

## JUSTICE IS NOT EQUALITY

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### *Abstract*

This essay disputes G. A. Cohen's claim that John Rawls's argument for the difference principle involves an argument from moral arbitrariness to equality and then an illicit move away from equality. Moreover, the claim that an argument from moral arbitrariness establishes equality as the essential distributive justice ideal is found wanting.

*Rescuing Justice and Equality* is an original, subtle, and astute work of ethical and political philosophy. From its justly renowned author, G. A. Cohen, we have come to expect no less. The work ranges over questions of ethical theory (metaethics) and normative political theory. My remarks address only the latter.

Cohen's book tries to develop both a sustained critique of some ideas on justice that had been affirmed by John Rawls<sup>1</sup> and a meditation on the ideal of socialism. This dual aim does not as one might fear force a split personality on the enterprise, which in fact shows a unified theme. Cohen interprets John Rawls as the quintessential liberal, urging that egalitarian justice can in principle be fully attained in a market economy setting. More important to Cohen is the way he sees Rawls distinguishing between public and private life in the just society. For Rawls, justice is a norm that mainly regulates the structure of major institutions—the basic structure of society. Individuals are bound by justice mainly to support just institutions when they exist or help bring them about when they do not, and to obey laws compatible with justice. Within just institutions, individuals are morally free to carry out their own projects and aims. This picture of the just society conjures up for Cohen the image of an economy in which selfish individuals try to do as well for themselves as they can within the just institutional rules. The image is defective, says Cohen, and the defect precludes our calling a society that fits the image a just society.

According to Cohen, the distributive justice component of social justice requires that the distribution of benefits and burdens across individual persons is fair, and bringing about and sustaining the just distribution are the responsibilities of the individual members of society not merely the standard for choice of basic structural institutions. In Cohen's idea of a just society individuals make their choices in daily life, within the limits of an appropriate personal prerogative that each of us has to pursue her own projects and aims, with a view to contributing to the good of others and to bringing about a just distribution, which Cohen supposes to be roughly an equal distribution. The shape and structure of institutions must also satisfy principles of justice, but that's not enough. In this connection Cohen makes an apt comparison between the just society and the society that overcomes racism. To qualify as non-racist, it is not enough that a society's institutional rules should prevent people from acting on racial prejudice when they interact within basic institutions.

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<sup>1</sup> . See John Rawls, *A Theory of Justice*, rev. ed. (Cambridge: Cambridge University Press, 1999).

I am entirely in agreement with Cohen that whether or not a society qualifies as ideally just depends not merely on the structure of its institutions but also on the dispositions and conduct of its members. Cohen's way of pressing this point against Rawls achieves a deep insight. One might put part of Cohen's point this way: in the ideally just society, the dispositions and conduct of the members, within the constraint of the personal prerogative accorded to each individual to give extra weight to her personal concerns in deciding how to live, do not limit the degree to which the society fulfills the goal set by the justice standard. If people were more altruistic, or more devoted to maintaining justice, justice would not be fulfilled to a greater extent. (Notice that this leaves it open to what extent individuals should be motivated in daily life by concern for the common good versus concern for their private good. Perhaps beyond a certain point, being concerned to improve the lives of others may be counterproductive. It is even abstractly possible that each person's being disposed to care only for himself and those near and dear to him would, in conjunction with a matching best set of institutions, be maximally conducive to the achievement of justice goals.) Cohen stresses a claim that goes further: in the just society, each member embraces the ideal of social justice as a goal and is dedicated to conducting her life so as to secure and maintain it (modulo the personal prerogative). There is an attitudinal component of the just society: a common devotion to the common good. That the members of society have this attitude is according to Cohen an intrinsic component of justice not merely a good instrument for achieving justice.

One might wonder how any of this is relevant to a meditation on socialism. One might suppose that the socialist following Jean-Jacques Rousseau takes 'men as they are and laws as they might be'<sup>2</sup> and proposes public ownership of a society's productive resources as the best social arrangement under these constraints. If you instead take people as they ideally ought to be and basic institutions as they ideally ought to be you are engaged in what Rawls pejoratively calls the 'ethics of creation.' Cohen disagrees. He thinks that what is just is what is ideally fair. What is ideally fair in given circumstances depends on what those circumstances actually are. What would be ideally fair if humans could secrete manna from their fingertips is not relevant. But to discover what is ideally fair one should abstract from any limits in people's willingness to comply with fairness constraints or to promote fairness goals. So if equality turns out to be ideally fair, it remains so even if we humans are so constituted that we are bound to act against this norm. According to Cohen equality or something close to it (equal access to advantage) does turn out to be ideally fair upon reflection, and the essence of socialism is the idea of a society that achieves this equality ideal and whose members are dedicated to it.

