.

If, as Kantian constructivists, we are trying to discover the demands of justice we must first seek to understand the subjects of Justice. We need to know what it is that persons are seeking to gain out of political co-operation so that we can know what they want to secure from the laws that govern it. Once we have established what persons want from political co-operation we can then consider what makes co-operation possible and what makes it difficult. What propensities do we have that allow us to act and think co-operatively and what propensities do we have that make co-operation more difficult? Once we have established our subjects we are in a position to set out a procedure that eliminates the barriers to reasonable co-operation yet respects the ends of co-operation. We can offer a conception of justice that reflects what its subjects want from it. Only once the procedure is properly constructed are we in a position to work out what principles it would recommend.

A famous historical example may help in our understanding of the process. Bentham's utilitarianism starts with a conception of persons as equals that all

wish to pursue pleasure and avoid pain, our two 'sovereign masters'.¹⁰⁸ In modern parlance we would say that Bentham has a 'mental states' account of what is and isn't good for humans.¹⁰⁹ His utilitarian calculus, designed to deliberate on distributive questions between such pleasure seeking and pain averse *equals*, responds to this understanding of the human condition by offering a principle appropriate for this conception, the product of this search being the greatest happiness principle. As we are equals all aiming for the same mental states, we ought to aim at that state of affairs that maximises pleasure and minimises pain.

It may seem odd to have chosen classical utilitarianism as an example of this structure of thought given that it is one of the traditions that Justice as Fairness wishes to define itself in opposition to. However, Rawls suggests that in the weak sense developed here utilitarianism *is* a constructivist doctrine.¹¹⁰ Justice as Fairness differs from utilitarianism in the details of the conception of the person, and thus the procedure and principles it recommends, rather than the broad trajectory of its reasoning. It is only the conception of the person that makes Rawls' constructivism identifiably *Kantian*.

In order to understand what is distinctive about Justice as Fairness we shall go through each component of the process to explain its particularities inside of the general framework of constructivism. We will start, as we have seen Rawls recommends, with Justice as Fairness' conception of the person.

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It literally starts that way in that he states it as a fact as the first sentence in Bentham J. 1907. An Introduction to the Principles of Morals and Legislation. Clarendon Press: Oxford. 1.1.

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The classic account of how to categorise different modern conceptions of the human good is to be found in Griffin J. 1986. Well-Being: Its Meaning, Measurement, and moral importance. Clarendon Press: Oxford.

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Rawls, J. 1980. Kantian Constructivism, p536.

The person (reasonable and rational)

The important thing to note is that *the conception of the person used in this phase of the constructive process is not the same thing as a conception of human nature*. We are not trying to describe what we are like, but rather, what we would like to be like if we are given the possibility to express ourselves properly. So, for example, we might recognise that we are quite capable of violence but be ashamed of it. In our conception of the person we would put forward the desire not to be violent as a *fundamental interest* that we wish to secure in our politics. It is only in the second stage of the constructive procedure that we start to consider facts about human nature that are relevant to this ideal conception. If we want principles that express our commitment to non-violence it is important that we know under which circumstances our capacity for violence is awoken.

We have already seen some of the basic material of what Rawls thinks we want from our political arrangements. We want, he thinks, to be treated as free and equal and to treat others in the same way. This is what he calls our general desire for justice. I want to say a little about why he thinks that it is reasonable to ascribe this desire to persons as well as some of the other things that we want from politics. Rawls identifies two 'moral powers' which form the basic constituent elements of Justice as Fairness' conception of the person. The constituent moral powers are:

- 1) The capacity to act from a sense of justice.
- 2) A capacity to form and rationally to pursue a conception of the good.

These moral powers are supposed to be offered as descriptions of the way that people actually think of themselves from the moral point of view. They just are what we want expressed in our political arrangements:

'These interests are supremely regulative as well as effective. This implies that, whenever circumstances are relevant to their fulfilment, these interests govern deliberation and conduct. Since the parties represent moral persons, they are likewise moved by these interests to secure the development and exercise of the moral powers.'¹¹¹

The first moral power has already been described in this thesis as our general desire for justice. That is our desire to treat other persons in a way that respects their equal moral worth. The second moral power needs a little bit more explaining. It is one thing to say that you want to respect other person's moral worth but what exactly does this demand of us? We have seen that Bentham believed it required us to treat other person's desire for pleasure and aversion to pain as important as our own. However, we might be averse to that thought for a couple of reasons. The first reason is that we might think that pleasing mental states are a bad description of the sort of state of affairs that we wish to bring about. Robert Nozick famously challenged the mental-state theory of the good on the grounds that we would not wish to take a drug, or enter the influence of a machine, that gave us the blissful mental state of pleasure even if we thought there was no chance that it would, in the long term, bring about pain.¹¹² According to Nozick our intuitive rejection of such an opportunity suggests that our notion of a good life entails a concern with *how* we bring about pleasure and pain. We care about the project and plans that we undertake in our life, for their own sake, and not simply for the sake of the pleasure that they bring about. Secondly, we might also think that it fails to reflect to reflect the priority between persons that any individual member of a moral community would actually want. Is there anybody

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Rawls, J. 1980. *Kantian Constructivism*, p525.

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Nozick, R. 1974. *Anarchy, State and Utopia*, Blackwell Press: Oxford, pp42-45.

who doesn't wish to have the capacity to show a preference for themselves and their loved ones over other people? If the answer is not, mental-state utilitarianism's attempt to treat persons as equals succeeds only at the cost of treating persons in a way that is equally dissatisfactory to all. This second thought is one of the reasons that Rawls thinks his principles are preferable to anything produced by the utilitarian doctrine. However, it is the first Nozickian challenge that better reflects why Rawls identifies 2) as one of our two moral powers.

Rawls' second moral power is best considered a reflection of the complexities of establishing an objective account of the good. There is not and cannot be a shared plan for life, but retreating to a mental-state theory inevitably fails to describe what it is that people actually want from life. To form and pursue a conception of the good is to have an idea in one's mind about how you want to live your life and to go about doing the things necessary to realise those ambitions. The fact that this is a power which is possessed by *individuals* actually separates Rawls' theory from prominent ethical conceptions other than mental-state utilitarianism. It is not the case in Rawls' theory that a conception of the good exists prior to the individual, which they are simply to discover or work towards, as in teleological theories like that of Plato or Aristotle. Rawls theory is thus explicit that, because of this, individuals are capable of forming different conceptions of the good from one another. There is not, to use Rawls' own language, a 'thick' conception of the good that is shared by all. By making this capacity one of his moral powers Rawls empowers his citizens to protect this capability and signifies the importance that he believes we attach to it.

By making these moral powers the content of his conception of the person Rawls is explicitly making his theory one appropriate to a certain comprehensive

understanding of the liberal tradition.¹¹³ Most obviously he is working in the Kantian tradition, as Rawls believes Kant to also ground his moral theory on a conception of the person who revises and pursues their own account of the good.¹¹⁴

I would like to finish by tidying up some matters of terminology that will make the remainder of the discussion clearer. There are a series of Rawlsian terms that are closely related to these moral powers which are not quite synonymous with them. Firstly the two moral powers coincide with a pair of moral capacities that Rawls endows us with in our ethical decision making. We are reasonable, in the sense that we sincerely wish to make concessions to the legitimate claims of others, and we are rational, in that we know how to pursue the aims that we are set ourselves. The two moral powers are also sometimes couched in the more rhetorically powerful terms of our desire for freedom and equality. I will, like Rawls, occasionally use them interchangeably.

The procedure (the original position)

Rawls' conception of the person tells us what we want expressed and preserved from principles of justice. The next difficulty for any constructivist theory is to imagine a deliberative procedure that represents these things alone. If we admit interests that we have that go beyond our shared moral understanding, perhaps

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The reasons for the "political turn" are discussed in Chapter 5 of this thesis.

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Rawls, J. 2000. Lectures in the History of Moral Philosophy, pp146-152. The notion that Kant's theory is grounded in a conception of the person as autonomous has been central to Kantian scholarship over the past half century. Alan Wood in particular has sought to demonstrate how this aspect of Kant's theory exonerates him from the traditional criticism that the categorical imperative is merely formal and can be filled with any universalisable law- however trivial. Rawls' interpretation of Kant then, though not traditional, has support amongst mainstream Kant scholars.

our fears of the untrustworthiness of others or our immoral desires to better other persons, than our deliberative procedure will not produce principles of justice but rather a prudential compromise between multiple values. We will have no clearer idea of what a shared conception of justice would look like.

Deliberative acts in our everyday society rarely meet this ideal for various reasons, but there are two primary obstacles. Firstly we find it difficult to separate ourselves from our immediate subjective interests, rather than our considered fundamental interests.¹¹⁵ If our primary source of income is the rent gained from property then knowledge of this fact is likely to influence any vote we have on the future principles dictating the distribution of property. As the renowned novelist and socialist Upton Sinclair once said, ‘it is difficult to get a man to understand something, when his salary depends on his not understanding it.’¹¹⁶

Beyond this difficulty of removing ourselves from our immediate subjective interests lies a further difficulty. Even if we were capable of identifying our subjective interests and removing them from our decision making, we may still find it difficult to assume an objective point of view. That is a point of view that takes into account the reasonable claims of all persons and shows no priority to any. For example, we may find it hard to imagine what the interests are of people with a radically different conception of the good to ourselves. Even if we do know the diaspora of interests and views of a community are, we might find it hard to reconcile competing claims between them without some form of abstraction. How

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When discussing Kant’s moral philosophy Rawls posits that Kant’s constructivism allows us to ‘check the purity of our motives.’ He suggests that this is perhaps due to Kant’s pietist background. I simple not here that Rawls himself once harboured ambitions to take the cloth. Rawls, J. 2000. Lectures On The History of Moral Philosophy, p148.

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Sinclair, U. 1935. I, Candidate for Governor: And How I Got Licked. University of California Press: California, p109.

do we deal with situations where two parties assert interests in claiming two rights that cannot be held at the same time?

Rawls famously believed that the model of procedure appropriate for such persons was the original position. The original position is characterised by self-interested parties deliberating about what the principles of justice for their society ought to be in an imagined environment where there is strict control over what we do and do not know about ourselves and society. This next section will explain what it is that Rawls allows knowledge of in the original position, and how this is appropriate to the conception of the person offered in the previous section.

The most evocative component image of the original position is the 'veil of ignorance.' The veil is a physical representation of the things that Rawls denies his citizens knowledge of whilst they are seeking to discover principles that best express their commitment to freedom and equality, and their shared fundamental interest in developing their moral powers. The intuitive idea behind the veil of ignorance is a simple one. If we remove from people the knowledge that they have about themselves which makes them judge political questions self-interestedly: the property they hold, the class that they belong to, their gender etc. and say to them that they have to make a decision about how to distribute advantages, liberties, property and everything else of political importance in a society, then they are forced to decide upon principles from a point of view that is firstly impartial between different conceptions of the good (thus satisfying our second moral power) and secondly pays equal concern to the interests of every member of the society (thus satisfying the first moral power). We would, even when acting self-interestedly, show equal and impartial concern to the interests of all citizens because we are aware that there is a chance that we could find ourselves in any position in society once the principles are decided upon. The result is that the model of the original position directs us towards an answer about how to prioritise different claims and resolve collisions of right in a way that conforms to our shared moral point of view. Now that I have expressed the

intuitive idea behind Rawls' decision making criteria I need to go into a few of its more technical details.

Justice as Fairness utilises a 'thick' veil of ignorance rather than 'thin' veil of ignorance. The latter is a process that starts with the observation that there are positions and advantages that individuals hold that shroud their capacity for impartiality. It then seeks to eliminate those advantages until we have modelled a system where individuals are unable to vote in any way other than impartially. Justice as Fairness, by contrast, starts with the assumption that we know nothing and introduces enough information for agreement between rational parties to be possible. The distinction is important because a thick veil of ignorance is likely to exclude information that a thin veil of ignorance would not. Rawls highlights the social history of a nation as a particular example as a piece of information not necessary for reasonable agreement between rational subjects but which would not shroud the partiality of subjects so long as they did not know the class, gender or racial roles that they have within it.¹¹⁷ Rawls advocates the use of a thick veil as the principles that he recommends are supposed to be expressions of nothing but our moral sensibilities. The inclusion of information that does not emanate from our sensibilities would, under the proper understanding of political autonomy, make the recommended principles heteronomous rather than autonomous.

Rawls' starting point in erecting the veil of ignorance is then to eliminate all knowledge and then slowly introduce those things that are necessary for agreement. I want to stress that it is at this point, and only at this point, that aspects of Rawls' 'theory of human nature,' as opposed to conception of the person, are introduced. This stage in Rawls' construction is perhaps the most controversial and faces one acute difficulty. The more information that one

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Rawls, J. 1980. Kantian Constructivism, p549.

removes from behind the veil of ignorance the more likely one is to produce a deliberative process that biases some reasonable conceptions of the good over others. Rawls characterises the difficulty as having to simultaneously satisfy the following two conditions:¹¹⁸

1) Agreement in the initial situation must be unanimous.

And

2) The parties, with their different conceptions of the good, must be treated fairly.

One of the primary mechanisms that Rawls utilises to avoid the second horn of his potential dilemma—that is prioritising some conceptions of the good over others—is making sure that the goods that are regulated and distributed by his principles of justice are useful to all persons independent of what their particular conception of the good is. His citizens are not securing access to solely money, which is of most useful to the consumerist, or landed property, which is of no use to the nomad, but rather an ‘index of primary goods.’ The ‘index of primary goods’ is a composite notion of goods that, given our conception of ourselves and the nature of political agreement, it is rational for *all* citizens to wish to secure. A primary good is useful to all persons in a political community. Those goods are: basic liberties, rights and opportunities for income and wealth, and the ‘social bases of self-respect.’

The principles and the reconciliatory power

Now that we have explained the construction of the original position we are in a position to pass comment on the reconciliatory power Rawls ascribes to the principles that it recommends. What is it about expressing those aspects of the

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Rawls, J. 1975. ‘Fairness to Goodness,’ *Philosophical Review*, 84(4), pp536-534.

self that we wish to express in our political principles, and the commitment to *take men as they are* and show no other compromises with the facts, that allows the individuals of a free community of equals to live autonomous lives?

Part of what makes the original position epistemically privileged is that, by removing knowledge from its representatives of information that they may be tempted to use to act in accordance with morally arbitrary reasons—for example, in order to satiate their weakness for either envy or vanity—each can know that the settlement reached is in accordance with the part of their natures that they wish to express. We shall call this phenomenon ***reconciliation through moral significance*** and it is perhaps best expressed by Rawls in his discussion of the relationship between his principles and 'self-respect.' Here Rawls highlights that by choosing not to seek advantages on the basis of morally arbitrary factors his citizens express a respect for each others' equality:

'By arranging inequalities for reciprocal advantage and by abstaining from exploitation of the contingencies of nature and social circumstance within a framework of equal liberties, persons express their respect for one another in the very constitution of their society.'¹¹⁹

The second reconciliatory power is that of ***fraternity*** and it is again treated as a product of the details of Rawls' construction. As the representatives of the original position are not aware of their own position in society they, out of their modeled self-interest, only accept those inequalities that are likely to the benefit of the least well off. The result, Rawls believes, is that both the worst off and the best off in a well ordered society know that inequalities could not be altered in a way that makes the worst off any better off. As such each individual knows that any advantages they accept or pursue have been organised in a manner that

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Rawls, J. 1999.Theory, p156.

respects the equality of all. Or as Rawls puts it: the principles express the reciprocated idea of 'not wanting to have greater advantages unless it is to the benefit of others who are less well off.'

What combines ***reconciliation through moral significance*** and ***reconciliation through fraternity*** is that they are the result of the original position publicly demonstrating that its recommended principles takes what we consider to be the best of our natures and is not diluted by any other concerns. The facts of human nature were only introduced *after* the political community had highlighted those aspects of the self which they together could affirm as morally significant, or what Rawls calls the 'conception of the person.' At the point where the facts of human nature are introduced they are not conceived as a constraint on the ideal of developing our moral powers, but simply the means that are available to us in setting up a society that will allow for their impartial development.

The goal of a realistic Utopia is to facilitate the reconciliation of moral individuals with the laws and institutions that govern them. This is what we might call an ideal goal. It does so by producing moral concepts that individuals recognise as expressing the moral component of their nature. The fact-sensitivity criterion that defines realistic Utopia cannot then be separated from its function. To search for the best possible arrangements, taking men as they are and laws as they can be, *is* to take the first and necessary step in reconciling those men with their political arrangements by finding political arrangements that are mutually agreeable to equal persons.

Utopia and inspiration

The fact that the reconciliation that Rawls wishes to bring about through political philosophy is one of strong moral content is significant. Without something like an appeal to an ideal and value like autonomy the call for reconciliation would be a decidedly conservative goal. Reconciling the individual to a status quo that is

unjust, perhaps in order to bring about stability or peace, would make political philosophy a force against potentially destabilising but rightful claims.

In the previous chapter we saw that modern ideal theorists have what we have called an 'inspirational' account of the function of political theory. Ideals are depicted independent of their feasibility in order to inspire us to want better and to prevent us settling for what we have. I'd like to conclude this section on the functional definition of realistic Utopia by saying how it fits into this tradition.

We have seen that Rawls believes realistic Utopia has the capacity to reconcile individuals to their collective arrangements in a well-ordered society. It does so by producing principles that they recognise as expressing what they consider to be their moral natures. If Rawls believed that we were already in a society with just institutions, but just didn't realise it, we might say that the only function of political philosophy is to educate individuals so that they can recognise the justice than they are embedded in. In this understanding of Rawls he was to 20th century welfare-state-capitalism what Hegel was to 18th century Prussian-constitutionalism, a philosopher whose philosophical aim was to reconcile his compatriots to their political arrangements by way of explaining their rightness.¹²⁰ This commonplace interpretation of the function of Rawls' political philosophy was, as with so many ideas in 20th century thought, mostly clearly articulated by Brian Barry:

'In return for this primary loyalty, the state undertakes to sustain a system of equitable law and order and to provide public goods and

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It should be stressed that this characterisation of Hegel is, despite its familiarity, unfair. The state Hegel depicts as an embodiment of freedom in *Elements of Philosophy of Right* differs from the Prussian state as he found it in a number of ways. Access to offices were not granted on the basis of merit and there was no representative assembly based on estates. See Wood, A. 1991

'Introduction' to *Elements of Philosophy of Right*.

services. In the post-war Western European version common to both main political tendencies, social democracy and Christian democracy, it also provides economic security in the face of such contingencies as youth, age, disability and unemployment. In typical Owl of Minerva fashion, this whole conception received its most systematic exposition in *A Theory of Justice*.¹²¹

To adopt Barry's Hegelian interpretation would be to misunderstand Rawls' own appraisal of the political institutions he found himself in. Rawls was doubtful that the institutions of welfare-state-capitalism had the capacity to express the moral sentiments he believed to be captured by his two principles. He described its redistributive measures as 'insufficient and ineffective' in the face of the large property holdings it guaranteed for the owners of capital.¹²² In his mind his principles could only be realised if there was a significant dispersal of capital in a society either in the form of a 'property-owning democracy' or a 'liberal socialist regime'.¹²³ Given this negative appraisal of the political arrangements he found himself in it is clear that Rawls would not have expected his principles to inspire reconciliation between the individual and her existing political institutions. They are not the institutions of a well-ordered society.¹²⁴

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Barry, B. 1998. 'The Limits of Cultural Politics,' *Review of International Studies*, 24, p307.

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Rawls, J, 1999.*Theory*, xv.

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Rawls, J, 1999.*Theory*, xv.

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The most sustained explanation of why welfare-state capitalism cannot satisfy Rawls' principles see O'Neill, M. 2009.

'Liberty, Equality and Property-Owning Democracy,' *The Journal of Social Philosophy*, 40(3).

The knowledge that something else is possible and better expresses ourselves should only have the opposite 'inspirational' effect. The effect of grasping Rawls' principles of Justice should be to inspire the demand for greater quality in, and wider distribution of, the goods that really matter in our society. The potential benefit of doing so is, as we have seen, great. By expressing our nature as free and equal persons in our political laws and principles the individual is afforded the opportunity for their political life to be a vehicle rather than an obstacle for the aim of living an autonomous life. That is the realistic Utopia that Justice as Fairness hopes to inspire us towards.

Chapter 3: The Concessionary Criticism

Now that we have established that Justice as Fairness is intended to be a realistic Utopia—and exactly what this demands of a theory—we are ready to move on to the critique of Rawls' method of which this thesis is a refutation of, G.A Cohen's 'concessionary criticism.'

In the introduction to his *Rescuing Justice and Equality* Cohen makes an observation about the purpose of his critique of Justice as Fairness. He remarks:

'Some people think that I exaggerate the difference between what Rawls offers and what I counter offer. If they were disposed, as a result, to call me a left-Rawlsian, I would neither disavow nor dislike the description. There is a strong egalitarian element in the in Rawlsianism that I try to train against its inegalitarian conclusions.'¹²⁵

From this comment we might imagine that Cohen did not wish to render Rawls' theory entirely defeated, but, to copy his habit of almost quoting Marx, to rescue the egalitarian kernel from Rawls' constructed shell. It is not, we are led to believe, an attempt to rescue equality *from* Justice as Fairness but to rescue the equality *in* Justice as Fairness. The book, *Rescuing Justice and Equality*, is structured around two distinct 'rescues' of which this is a fairly accurate depiction of the first (Chapters 1-5). The second 'rescue' is, by way of contrast and as the title suggests, concerned with rescuing the concept of justice itself (Chapters 6-8). During this second rescue Cohen advances a defence of the sort of fact-insensitive ideal theory, of which we have seen he was committed to in Chapter 1 of this thesis. He does so in order to offer a plausible alternative to Rawls' realistic Utopian constructivism.

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Cohen. G.A. 2008. *Rescuing Justice and Equality*, p12.

The sheer depth of Cohen's attack, as well as the fundamentally different vision he holds from Rawls about what principles of justice are, may give us reason to think that their disagreement is so basic that it cannot be resolved through argument. Cohen's belief in the existence of fact-insensitive fundamental principles which are knowable by all, and his rejection of the idea that justice is constructed as opposed to discovered, contravenes one of the fundamental axioms of Rawls' thought: that principles of justice are just those principles objectively acceptable to all when in the correct choosing situation and have no external reality. For Rawls principles of justice do not exist outside of the inter-subjective agreement of subjects.¹²⁶

It must be admitted that disagreements as deep as this are difficult to overcome. We often make assumptions and accept axioms whilst thinking through problems because we are most committed to them being true. It is this which makes axiomatic disagreement uncondusive to reasoned resolution. To understand why let us think of the most trenchant philosophical issues of the past two millennia, the problem of evil. The problem of evil asks why it is the case that there is evil in the world given that God is both omnibenevolent and omnipotent. A perfectly good God would surely want to use his infinite powers to prevent serious harm and injury to his creatures. To most modern eyes the problem of evil appears to be difficult for no greater reason than the fact it rests upon the arbitrary attribution of qualities to its primary protagonist, God. If it is not assumed that God is omnipotent, omniscient and omnibenevolent then there is not a problem to grapple with. However, if you try and challenge somebody working through the problem of evil on the basis that God does not exist, or doesn't have those qualities, then you are unlikely to make any progress. The recipient of such criticisms simply would not be engaging with the problem if they have not already

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The depth of Rawls' 'anti-foundationalism' is discussed in Chapter 5 of this thesis.

come to the considered and fixed judgment that such an entity does exist and does have those qualities.

Rawls' belief that there cannot be an external grounding to moral principles, such as the set of objective fact-insensitive forms that Cohen perceives, was as much a product of deep and lasting reflection as that of an expert theologian who has found herself engrossed in the problem of evil. It is not something that he is going to change his mind upon. Any challenge that Cohen makes against Rawls that simply asserts that justice *is* a fact-insensitive *if we could* principle will then rest upon a disagreement that is beyond resolution in the court of reasoned argument. It would not be persuasive.

It is with the limitations of an entirely external criticism of an argument in mind that I endeavour in this chapter to present Cohen's criticisms as he understood them: as part of a critique which *internally* damages to Rawls' project to such an extent that its very foundations are fatally undermined. Cohen's concessionary criticism, as we shall see, challenges Rawls' realistic Utopia on the basis of the claims that Rawls himself makes for his method. They are not, and cannot be, *reconciliatory* principles in the manner that the previous chapter described. I shall demonstrate that he is able to make this critique without depending upon the defences he makes on behalf of his entirely fact-insensitive approach to political philosophy throughout the second rescue.

Unequalising incentives

The subject that provoked Cohen's rescue of equality, and internal critique of Justice as Fairness, was that of 'unequalising incentives.'¹²⁷ Unequalising incentives are rewards attached to offices that are intended to motivate people to

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Cohen, G.A. 2008, *Rescuing Justice and Equality*, xv.

perform a task, and to perform it well, but in doing so create inequalities. For example, a society which pays its medical professionals a premium to not practice privately introduces unequalising incentives in order to achieve the ideal of distributing healthcare on the basis of need.¹²⁸ In the first rescue Cohen is concerned to show that Rawls' acceptance of 'unequalising incentives' is inconsistent with the egalitarian motivations that ground Rawls' principles of distributive justice. It is only the behaviour of 'talented' people, Cohen suggests, that make unequalising incentives potentially beneficial to a society. However, the principles of justice, and particularly the difference principle, are predicated upon a prior egalitarian commitment that advantage should not be afforded upon grounds that are 'arbitrary from the moral point of view.'¹²⁹ As the talented are only able to make the demand for extra incentives as a result of arbitrarily distributed talents, the demands that make unequalising incentives necessary are in contradiction with the egalitarian judgements which underpin the difference principle.¹³⁰

We shall see how Cohen uses the internal contradictions that he argues inevitably emerge from the construction of Rawls' principles of justice to suggest that Rawls' principles fail on their own terms. The principles inevitably fail to have 'reconciliatory' force either by appealing to our fundamental moral convictions about appropriate considerations in mediating clashes of right, or by fostering a genuine sense of fraternity. Realistic Utopia, it is thus alleged, not only produces principles in contradiction with its own motivating principles, but, in doing so, fails

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Medical professionals are often used as examples of Rawls' thought. See Titelbaum, M.G. 2008. 'What Would a Rawlsian Ethos Look Like', *Philosophy and Public Affairs*, 36 (3).

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Rawls, J. 1999. *Theory*, p63.

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Cohen, G.A. 2008, *Rescuing Justice and Equality*, pp90-91; pp152-153.

to perform the *functional task* that Rawls designates for it. It does not produce an ideal concept even as Rawls understands the term and thus our political vocabulary is weakened by the Rawlsian misuse of the term justice.

For the sake of the structure of my argument I do not offer a challenge to Cohen's interpretive claims throughout this chapter. This is not to be interpreted as a sign of my agreement but rather a disciplined biting of the tongue. The challenge made to Cohen's concessionary criticism should only be launched once it has been presented with its fullest force and the implications of the possibility of it being true rendered clear.

Rawls' principles of justice

Justice as Fairness recommends two principles of justice. I shall introduce the principles by adopting the same formulations used by Rawls when he first presents them in *Theory*.¹³¹ The first principle first concerns the distribution of 'basic liberties' and requires that:

- 1) Each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.

The second principle comes in two parts and is concerned with the distribution not of liberties but of all purpose social and physical goods, known as primary goods, which allow individuals to carry out whatever it is they plan to do with their life. Specifically it states that social and economic inequalities should be arranged so that they are both:

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Rawls, J. 1999. *Theory*, p58.

2a) reasonably expected to be to everyone's advantage,

And

2b) attached to positions and offices open to all.

From here on in I shall, in compliance with the usual conventions, refer to 1) as the 'equal basic liberties principle,' 2a) as 'the difference principle' and 2b) as the 'fair equality of opportunity principle.'

Under circumstances in which the principles conflict, they are not to be weighed against each other. Instead they are assigned a strict priority whereby the most important principles cannot in anyway be compromised in order to make gains with regards to the less important principles. The order of the principles by priority is **1st)** equal basic liberties principle, **2nd)** fair equality of opportunity principle and **3rd)** the difference principle. For the sake of understanding this feature of Rawls' position, I invite you to assume that it is true that there are great efficiency savings to be made by assigning advantageous roles to persons on the mere basis of the status given to them by birth. A society would be able to concentrate specific educational resources only to those who need them—say an hereditary aristocratic elite—and invest the savings in to the production of universally available primary goods.¹³² Even though a greater gain is made with regards to the claims of the difference principle than loss is made with regards to the fair equality of opportunity principle, the strict 'lexical' ordering of Rawls' principles makes the move impermissible.

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This is not unlike the argument for class division from the 'principle of specification' that Plato develops in Chapter 3 of Republic. Plato. 1993 (380bc). Republic, (Waterfield, R, trans.) Oxford University Press: Oxford.

Rawls does not always render the difference principle exactly as it is presented here. Two sections further in to *Theory* Rawls makes an attempt to explain why it is that the decision makers in the Original Position—bound by his constraints on rationality and knowledge as they are—would come to settle upon a distribution of primary goods which conforms to the difference principle.¹³³ Rawls explains that the mutual indifference and ignorance of his representatives means that they are interested in maximising the advantages of every position in society but at each stage give priority to the least well-off. They do as they are risk-averse and are ignorant of their own economic standing and thus aware that the unfortunate least advantaged individual could be them. Once the primary goods which enable welfare for the least well-off has been maximised the mutually indifferent deciders then wish to maximise the primary goods of the next better-off representative for the same reason. The next best off individual could also be them and they have every reason, now the least advantaged individual's status has been maximised, to make the next most advantaged individual as well off as they can be. As Rawls puts it his representatives would:

'first maximise the welfare of the worst-off representative man.

Second, for equal welfare of the worst-off representative, maximise the welfare of the second worst-off representative man, and so on until the last case which is, for equal welfare of all preceding $n-1$ representatives, maximise the welfare of the best-off representative man.¹³⁴

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Rawls, J. 1999. *Theory*, p67.

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Rawls, J. 1999. *Theory*, p72. Please note that Rawls' language is actually slightly misleading here. Rawls' principle does not distribute welfare but primary goods which enable welfare. What we do with primary goods once we receive them is up to the individual. This is important as it allows Rawls' theory to avoid many of the problem of 'expenses tastes' which afflict welfarist principles of justice.

