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Incentives, Structures and Ethos -

GA Cohen's Internal Critique of Rawls's Difference Principle

Submitted for the degree of PhD in Politics and International Relations

March 2022

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Contents

Thesis Abstract.....	7
Acknowledgements.....	8
Chapter 1 - Introduction	9
A Tale of Two Georges (and a Gerald)	9
The Significance of Rawls.....	11
The Significance of Cohen’s Critique.....	13
The Rationale of this Thesis	14
The Structure of the Thesis.....	19
Methodology.....	22
Chapter 2: Rawlsian Theory	25
Introduction to Chapter 2	25
1. Justice as Fairness – fundamental ideas	26
1.1 What is justice?	26
1.2 Contractualism and the Original Position	28
1.3 Reflective equilibrium	34
1.4 Congruence and Stability	36
1.5 Publicity.....	37
1.6 Constructivism	38
2. Justification	40
2.1 The Two Principles of Justice as Fairness.....	40
2.2 Arguments from the Original Position	43
2.2.1 The Maximin Argument – Justice as Fairness vs Utilitarianism	43
2.2.2 The Reciprocity Argument for the Difference Principle – Justice as Fairness vs “Mixed Conceptions”	46
2.3 Confirming Grounds.....	51
2.4 Institutions - Labour: Work and Pay	52
2.5 Stability of Justice as Fairness	53
2.5.1 Moral Psychology.....	53
2.5.2 Congruence	55
Conclusion to Chapter 2.....	58
Chapter 3: Cohen’s Objections to Rawlsian Incentives Payments.....	59
Introduction to Chapter 3	59
3.1 Incentives, Necessity and Community	60

3.1.1	Justificatory Community and the Interpersonal Test	60
3.1.2	Analysis of Cohen’s Incentives and Community Objection.....	67
3.2	Pareto Efficiency and Welfare as Desideratum	78
3.2.1	The Pareto argument and Cohen’s objection	79
3.2.2	Analysis of the Pareto Objection.....	81
3.3	The Freedom Argument.....	88
3.3.1	First Trilemma – Freedom of Occupational Choice	88
3.3.2	Second Trilemma – Freedom of Self-Realisation	90
3.3.3	Analysis of the Trilemma Solutions.....	92
	Summary and Conclusion to Chapter 3	96
Chapter 4	- Cohen’s objection to the Rawlsian Basic Structure Argument	98
	Introduction to Chapter 4	98
4.1	On the Site of Justice - The Rawlsian Basic Structure Objection	99
4.2	Analysis of Cohen’s objection: structure and personal decision	105
4.2.1	The Basic Structure Excludes Non-Coercive Institutions	105
4.2.2	Equality of Spouses within the Family	111
4.2.3	Equality of Children as Future Citizens	115
4.2.4	Justice is not Restricted to the Basic Structure.....	120
4.2.5	Cohen’s Concerns about Incentives can be Addressed by Coercive Institutions	122
	Conclusion to Chapter 4.....	126
Chapter 5	– Rawls’s Egalitarian Ethos.....	128
	Introduction to Chapter 5	128
5.1.	Why Ethos?	128
5.2.	What is an Ethos?.....	130
5.3	Rawls as Ethos Theorist.....	132
5.4.	Historical Conditions of the Egalitarian Ethos - Why Ethos Tracks Institutions.....	139
	Conclusion to Chapter 5.....	143
Chapter 6:	The Content Contradicts the Case – the Difference Principle Objection.....	144
	Introduction to Chapter 6	144
6.1	Case versus Content in Rawls	147
6.2	Rawlsian Arguments for the Difference Principle.....	154
6.3	Can one believe the difference principle but not act upon it?	159
6.4	Constructivism	160
	Conclusion to Chapter 6.....	162
Chapter 7	– Summary and Conclusion.....	163
7.1	Summary of Chapters 2-6	163

7.2 What actually is the disagreement between Rawls and Cohen?.....	167
7.3 Further research	169
7.3.1 Ethos	169
7.3.2 Meta-ethics	170
7.3.3 Realism.....	170
7.4 Conclusion to the Conclusion.....	172
Bibliography	173

Thesis Abstract

This thesis concerns GA Cohen's critique of John Rawls's difference principle, the principle of justice which permits social and economic inequalities that are structured to the maximal benefit of the least advantaged class. Cohen expresses concern that the economic inequalities which the difference principle permits are inconsistent with the rationale of justice, that individuals should receive full redress for inequalities that are the outcome of luck, rather than choices one makes. This is because the difference principle permits economic incentives to the more talented members of society, those with more favourable, or useful, talents, when the deployment of those talents maximally benefit the least fortunate. But this is at odds with the rationale of justice as talents are the outcome of nature rather than the outcome of choices and efforts one makes and so the talented ought not receive incentive payments which make them better off than the less talented.

My study of Cohen's critique aims to show that Cohen's concerns about incentives arise from a mis-reading of Rawls and that when these mistakes are corrected, his disagreement with Rawls is significantly narrowed. Primarily, Cohen overlooks that it is not only the difference principle which regulates the distribution of income and wealth but also the other principles of justice. Once the other principles are also accounted for, we see that both the Rawlsian citizen and a Rawlsian society far more closely resemble Cohen's egalitarian ideal than he realises. The primary disagreement between them is not that Rawls unjustly permits incentives to the talented but rather Cohen's narrow conception of justice, that the sole or primary aim of social justice is to make redress for bad luck. While this principle of redress might be the primary aim of a conception of *justice*, it is implausible as an ideal of *social or distributive justice*, as Cohen believes, as social justice must account, not only for what one is due, but also for what one contributes.

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Extra special thanks go out to my supervisors Drs Matt Sleat and Edward Hall, from whose sharp minds I have learned a great deal and to whom I feel I must apologise for some of the drivel I gave them to read over the last few years. Thanks also to all the other scholars in the University of Sheffield Department of Politics and International Relations, particularly the members of the Political Theory Research Group, from whom I have also learned a great deal, often from even the most informally brief discussions. I shudder when I think how little I knew before I began this endeavour. I have also greatly benefited from teaching undergraduate students in the department so many thanks to them also and for helping me discover that I really like teaching and that I’m not too bad at it either.

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Much love goes out to my brother Matthew, who has also discovered a love of teaching recently, and my brother-in-law Michael, who has bravely faced much hardship in life.

Finally, I would like to dedicate this thesis to my mother-in-law, Jane, and my aunt Doreen, both of whom were sadly lost during the last four years and who are both greatly missed by all that loved them.

Chapter 1 - Introduction

A Tale of Two Georges (and a Gerald)

Gerald (or GA) Cohen was a prominent Canadian political philosopher of the left and in the posthumously published collection of his essays provocatively titled *If you're an Egalitarian, Why are You so Rich?*, some autobiographical background is given for Cohen's Marxist and egalitarian interests and motivations and, upon reading these, I discovered that his autobiographical story intersects my own. My initial interest in socialist politics was probably stirred by my maternal grandfather, George Light, who was a trade union representative, school governor, Labour councillor and mayor in the London Borough of Lambeth during the 1950s and 1960s (until he stepped down due to health problems). Cohen's entertaining and enlightening autobiographical story tells us that he was a member of the Lambeth Labour Party during the early 1960s, and that his early cynicism about self-proclaimed egalitarians was stimulated by his volunteering for the party at that time and his interaction with prominent members at the constituency party headquarters at their Wandsworth Road offices in Vauxhall. Considering my grandfather was a prominent member of the Lambeth constituency party during that time, it seems likely that Cohen at least knew of my grandfather and it is possible that he may even have known him personally. In fact, Cohen tells us that he joined the campaign for the then incumbent Lambeth MP, George Strauss in 1964, which my grandfather, who was then mayor, also participated in. My uncle, John Light, tells me that he remembers a Canadian man helping out on that campaign and this may well have been Cohen.

Cohen thought that the wealthier members of the local party who proclaimed egalitarian beliefs were hypocrites. Campaigning in 1964 for Strauss, Cohen says, was uncomfortable (Cohen, 2002, p.152). Lambeth "was a place of poverty" and the Labour Party "could still have been styled as an egalitarian party, by virtue of its ideology, if not by virtue of the policies of its governments", and Cohen's uncomfortableness arose when he observed Strauss, a public school educated millionaire, arrive "sporting a silk scarf, beautiful coat, and other sartorial and behavioural accoutrements of opulence". Strauss, he says, was a Labour hero for playing a key role in the nationalisation of the steel industry under Clement Attlee but Cohen could not help wondering, if Strauss and the Labour Party were egalitarians, why did Strauss, and other prominent Labour members, have so much money? Surely, egalitarians, and Labour heroes, should happily pass that excess wealth on to those in need.

Having too much money was certainly not the case for George Light. While both Cohen and my grandfather were from working class backgrounds and had both lived through poverty, Cohen's understanding of socialism, unlike my grandfather's, was a significantly intellectual one. Cohen was taught about Marxism by his parents and at school and later, as an Oxford professor, applied the techniques of analytical philosophy to both Marx and contemporary political theory, first that of Nozick and then Rawls. My grandfather, as far as I am aware, did not engage with socialism in an academic way. Rather, his socialism was a response to his lived experience, as a working class man, not only of the difficulties of twentieth century capitalism and its injustices but also his traumatising experiences of fighting in the second world war. There is therefore an interesting contrast between Cohen and my grandfather. The former was greatly interested in the intellectual understanding of socialism and egalitarianism and thought that a better understanding of principles of justice would aid the journey towards socialism. But my grandfather, rather, acted from socialist and egalitarian principles which his experiences had internalised without any deeper intellectual understanding of these principles. Both, I believe, contributed to the socialist cause in their own way. I, myself, despite being influenced by both men, have ended up doing more of the former than the latter. But my thesis, in part, argues, as I think Rawls also does, that the George Lights of this world can get on with doing justice without the need for deep philosophy, the need to understand precisely what justice is. George liked to help the needy and got on with it. I am sure he thought about why he did it at a less philosophical level than philosophers aim for, but concerns about whether justice had any specific ontological or epistemic status did not get in his way. He was compelled to make the world a better place for disadvantaged people and, for some of those, that is what he did.

In my mind, perhaps the most memorable instance of my grandfather's egalitarianism occurred after his death. He passed away when I was fifteen and a few years later my grandmother, Louisa Light, had the opportunity to purchase her council flat, a stone's throw from Lambeth Bridge in central London and so close to the houses of parliament that Big Ben would wake me up at night when I stayed there, at a greatly discounted rate due to the right-to-buy programme initiated by Margaret Thatcher's government. She, my grandfather, my mother and my aunt and uncles, had been the only residents in the flat which then was about forty years old and due to this long term tenancy it was offered to her, if I recall correctly, for £16,000. She had little savings but her four children considered buying it for her. It turned out they could not quite raise the funds but it didn't matter as my grandmother had already ruled it out. My grandfather would have been appalled, she said. She died about five years later and, if they had purchased it, my family would have inherited a former council flat worth a lot of

money which no doubt I would have benefited from. But I am proud of her for turning it down. It was the right thing to do and I would have done the same.

My grandfather was an egalitarian but he was not rich. When he was the union representative at his work, Smith Meters Ltd, in the 1950s, the management offered him a management role to get him off the shop floor and off their backs. This would have been greatly beneficial financially to him and his family but he turned the promotion down in solidarity with his fellow workers. While GA Cohen might have encountered hypocrisy in the Lambeth Labour ranks, he would not have found any in George Light as he did in George Strauss. My mother says that my grandfather thought highly of the other George, not sharing any uncomfortableness with Cohen about his wealthy background. The two Georges got on well and often associated with each other at various functions, she tells me. In Cohen's story, the question of why Strauss did not give away his excess wealth, which he mostly inherited, in the name of equality, appears to have motivated much of his later work. It is possible my grandfather may have known the answer to this question. Unfortunately, I cannot ask him what the answer might have been but it is, I believe, a perfectly reasonable question for political philosophers to ask.

The Significance of Rawls

John Rawls might be the most influential political philosopher of recent times, certainly in the Anglo-American analytical tradition. It is often said that he rejuvenated the field of political theory by applying the methods of analytical philosophy to the concept of social justice. While it was the culmination of at least a decade's work, his first major publication *A Theory of Justice* in 1971 was highly influential. Its main idea was to present and justify basic principles of justice, to show how social institutions might be structured to support those principles, and why citizens ought to accept those principles and institutions. The result was a liberal conception of justice, liberal in the sense of prioritizing individual liberty. But the most interesting element of *A Theory of Justice*, at least from the perspective of this thesis, is the attempt to reconcile two values that are often considered to be in conflict: liberty and equality. This reconciliation spoke to the disagreement between the right, who favoured more liberty, and the left, who favoured greater equality. On the one hand, western capitalist societies tended to over-value the former at the expense of the latter so that citizens' fates were subjected to the whims of a supposedly free market. On the other, communist societies tended to enforce the latter at the expense of the former, often to overly coercive totalitarian extremes, subjecting citizens to the inefficiency and oppression of state directed economies. Rawls's solution for reconciling liberty and equality was to advocate for a distribution of equal basic liberties,

strict equality of opportunity and to allow only economic and social inequalities which maximally benefit those with the least social and economic goods. This, he claimed, would be justified by a free choice procedure called the original position, designed to be free in the sense of banishing threat advantages which would bias a choice in favour of one group over another, such as the dominance of those better placed economically over those less favoured. The outcome might not be perfect material equality, but it permitted only a departure from equality that all should agree upon as being fair, just and mutually beneficial to all.

Rawls's theory of justice, which he called Justice as Fairness, has two principles, the second of which has two parts. It is the second part of this second principle, the difference principle, which permits only social and economic inequalities which most benefit the least economically favoured. Rawls's difference principle, as did his work more generally, gained much attention from the field of political theory. One reason for this is due to how influential his work has been, but one other reason is that Rawls is not always as clear as he could be when setting out his ideas. As we will see, GA Cohen made a significant contribution to the understanding of Rawls by arguing that the difference principle was not egalitarian enough for permitting some unjust inequalities. Another significant contribution was that of Robert Nozick's who preferred a libertarian form of distributive justice, objecting that the better off are exploited when expected to work to the benefit of the least well off. A further significant contribution to the debate came from Susan Moller Okin, who argued that Rawls only compensates for differences in economic class and not gender (although she also argued that there was no reason why he could not incorporate gender-blindness). A similar complaint was raised by Charles Mills, who argued that not only gender was set aside by Rawls but also race.

Rawls later re-considered Justice as Fairness and re-presented it as a form of Political Liberalism. His concern was that *A Theory of Justice* presented Justice as Fairness as a comprehensive moral theory, or doctrine, rather than a political doctrine which could be endorsed by those with differing comprehensive doctrines. A comprehensive doctrine is one that is "regarded as general and comprehensive" and it is "general if it applies to a wide range of subjects, and in the limit to all subjects universally" (Rawls, 2005, p.13). The later Rawls presented Political Liberalism in response to the fact of value pluralism. If liberty is prioritised, citizens will undoubtedly hold contrasting moral outlooks or ideas of the good. What a theory of social justice must be, says the later Rawls, is a *political* conception of justice, one which is justified by reasons those holding contrasting comprehensive doctrines can share.

The Significance of Cohen's Critique

GA Cohen was a Marxist scholar who applied the methods of analytical philosophy, the clarification of political concepts and principles, to Marx's work for the earlier decades of his scholarly career, and was considered to be the primary proponent of "analytical Marxism". Raised by Marxist parents and educated at a Jewish Marxist school, he later came to study philosophy at Oxford where he was taught by Berlin and Ryle. Later he moved on to the post-Rawlsian analytical theory which occupied him for the remainder of his life. The reason for this, he says was due to the "disintegration of the proletariat" and "the loss of confidence in a future unlimited abundance", the latter being a necessary condition of Marx's communism (Cohen, 2002 p.117). Cohen was not only Rawls's interlocutor, for he also significantly engaged with Nozick, concerning the matter of self-ownership, and Dworkin, whose luck egalitarianism he adopted (with amendments). Cohen, as we might expect for a Marxist scholar, was concerned primarily with the distribution of income and wealth, the matter often known as distributive justice¹. Cohen's thesis is that "in a society in which distributive justice prevails, people's material prospects are roughly equal: distributive justice does not tolerate the deep inequality, driven by the provision of economic incentives to well-placed people" (Cohen, 2008, p.2). His task then, in his critique of Rawls, is to rescue this "egalitarian thesis" from the unjust material inequalities which Rawls permits.

Cohen, adopting the Socratic method, frames his critique as an internal one. He wants to show that there are inconsistencies and ambiguities in Rawls which invalidate his conclusions. Cohen's main question is this: if the rationale of the difference principle, that the least well-off ought to be made maximally well-off, is affirmed, why would those with more favourable abilities, such as those with greater intelligence, require inequality-producing financial incentives to advance the material interests of those with less favourable abilities? Citizens, says Cohen, who endorse the difference principle ought not need to be motivated by pecuniary incentives, for they ought to be motivated by an equality-upholding moral obligation to work to the benefit of others. Most famously, Cohen concludes that Rawls is wrong to restrict justice to the basic structure, basically society's social and political institutions. This is because individual behaviour which escapes the coercive constraints of the basic structure also has a bearing upon the attainment of justice. Justice therefore must be expanded to also cover citizen's extra-legal behaviour and to do this requires an ethos of justice, by which people internalize justice and act from it in all aspects of their lives. There later follows a revision to

¹ Distributive justice however should not be thought of as only distributing income and wealth but also other goods such as rights and opportunities.

Cohen's conclusion which leads him towards a more radical critique of Rawls, that his previous conclusion that the difference principle should be expanded to also cover citizens' extra-legal behaviour should now be rejected. But throughout, Cohen maintains that there is an inconsistency, a "radical tension", between the *case* for the difference principle, which is that one should not get more for morally arbitrary reasons, and the *content* of the difference principle, which, by incentives, permits inequalities on this very basis.

Cohen states that his incentives critique concerns the *content* of justice, that it is a critique of the inequality-producing difference principle itself. But there is also a second critique which is more meta-theoretical, or meta-ethical in nature, and which challenges not the *content* of justice but the Rawlsian *concept* of justice, this being, according to constructivists like Rawls, that "the content of justice is identified by the rules of social living, the rules of regulation that would be chosen in a privileged choosing situation" (Cohen, 2008, p.9). While the earlier critique concerns and critiques Rawls's difference principle, Cohen's later critique says that the conceptualizing of justice in rule-generating procedural terms constrained by feasibility concerns such as facts about human nature and society and the need to secure other non-justice values should also be challenged. Like the first, this second critique also argues that Rawls is also inconsistent, that he acknowledges that fundamental principles of justice should be cleansed of facts, and so be fact-insensitive, but his constructivism produces principles which are not fact-insensitive. It is therefore also intended as an internal critique of Rawls. These two critiques are not unconnected, for Cohen claims that the second "supports [...] the claim that justice requires equality" (2008, p.3).

The Rationale of this Thesis

This thesis concerns Cohen's earlier Rawlsian critique which challenges the Rawlsian *content* of justice. I argue that Cohen's critique here makes a number of missteps and I argue that the difference principle and the incentives argument are more egalitarian than Cohen, and much of the secondary literature, realise. The aim is therefore to draw attention to the various ways in which Cohen misinterprets Rawls and to suggest that these misinterpretations mean that he fails to appreciate how a Rawlsian society governed along the lines of Justice as Fairness would be more compatible or consistent with Cohen's own egalitarianism than Cohen realised. Thus I argue that, contra Cohen, what emerges from the original position procedure is largely consistent with Cohen's egalitarianism, in terms of producing both egalitarian-minded citizens and egalitarian distributions of wealth and income. Much of the explanation for Cohen's

misinterpretation of Rawls comes from taking the difference principle in isolation from the other principles of justice. His reading is that it is the difference principle only which regulates the distribution of income and wealth, but this is not the case as the inequalities which the difference principle permits must be consistent with the other principles which take priority over it. Thus Cohen proposes a "strict" intention-relative reading of the difference principle to replace Rawls's intention-neutral "lax" version, but this revision, I argue, would not be necessary in a society governed by the full set of principles.

What this thesis is not concerned with is the later critique concerning the *concept* of justice. The earlier critique challenges the principles, particularly the difference principle, which Rawls believes the original position procedure would generate, while the later critique states that the explanation for this error is that the Rawlsian constructivist method for generating those principles includes facts and non-justice values. This thesis concerns the question of the content of justice: is Cohen right that, in Justice as Fairness, unequalising incentive payments are unjust by the standards of egalitarianism which Cohen claims Rawls's arguments show him to support? I argue that they are not. We can set aside the second critique because, if the first cannot be supported, then the second clearly cannot, as Cohen states, *further* support it. If it is demonstrated that the unjust inequalities which Cohen protests would not be generated, then a further argument cannot further support the claim that these inequalities would be generated. Cohen's claim that the concept critique further supports the content critique therefore looks something like this:

Premise 1) The *content* of Rawlsian justice permits unjust incentives

Premise 2) Rawls's *concept* of justice admits facts and non-justice considerations

Conclusion) Rawls permits unjust incentives because he permits facts non-justice considerations.

My thesis shows that Premise 1 is not supported by Rawls's text. Therefore, even if Premise 2 is correct, the conclusion must be wrong. I therefore need say nothing about Premise 2 to contest this conclusion as contesting Premise 1 is sufficient to establish its falsity. This is not to say that the second critique, about the fact-sensitivity of principles and the constructivist method, is not of great interest and might independently challenge the difference principle, but rather that, for this thesis, I need not consider it.

Thus, while they are both intended by Cohen to support the same egalitarian aim, the two critiques can be taken independently. The first concerns the matter of whether the difference principle permits unjust inequalities because it permits incentive payments on morally arbitrary

grounds. How the difference principle is derived may explain how such an “unjust” principle of justice was produced but it is not necessary to address this question to consider the justness of the principle itself, whether the principle is successful in attaining justice.

The matter of whether Cohen’s critique of Rawls should count as an “internal” one ought to be addressed. This is certainly how Cohen viewed the critique, his aim being to scrutinise and interrogate the premises, arguments, reasoning and conclusions that Rawls presents for the difference principle. However, there are a number of ways in which Cohen might be said to fail in this objective. Firstly, by “internal”, we might mean that Cohen ought not bring in any external arguments against Rawls. Yet, one reason for discounting Cohen’s critique as internal is because, as I will argue in this thesis, he often inadvertently introduces external arguments. One, for instance, is his idea of “justificatory community”, which introduces the idea that justifications are dependent upon who presents the justification to who, the speaker-audience relation. While this is an interesting idea, and certainly worthy of further study, it presupposes a background injustice which would not manifest in a Rawlsian well-ordered society. Cohen’s community argument therefore is that the difference principle is too accepting of the status quo. But this simply is not, I argue, the case, as background justice in a Rawlsian society would significantly reform the status quo and so there would be no power asymmetry between utterer and audience. Whether this should really count as an external argument however, might be disputed. Cohen might have just misunderstood Rawls and, in this thesis, I have tended to take this latter view.

A second external argument that Cohen might be said to be introducing might be perceived to be a more fundamental disagreement between Rawls and Cohen. This disagreement is that Cohen and Rawls differ on how political theory should be done. Cohen might be saying here that Rawls is too deferential to facts, in the sense of facts being states of the world, and it therefore appears that Cohen is, even in the first part of his critique, protesting Rawls’s inclusion of facts. My aim, however, in this thesis, is, as I say above, to set aside this disagreement and try to restrict myself to the arguments of Cohen’s which I believe would genuinely count as internal. Cohen does not dispute that facts might be included when considering viable “rules of regulation”, and if Rawls is knowingly proposing regulatory rules rather than fundamental principles, which, in my view, Williams convincingly argues (Williams, 2008, p.490), then the dispute between Rawls and Cohen significantly dissipates. This is because Rawls is not proposing fundamental principles at all.

There is also the possibility that another external argument that Cohen introduces is his introduction of intuitionism to critique Rawls’s reflective equilibrium, or coherentism. Very

roughly, Cohen thinks that intuitions, although he does not explicitly state what counts as an intuition, take methodological priority (Cohen, 2008, p.4). While, for Rawls, considered judgments, which appear to be very similar to intuitions, are not so privileged, as facts about stability or feasibility share equal prominence. If this objection is the right one, it is not the inclusion of facts that is the fundamental objection but rather that Cohen objects to Rawls's coherentism. Again, however, I try to pre-empt this response by setting aside this matter of methodology and presuming that, if Cohen's critique is to function as an internal one, it cannot object to Rawls's coherentist methodology. In my view, Cohen does not anyway provide a satisfactory argument for privileging intuitions. Although, to be fair, Rawls does not provide a decent argument for his coherentism either. However, I argue, in chapter 4, that a basic structure that is "coherently just" might be the most acceptable, or reasonable, justice option available, particularly if we accept the importance of liberty to justice, as both Rawls and Cohen do.

I am not, of course, the first to attend to the Rawls/Cohen debate. In my view, there are three main debates which have garnered attention. The first is the matter of incentives; the second is the debate concerning the basic structure and ethos; and the third is the meta-theoretical conceptual debate. As it is outside the scope of this thesis, the last of these can be set aside but let me briefly say something about the other two and how I see this thesis fitting into those debates. While I believe it has been largely settled that Cohen is wrong about Rawls's justifications for incentives, there are several gaps in the literature on this debate that I will address. The matter of whether justice should be restricted to the basic structure has not, in my view, been settled, and so I attempt to offer a resolution. Cohen's conception of ethos has garnered little attention but I demonstrate that those who believe Rawls must add an ethos are mistaken. Finally, Cohen's later re-articulation of his arguments has also gained little attention and so I make an attempt to bridge that lacuna. In each substantive chapter, I will provide an overview of the most relevant existing literature to show which of Cohen's interlocutors I am in agreement or disagreement with.