If we then relax the constraint of assuming that humans will go along with what is ideally fair, we then get a series of hard questions centering on the issue, what is the best we can get to from where we are now. The best place we can get to is the place in which all our values properly weighed, not only our justice values, are maximally realized. If we are deontologists and accept moral constraints, we may want to amend the question:

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<sup>2</sup> . Jean-Jacques Rousseau, *On the Social Contract, or Principles of Political Right* [1762], in Rousseau, Donald Cress, ed., *The Basic Political Writings* (Indianapolis: Hackett Publishing, 1987), p.141

what is the best place we can get to, without violating moral constraints we should accept, from where we are now.

From this standpoint, the Rawlsian enterprise can now be seen to have strayed off-track in two important ways. Rawls the liberal supposes that social justice is a norm that regulates primarily institutions and only secondarily individuals (the general secondary requirement is to support acceptable institutions and comply with their rules). On the contrary, Cohen sees distributive justice as a set of principles that specifies a fair distribution of benefits and burdens, good and bad fortune, to individuals, and holds that one who accepts such principles must see them as normative both as to what institutional arrangements she should support and what courses of action she should choose. Rawls the theorist identifies what is just with principles that would be chosen by persons who were trying by his very choice of principles to produce the best outcomes for themselves under constraints that assure impartial choice. But this preliminary formulation, to be later refined and developed in further discussion, already makes a big mistake in Cohen's view. People situated in a Rawlsian original position will choose with a view to gaining better outcomes, but that postulated motivation blends concern for fairness with concern for values that have nothing to do with fairness (but that would go into an assessment of outcomes all things considered).

I have already expressed agreement with Cohen on his first critical claim. However, his second critical claim is dubious. Whether or not the Rawlsian original position construction helps to characterize the best conception of social justice (or the best conception of the narrower ideal of distributive justice), a characterization even of the narrower ideal does not go astray just in virtue of assuming that the justice of a distribution of resources depends in part on the extent to which that distribution, compared to alternatives, improves the outcome by improving the quality of people's lives. Even if you thought equality were a big component of justice, why think it's everything?

#### **Against Incentives**

Cohen frames his critique of Rawls as a critique of liberal justifications of capitalism. The starting point of these justifications is the idea of an equality-versus-efficiency tradeoff. Economic equality, though desirable in itself, is a drag on economic productivity. A market economy is assumed to be an engine of economic productivity, but tends to generate inequality in people's condition, especially over the long run, as effects of early random shifts ramify and grow. If we reasonably care about both equality and efficiency (productivity), we should uphold a market economy modified by redistributive regulation and taxation and transfer, up to the point indicated by the correct tradeoff ratio. So runs the justification.

From this standpoint, Rawls's position might appear to be maximally egalitarian. The difference principle in its leximin formulation asserts that (within the limits established by lexically prior principles of justice) the basic structure of society should be set so that it maximizes, as a first priority, the advantage level of the worst off person, then as a second priority, the advantage level of the second worst off person, and so on, up to the best off. One could not tilt more strongly in favor of benefiting the worst off than by adopting the difference principle.

Cohen demurs, in two ways. He observes that if inequality, generated by incentive payments offered to talented persons to induce them to work productively,

would work to maximize the position of the worst off, there is in principle another equally productive possibility: the talented work at their most productive employment and forego the incentive payment. In this scenario their productivity gains are shared equally across all members of society. If all members of society are committed to egalitarian principles, and guide their economic choices by them, then no incentive inducements are needed to sustain productivity, and the equality-versus-efficiency tradeoff disappears, or rather, is no longer a binding constraint on the pursuit of equality. Moreover, the society in which individuals are regulated by egalitarian principles in their daily economic choices as well as in their choice of basic structure institutions is a more just society than one in which only the latter choice is so regulated. (The moral requirement to aim at the greater fulfillment of social justice goals in one's daily economic choices is understood by Cohen to be limited by an appropriate personal prerogative.)

The upshot is that according to Cohen a society that is through and through just, just in the disposition of its members as well as in the shape of its basic social structure, will not display incentive-generated inequality.

Suppose that people are not through and through just and we are thrust back in the realm of nonideal theory. The equality-versus-efficiency tradeoff then reappears. Let us say that the aggregate sum of advantages can be increased if inequality is instituted. Perhaps we should institute some inequality—this depends on further factors. A particularly uncontroversial case occurs if we can make someone better off without thereby making anyone else worse off. The Pareto norm then says we should move to some position against which this complaint cannot be made. Satisfying Pareto, we create inequality. Cohen insists that we should not now say that inequality is recommended by distributive justice. Distributive justice, he affirms, continues to favor equality. We have a conflict of values, and although no doubt in some cases the aggregative and efficiency norms should be followed, we should not misdescribe this choice as one that involves no sacrifice of distributive justice.