Rawls invites us to label this description of the difference principle as the 'lexical principle' and Cohen treats it as the 'canonical' formulation.¹³⁵ The lexical principle is supposed to be a more precise description of exactly what is understood by the principle of only allowing those inequalities that 'can reasonably be expected to everyone's advantage,' or, as he alternatively puts it, 'to the greatest expected benefit of the least advantaged.'¹³⁶ However, the very precision of the lexical principle invites us to imagine cases where the worst-off are not strictly affected by increasing inequalities which benefit the most advantaged. If there are two people in a society and there are 9 perfectly indivisible primary goods to share, moving from the distribution 4-4 (with 1 unclaimed primary good) to 5-4 does not advantage the individual who still receives 4 primary goods, but it does satisfy the 'lexical' or 'canonical' formulation of the difference principle. Rawls thinks that the 'connectedness' and 'close-knitness' of economies makes this distinction purely theoretical and of no practical importance.¹³⁷ In the real world, advantages afforded to one section of the society will always have an impact on the advantages afforded to others precisely because goods are almost always not indivisible and, even if they are, can be monetarised and taxed so that the advantages that flow from them are. However, it is worthy of note that when Rawls makes statements to the effect that 'the difference principle is a strongly egalitarian conception in the sense that unless there is a distribution that makes

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Cohen, G.A. *Rescuing Justice and Equality*, 2008, pp156-157.

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Rawls, J. 1999. *Theory*, p72; p266. The second reference refers to a formulation that takes into account how to fairly deal with the demands of inter-generational justice and reads and adds that the distribution must be 'consistent with the just savings principle. For the purposes of simplification this thesis shall not consider the merits of Rawls' approach to inter-generational justice.

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Rawls, J. 1999. *Theory*, p72.

both persons better off, an equal distribution is to be preferred,¹³⁸ he speaks strictly inaccurately through a conflation of his canonical and more plane language formulations.

We should also finally note that Rawls does not envision the outlined principles as governing individual behaviour but rather the institutions that individuals in a given society share. Rawls thus restricts the scope of justice to what he calls the 'basic structure.'¹³⁹ There is no ambiguity about this point, but it is important to outline it here as we will see it has been raised both in defence of Rawls against Cohen's concessionary criticism and by Cohen in the course of constructing that criticism. Rawls' restriction of the scope of justice to the basic structure is then central to the dispute under discussion. I shall cite the relevant passage in full for future reference:

'The primary subject of the principles of social justice is the basic structure of society, the arrangement of major social institutions into one scheme of cooperation... The principles of justice for institutions must not be confused with the principles which apply to individuals and their actions in particular circumstances. These two kinds of principles apply to different subjects and must be discussed separately.'¹⁴⁰

Incentives and the difference principle

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Rawls, J. 1999. Theory, p66.

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His reasons for doing so are discussed in some detail later in this chapter.

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Rawls, J. 1999. Theory, p47.

It is when discussing the 'offices' and 'positions' that are regulated by the equal opportunity principle that Rawls introduces what we recognise as 'unequalising incentives.' In the essay entitled *Justice as Fairness* Rawls writes:

'it may be, for the common advantage, [...] to attach special benefits and burdens to certain offices. Perhaps by doing so the requisite talent can be attracted to them and encouraged to give its best efforts.'¹⁴¹

We can see that the idea of paying a talented individual extra to utilise her talents in a socially useful way, as captured by the earlier example of medical professionals that we wish to work in public hospitals, would appear to meet the criteria and represents one sort of case that Rawls has in mind. Complicating matters is Rawls' decision to say that unequalising incentives might be necessary not only to attract people to such socially useful offices but also to 'encourage people to give their best efforts.' Rawls means by this some sort of system of extra incentives so that socially useful work is not only done by the talented, but done to the best of their abilities. In practical terms we can only assume he has in mind the way that pay is often linked the performance beyond the mere fulfilment of defined duties through bonuses and performance related pay. We can then say that, for Rawls, unequalising incentives are justified in two cases in which they are necessary to realise the difference principle. To put the same thing formally:

A just settlement allows unequalising incentives in order to...

- 1) Alter the talented's labour choices.
- 2) Alter the talented's work effort.

If and only if **1)** or **2)**

- 3) Are *necessary* to make maximise the advantages of the worst off.

It may appear unusual for me to have presented Rawls' incorporation of unequalising incentives into Justice as Fairness through passages in the essay that takes the same name. It is, after all, an early work which, as we have seen in the case of the formulation of the difference principle, contains some differences from the canonical *Theory*. I do so because Cohen's concessionary criticism takes particular note of the way that the incorporation is justified in that essay.¹⁴² For the sake of making Cohen's point I shall cite the passage at some length. Rawls suggests:

'If, as is quite likely, these inequalities work as incentives to draw out better efforts, *the members of this society may look upon them as concessions to human nature*: they, like us, may think people ideally should want to serve one another. But they are mutually self-interested, their acceptance of these inequalities is a merely the acceptance of the relations in which they actually stand.'¹⁴³

The justification that Rawls offers here for unequalising incentives is a familiar and seemingly conventional one. In political life we regularly come across situations where extra-incentives are afforded to the talented in order to keep their labour where we need it to be, but where we think that our having to offer those incentives is a reflection of the moral infirmities of the recipient. The near universal public disdain for the sizable bonuses for traders and executives at

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Cohen, G.A. 2008. *Rescuing Justice and Equality*, p177.

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Rawls, J. 1958. *Justice as Fairness*, p55. (Emphasis added by myself in this passage and the next two versions in order to highlight relevant difference between the three.)

state-owned banks being the most fitting contemporary example of looking upon unequalising incentives as 'concessions to human nature.' It is also a way of thinking about such policies with a long philosophical tradition. John Stuart Mill called paying the talented people more per an hour's graft than that of the standard worker a 'compromise with the selfish type of character.'¹⁴⁴ He still thought such compromises were necessary but compromises they were.

Cohen was interested in this paragraph in *Justice as Fairness*, and what we have called Rawls' conventional justification for unequalising incentives, because of the way it was altered in a near identical passage in *Theory*. Thirteen years later Rawls states:

'If, for example, these inequalities set up various incentives which succeed in eliciting more productive efforts, a person in the original position may look upon them as *necessary to cover the costs of training and to encourage effective performance*. 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 these inequalities is only an acceptance of the relations in which men stand in the circumstances of justice.'¹⁴⁵

Cohen wants to draw our attention to the fact that in 1958 Rawls called the acceptance of unequalising incentives a 'concession to human nature' but in 1971 this language disappears and is replaced with 'necessary to cover the costs

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Mill, J.S. 1909. *Principles of Political Economy*. London: Longmans, II.I.iv, p211.

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Rawls, J. 1971. *A Theory of Justice*, Harvard University Press: Cambridge, Massachusetts 151. Please note this is one of the few occasions in this thesis where I do not reference from the revised edition. My reasons for doing so will become clear in the ensuing paragraphs.

of training and to encourage effective performance.' This is the first major change between the two formulations but I would like to draw attention to another which Cohen ignores. In 1958 Rawls includes himself in the group of people who think that in an ideal world people should 'want to serve one another' by saying it is a thought 'we' have. In 1971 he instead says that it is a position that 'one' may have and leaves it ambiguous as to whether he himself holds that particular position.¹⁴⁶

Cohen speculates what may have motivated such changes. He is attracted to the 1958 phrase as it draws attention to what actually makes unequalising incentives 'necessary.' We have said that they are necessary to either **1)** attract talented people to work in socially useful offices or **2)** make those talented people work to the best of their abilities. It may very well be the case that incentives do have this effect and that we have, as of yet, no other policy tool that is as effective at doing so. However, it is true that unequalising incentives would not be necessary *if* people wanted to commit their skills to the task that would best serve justice and worked to the best of their abilities out of a pure sense of justice. Cohen suggests that this means what makes unequalising incentives necessary are 'infirmities in human nature.'¹⁴⁷ Whilst this may seem like an enormous jump in reasoning—could unequalising incentives not be a reflection of our rightful desire for freedom of occupational choice?—Cohen conjectures that, given the 1958 passage, this was at least in this stage of his intellectual development, Rawls' position too.

An important point to note is that Cohen suggests that Rawls' reason for the change of formulation is that at this point in his intellectual development he had become committed to the position that whatever was decided from the original

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The importance of this observation will reveal itself at the conclusion of this thesis.

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Cohen, G.A. 2008. *Rescuing Justice and Equality*. p178.

position *is* justice, and, as the original position necessarily assumes that men know facts such as the 'basic psychological principles' that make incentives necessary, Rawls was therefore uncomfortable calling anything that manifested into such facts 'concessions' to infirmities in human nature. Indeed we saw in the previous chapter that the construction of a decision making mechanism has to involve releasing whatever factual information to the representatives that is necessary to go about making an informed decision. Even a 'thin' veil of ignorance would be too thin without facts about human nature. According to this narrative Rawls' increasing embrace of 'constructivism,' framed as it is as a realistic Utopia, made him reticent to call vices what they were despite his earlier recognition that this was the implication of his theory. As Cohen put it:

'The 1958 sentence was dropped because it makes no sense within Rawlsian constructivism, according to which justice simply is the set of principles that an ideal choosing procedure says we should live by, all things considered, including the consideration of what people are like. It is difficult, within such a constructivist perspective, to acknowledge that a fact of human nature like selfishness shows people to be unjust.'¹⁴⁸

Necessity, incentives and the difference principle

Cohen has drawn out a point which is true for reasons independent of speculation about Rawls' intentions behind the change of formulation. The change reveals an important ambiguity as to how we are to understand the difference principle. It is one thing to say that inequalities are justified if they are *necessary* to make the worst off better off, but the implications of such a principle can only be understood if we clarify what we mean by *necessity* in this instance.

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Cohen, G.A. 2008. Rescuing Justice and Equality. p180.

We have seen that unequalising incentives are portrayed as necessary to achieve a given aim, which in this instance is to realise the difference principle. When we talk of what is necessary in the context of achieving a given aim we refer exclusively to those things which *strictly* need to be in place for us to achieve our goal. If, for example, I were to say that one needs an aeroplane to travel from England to America I would be abusing language given that it is possible to alight a ship. The fact that flying rather than sailing such distances is vastly more time efficient is irrelevant to the question of whether it is necessary to fly. If, however, I were to say that it is necessary to use an aeroplane if one wants to travel between England and America during a period in which the shipping company had cancelled their passages I would not be making the same mistake. What these simple examples show us is that when making statements about what is necessary to achieve a given goal we respond to the circumstances and available options. We have already seen that Rawls' commitment to, and conception of, ideal theory means that he is not willing to simply respond to presently feasible and available options. Instead he claims that he only wishes to accept those social facts that are demanded by human nature. In this particular instance this appears to manifest itself in the assumption that people are not motivated by 'the desire to serve one another.'

Cohen's rescue of the equality within difference principle, and his subsequent assault on the Rawlsian approach to constructing justice, starts by introducing another way of considering the way that necessity is conceived within Justice as Fairness. Cohen invites us to make the following distinction:

'...between inequalities that are necessary, apart from human choice, to make the worst off better off, and inequalities that are necessary to that end only given what some people's intentions are.'¹⁴⁹

Cohen calls the first approach an ‘agent-independent’ conception of necessity and the latter an ‘agent-relative.’ The first agent independent-independent conception of necessity would recommend what he calls a ‘strict’ interpretation of the difference principle where as the second agent-relative conception of necessity would recommend a more permissive ‘lax’ interpretation of the difference. The difference between the strict and the lax interpretations of the difference principle amounts to the equality within Justice as Fairness that Cohen’s first rescue is intended to recover.¹⁵⁰

The alleged contradiction

Cohen’s rescue of the equality within the difference principle rests upon demonstrating that its lax interpretation is in contradiction with the egalitarian judgements that underpin it and that only a strict interpretation of the difference principle will avoid such a fate. I shall now outline the argument for the alleged contradiction between the lax-interpretation of the difference principle and its egalitarian underpinnings.

The first move made Cohen is to draw our attention to an argument used by Rawls to justify why—when deciding what the principles of justice ought to be—we start from a *prima facie* assumption of equality and then, from this initial benchmark, ask whether any inequalities are ever justified and eventually move towards the difference principle.¹⁵¹ In the ‘democratic equality’ argument for the

Cohen, G.A. 2008. Rescuing Justice and Equality. p68.

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Cohen, G.A. 2008. Rescuing Justice and Equality. pp68-69.

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Cohen, G.A. Rescuing Justice and Equality, p89.

difference principle,¹⁵² Rawls goes through three alternative understandings of how our political and economic system ought to be organised given the moral conception that we have of ourselves as free and equal. The three systems are 1) natural liberty, 2) liberal equality and finally 3) democratic equality. Each system is intended to dialectically follow as a logical implication of the moral foundations of the previous system, and the contradictions between these foundations and the social and economic order.¹⁵³

The system of natural liberty is intended to denote a 'free market economy' with an 'open social system' where there are no formal barriers against talented people assuming high office.¹⁵⁴ There is, Rawls suggests, at least some important senses in which this system recognises the equality and liberty of persons. Offices are formally open to all persons affording some limited sense of equality of opportunity and the free market ensures many of our basic liberties are secured. This is an important improvement on the feudal order that preceded the birth and enactment of these ideas. However, Rawls points out the inequalities that would inevitably develop under such a system:

'There is no effort to preserve an equality, or similarity, of social conditions, except insofar as this is necessary to preserve the requisite background institutions, the initial distribution of assets for

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Rawls, J. 1999. *Theory*, pp57-73.

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Brian Barry described the three ideas as following each other 'both logically and chronologically.' Barry, B. 1989. *Theories of Justice*, p220.

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Rawls, J. 1999. *Theory*, p57.

any period of time is strongly influenced by natural and social contingencies.’¹⁵⁵

As such inequalities develop we come to see that it fails to be consistent with one of the considered moral judgements we have about social and economic systems. Rawls tells us that:

‘Intuitively, the most obvious injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by these factors [the natural and social contingencies] so arbitrary from a moral point of view.’¹⁵⁶

The next system in Rawls’ dialectic is that of liberal equality. The system of liberal equality seeks to correct the problem immanent within natural liberty by ensuring that individuals are not prevented from securing advantageous offices on the grounds of *social* contingencies and thus that the formal opening of offices for all the talents is supplemented by educational and economic institutions that make sure that any differences in opportunities are purely a result of native talent. The arbitrariness of social contingency is now properly accounted for but that of natural contingency is not. The move to democratic equality is propelled by this inconsistency. If the natural lottery of our social class is arbitrary from the moral point of view then why is the case that the natural lottery of genetic endowment is not also? After all, an individual is no more responsible for their genetics gifts or burdens as they are their social class. As Rawls says, ‘from a moral standpoint the two seem equally arbitrary.’¹⁵⁷

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Rawls, J. 1999. *Theory*, p62.

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Rawls, J. 1999. *Theory*, p62.

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The argument just traced is how Rawls establishes the initial assumption in favour of equality. It is from this egalitarian base that Rawls proceeds to argue that it would be irrational from this point of view of equality not to allow those inequalities that make the worst off representative better off.¹⁵⁸ However, the inegalitarian advantages that subsequently move us away from this initial position of equality are very clearly more readily available to those with a greater natural endowment. We have already seen that Rawls has in mind cases whereby extra incentives are afforded for talented people to occupy and perform well in important offices. Cohen invites us to accept that this is in obvious contradiction with the motivations that made us prefer a position of equality in the first instance.¹⁵⁹

If the talented chose to work as hard and as optimally as they possibly could do then the need for unequalising incentives would never develop. In this scenario the least advantaged would be made as well off as they can be without the need for incentives that take us further away from inequality. By asking for *extra* compensation to perform socially optimal tasks well the talented are using their talent to secure advantages that would not otherwise be available to them.¹⁶⁰ They seek reward for that which they themselves think is arbitrary from the moral point of view. The behaviour that makes the lax interpretation necessary is in contradiction with the moral motivations that underpin the difference principle and

Rawls, J. 1999. *Theory*, p65.

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Rawls, J. 1999. *Theory*, p45.

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Cohen, G.A. 2008. *Rescuing Justice and Equality*, pp98-101.

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Cohen, G.A. 2008. *Rescuing Justice and Equality*, p101.

thus an agent-insensitive 'strict' interpretation ought to be preferred from the point of view of justice as fairness.

Why Rawls adopts the lax rather than the strict

The previous section has demonstrated why Cohen believed that only a strict interpretation of the difference principle, insensitive to agent preference as it is, can properly be said to be consistent with the radically egalitarian moral underpinnings of Rawls' principles of Justice. I want to comment briefly on why it is not simple for a Rawlsian to simply accept Cohen's argument and move to a strict interpretation of the difference principle.

We remember that Rawls wishes for his ideal concept of justice to enable individuals to be reconciled with just institutions. If one adopts a strict agent-insensitive interpretation of the difference principle, as Cohen recommends, then one inevitably sets themselves up to be disappointed with institutions as they find them. It will not be the case, in any actual possible world, that talented people freely wish to devote their time and energies to whatever social and economic tasks happens to be optimal from the point of view of the difference principle. Talented people will want, in the absence of the correct incentive structure, to do other things. This much Cohen does not deny. This is precisely why Rawls does endow his decision makers with knowledge of social and psychological facts even when behind the veil of ignorance. Without doing so they can never be reconciled with institutions that represent what they understand to be the best of themselves. From the point of view of reconciliatory principles, the strict interpretation of the difference principle is a non-starter. The most important implication of this, from the point of view of this essay, is that if Cohen can demonstrate as he believes he can, that the lax interpretation of the difference principle will also fail to produce reconciliatory principles then he will have been successful in his internal critique of justice as fairness. Whatever Rawls does

with regards to agents' behaviour in his constructivism he will not produce the reconciliatory principles that he aspires to.

Implications of the concessionary criticism

Cohen does indeed go on to argue that the contradiction between the idea that nobody should benefit on the basis of morally arbitrary factors and the lax interpretation of the difference principle renders Rawls' principles lacking in reconciliatory force. In a moment we shall see why by returning to the concepts developed in the previous chapter of reconciliation through moral significance and reconciliation through fraternity. However, before doing so I wish to briefly introduce another critique that Cohen develops of the lax interpretation of the difference principle. Justice as Fairness as Rawls presents it depends upon a porous and indefensible notion of the basic structure.

'Porous' notion of basic structure

Cohen develops a secondary argument that Rawls' lax-interpretation of the difference principle depends upon a philosophically untenable restriction of the purview of justice.

Rawls' principles of justice are only intended to apply to the 'basic structure' of society. The basic structure is defined by Rawls as 'the way in which major social institutions distribute fundamental rights and duties and determine the division of advantages and social co-operation.'¹⁶¹ Once the basic structure is in place the effects of individual behaviour on distributive shares have no effect on whether

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Rawls, J. 1999. Theory, p 6.

we call the social system just.¹⁶² People are, in effect, allowed to behave as they like,¹⁶³ from the point of view of justice, so long as they adhere to the rules established. Importantly they can be as self-interested in their labour choices as they see fit. We have already seen the justification for such a restriction. As Rawls' principles are said to have been a product of a just process and to have shown equal concern for all in their formulation, the individual can be satisfied that in pursuing their own self-interest they still express their respect for the equality of other persons. Part of the beauty of a reconciled and well-ordered society is the individual can get on with living their lives without having to make constant calculations of the impact of their behaviour on social justice¹⁶⁴ as they know that principles and institutions have already been shaped so as to weight

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This is an interpretive claim that has been challenged by David Estlund (Estlund, D. 1998. 'Liberty, Fraternity and Equality in Cohen's Critique of Rawls' Political Philosophy,' *The Journal of Political Philosophy*, 6(1)) and Joshua Cohen (Cohen, J. 2005. 'Taking People as They Are?' *Philosophy and Public Affairs*, 30(1)). I do not wish to challenge this particular aspect of Cohen's interpretation as I think I am able to demonstrate that his concessionary charge doesn't follow through even if it is correct. However, I think he provides convincing textual evidence for his interpretive claim. (Cohen, G.A. 2008. *Rescuing Justice and Equality*, p126f) The following passage being particularly telling: 'The principles of Justice apply to the basic structure... the social system is to be designed so that the resulting distribution is just however things turn out.' Rawls, J. 1999. *Theory*, pp 242-243.

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They are of course likely to have other moral concerns in their everyday decision making. The point of such a 'division of moral labour' is not that we have no moral constraints on individual decision making but that our everyday lives are governed by non-political concepts. This point is stressed in Samuel Scheffler's close reading of Rawls on the basic structure. Scheffler, S. 2006. 'Is The Basic Structure Basic?' In (Sypnowich ed.) *The Egalitarian Conscience; Essays in Honour of G.A. Cohen*, Oxford: Oxford University Press, pp106-107.

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In *Political Liberalism* Rawls puts greater stress on our epistemic incapacity to comprehend the collective impact of our individual decision making in his justification of limiting the purview of justice to the basic structure. (Rawls, J. 1993. *Political Liberalism*, pp 267-268)

the limits and constraints on their due prerogative of self-interest. They will be remunerated, coerced by law and taxed accordingly.¹⁶⁵

Cohen argues that, despite these seemingly attractive qualities, Rawls' attempt to restrict the scope of justice to the basic structure is either too porous to offer any meaningful restriction or arbitrarily implemented if it is understood restrictively.¹⁶⁶ This is an argument that Cohen is able to make by standing on the shoulders of feminist critiques of Rawls that had previously questioned the internal coherence of Rawls' explanation of the basic structure.¹⁶⁷ In order to understand Cohen's strand of argument let us return to Rawls' definition of the basic structure:

'The way in which major social institutions distribute fundamental rights and duties and determine the division of advantages and social co-operation.'

We can divide this definition into two parts. Firstly there is the illustrative description of the sort of bodies that he is concerned with, to wit 'major social institutions,' and the relevant characteristics of that sort of institution, that they 'determine the division of advantages and social co-operation.' We assume that we are concerned with 'major social institutions' *because* they have this effect

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Rawls does imagine there to be some burdens of citizenship of a well-ordered society but they are notably weak. For example we must affirm our support for just institutions but, outside of abiding by its coercive mandate and the occasional demonstrative act such as voting, this does not have a great effect on our personal behaviour. For a discussion on the relatively weak claims that Rawls makes on citizens' personal claims see (Titelbaum, MG. 2008. 'What Would a Rawlsian Ethos of Justice Look Like' *Philosophy and Public Affairs*, 36(3)).

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Cohen, G.A. 2001. *If you're an Egalitarian, How Come You're So Rich?* pp129-131.

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Okin, S. 1989. *Justice, Gender and The Family*, Basic: New York.

and this is indeed what Rawls appears to indicate. Rawls tells us that 'the basic structure is the primary subject of justice because its effects (on life chances) are so profound and present from the start.'¹⁶⁸

Cohen's discussion of what makes unequalising incentives necessary has, however, made it clear that if we are concerned with that which has an impact on the 'distribution of advantages in social co-operation' we should be as interested in individual behaviour and choices as Rawls is in major institutions. Or, to talk about the currents and trends which are constituted by and perpetuates such behaviour, the culture and *ethos* of a society. Individual's labour choices clearly have significant impact on others' life opportunities and are thus captured by the non-illustrative definition of the basic structure, yet they are also very clearly not major social institutions, the sort of thing that Rawls has in mind when he identifies the limited scope of justice. If Rawls insists, as he does, that the scope of justice is limited to major social institutions he can only do so by abandoning his claim that citizens in his vision of a well-ordered society can be satisfied that the principles of social co-operation are organised so as to be mutually advantageous.¹⁶⁹

Reconciliation through Moral Significance

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Rawls, J. 1999. Theory, p7.

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Note that in this formulation it is irrelevant whether the basic structure is 'coercive' and individual interaction not. The point of emphasis is solely on the impact of social co-operation. This ignores the body of literature that seeks to argue that Cohen wrongly ignores the importance of this 'coercive feature' of the basic structure. (Scheffler, S, 2006. Is the Basic Structure Basic?; Murphy, L. 1999. 'Institutions and the Demands of Justice' Philosophy and Public Affairs, Vol. 27) I do so mainly for the sake of keeping the shape and focus on this thesis and a conviction that the liberty objection provides a much more fruitful line of response to Cohen than the Basic Structure objection.

The first implication of the contradictions that Cohen believes himself to have identified concerns what we have called 'reconciliation through moral significance.' In the last chapter we stated that an individual achieves 'full autonomy' and such reconciliation under Justice as Fairness:

'By arranging inequalities for reciprocal advantage and by abstaining from exploitation of the contingencies of nature and social circumstance within a framework of equal liberties, persons express their respect for one another in the very constitution of their society.'¹⁷⁰

However, we have seen that the lax interpretation is only necessary if we allow individuals to exploit the contingent natural lottery of talent. As Cohen says 'incentive seekers...exploit their contingent talent and social advantages' if they didn't there would not be any need for unequalising incentives.¹⁷¹ The individual who reconciles herself to such a society on the basis that social co-operation is organised so that advantages and disadvantages are distributed in ways that she considers morally relevant, is thus acting under a mere illusion. Rawls' principles cannot *reconcile through moral significance*, only the deceptive appearance thereof.

Fails to promote 'Fraternity'

Cohen also alleges that the contradictions he has highlighted suggest that Rawls' principles will not be able play the 'fraternal' role that Rawls assigns them.¹⁷²

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Rawls, J. 1999. Theory, p156.

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Cohen, G.A. 2008. Rescuing Justice and Equality, p76.

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Cohen, G.A. 2008. Rescuing Justice and Equality, pp77-80.

We have seen that Rawls claims that one of the 'further merits' of the difference principle is that it 'provides an interpretation of the principle of fraternity.'¹⁷³ The interpretation that the difference is supposed to express is 'the idea of not wanting to have greater advantages unless this is to benefit of others who are less well off.'¹⁷⁴ To say that this is a 'further merit' may suggest that this is a bonus feature of the theory that is incidental to its core aims. Indeed of the three great values of the French revolution, *fraternity* no longer carries the same cache as *equality* or *liberty*. Assigning fraternity secondary importance to Rawls' theory would be, however, a mistake. The 'interpretation offered' describes the attitudes of the individual towards the distributive share which they gain via the difference principle. The fostering of this 'fraternal' attitude towards the difference principle is a core component of that reconciliatory task. Fraternity, in the sense described, is a necessary feature of Rawls' principles and not a secondary concern.

Cohen interprets Rawls' claim that citizens can recognise the fraternal principle of 'not wanting to have greater advantages unless it is to the benefit of others who are less well off' as depending upon the worst-off being in a position where they are able to accept their position with dignity as 'they know that no improvements of it is possible, that they would lose under and less unequal distribution.'¹⁷⁵ Cohen believes himself to have demonstrated that they would be under an illusion.

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Rawls, J. 1999.Theory, p90.

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Rawls, J. 1999.Theory, p90.

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Cohen, G.A. 2008. Rescuing Justice and Equality, p130.

According to this line of argument, by restricting the scope of justice to major social institutions, and by hiding the role of human choice in making unequalising incentives unnecessary, Rawls' principles only mask the fact that worst off's condition is partly a result of the unjust choices of the better off. The better-off, by claiming that unequalising incentives are necessary to make the worst off better-off, do not express the desire only to claim those advantages which will make the worst off better off: worse still they demand a distributive share which is in contradiction with their own, and the supposedly well-ordered-societies' moral motivations.

The implication of Cohen's argument is that, if the individual is reconciled to their political arrangements out of the sense of fraternity that Rawls highlights, they are either deceiving themselves or are being deceived by others. They are not acting out of the reasons of their choosing but ones *heteronomous* to their own moral point of view. Fraternity, in a society governed by the principles that Rawls describes, is a barrier and not a vehicle for the living of autonomous lives. It should be noted that if Cohen's argument that the sense of fraternity and reconciliation through moral significance in Rawls' society is based upon an illusion in Rawls' well-ordered society then we have every reason to imagine that Rawls would be as perturbed by the finding as Cohen thinks that he should be. Rawls is insistent in *Theory* that in order for the self-respect felt by his citizens to be of worth it must not be the product of 'false and unfounded beliefs'¹⁷⁶ and rules out any sort of consensus about principles which is predicated upon a 'noble lie.'¹⁷⁷ Cohen is right to imagine that if his argument about the nature of the

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Rawls, J. 1999. *Theory*, p480.

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Rawls, J. 1999. *Theory*, p398f. The 'noble lie' is a reference to Plato's depiction of a just state in *The Republic* whereby the lower classes are convinced of a myth of the naturalism of social stratification in order to motivate them to work towards the common good. (Plato, 1993 *Republic*, Book III)

toleration of unequalising incentives is true he has caused direct and destructive damage to Rawls' own concept of his theory as an ideal response to the problem of Justice as Fairness.

Conclusion

We have seen that the implication of Cohen's concessionary criticism is that the method of realistic Utopia—that is ideal theory constrained by the limits of human nature—is not consummate with its reconciliatory aims. Cohen believes this to be the case because by making justice relative to infirmities in human nature Rawls is forced to offer a theory that is in contradiction with its own motivations and allow for a sphere of human selfishness which is arbitrary from the moral point of view. The result of these two contradictions is that any sense of reconciliation through fraternity or moral significance that is fostered by Rawls' principle of justice is illusory and deceptive and thus takes individuals away from the condition of acting out of principles which express their own moral reasons. That is away from Rawls' own *ideal* of autonomy between free and equal persons.

For the purposes of this chapter I have accepted Cohen's interpretive claims so that I could present his assault on realistically Utopian constructivism with its fullest force. The next chapter will look at the most important challenge made to Cohen's concessionary criticism of Justice as Fairness: the 'liberty objection.' It is the first step in our defence of the ideality of Rawls' realistic Utopia from a critique that challenges that method's capacity to produce the ideal principles that are necessary for us to live autonomous lives.

Chapter 4: The liberty objection

In the previous section we came across one prominent criticism of Cohen's concessionary criticism, the basic structure objection, but concluded that Cohen had shown that—from the point of view of the ideal of Justice as Fairness—it was arbitrary to restrict the scope of justice to major social institutions. In short, the basic structure objection is a poor candidate to rescue the ideality of justice of fairness and instead highlights a potential weakness in Rawls' theory.