The question remains why this thesis ought to be of interest. One hopes of course that it possesses some academic interest. Some might say that the Cohen/Rawls debate is not an active debate, that it lost prominence, perhaps having some seminal influence upon the present realism/moralism debates but giving way to those debates. I do not think this is the case. There are still a number of papers being published on Cohen's critique which shows that the issue has not been entirely resolved, and anyway, if it is receiving less interest than it did, this is not a reason to abandon it. Furthermore, there has not been much sustained engagement with Cohen. I am aware of only one book on Cohen's work, by Vrousalis, and the

Stanford Encyclopaedia of Philosophy does not have an entry on him, which is odd considering his prominence. In my view, no-one has really got to the bottom of the disagreement between Cohen and Rawls and I hope to shed some light on this here.

Another reason why one hopes this thesis ought to be of interest is because the questions that Cohen and Rawls address are still prominent political problems. One of Rawls's aims is to reconcile liberty, opportunity and equality and we might argue that ideological disagreements tend to be, at their core, disagreements about the reconciliation of these values. Rawls's solution is to sacrifice some material inequality on grounds that should be considered, and accepted, as just, and his reconciliation is a solution that I would consider to be far more appealing than those actually existing western liberal democracies tend to produce. Of particular interest to me is his preference for a property-owning democracy as an alternative to both socialism and capitalism, something that I have not seen discussed outside of academic debates. We might worry that Rawls's "realistic utopia" might be too utopian to be feasible, but it does provide a benchmark for critiquing present political arrangements which I believe would be greatly beneficial. A further criticism might be that it is implausible to expect general agreement on these matters, but polls often show that people do generally agree that we ought to aim for a fairer and more equal society. How we do it in practice might indeed be difficult for us to ascertain, due to what Rawls calls the "burdens of judgement", but I sincerely believe we can do much better and Rawls can point us in the right direction. Furthermore, if it can be shown that a socialist like Cohen and a liberal like Rawls should actually be in agreement about how to reconcile these three prominent political values, as I think they should be, we might be able to unite socialists and liberals to more effectively oppose capitalism. In fact, if we can show that a property-owning democracy is more appealing, or more feasible, than a socialist distribution of property, we might even get some conservatives on board. If we can produce arguments to unite socialists, liberals and conservatives to oppose capitalism, then we have a powerful weapon for the reformation of our social and political institutions.

There is, in my view, another interesting element of the Rawls/Cohen debate and it is the role of choice and circumstances within politics. Take, for example, Kymlicka's assertion that the influence of liberalism upon traditional leftist thought has been to prioritise differentiating choice and circumstances over traditional concerns such as oppression (Kymlicka, 2006, p.31). I take it that this is intended as a criticism of the left but, and here I agree with Cohen (see Cohen, 2011, p.32), the language of choice and responsibility has been increasingly utilised by the right in recent decades to promote supposedly free markets and small state libertarianism. The idea disseminated by the right is that when there are "free" markets and the state gets out of the way, where people end up in life is a result of their own choices and

efforts and therefore, if things do not go well for you, it is your own fault. Yet this “freedom” is in fact only freedom for those who are lucky enough to be born into favourable circumstances, their family wealth, their gender, their race, and so forth, and the opportunities and privileges those circumstance facilitate, while the opportunities for, and so the freedom of, the less privileged, no matter how hard they work, are greatly relatively diminished. If we are to take on the right’s ideological ignorance of these matters, and I maintain that we certainly should, but we also believe that people should be rewarded relative to contribution then we present better counter arguments by better understanding what counts as choice and what counts as circumstance. This does not mean that we are unconcerned with oppression. The language of choice is certainly used by the right to oppress those who are not so fortunate and thus, it is simply not the case that the matter of choice/circumstance is irrelevant to the matter of oppression.

The Structure of the Thesis

Following this introduction, there are five substantive chapters to this thesis. Cohen’s critique of Rawls is intended as a critique of Rawls’s difference principle, which permits social and economic inequalities which are of greatest benefit to the least advantaged class. The first of these, Chapter 2, therefore sets out the elements of Rawls’s theory necessary for understanding Cohen’s analysis. To do so we need to know more than what the difference principle is. We also need to know how and why it is justified, its subordination to other principles of justice, how those are also justified, the sorts of institutions Rawls believes would support these principles, and why citizens would endorse them. This chapter does not attempt to cast a critical eye over Rawls but will draw upon secondary literature to help clarify Rawls’s sometimes ambiguous arguments and terminology. As Cohen’s is a critique of the difference principle, this chapter draws mostly upon Rawls’s work relating to Justice as Fairness, the name for the theory set out in *A Theory of Justice* and later clarified in *Justice as Fairness: A Restatement*. His other major work, *Political Liberalism*, is not so much drawn upon here because the difference principle is only a principle of Justice as Fairness, which is only one form of political liberalism. However, *Political Liberalism* will be drawn upon where it makes substantial clarifications as it does concerning the basic structure and the institution of the family, both of which are inherent to both Justice as Fairness and Political Liberalism.

Chapter 3 begins my analysis of Cohen's critique of Rawls. There are three main objections raised by Cohen against Rawls's admission of incentives into justice. The first is Cohen's objection to what Cohen calls Rawls's "incentives argument", the claim that incentives are necessary to the "talented" in order to maximally benefit the less talented. I argue that there are a number of other reasons for incentives that Cohen does not consider and which ought to be admitted as just. I also show that Cohen fails to consider how the other principles of justice regulate the distribution of income and wealth and that these prevent the sorts of unjust inequalities Cohen is concerned with. The second objection is to what Cohen calls the "Pareto argument". The Pareto argument is that the difference principle must make allowances for the non-justice principle of Pareto efficiency, which states that if at least one person can be made better off without someone else being made worse off, then present arrangements are inefficient. Cohen concludes that the Pareto argument is a compromise between justice and Pareto but argues that Pareto and justice can be attained when workers are motivated to be maximally productive by their egalitarian conscience rather than by economic incentives. My main response to this objection is that Pareto should not be considered as compromising justice but as internal to justice, for social justice concerns not only what we get but also what we produce. The final objection made by Cohen is to the "freedom argument". This is the argument made by Rawlsians that Cohen's solution (which I argue is not in fact a solution, for the problem he envisages would not arise) to the Pareto argument is unacceptably coercive. I argue that Cohen's solution to the problem, being motivated by fraternal "friendly-feeling", is implausible and that Rawls presents a more plausible account of fraternity which Cohen misses. I also argue that Cohen's desire to add welfare to the currency of justice runs into familiar problems which Rawls wants to avoid.

Chapter 4 concerns Cohen's response to what he calls the "Basic Structure Argument". Cohen, presuming that he has been successful in showing that "distributive justice cannot be achieved solely through citizens' compliance with the laws of a state that aims at benefiting the worst off" (Cohen, 2008, p.16), anticipates the Rawlsian response to his incentives objections being that Rawls's principles are to apply only to the basic structure of society. But the reason, says Cohen, that the primary structure is the primary site of justice is that it has a profound influence upon how our lives go. However, the extra-legal choices of economic agents also exert a profound influence and to exclude those choices from the application of the difference principle shows an inconsistency. My response has several parts. Firstly, Cohen's objection does again assume that Rawls permits unfair bargaining by the talented for economic benefits which I show in the previous chapter to be a misreading. However, I also scrutinise Cohen's arguments here from two perspectives. Firstly, I question whether his view

of the family as, so he claims, a non-coercive institution demonstrates that the application of the difference principle to the family would produce a more egalitarian society than Rawls permits, and, secondly, I demonstrate that Cohen's claim that his concerns about incentive demands escaping coercive regulation appear dubious. In doing so I develop the idea of direct and indirect applications of justice which Rawls applies to other associations and extend its application to social institutions.

Chapter 5 turns to the matter of ethos. This is an important part of Cohen's critique because it is framed around his claim that a Rawlsian society consists of agents whose duty is only to follow the rules. Justice, says Cohen, also requires individuals to act from justice in some of their extra-legal behaviour and, to do so, society must be motivated by an ethos of justice, in which individuals have internalised justice. I argue that Rawls already includes something that would count as an ethos by Cohen's standards and so the debate should not be about whether society requires an ethos but about how the basic structure reflects the ethos. Cohen seems to think that the ethos arises independently of institutions and tends to overlook that an ethos reflects social and political institutions. Furthermore, I demonstrate that, for Rawls, a citizen's duty is not to the law but to justice.

Chapter 6 turns to Cohen's rearticulation of his previous objections to reach a stronger conclusion. This new conclusion is that the difference principle, in permitting incentives, is unjust in both its lax and strict forms because even if a talented person is willing but unable to prodigiously produce, the greater entitlements create an unjust inequality as the cause, being the allocation of talents, is morally arbitrary. In other words, whether the incentive offsets an unwillingness or an inability to labour is now inconsequential as all incentives are unjust. This objection however makes many of the same mistakes as the previous articulations of the objections. It does however make an argument that had not been raised previously, which is that there are good reasons for preferring a Pareto-inferior equality to a Pareto-superior inequality. However, I will argue that, while I agree with this point, I, again, do not think it is an objection which can be fairly levied at Rawls. Cohen also here lays the problem of incentives at the door of Rawls's constructivist method for making concessions to human nature, particularly our inherent selfishness, but I find it difficult to see where Rawls incorporates selfishness as a fact about humanity and Cohen is not at all clear at identifying its location either.

Finally, following these substantive chapters there is the conclusion, in which I will draw the conclusions of each chapter together to show that Cohen consistently repeats the same

oversights in his Rawlsian critique and that a Rawlsian society should be far more egalitarian than he realises. I will also suggest some avenues for further research.

Methodology

Rawls's and Cohen's work are both examples of Anglo-American analytical theory (or philosophy) and my thesis also engages this method. Blau defines analytical philosophy most basically as focussing "on the logic of inference – on how best to draw robust conclusions, on how to justify our conclusions against actual or potential critics". (Blau, 2017, p.1). I understand analytical political philosophy as the attempt to clarify concepts and justify principles by various interrogative methods, such as thought experiments, looking for internal incoherence, identifying missteps of logic or misunderstandings when interpreting texts, or subjecting conclusions to plausible real-world tests such as the feasibility of their implementation². The part of political philosophy attending to the clarification of concepts might be termed conceptual political philosophy, while the part which concerns the justifying of principles might be termed normative political philosophy or theory.

There are, of course, a number of considerations within each of these interrogative methods to which good political theory must attend. For instance, when it comes to the method of thought experiments, we must endeavour to avoid "narrative-framing biases" which might prejudice our response such as "question-beggingness", "validity" (meaning "the argument should not involve logically fallacious") or "argumentative relevance" (that "[t]hought experiments should be designed in such a way that we can focus on the relevant aspects of the scenario") (Brownlee and Stemplowska, 2017, pp.30-34). Thus, while I refrain from initiating my own thought experiments, we might critique those of others, such as those of Rawls's original position or Cohen's interpersonal test, on such grounds. When we turn to textual interpretation, which is key to my critiques of both Cohen and Rawls, we must show, for instance, why we favour one interpretation over another: "If two explanations are plausible but one is better supported by the evidence, we do not help our readers by pretending that one is definitely right while the other is undeniably wrong (Blau, 2017, p.2). Textual interpretation is key to Cohen's critique as it is intended as an internal critique and thus, if Cohen misunderstands Rawls, then it fails on those terms. Another method might be contending to matters of implementation. It would be no good if principles can only be justified under ideal or abstract conditions and not by real individuals in actual societies. This sort of

² Cohen would disagree that political theory, understood as an exercise in theoretical reasoning, ought to make concession to feasibility. I disagree with Cohen.

real world test appears when I argue that Cohen's fraternal ethos would have implementation problems. Similarly, we might want to consider whether there might be unforeseen consequences and judge their desirability or to develop a theory further than the original theorist did.

A key difference between the methodology of Cohen and Rawls is the role that intuitions play in political theorising. Cohen places great authority on intuitions while Rawls less so. In fact, it might be said that a key element of Rawls's method is his privileging of coherence, a reflective equilibrium between judgements and principles, over intuition. One way of critiquing Cohen is to question this authority of intuition, as what frequently arises in Cohen's objections is his tendency to avoid offering a persuasive argument for his deepest intuitions. I, myself, am deeply sceptical of Cohen's privileging of intuitions as a form of platonic moral realism. Yet on the other hand, we can question Rawls's presumption of coherence, who similarly does not provide satisfying support for this method. Rawls's method is also contractarian, in the lineage of Hobbes, Locke, Kant and Rousseau which means that not only must coherence be achieved between principles and judgements, but that principles must also be justified by some form of agreement. Rawls, I would say, uses two forms of contract: firstly, what Quong calls "consent contractualism", the idea that "asking whether suitably situated contractors would consent might be a helpful way of deciding whether it is permissible to ϕ " (Quong, 2017, p.67), and secondly, what Quong calls "rationality contractualism", the idea that we should "consider what people would accept if they were rational, either in a narrow self-interested sense, or in some broader sense" (Quong, 2017, p.69). Cohen, on the other hand initially resists contractualism - agreement cannot be grounds for justification. We might, after all, all be wrong about what we ought to do. However, I would argue that in his post-Rawlsian publication, *Why not Socialism?*, the camping trip thought experiment appeals to notions of what the campers would agree to be reasonable behaviour. While there are good reasons to doubt contractualism on grounds of implausibility, perhaps because wide consensus is unlikely or because humans are often not rational, I do, unlike Cohen, think that principles should pass some feasibility test and be revised if they do not. They must therefore be generally accepted if they are to be plausible principles for us. This does not mean, as Cohen seems to imply, that anything goes, but rather that principles of justice must be both feasible and (morally) desirable.

It might be worth clarifying whether I am doing normative philosophy in this thesis. While Rawls and Cohen certainly are, my primary aim is not so much to argue for or against normative principles. However, not all enquiries within normative philosophy are normative questions. For instance, Cohen's claim that we might get different principles if the pecuniary motivations

of individuals within Rawls's original position are exchanged for moral ones, is fundamentally an exercise in both logic and conceptual clarity. There is therefore some relation between conceptual clarity and norms, perhaps the former is essential for the latter. Primarily, this thesis is an exercise in textual interpretation, of texts which attend to both conceptual and normative matters but it is not, in itself, primarily a work of normative philosophy. Yet, having denied this, I think it will be obvious to the reader that there are some normative matters expressed by both Rawls and Cohen that I agree with and others that I do not. For instance, it will likely be obvious that I am an egalitarian in the sense that I believe we should aim to bring societies like the UK much closer to economic parity for citizens. I agree with Cohen that such equality is desirable but I disagree with Cohen that a Rawlsian society allows too much inequality. Furthermore, even if addressing the disagreement between Cohen and Rawls is the primary aim of this thesis, I do develop some normative ideas here and there, such as my development of the Rawlsian idea of direct and indirect justice and whether Rawls ought to endorse other economic principles such as the principle of comparative advantage.

Chapter 2: Rawlsian Theory

Introduction to Chapter 2

While this thesis is intended as an analysis of Cohen's post-Rawlsian egalitarianism, we must first take some time to carefully set out Rawls's position on equality and distributive justice to which Cohen responds, and this will be the purpose of the present chapter. Cohen's dominant concern is an analysis of the distribution of income and wealth governed by the difference principle and so other elements of Rawls's work unrelated to the distribution of income and wealth will not be of such concern to us here. There are therefore two main sections to this chapter. The first attends mostly to the major ideas which Rawls draws upon for setting up his account of procedural justice. This section is drawn mostly from *A Theory of Justice* because Cohen's interaction with Rawls engages mostly with this earlier work. It does, however, draw upon other works where those have provided clarification. The second section mostly concerns the derivation, and justification, of the difference principle and will draw mostly from Rawls's earlier work as *Political Liberalism* is primarily concerned with legitimacy and Rawls considers the difference principle, which governs economic distribution, not to be an essential condition of legitimacy (Estlund, 1996, p.77).

Rawls's *A Theory of Justice*, although a culmination of more than a decade's work, was first published in 1971. His overall aim was to defend liberalism at a time when great political struggle and unrest was undermining faith in liberal institutions and the arguments presented in support of them (Daniels, 1975a, p. xv). This defence of liberalism begins by challenging the dominance of both utilitarianism and intuitionism within political philosophy, the paradigm of which is said to be the philosophy of Sidgwick (Rawls, 1999, p. xvii). Both are found to be unsatisfactory and more often than not, Rawls says, when forced to choose between utilitarianism and intuitionism, we coalesce around a form of the principle of utility constrained by "ad hoc" intuitionism (Rawls, 1999, pp.xvii-xviii). But Rawls thinks we can do better and attempts to show that justice may be more plausibly explained by the social contract method. While Justice as Fairness is perceived by Rawls as a form of liberalism, Cohen's critique of Rawls is not framed, as we might think a socialist's critique of liberalism might be, as an outright objection to liberalism. Cohen, who by the later stage of his career had become, perhaps, a little sceptical of the "scientific" Marxism he had previously avowed and defended, was attracted to Rawls's vision of justice, for it provided, he thought, not only a more convincing practical argument for egalitarian distributive justice than the implausible Marxian vision (Cohen, 2002, pp.101-115) but also a principled one grounded in liberal ideas of choice

and responsibility. Cohen, certainly supportive of the value of liberty, therefore does not mount an objection to liberalism but rather presses for a *more* egalitarian, in the distributive sense, liberalism which might possibly constitute a form of democratic socialism³.

1. Justice as Fairness – fundamental ideas

1.1 What is justice?

Rawls is concerned with social justice, and it applies primarily to what he calls the basic structure of society. Society, says Rawls, is a mutually beneficial cooperative exercise and the basic structure is a system of public rules regulative of cooperative activities by which men and women generate a greater quantity of benefits and which designates legitimate claims to a share of those benefits (Rawls, 1999, p.74). The basic structure is constituted of the major social institutions and concerns how those institutions distribute fundamental rights and duties, and the advantages of cooperation (Rawls, 1999, p.6) These major institutions consist of the constitution and the main social and economic systems (Rawls, 1999, p.6). Social institutions are therefore the “practices and rules that structure relationships and interactions among agents” (Pogge, 2007, p.28) and, famously, Rawls says that justice is the first virtue of justice, meaning that “justice is the primary end at which the design of institutions must aim” (Murray, 2015, p. 217). In certain societies, liberal/social democracies like our own, these institutions may consist of such things as one’s legally protected right to freedom of thought and conscience, competitive markets, private ownership of the means of production, and the family (Rawls, 1999, p.6). Importantly, the principles which govern the basic structure “do not apply directly to particular components or elements of a society’s basic structure taken one at a time; they apply directly only to the whole structure” (Reidy, 2015, p.56), which means that an individual institution might in itself be considered unjust if that injustice is compensated elsewhere in the basic structure.

Why the basic structure is of such concern to social justice, why it is “primary subject of justice” (Rawls, 1999, p.7), is firstly because it is an essential part of social life and so constitutive of

³ Cohen is often described as a left-libertarian because he believes equality can be attained through individuals freely choosing equality. I prefer to think of him as a liberal democratic socialist as, while he is frequently concerned about the matter of individuals’ extra-legal choices and behaviour, he does not appear to argue that the state should not regulate economic behaviour when it is able to, providing it is not illiberally coercive (or “Stalinist”).

the “fundamental character” of productive social cooperation (Rawls, 1999, p.5). It therefore has a profound effect on the shaping of its subjects’ lives (Rawls, 1999, p.60). But it is not simply that the basic structure should be structured to satisfy the desires and preferences citizens already hold, it also forges those citizens will acquire (Rawls, 1999, p.229). As it shapes what people get, concerns about injustices such as inequality or poverty can be traced back to social institutions, as the outcome of structural flaws. But as it also shapes people’s wants and desires, concerns about greed and egoism might also find their origin in structural flaws. Thus, that Rawls prioritises the basic structure demonstrates a “holistic” social ontology which states that injustices are the outcome of unjust institutions, rules and practices rather than the individual actions that those institutions, rules and practices might produce. Therefore, it is recognized that “[c]onflicts and inequalities arise among individuals not [because] of individual actions, but [because] of structural dysfunctions or injustices” (Audard, 2007, p.61). Furthermore, because of its fundamental importance, the institutions of the basic structure are “[b]acked ultimately by a threat of force” (Mandle, 2009, p.37). As I understand it, this does not mean that it is a necessary feature of a basic structure institution that it is regulated coercively, but rather that it would be legitimate to deploy force if needed to maintain that institution.

However, that it is the “primary” subject of social justice does not mean that it is the only subject. There are also duties for individuals, such as the duty to comply with justice (Rawls, 1999, p.93). Thus, “in addition to being a virtue of social institutions, justice is also a virtue of individuals and individual conduct” and “[j]ustice as fairness recognizes this, but only gives an incomplete account of this individual virtue” (Mandle, 2009, p.12). In other words, Rawls’s project is an identification of the principles which underpin a just basic structure and therefore limits its investigation of the justice of individuals to the obligations and duties citizens have towards supporting it. Furthermore, that the basic structure has a profound effect on citizen’s lives may not appear sufficient to establish it as the primary site of justice for other associations such as religious associations, for instance, might shape individual identity, interests and desires more profoundly than political institutions. What Rawls means therefore is more nuanced - that the basic structure has a profound effect on shaping people’s lives as free and equal moral persons - “it is *only* by acting within a definite institutional framework (of equal basic rights and liberties, fair equal opportunities, etc) and acting to uphold the justice of these institutions” that our nature as free moral persons can be realised (Freeman, 2016, p.98).

There is another reason for restricting justice to the basic structure and it is that within the socio-economic sphere, justice “normally requires more information than we can expect to have” (Rawls, 1999, p.174) - individuals are unable to anticipate the distant effects of their

economic decisions because, in contemporary societies, these decisions are dependent on numerous other unknowable decisions by other individuals. Thus, while reforming our social institutions requires cooperation which is not easy or straight-forward, it is more likely to be successful than reforming one's individual conduct. This is another reason why the basic structure is the primary subject of justice. According to Brian Barry, the attention of justice to the basic structure was a unique and profound development for a philosopher in the liberal tradition and shows the influence upon Rawls of social theorists such as Marx and Weber (Barry, 1995, p.214).

The "early" Rawls is the Rawls of *A Theory of Justice* and the theory it presents is called Justice as Fairness. We might wonder what a theory should do for us and Rawls tells us that "a useful theory defines a perspective within which the problem [...] can be approached; it identifies the relevant considerations and helps us to assign them their correct weights in the more important instances" (Rawls, 1999, p.320). This theory concerns justice and people, he says, generally possess a *conception* of justice, this being one's personally preferred set of principles for designating rights and duties and distributing the benefits and burdens which derive from social cooperation (Rawls, 1999, p.5). However, one's conception of justice, what one considers as being just or unjust will, in a pluralistic society such as ours, inevitably be disputed and so the *concept* of justice, distinct from the many individually held conceptions of it, is determined by what these various conceptions have in common. The *concept* of justice is thus distinguished from a *conception* of justice by the former functioning as a shared "public conception of justice" acceptable to those holding differing, non-public (but reasonable) variations of the latter.

1.2 Contractualism and the Original Position

In his earlier work, Rawls wants to demonstrate that the social contract method can produce a better and more useful theory of justice than other leading theories such as utilitarianism, intuitionism and perfectionism. Intuitionist approaches, a form of moral realism in which certain abstract principles are presented as self-evident and as existing "prior to and independent of our moral reasoning that are somehow "given" to us" (Freeman, 2007, p.38), Rawls says, have two salient problematic features. These are that firstly, a plurality of intuitions can provide conflicting instructions and secondly, that they provide no priority rules and so cannot be properly weighed against each other – all we can do is balance intuitions by something like instinct, what just seems to us to be the right course of action (Rawls, 1999, p.30). This lack of priority rules is, Rawls thinks, a fundamental problem for intuitionism. It is not that intuitionists have not yet discovered such a rule but that either they deny its existence or deny

that we can reduce moral principles to a more ultimate and fundamental one (Rawls, 1999, p.36). Intuitionism, then, is impractical and unsystematic “because they [intuitionists] provide only a plurality of unranked principles and hence no constructive procedures for agents to resolve moral problems” (O’Neill, 2003, p.350). All that can be done is to “rely on our intuitive judgement to strike an appropriate balance in each case” (Scheffler, 2003a, p.442). Moreover, there is a further problem with intuitionism: we cannot be confident that our intuitions are reliable and we therefore need a basis for justice which can provide greater confidence. We see here that Rawls does not think of intuitionism in an epistemological sense, that it relies upon “some sort of immediate capacity for perceiving moral truths” but rather as an “intuitive capacity”, this being an ability to “settle conflicts between different intuitions” and which might more properly be termed pluralist intuitionism (Krasnoff, 2016, p.76). Quite what the epistemological or metaphysical nature of intuitions might be is not the issue, but how a plurality of intuitions might be systematically ordered.

The more popular alternative, at Rawls’s time of writing, to intuitionism was utilitarianism, which confronts the plurality problem by reducing justice to one metric: happiness. Therefore, unlike intuitionism, it can be characterised as a system. But utilitarianism is also problematic for not taking seriously the “distinction between persons” (Rawls, 1999, p.24) - “it fails to respect the fact that the life of each individual person has unique value for him or her, not to be casually sacrificed whenever it is outweighed by the interests of others” (Lovett, 2011, p.109). In other words, a utilitarian theory of justice requires individuals to accept that the happiness of others may rightly outweigh their own, which is not only unlikely to gain support but also unreasonable because our happiness is understandably of great importance to us. Thus, utilitarianism would only be chosen as a conception of justice by “an impartial sympathetic spectator” or a perfect altruist who conforms to such a notion (Scheffler, 2003a, p.430). But actual humans are neither and therefore would not be able or willing to commit to utilitarianism.

