

## **False alarm**

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### **1. Cohen's rescue**

G. A. Cohen offers to rescue justice and equality from two Rawlsian mistakes: constructivism about justice and the restriction of justice to the basic structure. In this rough note—a glorified seminar handout, really—I criticize some of Cohen's arguments for the claim that any theory that has these features can't be right.

#### **A. Constructivism**

### **2. The mixed-bag objection**

Definitions: A principle of justice is *applied* if it's derived from a mixture of principles of justice and considerations that are not principles of justice, and *fundamental* if it's not applied. *Constructivism about justice* holds that a principle is a correct principle of justice if it is, and in virtue of its being, the output of some specialized procedure for choosing principles to regulate social life.

Cohen argues that the output of such procedures cannot count as fundamental principles of justice because its determination is necessarily sensitive to an inappropriately mixed bag of considerations:

[I]n any enterprise whose purpose is to select the principles that are to regulate social life, attention must be paid to considerations that do not immediately concern the content of justice itself:... contingencies that determine how justice is to be applied, or that make justice infeasible, and values and principles that call for a compromise with justice also have a role to play in generating the principles that regulate social life. ... It follows that any procedure that generates the right set of principles to regulate society fails thereby to identify a set of *fundamental* principles. ... [P]rinciples for regulating our common life ... are not themselves fundamental principles of justice, since they must honor considerations other than those of justice itself.

### **3. Begging the question?**

It takes some care to understand Cohen's argument so that it doesn't beg the question against the constructivist. You might take the quoted passage to be making these claims.

- (1) If nonjustice considerations play a role in the selection of social regulatory rules, then those rules cannot be fundamental principles of justice.
  - (2) Nonjustice considerations will play a role in any decent procedure for choosing social regulatory rules.
- So (3) Any decent procedure for choosing social rules will choose rules that aren't fundamental principles of justice.

But it's all over at (1). The committed constructivist, and anyone who's undecided about whether constructivism is true, can't accept (1).

Here's what I think's going on instead. We're to consider some examples of constructivistically approved regulatory rules. We're to judge that they aren't fully just. And we're then to explain this tendency to get the wrong answers by the fact that the deliberators are allowing nonjustice considerations to matter. That diagnosis of the mistakes will show us that, on our own view of justice, nonjustice considerations must not play the relevant roles and so that constructivism is false.

So let's look at the examples.

#### 4. Tax-bracket example

Suppose that justice requires collecting taxes calculated as some function of persons' market incomes. Let  $F$  = facts that make a continuous and strictly increasing function impracticable. Given  $F$ , the legislators adopt as a rule of regulation the use of a step function.

We shouldn't say that justice consists in using a step function and leave it at that. But the constructivist might argue that the legislators choose a rule like

(1) Get as close to a continuous and strictly increasing function as you can given the facts and that justice requires that you follow (1). Then you have

(2) Given  $F$ , the step-function is just.

But for Cohen "the very *concept* of justice ... tells us that justice is not fully realized by ... a step function." So (2) is false.

It's probably a mistake to rest the rejection on (2) on information about the *concept* of justice. I am skeptical, not because I deny that there are conceptual truths, but because I doubt that we have any about justice that are this rich. Better to say that, exercising our knowledge of what justice is, we judge that the step function is not fully just.

I doubt it's safe to assume that most people will accept this judgment. I don't share it.

One argument for it is suggested by something Cohen says in reply to an objection. Suppose that  $F$  allows us to use seven bands. Why should we use seven bands rather than two? Cohen says that the answer is surely that seven is closer to the just, continuous scheme. But (1) offers another explanation: that two fails to get as close as is feasible to a continuous and strictly increasing function.