Other than the basic structure objection the most common line of response to Cohen's argument is what is conventionally called the 'liberty objection.'¹⁷⁸ There are many different varieties of the liberty objection¹⁷⁹ but they are usefully grouped together on the basis of their common belief that: *Cohen misconstrues the behaviour of the talented as a moral infirmity when it is in fact a legitimate exercising of their freedom to pursue their own plan for life.* This is usually intended by its proponents as an interpretive or exegetical claim about how we should understand self-interested behaviour in the labour market, and elsewhere in a well-ordered society, from the 'point of view' of Justice as Fairness. However, the stakes are higher than this. If the liberty objection is true—and Rawls' treatment of self-interested choices is consistent with the moral convictions that justice is supposed to express—then Cohen is wrong to characterise Justice as

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See Williams A, 1998, 'Incentives, Inequality and Publicity,' *Philosophy and Public Affairs*, 27(3) p228.

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Perhaps the clearest expression of the liberty objection can be found in the examples offered by Norman Daniels of agents acting out of legitimate sympathies for personal friends or relatives in a way that undermines a strict interpretation of the difference principle but nevertheless conforms to what a Rawlsian believes we are due from each other. See Daniels, N. 'Democratic Equality' in (Freeman, S, Ed.) *The Cambridge Companion to Rawls*, Cambridge University Press: Cambridge p266. The same view is also put forward by Samuel Scheffler' Scheffler, S. 2006. *Is the Basic Structure Basic?*; and Estlund. D. 1998. *Liberty, Equality and Fraternity in Cohen's Critique of Rawls*; and Titelbaum. M.G. 2008. *What Would a Rawlsian Ethos of Justice Look Like.*

Fairness as a concessionary or non-ideal theory. The interpretive claim then leads to the substantial claim that *the treatment of self-interest interested behaviour in the labour market in Justice as Fairness is ideal*.

The liberty objection is, I believe, correct in both its exegetical and substantive claims. It is how we can effectively demonstrate Rawls' fidelity to ideal theory. However its proponents have overstated the degree of freedom of occupational choice that is secured by the first principle of justice, and, partly as a result, the objection has as-of-yet not been levied in such a way that refutes Cohen's concessionary criticism. The interpretive truth that Rawls prioritises the 'basic liberties' necessary to pursue one's life plans over the difference principle in his theory of justice is not sufficient in itself to overcome Cohen's suggestion that the well-ordered-society Rawls describes is a prudential compromise between Justice and other values.

This chapter is written to support that critical claim by showing that, **1)** from the point of view of Justice as Fairness, Rawls' support for freedom of occupational choice has to be far more limited than is usually supposed by proponents of the liberty objection and that, **2)** the freedom of occupational choice that is guaranteed by the first principle is not sufficient to justify tolerance of unequalising incentives. The priority of basic liberties, and the identification of a measure of freedom of occupational choice as a basic liberty, does not do this in and of itself. Therefore the liberty objection, as it has thus far been presented in the literature, is not sufficient to overcome the concessionary criticism.

The liberty objection

To frame the liberty objection we shall turn to a passage from the 'democratic equality argument,' where Rawls argues that the difference principle allows individuals to express their respect for one another. We do so in light of Cohen's claim that Rawls' vision of a well-ordered-society does not express such

respect—and thus does not carry the reconciliatory force that the project of Justice as Fairness demands—because it violates its self-professed moral motivation to eliminate the effects of arbitrary advantages. I would like to highlight a qualification made in the following passage that was noticed by M.G. Titelbaum in his essay, which stands as an exemplary articulation of the liberty objection, '*What Would a Rawlsian Ethos of Justice Look Like?*':

'By arranging inequalities for reciprocal advantage and by abstaining from exploitation of the contingencies of nature and social circumstance *within a framework of equal liberties*, persons express their respect for one another in the very constitution of their society.'¹⁸⁰

Titelbaum draws our attention to the fact that even in the passages where Rawls stresses the significance of the moral irrelevance of contingencies of nature, the countering of their effects is only said to express respect for one another 'within a framework of equal liberties.' This is important because it suggests that, for Rawls, the moral demand that we neutralise the arbitrary effects of native endowments does not take force until *after* our demand for basic liberties has been taken into account. Titelbaum uses this observation to argue that our moral motivation to eliminate the effects of native endowments *ought* to be fettered by our desire allow others to exercise their basic liberties. That is to say that an ethos that takes into account our desire for liberties to be prioritised over distributive shares better expresses the convictions we hold about justice, from the point of view of Justice as Fairness. Titelbaum has used the cited passage to ask a question central to the force of the liberty objection: *if ethos is part of the basic structure, should it not be characterised by the same priority rules as the rest of it?*

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Rawls, J 1999. A Theory of Justice, p156. The emphasis is not in the original text. Its importance was first stressed by

Titelbaum, MG. 2008. What Would a Rawlsian Ethos of Justice Look Like, p312.

It is important to note that Titelbaum's argument does not challenge Cohen's attempt to include ethos as a constituent element of the basic structure. This is because the liberty objection does not depend upon the various arguments put forward for why it is inappropriate to include ethos as a component of the basic structure. It instead makes two moves. It reminds us of the lexical priority of the equal basic liberty principle with regards to the difference principle and then seeks to implicitly suggest that a degree of freedom of occupational choice is one such basic liberty. By demonstrating that Rawls believes his citizens have this lexical priority in mind even when they seek to eliminate the effects of arbitrary advantage, Titelbaum is able to conclude that Cohen's strict egalitarian ethos would not capture Rawls' citizens' considered moral judgements about what Justice demands: only a 'liberal ethos' which celebrates freedom of occupational choice would be able to do that.

We can present the argument formally as follows:

- 1) Ethos is part of the basic structure.
 - 2) Rawls affords the equal basic liberties principle priority over the difference principle in governing the basic structure.
 - 3) Freedom of occupational choice is a basic liberty.
- Ergo
- 4) The ethos of a just society would respect and celebrate the exercising of freedom of occupational choice.

Titelbaum concludes that a just society would be governed by a liberal ethos that respects freedom of occupational choice as having priority over the difference principle: 'All members of the just society, including the worst-off, understand and

accept the values that underlie the basic liberties' lexical priority.¹⁸¹ The conclusion ensures that, from the point of view of Justice as Fairness, the inequalities generated by unequalising incentives can be seen as being necessary in order to coherently institute the liberty demanded by the ideal of justice rather than a compromise between justice and regrettable self-interest or human selfishness. The question of 'moral infirmities' presented by Cohen is, for the raisers of the liberty objection, a rhetorical flourish to an argument which depends upon an unsupportable interpretation of the moral convictions that Justice as Fairness is supposed to express.

The examples offered by Norman Daniels, in his essay *Democratic Equality: Rawls' Complex Egalitarianism*, best capture the intuitive thought behind this technical point. Daniels offers a series of examples of where we might think unequalising incentives necessary to attract talented people to socially useful tasks given personal circumstances that we are intuitively more sympathetic towards than the cases that Cohen presents. Take his example of Ben, a talented individual who, if he were to put his talents to the most efficient use, could greatly benefit the worst off:

'Ben supports his family modestly through an ad agency that he runs from his home. Being self-employed at home allows him... to give personal care for his elderly mothers. He would be willing to work outside of his home... (but) only for an incentive that is much larger than is needed simply to cover the costs of care for his mother.'¹⁸²

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Titelbaum, M.G. 2008. What Would a Rawlsian Ethos of Justice Look Like, p312.

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Daniels. N. 2003. Democratic Equality, p266.

Ben's personal circumstances highlight one of the reasons why we might think the freedom to dispose of our labour power as we see fit is a basic liberty. The way that we spend our productive time, and the amount of time and effort we put into it, is a vitally important decision in carrying out whatever our life plans are. If we want to be good sons, or any other role that is not a cog in the machine of a just society, then it is a freedom to which we afford high priority. I shall finish with one final example from Daniels which rests upon a similar insight and shall prove important later in the essay. Sophie's preferred role is not that of a good daughter but that of an outstanding conceptual artist. However, the talent that she has for conceptual art is not enjoyed by many and could, from the point of view of making the worst off better off, be better disposed producing commercial art. Perhaps she could be a children's illustrator or a Hollywood costume designer and make a great number of people happier. Sophie's conceptual art, is, however, extremely important to her. Unless she receives a large amount of compensation allowing her to invest in expensive materials to work upon in her spare time, she would always prefer to dispose of her labour power in a way that is sub-optimal from the point of view of the difference principle. Titelbaum and Daniels tell us that a well-ordered Rawlsian society would not look upon paying either Sophie or Ben as a compromise between justice and the unfortunate infirmities of Ben and Sophie's character, but as a respect of the basic liberty of freedom of occupational choice that every citizen knows they would demand from a position of fairness.

The exegetical claim of the liberty objection

An essential move in the liberty objection is the third premise in the formal representation above, which offers freedom of occupational choice as the sort of 'basic' liberty that Rawls has in mind as being guaranteed by his first principle of justice. If freedom of occupational choice is not such a basic liberty, then the fact that our moral convictions demand that we prioritise basic liberties would not lead us to automatically accepting the outcome of free choices in the labour market as

being affirmed by our sense of justice. The labour market choices that make unequalising incentives necessary would be under the purview of justice and Cohen's strict application of the difference principle the correct interpretation.

This is a real danger for raisers of the liberty objection because in the few moments of *Theory* where Rawls offers an illustration of what he means by a basic liberty he does not explicitly include freedom of occupational choice. In his most extensive list¹⁸³ he includes; the right to vote and to hold public office; freedom of speech and assembly; liberty of conscience and freedom of thought; freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and freedom from arrest and seizure as defined by the concept of the rule of law. If freedom of occupational choice is to be shown to be a basic liberty, raisers of the liberty objection will have to show either that Rawls made a mistake in leaving it off of his list or that it is covered, in some ways, by the liberties that he has listed. They are going to have to get creative to demonstrate the soundness of their interpretation.

To present the case that freedom of occupational choice is a basic liberty we should begin by remembering precisely what Rawls' first principle says would be demanded from a position of fairness. Rawls' first principle of justice states, 'each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.' There are two features of the principle that need to be explained. Firstly it seeks to maximise basic liberties, the more of them the better, and secondly this maximisation ceases once it is no longer compatible with a 'similar scheme for others.' We

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Rawls, J. 1999. *Theory*, p53.

shall call this the *egalitarian proviso*.¹⁸⁴ I shall begin by briefly outlining the definition of rights and liberties that Rawls is using in his first principle before turning to a passage in *Political Liberalism* to explain why basic liberties would be prioritised and why freedom of occupational choice might be considered a basic liberty.

The first thing to note is that Rawls adopts MacCallum's triadic conception of freedom¹⁸⁵ whereby every claim about liberty is constituted by a relationship between three items: agents (x), their aims or intentions (z) and potential restrictions or limitations (y) that are in place which prevent these agents from carrying out their intentions. If a claim is properly about liberty then it can be broken down into the form x is (un)free from y to do z. Rawls states that in adopting this conception he hopes to 'bypass the dispute' over the meaning of liberty,¹⁸⁶ but he does make a noteworthy intervention in stating that he does not treat the absence of means or the capability of exercising a freedom as a loss of liberty but instead as a diminishing of worth of the liberty.¹⁸⁷ For example, if there are no restrictions in place that prevent me from travelling on the train from Oxford to London, but I do not have the means of buying a ticket due to my financial condition, Rawls thinks it appropriate to say that I lack the means of

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To my knowledge this is a new term. The creation of new jargon shall be justified later in this chapter where I shall make it clear why it is useful to use a term than reminds us of John Locke's proviso over the right to claim property.

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MacCallum, GC. 1967. 'Negative and Positive Freedom,' *The Philosophical Review*, 76(3).

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Rawls, J. 1999. *Theory*, p176. By which he means to say he wishes to take no stance in Isaiah Berlin's claim that there are two conceptions of liberty, positive and negative, which either focus on what we are free to do (z) or the absence of interferences (y) respectively.

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Rawls, J. 1999. *Theory*, p179.

exercising my liberty to do so. It is his second principle of justice that distributes our means of exercising liberties whereas the first concentrates solely on the rules that govern the liberties themselves.

The notion of rules that govern liberties, that it to say the institution of rights, brings us to our second point of note. Rawls has a Hohfeldian understanding of the way in which liberties can be formally instituted as rights; he understands the rules that govern liberties to generate duties and to delineate where there is an absence of such duties.¹⁸⁸ This conforms to Wesley Hohfeld's classic account of the structure of rights,¹⁸⁹ whereby rights either describe 'privileges,' x's freedom from duties to do some y, or 'claims,' the right of x to ask y to respect their duty to do z. When Rawls seeks to explain what he has in mind by basic liberties he describes one basic liberty, the right to freedom of conscience, in terms which can clearly be identified as a set of privileges and claims: first there is the privilege, 'individual have this basic liberty when they are free to pursue their moral, philosophical or religious interests without legal restrictions requiring them to engage or not engage in any particular form of religious practice,' and then secondly there is the claim, 'other men have a legal duty not to interfere.'¹⁹⁰

Hohfeldian claims and privileges structure the arrangement of duties that constitute our rights. Rights are what are necessary to institutionally guarantee liberties. It follows that the liberties secured behind the veil of ignorance are, at root, a demand for a particular set of claims and privileges from and over one

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Rawls, J. 1999. *Theory*, p176.

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Hohfeld, W. 1919. *Fundamental Legal Conceptions*, W. Cook (ed.) New York University Press: New York. This is still regarded as the classic taxonomy of rights language.

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Rawls, J. 1999. *Theory*, p177.

another. The question of why Rawls supports the equal basic liberty principle is then really the question of why he thinks that a particular set of claims and privileges would be chosen from behind the veil of ignorance. Why does he support the distribution that he does?

To answer the question of why Rawls supports the distribution of privileges and claims that he does, I invite you to accept—as we have shown it is a belief held by Rawls—that one of the primary goals of a political arrangement is to allow individuals to recognise that their desire to pursue their own conception of the good is respected by others. It follows that the rights that would be demanded would, first and foremost, be those which allow us to form and voice our own opinions about a good life. This naturally includes political concerns about the institutions that we bring into to being to mediate and pursue our shared common endeavours. Without this, whatever concern is shown for our welfare or good does not have the quality of respecting our capacity to form and revise our own conception of the good. That is why Rawls says that 'liberty of conscience' and 'freedom of association' are necessary features of the scheme of basic liberties that we would secure in a position of fairness. In Rawls' own words they are needed to 'secure the full and effective application of citizens' powers of deliberative reason to their forming, revising and rationally pursuing a conception of the good.'¹⁹¹

Rawls goes on to argue in the same passage that the 'liberty and the integrity of the person' is necessary if our freedom of conscience and association are to be guaranteed. The thought here is that the right to associate and develop your own mind is unrealisable if other individual or groups have too stronger claims over you. It is necessary to be afforded the claim of a degree of private space and the

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privilege of time devoted to your own ends, if we are to secure, develop and revise our own conception of the good. It is the passage in *Political Liberalism* where Rawls discusses the liberty and integrity of the person that has been used as the basis for arguing that he believed freedom of occupational choice to be a basic liberty.¹⁹² The supporting evidence is offered in a parenthesis which seeks to explain what Rawls has in mind by liberty and integrity of the person. Given its importance to the exegetical soundness of the liberty objection I shall cite it in full. Rawls states that that liberty and integrity of the person is, 'violated, for example, by slavery and serfdom, and by the denial of freedom of movement and occupation.'¹⁹³ We might also add in support of the case of the liberty objection that freedom of occupational choice is mentioned in the same context—that is in conjunction with freedom of movement—in an essay clarifying the content of primary goods which was published between *Theory* and *Political Liberalism*.¹⁹⁴ As Rawls uncritically references this essay in *Political Liberalism* as offering his settled opinion on the basic liberties we shall treat the two accounts as perfectly consistent.¹⁹⁵

It should be noted that the passage in *Political Liberalism* has what appears to be a far more extensive understanding of what the integrity of the person demands than the relevant passage in *Theory*, where the integrity of the person is offered as being constituted by the absence of 'psychological assault, physical assault

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Williams, A. 1998. Incentives, Inequality and Publicity, p228.

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Rawls, J. 1993. *Political Liberalism*, p335.

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Rawls, J. 1982. 'Social Unity and Primary Goods' in (Sen, A. and Williams, B. eds.) *Utilitarianism and Beyond*, Cambridge University Press: Cambridge, p162.

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Rawls, J. 1993. *Political Liberalism*, p309.

and dismemberment.¹⁹⁶ If proponents of the liberty objection wish for their interpretation of Justice as Fairness to include the articulation offered in *Theory* they must ask us to accept that this revision represents a clarification rather than a modification of Rawls' view. They ask us to believe that freedom of occupational choice was always, for Rawls, the sort of freedom necessary to secure the integrity of the person that itself is necessary to develop and revise our own conception of the good.

To set out the exegetical support of the liberty objection formally we can say that Rawls appears to argue in *Political Liberalism*—which is taken as indicative of the wider view of Justice as Fairness—that freedom of occupational choice is a necessary feature of a just scheme of basic liberties through the following steps:

- 1) Basic liberties are those liberties that are necessary for us to pursue our own conception of the good. Justice affords priority to maximising them.
 - 2) Freedom of conscience and association are necessary for the individual to be able to pursue their own conception of the good.
 - 3) Bodily integrity is necessary to guarantee freedom of association and conscience.
 - 4) Freedom of occupational choice is a necessary feature of bodily integrity.
- Ergo
- 5) Freedom of occupational choice is one of the basic liberties that justice affords lexical priority to.

The argument presented is valid and I do not wish to challenge that Rawls shows a commitment to each of the premises and the conclusion: not least because I

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Rawls, J. 1999. *Theory*, p53.

have provided here the textual support for each of them. There is undoubtedly an exegetical case to be made for the liberty objection despite the fact that that freedom of occupational choice is not listed as a basic liberty in *Theory*.

I would like to conclude the section by adding another piece of textual mining that proponents of the liberty objection have found useful. The artefact under consideration here is not, however, from the pen of Rawls but Cohen. In the *Tanner Lectures* explanation of his arguments against unequalising incentives Cohen says that ‘only an extreme moral rigorist could deny that every *person has a right to pursue self-interest to some reasonable extent*.’¹⁹⁷ This comment, with its language of moral rights, has been used to suggest that Cohen himself believes that justice demands we take into account some sort of basic liberty to be self-interested before making demands on the contribution we make to a distributive scheme.¹⁹⁸ Cohen does not offer himself as what he called an ‘extreme moral rigorist.’ Indeed in later works he is at pains to deny it despite having been often read in that way,¹⁹⁹ but instead argues that it is irrelevant to his critique of unequalising incentives since **1)** he is interested, in part, in the way that incentives are justified in actual politics where incentives are used to support what Cohen regards to be palpably unreasonable demands of self-interest, and that **2)** Rawls’ incentives argument is ‘supposed to be quite general. It should therefore apply no matter how badly off the badly off are, both absolutely and

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Cohen, G.A. 1991. *Incentives, Inequality and Community*, p302. The emphasis is his. His support for what is sometimes called an agent centred-prerogative is also affirmed in Cohen, G.A. 2000, *If You’re an Egalitarian, How Come You Are so Rich?*, p206f.

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For example, Scheffler, S. *Is the Basic Structure Basic?*, 2006. pp 119-120; Daniels, N. 2009. *Democratic Equality*, p265.

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Cohen, G.A. 2008. *Rescuing Justice and Equality*, p10.

relatively to the well off. Accordingly, it is methodologically proper to focus on particularly dramatic cases of its application.²⁰⁰

The first point is, on its own, irrelevant from the point of view of ideal theory, which is the focus of this thesis. Cohen's arguments against unequalising incentives are supposed to describe not only what is wrong with the way that Rawls' principles are used, but why it fails to capture the proper demands of the *ideal* of justice. Cohen's plausible claims about the unreasonableness of arguments made in actual political communities do not help him make his wider, and philosophically more important, point about the depiction of an ideal community.

The second point is, however, much stronger. Rawls does not say that unequalising incentives are to be supported if they are necessary to make the worst off better off in the context of a prerogative of 'reasonable self-interest.' As we have already outlined he instead says they are necessary to attract people to **a)** socially useful tasks and **b)** to work to the best of their ability. Cohen's point is that it could be the case that unequalising incentives are necessary to realise the difference principle in response to either a) or b), *because* the members of a political community demand to have a personal prerogative that goes beyond the reasonable. If this is the case then Rawls' grounds for delineating the degree of self-interested that a just society ought to permit would fail to track his own ideal-societies understanding of the demands of justice.

Two reasons to be suspicious of the exegetical case

Having shown the textual evidence for the interpretation of reasonably self-interested behaviour in the labour market offered by raisers of the liberty

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Cohen, G.A. 1991. Incentives, Inequality and Community, p303.

objection we are still left with two important questions that should make us suspicious of its soundness.

1) Precisely which privileges and claims are guaranteed under the banner of 'freedom of occupational choice?' If Rawls means something like the claim to not be interfered with in the disposal of our labour power, then it is clear why unequalising incentives would be necessary, from the point of view of justice, to attract talented to do socially useful tasks. It is a common feature of jobs which individuals find personally rewarding that they involve small scale human interaction. We have the opportunity to see the worth of our labour to other persons in the flesh, and we can develop our skills and talents to suit their specific needs and desires. Conversely there are many socially useful tasks that lack these personally rewarding factors, for example much bureaucratic work relies upon a sense of scale which, whilst helping a greater number of people, removes the worker from a direct observation of that good. The result is that socially useful tasks often require unequalising incentives to attract talented people. Daniels' earlier example of Sophie the conceptual artist, who can do more good as a commercial artist, is an illustration of this tendency. The implication is that, given the freedom to dispose our labour power as we see fit, individuals will often enough prefer to do socially suboptimal tasks over socially useful tasks to make unequalising incentives necessary.

Rawls might, however, have something far more restrictive in mind than the freedom to dispose our labour power as we see fit. Freedom of occupational choice might denote something like the following: the right of the individual to end a contract with an employer and chose a new place of employment but with the *proviso* that the individual has to dispose of their labour power in a way that is close to being socially optimal. I do not mean here that the individual would have to calculate in their mind how it is that they themselves can most benefit the least well off. What I have in mind, however, is an institutional design whereby there are socially productive bodies which individuals have some obligations to support

with some their labour power. This qualification ensures that the scope of justice remains at the level of the basic structure as Rawls clearly intended, however problematic that may be.

If Rawls has such a restricted understanding of freedom of occupational choice in mind then it is difficult to see why unequalising incentives would be necessary for a social system to tend towards making the worst off better off. If, in a well-ordered society individuals have to put their labour towards socially useful tasks then the buyers of socially useful labour are in a considerably more powerful position than one whereby individuals are free to dispose of their labour power as they see fit. To wit, they are not in competition with non-socially useful labour, and a life time of socially sub-optimal labour, as that choice is barred from citizens by right. The socially useful employer of artistic skills does not have to compete with the attractions of a lifetime of personally fulfilling but socially unwanted artistic endeavour.

I raise this possibility because if we look at Rawls' description of one of the two possible varieties of a well-ordered society—'liberal socialism'²⁰¹—we see that the arrangements of privileges and claims that it guarantees in the labour market far closer resembles this second, more restrictive, interpretation of freedom of occupational choice, than the first. This manifestation of a well-ordered society is described as guaranteeing 'free-choice of occupation'²⁰² whilst systematically denying the freedom to dispose of our labour power without being subject to any interferences, and imparting the duty on their citizens to invest their labour power

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For Rawls' most comprehensive description of what just social institutions might look like see Rawls, J. 2003. 'Part IV. Institutions of a Just Basic Structure,' in *Justice as Fairness: A Restatement*, pp135-180. The other form of just social institution is a Property-Owning Democracy.

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Rawls, J. 2003. *Justice as Fairness: A Restatement*. Harvard University Press: Cambridge Massachusetts, p138.

in socially useful ways. Our suspicion against the Liberal Objection is this: *if the ideal of liberal socialism is in accordance with the rights that we are entitled to demand in the labour market, then the more permissive interpretation supported by raisers of the liberty objection must go beyond what justice demands.*

What Rawls precisely means by liberal socialism is admittedly hard to deduce, since his descriptions of it amount to a series of brief and tantalising hints that there is a potentially just alternative to property-owning-democracy.²⁰³ However, he does tell us that his vision is similar to that of John Roemer's depiction of ideal market socialist societies,²⁰⁴ and offers that whilst private ownership of the means of production would be prohibited 'economic power is dispersed among firms, as when, for example, a firm's direction and management is elected by, if not directly in the hands of, its own workforce.'²⁰⁵ Liberal socialism differs from command-style economies not by allowing private-ownership of the means of production, but by allowing markets and prices, within a framework of collective-ownership of the means of production, to determine production decisions. This includes a market in labour whereby an individual can sell their labour power to one of the collectively-owned firms. We are then able to decipher a vision of a society whereby there are defined economic institutions that we have to invest our labour power in—since private ownership of the means of production is banned there is no other way to secure one's living—and thus our freedom of occupational choice, which Rawls grants this society as securing, amounts to the capacity to

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As well as the passage in *Justice as Fairness* there is also a (very) brief discussion in Rawls' account of Marx in his *Lectures in the History of Political Philosophy* (Rawls, J. 2008. *Lectures*, pp 321-323.) and in the 1999 preface to *Theory*: Rawls, J. 1999 *A Theory of Justice*, xv.

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Rawls, J. 2008. *Lectures*, p323; Roemer J. 1994. *Liberal Socialism*, Harvard University Press: Cambridge, Massachusetts.

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Rawls, J. 1993. *Justice as Fairness: A Restatement*. p138.

move our labour between these defined, socially productive, institutions. As Rawls is willing to call such a restrictive set of claims a just set of demands upon one another, we have reason to be suspicious that he believes we have a right to dispose of our labour power without interferences or any sort of exemption from socially useful tasks.

2) We also have the lingering question of why it is that Rawls does not include freedom of occupational choice in his list of basic liberties in *Theory*. Was this, as raisers of the liberty objection must implicitly suggest, an oversight; or alternatively was it symptomatic of Justice as Fairness' ambiguous response towards the freedoms usually associated with that term?

A critique of the exegetical case

In answering the two questions from the previous section I wish to demonstrate that an analysis of Rawls first principle proves our suspicions right, the freedom of occupational choice that Rawls has in mind cannot be of the quality that supporters of the liberty objection wish it to be. To say the same thing more precisely, it cannot provide a good reason for requiring unequalising incentives. This is because the freedom of occupational choice that Rawls identifies in the *Political Liberalism* passage, and more generally from the point of view of Justice as Fairness, must be extremely limited. Most importantly, it cannot take the form of the privilege to be free from the 'duty to serve others,' in productive life or the claim that others respect your 'right to dispose of your labour as you see fit'. To make either of these demands, would, I shall demonstrate, inappropriately prioritise the good of the talented over that of the untalented and thus would not be accepted in the original position

To make this claim we move on from why Rawls thinks we would seek to maximise basic liberties and on to why he thinks we would only do so to the extent that a similar scheme is extendable to others. We seek to explain the

rationale behind what I, self-consciously channelling the spirit of Locke, call Rawls' *egalitarian proviso*.

In his *Two Treatises of Government*, John Locke seeks to offer a moral justification for the institution of private property. He plausibly claims that without being able to make what we have called Hohfeldian claims over the products of nature, that is to assert that others have a duty not to interfere with what we grasp from nature as our own, it would be impossible for the individual to sustain himself or live a good life.²⁰⁶ We have then a *prima facie* right to claim products of nature, or the natural right to initial acquisition, which Locke famously imagines to be exercised by a process of mixing our labour with earthly goods. This *prima facie* right does, however, face one distinct difficulty. The products of nature are, before we have mixed our labour with them, unfortunately finite. If each person had a right to make innumerable Hohfeldian claims over natural resources there will come a point whereby there is no nature left for others to mix their labour with, thus denying them the possibility of the same claim rights which are necessary for them to sustain themselves. Locke concludes that if the right to initial acquisition is to be instituted in a way that respects the lives of all, then it must carry *provisos*. Most importantly he states that for that for an initial acquisition is to be just then the acquirer must leave 'enough and as good' for others.²⁰⁷ Locke's right to initial acquisition takes the form of two claims once the legitimate demands of other persons is taken into account:

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Locke's precise argument is that it would be impossible for us to exercise the right to life that is given to us by God. This brings in the further complication that, for Locke, we not only have a right to the resources necessary for life but a duty- to our creator- to take advantage of that right. I shall, however, seek to offer Locke's argument free of its theological premises. Locke scholars are by no means certain that this is possible, but I am not trying to offer an articulation of Locke's prevailing insight into the structure of normative political problems rather than a faithful interpretation.

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Locke J. 1998(1689). *Two Treatises of Government* (Laslett, P. ed.) Cambridge University Press: Cambridge, C. 5 , S. 33.

- 1) A has a claim over 'property they have mixed their labour with,' which B has a duty not to interfere with.

This right however is trumped by the following *proviso*:

- 2) A has a duty to B not to claim property if by doing so they do not leave 'enough and as good' for B.

The second claim, that made by B over A, is an explicit denial of A having the unconditional privilege to acquire nature as they see fit. It is a necessary *proviso* in light of what are not co-incidentally two of Rawls' circumstances of justice, relative scarcity and the equality of persons.

Rawls' *egalitarian proviso* of his basic liberties principle exists for exactly the same logical reason as Locke's *proviso*. It has to exist if equal concern is to be shown to the interests of each individual subject. Liberties, like property claims, have the quality of being the sort of thing that when demanded by separate persons have the habit of clashing. For example, if we were all to demand the liberty to drive motor vehicles wherever we chose we would end up in a situation where there are so many crashes and accidents that no one would be able to drive without being severely interfered with by another motorist. The 'freedom to drive where we want' is then not a liberty that is compatible with being extended across society. The 'freedom to drive where you want' is what Hillel Steiner has called 'impossible' with itself. If we were to afford it the status of right, we would have 'no principled grounds for a judgement between conflicting claims'²⁰⁸ when the inevitable collisions occur. In the absence of some form of distributive principle we can only imagine that those with the largest and strongest cars, and those with the least concern for the safety of others, would be better able to get

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Steiner H. 1987. 'Capitalism, Justice and Equal Starts,' *Social Philosophy and Policy*, 11(5), p62.

about. The interests and plans of one subsection of society would be prioritised over others on entirely arbitrary grounds. Liberties that govern our movement, as with most liberties including that of claiming property, must be distributed if we are to be afforded the equal opportunity to pursue our life plans. Rawls makes this general point about liberties point quite clearly in *Theory*. Unequal liberties are to be rejected by his citizens as they suggest that some individuals are more important than others and would undermine the moral equality of persons that is necessary to have a fraternal community whereby its citizens can stand with self-respect. Given its importance to my argument I shall cite the relevant passage at length:

‘No one is inclined...to acknowledge less than equal liberty...it would have the effect of publicly establishing their inferiority as defined by the basic structure of society. This subordinate ranking in public life would indeed be humiliating and destructive of self-esteem.’²⁰⁹

I have highlighted two cases where distributing liberties is essential to showing equal concern for others—Locke’s necessary *proviso* and the case of an impossible privilege—because they capture problems with natural interpretations of what is meant by freedom of occupational choice. The liberty to dispose of your labour time as you see fit—interpreted either as a claim over others that they do not interfere with how you use your labour, or as a series of privileges from the duties of socially useful labour, serving others, boring and mundane tasks, etc.—is a mutually impossible freedom.