A further problem for utilitarianism, which Rawls says is also shared by perfectionism, is that it is a “teleological” theory defining the right by the good, the maximisation of happiness. For a teleological theory, right action is that which realises an agreed, and prior, conception of the good. But in a pluralist society consisting of divergent moral, religious or philosophical beliefs, such as Catholicism, Kantianism, or utilitarianism for instance, which are types of what Rawls later calls comprehensive doctrines, each holding conflicting ideas of the good, an agreement as to what counts as the good cannot be forthcoming. Therefore, the right cannot be defined by the good and it is rather the role of justice to issue guidance about what we owe to each other when there is no such agreement on the good (Rawls, 1999, pp.27-28). An essential

feature of a deontological theory is that it denies moral teleology, and so "Rawls's theory is deontological because it maintains that respecting [...its...] principles is right independently of whether it produces good" (Kukathis and Pettit, 1990, p.54).

To overcome these problems, Rawls's seeks an alternative method, that principles of justice should be chosen and agreed by the parties concerned, under the appropriate conditions, in order to advance mutual advantage. This means that the central idea of justice must be that of the social contract, inspired by Locke, Rousseau and Kant. Arguably, the Rawlsian social contract method also incorporates elements of the Hobbesian contract method as, not only are Rawlsian contractors constrained, as are Locke's, Rousseau's and Kant's, by moral convictions modelled by the veil of ignorance, they, like Hobbes's, choose on the basis of rational self-interest (Freeman, 2007, p.16). The idea of the social contract method is that the principles should be understood as the "object of the original agreement" (Rawls, 1999, p.10). From the perspective of an absence of political and social institutions, traditionally known as the "state of nature" (in Rawls, as we will see shortly, the original position performs a similar role), contractualism assesses whether its inhabitants would agree upon the convening of particular institutions and the rules which govern them. The purpose of the state of nature is that it is intended to be "helpful in distinguishing between what [is] natural and what artificial in human affairs" (Lovett, 2011, pp.8-9). Traditionally, then, two essential ideas in contract theory are that there should be a comparison of the status quo to a state of nature, traditionally "an imagined time in human history before the introduction of political authority and social institutions" and that "government rest[s] in some sense on a sort of original agreement or compact between rulers and subjects" (Lovett, 2011, pp.8-9).

In a democratic society, Rawls believes justice to be the outcome of an agreement between free and equal persons who want to protect their own interests both as rational self-interested individuals and as reasonable moral persons, moral persons being, he says, autonomous individuals who possess, and are free to revise, both a rational idea of the good and a sense of justice (Rawls, 1999, p.17). In his social contract method, what is right or just emerges from the contracting procedure of the original position, an imagined initial situation absent social and political institutions in which representative parties are convened and tasked with producing a reasonable and fair agreement upon principles of justice appropriate for actual people, those whose interests they represent (Rawls, 1999, pp.15-16).

What counts as social justice is a difficult problem for us to grasp and to answer. But the original position allows us to "replace a more difficult problem with one that is more manageable but from which we hypothesise has the same solution" (Mardle, 2009, p.59) and

its basic purpose is to “devise a choice situation where rational decision is subject to reasonable constraints” (Freeman, 2009, p.167). These constraints consist of those it appears reasonable to place upon arguments supportive of principles of justice (Rawls, 1999, p.16) and so knowledge of the following is excluded from the parties in the original position behind a “veil of ignorance” because there is “broad agreement” (or a “considered judgement’) that these would tempt individuals to structure justice to their own advantage. Firstly, nobody should be “advantaged or disadvantaged by natural fortune or social circumstances in the choice of principles” (Rawls, 1999, p.16). Justice cannot be prejudiced by an individual’s natural talents, abilities or intelligence, or to their membership of, for instance, a social class, gender or racial group. Secondly, principles should not be designed in favour of “the circumstances of one’s own case” (Rawls, 1999, p.16). And thirdly, it is also generally accepted that “particular inclinations, aspirations, and persons’ conceptions of their good do not affect the principles adopted” (Rawls, 1999, pp.15-16). That this knowledge is obscured in the original position means that “the needs and interests of all prospective participants are represented and, thanks to the veil of ignorance, which eliminates threat advantage and implements the anonymity condition, represented fairly” (Pogge, 2007, p.66). This is how Rawls’s conception acquires its name: justice as fairness.

In addition to knowledge of particular persons, the veil of ignorance also hides knowledge of the type of society persons populate. By this it is meant society’s stage of development, such as the political, economic or cultural stage it has achieved, or geographical knowledge about where the society is placed (Rawls, 1999, p.118). This is because a fact of society is that institutions are not static and must change over time (Rawls, 1999, p.479). Thus, while the parties to the original position choose fixed perennial principles, it is recognised that the institutions which conform to those principles will reflect a society’s developmental stage and its environment. But the parties are aware of general facts about human society, such as theories concerning economics or human psychology, the former because the choice they make will require knowledge of the social systems they are intended to regulate, and the latter because they need to know if the principles adopted would be feasible and stable, whether they would be taken up and acted upon (Rawls, 1999, p.119). While Rawls refers to these concerns as “facts about human society”, they are also, somewhat confusingly, referred to as “laws and theories” and as “principles” (Rawls, 1999, p.119). In my view, Rawls is not careful enough here to demonstrate which knowledge made available to the parties to the original position is a principle or theory, and which is a fact.

One fact that the parties are aware of concerns the “circumstances of justice”, of which “general idea [...] is found in David Hume” (Freeman, 2007, pp.160-1612), which are “the

normal conditions under which human cooperation is both possible and necessary” (Rawls, 1999, p.109). The parties are therefore, as the question of justice concerns social cooperation, the circumstances of justice are presumed to obtain. The first of these circumstances is that individuals share a geographical territory within which no-one can be dominated by others, and the second is that of moderate scarcity - resources are not so abundant that everyone may be satisfied and so cooperation becomes unnecessary but neither are resources so scarce that any attempt at cooperation is unsuccessful - the only possible action might be that, by necessity, people resort to fighting over what is available. An additional and important feature added in Rawls’s later work to the circumstances of justice, at least within a modern constitutional democracy, is the that of reasonable pluralism (Rawls, 2005, p.66), that in a society of free and autonomous citizens possessing basic rights and liberties there will be a number of reasonable comprehensive doctrines, each offering different, and usually conflicting, conceptions or reconciliations of liberty and equality, and over which it is reasonable to disagree. This fact of pluralism is not a presumption that “people are necessarily selfish or egoistic [...but...] rather that people will inevitable have different life plans, based on their differing conceptions of the good” (Lovett, 2011, p.81).

A further fact about economics which Rawls incorporates is that of a “regulated free market economy” (Rawls, 1999, p.239), although who owns the means of production, whether it should be owned in common or privately owned is set aside because both forms of ownership can be compatible with justice (Rawls, 1999, p.228). That both may be compatible means that Rawls thinks there are forms of both capitalism and socialism that are compatible with liberal justice. The parties are also aware that humans display what is usually known as “limited altruism”, which is assumed because “if humans were impartially benevolent, equally concerned with everyone’s welfare, then justice would be “superfluous”” (Freeman, 2007, p.161). They would gladly and amenably sacrifice their own interests for the sake of others rather than seek to balance theirs’ against others’ interests as justice requires. A further fact introduced in the early Rawls is that humans suffer the “burdens of judgement” (Rawls, 1999, pp.36-37), Rawls’s term for “limited knowledge, thought, and judgement, as well as differences in experiences” and which acknowledges that “regardless of how impartial and altruistic people are, they still will disagree in their religious, philosophical, and moral views” which can be the origin of “the fact of reasonable pluralism” (Freeman, 2007, p.161). Also introduced in the early Rawls but expanded upon greatly in his later work is the idea of public reason and, in addition to the principles of justice, the parties know they are also to agree to the “guidelines of public reason” needed for applying justice. Therefore, the parties in the original position are also aware that citizens must justify their political decisions to each other and that there must be a publicly known standard for doing so.

Rawls thinks that there should be no objections to including general facts, such as those of “economics and psychology” in the choice procedure of the original position, providing, of course that they are true (Rawls, 1999, p.137). He contrasts this with approaches which turn moral philosophy into the “ethics of creation”, an approach in which philosophers presume that fundamental principles must be derived independently of assumptions about contingency, and that the only facts that should be taken into account are those of logic and any others which can be shown to be true from the perspective of the supposedly correct understanding of the relevant concept (Rawls, 1999, p.137). In these cases, he says, philosophers play God, for they re-design the world, and its laws of nature, into one in which their ethics would be possible. Furthermore, these approaches suggest an alternative original position in which the person making the choice knows no facts at all, nothing about themselves or the nature of their world, and so would be unable to make any decision (Rawls, 1999, p.138). Therefore, the parties of the original position must know the relevant facts needed to make the appropriate decisions necessary to construct principles of justice.

To construct the principles of justice we therefore begin by imagining such a situation as duly described. According to Audard, what motivates individuals to be just and compliant with just laws is threefold. Firstly, there is the motive of mutual advantage, the “promotion of our wellbeing at an acceptable cost to ourself and to others” (Audard, 2007, p.35). Human beings and societies flourish only when they cooperate and to best cooperate they need justice. Secondly, there is the motive of impartiality, the requirement that like cases are treated alike and different cases treated differently, and thus that “laws are not biased or arbitrary” (Audard, 2007, p.36). The third motive is reciprocity, which “focuses on the social aspect of human nature and on the reasonableness of social links” (Audard, 2007, p.38). It concerns “what makes society as a whole function well” (Audard, 2007, p.39) and what does so is a public, and publicly justified, system of rules.

The idea of the original position procedure is that parties in the original position are then presented with arguments for and against leading competing moral theories in order to choose, from the perspective of these motivations, that which is most acceptable to them. These arguments will be set out in section 2 of this chapter.

1.3 Reflective equilibrium

There is another part of Rawls's procedure, and this is a comparison of the principles that would be chosen with our "considered convictions of justice" (Rawls, 1999, p.17). Here parties check whether the principles chosen within the original position match the convictions we already hold and have confidence in about the structure of society or whether these principles might resolve uncertainties about present judgements. An example of the former would be certainties such as the injustice of racial or religious intolerance, while an example of the latter, a conviction that is less clear to us, might be the proper distribution of wealth and authority (Rawls, 1999, p.17). Considered judgements, then, are those that "seem clearly to be correct under conditions conducive to making good judgments of the relevant kind; that is, when one is fully informed about the matter in question, thinking carefully and clearly about it, and not subject to conflicts of interest or other factors that are likely to distort one's judgment" (Scanlon, 2003, p.140).

The idea then is that "Rawls assumes that we start in a position of intuitionism, and as we move in the direction of reflective equilibrium our goal is to push back the point at which we must simply resort to intuition and undefended judgments" in order to resolve "conflicts and gaps" (Mandle, 2009, p.45). By doing so, Rawls hopes to avoid any claims about privileging any controversial intuitive ontological or epistemic claims about justice, requiring only the necessary condition of coherence. However, it is not only philosophical arguments which can be included in the procedure. In addition to both specific moral judgements and general principles, there might also be procedural constraints, what Rawls calls comprehensive doctrines, scientific evidence and theories and more (Mandle, 2009, p.171).

If chosen principles do not match our considered judgements, either may be revised until there is a reasonable alignment which Rawls calls "reflective equilibrium"⁴ (Rawls, 1999, p.18). But considered judgements are not simply empirical observations about what we perceive to be right or wrong. They are judgements with supporting reasons, reasons which provide some idea as to why we hold these convictions (Scanlon, 2003, p.149), and convictions without supporting reasons will not be suitable for the procedure. Rawls does not think that if equilibrium is achieved it is stable, that it is permanently solved, for circumstances should and are likely to engage further reflection when necessary. Additionally, Rawls does not think that reflective equilibrium is a state people are likely to achieve at all - rather it is an ideal to which

⁴ Perhaps a little confusingly, "reflective equilibrium" is both the name of the procedure and the procedure's ideal outcome.

people ought to aim (Scanlon, 2003, p.141). In aiming for equilibrium, we might think that Rawls pursues a form of coherentism (O'Neill, 2004, p.351; O'Neill, 2015, p.61), a necessary condition of an ethical theory being that principles and judgements must be consistent with each other and mutually supported. However, this would not be the case if we think of coherentism in the moral realist sense of revealing the truth of moral principles. Rather, the coherence achieved in equilibrium shows that the parties' clients, the actual people they represent, are rational, they have "coherently ordered their purposes and commitments into a rational plan of life" (Freeman, 2007, p.148). Reflective equilibrium is therefore non-foundationalist as it "does not attempt to "ground" moral principles in other principles or abstract judgements that are taken as axiomatic, self-evident, and not open to revision" (Freeman, 2007, p.33). By being both (hypothetically) accepted and coherent, the problematic claim of rational intuitionism, as well as many theories of the good, that either principles or judgements are in any way true, is avoided. Rather, principles are justified because they would be agreed in an imagined fair initial situation which represents equality, this relation of equality being one which, Rawls believes, we either already accept or would be persuaded of by philosophical reflection (Rawls, 1999, p.19) and which aim at coherence. Thus Rawls's is not a metaphysical theory that reveals the nature of truth, or an epistemological thesis concerning the nature of justification generally but a thesis concerning the nature of justification within, specifically, moral philosophy (Freeman, 2007, p.36).

We might wonder, however, considering Rawls's vow to liberate justice from intuitionism, whether a considered judgement is, in fact, not simply an intuition. We might then worry that, rather than looking for objective truths about political values and principles, Rawls is simply, and conservatively, confirming existing subjective preferences and proposing relativism. But Rawls thinks considered judgements can be justified in a way that intuitions are not, for he believes "we have examined these things with care and have reached what we believe is an impartial judgement not likely to be distorted by an excessive attention to our own interests" (Rawls, 1999, pp.17-18). The idea, very roughly, is that citizens have indeed considered these beliefs, as have their ancestors, discussed them with others, considered them as explanations of their experiences and used them to guide their actions with sufficient success to have greater confidence in them than mere intuitions. This does not mean that they perfectly understand their own conception of justice but, and here Rawls makes comparison with language, they have the ability to make use of it reasonably successfully without being able to explain its fundamental nature or rules (Rawls, 1999, p.41).

1.4 Congruence and Stability

There is also a further stage of the procedure and this asks whether the principles which emerge would be a “feasible conception” (Rawls, 1999, p.508), whether they would achieve stability. In Rawls, we therefore see an attempt at reconciliation of both desirability and feasibility. Firstly, the original position, under conditions of impartiality, presents arguments for values such as liberty, opportunity and equality and the appropriate priority rule, and in doing so addresses the desirability constraint. But that the parties in the original position also know that the principles which emerge must achieve stability shows that Rawls is also concerned about whether the principles selected would be feasible. Stability should not, however, simply be thought of as concerning whether an agreement about justice would be “sustainable over time”, but also whether “we can understand the persistence of this kind of agreement as fully rational, in the light of all the things we take to be valuable” (Krasnoff, 2016, p.84).

A society as a scheme of social cooperation is stable when there is general and voluntary compliance and force may be legitimately deployed, following infractions and violations, to stabilise arrangements (Rawls, 1999, p.6). This does not mean that social arrangements should not change but rather that when social change occurs, such as social and economic institutions being reformed, society can continue to support the principles of justice for its regulation. Stability is a motivational problem. We ask, following the agreement of the principles of justice as the foundation for laws, what can motivate individuals to will justice and to conform to it. Rawls’s sense of the requirement of stability is to examine whether proposed principles of justice for the basic structure are compatible with general subjective facts about human nature, particularly our moral psychology and our sense of justice, and general objective facts concerning social and economic institutions, and also to examine whether principles are congruent with realising the human good. That members have an effective sense of justice, “a settled disposition to act according to the principles of justice and their institutional requirements”, is the primary basis for stability (Freeman, 2007, p.250) because it is the “primary motivational basis of human sociability” (Freeman, 2007, p.254). Rawls then also wants to “show that having a sense of justice with the content that justice as fairness describes is congruent with our good” (Scanlon, 2003, p.158). By this he means that “[w]hether or not it is good for me to be just depends on what the conception of justice in question demands of me, in the range of conditions under consideration, and on which conception of the good we are using to evaluate the desirability of having a sense of justice, so specified” (Lister, 2015, p.133). This is necessary because citizens will not be disposed to take up justice as fairness if it conflicts with what they want to do with their lives, providing that what they want to do with their lives is not unreasonable.

Stability therefore should not be a “mere modus vivendi” (Rawls, 2005, p.147), but should produce stability for the “right reasons”, meaning moral reasons. A modus vivendi, says Rawls, is only stable when the present balance of power persists. When one group asserts its power, it will try to enforce its superiority to destabilising effect.

1.5 Publicity

The parties of the original position choose principles to represent a *public* conception of justice but the idea of a public conception of justice has a number of senses. One has an ontological sense, that it is the justice of the public rather than of individuals. However, another, mentioned briefly above in the discussion of public reason, has an epistemological sense, that the conception should be publicly known. This second sense therefore issues a further constraint upon feasibility and it is thus a condition of the original position that the parties must assume that the principles they choose will be public known and understood, and so able to be followed by all (Rawls, 2005, p.115). Principles which are only understood by a few or even none and perform well enough as a generally recognised standard only when this fact is not widely known, should be ruled out (Rawls, 2005, p.115). This requirement of full publicity may be seen as a response to the Marxian idea of “false consciousness”, or ideology (Rawls, 2001, p.121). This is necessary to respect the idea of persons as being free and equal - people cannot attain either condition without knowledge of justice.

There is a further justification for the publicity condition: it “allows that all can justify their conduct to everyone else [...] without self-defeating or other disturbing consequences” (Rawls, 2005, p.510). People cannot make reasonable claims upon each other or adjudicate between claims unless justice is publicly known (Rawls, 1999, p.4). Therefore, if citizens must agree that the basic structure conforms to the shared public conception of justice, they must possess a shared method of judging whether this is so, to compare the conception to the institutions they design. Finally, one further justification for publicity is that people must be able to learn the conception of justice (Rawls, 2005, p.71). People cannot know how to do justice if they are not made aware of what it is. Rawls believes publicity to be implicit in the tradition of the social contract - if people are to agree to principles of justice then they must have knowledge of them (Freeman, 2007, p.162).

1.6 Constructivism

While the earlier Rawls is explicit that his theory is contractarian, he was not then aware that his method was constructivist and credits Ronald Dworkin as being the first to note, like most but not all contractarian conceptions, its constructivist nature (Rawls, 2005, pp.90-91, *n.1*). Constructivism is therefore defined more systematically by the later Rawls as possessing the following features. Firstly, it is the view that “once [...] reflective equilibrium is attained, the principles of political justification (content) may be represented as the outcome of a certain procedure of construction (structure)” (Rawls, 2005, p.93). Constructivism, therefore, is usually thought of as the construction of an account of right which is anti-realist (O’Neill, 2003, p.147), in the sense of not being dependent upon facts of nature (Audard, 2007, p.21) but rather a fair procedure (Kukathas & Pettit, p.125). Secondly, unlike intuitionist moral theories which are based upon theoretical reason, constructivism, although not abandoning theoretical reason entirely, must be based upon practical reason (Rawls, 2005, p.93). In other words, practical reason is the reasoning people use to devise their own answers to practical problems. Thirdly, constructivism requires a conception of both the person and of society (Rawls, 2005, p.93), and in Rawlsian justice the society is a fair system of cooperation and the person is an individual in possession of the two moral powers, both a sense of justice and a conception of the good. These conceptions of both the person and society are essential if the public conception of justice produced is to be suitable for those who wish to make use of it. Finally, constructivism also specifies what counts as reasonable (Rawls, 2005, p.94). Thus, citizens can reasonably justify their decisions publicly when they are ready to offer fair terms of cooperation to each other commensurate with the conception of political justice specified to be most reasonable, and they act upon those terms, even when there may be a cost to their own interests, on the condition that others are also accepting of those terms (Rawls, 2005, p.446).

Constructivism is therefore a necessary condition of a cooperative pluralist democracy within which fair terms of cooperation cannot be dependent upon an external independent authority, such as God’s law, or any other moral authority because there will not be any agreement on what this authority should be (Rawls, 2005, p.97). Rather, justice as fairness takes the view that citizens should establish cooperative terms concerning what is to their reciprocal advantage. Krasnoff summarises Rawls’s constructivism as being understood in two distinct ways: the first is that it is contractualism or “hypothetical proceduralism” - it is a theoretical device providing a procedure of rational choice for weighing intuitions about justice; but secondly, it is constructive in the sense of having a practical role *as well as* a theoretical role (Krasnoff, 2016, p.79). The second can be seen as distinct from the first: in a particularly

religious society, for example, a dominant, and non-contractualist, religious conception of justice may do better practically, being better at resolving disagreements about justice, without being grounded in the theoretical justification of the social contract (which in turn may or may not be generally accepted within such a society). Rawls fuses both these senses of constructivism.

An objection might be raised that principles procedurally produced are unacceptably coercive because they come from “outside”, external to one’s internal conception of the good. But Rawls also justifies his theory by its modelling of autonomy, conceived as expressing a Kantian conception by which “a person is acting autonomously when the principles of his action are chosen by him as the most adequate possible expression as a free and equal being” (Rawls, 1999, p.222). And, as we have seen, Rawls conceives of the structure of the original position procedure and the inclusion of the veil of ignorance as representing this status. (Rawls, 2005, p.77). There is also a distinction made between political and ethical autonomy. Citizens are *politically* autonomous because they act upon principles which would be freely chosen under these conditions and which are expressed politically, by participating in political affairs. Ethical autonomy, on the other hand, is expressed more comprehensively within both one’s social life and personal life (Rawls, 2005, p.78).

It should be clarified, then, that what is constructed is the content of the public conception of justice and it is not the original position that is constructed, rather it is “laid out” (Rawls, 2005, p.103). A theory cannot start from nowhere so Rawls’s begins with the idea that social justice most fundamentally is understood as a fair system of cooperation between citizens who are both reasonable and rational and regard themselves and each other as both free and equal. What is laid out is a procedure that places reasonable constraints on the parties rationally choosing principles for the basic structure. The aim is to represent, or model, in this procedure, the necessary relevant features that are applicable to justice. The basis of the procedure is a basic conception of both the citizen and the well-ordered society. Citizens are defined by the two moral powers and the first, a sense of a conception of the good, is modelled by the rationality of the parties, while the second, a sense of justice, is modelled by the situation of equality within the original position and the informational constraints imposed on them by the veil of ignorance (Rawls, 2005, p.104). This second moral power is also modelled by the procedure taken as a whole - citizens are both reasonable and rational in contrast to the parties in the original position who are only rational. The principles of justice therefore are constructed by practical reason and their origin is the moral powers (Freeman, 2007, p.290). What is also laid out in the original position is, as have seen, the idea that a political conception of justice within a well-ordered society must be public. This is modelled by parties taking account of the

consequences of the principles they consider being recognised mutually and how this affects citizens' understanding of their own conception of the good, and how their behaviour might be motivated by the principles chosen (Rawls, 2005, p.104). Thus. Rawls starts with certain facts about humans, such as that they are rational in the sense of wanting to pursue a conception of the good, or that principles must be subjected to publicity if they are to be affirmed and adopted. Finally, also laid out are the principles of practical reason, and the conceptions of society, person and publicity are in fact "ideas of practical reason" (Rawls 2005, p.110) in the sense that, if we want to work out what we ought to do, these conceptions are necessary.

2. Justification

In this section, I will firstly set out the principles of justice which Rawls proposes before guiding us more explicitly through the arguments which Rawls believes would lead to the adoption of the two principles of justice as fairness by the parties in the original position. These arguments mostly consist of demonstrating that justice as fairness is not only viable but that it would be preferred to the other conceptions of justice. While utilitarianism is the theory which is predominantly submitted to the pair-wise comparison, the establishment of priority rules is also intended to show that justice as fairness defeats the imprecision of intuitionism.

I remind the reader that Cohen is primarily concerned with the adoption of what Rawls terms the difference principle, which governs inequalities in the distribution of wealth and income, as it is to this principle which he primarily frames his objection. However, we must also understand the arguments presented in favour of Rawls's other principles which governs the distribution of the basic liberties if we are to subsequently properly understand Cohen's various objections, so these will also arise in the discussion.

2.1 The Two Principles of Justice as Fairness

We begin this sub-section by setting out the principles of Rawlsian justice. The arguments in favour of them will be presented in the following sub-section.

Rawls sets out the two principles of justice as fairness as presented to the parties thus:

"(a) Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties compatible with the same scheme of liberties for all; and

(b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second they are to be to the greatest benefit of the least-advantaged members of society (the difference principle)" (Rawls, 2001, pp.42-43).

The least advantaged class is the class of working people who are least favoured by three main contingencies: "persons whose family and class origins are more disadvantaged than others, whose natural endowments (as realised) permit them to fare less well, and whose fortune and luck in the course of life turn out to be less happy" (Rawls, 1999, p.83). Concern has been expressed that Rawls considers only economic disadvantages and ought also include both gender and racial disadvantages, and in response, Okin has indicated how Rawls can accommodate the former (Okin, 1991, p.174) and Mills the second (Mills, 2007, pp.96-97). These persons are also representative persons "holding the various social positions, or offices established by the basic structure" measured by their "life prospects" over the course of their lives (Rawls, 1999, p.56) rather than particular persons. This means that we are not weighing up societies in which a particular person is better or worse off, but between societies in which the least advantaged person in that particular society is best off. Rawls is ambiguous about how the lowest representative group can be identified but one way might be "in terms of a fixed percentage of the population" (Pogge, 2007, p.113). The principles can be no more detailed at this stage because, as we have seen, the parties are deprived of information about the specific conditions which apply to those they represent and which would be necessary to give them more content. It would be no good proposing a more detailed design of the basic structure, applied more directly to the design of institutions, because it may turn out, when the veil of ignorance is lifted, to be ill-fitting (Pogge, 2007, p.70). The principles must therefore have a good chance of fitting the widest range of possible actual scenarios.