Cohen accuses Rawls of failing to call things by their right names here. Rawls affirms the difference principle as a principle of distributive justice, but this affirmation confounds the true egalitarian principle of distributive justice with the nonjustice considerations that compete with it and that sometimes outweigh it and determine what we ought to do all things considered. The Rawlsian mix-up facilitates our viewing capitalism, when and if it would be justified by the difference principle, as fully satisfying the principles of distributive justice, but viewing things this way is wrong and glosses over a genuine unredeemed loss. The mistake here is the same in character as the one we would make if, finding in some unfortunate social circumstances that slavery cannot be abolished without generating unacceptable moral costs, we described the situation, in which all things considered we should not act to eliminate slavery here and now, as one in which slavery is just.

The Rawlsian mistake is especially poignant, as we see when we notice following Cohen that Rawls's intuitive argument for the difference principle is incoherent. Rawls advances an argument from moral arbitrariness that establishes equality of a certain sort as uniquely what distributive justice calls for. Rawls then asserts a nonjustice value, the Pareto norm, and claims that we are driven by that value to abandon the presumption of equality established by the moral arbitrariness argument and to embrace as our ultimate

distributive justice value the difference principle, which says in effect, do the best we can for the worst off, and pay no heed whatsoever to equality of condition as per se morally valuable. An egalitarian argument leads to equality and then somehow incongruously lurches past it, pushed by some other value entirely, and the principle we then end up with is identified with distributive justice rather than as a compromise with distributive justice or as a counterconsideration. So urges Cohen.

### **Conceptions of Justice**

I shall argue that Cohen is wrong to find in Rawls's intuitive argument for the difference principle an incoherent lurch past insistence on equality of condition. I shall also examine from several angles Cohen's rendering of the argument from moral arbitrariness that is supposed to establish a strong presumption in favor of equality. The argument does not look good from any angle.

Even though we find in Cohen's discussions no good argument for the claim that distributive justice demands equality, the claim might nonetheless be correct. However, this is doubtful. My own view is that the fundamental moral principle governing distribution and all other justice matters is to be found in the family of prioritarian principles, which say that one ought morally always to implement an act or policy, among the alternatives, that would produce no less moral value than anything else one might have done instead, moral value being entirely a function of well-being that accrues to individuals.<sup>3</sup> (The moral value of achieving a gain in well-being for an individual is greater, the greater its size, and greater, the lower the person's lifetime well-being level would be absent this benefit, and greater, the more deserving the individual.) Priority versus Cohen-style equality involves a consequentialism versus deontology issue that is irrelevant for purposes of this discussion. Setting that issue aside, one can construe priority as the idea that distributive justice is beneficence weighted by priority that varies depending on how badly off one is—this idea might be set in a deontological frame with its paraphernalia of constraints and options. Cohen clearly rejects this idea, and I have no arguments for it, so this side of the discussion ends in a standoff.

It's an odd standoff, seemingly more verbal than substantive. Cohen insists that distributive justice demands equality, but allows that other justice considerations might militate against equality, and allows also that nonjustice moral considerations including aggregative welfarist considerations might militate against the lot of justice considerations, and perhaps rightly outweigh them. He is opposed to priority in the sense that he does not declare a commitment to it, and not in the sense that he declares a commitment against it. His substantive claim is that priority, along with the Rawlsian difference principle and other moral ruffraff, should not usurp the name of *justice*.

It might seem tedious and fruitless to quarrel with a theorist about the names she attaches to the entities that concern her. Nonetheless I do want to quarrel with Cohen on this point. I object to his definitional stipulations regarding the term *justice*. Something, though perhaps not much, is at stake here. It is perhaps worth mentioning that Cohen does not regard himself as making a convenient definitional stipulation; he is asserting what he regards 'our' conception of justice to be.

In ordinary English usage the term 'justice' tends to be applied to what the speaker regards as a paramount value and also an all-things-considered value. My

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<sup>3</sup>. On priority, see Derek Parfit, 'Equality or Priority?', reprinted in Matthew Clayton and Andrew Williams, eds., (New York: Macmillan and St. Martin's Press, 2000).

dictionary ready to hand gives as the first meaning for the ‘justice’ entry the following: ‘moral rightness, equity.’ On this usage, if something is not morally right, it’s not just. John Rawls appeals to something like this usage in the magisterial first sentences of *A Theory of Justice*: ‘Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.’<sup>4</sup> Rawls starts with the formal point, that justice is the paramount value in social relations, and then couples it with the polemical claim that justice, the trumping value, has nothing to do with the maximization of welfare.