If these privileges or claims were to be extended to everyone in society then a society would not have the means to support and sustain those very same privileges and claims. That is because as privileges and claims they depend a

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Rawls, J. 1999. *Theory*, p477.

productive system which they assert the right not to contribute towards. The result is that these privileges are incompatible with being extended across society. As boring and menial tasks exist in any productive system, if one person has the privilege of being free from menial and boring tasks at work it is necessarily the case that someone else is doing them. If an individual asserts that their freedom of occupational choice means that society cannot force them to do menial and boring labour, they are demanding a privilege that demands their good be placed over that of others. The claim of non-interference with your labour power, of course, implicitly contains the demand for such privileges since it contains the right to choose to use your labour power, if you happen to be talented enough to be granted such a privilege, in ways that do not bore you. To the extent that Norman Daniels' Sophie made her demand to be paid more to be a commercial, rather than conceptual, artist on the grounds that she finds the former job menial and dull she demanded that uneven payment on the basis of a privilege that simply is not extendable across society. It is not, and cannot be, an expression of her Rawlsian basic liberties.

It is worthy of note that Cohen makes a very similar point in an entirely different context. In an early response to Robert Nozick's conception of self-ownership, his 1977, *How Patterns Preserve Liberty*, Cohen discusses what we are to make of the claim that 'every man has a natural right not to work for any other man.'²¹⁰ Cohen accepts that under a capitalist system you might formally have a set of rules which extends this right, but the necessity of production means that, if it is enjoyed by some, then it must be the case that it is not enjoyed by others. As he puts it, 'some can live without subordinating themselves, but most cannot.'²¹¹ We have used his insight to confirm our suspicions of the interpretive case of the

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Cohen, G.A. 1977. 'Robert Nozick and Wilt Chamberlain: How Patterns Preserve Liberty', *Erkenntnis*, 11, p18.

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Cohen. G.A. 1977. *How Patterns Preserve Liberty*, p8.

liberty objection: it rests upon an understanding of freedom of occupational choice that cannot be demanded in a way that shows equal concern for the good of others.

Given the amount of restrictions that Rawls must place on freedom of occupational choice we speculate that its non-inclusion in the list of basic liberties during *Theory* was not an oversight on the part of Rawls but a recognition that, from the point of view of Justice as Fairness, many of the privileges and claims associated with that term are simply unjust. Indeed we shall conclude this passage on the textual case for the liberty objection by noting that even in the passage in *Political Liberalism* that it is included in, it does so in a parenthesis alongside the freedom to be exempt from slavery and serfdom.²¹² In light of Rawls' lack of explicit support for a more extensive interpretation of freedom of occupational choice, and the logic of his own egalitarian proviso; it seems far more natural to interpret this positioning as significant. By freedom of occupational choice Rawls likely means little more than non-slavery or serfdom, i.e. the ability to sell your labour power rather than having it owned by another agent. We can see that every citizen has an effective interest in not being locked into a permanent contract with other persons.²¹³ Every individual must, after all, be able to revise their conception of the good over time. I might wish to live in one town at one point in my life, and a different one in another. I might wish to work nights when I am young in order to study during the day but desire to work

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A reminder that the parenthesis reads as follows: 'violated, for example, by slavery and serfdom, and by the denial of freedom of movement and occupation.' Rawls, J. 1993. *Political Liberalism*, p335.

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We ought to note two things in support of our case. 1) It is a traditional liberal argument against slavery that the finality of the contract that makes it illegitimate. 2) In *Social Unity and Primary Goods* Rawls suggests that it is finality that makes freedom of occupational choice important. Rawls, J. 1982. 'Social Unity and Primary Goods,' in (Williams, B & Sen, A eds.) *Utilitarianism and Beyond*, Cambridge University Press: Cambridge, p166.

regular shifts when later burdened with parenthood. However, the rules governing the duties that we must honour and respect in selling our labour are however, by right, extensive. They are certainly extensive enough to make illegitimate many of the privileges and exemptions which the talented usually claim under the banner of freedom of occupational choice. There is no other way to show equal concern and respect for the good of others.

Possible responses

One reason readers might reject our claim that Rawls cannot support a permissive interpretation of freedom of occupational choice is that they may believe that if what we say is true of the right to dispose of our labour as we see fit then it must be true for nearly all privileges and claims, and thus we have rendered Rawls' first principle in such a way that leaves it meaningless and without reference. The principle of charity would indeed dictate that any interpretation of the logic of Rawls' first principle that leaves it powerless to guarantee any substantial liberties is clearly barking up the wrong tree. This is not, however, an unhappy circumstance that befalls our interpretation. For example, the privilege of not having a duty to pray can be extended across society.²¹⁴ That is because our praying or non-praying does not have any effect on the production or distribution of a good that it is necessary for the institution of praying. The same can be said of voting, associating, expression of opinion etc. Nor is it true of all claims. Importantly our restricted understanding of freedom of occupational as the right to withdraw labour from a particular employer, and sell it to another productive employer, is perfectly extendable across society.

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Unless, of course, one wanted their right to prey to be extended across all of their available time. Such a demand would ask for the resources necessary for worship without making the contribution necessary to maintain the institution of preying.

Another response to what has been outlined is to stress the point that Rawls' second principle is designed to fairly distribute our *power* to enjoy whatever rights are secured in the first principle. For example, Rawls, unlike Locke, does not need to put *provisos* on our right to hold property since it is, from the point of view of Justice as Fairness, a formal right equally available to all, and then his second principle of justice ensures that we have equal power to enjoy the formal right through the distribution of the primary goods necessary to take advantage of the liberty: income and wealth. Could the right to freedom of occupational choice be of the same structure, with the right being absolute and formally equal and then resources being distributed in accordance with the difference principle to ensure that we have equal power to enjoy it? This form of response simply will not work in this case however. The rights that are being demanded ask for immunity from contribution to a system that the very immunity depends upon: if they are enjoyed, it is necessarily the case that there is someone else not enjoying them. There cannot be a mechanism of distributing other primary goods which give members of a society equal opportunity, depending on their tastes and life choices, to enjoy the privilege of not working for others since some having it demands upon it being the case that others do not. It is a right that we are, to once again utilise a point that Cohen makes elsewhere, collectively unfree to exercise.²¹⁵

I would also like to deal with another possible response to my claim that freedom of occupational choice is not mentioned as a basic liberty in *Theory*. It could be argued that I have offered a somewhat obtuse line of argument since Rawls makes it clear in his discussion of conscientious objection that conscription,

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Cohen argues in his 'Cohen, G.A. 1988. 'The Structure of Proletarian Unfreedom,' History, Labour and Freedom: Themes from Marx, Oxford University Press: Oxford' that workers are not free to become members of the bourgeoisie because if they all tried to exercise their formal right to do so they would be prevented from doing so. They face a situation whereby the existence of a formal freedom open to all masks a collective unfreedom in that it is a freedom that can only be exercised at the expense of others.

though sometimes justified, is a violation of our basic liberties.²¹⁶ However, there is no reason to think that freedom from conscription from military forces is a basic liberty because of a generalised basic liberty of freedom of occupational choice. Engaging in military action demands of the individual that they engage in actions that are otherwise totally absent from the employment tasks of a just society, the most obviously challenging to an individual's sense of the good is the task killing of other persons. What is more military service is not like other jobs in that the individual is subjected to a new set of codes of practices and indeed laws that are not covered by civil law, there are no other jobs that carry with them the threat of a courts martial for desertion. There are plenty of specific obligations that are generated from military service that are an important restraint on our capacity to pursue the good that it would be strange to imagine that his description of conscription as violating our basic liberties commits Rawls to a general position that extensive freedom of occupational choice is a basic liberty. Indeed, given the punishment of courts martial for desertion, military service violates our basic liberties on our restricted understanding of freedom of occupational choice whether that service is procured by conscription or a market. A soldier is unable to withdraw their labour if he revises his conception of the good. His or her decision is final.²¹⁷

Finally, those familiar with the details of Rawls' equal basic liberties principle may be wondering if one of the complexities of the principle that I have so far ignored-

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Rawls, J. 1999. *A Theory of Justice*, pp323-326. It is only justified in cases where the basic liberties of other persons is at stake. Rawls is thus consistent in his application of the priority rules which only allow the denial of basic liberties in order to secure other more valuable basic liberties.

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It should not be forgotten that Rawls wrote *Theory* during a time of heightened debate about the morality of conscription into the US Army for the war in Vietnam. For details of the effect of this debate on Rawls' thought, and more widely on divisions in analytic political philosophy, see Forrester, K. 2014. 'Origins of International Ethics,' *The Historical Journal*, 57(3).

that it deals with schemes of liberties in their totality rather than individual liberties separately- masks a more permissive interpretation of the extent of freedom afforded in the labour market. When we move our unit of analysis to schemes of liberties Rawls suggests that we would be willing to restrict basic liberties, but only 'for the sake' of other basic liberties.²¹⁸ Rawls offers further clarity on this point by explaining under what conditions it would be acceptable to exchange some liberties for others. Under Rawls' understanding there are two cases. One is the case of where 'less extensive' liberties, that is liberties with greater restrictions and provisos, lead to an overall gain in basic liberty. The second is where liberties cannot be extended equally, but doing so better secures the liberty of those who are not afforded the liberty. This gives rise to two cases, defined by strict necessary conditions, where justice demands that we exchange some basic liberties for others.²¹⁹

- a) A 'less extensive liberty' must strengthen the total system of liberties shared by all.
- b) A 'less than equal liberty' must be acceptable to those with the lesser liberty.

Cases **a)** and **b)** can be taken in conjunction and entitled the Priority Rule.²²⁰ I will offer an illustrative example of each so that it is clearer what Rawls has in mind. After this I shall explain the implications for freedom of occupational choice.

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Rawls, J. 1999. Theory, p266.

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Rawls offers the same formulation twice in Theory. Rawls, J. 1999. Theory, p220 and p226.

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This is Rawls' name rather than mine. Rawls, J. 1999. Theory, p220.

Consider the example earlier offered of restricting the privilege to move where one chooses with a motor vehicle, doing so vastly improves our capacity to get where we chose. I offer this as an uncontroversial example of the introduction of a less extensive conception of 'freedom of movement,' in that there are more provisos and restrictions (stop at traffic lights drive on the left hand side of the road, do not go over 70mph etc.) which are necessary to strength the total scheme of liberties. Our capacity to freely associate, to go to work where we choose, to pursue leisure is greatly improved. It is an excellent example of case **a).**

We can also think of fairly uncontroversial cases of **b).** For example, the claim right to coerce during crowd control is not something that can be afforded to an entire citizenry. It is, however, the sort of unequal right that we are going to have to grant to the police officer or stewards if we want to be able to protest and gather in large and potentially unsafe numbers. By affording this unequal claim the rest of the citizenry guarantees its own liberty. The pertinent feature here is that, as with in Rawls' difference principle, the only reason that a citizen would afford an unequal freedom to another person is to guarantee and secure their own freedom. Despite allowing the inequality we can still intelligibly label it an equal scheme of basic liberties as it is *maximised from the point of view of equality.*

Now that we have clarified the Priority Rule the question is what level of freedom of occupational choice is appropriate to a scheme of equal basic liberties? The first priority rule offers little hope for the liberty objection since it is concerned with cases where we might support more rather than less extensive liberties. Indeed we might think various restrictive aspects of employment law, such as mandatory retirement ages, as reasonably analogous to traffic restrictions in that they are necessary to secure a more generalised freedom of employment. The second, however, provides a possible glint of light. The second principle suggests that,

from the point of view of Justice as Fairness, some unequal liberties may be tolerated if they would be tolerated by those who do not gain the extra liberties. However, Rawls is quite clear that the only thing that we would be willing to trade in for an unequal liberty is a gain in other liberties. Unless proponents of the liberty objection can demonstrate that the necessarily unequal privileges and claims that they hold under the banner of freedom of occupational choice increase other, moral valuable, basic liberties, for those who do not gain the privileges and claims, then there is no reason for those who have the possibility of not gaining the unequal claims and privileges to acquiesce in others having them. The only hope the Rawls' Priority Rules afford raisers of the liberty objection is that—like ceding the crowd control officer being granted limited powers of coercion—they can demonstrate that a group of persons being exempt from socially useful labour will maximise other's basic liberties. I am happy to leave that challenge open to them.

Conclusion

Proponents of the liberty objection wished to move from Rawls' inclusion of freedom of occupational choice as a basic liberty in *Political Liberalism*²²¹ to the conclusion that the necessity of unequalising incentives is a reflection of our considered views about justice. The alleged implication is that Cohen is wrong to suggest that Rawls must support a strict interpretation of the difference principle, and that Rawls' treatment of self-interest is in conformity with our ideal response to the problem of Justice as Fairness. I have shown, by a clarification of what liberties are and are not secured by our right to the basic liberty of freedom of occupational choice, that this response to Cohen's criticism is untenable. If the reasons that Rawls presents for the necessity of unequalising incentives— attracting the talented to socially useful tasks—are meant in the light of right to

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To which we supportively added a relevant passage from Social Unity and Primary Goods.

dispose of our labour as we see fit then, under the light of a proper examination of the just claims and privileges we can demand behind the veil of ignorance, it appears to amount to a concession to the special pleading of the talented.

The substantial conclusion to make is that the reasonable prerogative of self-interest that individuals are entitled to command from one another is not obviously tracked by a lax-interpretation of the difference principle. Unequalising incentives that are necessary to attract talented individuals to socially useful tasks, and to make them work hard whilst in those tasks, ought not, it seems, to be a feature of a just society. This is not, I stress, the conclusion this thesis shall come to rest at, but it is our understanding of where the literature is at given the inadequacies of how the liberty objection has thus far been stressed. In the next section of this thesis we shall restate the liberty objection in a new way to demonstrate that it can be used to overcome Cohen's concessionary criticism. We do not have to see the well-ordered society described by Rawls, tolerant of unequalising incentives as it is, as a prudential compromise between justice and other concerns or as a concession to the infirmities in human nature. If we are to do so, however, we must do much more than to assert that freedom of occupational choice is a basic liberty, the evidence of the textual material and the logic of Rawls' *egalitarian proviso* simply won't allow it.

Chapter 5: The Ideality of the Political Turn

At this point in the thesis Cohen's concessionary criticism appears to be on a strong footing. We have seen how Rawlsians are unable to easily reply to it with either the 'basic structure objection--'²²²because it is not possible to come up with a conception of the basic structure that both excludes individual behaviour and captures Rawls' citizens' moral concerns—or the 'liberty objection'—because the privileges and claims that would necessitate unequalising incentives are not obviously basic liberties.²²³ There is no straight-forward reason why the logic of Rawls' ideal of a community of free and equal persons would demand that we accept inequalities generated in the labour-market as a result of self-interested behaviour. As such, Rawls' tolerance of unequalising incentives appears at this stage to be as Cohen says it is: a prudential compromise between justice and other concerns in light of a concession to the infirmities within human nature.

The next two chapters will demonstrate that, despite this, any move to affirm the concessionary criticism would be far too quick. I do so by putting forward the liberty objection in a new form which is invulnerable to observation that untrammelled freedom of occupational choice is not obviously a basic liberty from the point of view of the original position. I show that it is the ideal requirement that we secure 'stability for the right reasons' which makes a thick (incentive requiring) notion of freedom of occupational choice a legitimate demand of justice. What we could not straightforwardly extract from the logic of Rawls' initial choosing situation will be justified once, and only once, we take these wider but no less central Rawlsian concepts into account.

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See Chapter 3 of this thesis.

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See Chapter 4 of this thesis.

This particular chapter has a modest aim that, without some prior explanation, may seem something of a diversion from my core argument. I wish to explain why it is that Rawls came to alter the justification for his theory so as to make Justice as Fairness deferential towards what he called ‘the fact of reasonable pluralism.’ That is the changes to Justice as Fairness that came to be known as the ‘political turn’ which Rawls made between the 1971 publication of *Theory* and the 1993 *Political Liberalism* in order to make his principles acceptable to persons with radically different religious and philosophical beliefs.²²⁴

Those versed in Rawls scholarship may be wondering how it is possible to make a modest contribution to what was, and is, an enormously contentious moment in Rawls’ intellectual development. Indeed the second half of this chapter will show particular interest in the criticisms of the political turn that were produced by Brian Barry and Jürgen Habermas. I use the word modest then not as a reflection of the weight of the issue but because this chapter boasts of only a little originality. I am instead primarily committed to re-producing arguments for the changes that Rawls himself clearly articulates.²²⁵ My reason for doing so is to express some important and salient features in Rawls’ own argument that will prove to be of use in the following chapter where I reconstruct the liberty objection. We will see that the way Rawls defends his deference to the fact of reasonable pluralism, particularly against the criticisms of Habermas and Barry, provides a workable blueprint for how to defend his tolerance of unequalising incentives. My

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The full explanation of the fact of reasonable pluralism and the political turn is to be found in the second half of this chapter.

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I will also make use of the defence made on Rawls’ behalf by Larry Krastoff as well as Burton Dreben’s articulation of the differences between *Theory* and *Political Liberalism*. Krastoff, L. 1998. ‘Consensus, Stability and Normativity in Rawls’ *Political Liberalism*,’ *The Journal of Philosophy*, 95(6). Dreben, B. ‘On Rawls and *Political Liberalism*’ in (Freeman, S. ed.) *The Cambridge Companion to Rawls*, Cambridge University Press: Cambridge.

reproduction of Rawls' justification of his political turn is provided here in order to recover this blueprint.

Reflective equilibrium

I will start laying the foundations of my argument by re-introducing the concept of reflective equilibrium in greater depth. It is central to Rawls' understanding of his theory as an ideal appropriate for equal and autonomous persons. What is written in this section is not intended to be controversial as my ambitions are limited to offering the consensus understanding²²⁶ of what reflective equilibrium is (for Rawls)²²⁷ and why it is a necessary stage in the justification and construction of his principles.

Thus far in this thesis we have presented Rawls' principles as being justified on the basis that they would be chosen from an initial position of fairness. We explained that what is fair was defined by whatever shared moral convictions about how to treat each other the citizenry wanted to express in their politics, in the case of Justice as Fairness the pertinent moral convictions being the freedom and equality of persons. However, this is only the first stage of justification in Rawls' theory. There is a second stage of justification that explains a little more about what Rawls means by shared moral convictions and why he wishes to afford them such importance.

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There is for example nothing in my exposition that clashes with the interpretations of authoritative Rawls scholars such as Samuel Freeman or Norman Daniels.

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I include this qualification because others have used the term 'reflective equilibrium' to mean something different to what Rawls intended. Indeed this section picks out two important features of Rawls' reflective equilibrium, that is 'anti-foundationalist' and that it is 'wide' rather than 'narrow,' that are not always present in other theories operating under the same banner.

In this second stage of justification the principles recommended from behind the veil of ignorance are checked against what Rawls labels our 'considered moral judgements'.²²⁸ Our considered moral judgements are those moral claims that we have thought about seriously and, through a process of critical examination, have come to be sure of their truth. Rawls offers as examples the near certain conviction we have that religious intolerance and racial discrimination are unjust.²²⁹

If the principles that come out of initial position of fairness are shown to violate our considered moral judgements then, according to Rawls, it is imperative that we discover the cause of this disharmony and respond appropriately. It may be the case that the incompatibility of our constructed principles and our considered moral judgements unveils an error in our previous moral thought. An egalitarian may have thought that that to treat people as equals one needs to ensure a perfect equality of social and economic goods. However, having been confronted with the different recommendation offered by reasoning from the original position, to wit, the difference principle, they may come to believe that the constructive process, treating each member as an equal as it does, reveals this previously settled moral conviction to be false. Alternatively one may decide that the incongruence between principles and settled moral judgements is reason enough to reconsider the process by which one has constructed their principles. If, to use the already cited example, our deliberative procedure recommends principles that upon testing are shown to demand religious intolerance or racial discrimination, then, given our certainty that these things are unjust, there is good reason to believe our constructive process has gone awry. The construction is

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The most complete account of reflective equilibrium and this language in Theory is on pages 43-46 of the 1999 revised edition.

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Rawls, J. 1999. Theory, p17.

failing to coherently express our shared and settled conception of justice. Justice as Fairness tells us we ought to go on repeating this process of revising either our moral judgements, or our decision making mechanism, until our principles and judgements are in harmony with one and another. Rawls calls this second stage in Justice as Fairness' constructive process 'reflective equilibrium.'

There are particularities of Rawls' conception of reflective equilibrium which need to be explained if we are to understand my argument that Rawls' desire for his principles to be able to secure stability for the right reasons is necessitated by his conception of ideal theory. Two important features of Rawls' theory shall be noted, **1)** Rawls' theory is 'anti-foundationalist' and **2)** it advocates a 'wide' and 'political' reflective equilibrium rather than one concerned with accurately and coherently describing the features of an individual's personal moral sense. I shall deal with each of these in turn.

1) ***Anti-foundationalist***

Those who read *Theory* for the first time often ask why Rawls feels the needs to include this second stage in the constructive process. It seems superfluous given that Rawls' principles are already justified on the basis that they are the outcome of deliberation in an initial position of fairness. The fairness and neutrality of the procedure in and of itself seems to give enough reasons for thinking that we ought to accept and agree to the principles that it recommends. What is it that is added by then checking the principles recommended from the original position against our considered moral judgements?

One possible but ultimately misleading explanation is hinted at in a footnote by Rawls in which he notes a similarity between the procedure of reflective equilibrium and the way that natural sciences work.²³⁰ In the natural sciences

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Rawls' reference (Rawls, J. 1999.Theory, p18) is Nelson Goodman's Fact, Fiction and Forecast, Harvard University Press:

deductive claims about the nature of previously unobserved phenomena are often justified on the basis that they support, and are congruent with, a set of known facts. Congruence with a set of fixed empirical facts is seen as a *prima facie* reason to take seriously a set of theoretical claims and indeed much empirical science is dedicated to finding ways to test theoretical claims developed to make consistent what we know about the external world. In epistemological terms we might say that natural science works primarily with a correspondence theory of truth and uses coherence, or the lack thereof, as a basis of triggering both empirical investigations and theoretical speculations. Rawls' footnote suggests that reflective equilibrium might be considered as the adoption of this mainstream scientific practice in moral and political theory.

The recent 'confirmation' of the existence of the 'Higgs Boson,' which scientists had previously accepted the truth of on the basis of it being necessary to make consistent what we already knew about particle physics, drew popular attention to the mutually constructive process of inductive and deductive reasoning, and the correspondence and coherentist accounts of truth, in the natural sciences. The 'Higgs Boson' had been proposed as an explanation for why the particles that transmit the fundamental laws of nature, gauge bosons, have high mass rather than the zero mass that we usually observe in unchanging objects. Peter Higgs is one of the theoretical physicists who in the 1960s suggested that the only way to explain the mass of gauge bosons was that the particles interacted in a previously unobserved field which allowed this otherwise impossible feature.²³¹

Cambridge. Goodman's book is most famous for his 'grue' example that stressed that scientific 'hypothesis'--law like statements that only apply to a certain class of object--are not exempt from Hume's problem of induction. However, Rawls is more concerned with Goodman's descriptive claim that many of the natural sciences as actually practised treat deductive and inductive claims as engaged in a symbiotic relationship that mutually justify each other. Samuel Freeman calls this 'holistic epistemology:' Freeman, S. 2007.

Rawls, Taylor and Francis, London, p31.

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Higgs, PW. 1964. 'Broken Symmetries, Massless Particles and Gauge Fields,' in Physics Letters, North-Holland: Amsterdam.

It was only after the construction of the Large Hadron Collider near Geneva that scientists were able to test the existence of Higgs' predicted field, something that was finally achieved in 2012. The 'Higgs Boson' was then, in the 1960s, a deductive inference formed to make consistent otherwise contradictory empirical facts. As a valid and important deductive inference it dictated the research agenda of empirical physics, to the extent that it was the primary motivation behind the construction of a piece of machinery that cost over 10 billion Euros.²³² Perhaps more astonishingly it brought together the states of Europe to work towards a common goal. As a result of successful empirical research conducted at the Large Hadron Collider the Higgs Boson is now, in 2014, justified not simply by this congruence with wider theory but by it being observed. It has become part of our body of empirical knowledge which will contain new contradictions in need of testable theoretical explanation. The symbiotic relationship between our different capacities to reason and pursue knowledge continues.

Given the parallel that Rawls draws between the natural sciences and reflective equilibrium it is tempting to imagine that he conducts his theory in the same way. Our considered moral judgements act as revelations of moral facts and we work through the process of reflective equilibrium to construct a conceptual apparatus that renders them consistent with one and another. This parallel, between reflective equilibrium and what natural scientists do, has indeed been enthusiastically embraced by later political theorists.²³³ It is perhaps too easy to speculate as why. Political philosophy's flirtation with positivism in the previous century and biologism in the one before that speaks to an understandable desire to reconnect our field with the always prestigious natural sciences. However, we

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Sample, I. 2011. 'Higgs Boson: Scientists Close in on The God Particle,' *The Guardian*, 13/12/11.

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McDermott, D. 2008. 'Analytic Political Philosophy' in (Stears and Leopold Ed.) *Political Theory: Methods and Approaches*,

Oxford University Press: Oxford.

have reason to be suspicious of the directness of the analogy; Rawls only makes the comparison in a singular footnote and does not make it central to his justification of reflective equilibrium.²³⁴ This, I submit, is because any sustained study of reflective equilibrium suggests that what is analogous between mainstream scientific practice and reflective equilibrium is cosmetic. More precisely the parallel breaks down as soon as we turn to the details of the symbiotic relationship between 'facts' and 'theory' in Justice as Fairness.

The salient difference is that Rawls, unlike the natural scientists, affords no *primacy* to empirically observed 'facts,' that is by way of analogy his considered moral judgements, over 'theory,' that is the principles recommended from the original position. By this I mean that they are not absolute fixed points to which the theory/principles must revise in the search for equilibrium; instead he makes *both* variables equally subject to the possibility of alteration. See for example that in *Theory's* first explanation of reflective equilibrium Rawls writes:

'We can either modify the account of the initial situation or we can revise our existing judgements, *for even the judgements we take provisionally as fixed points are liable to revision...* I assume that eventually we find a description of the initial situation that both expresses reasonable conditions and yields principles that match our considered judgement duly pruned and adjusted. This state of affairs I refer to as reflective equilibrium.'²³⁵

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It should be noted that Rawls was, as a young scholar, very attracted to the parallel and thought it a useful mechanism for explaining the possibility of objective claims in ethics: Bevir, M and Galisanka, A. 2012. 'John Rawls in Historical Context,' History of Political Thought, p707. That same paper argues what I believe is clear from Theory, that this is a position that Rawls quickly became dissatisfied with.

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Rawls, J. 1999. Theory, p18. Emphasis is mine.

The same point is made again in Rawls' next extended explanation of reflective equilibrium where he states: 'an allowance must be made for the likelihood that considered judgements are no doubt subject to certain irregularities and distortions despite the fact that they are rendered under favourable conditions.'²³⁶ In *Political Liberalism*, Rawls makes much the same point. What we might be tempted to treat as moral facts in the constructive process, like the claim 'slavery is unjust,' must be treated as a 'possibility of construction' that we must go on to test in the constructive process.²³⁷ Unlike the treatment afforded to empirical facts by the natural sciences, there is nothing inviolable or even prior in Rawls' account of reflective equilibrium about his citizen's considered moral judgements.

This is not an insignificant exegetical observation. Rawls makes both his initial construction and our considered moral judgements subject to alteration because he does not believe that either warrant being treated as genuinely fixed points to which the other must respond. Natural scientists prioritise observed facts in their process because they implicitly believe in the existence of an objective and independent reality that they are seeking to describe and explain in their theories. The 'real' world of matter is the foundation that 'grounds' any theoretical scientific claim.²³⁸ In moral and political philosophy there have been many attempts to

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Rawls, J. 1999. *Theory*, p43.

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Rawls, J. 1999. *Political Liberalism*, pp123-124.

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Realism is, of course, not the only theory of the ontology of claims made in the natural sciences. There are irrealists of both a pragmatic and idealist bent. However, I do not consider it controversial to suppose that realism amounts to the predominant belief system of natural scientists. For evidence, see that those who propose an alternative do so on the working assumption that they are challenging mainstream assumptions. Dupre, J. 1995. *The Disorder of Things*, Harvard University Press: Cambridge, Massachusetts, pp1-5.

argue for the existence of a similar foundation that grounds our moral reasoning: there have been hopes of an external world of moral facts to which our philosophical theories must respond, these external facts being delectable either by *a priori* reasoning, as in both the Natural Law and Kantian traditions, or more recently an isolation of our intuitions. If one were to accept with Cohen that our intuitions tend towards a set of universally shared *if we could* statements then they would have good reason to treat such fundamental principles as a possible candidate for this grounding role. In not considering either our judgements or our principles genuinely fixed Rawls demonstrates that he does not believe either to provide such a foundation. He is, to use the contemporary jargon, an 'anti-foundationalist'²³⁹ who makes agreement itself, rather than correspondence with an external order, the source of objectivity in his theory.

I mention objectivity as it is an essential feature of just principles for Rawls for both historical and theoretical reasons. Rawls was writing in an intellectual context where those who shared his suspicion of the existence of external moral facts had come to embrace scepticism over whether moral language could amount to anything more than an expression of the subjective preferences of the speaker.²⁴⁰ The ideal of autonomy that we have seen Rawls' problem of justice is centred around is unlikely to be achieved if the moral language of a political community, like justice, is seen by the citizenry as nothing more than an assemblage of such subjective preferences. There has to be something about the moral principle which is seen by each citizen as having legitimate sanction

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It should be noted that Rawls personally prefers the term 'nonfoundationalist': Rawls, J. 2001. *Justice as Fairness a Restatement*, p31.