There are two principles because Rawls envisages the basic structure as consisting of two parts: one defines and secures the basic liberties, which are distributed equally, and the other specifies and establishes acceptable economic and social inequalities (Rawls, 1999, p.53). The basic liberties, when distributed equally, "enable individuals to freely exercise their consciences, decide their values, and live their chosen way of life" (Freeman, 2007, p.44). That the distribution of the basic liberties are prioritised explains why justice as fairness is a liberal conception of justice. The basic liberties distributed by the first principle include "political liberty (the right to vote and to hold office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and freedom from arbitrary arrest and seizure as defined

by the concept of the rule of law” (Rawls, 1999, p.53). These are distributed equally because of what Rawls calls the “principle of (equal) participation” which entails that every citizen possesses an equal right to be a part of the constitutional process which determines the laws with which they are expected to comply (Rawls, 1999, p.194). The basic liberties are distributed by the constitution, its “main purpose [...] is to put into place constitutional rights and procedures that specify and protect the equal basic liberties” (Freeman, 2007, p.205). This principle thus endorses the constitution as the principal system of rules attending to the generation of social rules for a state with the right to employ coercive authority over a particular area and its subjects (Rawls, 1999, p.195).

The second principle concerns the distribution of wealth and income and the design of organisations which require “differences in authority and responsibility” (Rawls, 1999, p.53). Its second part, the difference principle, concerns social and economic arrangements such as education and health care systems and the organisation of the economy. The principle states that, unlike the basic liberties, it would be desirable for the distribution of wealth and income not to be distributed equally but in a way that is advantageous to all and when inequality reflects choice, such as to develop one’s talents or to work hard, rather than circumstances. The rationale of the difference principle is to eliminate “inequalities that are not needed to provide maximum benefit to the worst off” and which “depends on the moral claim that it is unfair if people suffer or benefit differentially because of differences between them that are not their fault” (Nagel, 2003, p.71). The first part of the principle is a principle of fair opportunity and states that positions must be accessible to all irrespective of all contingencies. The second principle is distributed at the legislative stage rather than the constitutional stage.

What is distributed by the two principles are social primary goods and these are the “things that every rational man is presumed to want” because they “normally have a use whatever a person’s rational plan of life” (Rawls, 1999, p.54). Social primary goods consist of “rights, liberties, and opportunities, and income and wealth” and also the social bases of self-respect and these are a product of the social structure. As well as social primary goods, there are also natural primary goods such as “health, vigour, intelligence and imagination”, which, although dependent upon the social structure to some degree, are not, unlike social primary goods, *primarily* dependent upon the social structure. More specifically, what is distributed is the “prospects” of primary goods, or “expectations”, which means that citizens do not simply receive primary goods without contributing to society. Also, prospects are measured across each citizen’s lifetimes rather than applied to particular economic decisions by citizens. As it is presumed that primary goods are those that every citizens is presumed to want, they “serve as the basis for objective comparisons between individual positions – what economists call

interpersonal comparisons of well-being” (Audard, 2007, p.141). Primary goods have an advantage over utilitarian and other conceptions whose distribandum is welfare, as these conceptions have yet to answer the difficult question of “how to define and measure welfare, both collective and individual, in objective and unequivocal terms” (Audard, 2007, p.141). This is not to say that what counts as a primary good is not at all uncontroversial but rather that it is less controversial than the matter of what counts as welfare.

Rawls states that underlying the two principle of justice as fairness is the more basic principle of the general conception of justice:

“All social values - liberty and opportunity, income and wealth, and the social bases of self-respect - are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone’s advantage” (Rawls, 1999, p.54).

Rawls distinguishes between this general conception of justice and a special conception like justice as fairness. The general conception constitutes only one principle of justice, the difference principle, in this case applied to all social primary goods, and it applies only when material conditions are below an acceptable threshold. The priority then for the general conception is to improve material conditions until they are sufficient for citizens to focus on rights and freedoms, content that material conditions are not unacceptably, perhaps perilously, low. When material conditions are raised, citizens prioritise rights and liberties over material goods, and a special conception, such as justice as fairness, applies. Under the general conception denizens can trade off freedoms against material gains but this is not allowed by the special conception.

2.2 Arguments from the Original Position

2.2.1 *The Maximin Argument – Justice as Fairness vs Utilitarianism*

Now the principles of justice as fairness have been introduced, we must consider why they would be preferred over other theories of justice by the parties of the original position. We therefore proceed by imagining the presentation of various competing moral theories to the representative parties. Rawls’s first shows that his theory would be chosen over utilitarianism and there are several ways to justify the parties’ choice. One is to present arguments from

behind the veil of ignorance as to why the parties would choose one conception of justice over another. Another is, by reflective equilibrium, to compare them to our considered convictions about justice and consider the types of institutions they would entail. And the other is to consider whether the principles are feasible considering what we know about the facts of human psychology and society. Satisfying each type of justification is a necessary condition, none are independently sufficient.

In the original position, parties asked to consider the distribution of social primary goods begin with an equal distribution: an equal distribution of basic liberties, the condition of fair equality of opportunity, and an equal distribution of wealth and income (Rawls, 1999, p.130). This is not because it is morally right to do so but because the distribution is presumed to be rational and modelled as reasonable by the veil of ignorance; it would, at this stage, be irrational to ask for less than equality in case those they represent come out badly but also unreasonable to ask for more as they could not present a reasonable justification to others for more than an equal share (Rawls, 1999, p.130). The first principle is chosen as lexically ordered, meaning the need to “satisfy the first principle before moving on to the second” (Lovett, 2011, p.46), prior to the second principle. This is because it is presumed that the parties view those they represent primarily as free persons with fundamental interests entitled to make claims on each other in regard to the design of society’s basic structure (Rawls, 1999, p.131). Despite the parties not knowing the precise content of these particular interests, it is presumed that people have a highest-order interest in how their interests are supported, forged and regulated by social and political institutions. Free persons are therefore those who “conceive of themselves as beings who can revise and alter their ends and who give first priority to preserving their liberty in these matters” (Rawls, 1999, pp.131-132). Additionally, the principle of fair equality of opportunity takes priority over the difference principle but according to Lovett, it is not at all clear why this is so. Lovett suggests that it is “somehow connected to the importance of self-respect” which cannot be realized without fair access to opportunities (Lovett, 2011, p.119). I agree with Lovett that, while Rawls provides a justification for the first principle’s priority over the second, he is indeed not clear about the lexical ordering of the two parts of the second principle.

It is also presumed that it is rational for the parties to want to maximise their allocation of primary goods because they want to “protect their liberties, widen their opportunities, and enlarge their means for promoting their aims” (Rawls, 1999, p.123). Thus, “[w]hen Rawls talks about the parties protecting themselves against the worst possible outcome, it is not the possibility of having a below-average (or even the smallest) share of wealth and income that he is primarily worried about. Rather it is the prospect of not being able to satisfy one’s

fundamental or higher-order interests” (Mandle, 2016, p.138). This means that they would prefer an unequal distribution if that distribution provided them with more primary goods than under the initial position of equality if those primary goods allowed them to better fulfil their aims.

The argument presented for the preference of justice as fairness over utilitarianism is a maximin argument. The maximin rule, “maximin” being a blend of “maximizing the minimum”, states that we should order the alternatives by their worst outcomes and select the alternative with the best worst outcome (Rawls, 1999, p.133). Imagine therefore that we must make a choice under uncertainty, as we do in the original position - in this case we are uncertain which class we would end up in when the veil of ignorance is fully removed. There are three social arrangements we can choose and there are three possible classes that we might find ourselves in of which we have no information about the probability. This might be represented in the following table which shows the change in the sum of primary goods each class would receive in three societies compared to the initial situation of equality (adapted from Rawls, 1999, p.133):

	Lowest Class	Middle Class	Highest class
Society 1	-7	8	12
Society 2	-8	7	14
Society 3	5	6	8

The maximin rule says that we should choose society 3 because it has the best worst possible outcome of an improvement of 5. Of course, we might be frustrated if we choose society 3 and subsequently find ourselves in the higher class as we would have achieved a better outcome if we had chosen either of the others. However, we would regret choosing either of those other societal arrangements if we then find ourselves in the lowest class as we would be worse off than the initial position of equality. Therefore, the maximin rule states that we should always make the most conservative and risk-averse decision when faced with no information about the probability of the occurrence of the possible circumstances. As we have already seen, the rights and liberties distributed by the first principle must be distributed equally and so it is only income and wealth, and the opportunity to compete for offices of authority and responsibility which can allow any inequality of distribution.

The maximin rule, says Rawls, is a “good guide” for decision making under conditions which have certain features. The first feature is that it is the only plausible answer under conditions of uncertainty, when the probabilities of the actual social conditions are unknown (Rawls, 1999, p.134), as is the case in the original position. When probabilistic calculations are impossible, Rawls argues that the only rational option is to choose the option which has the best worst outcome. The second feature is that each party possesses a personal conception of the good which would be satisfied by the minimum achieved under the maximin rule and so cares little about gaining more. Combined with “reasonable demands of efficiency”, each will receive at least a minimum allocation which they would find satisfactory for pursuing their conception of the good and there will therefore be no reason to want anything greater (Rawls, 1999, p.135), although, of course, they may well end up with more. In other words, the “best worst-case scenario is acceptable (it is not very important to do better)” (Pogge, 2007, p.68). The final feature is that the outcome might present us with “grave risks”. If we made a decision because it has the best possible best outcome, such as society 2 in the above table, the worst possible outcome following that decision might turn out to be so bad as to put ourselves in an intolerable situation of serious harm or degradation. Rawls argues that his principles guarantee against these concerns and utilitarianism cannot. Under utilitarianism, more specifically the principle of average utility, there is the chance that total welfare might be distributed in a pattern that allows for extreme deprivation of the lowest class and so would not be chosen in the original position.

2.2.2 The Reciprocity Argument for the Difference Principle – Justice as Fairness vs “Mixed Conceptions”

While Rawls believes, as we have seen in the previous two subsections, that the maximin argument defeats utilitarianism (the principle of average utility) in preference for justice as fairness, it does not, he says, endorse a preference for his principles over “mixed conceptions”. Mixed conceptions are those in which the first of Rawls’s principle guaranteeing equal basic liberties is combined with a principle of distribution other than the difference principle (Rawls, 1999, pp.277-278). Rawls presents arguments against one of these which he says might not be unacceptable to the parties in the original position and this is the “principle of restricted utility” which is a conception in which utility is partially restricted by the securing of the basic liberties and citizens are entitled to a fixed social minimum (Rawls, 2001, p.120). A society regulated by this principle is termed “welfare capitalism” and this conception might be acceptable to the parties because “no matter what one’s social position is in a society

governed by these mixed conceptions, basic needs along with basic rights and liberties are guaranteed” (Freeman, 2007, p.189).

But the argument in favour of the difference principle over the restricted utility principle cannot be a maximin argument, as is presented again utilitarianism. This is because “both alternatives ensure against the worst possibilities, not only against the denial or restriction of the basic liberties and of fair equality of opportunity, but also, given the social minimum in the utility principle, against the more serious losses of well-being” (Rawls, 2001, p.120). Under conditions of uncertainty, it would be entirely reasonable for the parties of the original position to choose restricted utility over the difference principle. Therefore, we must look elsewhere to find support for the difference principle, and it is reciprocity which Rawls offers as grounds for choosing the difference principle over restricted utility.

Rawls proposes the difference principle as a balancing of reciprocity and efficiency. A fact about human society that Rawls believes should not be obscured from the parties in the original position is the fact of efficiency and we get to the strict reciprocity of the difference principle by considering which distributive principles would be both compatible with efficiency but also just. Freeman describes reciprocity well as “a moral requirement on citizens and officials; they should reasonably believe that the terms of cooperation they propose be reasonably acceptable to others as free and equal citizens, and not as manipulated, dominated, or under pressure of being socially or politically inferior” (Freeman, 2007, p.482). Efficiency, known to economists as Pareto optimality, is usually applied to economic configurations but Rawls, who wants to similarly base justice upon the outcome of a rational choice procedure, applies it to all social institutions. Thus, it is also applied to the basic liberties and opportunities. Applied to institutions, the principle of efficiency states that a distributive configuration is “efficient whenever it is impossible to change it so as to make some persons (at least one) better off without at the same time making other persons (at least one) worse off” (Rawls, 1999, p.58). Imagine then that in society there exists a distribution of a particular benefit B. If the production of B could be increased then we would expect some people, or at least one person, to get more of it. If so, then this new distribution would be more efficient only if there also would be no-one, in that new distribution of B, who were burdened by a loss of B. This therefore means that if the present production of B could be improved in a way that benefits some and burdens none then the present production and distribution of B is inefficient. It should be added here that I agree with Shaw that Rawls is unclear whether he supports the weak or strong Pareto principle. The former is the principle that “[i]f a change is beneficial for everyone then it is a change for the better”, while the latter states that “[i]f a change is beneficial for at least one person and worse for nobody then it is a change for the better” (Shaw, 1999,

p.354). For although he states endorsement of the strong principle in the present argument against restricted utility, at other places he appears to endorse the strong principle, most obviously in the canonical difference principle itself.

However, there is not only one efficient distribution. For instance, if there are only two people, Anna and Brian, the distribution would be efficient if the sum of B were allocated to Anna and Brian when production has been maximised but there are numerous ways that B may be efficiently allocated between them. Thus, if there are many efficient configurations, to choose between them requires another principle and Rawls proposes justice, which takes priority over efficiency (Rawls, 1999, p.59). If, as Rawls says, efficiency is a fact of human society and justice is a fact of human nature, then we must look for a just distribution which is consistent with efficiency and if a distribution is both just and efficient then it should be preferred to one that is only efficient. The distribution of liberties, as have seen, must remain equal but what can be manipulated is the distribution of income and wealth (Rawls, 1999, p.61). Rawls's proposal then is the difference principle, as laid out above, which constrains the distribution of income and wealth according to social contingencies and natural talents and abilities, such as "intelligence and imagination, strength and endurance" (Rawls, 1999, p.383), which are considered morally arbitrary, an "outcome of the natural lottery" (Rawls, 1999, p.64). These are morally irrelevant because they are contingencies - they do not come about because of a decision or choice made by the recipient. That talents are distributed unevenly is itself neither just nor unjust but rather a natural fact (Rawls, 1999, p.87). But what is just or unjust is the way in which basic institutions respond to these facts and in *Justice as Fairness*, individuals agree to make use of these contingencies only when they can be employed for mutual benefit (Rawls, 1999, p.88).

The difference principle asks what might make a move from an equal distribution of income and wealth permissible or desirable and the answer is a situation in which everyone is better off than in the initial situation of equality. This would conform to the principle of reciprocity as all, says Rawls, would freely agree to this move. It also conforms to the demands of justice as reciprocity is understood by Rawls as a fundamental element of justice (Rawls, 1999a, p.190). Thus, if, for example, there are two classes of people, a working class and an entrepreneurial class composed of those with more productive talents and abilities, greater expectations of primary goods to the latter would be permissible if greater expectations also redounded to the working class. These greater expectations of the entrepreneurial class therefore act as an incentive to be more productive, the benefits of which should also raise the prospects of the working class. The idea is that the talented are rewarded for developing and using their

(undeserved) talents when they also benefit the (also undeservedly) less talented. Unequal abilities are addressed by the exercise of those abilities benefitting everyone.

The difference principle thus would be chosen over the principle of restricted utility on grounds of reciprocity. Under the difference principle, which guarantees that greater rewards to the rich also (maximally) benefit the poor, “gains are not made at others’ expense” (Freeman, 2007, p.189) but with restricted utility, gains to the rich are made at the expense of the poor. The rich may improve their returns when the poor do not benefit at all. Thus, Rawls argues that restricted utility would not be acceptable to free and equal citizens. This is because, firstly, it asks the more disadvantaged class to accept inferior social and economic prospects for the sake of greater prospects to the more advantaged class and this is an “extreme demand” which would exceed the strains of commitment for people considering themselves to be free and equal and so lead to instability (Rawls, 1999, p.127). Additionally, the restricted utility principle would have difficulty setting a social minimum. The least advantaged would struggle to affirm the idea of a set minimum. They become resentful and bitter, reject restricted utility’s conception of justice and consider themselves to be oppressed (Rawls, 2001, p.128). They might then either take violent action in order to protest against their condition and this, of course, would be destabilising, or they might not be able to affirm the principles of justice because they have instead become “withdrawn and cynical”. If this is so, then the priority of the basic right of self-respect has been violated (Freeman, 2007, p.195). The difference principle would be chosen in preference to the restricted utility principle because it guarantees a social minimum but also more: it also allows citizens to see themselves as free and equal and to conceive of society as a fair system of cooperation (Rawls, 2001, p.130).

Rawls says that justice must constrain the advantaged class acting in self- or group- interested ways which improve their situation in a way that diminishes the situation of the least advantaged, and there are three reasons why the advantaged in a well-ordered society, a society in which all willingly comply with justice as fairness, would restrain themselves. The first is justice’s educational role (Rawls, 1999, p.125). Because everyone considers themselves free and equal and engaged in an advantageous program of social cooperation, they believe that the distributive principle should include the concept of reciprocity (Rawls, 2001, p.126). This belief is shared by all, both the advantaged and the disadvantaged. Secondly, the advantaged are aware of their good fortune in the distribution of natural abilities, and that they benefit further by a basic structure which the less advantaged affirm, one within which they are able to take advantage of opportunities to better their own situation, providing they also benefit others. The third reason concerns stability. The difference principle is publicly

acknowledged as of benefit to the common good and because of this, both mutual trust and the virtues of cooperation are encouraged.

There are just distributions motivated by the difference principle which may be more or less just. A “perfectly” just distribution occurs when the conditions of the least advantaged is maximised and in such a situation, no changes in the expectations of the better off classes can improve the situation of the worst off, but a distribution is unjust when the expectations of the higher class are “excessive”, when a reduction of those expectations would raise the expectations of the lower class, and how unjust the distribution is correlates positively with the excessiveness of the expectations - the more excessive, the more unjust (Rawls, 1999, p.68). Here, Rawls says that he does not want to attempt to measure the degree of injustice that might be present in such a situation. A scheme in which the contributions of the better off class are negative would also be unjust (Rawls, 1999, p.68)⁵ as the difference principle says that greater inequalities should be to everyone’s advantage, and that, of course, includes the better off class who gain by incentive rewards for exercising their abilities. The difference principle requires only that the worst off class are identified, by their share of the distribution of wealth and income, and Rawls presumes that if the prospects of that class are improved then there will be a “chain connection” (Rawls, 1999, pp.70-72), an improvement in the lowest class will also extend to an improvement in all other classes. Therefore, when society is structured to the benefit of the least advantaged, it should also improve the prospects of all classes. However, it is not only that this distribution of goods should be maximised within the present economic system, this being called “allocative justice” by Rawls, and so re-allocate the present pool of wealth. There is also a prior stage which is to choose a system of “background justice”, the economic institutions which set the conditions which make economic production possible and which constitutes “distributive justice”. Both are required to maximise the condition of the least advantaged class.

The difference principle therefore is justified not only by maximin but also by reciprocity. However, it is a common misconception, and understandable, according to Freeman, that the difference principle is justified by only the former because Rawls not only discusses “the difference principle at length [...] immediately after the maximin argument for justice as fairness over average utility [utilitarianism]” but also calls the difference principle “the maximin criterion of distributive equality” (Freeman, 2007, p.188).

⁵ As we will see in subsequent chapters, such an injustice would be an outcome of Cohen’s egalitarianism.

2.3 Confirming Grounds

We saw in Section 1 that Rawls takes feasibility constraints into consideration. Following the maximin argument, Rawls offers “confirming grounds”. This that “for an agreement to be valid, the parties must be able to honour it under all relevant and foreseeable circumstances” (Rawls 1999, p.153). The first of these grounds considers whether the principles would pass the “strains of commitment”, that, because of the condition of finality, the parties cannot agree upon principles which would have unacceptable outcomes (Rawls, 1999, p.153). Rawls states that his principles pass the strains of commitment because they are insured against the “worst eventualities” (Rawls, 1999, p.154), which means that there is no possibility of anyone losing any of their freedom so that others can enjoy a greater good, as would occur under utilitarianism, and which would be a situation people would be able to support. Audard puts this more clearly, and less abstractly, stating that, “[t]he parties select the consequences of the various options and examine whether they are reasonable in terms of commitments, that is, of acceptable social minimums and decent standards of living, but also of alienation and potential crisis and revolts” (Audard, 2007, p.136).

The next confirming argument relates to the “condition of publicity as well as that of the constraints on agreements”, and it is a question of psychological stability asking whether a preferred conception of justice can sustain its own support (Rawls, 1999, p.154). When the basic structure of society is known publicly to conform to its principles, its subjects develop the desire to act in accordance with those principles and to support the institutions which embody them (Rawls, 1999, p.154). And Rawls thinks his principles would be chosen and *willingly* supported (and so not by coercion) because they allow people to pursue their own conception of the good (Rawls, 1999, p.155). This, Rawls says, would not be the case under utilitarianism where the greater good may demand a sacrifice of one’s own prospects when outweighed by a corresponding success of the prospects of others.

Stability is further confirmed because the publicity of Rawls’s two principles supports people’s self-respect, this being “a sense of one’s worth” (Rawls, 1999, p.155). People need self-respect “if they are to pursue their conception of the good with satisfaction and to take pleasure in its fulfilment” (Rawls, 1999, p.155). Thus, justice as fairness “would tend to promote [...] a convergence of a good life and a just life” (Hill, 2014, p.207). One’s self-respect is usually dependent upon the respect of others and those who respect themselves usually respect others. Rawls’s principles embody self-respect because they treat people as ends and not only as means (Rawls, 1999, p.156). Furthermore, when all are respected by all, social cooperation is more effective (Rawls, 1999, p.157). Utilitarianism cannot secure mutual self-

respect when it has a lower appreciation for the worth of those already less favoured. Therefore, because it would be difficult to support, it would be destabilising. The principle of restricted utility would also manifest a lower appreciation for those less favoured and therefore also be destabilising.

2.4 Institutions - Labour: Work and Pay

Following these arguments in favour of Justice as Fairness, Rawls wants to fill out the content of the principles of justice. He suggests a four-stage sequence in which the veil of ignorance is gradually thinned. The idea is not to show that the institutional content Rawls proposes is the only one that is just but rather to show that his principles “define a workable political conception, and are a reasonable approximation to and extension of our considered judgements” (Rawls, 1999, p.171). The part of this stage that is particularly important for understanding Cohen’s critique is Rawls’s political economy, more specifically how justice as fairness correlates with our judgements about the economy, and particularly with work and pay.

When considering whether economic institutions conforming to the principles of justice reconcile with our considered convictions and proposed institutions, Rawls considers our common sense precepts concerning wages such as “to each according to his effort and to each according to his contribution” (Rawls, 1999, p.268). Wages are determined by supply and demand: employers must not only be able to afford these wages but also must use pay to attract the talented. Because labour is valued by its marginal productivity, the sale price of commodities in excess of the cost of labour needed to produce it, the talented are presumed to be those who “earn a premium” because they have the experience, training, natural abilities and specialist knowledge which entails greater productivity (Rawls, 1999, p.269). This satisfies the first precept: to each according to his contribution. But on the supply side, a premium must also be paid if we are to entice those who might later offer their services to invest in training and be burdened by the cost of postponement (Rawls, 1999, p.269). Additionally, unpleasantly dangerous and hazardous jobs tend to offer compensation in the form of greater pay because otherwise nobody will want to do them (Rawls, 1999, p.269). These two circumstances express the precept, “to each according to his effort” (Rawls, 1999, p.269). These two precepts, says Rawls, would be supported by the difference principle. The two precepts are often said to be a fundamental maxim of socialism. Famously, Marx adapts the precept under communism to ““from each according to his ability, to each according to his needs”.

Rawls also says that “what men want is meaningful work” (Rawls, 1999, p.257). When considering the phenomena of labour burden (whether jobs are meaningful, rewarding or burdensome), we should consider what Rawls calls the “Aristotelian Principle” which is that “other things being equal, human beings enjoy the exercise of their realised capacities (their innate or trained abilities), and this enjoyment increases the more the capacity is realised, or the greater its complexity” (Rawls, 1999, p.374). It is somewhat similar to Mill’s distinction of the “higher pleasures” (Freeman, 2007, p.24) and Rawls relates this not only to the desire for meaningful work but also to the exercise of these capacities outside of paid work.

2.5 Stability of Justice as Fairness

The final part of *A Theory of Justice* considers stability from another perspective, by seeing how Justice as Fairness is “rooted in human thought and feeling, and tied in with our ends and aspirations” (Rawls, 1999, p.343) and here Rawls is predominantly concerned with moral psychology and congruence between the right and the good.

2.5.1 Moral Psychology

Stability requires citizen’s to possess a “sense of justice” because “[h]owever attractive a conception of justice might be on other grounds, it is seriously defective if the principles of moral psychology are such that it fails to engender in human beings the requisite desire to act upon it” (Rawls, 1999, p.398). The sense of justice is an effective desire to act upon the principles of justice, it “motivates us to treat others in accord with the principles of justice, regardless of any special ties (for example, of friendship) that we may have with them” (Hill, 2014, p.204). It is important because “Rawls’s theory [...] affirms values deeply opposed to stabilizing measures (such as force, manipulation, and deception) that could be acceptable under other conceptions of justice” (Hill, 2014, p.205).