Back in 1861 John Stuart Mill had in effect protested against the move that Rawls is making.<sup>5</sup> Mill more or less asserts that in a narrow sense of the term *justice*, it might be counterposed to anything that smacks of utility-maximizing, but there is also a broad sense of the term, perhaps more common, according to which it is an all-things-considered and hence paramount moral evaluation of social matters. It is illegitimate to slide between the narrow and broad senses to convey the impression that obviously justice broadly conceived has nothing to do with utility. On the contrary, says Mill, even those who take equality to be the essence of the ideal of justice, end up adjusting the ideal so that inequalities that are expedient are not deemed unjust, nor are equalities that are inexpedient deemed to be just.

I’m with Mill up to a point. When judgments invoke the idea of justice as a trumping value, it is also an all-things-considered value, and it is a wide open question, to what extent increasing aggregate human well-being is a consideration included in the calculation. I would go further. When justice is identified with equality, it is equality of treatment that is in play, and the notion of equality here is formal, that people who are in relevant respects the same should be treated the same. Any ideal of substantive justice appeals to fairness, and it is part of our idea of fairness that if a resource is worth a lot to you and a little to me, you should get it (I would add that how badly off each of us would otherwise be is also a factor). ‘Be reasonable!’ you might say if I act as a dog in the manger, hogging a resource that does hardly anything for me when the cow really needs it to get fed. ‘Be fair!’ you might just as well say in that situation.<sup>6</sup> Cohen asserts that when we are talking specifically about *distributive justice*, whether a distribution is just depends on what one person gets as compared with what others get, and the operative notion of justice here is equality, nothing except differential fault or choice or desert serving to justify inequality. I simply report that I don’t find in my own convictions any trace of this supposed ideal of distributive justice; nor do I see that it is derivable from more basic common-sense convictions we should be loathe to relinquish.

Cohen might wish to argue in a revisionary spirit that we ought to accept his distributive ideal, but it would be misleading to claim any entitlement much less

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<sup>4</sup> . Rawls, *A Theory of Justice*, p. 3.

<sup>5</sup> . J. S. Mill, *Utilitarianism* [1861], George Sher, ed. (Indianapolis, Hackett Publishing, 1979), chapter 5, paragraph 10.

<sup>6</sup> . The non-dog-in-manger principle should surely be incorporated in any plausible interpretation of the ideal of socialism. On the principle, see Brian Barry, *The Liberal Theory of Justice* (Oxford: Oxford University Press, 1973).

exclusive entitlement to the word ‘justice’ with its powerful connotations. I suggest it would make for clarity if he used a fresh invented term for his ideal, say *distributive jarstice*. Then a reader like me could register that he does not care at all for distributive jarstice without thereby seeming to insinuate that he cares not at all for the paramount all-things-considered value in social relations, or not at all for the more specific value of fairness in social relations.<sup>7</sup>

Cohen objects that Rawls plays fast and loose with the notion of *distributive justice* when he allows that, with other principles in place, a distribution of resources that satisfies the difference principle is just, fully accords with the conception of distributive justice that we ought to accept. The difference principle in one of its formulations says that an inequality in resource shares is just provided that it works to maximize the set of resources (primary social goods) that goes to the worst off. Cohen proposes to identify distributive justice with luck egalitarianism.

### **Equality and Moral Meritocracy**

Some regard the canonical statement of luck egalitarianism to be this formulation introduced by luck egalitarian Larry Temkin: ‘It is bad (unjust and unfair) for some to be worse off than others through no fault [or choice] of their own.’ Call this the Temkin formulation (it’s from his book *Inequality*).<sup>8</sup> Cohen affirms roughly the same view, when he avows his conviction ‘that an unequal distribution whose inequality cannot be vindicated by some choice or fault or desert on the part of (some of) the relevant affected agents is unfair, and therefore pro tanto unjust, and that nothing can remove that particular in justice.’

And some might regard this as a necessary supplement to this canonical statement of luck egalitarianism: ‘It is morally bad (unjust and unfair) if some have less than others beyond the level of inequality that is proportionate to the comparative merit (faultiness) of their choices.’ Unless you add the supplement, or something along this line, your luck egalitarian principles set no limit on how much worse off than another it is acceptable for a person to be, given that she has behaved in a manner that is more faulty, even by a smidgeon, than the other person or persons with whom her condition is being compared.

