

Review

Reviewed Work(s): Rescuing Justice and Equality by G. A. COHEN

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BOOK REVIEWS

Rescuing Justice and Equality. G. A. COHEN. Cambridge: Harvard University Press, 2008. xviii + 430 p. Cloth \$50.00.

In *Rescuing Justice and Equality* (hereafter *RJE*), G. A. Cohen mounts an ambitious argument against the Rawlsian vision of a just society. The argument proceeds in two stages. Part one attempts to rescue equality from the Rawlsian willingness to countenance inequality in a just society. Part two attempts to rescue justice from the constructivist treatment of that concept, taking Rawls's constructivism as the prime example. While both parts merit careful attention, much of the material in part one has appeared in print elsewhere and will be familiar to many people. So, in what follows, I will briefly examine part one, highlighting some of the new material, and then examine part two in more detail.

Rawls's difference principle allows inequalities so long as they are needed to improve the lot of the worst off.¹ This is often taken to license giving talented people incentives to produce more, with some of the extra that they produce being used to benefit the worst off. Cohen is well known for arguing that, properly interpreted, the difference principle does not actually allow this kind of incentive-generated inequality. Part one begins by rehearsing these arguments. The basic thought is that the talented could simply choose to be more productive without receiving extra compensation and would do so if they really accepted the difference principle and applied it to their everyday lives.²

¹ This is a loose rendering of the difference principle. But this is the version Cohen largely focuses upon.

² This argument has been widely discussed in the literature. See, for example, Kenneth Baynes, "Ethos and Institution: On the Site of Distributive Justice," *Journal of Social Philosophy*, xxxvii, 2 (Summer 2006): 182–96; Joshua Cohen, "Taking People as They Are?" *Philosophy and Public Affairs*, xxx, 4 (October 2001): 363–86; David Estlund, "Debate: Liberalism, Equality, and Fraternity in Cohen's Critique of Rawls," *Journal of Political Philosophy*, vi, 1 (March 1998): 99–112; Thomas W. Pogge, "On the Site of Distributive Justice: Reflections on Cohen and Murphy," *Philosophy and Public Affairs*, xxxix, 2 (April 2000): 137–69; Samuel Scheffler, "Is the Basic Structure Basic?" in Christine Sypnowich, ed., *The Egalitarian Conscience: Essays in Honour of G. A. Cohen* (New York: Oxford, 2006), pp. 102–29; Seana Valentine Shiffrin, "Incentives, Motives, and Talents," *Philosophy and Public Affairs*, xxxviii, 2 (Spring 2010): 111–42; Kok-Chor Tan, "Justice and Personal Pursuits," this JOURNAL, ci, 7 (July 2004): 331–62; Michael G. Titelbaum, "What Would a Rawlsian Ethos of Justice Look Like?" *Philosophy and Public Affairs*, xxxvi, 3 (Summer 2008): 289–322; Andrew Williams, "Incentives, Inequality, and Publicity," *Philosophy and Public Affairs*, xxvii, 3 (July 1998): 225–47.

In *RJE*, Cohen transitions from arguing against Rawls's interpretation of the difference principle to arguing against the difference principle itself. Cohen argues that the case for the difference principle is in tension with its content. Here Cohen follows Brian Barry's reconstruction of the case for the difference principle (87). That reconstruction casts the argument in two stages. In the first stage we move from equal opportunity to equality. True equality of opportunity requires the removal of all morally arbitrary causes of inequality and "there exist no causes of inequality that are not arbitrary in the specified sense" (89). Having arrived at an equal distribution, at the second stage we see that introducing inequalities could make everyone better off. Why would anyone, especially the worst off, resist this Pareto improvement? Thus, we are led from equality to the difference principle.

In this reconstruction, the case for the difference principle requires taking seriously an objection to morally arbitrary inequalities. But the difference principle allows inequalities that are morally arbitrary. To be sure, on Cohen's interpretation of the difference principle, this license for morally arbitrary inequalities is more circumscribed than on the standard interpretation of the difference principle. As we have seen, Cohen believes that the difference principle disallows incentives that are needed to benefit the worst off only because of the unwillingness of the talented to work more productively for equal compensation. Still, he recognizes that there might be other reasons why incentives are needed to benefit the worst off. Perhaps, for example, informational or organizational constraints prevent running the economy efficiently without incentives for the talented (155). But Cohen argues that even this more narrowly circumscribed license for morally arbitrary inequalities is in tension with the case for the difference principle: it ignores the objection to morally arbitrary inequalities that motivated the move to equality in the first place.