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That is the theory of emotivism that was expressed most vividly in Ayer, A.J. 2001 (1936). *Language, Truth and Logic*, Penguin: London.

over them. There has to be something objective about political principles if Rawls' ideal of autonomy is to be realised.

2) ***Wide rather than narrow***

In *Theory* Rawls only reveals the full extent of this anti-foundationalism, and thus confirms the disanalogy with natural sciences, in the last chapter of Book 1 titled *Some Remarks about Moral Theory*. During those passages he explains what he believes the purpose of political philosophy to be, and the most striking thing about his discussion is how descriptive and personal his conception initially appears. For a characteristic example, Rawls writes:

‘one may think of moral theory at first as the attempt to describe our moral capacity; or, in the present case, one may regard a *Theory of Justice* as describing our sense of justice.’²⁴¹

In the same passage as above Rawls includes a description of the process as reflective equilibrium as that which gives ‘the best account of the *person's* sense of justice.’²⁴² Indeed it is notable that he repeatedly states that it is a process conducted by ‘persons’ or ‘individuals.’ This language leads to the natural but mistaken interpretation that reflective equilibrium is a process aimed at coherently and consistently describing an individual’s personal moral sense. It is a philosophical process of self-discovery. However, Rawls himself recognised this

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Rawls, J. 1999. *Theory*, p 41.

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Rawls, J. 1999. *Theory*, p43. Emphasis added.

as a regretful error²⁴³ and later states he actually intends reflective equilibrium to be a process conducted whereby the individual not only seeks to understand whether their own moral convictions are internally consistent, but also seek to check that they are consistent with the moral convictions of the other members of one's political community. For evidence of this see that in *Justice as Fairness: A Restatement* he offers reflective equilibrium as an answer to the following question: 'how can we make our own considered judgements of political justice more consistent both within themselves and with considered judgements of others?'²⁴⁴ The demand that we check our principles with the considered judgments of others makes Rawls' equilibrium a political rather than a merely personal balancing act.

In this process of 'wide' and 'political' reflective equilibrium individuals attempt to come to equilibrium with the moral convictions of other members of their political community which, if successfully carried out by each member, makes a set of principles mutually acceptable.²⁴⁵ The features of Rawls' design suggest why this should be possible. Remember that the original position was supposed to be created from widely shared convictions about how we ought to treat each other.

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See his lament that he failed to differentiate between wide and narrow, general and particular, reflective equilibrium.

Rawls, J. 2001. *Justice as Fairness: a Restatement*, p31.

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Rawls, J. 2001. *Justice as Fairness: a Restatement*, p30.

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A note clarifying some issues with language: what I have called 'political' reflective equilibrium is sometimes referred to by Rawls as 'general' reflective equilibrium. I justify this alteration of the jargon as 'political' is far more descriptive of what makes the equilibrium 'general.' As we said with regards to 'general facts,' one obvious source of generality is a shared human nature. Rawls' anti-foundationalism is an explicit rejection of the notion that we might have shared moral nature that provides such generality. All we have instead is a shared desire to reach a mutually acceptable agreement and a generalised sense that morality is important to others.

For example, the lack of information that we possess about our talents was there to model the shared political conviction that individuals ought not to be disadvantaged on the basis of features about the self that they themselves cannot control.²⁴⁶ As the content of the principles is supposed to reflect widely shared convictions on how we ought to treat each other it should be the case that individual members of the political community can come to affirm the principles that are produced as being consistent with their own moral judgements.

We are now in a position to bring together the two features of reflective equilibrium, that it is anti-foundationalist and that it is political, to see how they are connected. Rawls suggests that we ought to think of a successful political equilibrium as a substitute for the foundations that in the previous section we saw that Rawls thought were naturally entirely absent in moral theory. As Rawls says in '*Kantian Constructivism*:'

'The search for reasonable grounds for reaching agreement rooted in our conception of ourselves and in our relation to society replaces the search for moral truth interpreted as fixed by a prior and independent order of objects and relations, whether natural or divine, an order apart and distinct from how we conceive of ourselves.'²⁴⁷

Another way of making the same point is to say, as Rawls does in *Kantian Constructivism*, that Justice as Fairness takes the approach of 'pure procedural justice.'²⁴⁸ Rather than having a fixed notion of what justice is and then

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See Chapter 3 of this thesis.

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Rawls, J. 1980. *Kantian Constructivism*, p519.

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Rawls, J. 1980. *Kantian Constructivism*, p523.

discovering a procedure that tends towards it, pure procedural justice says that justice *is* whatever is acceptable to all persons on matters of duties and obligations when they sincerely attempt to reach a political equilibrium. This ideal and reconciliatory feature of political reflective equilibrium reached by Justice as Fairness is best articulated by Rawls in a long and important footnote in his *Reply to Habermas*. I will quote it as well as some other material that strongly supports the interpretation that is offered here. As a result of the features outlined Rawls states that:

'This equilibrium is fully inter-subjective: that is, each citizen has taken into account the reasoning and arguments of every other citizen.'²⁴⁹

They are necessary to give objective form to principles in the absence of any grounding external moral reality:

'If construction does yield the first principles of a conception of justice that matches more accurately than other views our considered convictions in general and wide reflective equilibrium, then constructivism would seem to provide a suitable basis for objectivity.'²⁵⁰

Objectivity has been reached because citizens have agreed to co-operate on terms which are mutually considered to express their understanding of themselves as free and equal. The principles dictate the distribution of goods that tends towards our realisation of these ideals and do so on terms that each can recognise does so. In doing so Rawls achieved one of his primary aims: 'Kantian constructivism, as I would state it, aims to establish only that the rational

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Rawls, J. 1995. 'Reply to Habermas,' *The Journal of Philosophy*, 92(3) p141f.

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Rawls, J. 1980. *Kantian Constructivism*, p568.

intuitionist notion of objectivity is unnecessary for objectivity.¹²⁵¹ The new objectivity formed in Justice as Fairness is 'a practicable conception of objectivity and justification founded on public agreement in judgement on due reflection.'¹²⁵²

The corollary of what has been argued, that an ideal conception of justice must be able to reach reflective equilibrium, is that principles that are not in such equilibrium are not ideal. We know that principles that are not in political reflective equilibrium have failed to be constructed in a way that is appropriate to a free community of equal and autonomous persons as they are not mutually acceptable. Our desire not to impose principles on the other that they themselves cannot accept has not been realised and thus our political principles are not a vehicle for political autonomy. We have ideal grounds for rejecting them.

The political turn: stability and reflective equilibrium

I hope that none of the interpretive claims that came in the previous section were too controversial. It was intended as an explanation of the consensus view of why Rawls includes his two levels of justification, and what the relationship between the two is. We are now ready to move into choppy waters. For this uncontroversial interpretation of reflective equilibrium is the key to understanding Rawls' position on the much thornier issue of why his principles must show deference to what he calls 'the fact of reasonable pluralism.' We will see that Rawls is accused of inappropriately extending the process of reflective equilibrium to circumstances where citizens are not seeking to isolate their moral point of view. This is, we shall see, a false charge, and Rawls' deference to the

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Rawls, J. 1980. Kantian Constructivism, p570.

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Rawls, J. 1995. Reply to Habermas, p230.

fact of reasonable pluralism does not depend upon a misuse of reflective equilibrium.

In order to advance this claim I will proceed with the following structure. Firstly I am going to explain some of the new vocabulary that Rawls introduced during what we have called 'the political turn,' which has been correspondingly absent thus far from this thesis. I then offer a short explanation of some of the key alterations that Rawls makes to Justice as Fairness in light of his self-perceived failure to show deference to 'the fact of reasonable pluralism.' Once this is complete, and thus the political turn has been explained, I shall then introduce a criticism of the turn that was levied by Jürgen Habermas and Brian Barry. Both Barry and Habermas argue that the political turn reduces the normative force of Rawls' argument by making his principles subject to the vagaries of human motivation. They develop their own version of what we have called a concessionary criticism. I will then finally go on to show how Rawls responds to such criticisms and thus how Justice as Fairness retains the normative force of its principles and shows fidelity to Rawls' commitment of producing ideal principles.

We are then ready to move on, in the next and final chapter, to my claim that the argument Rawls offers in support of showing deference to the fact of reasonable pluralism is also applicable to a different set of facts—which happen to necessitate the use of unequalising incentives—and thus that the argument Rawls develops in response to Habermas and Barry offers a blueprint of how we can reconstruct the liberty objection.

Terminology of the political turn

Reasonable pluralism is a situation whereby individuals have thought deeply about religious and philosophical questions and have come to divergent views.²⁵³ Citizens must not have not been tricked or coerced into accepting different philosophical beliefs, or simply not thought about religious and philosophical matters that much at all, but instead have come to their divergent views as a result of the ‘free exercise of their reason.’ If this is not the case there may be pluralism, but it would not be reasonable.²⁵⁴ I will leave aside for now what is added by the prefix ‘the fact of’ to ‘reasonable pluralism,’ mostly because, as we will see, the answer is unfortunately best expressed as “only confusion.”

A **fully comprehensive doctrine** gives answers to specific questions by calling upon a philosophical or religious framework that seeks to explain much wider questions.²⁵⁵ If I were asked to explain my views on marriage equality, and I were to invoke the divinity of scripture in my response, I would be invoking a fully comprehensive doctrine about where moral truth comes from (the word of God) and what epistemic capacities humans have to access it (literal interpretations of holy books).

Central to the political turn is Rawls’ insistence that fully comprehensive doctrines cannot be accepted as reasons in a community where there is reasonable pluralism, as citizens trying to persuade each other will be relying upon premises that their fellow members cannot accept as a result of their divergent beliefs. The originality of this thought, and indeed Rawls’ brand of liberalism, is brought out by

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Rawls, J. 1993. *Political Liberalism*, xvii.

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Reasonable here having the impeccably Rawlsian meaning of ‘the product of our two moral powers’ as explained in

Chapter 2 of this thesis.

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Rawls, J. 1993. *Political Liberalism*, xix.

the fact that we recognise most great works of political philosophy as explicitly being part of a fully comprehensive doctrine. For example the answer to problem of political obligation offered in Hobbes' *Leviathan* is predicated upon a physicalist account of human motivation, Locke's alternative answer to that same problem calls upon his Protestant theology and the terms of God's gifting of the world to humankind. If you do not believe that God gifted mankind the world in common in order for them to live their lives, and in doing so generating duties and obligations amongst the citizenry, Locke's justification for the institution of property rests upon premises than you do not have reason to accept.

Stability is a political system's ability to motivate the behaviour necessary to maintain itself over time.²⁵⁶ If a political system can maintain itself by every citizen being self-interested, and its people are as a matter of fact self-interested, then it would be stable in the relevant sense. Conversely if a political system requires its citizenry to be altruistic and collaborative, but encourages them to be competitive and self-interested, we may suspect that it is fundamentally unstable. There is a familiar argument that the competitive nature of market societies systematically destroys the traditional values of trust that those markets, backed as they are by contracts and property claims with difficult enforcement issues, actually depend upon. This famous 'parasitic liberalism thesis' can usefully be considered as an argument about the lack of Rawlsian *stability* in market societies.²⁵⁷

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Rawls, J. 1999. *Theory*, p398.

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There is, it must be stated, good empirical evidence to suggest that market liberalism does not have this self-destructive bent. See Bowles. S. 2011. 'Is Liberal Society A Parasite on Tradition,' *Philosophy and Public Affairs*, 39(1).

The ***congruence*** that we shall see Rawls is concerned with is that between a community's principles of justice and its citizens' conception of their own good.²⁵⁸ It is important to note that this account of the good is slightly but significantly different from 'considered judgements' that constitute the material of reflective equilibrium, and the 'thin' conception of the good that is used to make neutral principles behind the veil of ignorance. The conception of the good that we speak of here is one that is held by 'flesh and blood citizens' once they are attempting to live with constructed principles, and is thus not lacking in information (like a thin conception of the good), and is not necessarily limited to the moral standpoint (like considered judgments). It may include religious, philosophical and personal beliefs and everything else that is central to a flesh and blood individual's actual personal plan of how to live their life.

Stability for the right reasons

Now that I have introduced the vital terminology for understanding Rawls' political turn I want to put them into the context of Rawls' philosophical arguments. First we will see how 'stability' and 'congruence' are connected in *Theory* and then we will see why Rawls thought that this part of his articulation of Justice as Fairness was a failure that needed correcting. We do so by re-introducing the concepts of 'reasonable pluralism' and 'fully comprehensive doctrines.'

Congruence and stability are self-evidently not entirely distinct concerns. If an individual finds the principles of justice that they are bound to obey offend their own notion of the good, which is to say that they are *incongruent*, they are far more likely to engage in behaviour that undermines the institutions that uphold those principles. The virtuous connection between congruence and stability is a characteristic feature of a well-ordered-society. An example will help elucidate the

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Rawls, J. 1999. *Theory*, p450.

idea in question. If an individual thinks that the state spends money on practices that they are not proud of, perhaps they are committed to racial equality and the state is using the income gained through taxation to uphold a system of apartheid, they are unlikely to think that state spending represents an opportunity for them to be good persons. In such a scenario we might expect tax evasion and avoidance to be high or for the state to have to pay extremely high wages to attract enforcement workers, or perhaps even being reduced to coercively enlisting staff. If, however, there are fervent racists in this particular political community no such mechanisms will need to be put in place. Racists will freely step forward to sell their labour to racist institutions. We can conjecture from this with Rawls that political institutions that are perceived to be governed by principles incongruent with its citizens sense of the good life are unlikely generate the sympathies that help to maintain themselves over time. Incongruent societies are inherently less stable. The corollary of this is that institutions which are congruent will motivate the correct behaviour and are thus inherently stable.

That congruence is of instrumental use to stability does not mean that is the only reason that Rawls places value in it. It demonstrably is not. We know this because whilst it is clear that Rawls thinks congruence can play a role in generating stability he does not think it is a necessary condition, or that there are not genuinely viable ways to achieve stability without congruence. His commitment to principles of justice that are both stable *and* congruent must therefore be for reasons other than the instrumental value the former has for the latter.

Evidence for this claim can be found in the way that Rawls frames his interest in the problem of stability. Rawls surprisingly suggests in *Political Liberalism* that his problem of stability is almost unique in the history of political philosophy.²⁵⁹ Many

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Rawls, J. 1993. *Political Liberalism*, xvii.

of Rawls' contemporary readers were puzzled by this as the problem looks a lot like 'the problem of order,' which has an undeniably long tradition and most notably played a central organising role in Thomas Hobbes' *Leviathan*. Habermas implicitly treats Rawls' problem as identical to that which exercised Hobbes,²⁶⁰ and the thought that these problem are synonymous is voiced even more explicitly by Brian Barry. Barry writes:

‘All we have to do is *rechristen* the problem of stability as the problem of order and we can immediately recognise it as a central focus of political philosophy in all periods-but especially, of course, at times when order is particularly problematic. (i.e.) Hobbes, reacting to the English Civil War, and de Maistre, reacting to the French Revolution.’²⁶¹

In his *Reply to Habermas* Rawls responds to this observation by distinguishing his concern from that of Hobbes by saying that he is not interested in stability *per se*, but rather something that he calls 'stability for the right reasons.'²⁶² What was wrong with Hobbes' theory, Rawls thought, was not that it failed to answer the problem of stability- in fact he thought that it did-²⁶³ but it failed to do so for whatever the right reasons are. As Rawls was only interested securing stability

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Habermas, J. 1995. 'Reconciliation Through The Use of Public Reason,' *Journal of Philosophy*, 92(3), p113.

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Barry, B. 1995. 'John Rawls and the Search For Stability,' *Ethics*, 105(4), p880.

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Rawls, J. 1995. *Reply to Habermas*. p146.

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That is, at least, the impression one gets from his lectures on Hobbes. Rawls, J. 2007. *Lectures on the History of Political Philosophy*, (Freeman, S. Ed.) Harvard University Press: Cambridge, Massachusetts, p70.

for the right reasons, and Hobbes just wanted stability of any form, they were, Rawls concluded, really consumed by different problems.

In fact Rawls had noticed the affinity between Hobbes' problem and that of stability long before Habermas and Barry commented upon it. In a 1987 paper called *The Idea of an Overlapping Consensus*, Rawls presents an account of the differences between the two problems which provides the most enlightening explanation as to what he means by the distinction between stability and stability for the right reasons. Rawls calls the Hobbesian response to the question of stability a *modus vivendi*.²⁶⁴ This is a Latin phrase that roughly translates as 'way of living' but is often used more specifically to describe a temporary accommodation to a political dispute that is reached in order to allow its participants to get on with their lives until a more permanent resolution is found. For example the present peace process in Ireland is often described as a *modus vivendi*, because although the Republican side still support the principle of a united Ireland they have agreed to work within present British institutions within Northern Ireland so that the people of the region can get on with living their lives. Rawls' first example of a *modus vivendi* is similar in that it describes two rival nations who wish to overcome each other by force but recognise that, as they each have enough strength to wound but not overcome the other, it is in their temporary interests not to attack and thus sign a non-aggression treaty.²⁶⁵

Rawls' use of this phrase might give us reason to pause before accepting my interpretive claim that what was wrong with Hobbes' solution to the problem of stability, at least in Rawls' view, wasn't that it wasn't stable. *Modus vivendi* are almost by definition contingent holding positions rather than permanent

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Rawls, J. 1987. 'The Idea of an Overlapping Consensus,' *Oxford Journal of Legal Studies*, 7(1), p1.

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Rawls, J. 1987. *The Idea of an Overlapping Consensus*, p11.

resolutions and thus might be seen as unlikely to provide stability in the relevant sense. Rawls' example of the two rival nations is a potential case in point. The two nations only sign the agreement in recognition of their equal power. If one of the two nations were to become more powerful than the other then the basis of the agreement would have disappeared. Similarly Hobbes' 'balance of power' solution to the problem of stability depends upon the roughly egalitarian distribution of strength accorded by nature between persons. Once that equality is disrupted, perhaps by men and women grouping together to conjoin and multiply their force, the balance of power is broken, and with it the basis for stability.

Despite this observation, and Rawls stating that Hobbes' solution rests upon a 'fortuitous conjunction of contingencies',¹²⁶⁶ a careful reading of the paper in fact suggests what we have already proposed—Rawls' opposition to the Hobbesian solution to the problem of stability is based on qualities and values other than stability itself. We make this claim on the basis that when Rawls descends from abstractions and uses historical anecdote to describe an actual *modus vivendi*, he criticises it not for its instability but for its effect on the 'moral quality of public life.'¹²⁶⁷

His anecdote is a stylised version of the principle of toleration that arose in those 16th and 17th century European nations that had a roughly equal proportion of Protestant and Catholic subjects. The legal embodiment of that principle being the 1555 Peace of Augsburg, which allowed for subjects within the Holy Roman Empire to enter the protection of their preferred denomination and thus created

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Rawls, J. 1987. The Idea of an Overlapping Consensus, p1.

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Rawls, J. 1987. The Idea of an Overlapping Consensus, p12.

an institutional framework for Lutherans and Catholics to co-exist.²⁶⁸ For the sake of the example Rawls asks us to accept the claim that those religions at the time demanded that religious rulers had a duty to uphold 'the true faith' by punishing heretics. To use Rawlsian language this is the 'considered moral judgement' that the subjects of these states wanted their political institutions to represent. Rawls also asks us to accept that, to the extent that the principle of toleration emerged and thrived in nations facing these circumstances, it did so as each greatly feared being a victim of persecution. This, it is important to remember, was a psychological status that was only preserved due to the roughly equal power of the respective sects in such nations and would have wilted if either side believed they were capable of getting the upper hand. Rawls is not explicit about what the pernicious effects such a scenario is supposed to have on 'the moral quality of public life,' assuming them to be obvious,²⁶⁹ so we can only reasonably conject. We can make two observations about public life in Rawls' stylised account of a reformation-era *modus vivendi*.

Firstly it is noteworthy that for neither Protestants nor Catholics in the stylised society does the principle of toleration affirm their actual view of the correct role of the state in governing religious beliefs. The state does not, as they want it do, use its coercive power to uphold the true faith. We may say that as a response to circumstance it asks them to put their rational interests, not being persecuted by opposing sectarian forces, ahead of their considered illiberal judgements about how a political community ought to be organised.

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This is my extrapolation of what Rawls has in mind. He does not mention the Peace of Augsburg.

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Rawls, J. 1987. The Idea of an Overlapping Consensus, p12.

Our second observation about the effect of a *modus vivendi* on 'the moral quality of public life' is a reflection of the fact that stability rests upon the maintenance of a balance of power. This may be possible to maintain over time but, at least from the point of view of the rational choice theory that Rawls so often flirted with, only if the subjects interpret those that do not share their faith as rivals. As rivals it is in their interests to thwart the development of each other's power, population numbers and capacities. Given that Protestant and Catholic strands of Christianity are cosmopolitan in their belief structure, they believe that all men were created equal; we can only assume they would rather convert rather than stifle the heretics. The 'tolerant' political settlement once again demands of them an attitude and mode of behaviour towards the other that is exterior to their moral beliefs.

Both of these concerns, we may observe, are denials of Rawls' understanding of political autonomy. The sources of stability in a reformation-era society governed by a tolerant *modus vivendi* are heteronomous to the moral perspective of its constituents and its subjects are behaving in a way that subsumes the reasonable part of the self to the force of instrumental rationality. This is why the Hobbesian answer to the problem of stability is *uninteresting*, even though it is not wrong, and this is what Justice as Fairness must correct. Stability for the right reasons must produce the motivation to act justly but do so in a way that does not deny or diminish the quality of autonomy. In order to do so the constituent members of a political community must find the principles which govern their society to be congruent with their own good. Congruence, just as mutually acceptable principles before it, appears to be a pre-condition of autonomous politics.

The congruence argument in Theory

Stability for the right reasons is secured in Part III of *Theory* through the argument from congruence. The members of a society governed by Rawlsian

principles of justice develop what he calls an ‘effective sense of justice,’ which means that they come to consider the behaviour necessary to uphold those just institutions as a constitutive element of their own good.²⁷⁰ In this section of the argument I am going to briefly outline three things. Firstly, how the argument from congruence works, secondly why Rawls came to believe that it was inconsistent with ‘the fact of reasonable pluralism’ and finally the changes made to Justice as Fairness that were made in response to this inconsistency. The end result shall be a workable synopsis of what the political turn is, and why Rawls felt that he had to undertake it.

Despite unfolding slowly over three chapters the congruence argument in *Theory* is actually rather simple. Rawls believes that the persons that will emerge in a well-ordered society will desire to act justly more than any other rival desire and thus they will find it part of their good to commit to, and support, whatever just institutions there are available to them. The remarkable simplicity of the structure of the argument is best captured in the following passage:

‘Being the sorts of persons that they are, the members of a well-ordered society desire more than anything to act justly and fulfilling this desire is part of their good.’²⁷¹

Though the structure of the argument may be simple it is clear that the claims within it are highly contentious. We will grant for the sake of the argument, in the face of many very real concerns about collective action problems and neglect of the role of irrationality in human behaviour, Rawls’ implied claim about the relationship between subject, institutions, desires and motivations. That is

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Rawls, J. 1999. *Theory*, p497.

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Rawls, J. 1999. *Theory*, p498.

something like the following: if x is y 's strongest desire and z institutions supports x then y will support and uphold z . However, there is a much more challenging question that it would be too generous to simply grant: how is Rawls able to posit the original premise that for the citizens of a well-ordered society 'acting justly' is their strongest desire? Whatever Rawls precisely means by that set of motivational capacities, it is certainly not something that we witness in contemporary societies. This question is particularly pertinent in the context of this thesis which takes seriously Rawls' claim that he shall 'take men as they are.'

The first thing to note is that Rawls does not mean something that is a natural interpretation of 'to desire more than anything to act justly' but must strike every reader as highly implausible: the desire to be just will always be our strongest desire and trumps all other desires no matter what the situation. I think we can all recall situations where our desire to act justly, to the extent that we possess one at all, was far from the most powerful motivating force in our behaviour. It would be a perverse individual indeed who, even at life's finest and most personal moments, thought primarily of a political virtue like justice. Rawls instead means something far more restrictive like 'the desire to be just will always be stronger than the desire to be unjust' when we are subject to situations where our desire to be just comes into conflict with other motivations. That is to say, when politics comes into play. We know this to be the case because Rawls proceeds through a series of arguments where he contrasts our motivation to be just with available substitutes, this is, pace Rousseau when interpreted as moral rigorist,²⁷² rather than a series of arguments about why justice will become our highest and all consuming good.²⁷³

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By this I mean those who emphasise Rousseau's fascination with the all-encompassing civic virtue of Sparta. Shklar, J.

1969. *Men and Citizens*. Cambridge University Press: Cambridge.

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Rawls, J. 1999. *Theory*, pp499-501.

The first argument that Rawls develops begins by asking the reader to place herself in the context of a well-ordered society. Such a society has, Rawls suggests, features which are significantly different to our own unjust societies that make the development of an effective sense of justice more plausible. It is important to note here that as a well-ordered-society is as of yet unrealised, Rawls is making claims about the way that human motivation will behave in an unobservable world. He is asking for a speculative act of the imagination on behalf of the reader. We will see in the next chapter that this is far from the last time that he will do so, and that it is an argumentative technique not without controversy, but for the sake of the argument I ask you to provisionally accept it.

Other citizens in a well-ordered-society are, by way of definition, genuinely acting justly and supporting and upholding institutions which we know have been designed in accordance with principles that you yourself accept as reflecting how you want to treat other persons. The choice then, when we properly consider the circumstances, is between acting justly and 'a systemic course of deception and hypocrisy.'²⁷⁴ Rawls is well aware that in actually existing social institutions people regularly choose to publicly pay lip service to reasonably just institutions whilst hypocritically undermining them through their personal behaviour. For example, many a tax dodger has taken Rawls' second option of systemic hypocrisy by giving vocal support to the publicly funded institutions of the welfare state and the principle of progressive taxation. However, as Rawls points out, in a well-ordered society we, the potential hypocrites, do not have refuge in the common self-justifications of "everyone's at it" or that the institutions of the state are "not all that fair anyway." The individual who chooses to act unjustly in a well-ordered society must live knowingly with their own hypocrisy. This, Rawls suggests, is a strong psychological barrier against wanting to be unjust. It is not a

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Rawls, J. 1999. *Theory*, p499.

normal feature of human desire to want to be hypocritical, and when it is more difficult to engage in a personal conceit that barrier becomes higher and less likely to be hurdled.

You might think that Rawls account of the psychological drain of hypocrisy is insufficient to demonstrate that individuals will always choose justice over injustice. Our powers of personal conceit are certainly stronger than anything that can be dismissed in the space of the two short paragraphs that Rawls devotes to that particular line of argument. If so, there are still two more claims made by Rawls that may convince you. The next argument that Rawls develops concerns the development of our moral powers. We have seen in our explication of the primary goods that Rawls assumes that we always seek to develop our human capacities and always prefer the opportunity to do so over not doing so.²⁷⁵ There are, Rawls suggests, some powers and capacities that we possess that we come to see can be expressed only in union with others. In Rawls' words we 'depend upon the cooperative endeavours of others not only for the means of well-being but to bring to fruition our latent powers.' Just social institutions, in providing a platform for fair co-operative endeavour, are likely to gain our allegiance as we recognise them as a vehicle for developing our moral powers.

The strongest challenge to this second argument is quite obvious. It might be the case that we find acting in concert and collaboration with others allows us to develop our moral powers, but there seems to be few reasons why those co-operative institutions need to be just. For example, if a talented scholar is able to develop her intellectual capacities at a university which systematically rips off its students, she may still find her desire to develop her most complex capacities is

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Rawls actually invokes a slightly more complex claim that suggests we always prefer more complex goods over simpler ones, the so called 'Aristotlean principle.' Rawls, J. 1999. Theory, p372. However, it is not necessary to explain this in full in order to advance our argument.

best satisfied by upholding and supporting unjust institutions rather than just ones. Indeed just institutions may require her to devote more time to teaching and administration that she presently has to give away. One might observe that the history of political philosophy has been littered, from its Athenian genesis, with talented men justifying seemingly unjust institutions on the basis of the talents it allows them to cultivate.²⁷⁶

The final argument that Rawls presents rests upon the notion developed in chapter 2 of this thesis that principles of justice ‘express our nature as free and equal persons,’ or what Rawls calls the ‘Kantian interpretation of Justice as Fairness.’²⁷⁷ We remember that Rawls attributes to every individual the desire to treat other persons in accordance with principles that they themselves can accept, this desire apparently flows from our shared conception of each other as free and equal persons, Rawls then goes on to suggest that this desire motivates our engagement with the problem of justice in the first place. The relationship between our desire to express ourselves as free and equal persons and Rawls’ claim that we develop an ‘effective sense of justice’ is the most direct of his three arguments. Rawls straight-forwardly believes that properly just institutions are an avenue for realising this immanent desire. There is, Rawls tells us, a ‘practical identity’ in the interest to express oneself as a free and equal person and the desire to act out of an effective sense of justice.²⁷⁸

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Plato seemingly defends a rigid class system in Republic on account of it being necessary to preserve the opportunity of an elaborate education for the Guardians of the city. Plato. 1993 (380bc). Republic, pp70-115, 4:376-412.

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Rawls, J. 1999. Theory, p221.

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Rawls, J. 1999. Theory, p501.

The beauty of the third argument for congruence is that it deals with many of the problems of the first two. Our desire not to be hypocritical is less likely to be dulled by the ingenuity of human self-deception if we also possess a desire to express ourselves as free and equal persons. Our desire to engage in collaborative exercise is more likely to attach itself to just rather than unjust institutions in the context of this general Kantian desire to express our nature as free and equal persons. The third argument complements and supports what has come before and thus is essential in the development of a clear and comprehensive picture of why Rawls believes that in a well-ordered society our desire to be just will trump any conflicting desires. The well-ordered society of Justice as Fairness is so congruent with its flesh and blood citizens' conception of the good that it ought to organically produce those motivations that are needed for a stable system. What is more, this is all done for the right reasons and thus preserves our opportunity for autonomous politics. The deleterious effects on the moral quality of public life that we associate with a Hobbesian *modus vivendi* are kept at bay.

The political turn

Rawls is quite clear in introduction to *Political Liberalism* that the changes he makes to Justice as Fairness through the political turn are a result of dissatisfaction with this argument from congruence.²⁷⁹ Rawls suggests that the argument will not work as it is in conflict with what he calls 'the fact of reasonable pluralism,' that is the plurality of beliefs that inevitably exists within a liberal political community about philosophical and religious issues.