The Temkin formulation looks to be unpromising as a canonical statement of any sort of egalitarianism, because it is ambiguous. It is (can be interpreted as) fully compatible with the following: ‘It is morally bad (unjust and unfair) if some have the same as others through no merit of their own.’ This says it is morally bad if some make less meritorious, more faulty choices than others yet end up with the same as what others get. And both the Temkin formulation and the just-stated claim can be read as partial statements of moral meritocracy. The full statement of moral meritocracy would be: ‘Each person should get good fortune in life according to her moral merit (the degree to which her choices are faulty, compared to others’ choices). (This is not quite right, because the Temkin formulation includes an odd causal requirement—whether

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<sup>7</sup> . But isn’t the prioritarian being equally revisionary in denying that it matters at all (except instrumentally) from the standpoint of justice, how one person’s condition compares to the condition of others? My point is simply that Cohen cannot appeal to any uncontroversial common notion to buttress his claim that distributive justice essentially requires equality.

<sup>8</sup> . Larry Temkin, *Inequality* (Oxford: Oxford University Press, 1993), p. 13. In footnote 21 on the same page he adds to his formulation the words ‘or choice’ that I have added in square brackets.

inequalities are good or bad depends on the causal process through which the inequality arises. My statements of moral meritocracy extrude the odd causal requirement.)

To get any sort of egalitarianism into the picture, you need to amend or interpret the Temkin formulation so it tilts in favor of equal distribution in some way: Perhaps it might be read as asserting: Equality is morally desirable, provided that inequality does not arise through fault or choice. (This is neutral on the issue, what is desirable when inequality does arise through fault or choice.) Another possibility: Add to the Temkin formulation a straight affirmation of equality: It is morally better if all have the same. Another possible view is that is, equality is morally desirable only provided the equal desert condition obtains, and it is morally desirable that the equal desert condition obtains.

### **Cohen versus Rawls**

Cohen argues that Rawls produces an intuitive argument for the difference principle that illicitly moves from (a) premises that appeal to the value of equality to (b) a conclusion that affirms the difference principle as the core principle of distributive justice. However, the difference principle, most clearly in its leximin formulation, attributes no value whatsoever to equality. According to the leximin difference principle, justice requires (against a background of equal basic liberty and fair equality of opportunity) that as a first priority, the primary goods allocation going to the person with least primary goods be maximized, then as a second priority, the primary goods allocation going to the second-worst off person be maximized, and so on up to the best-off person. In other words, the difference principle instructs us to arrange the basic social structure so as to make the worst off as well off as possible, and to let the equality chips fall where they may. Cohen protests that there is an incoherence in this argument. From premises affirming the intrinsic moral value of equality, how can you validly reason to a conclusion that says inter alia that equality is not intrinsically morally valuable at all?

Rawls in my judgment is innocent of the error that Cohen accuses him of making. Cohen himself starts with the strong antecedent opinion that equality of condition is a very important and central justice value, in fact for Cohen it turns out to be the entirety of distributive justice when properly elucidated. Holding this opinion, he finds it charitable to Rawls to impute to him similar views on the basis of his claims about the moral arbitrariness of the natural lottery. I admit these claims exhibit a Cheshire Cat elusiveness, but deny that they are best construed so as to reveal the argument Rawls builds from them to be incoherent.

However, not much hinges on this dispute. If it is true that Rawls moves from 'equality per se matters' premises to 'equality per se does not matter' conclusions, this merely indicates that Rawls, a pioneer in the articulation of contemporary egalitarianism, is not perfectly clear at the start about how the considerations that move him fit together into a plausible account of justice paired with good arguments supporting it. If Rawls ends up retracting some of what he asserts at the beginning of the discussion, that in itself is not a good reason to reject his final judgment that 'equality per se does not matter.'

The relevant passages in Rawls occur in chapters 1 and 2 of *A Theory of Justice*. In chapter one, explaining why the basic social structure deserves to be the primary subject of justice, Rawls states that over time the basic social structure brings it about that people begin their adult lives with very unequal holdings and prospects of primary social goods, and these initial inequalities cannot possibly be justified by appeal to individuals'

differential desert. The fundamental task of a theory of distributive justice is to specify what justifies such inequalities when they are justified. In chapter two Rawls objects to the ‘system of natural liberty,’ roughly a society in which free speech and civil liberties are protected and a free market economy with private ownership of resources operates under the constraint of careers open to talents. Rawls observes:

The existing distribution of income and wealth, say, is the cumulative effect of prior distributions of natural assets—that is, natural talents and abilities—as these have been developed or left unrealized, and their use favored or disfavored over time by social circumstances and such chance contingencies as accident and good fortune. Intuitively, the most obvious injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by these factors so arbitrary from a moral point of view.<sup>9</sup>