The account Rawls provides of developmental moral psychology aims to bridge two approaches (Rawls, 1999, p.401). The first is “empiricism” (but also known as “social learning theory”) and the other is “rationalism”. The difference between the two approaches is that in the empiricist tradition, moral motivations are not natural to us but come about by a programme of education which provides the appropriate moral motivations, while in the rationalist tradition we come to understand our innate moral feelings by experiencing our natural emotional

response to others' displeasure of their good being frustrated. Rawls's approach is to try to combine both of these models (Rawls, 1999, p.404) and provides a three-stage account of how moral development might occur in a well-ordered society conforming to justice as fairness. Each stage is based upon a law of reciprocity. This is because "it is a "deep psychological fact" that we form attachments to persons and institutions according to how we perceive our good to be affected by them", that "normally people come to want to do justice in response to justice, and that under the special circumstances of a well-ordered society of justice as fairness, people eventually will acquire a desire to support just institutions because they benefit them and those they care about" (Freeman, 2007, p.254).

The first stage is the "morality of authority" (Rawls, 1999, p.405) and develops from one's relationships with one's principle care-givers, which in many cases will be one's parents. At this stage, the child has no understanding of the concept of justification and therefore is unable to doubt the parent's injunctions. However, as the society is well-ordered the injunctions should indeed be justified. The morality of authority manifests as the child's disposition to follow, without any expectation of either reward or punishment, specific precepts that seem to the child not only generally arbitrary but also perhaps at odds with their natural inclinations (Rawls, 1999, p.408). The child loves and trusts his care-givers and their prohibitions indicate the sort of character the child ought to adopt. This morality is a primitive one because the child does not, for the most part, comprehend its precepts within a scheme of right and justice within which these rules are justified to them. The second stage is the "morality of association" and its content is defined by the standards suitable to one's role as a member of various associations (Rawls, 1999, p.409). It begins in the family where the child learns what it means to be a good son or daughter, either by this being explained or by them experiencing their parent's approbations and disapprobation. There is also the associations of both the school and of the neighbourhood, and interaction through games played with peers. From these situations, the child learns virtues such as what it means to be a good student and ideals such as that of a good companion. In adulthood, other ideals such as that of a good wife or husband or a good citizen are appropriated. At this second stage, we learn that others hold different conceptions of cooperation to us and so develop various skills for perceiving the perspectives of others, to assess their "actions, intentions and motives", from such things as their "speech, conduct and countenance" (Rawls 1999, p.410). We consider how we become attached to our associates and this develops, says Rawls, by participating in that association and developing fellow feeling, leading to friendship and mutual trust (Rawls, 1999, p.411). Once the ties have been established, individuals will feel guilt when they fail to contribute and so become inclined to make reparation or offer apologies (Rawls, 1999, p.412). When these bonds are formed, a reciprocal equilibrium is achieved in which everyone does their part and new members of the

association observe “moral exemplars”, those who are admired for demonstrating to a superior standard the ideal consonant with their role (Rawls, 1999, p.413). Rawls assumes that there is a morality of association relating to the role of citizen in which compatriots hold a view of each other as “equals, as friends and associates”. The virtues of the citizen are the cooperative values, such as “fairness, fidelity and trust, integrity and impartiality”, while the vices are “graspiness, unfairness, dishonesty and deceit, prejudice and bias” and succumbing to any of these vices arouses within oneself a feeling of guilt (Rawls, 1999, p.414). The third and final stage is the “morality of principles” and this is a desire to act justly and to advance just institutions (Rawls, 1999, p.414). Someone who already understands the previous stage has an understanding of the principles of justice and is disposed to observe the standards relevant to his various positions in society by way of others’ approval and disapproval. The good citizen then is motivated to comply with the principles of justice by his bonds of friendship and fellow feeling for others and desires the approval of society more generally. This third stage develops therefore because the previous stage inclines one towards an understanding of the standards of justice. People know that to adjudicate between competing claims requires them seeing others’ points of view and this is done by “putting the principles of justice into practice”. This is done by going through Rawls’s four-stage process of considering constitutional essentials, then the legislature, and so on and once this mastery of the principles is achieved, one sees how they secure desirable values which are to everyone’s advantage. We then, again, experience guilt when we fail to maintain such arrangements and so cooperate with those with which we feel no bonds of friendship or fellow feeling (Rawls, 1999, p.415). This form of guilt is different to that associated with the first and second stages, for we now explain it by reference to the principles of justice (Rawls, 1999, p.415). The overall point of this sketch of developmental moral psychology presented by Rawls is to show that when external sanctions are absent, the temptation for one to free ride can be overcome by internalising either a sense of justice or a concern for those who would be disadvantaged, or preferably both (Mandle, 2009, p.124).

2.5.2 Congruence

Stability is demonstrated by not only asking whether justice as fairness might have psychological support, but also whether there is congruence between the right and the good (Rawls, 1999, p.508). The question asked is whether it is “rational in a well-ordered society to exercise and develop the sense of justice, as defined by justice as fairness, and incorporate this virtue into one’s conception of the good” (Freeman, 2003, p.25). There are two senses in

which a sense of justice might be considered a good. The first is whether it supports “final ends” - whether what it is that someone ultimately wants to do with their life, their “full theory” of the good, is not compromised by the public conception of justice. The second, is whether justice is itself a primary good, whether it is supported by a “thin theory” of the good. Within the original position, the parties know about individuals’ “thin theory of the good”, because without at least a minimal sense of the good, the parties could not be motivated to choose or agree upon anything (Rawls, 1999, p.348). These “bare essentials” of the good therefore are used to determine the primary goods (Rawls, 1999, p.348). Thus, the thin theory of the good tells us what counts as a good and why it is rational to want it but not the content of the good which, because of value pluralism, will vary across the population. This is necessary, Rawls says, to produce the principles of justice which in turn support one’s full theory of the good, one’s comprehensive doctrine. If the principles of justice cannot be self-supporting because those principles cannot support a full theory of the good, meaning the right and the good are not congruent, then constitutions or institutions constructed upon such principles of justice will not be stable.

Rawls therefore must attempt to establish that it is rational, from the perspective of the thin theory of the good for members of a Rawlsian well-ordered society to accept their sense of justice as regulative of their life plan and that doing so would correspond with each individual’s conception of the good (Rawls, 1999, p.457). Furthermore, if justice accords with one’s thin theory of the good then we might presume that it would also support one’s full theory. For some people, conforming to justice just is part of their good and so they desire to act justly. Justice, for them, is an end in itself and we might call this pure conscientiousness (Rawls, 1999, p.499). But the more difficult problem is to show that justice is a good for those whom justice is not an end but whom accept that Rawls’s principles of justice are the best choice by the parties in the original position. This problem asks us whether it would be better for such a person to act justly at all times or whether they should falsely pretend to hold the required moral sentiments but act as a free-rider when it better suits his interests. Rawls however, makes three assumptions that might restrain the potential free-rider. Firstly, where the appropriate civil bonds have been established and the society is well-ordered, the free-rider knows they will feel guilt because they know that not doing their fair share for the good of the community hurts everyone (Rawls, 1999, p.500). A second constraint is that being a participant in the life of a well-ordered society is a good in itself, that we can achieve more by way of cooperation than we can on our own (Rawls, 1999, p.500). The third restraint is that acting justly is essential behaviour for rational free and equal beings and so “express(es) our nature as free moral persons” (Rawls, 1999, p.501). Finally, Rawls also considers those for whom the sense of justice is not regarded as a good (Rawls, 1999, p.503) and whether it is

unjust to coerce them to conform to just institutions. Rawls says that it would not, for the reason that “general egoism” would be rejected in the original position which constrains self-interest and that non-compliance would not be rational because social cooperation is a great asset (Rawls, 1999, p.504). Rawls acknowledges that they would not be happy but that it is a misfortune that they are naturally disposed to shun justice. This final consideration shows that, while he contends that the parties in the original position would consent to the principles of justice, a stable well-ordered society does not require actual universal consent. Rather there is a direct correlation between congruence and stability - the greater number of individuals who perceive congruence between the right and their good, the more stable will society be and justice as fairness seems to demonstrate a sufficient degree of stability (Rawls, 1999, p.505).

Finally, when considering the stability of his principles, whether justice supports considered judgements concerning ends, Rawls considers whether contractualism is satisfactory for understanding the value of community and its establishment because congruence between both good and right depends on attaining community (Rawls, 1999, p.456). Community here is the object of “common ends” achieved by “common effort” (Freeman, 2003s, p.287). This question is important because “most people reflectively affirm the value of sociability and community” (Freeman, 2003a, p.287). It is also important that “liberals can sincerely point out that, for all their emphasis on individual freedom and rights, they too value and appreciate the significance of community” (Mulhall & Swift, 2003, pp.461-262). In other words, community is a considered judgement about societal arrangements held by many of us.

To help us understand what counts as community, we are asked to consider two conceptions of a social order that might be attributed to the suppositions inherent to the original position. One is the idea of the “private society” of which there are two main features: firstly, the people who comprise it have their own private interests which are not at all complimentary, but rather competing or independent; the second is that institutions are not thought of as a good in themselves but rather as a burden (Rawls, 1999, p.457). Such social arrangements are seen merely as a means to realising private aims and nobody really cares about the good of others. The outcome of the private society might be accidentally fair if it satisfies the claims for mutuality and everyone can make use of private goods for furthering their own interests and needs. But the paradigm of the private society is the theory of competitive markets and if such a society is fair, its members are not motivated to act by justice and thus for any just and efficient arrangements to be stable normally requires the use of sanctions (Rawls, 1999, p.457). Private society is not held together by any desire for just arrangements but by its members calculating that changes to it would make it more difficult to pursue their personal

ends (Rawls, 1999, p.458). However, a social order might be conceived of in another way, and this is the idea of a social union in which its members have “shared final ends and they value their common institutions and activities as good in themselves” (Rawls, 1999, p.458). Each member of society has different potentialities, not all of which can be realised and so each must organise themselves around which of these should be pursued (Rawls, 1999, pp.458-459). The foundation of a social union is therefore the needs and potentials of each of its members benefiting from the sum of the effective natural abilities of each other (Rawls, 1999, p.459). This is indeed how the original position is conceived - that natural assets are thought of as a shared resource. This leads us to the idea of community, the idea that members of a social union benefit from each other’s merits and acknowledge the good of all as part of the scheme of social cooperation consented to and from which each sustains their good (Rawls, 1999, p.459). Justice as Fairness embodies this ideal of community because it has these characteristic features of a social union.

Conclusion to Chapter 2

I have demonstrated the arguments presented by Rawls to justify his procedural approach to justice and the main arguments in favour of his theory of justice as fairness as the most preferable conception of justice. This is not a comprehensive overview because, for the purposes of this thesis, we are interested in the objections Cohen raises and so only those elements or, to facilitate their understanding, those elements which support them, are covered here. Let us now proceed on to considering Cohen’s initial set of objections.

Chapter 3: Cohen's Objections to Rawlsian Incentives Payments

Introduction to Chapter 3

The fundamental disagreement between liberalism and socialism, says Cohen, is that, unlike a liberal society, “[i]n the ideal socialist society, equal respect and concern are not projected out of society and restricted to the ambit of an alien superstructural power, the state” (Cohen, 2008, p.1). For Marx, the state withers away when the right principles for “real, everyday material life” are “practiced in everyday life” (Cohen, 2008, p.1). But in liberalism there is “on the one hand [...] an economic structure which is organised to achieve a certain form of justice, and, on the other, a set of individual economic choices that need show no respect for that justice” (Cohen, 2008, p.2). At the root of the disagreement, appears to be a schizoid liberal contradiction between “economic agents [that] are self-seeking” and “political agents [that ought] to act against the grain of their self-interest” (Cohen, 2008, p.2). Liberal theorists thus presuppose the “homo economicus” rationally piling up “earthly goods on the mundane plane of civil society”. But there is, says Cohen, an alternative account of rational humanity, in which humans act from concern for others, from an “egalitarian conscience”. As we will see, this is the principal accusation Cohen aims at Rawls’s liberalism, that Rawlsian citizens set up coercive economic rules, or structures, rather than being motivated to act justly because they themselves endorse (or accept or internalize) an ethos of justice. Because Rawlsian citizens are only required to follow the rules, they can therefore exploit their economic productivity for maximal acquisitiveness in their extra-legal decisions and behaviour. When they do so, large inequalities will arise which egalitarians, certainly socialist ones, will object to for being unjust. One of the central claims I will make in this thesis is that this absence of ethos is a misreading of Rawls, that the disagreement between Cohen and Rawls does not concern the matter of ethos, for Rawls does include one. However, I will also argue that the basic structure, when there is an ethos of justice, can implement justice anyway and so we need not appeal to the justice of extra-legal behaviour.

A further central claim made in this thesis is that the large unjust inequalities which motivate egalitarians like Cohen would not arise in a Rawlsian society and, in fact, Rawls is more egalitarian than Cohen realises. The conclusion then is that Rawls can deliver what Cohen says he cannot, and this Cohen calls justice tout court, that there is both distributive justice and just citizens who intentionally bring justice about.

The present chapter will mostly attend to considering how Cohen objects to the Rawlsian argument that inequality-producing pecuniary incentives to the talented are necessary to benefit the least advantaged. It should be kept in mind that Cohen's analysis of Rawls here is what might be described as an immanent, internal, or perhaps Socratic, critique - the aim is to uncover inconsistencies, ambiguities or invalidity in Rawls's arguments and conclusions. However, we should also keep in mind that Cohen is very sympathetic to Rawls's project and, with nuanced caveats, generally offers his endorsement. After all, the later Cohen which emerges from the earlier Marxian scholar states he would not have objected to being designated a "left-Rawlsian" (Cohen, 2008, p.12) and, like Rawls, considers himself a "partisan" of deontology, very roughly the assertion that moral acts constitute duties and are inherently right or wrong regardless of their consequences.

In this chapter, I will set out and respond to Cohen's three objections to Rawls which may be summarised more generally as arguments against the necessity of incentives. The following chapters will deal with the connected objection to restricting justice to the basic structure of society and the issue of ethos. We might say that the former concerns the issue of what justifies departures from strict equality, while the second concerns the site of justice debate, the matter of to which parts of society justice should be applied. The first of the incentives objections is twofold, that incentives are not necessary for the talented to be maximally productive, and that, demonstrated by his interpersonal test, incentives are incompatible with the value of community. We might say that the former is an argument from justice and the latter an argument from community. I will then turn to Cohen's second objection, his response to the Rawlsian dilemma, that equality cannot be reconciled with Pareto efficiency. The third part of this chapter concerns Cohen's response to the Rawlsian trilemma stating we cannot have all three of equality, Pareto and freedom.

3.1 Incentives, Necessity and Community

3.1.1 Justificatory Community and the Interpersonal Test

In the first part (of two) of *Rescuing Justice and Equality*⁶, Cohen wants to rescue equality from one consequence of the Rawlsian justification for inequality, that inequality is just when

⁶ The first part concerns the content of the difference principle, the second concerns the concept of justice (see Chapter 1).

productivity-motivating pecuniary incentives to the more advantaged members of society support the difference principle and so maximally benefit the least advantaged. The Rawlsian incentives argument, says Cohen, is that such incentives to the talented, the “fortunate people” who are “so positioned that, happily, for them, they do command a high salary and they can vary their productivity according to exactly how high it is”, (Cohen, 2008, p.120), are *necessary* to benefit the least advantaged (or less talented). This is because the talented must be incentivised to be more productive and those greater returns to the talented are justified by the benefits also redounding to the less talented, a distribution all hypothetically ought to accept according to the original position procedure. What exercises Cohen’s concern is that egalitarians like himself, those he defines as being concerned about a wealth and income distribution in which some have so much when many have so little (Cohen, 2008, p.31), would consider incentives unjust for permitting or necessitating these potentially unlimited inequalities.

Cohen’s initial objection to incentives concerns what he call a “real political use” of the Rawlsian incentives argument (Cohen, 2008, p.62) and he begins by showing this to be problematic because the incentives argument contradicts the value of community, a value with which, as we have seen, Rawls thinks the difference principle achieves coherence. Cohen says the incentives argument presupposes a society he terms a “non-community”, one in which relations between compatriots are understood to be strategic, conceiving others as opportunities for personal gain, rather than a society in which each justifies the way they live to each other (Cohen, 2008, p.15). The former is the “bargaining” model (Cohen, 2008, p.82) and only the community model, which in its unqualified sense, is a society in which we share a “common life” (Cohen, 2009, p.38), is one in which justice may be operative. Even if we accept the difference principle, most basically the idea that the least advantaged should be as well off as possible, there is the problem of its defence of economic incentives to the talented because the inequalities it permits requires a society which violates an essential condition of community (Cohen, 2008, p.29). This “elementary condition” of community *tout court* is that of a justificatory community, a community in which there persists a “norm of justification”. Community requires the condition, in the qualified sense, of a justificatory community and, it seems that, if we are liberals and value democracy, we value acting as a mutually justificatory community in which we hold each other accountable for our actions. In fact, it is a necessary condition of democracy that we must justify our behaviour to each other in order to make policy together (Cohen, 2008, p.45).

This idea of contrasting ideas of society, which Cohen calls the community and bargaining models, is not uncommon in political theory more generally. The bargaining model is more

commonly known as a “private society” within which “members care only about their lives as private individuals” (Hussain, 2018). The idea is found in Tocqueville, Hegel, Rawls, and Dewey as a morally defective form of society. Its “[m]embers are not necessarily rational egoists—they may care about their family and friends [but] [w]hat is central is that their motivational horizons do not extend beyond the people and projects that are the focus of their personal lives” (Hussain, 2018). Members of the private society therefore only care about the shared concerns of the community only when these impact upon their private world and thus there is no conception of the common good. The alternative is the ideal of community, a society in which members “have a relational obligation to care about their common affairs [...] whether or not this pattern of concern leads to a suboptimal outcome” (Hussain, 2018). As the ideal society aims at the common good, one feature is that citizens should make decisions collectively. A prominent idea in democratic theory is that this requires a deliberative conception of justice, the ideal being that citizens make decisions collectively through a public reasoning process in which each is recognised as an equal member of the community (Hussain, 2018). This ideal is found in Rawls’s, Habermas’s and Joshua Cohen’s work. Thus, GA Cohen’s idea that the ideal society should be a community in which citizens work towards a common goal by making decisions collectively, and so requiring mutual justification, is a common one in contemporary political thought.

Cohen’s ideal of the justificatory community therefore is the idea that citizens are considered to be accountable *to each other* and the test for justificatory community is Cohen’s “interpersonal test”. The interpersonal test focuses not on the *content* of the argument but on who makes the argument to whom. The persuasiveness of an argument, Cohen says, is “speaker-audience-relative”, it depends upon “who is speaking and who is listening” (Cohen, 2005, p.36). Therefore it is the *persuasiveness* of the content of the argument which is tested by the interpersonal test.

To explain the interpersonal test, Cohen invokes the “kidnapper’s argument” which he feels is relevantly analogous to the incentives argument, relevant in the sense of it “encroaching upon justice and community” (Vrousalis, 2012, p.151, *n.27*). If a third person tells the parents they should pay the ransom for the return of their kidnapped child then it certainly appears in the parent’s interests, and so justifiable, to do so. But if the argument is instead presented directly by the kidnapper, that the parents should pay the ransom because if they do not, the child will not be returned, then the parents can ask the kidnapper to justify why the factual premise which states that the child will not be returned unless the ransom is paid is true, something they cannot do if the argument is presented in the mediated form (Cohen, 2008, p.39). The indirect form is explanatory but the direct form displays an intention and motivation which demands justification (Cohen, 2008, pp.65-66). If the kidnapper refuses to answer then he

does not consider himself to be accountable to, and so not in community with, the parents but if he does, the only answer can be that he deliberately caused that situation. Therefore, discredit may be attached to the kidnapper when uttering the argument in the interpersonal relation, even though its utterance in the impersonal form is, usually, an innocent one (Cohen, 2008, pp.39-40). And this discredit is that they demonstrate that they have caused the reprehensible situation to occur. The interpersonal justification shows them to be “awful” and “morally vile” and they should be “ashamed” to utter it (Cohen, 2008, p.40). Of course, they might not feel shame but then, if they do not, they must be sociopaths or egoists, and so, again, not in community with the parents, and nothing we could say to them would bring about their shame. Thus, the purpose, says Cohen, of the direct presentation of a justificatory argument is that it brings background conditions into view. In this case, the background conditions include that the kidnapper caused the situation to which their demands are presented. We see the vileness of the utterer’s intentions more clearly when they utter their demands and justifications to us directly, or are imagined as doing so.

Justificatory community obtains then when a *comprehensive* justification can be established between parties. Not only must the secondary action, ie. paying the ransom, be justifiable (in the sense of being in the second party’s interests), but so also must be the primary action, i.e. such as kidnapping the child, the reason why the secondary premise is made true. This is what it means for members of a community to each hold themselves accountable to each other, as we expect co-operating members of a democratic society to do. The kidnapper’s argument is therefore, Cohen, says, relevantly analogous to the incentives argument. The incentives argument, he says, expects us to treat it as though “no question arises about the justification of the behaviour of the talented rich [...] what we are offered may be a justification but it is not a comprehensive justification of the incentives policy” (Cohen, 2008, p.42). Therefore, to show that one is in community with others, any notification, threat, warning that one will act in a certain way must pass the interpersonal test for revealing a comprehensive justification and thus a relation of community. I presume that the test can work both as an imagined exchange or an actual exchange. Cohen explicitly states that we should “imagine” the exchange but might do so only because he thinks that it should not be invalidated by an inability to actually present the justification demand. Clearly, the requirement that the demand for justification be presented directly will be impractical in nearly all cases. But the point is that, Cohen “proposes - perfectly correctly - that a given policy or action is justified only if the principles that justify it could be employed by anyone in relation to anyone, impersonally” (Narveson, 2010, p.281).

Now, Cohen takes the *content* of the incentives argument to be false, that he “doubts that the difference principle justifies any significant inequality, in an unqualified way” (Cohen, 2008,

p.33). This is because, if the difference principle prohibits acts which harm the less well off, it is difficult to locate any inequalities that do not harm the least well off, as all social inequalities appear to benefit those at the bottom when we accept a background of unequal structures and inequality-affirming beliefs which no one who endorses the difference principle ought to accept (Cohen, 2008, p.33). In other words there is an inconsistency between the incentives argument, which permits inequality-producing pecuniary benefits and the difference principle which prohibits inequalities that harm the worst off. The latter is demonstrated by the talented rich: in claiming that they require greater rewards which will also benefit the untalented poor, they have chosen to act in a way that *harms* the badly off by stating they will work less hard without higher rewards, such as would be received by the lowering of income tax rates. This is an example of the “real political use of the incentives argument” Cohen has in mind, that the rich will claim that they will not work as hard and so less benefit others unless they are paid more (by lowering or not raising taxes). Thus, even if their immediate actions do benefit the badly off (in the sense that there will be an improvement in their situation from what it would be when they work less hard), and the badly off might also accept this to be the case, the well-off do so only against a prior background of income inequality that is not of benefit to the worst off. In other words, the poor might accept a situation in which they will be made better off by the efforts of the talented, and may believe it to be in their interests, but the proposal is only persuasive because of present or historical conditions which force prior burden upon them. Therefore, it might well be justified for the untalented poor to accept the incentives argument because for them it is an objective fact that the talented will not work as hard if pay is reduced. However, it cannot also be a justification for the talented as the fact of them reducing their toil is, for them, subjective - they can choose to do otherwise (Cohen, 2008, p.60).

But the application of the interpersonal test to the argument’s utterance is not intended to show that the content of the incentives argument is false (Cohen, 2008, p.35), rather it is intended to show that the utterer is being unreasonable and is not in community with those who demand a justification. The utterer fails the test of justificatory community and therefore does not think of themselves as sharing a common life with the requestors of the justification. Because the character of the argument changes relative to its utterer, the utterer ought to be ashamed to utter it and the recipient of the justification is more likely to perceive its unreasonableness, and so its un-persuasiveness, when uttered directly. And from this perception of the argument’s unreasonableness, one also perceives the utterer to be out of community with the recipient. The incentives argument, Cohen says, may sound reasonable when presented impersonally, the form in which it is usually presented (and in which we might think of Rawls as presenting it), but does not sound so reasonable, and so less persuasive, when a talented rich person presents it directly, or interpersonally, to the poor (Cohen, 2008, p.35). Unfortunately, “in its

standard presentation, the incentives argument is put forward as though it is irrelevant to its assessment whether the rich are justified in making its minor premise [that they refuse to work as hard for less reward] true, and as though it would be inappropriate to put that question to them” (Cohen, 2008, pp.54-55). But if we do put it to them, or we imagine we do, then background conditions come more clearly into view, such as the conditions of equality and accountability, (Cohen, 2008, p.47) and we will, Cohen says, more clearly see both that the content of the argument, its minor (factual) premise, is false and the vileness of the utterer. The rich are in fact perfectly *able* to work as hard without greater rewards and if they do not work as hard then this must be because they are rather not *willing* to. And this means the incentives argument cannot be comprehensively justified. The rich justify their incentive demands by saying that it will benefit the poor but if they are not willing to work as hard for less reward then their actions *do not* benefit the poor. If they were willing to work as hard without incentives, there would be greater resources available to redistribute to the poor. If they say they cannot do anything about the factual premise, then they alienate themselves from their own agency (Cohen, 2008, p.66), for they *can* choose to work as hard for less reward.

We might be wondering, because the interpersonal test is a test for the *persuasiveness* of a justification, whether the truth of the justification is also a condition of passing the test. It is not at all clear, from his exposition, whether it is, but Joshua Cohen, whose work GA Cohen was familiar with, might be able to enlighten us here. J Cohen states that “Rawls embraces the deliberative conception of democratic politics while also accepting that, even under the best circumstances we can reasonably hope for, members of a democratic society will disagree with one another about what justice requires” (Cohen J, 2003, p.103). This might indicate that the point of the interpersonal test is not to reveal a truth about the (in)justice of a situation, but rather to indicate that, even when there is no widespread agreement upon what justice is, as we would expect when we acknowledge the fact of value pluralism, the incentives argument ought to fail. This certainly makes some sense, as GA Cohen’s critique is intended as an internal one and Rawls does acknowledge this fact.