This also explains why we'd welcome technical improvements that allow us to use a larger number of smaller bands. For the constructivist who takes (1) to be chosen in the constructivist procedure, justice requires that a moral desideratum distinct from justice—similarity of treatment of similar cases, perhaps—be met to the maximum feasible degree. We are morally glad when the feasible set allows this to be met, not because justice is more fully realized, but because that independently morally valuable desideratum whose maximization constitutes justice is more fully realized. This gladness is systematically connected to the moral concerns that underwrite justice. But because those concerns are distinct from concerns justice, it need not consist in gladness at the achievement of full justice.

#### 5. Pareto

Cohen argues like this:

1. Any all-things-considered best principle for regulating social life will respect Pareto.
2. Constructivism identifies justice principles with ATC best regulatory principles.

So

3. Constructivism holds that justice requires pareto deviations from equality even when they reflect brute luck.

I can see two possible completions of the argument.

4. Some brute-luck-reflecting pareto deviations from equality are unjust.

So by 3 and 4

5. Constructivism is false.

Or

6. Many people believe that (4) is true.

So by 3 and 6

7. Constructivists can't give shrift to a common belief about justice.

(2) looks false to me. Constructivists qua constructivists identify principles of justice with principles chosen for regulating social life. But they need not identify them with the a.t.c.-best principles. Instead they might have in mind principles chosen with regard to a limited budget of considerations appropriate to the special moral problem that the constructivist takes to be solved by bringing a society under the regulation of those principles.

For example, to solve the problem of the justification of every person's conduct to every conduct person, the Scanlonian legislator is to consider only the interests and claims of persons taken one by one. That some principle realizes a small benefit for each of a larger number of persons is no reason to select it. But the Scanlonian might admit that, outside the special domain of what we owe to each other with which she's concerned, numbers of beneficiaries can count. Since it neglects the admitted value of helping a larger number, the Scanlonian choice does not consider all things.

Moreover constructivists are free to reject *Pareto* as a condition on the selected principles. For example, *Rawls* rejects it. He may or may not do so at the level of the difference principle; whether you'll think so depends on whether you understand the principle as condemning *Pareto* deviations that leave the worst off no better off. But he certainly rejects it as a stricture on the principles of justice taken together. By putting the first of his principles first, *Rawls* eschews any *Pareto*-superior primary-good distributions that trample the basic liberties.

Suppose that a constructivist's principles flout *Pareto*. I don't think this dooms the society she recommends to extremes of inefficiency. Even if the content of justice is given by a specially constrained hypothetical choice of social rules, actual legislators are free to consult values apart from justice in their relevantly unconstrained, all-things-considered choice of rules. And they may in particular weigh justice and *Pareto* together in whatever way *Cohen* himself endorses, coming as close to efficiency as a *Cohenian* legislature can.

So let 1' and 2' be 1 and 2 corrected by replacing "atc best" with "best with respect to special considerations C." Each constructivist should then ask whether the objectionability of brute-luck-laden inequalities is a reason to reject a basic structure given her own favorite substitution for "C." By asking that question, and however she answers it, she gives shrift to a judgment similar to *Cohen*'s. It's true that she can't consider directly the claim that the inequalities are unjust. But to object to this express neglect of justice within the procedure is to beg the question against constructivism. Considering the objectionability though not the injustice of inequality as a ground for rejection counts as giving shrift to (4). I conclude the (6,7) version doesn't succeed.

That leaves (1', 2', 3, 4, 5.) If a constructivist rejects *Pareto*, (1') is false. If she accepts it, *Cohen* must dig in at a direct appeal to (4). He says that he has more confidence in 4 than in any metatheoretical claim about justice. But that's him—he's said nothing to favor that methodological stance over the constructivist one of being willing to revise some beliefs about justice if this serves the best explanation of the reason-giving force of justice principles and over the substantive claim that the constructivist explanation is a good one.

## **6. Stability**

*Rawls* requires that his principles be stable in the sense that their satisfaction ensures that people will act in ways that ensure their continued satisfaction. And any chooser of principles for social regulation will require that they be stable in this sense.