Rawls is frustratingly vague about which components of the argument from congruence are supposed to be in conflict with the fact of reasonable pluralism

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Rawls, J. 1993. *Political Liberalism*, xv-xvi.

but it is perfectly possible to recover what aspects of the argument he was dissatisfied with. The well-ordered society described in Part III of *Theory* is said to be 'unrealistic' as its members endorse the principles of justice as part of a 'fully comprehensive doctrine.'²⁸⁰ A fully comprehensive doctrine, we remember, answers localised questions with reference to much more generalised system of philosophical beliefs. Rawls believed that the utilisation of fully comprehensive doctrines in the justification of political principles was not appropriate to a community with reasonable pluralism, as there would always be people for whom the wider premises of the invoked comprehensive doctrine were unacceptable.

We can why Rawls might have thought that the congruence arguments relied upon such fully comprehensive doctrines. One might think that the first two arguments, from hypocrisy and from the development of powers, rest upon an account of developmental psychology that doesn't amount to public knowledge about social facts which effect political matters, but rather Rawls' own speculations and personal conception of the good. He certainly does not attempt to demonstrate any embeddedness of the psychological claims within our political tradition in the same way he does the considered judgements that frame the original position, and it is possible to imagine religious and philosophical communities that would not be persuaded by its claims. For example, some religious belief systems strongly emphasise the role of independence and isolation in the good of individuals, they see the temptation of mass-production and collaboration as a danger to, rather than part of, the living of a good life. Indeed the notion of solitude as a core component of the good life is hardly absent from the dominant religion of Western cultures. We are told that Christ's own self-development was accelerated by an extended period of meditation in

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Rawls, J. 1993. *Political Liberalism*, xvi.

the Judean desert.²⁸¹ Why then should those committed to such religious beliefs be particularly attached to institutions which foster large scale collaboration?

Perhaps more problematic is Rawls' claim that we have a generalised desire to express our nature as free and equal persons. There are, we must surely recognise, religious belief systems which believe that our good is realised in fulfilling our duties to others rather than securing our freedom from their demands. The Kantian interpretation of Justice as Fairness, central though it is to the argument from congruence, seems sure to demand allegiance to a comprehensive belief system that many would reject, and, perhaps more importantly, find to violate their most personally important belief systems.

Even a staunch critic of the political turn like Brian Barry is willing to concede that, 'if the stability of a just society can be securely underpinned only by appealing to the "Kantian interpretation" of the principles of justice. This must count as a "comprehensive view" inasmuch as it invokes a particular conception of the good: a conception according to which the highest good of human beings is to express their free and rational natures.'²⁸² As Barry points out, this is an assessment shared by those far more sympathetic to these developments in Rawls' intellectual journey, such as Samuel Freeman. Freeman writes, 'from reading the first hundred pages (chapter 1-8) of *A Theory of Justice*, it is hard to see exactly where Rawls thinks he had to invoke a more comprehensive ethical doctrine to justify Justice as Fairness....only when we reach chapter 9 and the second stage of the argument for stability, from 'congruence,' that the deeper

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Matthew, 4: 1-11.

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Barry, B 1995. John Rawls and The Search For Stability, p887.

basis of the view in Kantian ethics becomes really apparent.²⁸³ Rawls, his supporters and his critics are in unanimous agreement that the central role of the Kantian interpretation of Justice as Fairness in the argument from congruence is likely to be unconvincing in a society marked by a reasonable pluralism of religious and philosophical belief.

Rawls' response to his dissatisfaction was to emphasise the 'political' rather than 'metaphysical' grounds for thinking that his principles of justice were mutually acceptable across liberal political communities. The considered judgements that we use to construct and test the decision making criteria are presented as those which pertain to our shared conception of each other as citizens, rather than as moral beings. As the shared conception of the citizen that Rawls identifies in our political community is, like the conception of the moral persons, constituted by a commitment to freedom and equality, Rawls does not believe that this leads to a different set of principles. It is not the principles of justice that are changed in Rawls' theory, they are the same in *Political Liberalism* as they are in *Theory*, but rather the grounds upon which individual members of the political community come to find the principles to be congruent with their good, and the justification offered for the principles amongst the citizenry. Each member sees in political institutions not an opportunity to practice and develop her moral nature, but recognition of her own conception of citizenship. When persuading a fellow citizen of the merits of political institutions we make appeal to our shared political, rather than moral, conceptions.

Rawls' deference as a concession

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Freeman, S. 1994. 'Political Liberalism and The Possibility of a Just Democratic Constitution' *Chicago-Kent Law Review* (69), p826.

Now that I have explained what is meant by the political turn I am going to introduce a common criticism of this development in Rawls' political thought. The charge is this: by stating that his principles must produce stability for the right reasons, and that a plurality of religious and philosophical belief must be accommodated in this search for stability, Rawls renders his principles subject to concerns that are exterior to the proper concept of justice. The exterior concern is whether principles would actually be *accepted* by the citizenry as being congruent with their own good. This, it is alleged, is a very different criterion from Rawls' previous commitment to political reflective equilibrium, which asks the importantly different question of whether the principles are *acceptable* from a point of view that isolates our moral judgement. Only the latter concern, with its carefully constructed model of neutrality and its ideal setting, properly directs us to the question of what justice is. This criticism was most famously voiced by Jürgen Habermas²⁸⁴ in his 1995 '*Consensus, Stability and Normativity in Rawls' Political Liberalism*,' and Brian Barry in his '*John Rawls and The Search For Stability*.'²⁸⁵ Although their responses to Rawls were developed independently of each other they are similar enough that I shall present them as a united challenge.²⁸⁶

To understand Barry's critique of Rawls' political turn we need to bring together the first half of this chapter, on political reflective equilibrium, with the second, on stability and congruence. We need to consider the difference between the

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Habermas, J. 1998. 'Reconciliation Through The Public Use of Reason,' *The Journal of Philosophy*, 95(6).

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Barry, B. 1995. 'John Rawls and the Search For Stability,' *Ethics*, 105(4).

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It should be noted that the criticism I am about to present is not unique to either Habermas or Barry. To take one example we see the same line of critical response in Raz, J. 'Facing Diversity: the Case for Epistemic Abstinence,' *Philosophy and Public Affairs*,

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second stage of reflective equilibrium—that is when we check whether our considered moral judgements are consistent with the principles of justice—and the process of checking to see whether the principles are congruent with the good of flesh and blood citizens. Barry's critique amounts to highlighting the difference between these two processes, and accusing Rawls of slowly and unacceptably collapsing them together.

We can start explaining this charge by noting similarities between the two stages of Rawls's theory. Considered moral judgements, like the good of citizens in a well-ordered society, belong to what we have called flesh and blood citizens rather than the abstract and radically disembodied decision makers of the original position. However there are good reasons to think we should not be seduced by this similarity into thinking that these are identical processes. The test of stability for the right reasons is not just an instance of our playing out the process of reflective equilibrium. To see why we might think this would be a mistake, consider that those attempting to engage in reflective equilibrium are still trying to isolate their moral or—to show fidelity to the changes Rawls makes through the political turn—political point of view. For evidence see that Rawls tells us in *Theory* that in identifying our moral judgements we must disregard our thoughts on matters to which we have a strong emotional or material attachment, for if we reason from these examples we are 'likely to be influenced by an excessive attention to our own interests.'²⁸⁷ Indeed, we remember that the radical ignorance of the original position is supposed to be little more than a device for representing the considered judgements of the citizenry. This commitment to isolating the moral or political point of view is not something that is true of the flesh and blood citizens that are going about their daily lives in the situations that test the stability of a society. These citizens are not attempting to reflect upon their understanding of what is *right*, but are instead trying to pursue their own individualised

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Rawls, J. 1999. *Theory*, p42.

conception of the *good*. Their interests, their emotional attachments and everything else that is central to a full conception of the good are thus very much on the table.

This observation is important because we have seen that reflective equilibrium is part of the justification of the principles themselves. An objective account of what is right could, in the absence of any exterior object called justice, only be constructed by identifying what is acceptable to all persons when they sincerely attempt to express their considered moral judgements about what justice demands of them. Barry suggests that whether a set of principles are stable, and indeed if they are congruent with the good of citizens, does not have the quality of reflecting our moral or political point of view, and thus should not play any part in their justification. This is for the good reason that flesh and blood citizens have their own interests and mix of motives that quite simply may be in violation of their own considered judgements about justice. In a seemingly flippant but actually rather pertinent passage he notes that one may come to find the desire to go on an expensive trip around the world to be a central component of our good once we become flesh and blood citizens. The second stage of reflective equilibrium, Barry suggests, would, so long as we have any interest in equality, tell us that this is simply an unreasonable claim over others that goes beyond any privileges that justice demands. However, what do we do if a vacation adoring individual is particularly disruptive and seeks to undermine the whole political system in order to get her trip, ought we to alter our principles and accommodate her demands to make sure the system is more stable? If we erect a test of stability as part of our attempt to identify what justice is, we may very well come to answer in the affirmative. This, Barry thinks, would fundamentally undermine the normative force of the principles of justice in a society and render them subject to the vagaries of human motivation. The proper thing to do would be to dismiss this particular citizen's demands as unjust and do so with reference to mutually acceptable principles produced from a fair procedure. Stability will either

have to be damned, or be sought through an alternative and more coercive source.

The accusation that Barry is putting forward is that Rawls' search for principles which are stable in a society with a plurality of religious and philosophical doctrines is analogous to absurdly seeking to compromise with potentially unjust demands. Religious and philosophical beliefs do not represent the judgement of individuals when they are sincerely seeking to create principles acceptable across a political community, and are thus liable to generating claims that go beyond that of the reasonable and the right. Justice as Fairness must, Barry thinks, be comfortable with the thought that sometimes the full conception of the good developed by its citizens will lead to unjust demands, and be willing to stand tall and say so. The *acceptability* of the principles from a position of fairness must be separated from their actual *acceptance* in any given society.

Barry even goes as far as to suggest there is good reason to think that Rawls, at the time of *Theory*, used to agree with him. It is only later, through the course of the political turn, that he changed his mind. In support of this claim he points out that in *Theory* Rawls suggests that when a political system is incongruent it must find stability from an alternative source, such as active and deliberate coercion.²⁸⁸ Stability for the wrong reasons was a potentially just if sub-optimal scenario from the point of view of Justice as Fairness. However, by the time of *Political Liberalism* Rawls had converted stability for the right reasons from a desirable bell and whistle of just principles to part of the justification of principles themselves. He had raised the test of stability for the right reasons to the same philosophical standing as the second stage of the constructive process, reflective equilibrium, by saying that just principles *must* be self-motivating rather than that it is desirable that they are. We finish our exegesis of Barry's critique of the

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Barry, B. 1995. John Rawls and The Search for Stability, p888; Rawls, J. 1999. *Theory*, p576.

political turn with the following passage. It offers a perfect encapsulation of the objection:

‘In *A Theory of Justice* the validity of the theory was unaffected by any lack of success it might have in forming a part of a people’s conceptions of their good. For we could say that all conceptions of the good incompatible with the principles of justice were necessarily unreasonable. But in *Political Liberalism*, Rawls denies that that a regime can be legitimate if there exists people with “reasonable comprehensive views” who reject its foundational principles.’²⁸⁹

We can find clear echoes of Barry’s critique of the political turn in Jürgen Habermas’ celebrated 1995 essay on Rawls’ philosophical project. Habermas developed the language that we have used here distinguishing between ‘the acceptable’ from a specific moral vantage point, and the ‘actually accepted’ in a flesh and blood society. As Habermas puts it, ‘when he (Rawls) calls his conception of justice political, his intention appears to be rather to collapse the distinction between its justified acceptability and its actual acceptance.’²⁹⁰

Habermas rejects the alleged collapse of the distinction. He welcomes the notion that consensus in a constructed position of fairness is a reasonable ground for determining the contents of justice. Indeed his own normative philosophy suggests something similar; albeit where the ideal decision making situation is one of perfectly egalitarian discourse and argumentation rather than Rawls’

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Barry, B. 1995. *John Rawls and The Search for Stability*, p890.

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Habermas, J. 1995. *Reconciliation Through The Public Use of Reason*, p122.

radical ignorance.²⁹¹ In his essay on Rawls he puts this as ‘principles are valid which meet with uncoerced intersubjective recognition under conditions of rational discourse.’²⁹² However, his own commitment to ideal theory leads him to concluding that the question of stability ought to be considered a ‘further and primarily empirical question’ which is outside of the province of normative theory.²⁹³ By making the lack of stability a reason to consider and revise a set of principles, Rawls’ theory loses its focus on constructing autonomous principles of justice and instead makes distortionary concessions to the preservation of political stability.²⁹⁴ This is the unified challenge that Barry and Habermas present to the changes Rawls makes through the political turn.

The ideality of the deference

We have seen both the changes that Rawls made to Justice as Fairness through the political turn and the accusation of Habermas and Barry that these changes reduce the ideality, and thus the normative force, of his principles. We are now ready to see how it is that Rawls defends himself from this particular concessionary charge. Rawls’ self-defence is important to this thesis as we will see in the next chapter that it offers a perfectly workable blueprint of how one can defend his tolerance of unequalising incentives, and thus ultimately defeat Cohen’s own concessionary charge.

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Habermas, J. 1984. *The Theory of Communicative Action: Reason and Rationalisation of Society*, Trans: McCarthy, T, Beacon: Boston.

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Habermas, J. 1995. *Reconciliation Through The Use of Public Reason*, p127.

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Habermas, J. 1995. *Reconciliation Through The Use of Public Reason*, p127.

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Habermas, J. 1995. *Reconciliation Through The Use of Public Reason*, p128.

At the heart of Rawls' defence is a clarification of the status of the fact of reasonable pluralism. The fact of reasonable pluralism is not, we shall see, straightforwardly a fact. It is instead a 'fact of the free development of human reason.' Such facts need to have their own sub-category because they are not empirical observations about the external world, but rather necessary implications of the conception of the person as free and equal that Rawls' principles of justice are appropriate for. In a political community committed to the freedom and equality of its citizens, those citizens will be able to freely develop their reason. The argument is that whilst it would be concessionary to show deference to any empirical facts about political cultures, showing deference to a fact of the free development of human reason amounts to little more than the commitment not to develop principles that are not in contradiction with their own aim of being fair across a community of free and equal persons. It is, we argue, the failure of Rawls' critics to recognise this distinction that gives the misleading impression that Rawls' deference to the fact of reasonable pluralism reduces the ideality and normative force of Rawls' position.

Ed Wigenbach, an advocate of a similar line of argument pushed by Habermas and Barry, offers a quotation that perfectly summaries the interpretive confusion under discussion. In the process of criticising the political turn he laments that:

'Rawls takes historical facts about modern culture as the necessary conditions of any discussion about politics or justice. Self-evident truths about the common conditions of modern democracy.'²⁹⁵

We start our argument by noting that the two categories that Wigenbach offers as synonyms, that is 'historical facts' and 'self-evident truths,' are in reality two very

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Wigenbach, E. 1999. 'Unjust Context: The Priority of Stability in Rawls's Contextualized Theory of Justice,' *American Journal of Political Science*, 43(1), p225.

different beasts. It is to the first that Barry and Habermas implicitly accuse Rawls of conceding the concept of justice, and not the second. However, the fact of reasonable pluralism is much closer to a self-evident truth than a historical fact. It is *a theoretical and inevitable feature of Rawls' ideal of pure procedural justice rather than a historical truth which he so happens to take seriously*. My argument will take the following structure. Firstly I will show why if the fact of reasonable pluralism is a 'self-evident truth' rather than a 'historical fact' it would not be concessionary to be deferential towards it. I then go on to show that Rawls unambiguously conceived of the fact of reasonable pluralism as a self-evident truth rather than as a historical fact.

Why self-evident truths are special

If reasonable pluralism were simply an historical fact about democratic communities we can see why it would be problematic to suggest that political principles must be deferential towards it. It might be, as Barry seems to suspect, simply the case that religious and philosophical pluralism is, from the point of view of justice, an unfortunate feature of modern democratic societies which makes justice hard or difficult to obtain without strict coercive practices. Its existence should not be reason to alter the justification of the principles unless these divergent philosophical and religious belief systems actually alter the understanding that citizens have of how they ought to treat each other when they sincerely contemplate their considered political judgements. The potential for instability, or the need to seek stability for the wrong reasons, is not reason in and of itself to alter the way that the principles are justified. Doing so would subject the principles to a stage of justification that, unlike reflective equilibrium, is outside of our sincere attempt to adopt the moral point of view.

However, if the fact of reasonable pluralism is not a historical fact but rather a 'self-evident truth' we would have excellent grounds for treating it differently. If reasonable pluralism will inevitably be produced in a society that is committed to

the autonomy of its citizenry, we develop a new reason for not wanting to promote principles that can only be either unstable, or stable for the wrong reasons. We remember that the citizenry is ultimately looking to establish political principles that will allow each citizen to pursue of his or her own good in a framework that is known to be fair to all. This, Rawls thinks, is the only way we can properly express our shared commitment to the freedom and equality of persons. If it is the case that such an autonomous society would always be pluralistic, and Rawls' decision makers advance principles that are only congruent for believers of a particular fully comprehensive doctrine, then it follows that his decision makers are unwittingly exposing themselves to the possibility that they will be actively coerced into supporting the basic structure of society. If only a minority in the society have this fate fall upon them then we might say that it turns out that the basic structure is more hospitable to some conceptions of the good life than others. If everyone succumbs to stability for the wrong reasons then we will certainly suspect that the basic structure is sub-optimally arranged for the society in question.

Sub-optimality and lack of neutrality between different conceptions of the good are not, in a vacuum, necessarily reasons to dismiss a set of principles. There will of course be conceptions of the good which go beyond what justice can grant and there will be times where pursuing justice is less important than other goods. This is what Barry's flippant example reminds us. However, when sub-optimality and lack of neutrality are built into the design of the basic structure—when they are an inevitable consequence of the way that principles are decided upon—we are left with a very different problem. For in such a scenario the participants in the constructive process are inevitably subjecting themselves to the possibility of these dangers despite the fact the system itself is supposed to be one of mutual advantage. They are trying to will for a system whereby each reasonable conception of the good can prosper, and, by not taking into account the fact of reasonable pluralism, engaging in a task that is certain to fail. It would, in short,

be self-contradictory not to make sure that principles are deferential to the fact of reasonable pluralism 'from the start.'

I think we will bring clarity by putting what we have just said in the language of constructivism that we developed in chapter 2 of this thesis. We saw that Justice as Fairness was supposed to develop principles appropriate to the conception of the person or citizen as free and equal. In a political community which values the freedom and equality of its citizens, the citizenry will be able to freely develop their reason. One inevitable effect of the free development of human reason is that there will be a pluralism of beliefs about religious and philosophical issues. If political principles are proposed that are only congruent with the good of citizens that adhere to a particular religious or philosophical doctrine then there will be some persons who are subject to coercion through no fault of their own. To coerce an individual for no fault of their own would fail to express our commitment to the person as free and equal. It follows, therefore, that in order to properly express the conception of the person that Justice as Fairness is interested in—that is the free and equal person—we must make sure that principles can be accepted by those with a divergent set of religious and philosophical beliefs. The fact of reasonable pluralism must be shown deference if we are to build principles appropriate to the conception of the person as free and equal.

This suggests that the test of stability for the right reasons cannot, as Rawls' critics suggest, straightforwardly be dismissed as a bell and whistle of just principles. Political principles which *guarantee* instability or stability for the wrong reasons are in contradiction with the very ends to which they are supposed to aim towards. What is more, we can see that Rawls preserves the ideality of his conception of justice. The reason we take the fact of reasonable pluralism into account is that it is an implication of the development of the part of the self that we want to develop (the capacity to reason that is a moral power), as well as the

values we want to express (the respect of the autonomy of other free and equal citizens).

Whilst stability for the right reasons is not the test of reflective equilibrium, it is—so long as the stability considered is a product of the free development of human reason—quite properly the sort of thing that has to be considered when we seek to determine what justice is. It is, and ought to be, part of the justification of the principles themselves.

The fact of reasonable pluralism is not a fact

If we look at the way that Rawls defends his deference to the fact of reasonable pluralism we see bountiful evidence that he fully intends the fact of reasonable pluralism to be understood as a logical implication of an autonomous political community. For example, In *Political Liberalism* he writes that:

‘the diversity of comprehensive... doctrines found in modern democratic societies is not a mere historical condition that may soon pass away; it is a *permanent feature* of the public culture of democracy. Under the political and social conditions secured by the basic rights and liberties of free institutions, a diversity of conflicting and irreconcilable doctrines *will* come about and *persist*.¹²⁹⁶

I have added emphasises to the above quotation to highlight certain key features of Rawls' understanding of the fact of reasonable pluralism. Namely that it is a permanent and necessary feature of societies, such as the one outlined by Justice as Fairness, which guarantees citizens basic rights and liberties. The claim that reasonable pluralism is not a contingent feature of free and democratic societies is intended as a strong one. It is not one that could be made by

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observing that all hitherto free societies have contained this feature, for such inductive reasoning can never guarantee the continuation of a correlation. In order for Rawls to make that claim he has to be able to show that there is something inherent in the idea of free societies that guarantees reasonable pluralism. Rawls establishes such a relationship through an extraordinary suggestion. The originality and importance of which I and many others would have missed if it were not for Burton Dreben's essay *On Rawls and Political Liberalism*.²⁹⁷ Rawls posits that, if human reason is left to its own devices, it will by its very nature come to different conclusions about the moral and philosophical questions over which comprehensive doctrines compete.

Rawls is aware that this is a strong claim about the nature of human reason. In the section where he explains the fact of reasonable pluralism he asserts his claim by way of contrast to rival theories that seek to explain the diversity of human thought. His first point of contrast is those that explain diversity solely as an 'up-shoot of self- and class interest,'¹²⁹⁸ where his implied opponents are those committed to a form of Marxism that sees religious and philosophical consciousness and an epiphenomenon of power. He also mentions those who bemoan diversity as the result of an 'understandable tendency to view the political world from a limited standpoint.'¹²⁹⁹ One would only regret a 'limited' standpoint if one felt there was a privilege attached to the an 'unlimited' standpoint that tends towards universal answers to comprehensive questions, which we might think of the traditional and predominant Platonic view in Western

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Dreben, B. 2003. On Rawls and Political Liberalism, pp316-346. Larry Krastoff also pursues a similar line in defence of Rawls. Krastoff, L. 1998. Consensus, Stability, and Normativity in Rawls.

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Rawls, J. 2003. Political Liberalism, p37.

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Rawls, J. 2003. Political Liberalism, p37.

thought. Against these two positions Rawls asserts his alternative view, that diversity is '(in part) the work of free practical reason within the framework of free institutions.'³⁰⁰ As Burton Dreben puts it: Rawls is, 'asserting that it is inevitable—not inevitable because of some faults in us, but inevitable to the free use of human reason—that reasonable and rational people will inevitably differ on fundamental doctrines.'³⁰¹

Rawls concludes his discussion of reasonable pluralism by suggesting 'in framing the political and conception so that it can, at the second stage, gain the support of reasonable comprehensive doctrines, we are not so much adjusting that conception to the brute forces of the world but to the inevitable outcome of free human reason.'³⁰² He could have just as easily observed that the adjustment is made not in response to stubborn feature of the real world, but inherent features of the ideal society affirmed by Justice as Fairness. He comes closest to making this thought explicit when he tells us of his motivation:

‘The fact of reasonable pluralism...shows that, as used in Theory, the idea of a well-ordered society of justice is *unrealistic*. This is because it is inconsistent with realising its own principles under the best foreseeable conditions.'³⁰³

Justice as Fairness as presented in *Theory* is not a successful realistic Utopia. It does not express the best that laws can be given how men are.

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Rawls, J. 2003. *Political Liberalism*, p37.

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Dreben, B. 2003. *On Rawls and Political Liberalism*, p318.

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Rawls, J. 1993. *Political Liberalism*, p37.

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Rawls, J. 1993. *Political Liberalism*, xvii.

Conclusion

This chapter has demonstrated why it is that Rawls' ideal of a community of free and equal citizens demands that we pay deference to the fact of reasonable pluralism. It is not, we saw, a prudential compromise with our desire for stability. Nor is it a mistaken extension of the process of reflective equilibrium. Instead, the failure of a set of principles to be congruent with those conceptions of the good that will inevitably be held in a well-ordered society would show that the initial process of construction had failed to properly express a commitment to treating citizens as free and equal. It is Rawls' belief that the flesh and blood citizens of *Theory*, freely developing their reason, could not affirm the principles of justice as a constitutive element of their own good for the reasons stated in the argument from congruence that led to the political turn. This is the impeccably ideal, and realistically Utopian, explanation for Rawls' deference to the fact of reasonable pluralism.

This explanation of the political turn is only the foundation of a two-part argument. In the next chapter we shall see that Rawls' tolerance of unequalising incentives can be justified on the grounds that they are rendered necessary by something that I call the 'fact of uneven attachment.' The fact of uneven attachment is, like the fact of reasonable pluralism, not just a feature of societies as we find them. It is instead an inevitable consequence of the free development of human reason. Proposing principles that would violate the fact of uneven attachment would then fail to be affirmed by flesh and blood citizens in a well-ordered society, and is thus unjustifiable. Ideal theory, as realistic Utopia understands it, demands that the concept of justice show deference towards the fact of uneven attachment, and ultimately tolerate of unequalising incentives, for the same ideal reasons we have seen here that Rawls believes it demands we show deference to the fact of reasonable pluralism.

Chapter 6: The Fact of Uneven Attachment

The previous chapter demonstrated why Rawls' ideal of principles of justice appropriate to a community of free and equal citizens demands deference to the fact of reasonable pluralism. The failure of a set of principles to be congruent with those conceptions of the good that would inevitably develop in a society committed to the free development of the reason of its citizens, such as one organised by Rawls' principles of justice, would, from the very outset, fail to express our shared understanding of the citizen as free and equal.

The explanation offered for the political turn is only the first leg of a two-part argument. In this chapter we shall see that Rawls' tolerance of unequalising incentives can be justified on the grounds that they are rendered necessary by something that I call the 'fact of uneven attachment.' The fact of uneven attachment is, like the fact of reasonable pluralism, not just a feature of societies as we find them. It is instead an inevitable consequence of the free development of human reason. Principles that violate it would thus inevitably fail to be congruent with the good of citizens in a well-ordered society. Ideal theory, as realistic Utopia understands it, thus demands that the theorist of justice show deference towards the fact of uneven attachment, and ultimately unequalising incentives, for exactly the same reasons we have seen that Rawls believes it demands we show deference to the fact of reasonable pluralism.

To make my argument I will explain what the fact of uneven attachment is and make the case that it has the same logical status as the fact of reasonable pluralism. Once this has been done I offer a suggestion that the general social facts that Rawls' citizens take into account must include the fact of uneven attachment and that this is enough to render unequalising incentives necessary from the ideal point of view of Justice as Fairness. After making clear the implications of my claims for both the liberty objection (it has been successfully reconstructed) and the concessionary criticism (it has been defeated), I conclude

the chapter by dealing with some possible objections to the way that I have reconstructed the liberty objection. I will pay particular attention to the idea that my reconstruction renders Justice as Fairness unfalsifiable. I accept the charge but suggest that it is not fatal to Justice as Fairness, and that unfalsifiable theories are the only reasonable response to the task of ideal theory.

Formal argument

We will start the presentation of the second leg of the argument by reiterating the formal constraints on principles of justice that Rawls' justification of deference to the fact of reasonable pluralism commits him to: *principles of justice must be congruent with those conceptions of the good that inevitably flow from the free development of human reason.*

For the sake of reference I offer a formalised expression of the argument for such a constraint. It merely expresses the claims that we developed in the previous chapter:

- 1) Principles of Justice ought to express our shared understanding of the person as free and equal.
 - 2) To express our understanding of the person as free and equal we must not produce principles that will inevitably conflict with the good of free and equal persons through no fault of their own.
 - 3) In a political community that supports the freedom and equality of persons we want the citizenry to freely develop their reason.
- Ergo
- 4) Principles of Justice must not conflict with those conceptions of the good that are a product of citizens freely developing their reason.

We can add the implications for the fact of reasonable pluralism to this general argument about the formal constraints placed upon principles of justice:

- 5) Pluralism of philosophical belief is a natural outcome of the free development of human reason. (The fact of reasonable pluralism properly understood)

If we then turn conclusion 4) into a premise and combine it with premise 5) we find that the following flows:

- 6) Principles of Justice must not conflict with the conceptions of the good that we associate with the fact of reasonable pluralism.

Now that we have outlined the formal constraint that Rawls' approach to ideal theory places upon principles of justice, and reminded ourselves of the consequences for the fact of reasonable pluralism, we are ready to connect this to the matter of unequalising incentives. Our argument rests upon demonstrating that unequalising incentives are made necessary not by human selfishness, or an arbitrary demand for the right to buy and sell our labour as we see fit, but by the free development of human reason. I am going to do so in two stages. Firstly I am going to argue that there is something called the 'fact of uneven attachment,' which is a logical parallel of our 5th premise. It is, like the fact of reasonable pluralism, a set of affairs that will inevitably come about with the free development of human reason. I will then argue that, in light of the fact of uneven attachment, unequalising incentives are necessary to make sure that principles are not inconsistent with those conceptions of the good which Justice as Fairness ideally wishes to encourage.

The parallel

In this section of the argument we want to show that there is something called 'the fact of uneven attachment' and that it is a logical parallel of the fact of reasonable pluralism. We remember that the feature that makes the fact of reasonable pluralism play a role in the justification of principles of justice is that it is the inevitable product of the free development of human reason (Premise 5 of our formal argument). As Rawls puts it in *Political Liberalism*:

*'Pluralism... is the natural outcome of activities of human reason under enduring free institutions.'*⁶⁰⁴

We thus want to demonstrate that:

Uneven attachment... is a natural outcome of activities of human reason under enduring free institutions.

I will start by defining the fact of uneven attachment. The fact of uneven attachment states that, under conditions which allow for the free development of human reason, it is inevitable that individuals will become more attached to some individuals than to others. Attachment here means that the understanding of the good life of one individual is bound up in the good of particular other individuals. Seeing a particular other live a good life is part of an individual's own good life, as is helping them live that good life through support, friendship and work.