But if this indeed how Cohen understood the interpersonal test, as independent of the content of the argument, this does not seem right to me, at least not in the incentives case. As an argument for incentives, the incentives argument fails because the rich cause the unjust background conditions against which their justification is made. Thus, although we are asked specifically to consider the direct presentation of the argument, I agree with Lippert-Rasmussen who states that the incentives argument fails as an argument *whoever* utters the argument because the argument’s content is unsound (because the utterer creates the unjust situation being justified) (Lippert-Rasmussen, 2009, p.70). Cohen’s first objection to

incentives therefore contains two arguments. The first is an argument from justice, that the incentive-seeking talented cause the less talented to be worse off than they would be without incentives. This cannot be justified at the bar of justice. The second is the argument from community, that the incentive-seeking talented are out of community with the less talented. The first may be made independently of the second. But the second cannot be made independently of the first, at least certainly in the incentives case, as it is a necessary condition of the community test that the first argument is valid. Thus, if the interpersonal test is indeed intended to be independent of the justice argument, as the previous paragraph suggested, it fails, at least in the incentives case.

Cohen's objection is not here to the difference principle but to the incentives argument which the difference principle, in its Rawlsian form, permits. Cohen says that a society in which the talented are able but not *willing* to work as hard, and so permits incentives, is one that implements a "lax" reading of the difference principle. The "lax" reading is therefore intention-independent as incentives are permitted irrespective of the intentions of the talented. Cohen therefore equates the Rawlsian difference principle with this lax form. Economic justice, says Cohen, requires a "strict" reading of the principle in which incentives are permitted only when the talented are *unable* to work as hard as the untalented for equal remuneration (Cohen, 2008, p.68). This reading therefore is intention-relative - only those who are willing but unable without incentives to work as hard may receive incentives. The distinction speaks to the question about what counts as a necessary incentive "and thus allows two interpretations of the principle, a lax reading, which allows inequalities that are necessary intention-relatively, and a strict reading that allows only inequalities that are necessary intention-independently, that is, those that are, strictly necessary" (Smith, 1998, p.207).

There is thus some incoherence in a well-ordered Rawlsian society between affirmation of the difference principle and the incentive-seeking talented who are not fully motivated by it. Another way of putting it is, if the talented are unwilling to work as hard then the difference principle may well appear, or even be, justified but it is not justified at the bar of justice. It is not a *basic* principle of justice, and, if it is a principle of justice, it is a primarily a principle for addressing *injustice* (Cohen, 2008, p.84-85). This is not to say that the difference principle is not a suitable or reasonable regulatory rule, but it is not one we should call a fundamental principle of justice.

3.1.2 Analysis of Cohen's Incentives and Community Objection

There are a number of missteps made in Cohen's objection to incentives which I will now address. Firstly, Cohen states that Rawls acknowledges that "“deep inequalities” are “inevitable in the basic structure of any society” (Cohen, 2008, p.129, n.27). This, says Cohen, demonstrates that Rawls accepts that unjust inequalities will arise in any basic structure and so justifies his claim, which will be the focus of the following chapter, that justice cannot be achieved by the basic structure alone.

To provide further context, Rawls says: “the institutions of society favour certain starting places over others. These are especially deep inequalities” (Rawls, 1999, p.7). These inequalities are “pervasive” and “effect men's [sic] initial chances in life” (Rawls, 1999, p.7). But “they cannot be justified by an appeal to the notions of merit or desert. It is these inequalities, presumably inevitable in the basic structure of any society, to which the principles of social justice must in the first instance apply” (Rawls, 1999, p.7). What Rawls really means by “deep” inequalities I am not quite sure but I am not as certain as Cohen appears to be that he means large economic inequalities. It could be that deep inequalities are those that are profound in the sense of not being at all trivial, it might be that they are complex and that addressing them is not at all simple, or it might be that they are deep in the sense of not being easily observable. Nevertheless, Rawls does accept that there will be inequalities. However, as we will see in the following paragraphs, there are good reasons, consistent with justice, as to why inequalities are inevitable. Moreover, Rawls does not simply want these inequalities of “starting position” to preclude justice as Cohen implies as it is the role of justice to respond to these inequalities, so that they are made compatible with social justice. Cohen also says that the only way Rawls can deal with these unequal starting positions is by becoming a “radical socialist” (Cohen, 2008, p.129, n.27), by which Cohen means extending justice to beyond the basic structure to also govern extra-legal choices, but as I will show in the next chapter, Rawls does extend justice beyond the basic structure. This is not to say that there are not liberalisms which might entail large unjust economic inequalities, but Rawls's is not one of them.

Cohen's critique of Rawls is intended as an internal critique. Therefore, Cohen must be objecting to the deployment of the incentives argument within a well-ordered Rawlsian society governed by Rawls's principles of justice. Let us then consider the objection that incentives cannot be comprehensively justified in a Rawlsian society. A problem for Cohen's objection is that a well-ordered society should not manifest the inequalities which exercises Cohen's concerns and which would constitute a background injustice. This is principally because Cohen appears to assume a distinct division of labour between each of Rawls's principles, that it is the difference principle only that governs economic distribution. But Rawls states that

“in regard to the second principle, the distribution of wealth and income [...is...] to be consistent with both the basic liberties and equality of opportunity” (Rawls, 1999, p.54) and that part of his project “is to see how the *two principles* [emphasis added] work out as a conception of political economy, that is, as standards by which to assess economic arrangements and policies, and their background institutions” (Rawls, 1999, p.228). In other words, when citizens consider economic policy, they are guided by each of the principles, the others taking priority over the difference principle, and thus the large inequalities with which Cohen claims to be concerned, being motivated by the concern that some have so much when many have so little, should not obtain because “the kinds of objectionable extortion-like cases that Cohen criticizes are likely to be relatively infrequent” (Mandle, 2009, p.196). The institutions which would be compatible with the full array of principles ought not to let these sorts of cases prevail.

I am not the first to point this out but it remains under-acknowledged more generally in the supporting literature. The objection here, that Cohen both overlooks the full compliment of principles and therefore also the institutions appropriate to those principles, was made by Smith and so I am generally in agreement with Smith on this point. Smith’s argument was that a Rawlsian society is consistent with Cohen’s egalitarian idealism and that the difference between them concerns the “means to its realisation” (Smith, 1998, p.205). Like Smith, I also object that “Cohen examines the difference principle in abstraction from the other principles in Rawls’s conception of justice” (Smith, 1998, p.217) and thus overlooks the role the other principles have over the distribution of income and wealth. However, I disagree with Smith that the *fundamental* difference between Rawls and Cohen are the institutions which would be convened to realise the egalitarian ideal, although I agree that this is indeed overlooked by Cohen. While Smith also, like myself, has much to say about how Rawlsian institutions should be considered egalitarian by Cohen’s standards, he does not, as I do, apply this to further objections made by Cohen, such as the objection to concerns of efficiency, his specific basic structure objection or his ethos stipulation. Furthermore, I do not argue that a Rawlsian society would be just by Cohen’s standards, only that it is much closer to equality than Cohen realises. Smith, also, is concerned only with distributions and does not address the matter of justice of individuals as I do, and which Cohen considers an essential element of justice. Smith and I are not alone in our understanding of Rawls’s institutions as very egalitarian. Others are also broadly of this view that Rawlsian institutions would constrain inequality, stating that incentives are just for compensating for education and training (Scanlon, 2006, pp.82-83) and that the exploitation of talents ought not arise (Mandle, 2009, p.196) but no-one has consistently applied this across each element of Cohen’s objection(s).

Let us first consider ownership of the means of production of which Rawls states, when he considers political economy, that there are only two just distributions. Firstly, the liberal socialist model in which “the means of production are owned by society” and, secondly, a property-owning democracy in which there is “widespread ownership of assets and human capital” (Rawls, 2001, pp.138-139). Which of these is most feasible or appropriate depends upon the specific history of the society to which the ownership of the means of production will be applied. As much inequality in actually existing societies is the outcome of its concentration, a fairer and more equitable distribution of capital ought to ensure that the gross inequalities which arise from its concentration are avoided. Additionally, if ownership is distributed more equitably, workers will be less dependent upon wage slavery as they will also benefit either directly from the ownership of capital or indirectly from its being held in common. One reason why only these two distributions of the means of production cohere with justice is because of the priority of the first principle which distributes the basic liberties. Basic liberties must be distributed equally and the concentration of capital greatly prejudices their distribution. For instances, as should be obvious to anyone living in the UK, those who own the means of production have greater political influence than those who do not and this is undemocratic. Furthermore, Rawls stipulates a condition of strict equality of opportunity but capitalism is at odds with this stipulation. For instance, under capitalism, those with capital can choose between working, in the sense of selling their labour or profiting from the labour of others who sell their labour to them but this choice is denied to those without capital, the working classes. The uneven distribution of capital therefore provides greater access to liberties and opportunities to those with capital than those without. Capitalism, which concentrates capital in the hands of the few, therefore must be ruled out by justice as unfairness. Communism, on the other hand, usually utilising state-directed economies under which its subjects do not have the basic freedom to choose their occupation, must also be ruled out⁷.

Although “underappreciated” (O’Neill, 2012, p.75), there has been some literature on how Rawls perceived and justified ownership of the means of production. It is generally accepted that of the two distributions, Rawls’s view was that “welfare state capitalism was essentially unjust and should be replaced with property-owning democracy” (Chambers, 2012, p.17). This might initially seem “revolutionary” compared to present arrangements in many western liberal or social democracies but, according to Chambers, Rawls “implies that existing property relations and the distributions of wealth are out of line with political culture” (Chambers, 2012, p.22). There is, I think, something to this. If we do indeed have some fundamental commitment

⁷ It is often said that many critics read Rawls as endorsing a form of capitalism against which the difference principle is intended to restrain its worst effects. See for instance Holt who attributes the following to Rawls: “Capitalism will limit inequality and exploitation if the difference principle and other just institutions are in place” (Holt, 2011, p.253). I do not agree with this reading of Rawls as endorsing a regulated capitalism.

to both liberty and equality, welfare state capitalism is indeed, I believe, out of step with those beliefs. However, while it is often said, as Chambers does, that Rawls expressed a preference for property-owning democracy over a liberal socialism, I do not read this preference in Rawls. The reason that this preference is often assumed is because Rawls spends far more time considering the former over the latter, but he clearly states that both are just.

This disparity of attention might be because, at the time of his writing, Rawls was interested in the work of the British economist James Meade on property-owning democracy as an alternative to both capitalism and socialism. The idea of property-owning democracy therefore does not find its origin in Rawls. But, according to Jackson, its genesis is not to be found in Meade either, but rather in both “commercial republican thinking in the late eighteenth and nineteenth centuries and in the mid-twentieth-century high tide of the socialist critique of capitalism” (Jackson, 2012, p.33). Jackson states that Rawls departs from Meade by stipulating a choice between property-owning democracy and liberal socialism as Meade “advocated both” (Jackson, 2012, p.48). Jackson therefore disagrees with Chambers that Rawls preferred property-owning democracy over liberal socialism. However, I cannot find this “stark choice” in Rawls who sees both property-owning democracy and socialism as accommodating both privately and publicly owned firms, the difference between the two being a matter of degree between each form of ownership (Rawls, 1999, p.235). Thus it seems that any just economy will have elements of both and therefore he does not depart from Meade on this matter, as Jackson claims.

O’Neill, however, argues that the “best reasons for supporting a property-owning democracy are connected to the difference principle” and states his disagreement with Freeman who considers the best reasons to be connected to “securing the fair value of the political liberties, and on securing fair equality of opportunity” (O’Neill, 2012, p.93). While there is disagreement between O’Neill and Freeman, my point however is a much simpler one. My point is that Cohen just overlooks the roles of the other principles, which both O’Neill and Freeman both acknowledge as connected to some degree to the case for a property-owning democracy and also the, admittedly mostly clarified later, assertion by Rawls in favour of widely dispersed ownership of the productive means. But, as might be obvious from preceding paragraphs, I am closer to Freeman here. It is the other principles which do the most work here.

There are also other consequences for the distribution of income and wealth when we take account of the other principles. For instance, the principle of fair opportunity, which also takes priority over the difference principle, means that all get the opportunity to develop their skills and talents and so, when there is a greater supply of diverse talent, the talented could not utilise the bargaining power that obtains when situated within a workforce where less

developed skills and talents have greater prevalence (Rawls, 2008, p.67). The thinking here, therefore, is that one of the causes of inequality is unequal opportunity to develop natural abilities. For instance, in a society where only the wealthy can buy the superior education to develop those skills which are in greater demand, the supply of those with these in-demand developed talents will be constrained and so increase the pay of those who have had the opportunity to develop them. This is a basic principle of economics, that demand and supply determine wages and one therefore presumes that this is one of the “facts” of economics that the parties in the original position would, or ought to, be aware of.

Rawls also says that, although he considers it not ideal, progressive taxation may be deployed to deal with “accumulations of wealth that are judged to be inimical to background justice” (Rawls, 2008, p.161). As the tax system ought to be able to regulate large inequalities in wages then it can be implemented to redistribute incomes which arise from exceptional talents, those which we might call, following Nozick, Walt Chamberlain talents (or perhaps Lionel Messi talents to be more contemporary). Those with exceptional talents can indeed, as Cohen points out, threaten to go elsewhere if they are forced to redistribute their income in this way. But Rawls’s theory of justice is intended to be a closed system and this option would not be available. Furthermore, individuals who accept justice ought also support such redistributive schemes. This is because just institutions do not only shape the distribution of wealth; the background institutions of the basic structure shape the sort of person citizens become. Thus individuals who recognise their talents to be arbitrary and view fellow citizens non-instrumentally would not make unreasonable remunerative demands (Rawls, 2008, pp.196-197). They do not always have perfect access to wage data to judge their pay against others, but the idea is that social institutions will be better able to do this on their behalf. It is not the case that citizens follow the letter of the law and then ignore the spirit of the law when they are able to, as Cohen claims. As we will see in Chapter 5, when we consider the need for ethos, the claim by Cohen that citizens do not accept justice but rather just follow the law is not supported by Rawls's text.

I have argued that Rawlsian economic institutions will be far more egalitarian than Cohen realised. However, what about Rawls’s claim that inequalities are “inevitable”? Let us first take a look at those which, I argue, Cohen ought not object to before moving on to those that he would object to. Firstly, there are good reasons, of justice, as to why inequalities will be inevitable. Because of the priority of liberty, citizens are free to decide whether they wish to develop their talents or not, or whether to develop one talent rather than another. Even in a system with perfectly fair equality of opportunity, some will develop skills that are perhaps not their best natural abilities, perhaps because they enjoy their deployment more. Say therefore that I decide that I want to be a poet and I set about developing my poetry writing skills even

though I am well aware that I have a greater natural ability for medicine. Not many people like my poetry and therefore I earn less than I would have if I had taken up medicine, which I would have been very good at, but I earn enough to get by and I am happy because I love being a poet. Due to this freedom of occupational choice, I am relatively less well off than those who have developed the natural abilities they are best at, such as perhaps someone with the same natural abilities to me who develops, more prudentially, their talent for medicine rather than poetry. Should the basic structure redistribute income to equality in such a case? Not if, we think that workers should be paid relative to their productivity or their usefulness, as Cohen does, for, as a poet, I am not greatly productive or useful. Furthermore, I have freely made the choice to pursue poetry, and thus distributing income to equality is also not justified if we consider, as Cohen does, that income should reflect free choices. It is therefore not simply bad brute luck that I am less productive or useful and that I am relatively poorer as a result. However, there is some tension here within Cohen's critique, for he would say that there remains some unjust inequality here, for I have not acted justly in choosing poetry over medicine. This choice would be an injustice, says Cohen, because of my reneging upon a moral obligation to maximally contribute to the good of society by writing bad poetry rather than becoming a doctor. However, I will argue in sections 2 and 3 of this chapter that, while Cohen would still perceive an injustice here, he is wrong to do so.

There will therefore be inevitable just, by Rawlsian standards anyway, inequalities. But say I now have children. Deep inequalities should not have a profound influence over how their lives go. They should also benefit from equal basic liberties and opportunities to develop their talents and to contribute to the common good. Thus the "inevitable" inequalities which determine their starting position must be regulated by justice so that their effects can be said to be fair and just and equal. As I have stated above, the inequalities that arise between bad poets and good doctors have arisen when conditions of background justice have been met and are the outcome of free choices made by the poet and the doctor. Nobody has caused another to be poor and so incentives can indeed be comprehensively justified. These inequalities, the outcome of our choices, cannot, however, prejudice how the lives of my children go as they did not arise from their choices. Thus the basic structure must regulate against those inequalities being too damaging. It can attempt to do this by equality of access to education. However, there will certainly remain, as Rawls states, some inevitable inequalities in the starting position of our children. For instance, parents, if they are good parents, will inevitable and understandably want to contribute to their children's education. In fact we might think it an injustice if they did not. My children therefore might be relatively disadvantaged if I am only able to teach them how to write bad poetry rather than teaching them how to do something I would have been good at if I had chosen instead to develop other

natural abilities. This is a disadvantage which the basic structure can address to some degree by its educational institutions but can never fully compensate for. Adults must be free to educate their children if they so wish. Again, Cohen would probably not be happy with this but it is unrealistically utopian to think that full compensation for this unfairness is feasible.

The question seems to remain then as to why incentives are permitted by Rawls. This is not a misunderstanding of Cohen's as Rawls explicitly does allow for incentives (Rawls, 1999, p.68). However, Cohen does miss the nuances in Rawls's support for incentives. Rawls explicitly states that inequality-producing incentives are permitted to encourage citizens to best develop their talents by training and education, and to encourage those with the appropriate skills to take on positions with greater responsibility. This point has been raised a number of times in the supporting literature. For instance, Scanlon reminds us, "the idea of reward according to effort has a role in a society governed by Rawls's difference principle in the form of the argument that extra compensation should be offered to defray costs of training and to compensate people for performing particularly onerous and unpleasant tasks" (Scanlon, 2006, pp.82-83).

Thus, one reason for incentives would be the opportunity cost of training, this being one's earnings when entering the job market earlier albeit with less developed skills. Cohen, I think, should probably judge this to fair: compensating for the opportunity cost of training and education would not result in an unjust inequality. Furthermore, if income should reflect effort, as Cohen says it should, training and developing one's natural talents does indeed require effort. Additionally, training and education can often be onerous and so some financial encouragement might be useful in encouraging citizens' undertaking. This, I believe, ought to count as an inability rather than unwillingness to labour and so count as necessary by Cohen's standards. There is also usually some risk involved in additional training and, as risks can be onerous in various ways, Cohen should agree that such welfare deficits would be due compensation.

Thus, inevitable inequalities ought to reflect effort. Take for instance, Anna, who studies hard and develops her natural abilities into productive and useful skills that benefit society, and Bill, who would prefer not to study and therefore does not develop his natural abilities which, while useful, are not as useful as they might have been if he had put the effort into studying. Should Anna not be rewarded for her efforts? If her developed skills are more useful and beneficial to society than her undeveloped natural talents, are her additional rewards not incentives for developing them? Cohen, in fact, acknowledges, that efforts are what we ought to reward (Cohen, 2008, p.100), providing of course those additional rewards are reasonable. It is not, in this case, simply luck that Anna is more productive than Bill.

A further reason why incentives are endorsed is to encourage entrepreneurship. Say for instance, Smith Ltd have a monopoly on making and selling vacuum cleaners and sell them for £100 each. Jones has an idea about how to make vacuum cleaners more efficiently and therefore could sell them for £90. Incentivising Jones into establishing Jones Vacuum Cleaners Ltd and taking on greater responsibility than he would if he became a painter and decorator, something else he is also good at and which, having less responsibility, would be more enjoyable for him, would lead to a more efficient society. Additionally, developing this efficiency might take him five years and if he could have been earning a wage as a painter and decorator during that time, he might have been better off doing that instead. If he is incentivized into vacuum cleaner production, people would get more than they did previously when Smith Ltd had a monopoly on the vacuum cleaner market. As justice concerns what people are due then it seems reasonable that justice ought to encourage an efficiency which has the outcome that people get cheaper goods because, if goods are cheaper, they get more of them. A *reasonable* incentive therefore in increased expectations to Jones would be justified in that people get more material goods in exchange for their efforts and that Jones has exerted greater efforts and taken on greater responsibility. Incentives rewards to Jones would not, however, be justified if Jones's efficiency was achieved by reducing wages for his workers to lower than that which Smith's workers earn, but as ownership of the means of production is democratized, as we have seen, we would think that it should not be.

There is another reason why inequalities are permitted by justice and so are inevitable. This is that everyone has a right to pursuing some reasonable self-interest which should not count as selfishness. Say, for instance, I enjoy following my local football team. On my present salary I am able to attend each home game but with a greater salary I can attend away games also. It would not be unreasonable therefore to seek a greater salary to indulge my interests and I might achieve this by working extra hours. On the other hand, my sister has a much less expensive hobby, she enjoys running, which is a far less costly interest, and so is in need of less income than myself. She therefore can work part-time and between us some inequality opens up. But there does not seem to be anything unjust about this inequality, being generated by choices we each make. This right to some reasonable self-interest ought to be guaranteed by a society which prioritises individual liberty as Rawls's does. I am incentivised to work harder than my sister because my idea of the good, following my football team, is more expensive. If it were not, I might work less and contribute less to the common good (presuming my occupation does contribute to the general good, of course).

Cohen explicitly supports such a justification for inequality, contending that justice must also incorporate what he calls a "personal prerogative" which expresses the following principle:

“every person has a right to pursue self-interest to some reasonable extent” (Cohen, 2008, p.63). Precisely to what extent is reasonable and how much inequality it would licence is not laid out but it would certainly rule out the massive inequalities in wealth which we see in many societies, for vast wealth is not a necessary condition for the pursuit of *reasonable* self-interest. My example in the previous paragraph does not seem unreasonable for instance. Furthermore, Rawls appears to rule out large prerogative relative inequalities when he states that a feature of the conditions of uncertainty, as prevails in the original position, is that each party possesses a personal conception of the good which would be satisfied by the minimum achieved under the maximin rule and so cares little about gaining more.

Estlund contributes to the prerogative debate and states that “there is a wide variety of non-tainting but potentially inegalitarian motives available to citizens in a society well ordered by Rawls’s principles of justice” (Estlund, 1998, p.101). Anderson agrees that: “[t]he talented, no less than anyone else, are entitled to give their personal preferences some weight in deciding what to do”, but adds that, contra Cohen, “[t]his is a matter of justice, not merely a personal prerogative that compromises justice” (Anderson, 2015, p.32). I generally agree with this point, and so disagree with Cohen, that prerogatives are part of justice and not compromises with justice.

Tan states that, while the point of incentives is to entice individuals with a plurality of ends into useful roles, that they also permit some behaviour they are not intended for, such as some selfish market-maximising, is not a reason to dispose of them (Tan, 2012, pp.60-61). Furthermore, Cohen, says Tan, underestimates the fact of value pluralism, and so, under this justification, an acquisitive market-maximising doctor could claim that their acquisitiveness is “her rational conception of the good” (Tan, 2012, p.62). Freeman agrees that there is therefore “no way to prevent this [acquisitiveness] compatible with maintaining individual’s freedom” (Freeman, 2006, pp.140-141). However, as should be clear by now, I disagree that Rawlsian citizens would have such an idea of the good or that any selfish market-maximising would be permitted.

Taking all of this subsection into account, the outcome of incentives in a Rawlsian society should be a distribution of wealth and income which should not be considered unjust. It appears that there is much that Cohen overlooks in Rawls, primarily because he sets aside the other principles of justice and the economic institutions Rawls would endorse. If his is to be considered an internal critique, Cohen should have better accounted for Rawls’s justifications for incentives. If he had done so, he might have seen that a Rawlsian society would be far more egalitarian than Cohen believes. Large inequalities should not arise and inequalities that do appear should be largely due to free choice, such as the choice to exert

one's efforts, rather than good fortune. Thus, incentives ought not conflict with background justice and can be comprehensively justified. Some residual inequalities will likely remain that Cohen would consider unjust but I believe, and I will provide further arguments for this in the following sections of this chapter, that Cohen is wrong about this.

Now we have seen that the demand for incentives can be comprehensively justified in a well-ordered Rawlsian society, the plausibility of the interpersonal test for justificatory community when applied to the incentives argument looks dubious. While I agree with Vrousalis who says that Cohen's account of community has been "neglected" (Vrousalis, 2015, p.99), I also agree with Olsaretti who states that Cohen's principle of community is "not fully worked out" and so "needs further refinement" (Olsaretti, 2015, p.269). The element of community Cohen calls justificatory community and his Cohen's interpersonal test for justificatory community has certainly received little attention in the secondary literature. I find the interpersonal test to be a very intriguing and intuitive idea that warrants further study. However, I do not think its application to the incentives argument produces the result Cohen believes it will.

In his initial discussion of the interpersonal test, Cohen suggests that fraternity is a condition of the interpersonal test. However, this is not the case. Rather he uses fraternity in an example about how an "argument's persuasive value can be speaker-audience-relative" (Cohen, 2008, p.36). Certain arguments, if deployed in specific ways, might invoke feelings of fraternity by which we judge an argument's persuasiveness. However, fraternity does not seem to be a necessary condition of justificatory community and certainly this seems sensible when we consider that fraternity should not be expected across a political society in which the majority of citizens are strangers to each other. While Cohen does state that there are forms of community which are like friendship (Cohen, 2008, p.43), it does not seem to be the case that the element of community termed justificatory community requires fraternity, even if it is a necessary condition of community tout court. Rather, community is "a set of people among whom there prevails a norm (which is not always satisfied) of comprehensive justification [...and...] it follows that an argument for a policy satisfies the requirement of justificatory community, with respect to the people it mentions, only if it passes the interpersonal test" (Cohen, 2008, pp.43-44). The idea is that there prevails a norm in a democratic society that we make policy together (Cohen, 2008, p.45). However, Cohen then says that "[i]t is often said that it is unrealistic to expect a modern society to be a community, and it is no doubt inconceivable that there should be a standing disposition of warm mutual identification between any pair of citizens in a large and heterogeneous polity" (Cohen, 2008, p.45). What Cohen seems to be saying is that "warm mutual identification", a "soggy mega-Gemeinschaftlichkeit" (German for: social relations between individuals, based on close personal and family ties), is not what Rawls is claiming here. Rather Rawls is looking for a

basis upon which citizens, when fraternity is absent, are assigned a duty to make justifications to each other in the absence of close personal and family ties, what Rawls means by "a public basis in the light of which citizens can justify to one another their common institutions" (Rawls quoted in Cohen, 2008, p.45). That is indeed how I also understand Rawls.