The role of the rejection of morally arbitrary inequalities in Rawls's view is a delicate issue and worth exploring further.³ I will not attempt to do that here, however. I want to focus instead on how Cohen's rejection of the difference principle as a principle of justice affects the final argument of part one. So, let me turn to that argument.

As I presented Cohen's basic argument against incentive-generated inequality above, I focused on giving the talented incentives to produce more. But of course incentives are also used to encourage people to

³ For further discussion of this issue, see Richard J. Arneson, "Justice Is Not Equality," *Ratio*, xxi, 4 (December 2008): 371–91; and Jon Mandle, review of *Rescuing Justice and Equality*, by G. A. Cohen, *Notre Dame Philosophical Review*, August 5, 2009, <http://ndpr.nd.edu/news/24113-rescuing-justice-and-equality/>.

enter more socially useful occupations. One might worry, then, that Cohen's rejection of incentives can only be sustained at the cost of freedom of occupational choice. Cohen's response has a familiar form, at least at first glance: the talented could freely choose to enter more socially useful occupations. It is worth noting, though, that Cohen's rejection of the difference principle adds a wrinkle to this reply. People who endorse the difference principle might plausibly be understood to have some concern for the absolute condition of the worst off. So, perhaps such people would produce more or choose more socially useful occupations if the difference principle informed their everyday choices. But it is not clear why someone who is committed to equality rather than the difference principle should care about the absolute condition of the worst off rather than simply their relative position.⁴ Hence it is not clear why someone who is committed to equality should take a more socially useful occupation.

Consider an example. Suppose that, given equal compensation, one prefers being a gardener to being a doctor.⁵ Commitment to equality seems to rule out accepting extra compensation to take the more socially useful occupation of doctoring. But commitment to equality does not seem to settle the choice between occupations at equal compensation. Cohen sometimes seems to be sensitive to this problem, suggesting that the person who chooses the more socially useful occupation might be moved by "fellow feeling" (189, 193). But Cohen often talks as though commitment to equality alone is sufficient to motivate the choice of the socially useful occupation (182, 191, 193, 203, 204). And that seems like a mistake. Thus, once Cohen rejects the difference principle, the reconciliation of distributive justice with freedom of occupation is more complicated. Something more than an egalitarian ethos is needed.⁶

⁴ In the context of another argument, Cohen briefly entertains the possibility that justice involves a noncomparative element in addition to the comparative element on which he focuses (322–23). Cohen treats this possibility in a skeptical tone but does not rule it out altogether. He does not consider this matter further because the argument he is focusing on in that passage does not require taking a stand on the issue. But as I indicate in the text, settling this issue is important for understanding the motivations of those who Cohen suggests ought to choose more socially useful occupations. And much of Cohen's discussion seems to run counter to taking justice to involve a noncomparative element. He even suggests that justice might, in some cases, require leveling down (316–18).

⁵ When Cohen considers this case, he stipulates that doctoring does not involve any special labor burden that would justify extra compensation. It is not that the person in question hates doctoring; it is just that she prefers gardening (184).

⁶ For a related discussion, see Jonathan Quong, "Justice beyond Equality," *Social Theory and Practice*, xxxvi, 2 (2010): 315–40. For a distinct objection to Cohen's treatment of freedom of occupational choice, see Michael Otsuka, "Freedom of Occupational Choice," *Ratio*, xxi, 4 (December 2008): 440–53.

The second part of *RJE* offers a diagnosis of the source of the ambivalent Rawlsian attitude toward equality that the first part of *RJE* challenges. Cohen argues that constructivism is incapable of delivering principles of justice. The kind of constructivism about justice Cohen targets holds that principles of justice gain their “normative credentials through being the product of a sound selection procedure” (274) and, in particular, that this selection procedure involves presenting specially designed selectors with the question “What rules of governance are to be adopted for our common social life?” (275). Cohen takes Rawls’s use of the original position to be a paradigmatic instance of constructivism so understood.

There are two features of the constructivist procedure that prevent it from yielding principles of justice (275). First, the question of what rules ought to govern our common social life is properly sensitive to various non-normative facts about our situation. The deliberations of those in the original position, for example, are sensitive to facts about human nature and human society. But Cohen argues that these non-normative facts have no place in the justification of fundamental principles of justice. Second, Cohen argues that constructivism is not able properly to distinguish between justice and other values. The question of what rules ought to govern our common social life is properly sensitive to values in addition to justice, like efficiency. So, the answer to the constructivist question will yield principles that compromise justice with these other values instead of principles of justice. Cohen’s discussion of both of these objections is nuanced and worthy of close examination. A quick look at the first objection, however, will suffice to highlight the depth of Cohen’s disagreement with the constructivist strategy.