A couple of points of emphasis need to be drawn out here if what I am saying is not to be misunderstood. The fact of uneven attachment doesn't just say that some individuals care about the good of some other individuals more than they care about the good of others. After all, principles of justice exist in part to overcome this problem by setting up a basic structure that treats us fairly independently of who knows and who likes who. For example, we want principles

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of distributive justice to guard against the perfectly understandable nepotistic urge. We want principles of retributive justice to punish the crime rather than exonerating the well liked criminal. The fact of uneven attachment says something importantly different. We mean that in cases where our interest in the good of another is at its most acute—our lovers, our family our best friends—it becomes vital to our sense of our own good that we are able to spend our time and efforts helping them and seeing them prosper. The just claim made by the individual who is unevenly attached to another is not ‘this other person is to be advantaged,’ it is ‘I must be able to devote my time and efforts to helping that person prosper.’ This is a vitally important distinction. It does not posit that one individual’s interests ought to be considered more important than others when we distribute benefits and burdens in a political community. Instead it says that when we understand what the interests of an individual are, a vital stage in any constructivist process, we have to take into account their desire to serve some individuals more than they serve others. Failure to do so would inevitably subject citizens to principles that are inconsistent with their own conception of the good.

An example may help elucidate the idea in question. If I were a parent particularly committed to social justice, I may not wish for my sons or daughters to receive advantages that cannot reasonably be extended across a political community. However, this does not stop me having a vital interest in wanting to be one of the persons that administer the just opportunities that they do have available to them. Parents want to drive their children to football practices, to take them to museums and go on holidays independent of any positional advantage such acts have. Their attachment demands it.

How can we demonstrate that what I have called the fact of uneven attachment is ‘a natural outcome of the activities of human reason under enduring free institutions?’ Like Rawls we have no society governed by perfectly free institutions that offer a testing ground to look to see if this is a feature of human rationality that has always developed. We must instead speculate from the way

that human reason has developed in other imperfect environments. The development of reason in imperfectly free institutions is as good a foundation for speculating about the development of reason in perfectly free institutions as we have. I do not anticipate it will be hard to persuade the reader that the fact of uneven attachment is true, but I shall still offer an argument from this sound basis.

George Orwell's dystopian novel, *Nineteen Eighty Four*, has assumed a position in the popular imagination as the perfect exposition of the horrors of a totalitarian state.³⁰⁵ This is a well deserved reputation for what is a brilliant work of fiction. We turn to Orwell because one of the most disturbing features of his dystopian vision appeals to our deep seated interest in being free to devote our time and efforts to the good of another. The hero of the novel, Winston Smith, is ultimately arrested for various political 'thoughtcrimes.' However, the Thought Police only become suspicious of Smith as a result of his clandestine relationship with a woman named Julia. In Orwell's nightmare society the desire to spend your energy and time with a particular individual is reason enough to be suspicious of disloyalty to the state. Indeed of all the horrific subversions of political language in the novel I find the most egregious is that the department for Law and Order is named the Ministry of Love.³⁰⁶ Love, the highest form of uneven attachment, is subverted into something that requires devotion to the common cause. The common good is not, as it would be in a society that respects the fact of uneven attachment, constituted in the knowledge that part of what it is good for individuals is to be able to devote their time and efforts to those they are most attached to.

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Orwell, G. 1949. *Nineteen Eighty Four*, Sacker and Warburg: London.

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It is Winston's least favourite Ministry: Orwell, G. 1949. *Nineteen Eighty Four*, p3.

Beyond dystopian novels we see plenty more evidence in popular culture that the sense that uneven attachment is vital to our moral interests is deeply embedded in our thought. A staple of the Hollywood family movie is the damage caused to an individual by working in an environment that does not afford them sufficient time to spend with their children.³⁰⁷ The sheer volume of popular stories that start from this thought surely speaks to a widespread sense that the basic structure of our own economies fails to show sufficient deference to the fact of uneven attachment.

I would like to finish my case that the fact of uneven attachment is rendered inevitable by the free development of human reason by offering the tentative suggestion that Rawls himself would have been attracted to this particular line of argument. In the section of *Political Liberalism* in which Rawls offer a theoretical justification as to why reasonable pluralism is an inevitable consequence of the free development of human reason, *The Burdens of Judgement*, he offers reasons why we inevitably disagree about matters of value. The list he offers is brief and the emphasis is largely on our intellectual capacities. However, buried in there is an explicit reference to something like the fact of uneven attachment. It is not a thought that Rawls extends but it is worth noting it is there. Rawls writes:

‘Religious and philosophical doctrines express views of the world and our life with one another, severally and collectively, as a whole. Our individual and associative points of view, intellectual affinities, and *affective attachments*, are too diverse, especially in a free society, to

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To pick a random examples from a plethora options we have Robin William’s grown up Peter Pan in Hook, who, despite being an orphan himself, needs to return to Neverland to remember the importance of being there for his children.

enable those doctrines to serve as the basis of a lasting and reasoned political agreement.³⁰⁸

Unequalising incentives

Now that I have established that the fact of uneven attachment is a logical parallel of the fact of reasonable pluralism, we have to connect this to Rawls' tolerance of unequalising incentives. It needs to be shown that the 'laws of psychology and economics,' which Rawls' decision-makers take on board in the original position, are necessary in order to make sure that principles are not proposed that will inevitably conflict with conceptions of the good held by citizens with such uneven attachments.

My argument is a simple one: without knowledge of the necessity of some unequalising incentives Rawls' decision makers are liable to proposing principles that they find so radically incongruent with their own good that they would not be able to live with the consequences, or only do so with great and undesirable difficulty.³⁰⁹ We start with our knowledge that in a well-ordered political community there will be uneven attachment.

Uneven attachment is a natural outcome of the free development of human reason.

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Rawls, J. 1993. Political Liberalism, p58. Emphasis mine.

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This language is chosen to mirror that of Rawls on the strains of commitment: 'They cannot enter into agreements that may have consequences they cannot accept. They will avoid those that they can adhere to only with great difficulty.' Rawls, J. 1999, Theory, p153.

From this fact of the free development of human reason we need to know what this implies for different sets of social arrangements. One way to go about this task would be to start from the assumption that no unequalising incentives are present in a political community characterised by the fact of uneven attachment. We then ask whether in such a political community citizens would find the basic structure to be incongruent with their sense of the good. If the answer is ‘yes,’ then we know that, without taking on board the necessity of unequalising incentives, Rawls’ theory is in danger of disadvantaging some of his citizens through no fault of their own. There has been a failure in the constructive process.

To conduct this test I invite you to accept two facts: **1)** any political community has some offices which carry such vital functions that they have to be occupied by some of the members of the citizenry. For example: banking, bureaucratic management and medical services; **2)** Some of these vital offices require long periods of arduous training. The training for these offices thus requires an individual to spend less time with those to whom they are attached.³¹⁰

From these simple facts we can immediately see a problem. Unless those unevenly attached individuals are able to offset the cost of training and developing skills for vital tasks, perhaps with the promise of longer holidays in the future or more money for family holidays so that the time they do have is quality time, then it is difficult to see why unevenly attached individuals would ever freely undertake the training necessary to fulfil these vital functions. The state would

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It can be noted that the focus on training and skills is in conformity with the articulation of the reasons why unequalising incentives are necessary in the original edition of Theory: ‘If these inequalities set up various incentives which succeed in eliciting more productive efforts, a person in the original position may look upon them as necessary to cover the costs of training and to encourage more effective performance.’ Rawls, J. 1971. Theory, p151.

then have to either not fill these offices or actively coerce individuals into performing them. Neither state of affairs represents what we want from our politics. It follows, I propose, that unequalising incentives are necessary if we are to show fidelity to our commitment to producing principles appropriate to those with uneven attachments.

Without knowledge of the need for unequalising incentives, decision-makers are in danger of producing principles incongruent with those conceptions of the good that develop as a result of the fact of uneven attachment.

Some philosophically important points about the example I have created need to be raised. The only motivational fact (or fact about human nature) that was needed to create our example was the fact of uneven attachment. The fact of uneven attachment is not however, a brute fact. It is instead an implication of the conception of the person we *want* to express in our politics. Showing deference to it is then not a concession to an aspect of the self that members of a political community would consider an infirmity, but rather an expression of their own ideal. The other facts that were included do not depend upon human motivation. Individuals will need to be trained to do difficult and complex tasks in any economy which depends upon skilled labour. These are general facts of production that are independent of psychological assumptions that characterises much of economic theory. As we established in chapter 1 of this thesis, to not take such non-social facts into account would move ideal theory away from questions of politics and into realm of fantasy. We have then developed a reason for tolerating unequalising incentives in conformity with our explanation of realistic Utopia. Rawls uses a developmental account of human nature, and a commitment to using a conception of the person to isolate those features of ourselves that we want to express, to delineate how *laws can be* in an ideal world.

We are ready to bring together our argument about the implications of the fact of uneven attachment with what we have already shown to be the formal constrictions on Rawls' ideal principles of Justice. In doing so we offer a concise and formalised expression of our argument. We start with the formal constraint of principles of justice deduced in the last chapter and combine it with the parallel between the fact of uneven attachment and the fact of reasonable pluralism that has been made in this:

- 1) Principles of Justice must not conflict with those conceptions of the good that are a product of citizens freely developing their reason.
- 2) Uneven attachment is a natural outcome of the free development of human reason.

Ergo

- 3) Principles of Justice must not conflict with the conceptions of the good that we associate with the fact of uneven attachment.

The conclusion 3) is turned into a premise and combined with premise 4), which was argued for in the example developed in this section, to finally establish our conclusion in 5):

- 4) Without accepting unequalising incentives, decision-makers are in danger of producing principles incongruent with those conceptions of the good that develop as a result of the fact of uneven attachment.

Ergo

- 5)** Principles of Justice must be sensitive to the need for unequalising incentives.

This is the perfectly ideal reason, consistent with Rawls' vow to take men as they are and laws as they can be, why Justice as Fairness must tolerate unequalising incentives.

The liberty objection

I have repeatedly stated that my argument ultimately comes to rest at variant of the liberty objection. I take us to have arrived at our destination. We rejected the idea that Rawls' principles could justify a right to dispose our labour power as we see fit, and instead suggested that all that could be secured from the logic of basic liberties was a right not to be coerced into selling our labour to a particular employer, or worse into having labour extracted coercively. What we have developed since is a form of the liberty objection which is consistent with this limited notion of freedom of occupational choice, but still justifies the need for some unequalising incentives.

We argued that any political community interested in the development of the reason of its citizens will see those citizens become unevenly attached and thus face a choice of either offering incentives or coercing people into doing particularly difficult and long training exercises. Thus far we have said that choosing the latter would be a failure to express our ideals of politics appropriate for free and equal persons. We can now add that the restricted interpretation of the basic liberty of freedom of occupational choice helps to make sure that this moral concern is respected by our institutions. No individual ought to have their labour power extracted from them without her consent. It is this perfectly extendable thought--which makes no concession to the talented--that ultimately renders unequalising incentives necessary from the point of view of Justice as Fairness. Our argument is thus ultimately rooted in the moral concern that is expressed in the restricted basic liberty of freedom of occupational choice. It is a variant of the liberty objection that does not over-state the privileges and claims that can be attached under the banner of freedom of occupational choice.

Implications for the concessionary criticism

Now that we have clearly articulated our variant of the liberty objection, we are ready to see what this means for the concessionary Criticism. I would like to begin by making an observation about one of Cohen's minor arguments. We saw in Chapter 3 that Cohen believes that the difference principle can be understood in two distinct ways, the strict and the lax. In the lax interpretation we take the claim that inequalities are necessary to make the worst off as well off as they can be to assume the necessity of some unequalising incentives due to the 'laws' of economics.³¹¹ In the strict interpretation, which Cohen claims to show a greater fidelity to the moral convictions of Rawls' citizens, unequalising incentives are not assumed in this test of necessity. The difference between these two interpretations amounts to the equality within Justice as Fairness that Cohen sets out to rescue.

What we have achieved over the past two chapters is to show that Rawls' stipulation to the test of necessity is not arbitrary, or a concession to human selfishness. Instead it is there as it is necessary to make sure that principles are not understood and instituted in a way that fails to express our conception of the person as free and equal. The stipulation, and the lax interpretation of the difference principle, is needed to show consistent fidelity to our ideals. The strict interpretation, on the other hand, fails to show such fidelity and thus should be rejected from the pure point of view of justice, not because it is infeasible or difficult to obtain. It is rejected because it fails to properly express the ideal of justice as principles that properly express our conception of the person as free and equal.

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Cohen, G.A. 2008. Rescuing Justice and Equality, p68.

We saw in Chapter 3 that Cohen's internal critique of Justice as Fairness depended upon the notion that reconciliation through 'moral significance' and 'fraternity' felt by citizens depended upon an illusion or worse, a deception.³¹² As neither illusion nor deception are acceptable means of persuasion for a political community committed to the autonomy of its citizens, this implied that the economic 'facts' Rawls endowed his decision makers with destroyed the functional role that Rawls demanded of his own principles. Rawls' fact-sensitivity was alleged to render his principles lacking in *reconciliatory* force. This is Cohen's most important critique of Rawls as it does not depend upon any meta-philosophical assumptions that Rawls does not accept, but is instead a direct internal attack on the capacity for Rawls' method of doing political philosophy to produce principles with the virtues he himself claims for them.

The way that we have reconstructed the liberty objection gives us a good reason to reject Cohen's assertion. The economic facts that Rawls endows his decision makers with are not selected because they are unfortunately persistent features of societies as we find them. Indeed the fact that we do find them to be true in our political communities is not offered as a reason at all. They are instead there as they are necessary to ensure that the ideal of principles appropriate to free and equal persons is not self-defeated by the lack of knowledge possessed by decision-makers about the implications of their own ideal conception of the person. The ideal conception of the person dictates which 'facts of the development of human reason' are salient to justice rather than mere facts about the world dictating what conception of the person can and cannot be expressed.

We conclude that those raising the liberty objection against Cohen were correct. Rawls does think that his citizens would look upon their freedoms in the labour market as an expression of the ideal of justice. As Rawls strongly puts it, in

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See Chapter 3 of this thesis.

Justice as Fairness: 'we expect and indeed *want* people to care about their liberties and opportunities in order to realise these powers, and we think they show a lack of self-respect and weakness of character in not doing so.'¹³¹³ What we have shown is that the citizens of a well ordered society are able to assume this position, and Rawls' principles are able to take on reconciliatory force, because of the precise nature of the facts that make unequalising incentives necessary. They are facts that develop because we *want* individuals to freely develop their reason; it is in the very conception of the person that Justice as Fairness is predicated upon. If his citizens were to come to tolerate just unequalising incentives there is no reason to think they are being deceived into thinking that those inequalities are necessary to express their own moral point of view. Reconciliation in a Rawlsian well-ordered society would preserve the political autonomy of the citizenry.

Possible objections

I want to conclude this chapter by dealing with some potential objections that a Cohenite might have to my argument. The formality with which we have presented the argument makes it very clear what potential avenues of objection are available to those wishing to criticise it. There are two premises that are subject to possible counter claims which need to be considered. I will briefly deal with each of these in turn before moving on, in the following sections, to deal with two more fundamental objections to the approach I have developed.

- 1) The fact of uneven attachment is not inevitable.

The first premise in my argument that is subject to a form of empirical challenge is that that the fact of uneven attachment is an inevitable consequence of the free

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Rawls, J. 1980. *Kantian Constructivism*, p527. Emphasis is my own.

development of reason. A critic could theoretically respond that under free institutions it is possible to imagine the mind developing a more egalitarian attachment. I do not think that a challenge to this particular premise is likely to be popular, but it is worth noting that the only material that is available to us when testing the claim is from worlds in which individuals are socialised into thinking that part of a good life is a core friendship group, a family and variety of other hierarchies of attachment. All of these institutions have been subject to criticisms of fundamentally diminishing the free development of reasons. We are tempted to say that, even if this is true, these institutions are so universal that they must exist to serve natural human sentiment. However, we must temper our certainty by noting that this is a claim we are in no position to test as there are no worlds where human reason has been able to develop free of unjust coercion.

- 2) The fact of uneven attachment does not render unequalising incentives necessary.

A central claim in our argument that is far more likely to be challenged is that the fact of uneven attachment renders unequalising incentives necessary. I say this is far more likely to be challenged as the opposite point of view, that even in a state of affairs where there is uneven attachment unequalising incentives would not be necessary to attract workers to important offices, has an obvious and popular standard bearer in Karl Marx. Marx describes, in *Critique of the Gotha Programme*, how he imagines man to transition from capitalism through a form of centralised socialism finally into what he calls 'full communism.'³¹⁴ We may observe that in his depiction of full communism there is an apparent commitment to uneven attachment. One of the reasons that full communism does away with contribution-based distributive principles is to show proper concern for the

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Marx, K. 2000(1891). 'Critique of the Gotha Programme,' (McLellan, D. Ed.) Karl Marx: Selected Writings, p614.

special interests that a worker develops in becoming a father or husband.³¹⁵ However, under full communism unequalising incentives are absent as all primary goods are distributed on the basis of needs and work is distributed on the basis of ability to perform roles. Marx uses his own developmental account of human nature to suggest how such a productive system could become possible. If the productive forces are organised in a way that satisfies human needs independent of who produces them, then the individual comes to recognise that in his labour he is afforded the best opportunity to express his commitment to himself and to his fellow citizens. In Marx's famous phrase, 'labour not only becomes a means of life but life's prime want.'³¹⁶

To this line of response we reiterate the precise details of what the fact of uneven attachment states. We are not merely concerned with the interests of our loved ones being furthered in a political arrangement, something that is satisfied by Marx's distributive principle under full communism, but our ability to share a role in their pursuit of those interests. This is necessarily something that involves the capacity to remove one's labour and devote their time to non-labouring activities, rather than labour becoming one of life's prime wants. We can thus see that the most famous example of a line of an alternative conception of how labour could be distributed once human reason is able to develop fails to satisfy the demands put forward by the fact of uneven attachment. Marx's disagreement with Rawls is then really about the way that human reason would develop, and is thus a variety of the first objection, rather than about the implications of uneven attachment.

Compensation or Incentives

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Marx, K. 2000 (1891). Critique of the Gotha Programme, p615.

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Marx, K. 2000 (1891). Critique of the Gotha Programme, p615.

A clarification needs to be made to ensure that the argument I am making is not thought to rest upon a failure to make a proper distinction between 'compensation' and 'incentives.'

Egalitarians have little problem dealing with cases whereby individuals require extra remuneration because the tasks they are carrying out are particularly burdensome. To offer additional remuneration for particularly burdensome tasks is simply to make sure that there is a properly egalitarian distribution of relief from burden and financial compensation as any properly egalitarian scheme takes into account a matrix of benefits and burdens when making distributive decisions. Most egalitarians would also advocate unequal resources in cases where an individual requires greater resources in order to have the same opportunity for welfare as other persons, such as a blind person requiring a guide dog. Cohen, for example, clearly states that a perfectly egalitarian society must compensate individuals for 'special needs' or 'specific burdens of their job' but stresses that this is conceptually different from 'incentives.'³¹⁷

Where incentives are involved we are dealing with cases whereby individuals are compensated in a way that moves away from an egalitarian distribution of benefits and burdens in order to get people to perform a certain task and, or, to perform it well. To pay an individual more money to work on an oil rig than they would receive for an inland job is to offer an egalitarian distribution of benefits and burdens. To pay someone extra to do an already attractive task, or a task no more burdensome than others, is to incentivise.

The problem that my argument faces is that it might appear that the incentives necessitated by the fact of uneven attachment are more accurately depicted as egalitarian compensations, either for the special needs brought about by having

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Cohen, G.A. 2008. *Rescuing Justice and Equality*, p73.

children or the special burden brought about by long and arduous training. If this is so then the fact of uneven attachment does not render unequalising incentives necessary but rather an egalitarian system sensitive to the special burdens and needs that the fact of uneven attachment brings about. Cohen has no problem stating that justice and equality demand compensation in such circumstances.³¹⁸

In order to demonstrate that my argument does not rest upon this conflation I would like to once again draw an analogy between the fact of uneven attachment and the fact of reasonable pluralism. It is my contention that in cases of reasonable pluralism we permit transfers that go beyond a mere recognition of special burden or special need and that this helps render clear an important feature of the extra remuneration demanded by our deference to the fact of uneven attachment. The extra remuneration demanded by the fact of uneven attachment and the fact of reasonable pluralism are a recognition of *voluntary expensive tastes* that egalitarians, particularly of the Cohenite stripe, do not usually consider to be demanded by equality. They are unequalising rather than compensatory transfers yet still demanded by justice.

Before I can make this argument a little more work needs to be done explaining the relationship between compensation for ‘burdens’ and ‘special needs,’ and the idea of voluntary and involuntary expensive tastes.

Expensive tastes are those preferences or facts about individuals that mean that they need more resources in order to have the same amount of welfare as other persons.³¹⁹ The earlier case of the individual who was blinded for no fault of their own, who needs the extra resource of a guide dog, is an example of the sort of

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Cohen, G.A. 2008. *Rescuing Justice and Equality*, pp102-103.

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Cohen, G.A. 1989. *On the Currency of Egalitarian Justice*, *Ethics*, 99(4), p913.

involuntary expensive taste that egalitarians are usually happy to compensate for. Cohen is willing to follow the logic of these examples to its conclusion and state that any genuinely involuntary expensive taste demands compensation from the point of view of equality. If an individual genuinely has no opportunity for welfare in the absence of fine wines and high-end dining, and has not purposefully cultivated such tastes, then from the point of view of equality they ought to be compensated. Compensation in such circumstances, Cohen argues, is merely correcting involuntary disadvantage, genetically endowed expensive tastes, which is arbitrary from the moral point of view.³²⁰ The correlative of this is that any disadvantage with regards to converting resources to welfare which is a result of voluntary action does not require compensation from the point of view of equality. If we give extra resources to an uninsured skier who has crashed and requires extra medical attention we do so out of a moral sense, perhaps charity or compassion, that is quite distinct from equality.

If we turn to the fact of reasonable pluralism I think it is pretty clear that there are preferences and desires that are generated as a result of the inevitable pluralism of religious belief that we recognise as amounting to a voluntary expensive taste yet do not mind making unequalising allowances for. For example, I would expect most liberals to believe that it is a voluntary decision to fast during Ramadan and simultaneously that Muslim's ought to be afforded relief from physical burdens at the workplace during the month if they request it without facing any monetary penalties. Many would also accept the case for public funding of a place of worship for a newly migrated religious community whilst again accepting that religious belief is a matter of personal choice. The key feature here is that whilst a pluralism of religious belief itself is an inevitably determined by the structure of liberal society, the actual religious observances of individuals remains a matter of voluntary choice. As, from the point of view of justice, we know that people will develop these beliefs that are central to their good we have reason to defer

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resources and allowances when they do in fact occur even though we know ourselves not to be compensating for involuntary expensive tastes or special (in the relevant Cohenite sense) religious needs.

The behavioural patterns and preferences that will inevitably develop as a result of the fact of uneven attachment are of the same quality. The claim of talented individuals that they need extra resources in order to be happy preparing in training for particular tasks, or to be happy living in given parts of the world, than less talented people would, is certainly a voluntary expensive tastes that equality does not demand that we compensate for. However, as we know that these tastes will inevitably develop and in a given society we could only create a basic structure which compels the talented to do these tasks without additional compensation in the knowledge that we are going to subject individuals to a diminishment of their good. Justice but not equality demands that we show deference towards these facts.

Please note that the claim is not that the untalented do not develop such expensive tastes. They are just as likely to do so as the talented. However, I am assuming that the skills of the talented are scarce where as those of the untalented are replicable. If I were to say I can't possibly do foreign office training without extra compensation allowing me to fly home to see my loved ones then the foreign office would find someone else equally skilled happy to do the task without unequalising incentives. If, however, the one person who speaks a vital language fluently were to do the same they would face a very different situation. Compelling a person to work without additional compensation would be to subject them to unhappiness as a result of their talents, giving them extra compensation would be to offer an incentive in response to a voluntarily cultivated expensive taste.

A possible objection to the line of argument I have pursued here needs to be addressed. Cohen claims that Rawls believes that ‘justice ignores expensive tastes.’³²¹ If this were straightforwardly true it would be problematic for my argument because it would imply that the voluntary expensive tastes generated by the facts of uneven attachment and the facts of reasonable pluralism were outside of concerns of justice. However, Rawls actually says something importantly different from what Cohen attributes to him. Whilst Rawls does say that citizens ought to ‘take responsibility for their own ends’ and that society is not responsible for the ‘strength and psychological intensity of their claims,’ he does so with an important caveat.³²² The caveat is that we must show collective concern for wants and desires that amounts to an individual’s ‘needs and wants as a citizen.’

This caveat is important as one can clearly see that without having the needs and wants generated by the fact of uneven attachment, or indeed the fact of reasonable pluralism, shown deference towards it is hard to stand in a relationship of *liberal* citizenship with those you share a political space with. A political community that demands allegiance which violates affectionate or reasonable religious concerns wishes to impose something akin to the status of subject on the individual. The individual can quite legitimately say to her fellow citizens that any political community they wish to be a part of must allow them to make economic decisions that put a large weight on these matters. However, when they do we have seen they are not demanding compensation for an involuntary expensive taste or a particularly burdensome task.

The conclusion of our analysis of the preferences and desires developed as a result of the fact of uneven attachment is that extra remunerated introduced in

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Cohen, G.A. 1989. On the Currency of Egalitarian Justice, p913f.

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Rawls, J. 1985. Justice as Fairness: Political Not Metaphysical, p244.

order to show deference towards them does not necessarily have the quality of being compensatory. Justice demand unequalising incentives not solely to compensate for special burdens or involuntary expensive tastes but also to provide incentives in the face of desirable and inevitable voluntary expensive tastes. The fact of uneven attachment generates the need for unequalising incentives and not merely compensation for burdens.

Unfalsifiable theory

I would like to finish with what I think is the strongest criticism of the line of argument that I have sought to pursue. The criticism is that my interpretation of realistic Utopia renders Rawls' theory unfalsifiable. Unlike the previous three objections this is not an attack on the premises of the argument, or the coherence of the distinctions that the argument relies upon, but rather the plausibility of the whole style of argument. This is not, I concede, a claim that we can reasonably reject. However, we ought not to think that this admission causes terminal damage to Rawls' theory. Unfalsifiability is instead a feature of ideal theory that Rawlsians must embrace, albeit with due caution.

A theory or statement is unfalsifiable if it is impossible to demonstrate that its claims are false.³²³ The easiest way to grasp the idea is to by way of its opposite: the falsifiable statement. If I, having only ever come across swans that are white, were to infer that 'all swans are white,' all that one would need to show that my claim is false is to observe a single case of a non-white swan. This could be done with a short trip to Dawlish Warren. 'All swans are white' is then a false but importantly falsifiable claim. This is useful to us because it is impossible for any individual or institutions to observe every swan in the world and across all time periods, and thus we are not able to confirm the claim that all swans are white by

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Popper, K. 2002. *The Logic of Scientific Discovery*, Routledge: London, p59.

the process of direct observation. What is more, because categorical statements are supposed to be claims about the future, and the problem of induction tells us that x having always followed y is not enough reason to assert with certainty that x will always follow y, the problem of the verifiability of categorical claims is a constant menace. This is what leads advocates of 'falsifiability' to claim that any categorical statements about empirical facts must be falsifiable. By making a claim that is subject to falsifiability we have a reason to believe that, so long as it actually hasn't been falsified, it represents the best available extrapolation of our inevitably limited empirical knowledge. If a categorical claim about the external world is not falsifiable, then we lose this source of security of our knowledge.

Our justification for the ideality of Rawls' theory depends upon the claim that 'the fact of uneven attachment is an inevitable result of the free development of human reason.' We saw that this is a parallel to a claim that Rawls himself makes about his deference to different opinions about religious and philosophical beliefs. To wit, 'the fact of reasonable pluralism is an inevitable product of the free development of human reason.' Both of these are categorical claims about the development of human nature. They are instances of Rawls 'taking men as they are.'

The question that one might be tempted to ask is the following: are either of these categorical empirical claims falsifiable? The answer, I submit, is clearly not. Firstly the claims are made through a process of speculation about the way that man's nature would develop if it were the case that our reason was allowed to develop autonomously in a well-ordered society. Rawls does not believe us to live in well-ordered societies, but instead makes his claim on the basis of the way that our reason has developed in nearly just and nearly well-ordered societies. I have done the same for the fact of uneven attachment. The result is that we do not have available to us the correct conditions necessary to allow us to test the claim by the process of looking for cases whereby there is a well-ordered society which does not demonstrate either 'reasonable pluralism' or 'uneven attachment.'

If these are inferential claims they are not, in contrast to ‘all swans are white,’ claims that we have reason to be more certain of in light of their non-falsifiability. They are unfalsifiable claims.

One may object to my characterisation of the ‘fact of uneven attachment’ and ‘the fact of reasonable pluralism’ as unfalsifiable by suggesting that I have been too strict in my understanding of what a falsifiable claim is. I have asked for a claim to be falsifiable given our present epistemic capacities, but, could we not make reasonable speculations and frame them with the thought in mind that they ought to be falsifiable in the future? If you remember in the last chapter where I used the discovery of the Higgs Boson to explain a misinterpretation of reflective equilibrium, the empirical claim made by Higgs was not, at the time, in anyway testable.³²⁴ This is because it depended upon a speculation about the properties of a field of the physical world that we did not have the equipment to observe. However, Higgs’ claim was at the very least *theoretically* falsifiable. He could say to his fellow scientists that ‘if it were the case that we could create x conditions’ then there will be bosons which do not change and have a high mass.’ It follows that ‘if we create x conditions and we do not observe bosons with high mass, Higgs’ speculations are false.’ Could Rawls’ claims about the free development of human reason not be defended on the same grounds?

Rawls’s speculations about the development of human nature ought not, I think, to be afforded this status of ‘theoretical falsifiability.’ To do so would ignore the difficulty that there is in properly specifying the content of ‘conditions x’ under which the claims could theoretically be tested. This is because the only potential candidate for ‘conditions x,’ the free development of human reason is, in itself, an ideal state of affairs that we are uncertain of the appearance of. If someone were to point to a society which is not pluralistic or possesses an unusually egalitarian

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See Chapter 5 of this thesis.

distribution of attachment, they would have the further problem of then having to show that the society truly is one where human reason has been able to develop autonomously. This might sound like a possible task until one considers the difficulty of distinguishing between autonomous co-operation between equals and the dominance of one party over the other. Does a parent or teacher imbuing a child with a set of concepts about how to consider and evaluate the world count as heteronomous source? If so, how is it that we can even conceive of human reason developing? Sensible people may come up with wise suggestions about that division, but, unlike the conditions laid out by natural scientists, they do so knowing that they are trying to draw a line under what is probably an essentially contestable demarcation. There can be no specification of what amounts to the free development of human reason. There does not appear to be any way of rendering Rawls' theory falsifiable.