Cohen points out that people worry about whether justice will continue to prevail. And he claims that the constructivist must hold that this worry is incoherent since she believes that, necessarily, justice principles are stable.

Minor objection: Unless stability implies that reproduction is certain, people can still worry about the possibility of disruption. But put this aside.

Fundamental objection. Whether the worrier's worry is coherent depends on the concept of justice. And the constructivist doesn't say that the worrier's concept of justice is such that it's a conceptual truth that justice principles are stable. The constructivist doesn't say that it's "true by definition that there is no danger that justice might last." Her constructivism is a claim about the property of justice that carries no such commitment about the concept.

Cohen wonders why people want justice to be stable. He says that the obvious answer is that they want justice to continue since it's morally good for justice to continue. And he argues this answer is undermined by making stability constitutive of justice.

First reply: Cohen's obvious answer is not the only explanation of a stability requirement. It can also be explained within the contractualist theory by saying that it's morally good for the features of a basic structure in virtue of which the theory counts it as just to continue.

Second reply: The obvious answer is not undermined after all. A theist who believes that God is essentially immortal can also want God to survive, even though he believes that it's metaphysically impossible for what he wants not to come to pass.

## **7. Publicity**

An old slogan: "Justice must not only be done but must be seen to be done." This presupposes that justice could be done without being seen to be done. Cohen says that this presupposition is false if any acceptable principle of justice must be *public* in the sense that every person is able to find out whether it's being complied with.

This is a mistake, I think. A principle's being public doesn't ensure that all people will know whether it's complied with. The incurious and the unreflective might never find this out, for example. It could happen, then, that a public principle is satisfied without being seen to be satisfied. So the slogan does not presuppose that non-public justice principles are possible.

But we can revise the principle so that it presupposes something ruled out by publicity. "Justice must not only be done but must be such that it can be seen to be done." Then, as with stability, the slogan would be worried about something that a constructivist says can't happen. And in an earlier version of this MS, Cohen rested his objection on this obviation of the worry. This objection draws the same reply as under stability: Whether the worry is coherent depends on the worrier's concepts. And the constructivist isn't giving a theory of the worrier's concepts.

In the current version, this appeal to the coherence of worries has disappeared, and I can't find the argument that's supposed to show that publicity is bound to conflict with justice. There's the example of a nondiscrimination principle that's not public since the motives for this or that act of seeming discrimination are not observable. But Cohen doesn't convince me that I should endorse this kind of nondiscrimination as a principle of justice. There are alternatives that do the same work of rooting out racism: for example principles that condemn a basic structure as unjust if people's life chances depend systematically on their membership in an ascriptive class.

## B. Basic structure

### 8. Positive and negative basic structure

There are two main ways of distinguishing a specially political subject matter for principles of justice. One starts with some allegedly specially political things—institutions, government policy, and so on—and offers an explanation of their specialness that explains our having reason to submit them to special moral standards. On the view I have in mind, the basic structure consists in the things that are special in this way. For example you might take the basic structure to consist in coercively enforced rules, and you might explain its specialness by claiming that, because coercion requires special justification, these rules must have a certain content if their enforcement is to be morally okay.

A second proposal starts with some allegedly specially personal things—daily life, personal relationships, individual exchanges, and so on—and offers an explanation of the value of abstaining from submitting these things to political standards. For example you might take it that it's valuable for each person to pursue certain projects and relationships without directly regulating them by the requirement that they serve the interests of all persons. The basic structure consists in what's left over: the things that can be regulated by political standards while preserving these zones of individual discretion.

On the first, *positive* conception the BS is special for what it is. On the second, *negative* conception the BS is special for what it's not. Notice that it might well be that a version of each view is true—that, as moral coincidence would have it, the BS is special in both ways.\*

### 10. Cohen's argument against incentive inequality

Consider this version of the difference principle:

DP. An inequality is just only if it's necessary for maximin.