Rawls is appealing to a moral judgment he expects his readers to share, to the effect that when morally arbitrary factors such as sheer good and bad luck in people’s initial social and natural circumstances and in the way that the ensemble of people’s desires continually reshapes itself into supply and demand conditions significantly influence the outcomes of free market competitive trading over time, the mere fact that distributive outcomes result from free trading in a competitive market economy does not suffice to justify these outcomes. Something more is needed. In other words, all Rawls is committed to in the passage under examination is (a) there is some initial presumption in favor of equal distribution and (b) the sheer fact that a distribution arises by free market trading, even by free market trading starting from a presumed fair starting point, does not suffice to overcome this initial presumption. Rawls says the system of natural liberty allows distributive shares to be ‘improperly influenced’ by the sheer luck of the natural lottery and market fluctuations. This suggests these factors might be regulated, without being eliminated or entirely offset, in such a way that they would properly influence distributive shares.

Rawls starts with a presumption in favor of equality of condition, and in the course of his reflections this presumption is overridden. In the end the presumption as it were disappears without trace. This need not betoken inconsistency. Analogy: One might start with a presumption in favor of the idea that when one is speaking to someone, one ought to be polite to that person. This presumption might be thought to be provisional. It disappears without a trace, for example, if one discovers one is addressing the person who brutally murdered your child and has shown no remorse. One might say the presumption is conditional: if the person one is speaking to has not done something that makes her the appropriate target of outraged or contemptuous or some other form of rude speech, there is a pro tanto moral reason to speak politely to that person.

A presumption in favor of equality of condition might be of any of a wide range of normative strengths. At one extreme, one might hold that if one knows nothing at all about a number of persons and one has to allocate goods among them somehow, since there is no basis for treating anyone asymmetrically, a respectful policy is to divide the goods equally across the persons. This very weak presumption gives way once any reason at all appears to give more goods to some rather than others. Alternatively, a presumption could be held to be stronger, and overrideable only by good enough reasons, and what counts as ‘good enough’ might be variously specified.

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<sup>9</sup> . Rawls, *A Theory of Justice*, p, 63.

I don't mean to advance any heavy-duty theses that would substantially contribute to a moral theory of presumptions. My point is that a presumption can be provisional, in the sense that its presence at the start of inquiry is compatible with its entire disappearance without remainder by the end of inquiry, or compatible with its thoroughgoing transformation into a doctrine of a quite different character during the course of normative inquiry. And a presumption can vary in strength, down to the vanishing point.

### **Moral Arbitrariness**

Rawls exegesis aside, does the moral arbitrariness claim provide an argument for equality of condition?<sup>10</sup> Suppose one asks, would the fact that people's holdings came about via free and voluntary market trading from a fair initial starting point justify those present holdings? One might answer No on the ground that whatever moral principle required a certain pattern of holdings at the start, that same principle would almost certainly be violated as people's holdings change in the course of market interaction, so at some point a return to a distribution closer to the initial starting point would be required. (To argue in this way would be to run Robert Nozick's celebrated Wilt Chamberlain argument in reverse.<sup>11</sup>) In further support of that answer, one might add that the nature of free market trading is not such that it automatically provides legitimacy to whatever outcome results, especially after many rounds of trading. What one gets in trading depend on many chance circumstances including one's stock of traits and how those traits interact with the ensemble of supply and demand conditions to provide opportunities to some and deny opportunities to others.

The moral arbitrariness objection so construed objects to a proposed departure from an initial starting point. Nothing says this starting point has to be equality. One could just as well use the argument to defend feudal inequality, construed as presumptively normative. Suppose one begins with the natural inequality proposal: aristocrats should get more of the good things in life, because blue blood courses through their veins, and others should get less, because their blood is metaphysically inferior. The suggestion is then ventured that over time in free market trading, some nonaristocrats will end up with about as much as their natural superiors, and will deserve their holdings earned in market interaction, even though the end result is a trend toward equality of condition. Back comes the moral arbitrariness objection: It is sheer unmerited luck, good or bad, that renders some people able and others unable to command high prices for the goods and services they offer in market interaction. So the equalizing tendency of market interaction—its tendency not to preserve the starting point inequality between the aristocrats and the others--is tainted by its source in a morally arbitrary causal process. The outcomes of market trading especially when repeated without redistributive correction over a long run, are determined in large part by accidents of birth, genetic endowment and favorable early socialization and education, and the like. Any equalization brought about by such a morally arbitrary process has no moral weight against the opposed norm of preserving an initially morally privileged starting point, in this case, feudal hierarchy and inequality by fixed rank.

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<sup>10</sup> . See Susan Hurley, *Justice, Luck, and Knowledge* (Cambridge, MA: Harvard University Press, 2003).