The problem however with Cohen's account of justificatory community is he links it to the incentives problem, which, as we have seen, is in fact not a problem. The result that Cohen anticipates when the interpersonal test is applied to the incentives argument will not be forthcoming as there is no background injustice to be revealed. I therefore agree with Hodgson that Cohen's principle of community "seems intended to solve a problem that doesn't arise in the Rawlsian framework" as "the wide disparities in living standards that Cohen worries about are ruled out" (Hodgson, 2018, p.28). The talented incentive seeker ought not feel shame when incentives are constrained by the appropriate institutions and those directly presenting the incentives argument therefore will not be shown by the test to be outside of the justificatory community by offering the argument as a justification. As is made clearer in Cohen's subsequent publication, *Why Not Socialism?*, "the community principle constrains the operation of the egalitarian principle by forbidding inequalities that the egalitarian principle permits" (Cohen, 2009, p.12). In other words, a purpose of community is to restrain inequalities which are just because they are the outcome of one's choices. If the purpose of invoking the need for justificatory community in his Rawlsian critique is also intended to serve this purpose then there is no need for it.

Furthermore, I am sceptical that if unjust inequalities did arise from incentives, such as they might in an unjust society like our own (and so now turning to non-ideal theory), that its persuasiveness is indeed speaker-audience-relative. It is not at all clear to me why a direct second person utterance of the argument reveals its unreasonableness when a third person utterance does not. The interpersonal test is therefore entirely irrelevant to whether we accept the incentives argument or not. If I think someone's demands for higher wages are unjustified, I can identify this from a mediated expression of the argument just as plausibly as from a direct expression. It is therefore not at all apparent what the interpersonal test adds to Cohen's objection from justice. Here, therefore, I agree with Lippert-Rasmussen that the argument's "unsoundness does not depend on the dialogical setting of the argument" (Lippert-Rasmussen, 2009, p.437). Cohen might respond that the interpersonal test is not intended as applying to the soundness of its argument (the argument's content) but how the utterer views their relation to those it is offered to. But, again, I am not at all clear why the latter would be deduced from the direct presentation of the argument only.

I am not saying here that Cohen's interpersonal test is not at all insightful. I do in fact agree that we ought to consider who presents justifications to whom when considering their acceptability and this might be for reasons other than, or additional to, the soundness of the argument's content. But Cohen here appears to be straying into the matter of public reason and Rawls states that not only do the parties to the original position negotiate principles of justice but also principles of public reason, the rules by which we justify our actions to each other. There is therefore a "duty of civility", which states that citizens should "be able to explain to one another [...] how the principles and policies they advocate and vote for can be supported by the political values of public reason" (Rawls, 2005, p.217) It is therefore a serious oversight of Cohen's that he does not engage with the literature on public reason when articulating his community objection because it seems that a refusal to offer a justification directly might renege upon this duty. However, Rawls does identify three problems of public reason (Rawls, 2005, pp.240-247) without acknowledging that, certainly in a society that is not well-ordered and so again here doing non-ideal theory, that what seems reasonable does, I believe, depend upon who offers the justification to whom.

3.2 Pareto Efficiency and Welfare as Desideratum

Cohen next turns to another argument put forward by Rawlsians and it is the "Pareto Argument". The argument is that, as we saw in the previous chapter, the difference principle is derived from justice's ordering of Pareto-superior distributions and it is presented, says Cohen, as the answer to a dilemma, this being that, according to Rawls, we cannot have both equality and Pareto efficiency and so an inequality-producing compromise must be made between the two values. Incentives encourage producers to be more efficient but incentives produce unjust inequalities. The Pareto argument therefore extends Cohen's concerns about incentives being necessary to implement the difference principle. Now the objection is, more specifically, to the Rawlsian argument that incentives are necessary for Pareto efficiency. But Cohen wants to demonstrate that there is in fact another solution to this dilemma, the reconciling of efficiency and equality, other than equality compromising pecuniary incentives, that the two values, equality and Pareto, are compatible without incentive rewards. Let us now take a look at how Cohen frames the argument and sets out his objection.

3.2.1 The Pareto argument and Cohen's objection

The Pareto argument is in fact not strictly Rawls's but Barry's reconstruction of Rawls and it is a two-stage argument. The first stage moves from equal opportunity to equality and "establishes equality as the only prima facie just basis of distribution" (Cohen, 2008, p.87), while the second contractualist stage moves from equality to the difference principle and is an "argument for a move from an equal distribution to a[n unequal] distribution governed by the difference principle" (Barry quoted in Cohen, 2008, p.87), a Pareto-superior distribution in which everyone is better off, or at least some are better off but nobody is worse off, than in the previous stage. It is not, says Cohen, Rawls's "official argument" for the difference principle because it does not include the original position device but it does possess the Rawlsian aim of reconciling inequalities with justice (Cohen, 2008, p.88). Cohen's problem with the two-stage argument is that the second move of the argument betrays the rationale of the first move. Firstly, the justification for equality in the initial stage is that it must abstract from morally arbitrary causes of inequality, such as one's economic class, in the starting position but the move to the second stage relies upon a re-introduction of talent which the first stage slated as morally irrelevant. It is crucial that this argument applies only to what Cohen calls the "standard case" in which the work of the talented is not obviously more hazardous than that of the untalented and is in fact usually more pleasant than the work of the less talented (Cohen, 2008, p.103). If this was not the case, this would justify, by the principle of equality, a greater allocation of primary goods to compensate for the welfare deficit incurred by such hazardous and unpleasant work.

The second inconsistency concerns this congeniality of the work experience, an element of welfare, which is inconsistently applied across the two stages. There is reason, says Cohen, to think that Rawls might be unaware that work congeniality (or labour burden as Cohen calls it) is applied to the first stage and not the second. The reason, says Cohen, Rawls provides for the abstraction of talent from the argument for the difference principle, that it is morally arbitrary, is that the talented already benefit from being talented. This is drawn from Rawls's disallowance of *further* benefits, meaning a greater allocation of primary goods, to the talented (Cohen, 2008, p.97). Thus, if a greater allocation of primary goods indicates further benefits, then we might ask what the initial benefit is to the talented in the initial situation. Cohen says Rawls is not clear on this but it cannot be that they receive additional social primary goods because these are distributed equally at this initial stage (Cohen, 2008, p.107). Cohen therefore speculates, drawing from Rawls's thoughts on the Aristotelian Principle (see Chapter 1), that the sort of work the talented do is more rewarding than that endured by the untalented and, if he is right, the talented therefore attain superior welfare by exercising their talents

(Cohen, 2008, p.107). If this is right, equality is therefore not achieved in the initial situation when, as Rawls claims, primary goods are distributed equally because the talented also have opportunity for greater welfare benefit, from their more rewarding work experience, which the untalented do not have access to. Cohen calls this component of the welfare metric “labour burden” and thinks it absurd to exclude, as Rawls claims to, welfare components from the distributive metric.

However, Cohen says that if he is wrong about labour burden (or benefit) being the source of the talented’s natural fortune, there remains an inconsistency between the two stages. This time, *when welfare is excluded* from the initial stage, the Pareto-superior inequality that is permitted by the difference principle is not justified, for there is also the option of a Pareto-superior distribution in which rewards are shared equally (Cohen, 2008, p.108). This is the same option that was also offered as an alternative to the incentives argument in the previous section.

Thus, Cohen says that the “Pareto argument” is presented as a compromise between equality and Pareto efficiency. We cannot have both and the argument states that to benefit the least advantaged requires a move to an unequalising position. But, says Cohen, there is in fact a way of reconciling the two values. Recall from the incentives argument that the talented make the situation true that they are unwilling to be as productive unless they receive greater rewards than the untalented and so this fact permits a move from equality which the untalented would accept as they would be made better off. However, there is, says Cohen, an option which both retains equality and is Pareto-superior. This is a situation where, because the talented remove the fact of being unwilling to work as hard without greater remunerations, the rewards generated by the superior productive abilities of the talented are re-distributed so that everyone then receives a greater but equal allocation (Cohen, 2008, p.100). This is morally acceptable because, while the talented work hard and are more productive, they work no harder than the untalented or endure no inferior labour burden, greater efforts and increased burden both being criteria which permit unequal income (Rawls, 2008, p.181). Rather, the talented, when affirming the principle of equality, because they have superior productive abilities, produce more and share the benefits equally with everyone else. This, says Cohen reconciles the dilemma: both Pareto efficiency and equality can be attained.

3.2.2 Analysis of the Pareto Objection

Cohen's objection to the Pareto argument continues his objection to the Rawlsian claim, to which his objection to the incentives argument is also directed, that "unequalizing incentive payments to productive people are necessary to make the worst off better off" (Cohen, 2008, p.19). Here, the objection remains that it is the talented who make the need for inequality-producing incentives true when they can choose to do otherwise and what they can instead choose to do is to work to produce a Pareto-superior equality rather than a Pareto-superior inequality if they are properly motivated to act justly. The answer to the dilemma therefore is that justice demands that the talented work to maximal efficiency because it is the right thing to do, not because they are rewarded for doing so. We can then have both equality and Pareto rather than a Pareto-compromised inequality.

This objection to Pareto therefore incorporates some of the elements of the incentives objection, but while there is some overlap, the incentives objection does not address the Rawlsian condition of Pareto efficiency. The incentives argument says that incentives to some are necessary to maximally benefit others. Cohen objects that this is not so – the talented can choose to do so without economic benefits and he also adds that incentives conflict with another political value, community. His anticipated response from the Rawlsians to that objection is that, if his objections to the incentives argument stand (and I have argued they do not), then there remains the problem of efficiency. The Pareto argument says that economic incentives are necessary for efficiency, and therefore we cannot have both efficiency and equality, but Cohen says that we can by replacing economic incentives with moral imperatives.

Cohen's objection to the incentives argument retains his concerns about incentives which I rejected in the previous section. There I argued that Rawls does not allow any unjust inequalities by Cohen's standards. I need not repeat these points here, for I do not find anything in the Pareto objection that would cause me to reconsider my previous response. But the first part of Cohen's objection to Pareto that I want to engage with here is Cohen's statement that the Pareto argument is not Rawls's official argument as it does not involve the original position. Because it is not, it is said, presented as part of the original position procedure, it is therefore referred to by Cohen as an "intuitive" argument. But this is not quite right, although the mistake is understandable considering Rawls's odd ordering of his arguments. While Cohen is right that the explanation of the difference principle as a just form of Pareto efficiency is not presented in the section titled "The Original Position" in *A Theory of Justice*, the argument in favour of it, as we saw in the previous chapter, is indeed that it would be chosen in the original position. The, so-called, "intuitive" argument, says Rawls, explains the

conception of the difference principle, to “prepare the way for the favoured interpretation of the two principles so that these criteria, especially the second one, will not strike the reader as extreme” (Rawls, 1999, p.65). But, he adds, “in contract theory all arguments, strictly speaking, are to be made in terms of what it would be rational to agree to in the original position” (Rawls, 1999, p.65). My understanding is that, by explaining the conception of the difference principle, he is putting forward arguments for why it ought to count as a considered judgement but considered judgements about justice are justified by their being chosen over other considered judgements in the original position.

As we saw in the previous chapter, the reason that the difference principle is chosen in the difference principle over utilitarianism is because of maximin and over mixed conceptions because of reciprocity. What Cohen calls the “intuitive” argument is Rawls showing how efficiency can be accounted for by justice, for it is assumed that, as part of distributive justice concerns the distribution of income and wealth, we must consider efficiency concerns. Cohen, however, seems to think that efficiency should not be a concern of justice but I find this difficult to agree with. Assuming we all want more primary goods, we ought to employ the most efficient processes for their production if we want to fulfil that aim. Additionally, the more efficient method might also require less labouring and so provide more leisure time, something it is also assumed people want more of. Justice, in the Aristotelian sense that Cohen understands it, is what people are due but what people are due cannot be divorced from what people get, and what people get, certainly in the matter of the distribution of material goods, cannot be divorced from what is produced. Thus, I find it unconvincing that concerns of efficiency should not be a consideration of justice, particularly economic justice. Here I appear to disagree with those of Cohen’s interlocutors who consider efficiency to be external to justice. For instance, Shaw, like Cohen, considers the application of Pareto to be a “compromise” with justice (Shaw, 1999, p.368), or Furandal who says that, as Cohen cannot say why justice should prefer an equality in which all are well-off to an equality in which all are badly off, he must add another principle to endorse the former. Furandal opts for a principle of “human flourishing” (Furandal, 2018, p.488) but I reject the need to add another principle as I believe that Pareto efficiency is an essential consideration of justice.

But while I have argued why efficiency must be accounted for, we have not quite arrived at the difference principle. When production is more efficient, there are more goods to be shared but we need to then make a further decision about who gets what. When production is efficient there are more primary goods to be shared but how do we get to the principle that the least advantaged receives a lesser, albeit maximal, allocation of goods, rather than, as Cohen would say, each gets an equal share (presuming they contribute equal effort)? It is worth

remembering here that the arguments that Rawls presents are not that Justice as Fairness is the perfect conception of justice but rather the best of our considered judgements about justice. As we have seen, the arguments presented are that Justice as Fairness would be preferred to utilitarianism on maximin criteria and that the difference principle is preferred to the principle of restricted utility on reciprocity criteria. Cohen does not address these preferences but rather argues that, in a further pair-wise comparison, his luck egalitarian principle would be chosen in preference of the difference principle. However, Rawls does also consider the “principle of redress”, “the principle that undeserved inequalities call for redress”, as the “single aim of the social order” and states that the principle of redress as a single principle of social justice should not qualify as a considered judgement about justice (Rawls, 1999, p.86). Thus, it is not put forward as an option in the original position. The principle of redress looks to be equivalent to Cohen’s luck egalitarian principle and, while justice, says Rawls, does recognise redress as a concern of social justice, it is not the only concern. Therefore, as a prima facie principle, it “is to be weighed against the principle to improve the average standard of life, or to advance the common good” (Rawls, 1999, p.86).

Rawls thus designates the difference principle as an attempt to reconcile a number of principles of justice, including the principle of redress. Cohen is right that Rawls agrees that rewarding the gifted for being gifted is giving to those who have. However, Rawls then adds, when contemplating redress, that “[t]he naturally advantaged are not to gain merely because they are more gifted, but only to cover the costs of training and education and for using their endowments which help the less fortunate as well” (Rawls, 1999, p.87). So here, when comparing Justice as Fairness to luck egalitarianism, Rawls restates that greater benefits to the naturally more talented are not merited simply because of those greater natural talents but by how they have developed them to the benefit of all. Thus, those who have developed their natural abilities get a bit more than those who have not as compensation for developing those natural talents, which we presume an efficient society has provided them with the opportunity to do. We then get a principle of economic distribution which reflects. The more talented therefore do not owe their greater share of the goods to the good luck of nature, but to their own choices and efforts.

We might now think that this does not quite get to the nub of Cohen’s objection. Those who have greater natural abilities are still benefiting from those talents, as one cannot develop natural abilities that one does not have. To be sure, the opportunity to develop natural talents does depend, to some degree, on the good luck of having them in the first place but, even if Cohen’s position on talents were conceptually, or philosophically, plausible, it would have unappealing consequences in practice. To fully compensate for the brute luck of natural talents

advocates giving greater attention to those with less favourable natural endowments and so a greater proportion of resources would need to be allocated to the education of those who are less intelligent than those who are more intelligent (Rawls, 1999, p.86). Doing so would be at odds with both the principle of liberty and equal opportunity, which both take priority, for it would provide the less naturally endowed with more opportunity to develop their talents. Not only does this seem unfair but it would also be inefficient to give less training to those who might contribute more greatly to the common good. Both its unfairness and its inefficiency would be a matter of justice and thus the principle of redress is unjust. Furthermore, I imagine a policy which provided greater resources to those with lesser natural abilities might not pass one of Cohen's interpersonal tests. Imagine someone with lesser talents justifying that a greater share of resources should be administered to develop their talents rather than the talents of those with greater abilities (again, presuming this is a plausible way to conceive of variances in natural abilities). Would the recipient of this justification pass the requirement that the justification be comprehensively justified? The less talented do not cause the injustice against which the policy is offered. However, I do not think the recipient of the justification would be persuaded the utterer was in a justificatory community with them if the latter were denying the former the same opportunity to maximally develop their natural talents. Moreover, community aims at the common good and the recipient is unlikely to be persuaded that the policy would entail such an outcome. In other words, Cohen's luck egalitarian principle is unreasonable and I am, therefore, in some agreement here with Anderson who, as well as, like myself, rejecting Cohen's assertion that Pareto improvements are alien to justice, sees the fundamental disagreement between Cohen's "consequentialism" and Rawls's "contractualism" as a matter of unreasonable versus reasonable demands (Anderson, 2015, p.37). Thus, while I am not convinced that Cohen should be thought of as a consequentialist as he is not only concerned with the teleological pursuit of his ideal distribution, I do agree with Anderson's general point that his luck egalitarianism is unreasonable.

An oversight of Cohen's then is that he does not connect what he calls the "intuitive" argument with the argument which justifies the difference principle in the original position, this being that it expresses the idea of reciprocity, the idea that it is a "principle of mutual benefit" (Rawls, 1999, p.88). The application of the principle of redress, rather than being of mutual benefit, can lead to a levelling down which makes us all worse off, as can be seen by Rawls's insight that it would lead to providing better education to the less favoured. Redress therefore cannot be a sole principle of justice because it is not consistent with the principle of mutual benefit. I am therefore in further agreement here with Anderson who also complains that Cohen's egalitarianism would generate a "levelling down" (Anderson, 2015, p.38), and Christiano and Braynen also address the "levelling down objection", agreeing that "the extent that the principle

of egalitarian justice makes the recommendation that everyone be made worse off” (Christiano & Bayden, 2009, p.30).

If the preceding paragraphs are right, then we have an answer to Cohen’s objection to the initial rationale for starting with equality being abandoned when the Pareto principle is introduced. Cohen is right that the initial situation of equality does indeed presume that natural abilities are undeserved and this could be argued, as Barry does in his reconstruction, to be the basis for starting with equality. Yet when we start considering efficiency as a condition of justice, as I have argued we should, we must also consider how natural abilities are developed and honed, as these developed skills would be necessary for optimal efficiency. Thus, the difference principle does not entirely abandon that initial rationale but balances it against further rationales of justice. One way of reading Rawls’s “intuitive” argument is that we start with equality because no-one has yet developed their natural abilities. Once we introduce efficiency, we then require those abilities to be developed for social use which takes effort and, when they are put to good use, this deserves reward and so inequalities appear. Thus, we ought to make a clearer conceptual distinction between natural endowments, such as strength and intelligence, and abilities (or skills or talents) which, although dependent upon natural endowments, are honed and developed through training, education and so forth. The former are the basis for equality in the initial stage of the argument and the latter are the basis for inequality in the second stage.

Cohen’s objection also poses the question as to whether the degree of labour burden one experiences, as a component of welfare, should be considered a primary social good (or bad). It certainly seems that a positive work experience would not only qualify as a good every rational person presumably would desire, but also one whose distribution, in contrast to a natural good, the basic structure is primarily responsible for producing. Cohen explicitly states that welfare ought to be part of the distributive metric but there are good reasons why we might resist the inclusion of labour burden in the index of primary goods. One that Rawls offers is the familiar one that welfare, or utility, calculations are too vague and imprecise to be useful (Rawls, 1999, pp.281-282). The Rawlsian theorist should object to including a welfare component in the primary good index because, considering the information that would be required, a useful theory of justice requires a more reliable indicator of each person’s utility functions than is realistically achievable. However, Cohen could claim that a rule of thumb should suffice here. For instance, the physically demanding experience of those on the factory floor compared to the work experience of the factory’s owner is a less fulfilling work experience. But I do not find this at all persuasive and suggests a patronizing lack of respect for those who do more physical work, assuming that it is less fulfilling.

Obviously, resource egalitarians do not entirely set aside the matter of welfare, as it is presumed that resources like primary goods are the means towards improving wellbeing. Thus, another reason why we might resist labour burden as a primary good (or bad) is that, as Cohen is again taking the difference principle in isolation, that a decent work experience should be an outcome of the Rawlsian distribution of resources. For instance, as we have seen, one of the outcomes of Rawlsian justice is that the economy is radically democratized in regard to the ownership of capital, that the means of production being substantially re-distributed, within which each worker's say over working conditions will be amplified. One would thus expect labour burden to be more fairly distributed when the workplace is democratized in this way. Also, due to the fair opportunity principle, there ought to be ample opportunity for everyone to develop their talents for an economy which best makes use of those talents, meaning that the Aristotelian principle will be fulfilled more thoroughly throughout society. If this is so then a distribution of decent work experiences palatable to the egalitarian ought to obtain without requiring the parties in the original position to consider it as a primary good.

Cohen's concern about including Pareto as a justification for the difference principle is a specific form of a more general complaint, that economic principles are principles of economics and not justice and so only compromise justice. Pareto, says Cohen, is a principle of economics rather than of justice, and Cohen says that Rawls strays from justice when he starts accounting for Pareto efficiency, which might be a desirable value but is also a non-justice value. It would be like setting out to make strawberry jam but adding blackcurrants to the recipe. What we end up with might be desirable but it is not strawberry jam. I have already argued that Pareto, being a principle of efficiency, ought to be considered a principle of justice. However, Rawls, in his later work, also appears to endorse the principle of comparative advantage, another economic principle which also addresses the distribution of talents (Rawls, 2001, p.76). This is the rule first formulated by Ricardo and endorsed, says Rawls, by many economists, that, in a free market, individuals are mutually better off when they specialise in producing a good in which they have a comparative advantage, measured in terms of the opportunity cost of the good's production (Sloman, 1991, pp.851-863). There are not only favourable and less favourable kinds of talents – such as, for instance, Amanda has a talent for doctoring and Bernard has a talent for gardening - but also variations in talents of the same kind – Amanda is better at both doctoring and gardening than Bernard - and both types of variation can be mutually beneficial because of the principle of comparative advantage. Amanda, therefore, has an absolute advantage in both doctoring and gardening as she is better at both but as she has a comparative advantage in doctoring, Bernard has a comparative advantage in gardening, for he would make a very poor doctor and so has a lower

opportunity cost of doctoring. The upshot of the principle of comparative advantage is that if each specialises in producing the good they have a comparative advantage in producing and then trade, as each will only agree on an exchange rate in which they are better off than if they produced both goods themselves, both will be better off. Thus, trade improves the wealth of all concerned and so can be endorsed by the difference principle, even if Amanda remains better off than Bernard post-trade. However, the rule of comparative advantage also states that, allowing, of course, for a mutually beneficial exchange rate, the wealth of both Amanda and Bernard ought to tend towards equality. If it is right that under free trade, wealth and income ought to tend towards parity, then unjustified inequalities in wealth and income must come from an injustice in the basic structure – such as when opportunities or ownership of the means of production are not distributed equally - which of course ought to be remedied. As Rawls is a contract theorist then comparative advantage, which depends upon citizens agreeing to trade, should be endorsed by the contractualist rationale. In short then, Rawls appears to hold the view that a fair free market requires a just basic structure of the type his principles would endorse.

It must be said that Rawls says very little about comparative advantage and it might have been that he intended to expand upon it and show how a truly free market could indeed produce an outcome without substantive unfairness. Furthermore, perhaps because his reference to it is so fleeting, further discussion of it is missing from the secondary literature. But if comparative advantage is indeed a generally accepted rule of economics, free trade within a just basic structure might indeed produce a fair, equal distribution of income and wealth. If it does then Cohen's claim that it is inappropriate to introduce non-justice values and principles, such as economic ones, would be tested because combining the value of Pareto efficiency with the rule that each should specialise in that which they have comparative advantage, both of which are economic principles, ought to produce a distributive outcome more egalitarian than perhaps Rawls realised.. Furthermore, if comparative advantage could be said to be a generally accepted rule of economics then it ought also be knowledge made available to the parties of the original position and so would contribute to the choice of the difference principle. In fact, Rawls does say that the parties are aware of "the principles of economic theory" (Rawls, 1999, p.119) and so ought to be aware of comparative advantage. Citizens of course are free not to trade if they so choose and they may well be worse off because of it, but Cohen ought not object to this as it would be the outcome of a free choice.

If comparative advantage tells us that the variation in talents is mutually beneficial then it provides another interpretation to what Rawls means by talents being more or less favourable. What I think he might mean by "favourable" is the idea of absolute advantage. To return to the

earlier example, Amanda has absolute advantage in doctoring and gardening over Bernard but only comparative advantage in the former. Amanda is therefore more favourably talented as she is better at both. If she did not trade, she has better prospects than Bernard in terms of how her life would go. But if she does not trade, her talents cannot be favourable in the sense that she can acquire greater income from her talents. On the other hand, if she does trade, comparative advantage tells us that she acquires greater prospects than if she does not, but it remains the case that her talents do not have economic advantages.