Cohen argues that all fundamental principles are fact-insensitive. If a fact supports a principle, Cohen contends that there is always an explanation for why this is so, and that explanation invokes or implies a more ultimate principle that would survive the denial of the fact in question. So, for example, suppose someone held the principle *we should keep our promises* on the basis of the fact that *only when promises are kept can promisees successfully pursue their projects* (234). Cohen holds that this fact could only support this principle because of some further principle, like *we should help people to pursue their projects*. In this way, examining fact-sensitive principles should lead us to uncover fact-insensitive fundamental principles. Cohen concludes that Rawls’s fact-sensitive principles of justice must depend on further fundamental principles and that Rawls’s constructivism obscures this.⁷

⁷For a close examination of the structure of this argument, see Pogge, “Cohen to the Rescue!” *Ratio*, XXI, 4 (December 2008): 454–74.

As Cohen acknowledges, this argument leaves open the possibility that the further fundamental principles in question are not themselves principles of justice (287). And he does not offer a general argument against this possibility. But it may be that the most compelling conception of the role facts play in Rawls's constructivism has this very structure. In response to Cohen's argument, for example, Arthur Ripstein has recently suggested the following interpretation of Rawls's constructivism.⁸ We begin with Rawls's claim that "the correct regulative principle for anything depends on the nature of that thing."⁹ This is a fact-insensitive principle and not specifically a principle of justice. From here, however, we need facts to specify the nature of the thing in question. Rawls takes principles of justice to be principles for regulating social cooperation among free and equal people. Thus, in order to identify principles of justice, we will need a specification of the problem that social cooperation poses for free and equal people. Here is where Rawls introduces the circumstances of justice, including factors like moderate scarcity and limited benevolence. These facts play a role in specifying the object that principles of justice regulate.¹⁰ On this version of the constructivist view, then, there are no fundamental fact-insensitive principles of justice, but the justification of the principles of justice does depend on at least one fact-insensitive principle of a different kind.

This sketch of a constructivist position indicates the way in which Cohen's argument against fact-sensitive principles of justice proceeds too quickly. The argument seems to ignore the sense in which principles of justice must somehow be sensitive to the kind of beings we are in order to be principles *for us*. I think that Cohen's worry about fact-sensitive principles gains traction when he calls this into question. He asks, "Is it an axiom that human beings are *capable* of justice? Is 'original sin' a contradiction in terms?" (330). We might take Cohen to be charging the constructivist with a kind of hubris. Principles that are designed for beings like us do not leave room for a radical critique of the kind of beings we are, and it is not immediately obvious why that kind of critique should be ruled out from the start.

One might argue that "ought implies can" blocks this kind of critique. But Cohen suggests that the ultimate fact-insensitive principles

⁸ Arthur Ripstein, "Critical Notice of G. A. Cohen *Rescuing Justice and Equality*," *Canadian Journal of Philosophy*, XI, 4 (December 2010): 669–700. See also Samuel Freeman, "Constructivism, Facts, and Moral Justification," in Thomas Christiano and John Christman, eds., *Contemporary Debates in Political Philosophy* (Malden, MA: Wiley-Blackwell, 2009), pp. 41–60.

⁹ John Rawls, *A Theory of Justice*, rev. ed. (Cambridge: Harvard, 1999), p. 25.

¹⁰ Ripstein, *op. cit.*, p. 685.

have the following form: “One ought to do *A* if it is possible to do *A*” (251). The impossibility of doing *A* would not impeach this principle. Of course, as Cohen acknowledges, if it is impossible to do *A*, such a principle may not be of much practical interest. But Cohen claims that “the question for political philosophy is not what we should do but what we should think, even when what we should think makes no practical difference” (268).

Here I think we reach the heart of Cohen’s objection to constructivism. His objection is motivated by his understanding of normative principles as fundamentally evaluative rather than action guiding. This orientation towards the normative opens up the space for questioning our capacity for justice, a question that it seems constructivism cannot entertain. While Cohen’s formal arguments against constructivism may be inconclusive, he is able powerfully to press for a defense of constructivism’s starting commitments, and to gesture in the direction of a different strategy.

Cohen thus leaves us with important questions about both the content of principles of justice and the concept of justice itself. While Cohen directs these questions toward Rawlsians, they are questions that anyone working in political philosophy must seriously consider.¹¹

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