<sup>11</sup> . Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 160-164.

The advocate of the moral arbitrariness argument construed as an argument for equality of condition might at this point be of the opinion that I have reinforced her case by this futile effort to tear it down. She now asserts that feudal hierarchy itself succumbs to the moral arbitrariness objection. Inequality of condition justified by the quality of individual lineage assessed by aristocratic standards is itself morally arbitrary if anything is. One finds oneself with aristocratic lineage or not as a sheer matter of brute luck beyond one's power to control. Seeing that one cannot use the moral arbitrariness objection to buttress any arbitrarily selected initial pattern of distribution suggests its inherent egalitarian affinity. Once one notices that choice or desert is the only morally nonarbitrary cause of unequal outcomes, one sees also straightaway that equality of condition is amorally privileged baseline—the two thoughts are flip sides of the same coin.

The easiest way to see that this train of thought is mistaken is to note that the moral arbitrariness objection in effect insists that what qualifies an individual as deserving or undeserving must not be a matter of sheer luck but must rather lie within her power to control. This idea can be embraced by someone who rejects equality of condition as any sort of distributive ideal—presumptive baseline, final end point, or anything in between. As I have already had occasion to mention, one might hold that it is bad—unjust and unfair—if some are worse off than others through no fault of their own and also hold it is bad—unjust and unfair—if some are just as well off as others through no merit of their own and interpret both assertions as partial statements of a moral meritocracy view: Each person should have good fortune or bad fortune over the course of her life in correspondence with what she deserves. Equality has no inherent value at all on this construal.

#### **Moral Arbitrariness Again**

Cohen finds in Rawls an argument from the moral arbitrariness of the sources of inequality to the claim that from the standpoint of distributive justice, it is unfair if some have less than others. This claim is qualified: it is unfair if some have less than others unless the inequality has a nonarbitrary cause. The argument according to Cohen does not begin with an assumed moral presumption in favor of equality of condition but rather establishes a moral presumption in favor of equality of condition.

I find this argument as Cohen presents it hard to construe, so I reproduce two of his formulations:

Cohen identifies his view as one that 'justifies equality as a starting point on the Rawlsian ground that the standard causes of inequality are morally arbitrary' (p. XXX).

Page XXX: 'The moral arbitrariness claim, which combines a post-medieval principle that none should be worse off than others through no fault of their own and modern sociological sophistication about the actual causes of how people fare' is said to 'put accidentally caused inequality under a cloud, as far as justice is concerned.'

The argument might be rendered as follows:

1. Differences in people's condition brought about by morally arbitrary causes are unjust.
2. The only causes of differences in people's condition that are not morally arbitrary involve differential desert.

Therefore

3. Differences in people's condition are unjust unless they are brought about by processes involving differential desert.

According to 3, inequalities that arise as incentive payments to specially talented individuals qualify as morally arbitrary and hence as unjust. Since only differential desert, or more broadly factors that lie within the individual's power to control, can generate inequality on a nonarbitrary basis, the Rawlsian attempt to begin with an argument from moral arbitrariness to a presumption in favor of equality and then to use that position as a foundation from which to establish the justice on inequalities that work to the advantage of the worst off is fundamentally flawed. The moral arbitrariness argument establishes a tie between justice and equality that considerations of what is advantageous for this or that social group are unable to break.

The easiest way to see that the moral arbitrariness argument as construed by Cohen only supports a presumption of equality if it assumes this presumption at the outset is to note that the taint of moral arbitrariness can attach just as readily to equality as to inequality. Consider this argument:

1. Sameness in people's condition brought about by morally arbitrary causes is unjust.

2. The only causes of sameness in people's condition that are not morally arbitrary involve equal desert.

Therefore

4. Sameness in people's condition is unjust unless it is brought about by processes involving equality of desert.

Since what is sauce for the goose is sauce for the gander, the moral arbitrariness argument, if acceptable at all, is just as successful at establishing an apparent presumption in favor of inequality, in its second formulation, as it was in establishing an apparent presumption in favor of equality, in its first formulation. The operative word here is "apparent." In fact the two arguments are compatible; they involve an assertion of a moral meritocracy position: People ought to get gain better or worse conditions of life corresponding to their moral deservingness. The more deserving one is, the better one's condition ought to be. Distributive justice is distribution of good fortune corresponding to each individual's level of deservingness. Inequality of condition is unjust when it obtains among persons who are equally deserving and equality of condition is unjust when it obtains among persons who are unequally deserving.