Normative theory and non-falsifiability

This chapter has argued that the liberty objection is justifiable on the grounds that a tolerance of unequalising incentives is necessary to render Justice as Fairness consistent with the fact of uneven attachment. I then went to suggest that the greatest difficulty for this line of response, and indeed Rawls' own justification for his deference to the fact of reasonable pluralism, is that it renders his theory unfalsifiable. I want to conclude this chapter by offering some reasons why we might think that this criticism does not cause terminal damage to Rawls' theory.

Falsifiability is, we have seen, a criterion used for having certainty in our categorical beliefs about the external world. The notion that falsifiability is an important characteristic of such claims rose to prominence in the philosophy of science thanks to the work of Karl Popper.³²⁵ However, Popper's claim is made in

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the specific context of attempting to properly demarcate between 'scientific' and 'non-scientific' knowledge. Popper's original motivation for drawing such a line was to attack the scientific pretensions of Karl Marx's historicism, which Popper believed to suffer from the same problems of specifying 'conditions x' as we have identified in Rawls' developmental account of human nature.³²⁶ The Marxist, challenged with the claim that the predictions of historical materialism has failed to come true, could always take refuge in the suggestion that the productive forces have, as of yet, not ceased to develop. Historical Materialism, by not sufficiently specifying the conditions under which a revolution would come about, rests upon an unfalsifiable claim about the inevitability of a socialist revolution. Popper suggests that it is this feature of Marx's theory that makes it non-scientific.³²⁷

What is clear is that John Rawls' theory of justice, unlike Karl Marx's theory of history, does not claim to be scientific. It is self-consciously a work of normative ideal theory which might not necessarily require the same level of certainty in our knowledge as we would expect in scientific claims. This is the line that I would like to pursue with some observations about the tough choices that normative theorists have to make in the face of radical epistemic uncertainty.

We introduced this thesis with an explanation of why normative theorists are interested in ideal theory. The basic premise that we offered is that political

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Popper, K. 1957. *The Poverty of Historicism*, Routledge: London.

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There is, of course, a large body of literature that challenges Popper's claim that scientific claims must be falsifiable. I do not intend to make an intervention into this particular debate as we will see that it does not matter for my defence of Rawls. See for example Bartley III, W. 1968. 'Theories of Demarcation between Science and Metaphysics, in (Lakatos, I. and Musgraves, A. eds.) *Problems in the Philosophy of Science*, Vol. III, North Holland Publishing: Amsterdam; Agassi, J. 1991. 'Popper's Demarcation Refuted,' *Methodology and Science*, Vol.24.

philosophers need to know how we would behave if we weren't constrained by this or that fact if they are to properly isolate our moral perspective rather than how we prudentially respond to contingent circumstances. This thesis has centred round whether the normative theorist's indifference to facts ought to be extended to facts about human nature. G.A. Cohen insists that it should where as Rawls believes that it should not. However, we have seen that Rawls is not really interested in brute facts about human nature but rather speculations about how human nature would develop if we had a politics that properly expressed those aspects of the self that we wanted it to. We have thus far presented these two approaches as different conceptions of the ideal, one reconciling us with the limits of possibility and other prepared to go beyond the possible. However, we could just as easily consider them to be different approaches to the radical uncertainty that there is about where the limits of human nature lie.

We have available to us a wealth of information about the 'laws' and 'rules' of psychology, sociology and economics which describe the cumulative effects of human behaviour. However, there is no pretence that whatever motivational capacities and desires that are expressed in these laws represent fixed barriers that humans will never go beyond. Cohen's response to the uncertainty that we have about what humans can and cannot motivate themselves to do is to suggest that we theorise under the assumption that there are no limits. This way we can be certain that we are never settling for something short of our best. Rawls' desire for the individual to achieve autonomy means that this is a path that is simply not available to him. Cohen's reaction to uncertainty about the limits of human motivation subjects the individual to permanently questioning whether they could achieve better or more. By encouraging us to make reasonable speculations as to what we can and cannot accept from the point of view of the ideal Rawls encourages us to sincerely contemplate the limits of human motivation so that, at least theoretically, we can be satisfied with our achievements.

We can note that Cohen's response, entirely fact-insensitive as it is, does not commit him to any unfalsifiable speculations. That is simply because he refrains from making any speculations about the development of human nature at all. If ideal theory is to be reconciliatory, it must respond to the radical fallibility we have about the limits of human nature by taking the other course. It must speculate, cautious all the while of the nature of its activity. We have no other way of engaging in ideal theory that does not either restrict us to our present moral failings or permanently deny us the possibility of autonomous reconciliation with our political arrangements.

Conclusion

In the first half of this chapter we used the structure of Rawls' defence of his deference to the fact of reasonable pluralism as a template for reconstructing the liberty objection. We saw that it is perfectly reasonable to endow decision-makers with a tolerance of unequalising incentives if we accept that the free development of human reason would inevitably lead to the uneven attachment between citizens. This is a fact, inherent in the logic of Rawls' ideal, which his ideal theory of justice simply must respond to.

Although we have offered this reconstructed version of the liberty objection as a viable response to the concessionary criticism we did not do so without recognising the difficulties that it poses for Rawls' approach to ideal theory. By interpreting the need to 'take men as they are' as requiring him to speculate about the demands of a freely developed and autonomous human reason Rawls leaves himself open to the charge that his theory is unfalsifiable. This potential criticism of Justice as Fairness is one that stands independent of whether one accepts my reconstruction of the liberty objection as it clearly stands against his own justification for his deference to the fact of reasonable pluralism. Despite raising this concern, however, it is one that I have offered us good reasons to reject. Normative theory, I suggest, unlike scientific claims, has to embrace the

radical uncertainty of human knowledge if it is to be performed properly. This is true of whatever approach one takes to ideal theory. I have then offered what I believe the best possible avenue for overcoming Cohen's concessionary criticism and in doing so defended the plausibility of realistic Utopia as a method of constructing ideal principles that is not inherently concessionary.

Conclusion

This thesis began by stating clearly what was at stake in resolving the disagreement between John Rawls and G.A. Cohen about what distribution of obligations and duties in a society amount to justice. I argued that the dispute, whilst ostensibly about the permissibility of unequalising incentives, is best understood as a disagreement about how political philosophy ought to be conducted if our political language is to be able to help us clearly articulate our political ideals and criticise our moral failings. It is a dispute about how philosophy must be done if we are to afford the correct power to our political language. Cohen's most important claim in this dispute is that Rawls' method of realistic Utopia, endowing his decision makers with the facts about themselves that are necessary to make decisions as it does, will always produce principles which are subject to various infirmities within human nature, and will thus fail to produce the ideal principles which are necessary to perform the reconciliatory function that Rawls himself demands of them.

The argument that I have developed shows that Cohen's critique of Rawls fails to substantiate this thesis: realistic Utopia is not necessarily concessionary. I did so by showing that reasonable assumptions about the free development of human reason gives us reason to believe that, without a tolerance of unequalising incentives, principles of justice will always be inconsistent with the good of some of the citizenry and thus produce the need for stabilising coercive practices. This was shown to amount to an ideal reason to tolerate unequalising incentives in precisely the same way that Rawls' response to the fact of reasonable pluralism was ideal: failure to do so would have amounted to accepting the design of a decision making procedure in contradiction with its citizen's desire for autonomous politics. A modified version of the liberty objection was thus shown to be possible once one properly considers the formal constraints that Rawls' commitment to ideal theory places upon ideal concepts. What is more, these are

formal constraints that look reasonable in light of the options available to the political philosopher and the functional aims of ideal theory.

In this conclusion I wish, for the sake of clarity, to summarise the contours of that argument and make some remarks about its importance. I have, I think, demonstrated an important strength of realistically Utopian philosophy that should be considered by all those who consider themselves to be advocates of ideal theory. In short it is possible, contra Cohen, to come up with concrete and ideal principles within its parameters that are not concessions to infirmities within human nature. In particular Rawls' method has the capacity to produce principles of justice that have the reconciliatory force that he attributes to them. However, in making this argument I have also rendered clear some of the weaknesses that are inherent in Rawls' approach. Most importantly I have shown how speculative it requires the philosopher to be about the possible constraints of an always developing human reason. I finish this essay with some thoughts on where this leaves normative political philosophy, in particular what the implications are for the substantive political issue of how we ought to respond to increasing inequalities in income and wealth.

Outline of the argument

My argument began by outlining the differences between Cohen and Rawls' respective conceptions of ideal theory. It was established that the two disagreed about whether ideal theory had to be entirely fact-insensitive and that this disagreement rested upon slightly divergent views about what ideal principles ought to be able to do. That is what I called their function. Whilst Cohen is comfortable with the thought that ideal principles may represent demands that go beyond the contours of human nature, as those principles could still play a vital critical role, Rawls is committed to the notion that political principles ought to be able to play a reconciliatory task in a just political community. This is the realistic Utopia that his ideal theory aspires towards. It was noted that as Rawls did not

believe us to be living in anything but a fundamentally unjust political community the role of his ideal principles would be, in practice, as 'critical' or 'inspirational' as Cohen's.

Having established this fundamental division in the meta-philosophy between our two protagonists the next chapter presented Cohen's 'concessionary criticism' of Justice as Fairness. This chapter demonstrated that Cohen's critique of Rawls does not rely upon meta-philosophical premises that Rawls could not accept, and was instead developed as an internal and dialogical critique. His concessionary criticism, properly understood as an internal critique of Rawls' project, suggests that the facts of psychology and economics which Rawls endows his decision makers with, which ultimately lead to the toleration of unequalising incentives, render the sense of fraternity and reconciliation through moral significance in Rawls' political community illusory. If the citizens of Rawls' well-ordered society are reconciled to the political order they are so on the basis of the sort of false beliefs that Rawls explicitly rules out from playing a role in autonomous public reason. Cohen's concessionary criticism is thus a mortal threat to Rawls' claim that his middle-ground approach to fact-sensitivity can produce ideal principles. It is an existential threat to the viability of the realistically Utopian approach to political philosophy.

The next stage in the argument was to present what is usually considered to be the most plausible response to the concessionary criticism: the liberty objection. The liberty objection is the claim that Cohen is wrong to imagine that unequalising incentives are rendered necessary by parts of the self that we consider to be immoral or unduly selfish, but are instead a reflection of the priority that a free community of equals would afford to the basic liberty of freedom of occupational choice. Unequalising incentives are necessary, according to this popular line of argument, for the perfectly ideal reason that it is a just demand that each individual be sovereign over her labour time. This, proponents of the liberty objection argue, is precisely how inequalities generated

by necessary incentives would be perceived by members of a well-ordered Rawlsian society.

Although this essay comes to support a variety of the liberty objection, it only does so having exposed some previously unexamined difficulties with this line of response. In particular it is shown that on the basis of the egalitarian *proviso* that Rawls attaches to basic liberties, and his understanding that unequal liberties would fail to show equal respect to the citizenry, that many of claims and privileges associated with the term 'freedom of occupational choice' are in fact very clearly *not* basic liberties. Textual support was offered for my scepticism of the straight-forward liberty objection in that Rawls does not mention freedom of occupational choice as a basic liberty in the lists he offers in *Theory*, and that where he does mention freedom of occupational choice elsewhere it is most plausibly read as advocating a far more constrained set of privileges and claims than raisers of the liberty objection need it to do. The liberty objection, I at this point provisionally conclude, has thus far not been levied in a way that would defeat Cohen's concessionary criticism.

Despite the destructive assault on the liberty objection carried out in Chapter 4 of the thesis I then go on in following two chapters to rebuild the objection out of the rubble that I have created. The liberty objection can be successfully levied by arguing that unequalising are necessary given what I call the 'fact of uneven attachment.' The fact of uneven attachment is deliberately named in a way that pays *homage* to Rawls' own arguments for why his theory must pay deference to 'the fact of reasonable pluralism.' They are both not facts about the world but rather inevitable features about the flesh and blood citizens of a well-ordered society. If political principles could not be found to be acceptable by the flesh and blood citizens of a free community of equals then it must be the case that they have not been appropriately constructed. This is not, I was clear to point out, because of the demands of reflective equilibrium. It is instead necessary to not develop principles that inevitably cannot be accepted by flesh and blood citizens

of a well-ordered society because doing so would demand the coercive practices of 'stability for the wrong reasons' and thus automatically produce principles in contradiction with the collective and ideal desire for autonomy.

The reconstruction of the liberty objection that I have just outlined is a rather complex and tricky task. That is why it is broken into two chapters. I first establish why ideal principles must be acceptable to flesh and blood citizens, using the arguments that Rawls' uses in his response to Habermas' and Barry's critique of Rawls' deference to the fact of reasonable pluralism. The next chapter then outlines why the fact of uneven attachment ought to be considered as a logical parallel of the fact of reasonable pluralism. It too is an inevitable product of the free development of human reason and thus any ideal theory must show deference towards it. As a political community lacking unequalising incentives *is* in conflict with the fact of uneven attachment it must be the case that a set of ideal principles shows deference to those incentives. A tolerance of unequalising incentives has been demonstrated as necessary by the logic of Rawls' conception of ideal theory, and thus Cohen's concessionary criticism has been defeated.

The political implications of realistic Utopia

Now that I have outlined the argument presented in this thesis I want to finish with some thoughts about what I think the implications are. There are, I suggest, important substantial lessons that can be drawn from the arguments presented. These are lessons that go beyond the obvious contribution the thesis makes to the theoretical discussion about how ideal theory ought to be conducted and the role of fact-sensitivity in normative theory.

The relevant substantial debate is that over the permissibility, from the point of view of justice, of unequalising incentives. Ought we to allow talented individuals large salaries that attract them to perform socially useful tasks, but which in so

doing move us further away from other more egalitarian judgements we have about how benefits and burdens ought to be distributed in a society?

The first thing I would like to say is that whether one is more sympathetic to the arguments of Rawls or Cohen it is unlikely to have an effect on one's judgements as to whether the unequalising incentives that pervade our own society are just or unjust. Whilst it is not wrong to conceive of Rawls' position to be more tolerant of unequalising incentives than that of Cohen's, it is simply the case that the unequalising incentives we face fall way short of the criteria that we have seen Rawls puts forward as necessary before such distributions can be sanctioned by justice. The criteria is, we remember, that the incentives are strictly necessary to make the worst off as well off as they can be. If it is not the case that they a set of unequalising incentives are strictly necessary to achieve this task, then Justice as Fairness would not bestow the word justice upon them.

This is a strict criteria but it has not stopped politicians making rhetorical use of Rawls' language and arguments to justify actually existing inequalities. For example, both of the major political parties of the United Kingdom have sought to justify the incomes of the very rich on the basis of their being necessary to improve the lot of the worst off in Britain. In a characteristically unapologetic defence of the super rich of London, Conservative Mayor Boris Johnson stresses 'the prodigious sums of money that they (the rich) are contributing to the tax revenues of this country, and that enable us to look after our sick and our elderly and to build roads, railways and schools.'³²⁸ The inequalities that he actively promotes are justified publicly on the basis of the benefits that they bring to the

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Johnson B. 2013. 'We should be humbly thanking the super rich, not bashing them,' Daily Telegraph, 17th November,

2013.

sick and elderly. This line of almost Rawlsian reasoning,³²⁹ that the increasing wealth of the rich is justified on the basis that it brings advantages for the least well off, is repeated by the Labour Party. Tony Blair told Jeremy Paxman in a pre-election 2001 interview that he didn't mind income inequality 'so long as the least well-off were doing better off in absolute terms.'³³⁰

Politicians are of course unlikely to use the technical language of Rawls' theory when making these sorts of arguments, or even mention Rawls by name. Indeed evidence suggests that the particular politicians in question may never have even read *A Theory of Justice* at all.³³¹ However, this does not stop those who make their living commenting upon professional politics making a public connection between these loosely expressed policy principles and comprehensive and complex philosophical theories. For example, *The Economist* assures us that President Obama's second-term interest in income inequality is the product of something that they call his 'Rawlsian heuristic.' For good measure its journalist

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The word 'almost' is there to denote the fact that neither Johnson or Blair say that unequalising incentives are necessary to make the worst off better off, it is simply the case that they believe them to do so. It should also be noted that their concern is purely with regards to financial income rather than the concern of the difference principles: those primary goods which are an advantage for welfare.

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Taylor, M. 2002. 'The Thinker Blair didn't understand,' *New Statesman*.

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Adam Swift retells a fabulous anecdote in the preface to his introduction to political philosophy. Blair wrote to Swift lamenting that he, as a law student, had not had much opportunity to read political philosophy as an undergraduate and wanted to know if there were any books or articles that he would recommend as a good place to start. Professor Swift obliged and sent a reply recommending a couple of introductory texts as well as some classics that Blair might be interested in. That weekend he was reading the Sunday supplement to his newspaper and was surprised to see in an interview with Blair that the books he had, just a few days earlier, recommended were Blair's philosophical inspiration. Swift, A. 2013. *Political Philosophy: A Beginners' Guide for Students and Politicians*, Polity Press: Cambridge, ix.

tells us that Rawls' principles are 'too demanding' for the realities faced by actual policy makers but 'the gist' of his approach is 'excellent.'³³² This is a rhetorical phenomenon that transcends the right/left divide. Commentators on the left of the political spectrum are also prone to suggesting that Rawls potentially provides an 'obvious philosophical foundation' for the vague notions of fairness being trumpeted by the Tory British Prime Minister David Cameron.³³³ If politicians provide comments open enough to be interpreted as Rawlsian justifications of unequalising incentives, political commentators have done the job of making sure that, to the extent that Rawls' theories are publicly known at all, that is the way that they have been popularly understood.

British politicians have certainly had lots of inequality to rhetorically justify. The *High Pay Centre* report that in the 1980s a typical CEO of a FTSE100 company could expect to be remunerated with between £100,000 and £200,000 for a year of his (and it was and is largely his) labour. By the turn of the millennium this had risen to a little over a £1,000,000. In 2012, in the aftermath of the near collapse of the global economic system, this had risen to a staggering £4,200,000 per annum.³³⁴ Such wage growth has not been enjoyed by the rank and file employees of their companies. In the 80s that same CEO could expect to earn roughly 20 times as much as the lowest paid employee at their firm, by 2012 the figure is closer to 160. These astonishing numbers only refer to inequalities in pay, but as Rawls says, income is but a flow of what wealth is a stock. Thomas

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The Economist. 2013. 'Obama's Rawlsian Vision,' The Economist, February 19th, 2013.

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Dillow, C. 2006. 'Toynbee or Rawls?' Stumbling and Mumbling, November 22nd, 2006.

http://stumblingandmumbling.typepad.com/stumbling_and_mumbling/2006/11/toynbee_or_rawl.html

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The High Pay Centre. 2014. How to Make Pay Fairer,p4. Accessed 25. 7. 2015 via

<http://mainlymacro.blogspot.co.uk/2014/07/if-minimum-wages-why-not-maximum-wages.html>.

Piketty's empirical observations about the structure of contemporary capitalism have provoked a great deal of academic and popular interest, but it is his claim that there has been a significant rise in wealth inequality in the UK that has proven to be particularly politically controversial.³³⁵ It is not often that the *Financial Times* feels moved to produce front page spreads criticising techniques in data collection for large-n academic studies.³³⁶

We are then in a situation of widening inequality of wealth and income, thanks in part to increases in pay for those at the top of our largest economic institutions. Rawls' theories, however loosely and badly understood, have been repeatedly used as a rhetorical device for justifying these increased inequalities. We must conclude with a heavy heart that Justice as Fairness is popularly understood as providing a moral theory that provides such a justification.

The appropriation of Rawls for this ignoble cause of course relies upon a complete indifference to the actual content of his ideas. We have already noted that Rawls himself was convinced that welfare state capitalism, his phrase for the economic model that we see in contemporary Britain, could not realise the principles of justice that he thinks are appropriate to a community of free and equal citizens. We do not, however, need to take Rawls' word on this to see that the Johnsons and the Blairs misuse Rawlsian rhetoric. We have instead only to notice how far away the arguments presented for unequalising incentives in our contemporary society are from meeting Rawls' strict criteria of being absolutely necessary to make the worst off as well off as they can be.

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Piketty, T. 2014. *Capital in the 21st Century*, Harvard University Press: Cambridge, Massachusetts, p430.

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Giles, C. 2014. 'Piketty Findings Undercut by Errors,' *Financial Times*, 23rd May, 2014.

The first thing to note is that according to Justice as Fairness the difference principle only kicks in once the equal basic liberty principle and the equal opportunity principle have been established. If citizens are not afforded an equal opportunity to gain access to offices that confer advantages upon the holder, they develop a reason to not wish the holder of that office to be well compensated, namely that it is unfair that they be excluded from the possibility of gaining those advantages themselves, which is lacking in a well-ordered society. Whatever virtues there are in Britain's major social institutions, it is hard to imagine anyone seriously arguing that its offices of advantages are equally open to all. To take the House of Commons as an example, only 27% of its members are women and only 4% have an ethnicity other than white British. This compares with figures of 51% and 13% amongst the citizenry they represent. What is worse is that politics has better statistics on these matters than other major professions such as the judiciary or directors of FTSE500 companies.³³⁷ From the point of view of Justice as Fairness an appeal to the difference principle should not even get off the ground in Britain due to its failure to realise prior and more important principles. The British people have no reason to accept the necessity of advantages being conferred on offices which are not available to them.

Even if we break with Rawls' intentions and take the difference principle in isolation there is an abundance of reasons to imagine that it will not justify the sort of unequalising incentives that it has been used to do. The most important thing to note is the claims that these salaries are necessary in order to attract the most talented labour available to socially productive firms already assumes a basic structure in which there is a 'free market' in labour. It assumes that the talented have the right to buy and sell their labour to the highest bidder. Rawls'

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'Characteristics of the new commons' House of Commons Library, Accessed 01/08/2014

<http://www.parliament.uk/business/publications/research/key-issues-for-the-new-parliament/the-new-parliament/characteristics-of-the-new-house-of-commons/>

conception of justice does not take the Basic Structure of a society to be a given and indeed assumes it to be the matter under discussion. This thesis has shown that there is no reason to imagine that a free market in labour could be a feature of a just basic structure. A cap on the pay that is and is not available to certain stations, and the shaping of opportunities available to citizens so that they have to do socially productive labour without unequalising reward, are both legitimate social arrangements according to Rawlsian principles of justice. We have no reason to accept the implications of wage demands in the context of free markets in labour when the free market in labour is a legitimate Rawlsian subject of justice.

The empirical challenge to those who wish to show that present unequalising incentives are just is then far harder than showing they benefit the least well off in society. Justice as Fairness needs to know that those inequalities are necessary to make the worst off as well off as they can be, that the lexically prior principles of justice are also satisfied and that all possible arrangements of the basic structure of society have been considered. This is not, we can safely assume, the Rawlsian heuristic that *The Economist* has in mind.

We have seen that Rawls' Justice as Fairness joins Cohen's more strictly egalitarian conception of distributive justice in offering no reason to support the unequalising incentives that pervade contemporary welfare state capitalisms. They provide separate grounds for rejecting these unequalising incentives as unjust. Despite this, we ought not to think that their dispute over unequalising incentives is a purely theoretical matter without political importance. Once we move beyond the critical task of a theory of justice, and imagine what a just society would look like, the theoretical divergence ultimately transmits itself into advocacy of extremely different political arrangements. It is in the difference between Rawls and Cohen's ideal societies, and thus the sort of political communities that they want us to work towards, that the political implications of this rupture in ideal theory lies.

In Cohen's last book published before his death, *Why Not Socialism?*, he gives an account of a way of organising ourselves that he thinks, if we were given the chance, would represent how we would choose to distribute the benefits and burdens of economic activity. It is an account of a society that, he thinks, perfectly embodies justice *if we could* only realise it.³³⁸

Cohen starts his depiction of a just society from the micro-environment of a camping trip amongst friends. There is plenty of work to be done on this camping trip; pots have to be cleaned; fishes caught and tents erected. However, the spirit of community that exists between the fellow campers means that these tasks are not allocated either through the sort of coercive practices that Rawls associated with stability for the wrong reasons, nor with a market system of incentives. Instead the campers celebrate the diversity of interests that exist amongst the group and allow those who enjoy cooking to work on the stove, those who enjoy fishing to take their rods and those who have a flair for construction to rummage around with the pegs and mallet.³³⁹ Where there is no harmony of interests and tasks, perhaps because a task is considered to be drudgery by all, each wants to give up their time to that task so as not to disadvantage other members of the political community. As Cohen puts it:

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Cohen, G.A. 2009. *Why Not Socialism?* Princeton University Press, Princeton: New Jersey.

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Cohen is, we assume, deliberately evoking Marx's famous description of the transformation of work under communism in *The German Ideology*. 'In Communist Society, where nobody has one exclusive sphere of activity but each can become accomplished in any branch he wishes, society regulates the general production and thus makes it possible for me to do one thing today and another tomorrow, to hunt in the morning, fish in the afternoon, rear cattle in the evening, criticise after dinner, just as I have in mind, without ever becoming hunter, fisherman, shepherd or critic.' Marx. K. 2000. 'German Ideology' in (McLellan, D. Ed.) *Karl Marx's Selected Writings*, Oxford University Press: Oxford, p185.

‘There are plenty of differences, but our mutual understandings, and the spirit of the enterprise, ensure there are no inequalities to which anyone could mount a principled objection.’³⁴⁰

In the rest of the book Cohen argues that our sympathy for the social arrangements of the camping trip reveals that *if we could* foster the spirit of enterprise and egalitarian ethos that governs the camping trip across a much larger economic community, then this is exactly what we would do. It is our failure to effectively design social institutions that organise on the basis of our egalitarian spirit, and relative success of our ability to organise economic institutions that respond to our base self-interest, that has led to us preferring market models of social organisation over more collective arrangements. The preference for self-interest appealing incentives is not, the analogy is supposed to remind us, one which we typically express when problems of feasible technical design are not at stake and thus is unlikely to represent our real judgement about what duties and obligations we *ought* to be able to demand off of each other in our collective arrangements.

It is fair to say that not everybody shares Cohen’s excitement for the principles and arrangements of the camping trip. However, Cohen’s concessionary criticism does not need his vision to gain widespread appeal if the argument from analogy is to hurt Rawls. Instead, all that would be necessary is to demonstrate is that these are sentiments that Rawls attributes to himself and his citizens. Indeed when we first presented the concessionary criticism we saw that this is exactly what Cohen sets out to demonstrate. We remember that Cohen was keen to highlight the difference in phrasing between two otherwise identical passages in the 1958 *Justice as Fairness* and the 1971 *A Theory of Justice*. In 1958 Rawls tells us that his citizens should look upon unequalising incentives as a

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Cohen, G.A. 2009. *Why Not Socialism?*, p4.

'concession to human nature' which takes us away from the 'want to serve each other.' This language disappears in 1971, and his citizens instead see the unequalising incentives as 'necessary to cover the cost of training.' Cohen suggests that the former configuration is a more honest reflection of the implications of Rawls' approach to political philosophy, but that it was an uncomfortable truth for Rawls to recognise. We are supposed to believe that the 1958 Rawls reveals that his citizens would prefer a system, like that of the camping trip, whereby individuals want to serve one and another *if they could* have it.

One of the things that this thesis has shown is that in fact there is little doubt that Rawls would not share this vision of *if we could* justice. What is wrong with extrapolating the principles of camping trip to the larger canvass of a complex political economy is not, as Cohen assumes, that it is presently infeasible. What is wrong is that it would never be acceptable to a political community which encourages the free development of the reason of its citizenry. A society committed to allowing citizens to develop their intellectual and moral capacities will always produce individuals who will find it an affront to their conception of the good to have to devote all of their time to the service of other persons. This is not, our reconstruction of the liberty objection invites you to accept, a reflection of human selfishness any more than human disagreement over philosophical matters is a reflection of inadequacies in our mental capacities. It is instead a reflection of the necessary implications to our *wanting* a political community that allows individuals to revise and develop their own conception of the good. A political community governed by the principles of the camping trip is very far from embodying our ideal of justice, we have ideal grounds for not affording the word justice to its description.

I want to finish with an observation about the divergence between the passages that Cohen draws our attention to. There is another difference between the passages which I think is far more telling than the difference which excites

Cohen. In 1958 Rawls imparts the following thought on the citizens of a well-ordered society: 'they, like us, may think people ideally should want to serve one another.' In 1971 this changes instead to, 'one might think that ideally individuals should want to serve one another.' The notion that the individual would ideally want to serve one another was, in 1958, one that Rawls was willing to attribute to himself, and to the readers that shared his considered moral judgements. However, by 1971 the sentiment is instead presented both less personally and less politically. It is a position that 'one' might hold. This does not commit Rawls to the claim that it is a sentiment that either he, or his sympathetic readers, held. It is instead just one possibility of construction that needs to be considered alongside others. Cohen's concessionary criticism implicitly assumes that this change in language is insignificant and that Rawls remained committed to the *if we could* ideal of serving one another. It is indeed the animating principle of Cohen's own egalitarian ethos. However, this thesis ultimately offers an alternative explanation. Rawls no longer attributes the ideal of serving one another to himself because he no longer conceived of it as a political ideal. It was, he came to believe, a demand that was inconsistent with the development of the autonomous conception of the person that his principles of justice are formulated to serve.

When those animated by a Rawlsian or Cohenite conception of justice oppose the inequalities of contemporary society they do so with very different alternative societies in mind. For Rawls, unlike Cohen, the notion of a collective desire to serve the other is simply inconsistent with what justice demands. What this thesis has shown is that this very real divergence takes place without Cohen's commitment to the discovery of *if we could* principles holding a monopoly over what is and is not ideal theory. Justice as Fairness also shows a consistent and plausible fidelity to the ideal as realistic Utopia understands it. Rawlsians can plausibly and consistently use the word justice to denote political and economic systems which incorporate unequalising incentives without robbing that word of

its capacity to remind us of the best of we can be. The language of Rawlsian justice retains our yearning for the ideal.

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