Is there inequality in a society whose members act so as to fully satisfy this DP? No, says Cohen.

Cohen argues for this answer as follows:

- (1) Incentive-bearing inequalities are necessary for maximin only if people don't apply the DP to their labor-market decisions
  - (2) People who act so as to fully satisfy the DP apply it to their labor-market decisions.
- so (3) Incentive-bearing inequalities are not necessary for maximin and so don't as count as just under the DP in a society whose members act so as to fully satisfy the DP.

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\* Thomas Nagel, "Moral conflict and political legitimacy":

[Liberalism's] relatively stringent impartiality applies only to uniform and involuntary social and political institutions. One might ask why. Why doesn't the same standard apply to the justification of all action that has an effect, even indirectly, on the interests of others? Part of the answer ... is that when we force people to serve an end that they cannot share, and that we cannot justify to them in objective terms, it is a particularly serious violation of the Kantian requirement that we treat humanity not merely as a means, but also as an end. The justification of coercion must meet especially stringent standards.

The other answer I would give is that we have here an instance of the moral division of labor between society and the individual, corresponding to the division of standpoints in each of us. We literally externalize the demands of the impersonal standpoint by placing in the hands of social and political institutions the task of enforcing the most general claims for assistance and restraint of our fellow human beings. Subject to our contribution to the support of these institutions, this ideally should leave us free to lead our individual lives in obedience to more personal attachments, commitments, and crochets.

### **11. The basic structure objection**

This argument raises the issue of the subject of justice by drawing the following objection to its premise (2):

- (4) Principles of justice are appropriately applied only to the basic structure of the society.
- so (5) People who act so as to fully satisfy the DP won't apply it to their labor-market decisions.

Cohen calls this "the basic structure objection."

### **12. Digression: the irrelevance of basic structure**

Before considering Cohen's reply to this objection, it's worth pointing out that, as Samuel Scheffler has argued, it is possibly irrelevant to the issue Cohen cares about, the permission or prohibition of inequality under the DP. Cohen agrees with the basic structure objector that the DP will tend to justify inequality unless (4) is false. He thinks this because he thinks that an ethos of egalitarian personal infrainstitutional choice, of a kind that (4) rules out, is required to realize the strict equality that he favors. But this is a mistake.

The adherent of (4) who takes it to imply that (2) is false can agree with Cohen that (3) is true. She can agree that incentive-bearing inequalities aren't necessary, since she can agree that it is possible that people might apply the DP to their labor-market decisions, even as she holds that people are not in fact required to do this. She will then favor implementing the DP by a choice of basic structure that achieves strict equality so as to avoid the inequalities that, in being unnecessary for maximin, are unjust.

It might be that this argument misunderstands the place of the ethos in Cohen's view. In an earlier paper I wrote that Cohen might mean to endorse an ethos E such that (strictly egalitarian taxes, ethos E) is maximin in the set of (tax system, work motivation) pairs, to endorse this on ground that this pair is maximin, and to criticize an ethosless society not merely for its including unjust inequalities but for its failing to be maximin. (These endorsements and rejections are relative to Cohen's acceptance-for-the-sake-of-the-incentives-argument of the DP; since he in fact regards the DP as false, he doesn't finally own these judgments.)

As Thomas Pogge and I have each pointed out, this (tax system, work motivation) maximin set-up has weird consequences. Suppose that, of two possible communities, A has leisure-loving talented people while B has consumption-loving ones. Maximin within B requires an ethos that leads each talented person to work  $n$  hours. If the ethos assigns fewer than  $n$  hours to the talented people of A, then it's not truly maximin, and it's weirdly accommodating of the preferences of the talented: it implies that justice demands less of the talented, the lazier they are. If on the other hand the ethos assigns  $n$ , then it's weirdly conditional on the hypothetical preferences of people in another possible society, and, moreover, it's not truly maximin, since it should in fact match or surpass not only the labor supply that obtains in B but what's forthcoming in the possible society with the most consumption-loving of all possible talented-person preferences.