The symmetrical position just described is broken only if one assumes at the outset that everyone's condition or quality of life ought to be the same, unless there is some special consideration in the circumstances that justifies inequality. This means that the argument that Cohen says establishes a presumption for equality in fact achieves that position only if one arbitrarily inserts the assumption of a presumption for inequality into the initial premise. No moral arbitrariness plus a presumption for equality implies a presumption for equality.

The moral arbitrariness argument as construed by Cohen is flawed in a more fundamental way than I have so far hinted at. The flaw lies in the idea of morally arbitrary causes of people's condition. Suppose that Mother Teresa has led an exemplary life, and Hitler has led a thoroughly evil life; the one is a saint and the other a villain. So far the circumstances of their lives have conspired to bring exactly the same degree of good fortune to each. Both are leading lives of middling quality. Then by chance a rock

falls on one of the two; forever spoiling the injured person's life, because the injuries are painful, disabling, and can neither be healed nor offset by any available compensation. So inequality of condition then obtains: One of the two ends up leading a life that is good on the sense of good for the one who leads it (obtains the good that the virtue of prudence takes as its object). Surely any view of justice that allows a role to considerations of deservingness should hold that it issues in a more just outcome if it is Hitler and not Mother Teresa who is the one hit on the head by a rock with unfortunate consequences. However, if one holds with Cohen that it is morally bad (unjust and unfair) if some are worse off than others through no fault of their own, then one must hold that it is morally bad (unjust and unfair) that Hitler and Mother Teresa in this imaginary story end up unequally well off, with Hitler worse off—since in the story it is through sheer bad brute unchosen luck, and not any fault of his own that Hitler is bonked by the randomly falling rock with harmful consequences.

At this point the advocate of the moral arbitrariness argument might dig in her heels and defend the special causation requirement incorporated in it. One might deny that it is deservingness over the course of one's life—deservingness in the air, one might say—that determines one's eligibility for being on the short end or the long end of the stick when inequality might be established. Rather the justifiability of an inequality depends on how that particular inequality is brought about. Suppose that Emma voluntarily engages in a series of gambles, which might have turned out badly for her, but did not. Then she is hit by a random meteor. The risk of suffering this accident could not have been reduced or enhanced by any reasonable course of action she might have taken, and no meteor collision insurance was available to her. If Emma is now worse off than others through no choice of her own, this inequality is tainted by its morally arbitrary origin in sheer brute bad luck. The fact that she engaged in prior gambles that turned out to be inconsequential is neither here nor there for the assessment of the inequality of condition that now afflicts her.

The proposal under review now is that from the standpoint of distributive justice, it is unjust if some are worse off than others unless one who is worse off has freely chosen the course of action that led to this outcome (or could have, but did not, advert to a possible course of action one might have taken, that would have been reasonable to take and would likely have left her no worse off than others). The deservingness, merit, faultiness, or demerit of the agent's conduct is not relevant. I find this an unappealing construal of the Temkin luck egalitarian ideal, but let that pass. The proposal also seems to invoke an unspecified fair framework for interaction, within which choices that lead to your being worse off than others reduce your claims to restoration to equality, but let that pass. However, setting these issues aside, I still insist that this notion of moral arbitrariness works in tandem with the idea of a morally privileged baseline distribution, departures from which are then claimed to be acceptable only if nonarbitrary. The morally privileged baseline could be the distribution that is conducive to maximizing utility, or anything else. Nothing says it has to be equality.

Suppose we amend the moral arbitrariness argument in a way that eliminates the special causation requirement that had been built into it.

1. Differences in people's condition are unjust if they are brought about in such a way that there is no good justification for them.

2. The only good justification for differences in people's condition involves differential desert of the unequally placed individuals.

Therefore

3. Differences in people's condition are unjust unless they involve the differential desert of the unequally placed individuals.

The problem with the reformulated argument is that whereas premise 1 now is unexceptionable, premise 2 looks false. There are plausible justifiers of differences in people's condition, inequalities in their well-being or advantage levels enjoyed over the course of their lives, other than differential deservingness. One plausible candidate justifier is that the status quo could be improved by introducing an inequality that renders one or more persons better off and no one worse off. Another plausible candidate justifier is that the status quo could be improved by introducing an inequality that renders some better off and some worse off but in such a way that the gains of the gainers—discounted and amplified by the moral value of achieving gains for those persons given how well off or badly off they would otherwise be—exceeds the losses of the losers—discounted and amplified by the moral disvalue of imposing losses on those persons given how well off or badly off they would otherwise be. There are other plausible candidates.

### **Conclusion**

There is much to like and embrace in *Rescuing Justice and Equality*. My arguments have focused on Cohen's attempt to rescue the idea of equality as a distributive justice ideal. Under examination, the attempt looks to be unsuccessful.

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