But there's another possibility. It might be that the whole content of the ethos is that it inclines people against "taking more than others." A person steeped in his ethos need not be motivated to work long and hard at average pay in the job to which her talents are best suited. Rather the ethos makes her merely unwilling to work long and hard as a way of getting more than others.

### 13. Cohen's fundamental reply to the BS objection

Cohen offers to answer the basic structure objection by arguing that its premise (4) should not be accepted. Here is the argument.

- (6) Informal structures like the family cannot be altered without altering people's personal choices.
- by 6 (7) If the BS includes informal structures like the family, then applying the principles of justice to the BS requires applying the principles of justice to personal choices.
- (8) If the BS excludes informal structures, then it excludes structures that are profoundly consequential for distribution.
- (9) The consequent of (7) is inconsistent with (4).
- (10) The only plausible justification for (4) is that the basic structure consists of structures that are profoundly consequential for distribution
- by 10 (11) The consequent of (8) is inconsistent with the only plausible justification for (4).
- (12) Either the BS excludes informal structures like the family or it includes them.
- And by 7, 8, 9, 11, and 12
- (13) Either (4) is false or it has no plausible justification.

What you make of this argument depends on how you understand its central notion of applying principles to things.

### 14. Subject, domain, and range

Say that, if there's an X and a P such that the fact that a society is just consists in the fact that the society's X satisfies the principle P, then X is the *subject* of justice; the subject X's having the particular morally valuable features required by P is constitutive of the society's being just. Say that an action or decision is in the *domain* of justice if it is morally appropriate to guide or to criticize that action by recourse to principles of justice. Finally say that a thing is in the *range* of justice if there are possible actions that affect this thing and that are in the domain.

Several phrases that recur through Cohen's article and the various replies to it—centrally “applies to X”, but also “governs X”, “is the site of X”, “has X in its scope”, etc.—are ambiguous between putting X in the subject of justice, putting X in the domain of justice, and putting X in the range of justice. Once these possibilities are sorted out, the argument (6)-(13) loses its appeal.

### 15. Two versions of (4).

These distinctions allow us to distinguish two versions of (4), corresponding respectively to the positive and negative conceptions of the BS.

(4\*) The subject of justice is the basic structure.

(4\*\*) Some personal choices are not in the domain of justice.

(4\*) captures the positive conception by taking the basic structure to consist in things whose having particular morally valuable features constitutes the justice of the society. (4\*\*) formulates the negative conception by implying that it's inappropriate to consider justice in guiding or criticizing the relevant personal choice, leaving a non-personal remainder as the only possibly appropriate contents of justice's domain. (But see section 9 for some doubts about whether this is an adequate formulation.)

### 16. Disambiguation of (7) and refutation of (9).

I will assume that (6) is true, and I will use the subject/domain/range distinction to state a version of (7) such that it follows from (6).

Here is one version that follows.

(7\*) If an informal structure is in the subject or the range of justice, then personal choices are in the range.

If personal choices were not in the range, no action guided by principles of justice could affect personal choices and therefore no such action could affect the relevant informal structure. So if that informal structure were in the subject, the principle of justice whose satisfaction by the structure helps to constitute justice would violate an ought-implies-can stricture on normative principles. Likewise the structure's being in the range of justice implies that action guided by principles of justice can affect it. But since by (6) this action also affects personal choices, it follows that personal choices are also in the range.

Are there are other versions of (7) that also follow from (6)? Here is one that does not:

(7\*\*) If an informal structure is in the subject or range, personal choices are in the subject.

Since (6) does not imply that informal structures are identical with patterns of personal choice, it leaves open the possibility that justice consists in informal structures' satisfying the PJs and that justice does not consist in a satisfaction of principles of justice by patterns of personal choice. So as far as (6) is concerned the structure can be in the subject without the choices' being in the subject. And *a fortiori* the choices' being in the subject is not implied by the structure's being in the *range*.

Similarly someone who accepts (6) is free to reject this:

(7\*\*\*) If an informal structure is in the subject or range, personal choices are in the domain.

For you can agree that it's appropriate to try to alter patterns of choice (e. g. by changing the rules that govern them) without agreeing that it's appropriate for the maker of any one of these individual choices to be guided by the relevant principles when she makes the choice.

Between them (7\*), (7\*\*), and (7\*\*\*) exhaust the possible ways of filling the blanks in "If an informal structure is in the \_\_\_\_\_, then personal choices are in \_\_\_\_\_" from the subject, domain, range menu. Of these, only (7\*) follows from (6).

But (7\*) is consistent with both (4\*) and (4\*\*). After a disambiguation that secures the validity of Cohen's argument by replacing (7) with (7\*) and that substitutes either (4\*) or (4\*\*) for (4), it comes out that (9) is false.

### **17. Prerogative or protective liberalism**

Diana Marian has pointed out that (4\*\*) is not the only possible version of a negative basic-structure view. (4\*\*) expresses the roughly Williamsian thought that it's intrinsically valuable that each person take herself to be unconstrained by principles of justice as she makes certain personal decisions. But there is another liberal motivation for a different way of marking out a personal sphere as off-limits to justice-minded politics. Namely that the political actors who carry out the principles of justice are constrained in carrying them out not to aim to affect certain personal choices made by other persons. This different way in which personal choices might be exempted from justice comes out in my terms as

(4\*\*\*) Some personal choices are not in the range of justice.

As Marian saw, the substitution of (4\*\*\*) for (4) threatens to undermine my case against (9), since (4\*\*\*) is inconsistent with (7\*) where they refer to the same kinds of personal choice.

Three thoughts.

First, before (9) is saved, it remains to be shown that the personal choices that must be altered if informal structures are to be altered are all protected under (4\*\*\*). As long as some choices in the first class are excluded from that protection, (4\*\*\*) allows for action that alters the informal structure so as to carry out principles of justice. For example it's plausible that the family structure might become substantially gender-equal if people ceased to be sexist in their personal choices, and that sexist personal choices aren't uniformly excluded from the range by a plausible protective liberalism. It's plausible that this liberalism will allow the public to aim for a feminization of domestic mores provided, for example, that it uses only rational and not coercive means.

Second, while an argument against (4\*\*\*) might have some independent interest, it can't help Cohen's reply to the basic-structure objection. The basic-structure objection is meant to show that people who act so as to satisfy the DP won't apply it to their labor-market decisions. And so it can't be interpreted as appealing to a principle that, like (4\*\*\*), merely directs *other* people not to interfere with those decisions in the course of satisfying the DP.

Third I show in the next section that (10) is false when (4\*\*\*) is substituted for (4). So to refute Cohen's argument for (13) in respect of (4\*\*\*) I don't need to show that (9) is false in respect of (4\*\*\*).

### **18. Refutation of (10)**

It's false that profound distributive consequence is the only plausible rationale for (4). This is easy to see in the cases of (4\*\*) and (4\*\*\*) since their rationale rests, not with causal facts about distribution, but on the value of screening personal choice from public-minded regulation. But it's also arguably true for (4\*) since there are arguably plausible reasons to make BS the subject that don't reduce to its being profoundly consequential for distribution. I have already mentioned one example. You might take the BS to consist in coercively enforced rules, and your reason for this might involve not its consequences for distribution but the requirement that coercion be justified.

I conclude that, because (9) can be resisted in the way explained in section 8 and is in particular shown there to be certainly false in respect of (4\*), and because (10) can be resisted in the way explained in this section and has been shown here to be certainly false in respect of (4\*\*) and (4\*\*\*), Cohen's argument for (13) is resistable.