3.3 The Freedom Argument

There is, however, Cohen posits, a Rawlsian objection to his solution to the Pareto dilemma and Cohen calls this the “freedom argument”. The Rawlsian freedom argument addresses whether “there is a price in loss of freedom to be paid for the conception of distributive justice that emerges from my criticism of the advertised argument” (Cohen, 2008, p.19). In other words, the Cohenian solution to the initial dilemma, this being that economic equality is maintained only when moral obligations rather than financial incentives direct the talented into Pareto efficient occupations, entails a loss of the talented’s freedom attributable to the moral obligation and thus violates justice. This freedom argument therefore states that a problem remains and it is a trilemma between equality, Pareto and freedom. You might, it says, be able to achieve a combination of any two but you cannot have all three. Two forms of this trilemma are hereby scrutinised by Cohen. The first trilemma specifically addresses freedom in terms of the compatibility of freedom of choice of occupation but another is considered in which a second specification of freedom, self-realisation within an occupation, is substituted for the first.

3.3.1 First Trilemma – Freedom of Occupational Choice

In the first trilemma, there is a “freedom requirement”, which states that “people not be coerced into particular jobs, whether by direct state order or by something else that also deserves to be called “coercive”” (Cohen, 2008, p.184). In this trilemma, while we may be able to achieve any pair of the three values, freedom, equality and Pareto, the Rawlsian argument is that we cannot have all three. The trilemma is this: for Pareto optimality to obtain, what is produced

must be determined by customer preference but for this to be achieved, labour must be responsive to shifting occupations – workers must be able to respond to the changing demands of the market. However, enforcing occupations coercively violates the freedom to choose one's occupation so that cannot be an option. Thus, the only way to shift labour without violating freedom of occupation would be to overprice work that would be otherwise disfavoured, and which, of course, would count as a financial incentive, but then overpricing work breaches equality as some earn more than others (Cohen, 2008, p.185). The argument therefore that Rawlsians would press is that equality can only be attained at the expense of either human freedom or human welfare (Cohen, 2008, p.185). Here, Cohen is equating welfare with Pareto efficiency – when talents are not efficiently deployed to where they are most socially useful, the welfare of others suffers. Thus, when income equality is maintained, to prevent welfare being diminished when labour is not matched to occupations which are desirable because socially useful, freedom is diminished because the only means to attaining both equality and Pareto would be coercive. This means that the answer to the original dilemma which reconciled equality and Pareto is only acceptable because it prioritises both over freedom of occupational choice (Cohen 2008, p.186). To attain both we must lose freedom of occupation choice.

But Cohen supports all three values and so wants to find a solution to this trilemma. Freedom of choice is supported because he supports liberty, and liberty forbids coercing people into occupations even if equality is the outcome (Cohen, 2008, p.186). He supports Pareto because its denial “makes us all losers” (Cohen, 2008, p.188) and, as we are aware, he supports equality (or more accurately only just inequalities). Cohen therefore wants to find a way to make all three compatible and he says the reason the Rawlsian trilemma is presented as an objection to their compatibility is because freedom is not sufficiently defined (Cohen, 2008, p.188). To assess how the argument ought to define freedom, the example of the doctor-gardener is thereby presented, this being someone with a talent for both doctoring and gardening and who would find either fulfilling but has a preference for the latter. A society in which everyone was rewarded equally would fail to recruit her as a doctor for she would choose gardening but this would be Pareto-inferior as her talents are not put to their most efficient use (they would be of greater benefit to others if she chose doctoring and so aggregate welfare will be diminished). The reconciliation of this trilemma is therefore achieved when individuals are motivated by “principled commitment and fellow feeling” to both freely choose the occupation which is Pareto superior and to accept parity of pay for doing it (Cohen, 2008, p.189). Thus, freedom here is defined as acting from one's subjective motivational set rather than from an external (objective) motivation. Principled commitment and fellow feeling

therefore would count as being within one's subjective motivational set and so cannot be coercive.

However, says Cohen, the Rawlsian may now object that work cannot be priced equally because its price must reflect demand. Someone who must choose, to continue the example, between becoming a doctor or a gardener must be able to identify which of these roles would be Pareto-superior and they do this by the value of the wages they would receive for doing it. So, that a doctor would receive higher pay to a gardener should identify its Pareto-superiority (Cohen, 2008, p.191). But, says Cohen, we might get round this by instituting a tax system which redistributes any wages over the average so that everyone receives parity. Thus, if citizens' understanding of freedom is motivated by "principled commitment and fellow feeling", and wages are redistributed as described, we solve the trilemma - individuals are free to choose their occupation, skills and talents are distributed in a pattern which is Pareto-superior, and equality obtains. The reason people do this is because, in a society of full compliance, they "believe in equality" (Cohen, 2008, p.190). The doctor-gardener, because she believes in equality, chooses freely because she believes it is the right thing to do, even if, other things being equal, she would prefer gardening, or because she simply enjoys doing what is right. Freedom is maintained because the doctor-gardener subjectively chooses doctoring, Pareto is achieved because she becomes a doctor rather than a gardener, and equality is achieved because she doctors at equal pay to everyone else. Cohen calls this the "ethical solution" because freedom is the "absence of legal obligation" (Cohen, 2008, p.194). Moral obligation, he says, is not coercive and so does not deny one's freedom. For instance, saving the drowning child at little expense to oneself is not coercive (Cohen, 2008, p.195). It is not clear, he says, whether it is Rawls's liberty principle or the principle of fair opportunity that attends to freedom of occupational choice but if either do, they only mandate *legal* freedom, with which the ethical solution would be compatible (Cohen, 2008, p.197).

3.3.2 Second Trilemma – Freedom of Self-Realisation

The second trilemma recasts freedom as "not freedom of choice of occupation but [...] freedom *in* one's occupation" (Cohen, 2008, p.205). If one accepts the ethical solution to the first trilemma proposed above, one might argue that, after conscientiously choosing a job which one would not choose otherwise, one's freedom to choose "an occupation which does not make a person's life oppressive and constraining but that allows her powers to flourish in a natural way" has been denied (Cohen, 2008, p.205). The issue is one of self-realisation,

which Rawls affirms as his Aristotelian Principle, and this trilemma is solved, says Cohen, when we understand self-realisation, unlike choice of occupation, by degree. Firstly, if the doctor-gardener chooses gardening, she may well be subjected to a loss in terms of self-realisation, but, says Cohen, the self-realisation of her patients will be greater (Cohen, 2008, p.206). The thought here is that her patients are more likely to attain self-realisation when they are in better health. But secondly, while her self-realisation might be diminished for the sake of the self-realisation of others, the situation is one in which she would still find doctoring fulfilling (although less so than gardening) and this is morally acceptable because it is no less fulfilling than the experiences of everyone else and probably more so than many (Cohen, 2008, p.206). Cohen seems to be presuming here that most people's work is not at all fulfilling and that doctoring is self-evidently more fulfilling than most work.

Cohen's solution should not be thought of as "slavery of the talented", he says, because the talented will be at least just as well-off, in terms of self-realisation, as everyone else. Here, Cohen alludes to a form of the interpersonal test. If the doctor says: "I regret becoming a doctor, I am fulfilled but not as fulfilled as I would be by gardening", it would not sound, to many of us who are less fulfilled by our work, like an acceptable justification for demanding compensation (such as greater income). It would be shameful to utter it and show the utterer to be out of community with those it is offered to. It would not sound so good to others who might perceive the inequality and say, with little sympathy, in response: "your life is still better than mine". In this resolution of the second trilemma, the talented are not asked to make a greater sacrifice than the untalented (Cohen, 2008, p.208). If the doctor-gardener, on the other hand, found the idea of being a doctor so repugnant because she would suffer an intolerable loss of self-realisation then, says Cohen, it would be unjust to offer her financial compensation in the form of increased pay. This is because the self-realisation argument is a moral argument and, says Cohen, one cannot demand pecuniary compensation, a financial incentive, for a moral deficit because her claim is that "her interest in meaningful work is beyond price" (Cohen, 2008, p.210). It would be like someone refusing to work on a Sunday for religious reasons but then agreeing to work if they were paid double.

Because he values liberty, Cohen says people ought to retain freedom to make their occupational choices but admits that this might not be Pareto-optimal, for some will not be motivated by their conscience to undertake a more socially useful occupation. To entice people to undertake work they might disfavour but which is Pareto-superior without offering incentives, requires them to be regulated by what Cohen calls the egalitarian ethos. We will discuss ethos, and how it is a requirement of justice, in Chapter 5.

3.3.3 Analysis of the Trilemma Solutions

By considering the freedom argument, Cohen now considers how equality might be balanced against liberty. However, it is not that he considers the full set of basic liberties but rather two forms of freedom of occupation, which is usually thought to be regulated by both the liberty principle and the principle of fair equality of opportunity. Once again, we ought to start by restating that the problem of unjust pecuniary incentives which motivates Cohen's objection is not one which ought to arise in a Rawlsian society, and again, I need not repeat the reasons for this here. Also, as I argued in the previous section, the Pareto/equality dilemma which Cohen seeks to solve also ought not arise in a Rawlsian society for the further reason that attaining Pareto efficiency by way of (just) incentives produces just inequalities. I need not repeat these points here either.

Turning to the trilemma, the answer to the motivation question is that the trilemma can be solved when the talented are motivated by a belief in equality (Cohen, 2008, p.192). The solution to the freedom trilemma is that the talented should be motivated by "compassion and fellow feeling" to undertake a less preferable, although not repugnant, occupation at parity pay. I am sceptical about the plausibility of this source of motivation as Cohen portrays it, that compassion and fellow feeling between citizens within a polity is a plausible source of motivation. Furthermore, Cohen seems to contradict himself here. Earlier when addressing the issue of community, he says that fraternity should not be expected across the polity yet here he presents it as a solution to the trilemma.

However, if Cohen is stating that justice requires fraternal motivations, it is odd that he does not address Rawls's account of fraternity. For Rawls also discusses fraternity and also expresses some scepticism about its applicability to politics. Rawls recognizes that widespread mutual fraternity within the polity is implausible, that "[t]he ideal of fraternity is sometimes thought to involve ties of sentiment and feeling which it is unrealistic to expect between members of the wider society" (Rawls, 1999, p.90). However, says Rawls, while it is unlikely to motivate the behaviour of citizens qua citizens, it is a "perfectly reasonable standard" by which to judge outcomes, and the outcome of the difference principle is that it satisfies the demands of fraternity, "at least in the sense that the inequalities permitted by them contribute to the well-being of the less favoured" (Rawls, 1999, p.91). If this is right, then we make a distinction between motivation and justification. The difference principle is justified not because it is motivated by fraternity but because its outcome corresponds appropriately to the

outcome we would expect from fraternal motivations. If fraternity is indeed impossible between citizens, then this surely is a desirable outcome.

Yet Cohen would probably say that this is not acceptable, that fraternity cannot only be justified by outcomes but must also be justified by intentions. If we justify fraternity, or any other values, only by outcomes then we will accept behaviour that turns out to be only “accidentally” just (Cohen, 2008, p.128). This is no good for politics because the proposed behaviour of political agents is judged by the principles which motivate their behaviour and thus, says Cohen, we judge fraternal outcomes on whether such outcomes were intentionally pursued. However, Rawls, as we saw in the previous chapter, says more about fraternity when he presents his sketch of how we develop our moral psychology. His sketch accounts for why we recognise that society is a mutually cooperative endeavour and makes use of fraternity in a perhaps more plausible way than Cohen does. Rawls acknowledges that we are just not going to get everyone caring about everyone else but, as we saw in the previous chapter, Rawls suggests we develop an attachment to the morality of principles by experiencing fraternity at a prior stage, the morality of association, in which we do experience fraternity by our closeness to others. Rawls’s sketch therefore does not require widespread mutual fraternal feelings. We do not enact justice because we feel sympathy, or fraternity, with each of our compatriots, although of course we may do, but because we see and accept the benefits of association. As we saw in the previous chapter, by participating in associations with others within families, communities, at schools, sports clubs and so forth, we develop fellow feeling, leading to friendship and mutual trust. We then, because we see the benefits of fraternity, co-operation, and reciprocity, internalize, accept and generally act from principles of justice. Thus, we have, via fraternity, internalized justice and enact justice when fraternity is absent.

Here, then, fraternity seems to be doing more work in a Rawlsian society than Cohen realises. We are not, in much of our behaviour, directly motivated by fraternity but rather indirectly. Furthermore, we realise that fraternal outcomes are a good standard by which to judge behaviour. Thus, our talented doctor-gardener in Cohen's thought experiment, in a Rawlsian society, ought to be indirectly motivated by fraternity. I will refrain from adjudicating on the plausibility of Rawls’s sketch as I am not qualified to do so but my point is that Cohen does not at all address Rawls's developmental psychology, and the role of fraternity it , and so it again seems to be an oversight to not do so from the vantage of internal critique. My criticism of Cohen therefore is similar to that made by Kukathas, that Cohen does not do enough to persuade us that a “love for others [...] will in no way reduce the productive capacity of a society” (Kukathas, 2015, p.242). Like myself, Kukathas also thinks that direct fraternal motivations are “highly unlikely” but I add here that Rawls’s account for fraternity is a more

plausible one than Cohen's. Thus, if direct fraternity is implausible at the level of the polity, indirect fraternity seems at least more plausible as a moral motivation.

There is, however, another motivation which Cohen offers. It is "ethos" and it is, Cohen says, a condition for solving the freedom trilemma. Ethos is not unconnected to fraternity but, for now, I am going to set the matter of ethos aside until Chapter 5 as it warrants a chapter of its own. This is because, as you will recall from the beginning of this chapter, the fundamental motivation for Cohen's dispute with Rawls is that he misses an ethos of egalitarian justice, a non-coercive internalization of and commitment to justice. In Chapter 5 I will argue that this is not so.

We should also ask whether acting from a sense of moral duty, or an egalitarian conscience, counts as coercion. Cohen attributes this claim to some unspecified Rawlsians and argues that acting from such feelings of compassion for others is not coercive but we may worry that this is a narrow understanding of coercion, as often we understand coercion as also including social pressure to behave. Now, it does not seem to be controversial to deny that a talented egalitarian is unfree if they do indeed freely choose a less preferable Pareto-superior occupation because of their moral conscience. We are not asking here whether they will be perfectly happy with the choice, if there will be any residual resentment or frustration, but whether they choose freely. A counter argument might be presented that the talented may be shamed into choosing a more socially useful role and, if they are, this might count as coercion. In feeling shame, there might be at least two possible sources. The first is that they feel shame because they accept it to be the right thing to do but have come to realise that they failed to act accordingly. This does not seem to be coercive in the sense that they have been made to do something that they do not want to do. Rather it is that they have been made aware of an oversight or error in their moral or practical reasoning. The other reason that they might feel shame is because they are concerned about their reputation, and if there is any coercion here, it is because of concerns about how one is *perceived* by others. If this is indeed coercive, if one seeks approval from others, then the coercion does not have its source in justice but rather in another principle, that one should seek the approval of others. Cohen's solution to the trilemma does not state that one should not choose Pareto-superior occupations to avoid disapproval but rather because one should act in accordance with accepted moral principles. I therefore do not perceive any coercion here.

Lang, in his discussion of Cohen's solution to the freedom objection, states that freedom, as the antithesis of coercion, must not only allow one the freedom to choose x but also to choose to not x. In the doctor-gardener example, Lang says, if she acts from her moral conscience

and chooses doctoring, she must also have the option to not choose doctoring (Lang, 2016, p.243). But this seems to be an odd objection to Cohen as the doctor-gardener certainly is free to choose gardening. There is no obstacle placed in her path to becoming a gardener. Furthermore, if politics is concerned with what might count as a legitimate complaint concerning the restriction of one's freedom, I find it difficult to believe that anyone could sensibly make the complaint that they were prevented from acting in a way that they believe to be wrong. In Cohen's solution to the trilemma, the doctor-gardener is motivated by what she subjectively feels to be right and if she takes up doctoring because she believes it to be the right thing to do, I cannot imagine that she could legitimately complain about her freedom being constrained. It would be like diving into the pool to save the drowning child and then complaining that you were not free to let the child drown. Furthermore, if Rawls is right about how we attain the sense of justice through natural needs and associations, I cannot see how the doctor-gardener has been coerced into internalising the justice of principles. Otsuka also wants to add more to what counts as coercion. He argues that Cohen's objection to coerciveness in relation to occupational choice is that people will object to being told what to do (Otsuka, 2009, p.78). Otsuka objects that Cohen's conception of coercion misses what is truly objectionable about coercion, that "it violates self-ownership underpinned by a more general objection to forced labour" (Otsuka, 2009, p.86). If Otsuka is right here then choosing a Pareto superior occupation for moral obligations should not count as forced labour and so should not count as coercion. Forced labour is involuntary work that one will be punished for not doing. Choosing to doctor for moral reasons is not forced labour and so, if Otsuka is right here, he agrees that it is not coercive.

Cohen also asks whether the talented individual suffers a welfare deficit, in terms of self-realisation, in choosing a second-choice occupation. Cohen thinks that if they do suffer an actual loss, it is justified comparatively, when the doctor's welfare remains higher than her patients. But posing the answer in this way again encounters the problems demonstrated in the previous section about welfare or utility calculations. Cohen assumes that a happy but less happy doctor can be countenanced by the increased happiness of others but I am not confident that those with greater natural endowments or talents are happier in their work. Cohen then asks, if the doctor has suffered a loss of self-realisation by acting with her conscience, whether she might be justified in complaining about suffering a welfare deficit *relative to others*? The justification, then, here is that, if their welfare has been diminished by an absence of self-realisation, the welfare of the talented remains superior to that of the untalented because their work is more fulfilling. But, again, I find this argument unpersuasive because it is not evident to me, as Cohen claims, that the occupations of the talented do sacrifice less self-realisation than the occupations of the untalented. The point of self-

realisation I take it is that, in the Aristotelian sense, humans achieve full flourishing - they most fully realise their unique potentials - and those who are less favourably endowed may well find it easier to realise their potential than the talented. If this is the case, then the untalented may gain greater satisfaction from their work than the talented, the latter perhaps being more frustrated by the difficulties of fulfilling their potential. There is also another way we might understand self-realisation, and this is as a perfectionist ideal of human flourishing. In this sense, only one with “superior” abilities might attain, or get close to, such perfectionism. But here we run again into the problem of value pluralism, that even if individuals do endorse a personal conception of perfectionism, these conceptions are likely to vary greatly across society.

Olsen identifies that, while Rawls “endorses an external standard”, Cohen inconsistently applies “internal” and “external” assessments of Pareto, equality and freedom of occupation (Olson, 2017, p.289). Very roughly, the former are subjective assessments and the latter objective (Olson, 2017, p.288) and both are contained within the doctor-gardener example. Pareto is treated externally as the doctor’s choice to doctor will be of greater benefit to society in improving health, yet equality is measured sometimes externally, as in income and wealth, but also at other times internally, such as in the case of welfare. Olson, I believe, gets to the heart of the disagreement between Cohen and Rawls concerning the metric of justice, for Rawls says that internal assessments about welfare are unreliable or too imprecise, and thus what should be distributed is primary goods which, Rawls believes, are objectively good, being basic goods that all should find useful. This is why I find Cohen’s attempts to reconcile the trilemma by way of welfare (or self-realisation) unpersuasive, because, and here I agree with Olson, Cohen encounters familiar difficulties concerning internal assessments of justice.

Summary and Conclusion to Chapter 3

This chapter has covered three objections Cohen makes against incentives. As it is intended as a comprehensive rebuttal of Cohen’s extended objection to incentives it covers a lot of ground. Each objection addresses the claim that incentives are not necessary for the talented to maximally benefit the less talented. The first says not only that the talented can choose to work for parity pay, but also that incentives betray a sense of community. The second objection is to the Pareto argument, which strictly is a reconstruction of Rawls’s argument by Barry. It shows, Cohen says, inconsistent rationales between the stages of the argument. The third

objection is to the Rawlsian claim that Cohen's solution to the Pareto argument would betray freedom of occupation but the answer to this is for the talented to be motivated by fraternity.

As I have shown, the major problem with Cohen's objection is that he gets off on the wrong foot. The first premise of his argument, that unjust inequality-producing incentives are permitted by Rawls, overlooks Rawls's qualification of incentives. I have also argued that efficiency should be considered a principle of justice, and that Cohen's luck egalitarianism, which Rawls calls the principle of redress, is unconvincing, that economic justice, as a component of social justice, cannot simply aim solely for redress. Redress produces outcomes that are not only unjust but also inefficient and it would not, I argue, be chosen as the most reasonable conception of justice. Another major disagreement between Rawls and Cohen is Cohen's faith in fraternity. Despite stating that it is inconceivable that fraternity can assume this regulatory role between citizens, he nevertheless offers it as a solution to the problem of reconciling the trilemma. I have shown that Rawls does not eschew fraternity but might be understood as invoking indirect fraternity, which I find more plausible.

Cohen also states that justice requires an ethos of justice. I have not addressed the matter of ethos here as it will be discussed in Chapter 5.

Chapter 4 - Cohen's objection to the Rawlsian Basic Structure Argument

Introduction to Chapter 4

Cohen also addresses what he terms the Rawlsian “basic structure objection”, a Rawlsian response to Cohen's objection that incentives to the talented are not necessary for the less talented to be maximally well off. The basic structure objection states that Cohen's claim that incentives demonstrate that individuals must also act justly in their personal lives cannot be a suitable response as justice as fairness is intended to be applicable only to the basic structure of society, its basic social and political institutions. This chapter continues my argument that Cohen's critique of Rawls's allowance for incentives is an unfair reading of Rawls and that a Rawlsian well-ordered society would deliver greater equality than Cohen realises. Cohen's argument is that justice cannot be restricted to the basic structure because it permits unjust inequality-generating incentives. I have argued in the previous chapter that Justice as Fairness does not permit unjust incentives when we also consider the role the other principles have in regulating the distribution of income and wealth. But here I argue that not only has Cohen also misunderstood Rawls's reasons for limiting his enquiry to the basic structure but also that it is not at all obvious that a basic structure restriction would constrain justice anyway.

Cohen's response to this objection brings the primary aim of his project into view. Recall, from the previous chapter that Cohen raises the “nonliberal socialist/anarchist conviction” which Marx presents in “On the Jewish Question”, over which Cohen says he is in disagreement with Rawls and the Rawlsians. This conviction states that ““human emancipation” would be “complete” “only when the actual individual man ... has recognised and organised his own powers as *social* powers so that social force is no longer separated from him as a *political* power: thus, only when he “has taken back into himself the abstract citizen” so that freedom and equality are expressed “in his everyday life, his individual work, and his individual relationships”” (Cohen, 2008, p.1). This non-liberal conviction of Marx's is, Cohen says, also expressed by the feminist slogan “the personal is political” (Cohen, 2008, p.116), a slogan which, as we will see, informs the feminist critique of Rawls which stimulates Cohen's analysis of the basic structure. This disagreement with the Rawlsians upon the site of justice also

shows, Cohen argues, that justice requires, and so also applies to, an “ethos” to motivate or regulate individuals in their chosen quotidian behaviour⁸.

In this chapter, I begin by setting out Cohen’s objection to restricting justice to the basic structure. The argument, very roughly, is that, in a liberal democracy, the basic structure of society is unable to regulate the talented’s desire for inequality-producing incentive rewards and so, if we are to attain full justice, their extra-legal choices must be regulated in some other way. Cohen’s conclusion is that the site of justice, the part of society to which principles of justice are applied, must be extended to also include those extra-legal choices, and Rawls, says Cohen, in restricting justice to the basic structure, therefore cannot achieve full justice. I will argue that the basic structure argument, that justice is restricted to the basic structure, is a misreading of Rawls as Rawls does not at all restrict justice to the basic structure. Rather, his project concerns social justice and the right principles for the basic structure. That he restricts his project in this way does not mean that justice should not also be concerned with extra-legal choices and behaviour, only that his project is a narrower one concerning the basic structure only. I then demonstrate that extra-legal choices and behaviour ought not necessarily internally conform to the difference principle and so show why an extension of justice beyond the basic structure cannot simply extend the difference principle into non-basic structure sites, as Cohen claims. I then move on to argue that Cohen’s argument intended to persuade us that justice should be extended beyond the basic structure is unconvincing anyway, for the basic structure can regulate the behaviour he is concerned about: incentive demands. Finally, I show that Cohen’s claim that the basic structure is fixed by the original position procedure is not quite right. Rather it is the principles of justice which are determined at that stage and while the basic structure must support those principles, its internal institutions are not fixed and can indeed be determined by the behaviour of citizens.

4.1 On the Site of Justice - The Rawlsian Basic Structure Objection

Cohen anticipates the following objection from the Rawlsians to his prior arguments against the necessity of incentives that were the focus of the previous chapter. The Rawlsians would say that to “focus on the posture of talented producers in daily economic life is inappropriate, since their behaviour occurs within, and does not determine, the basic structure of society,

⁸ By quotidian behaviour, Cohen means interpersonal behaviour not proscribed by the laws of the legal-coercive system or the constitution. For instance, murder is usually proscribed by law, while lying usually is not and so the latter would constitute quotidian behaviour. “Quotidian” is a word Cohen uses frequently to describe this type of behaviour. We might also call it interpersonal behaviour. However, we should not think of it as personal behaviour, which I interpret to mean behaviour which benefits the self.

and it is only to the latter that the difference principle applies” (Cohen, 2008, p.124). The sorts of injustices to which Cohen has so far objected therefore are “not the sort of injustice that the Rawlsian principles are designed to condemn” (Cohen, 2008, pp.124-125). That such choices occur within an already established basic structure means they do not and cannot affect the justice of the basic structure to which Rawls’s principles of justice apply and the difference principle therefore regulates the choosing of institutions rather than the choices of individuals made independently of those institutions.

The basic structure, recall from Chapter 2, is, says Rawls, “the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation” and “[b]y major institutions, I understand the political constitution and the principle economic and social arrangements” (Rawls, 1999, p.6). But many readers have found Rawls to be ambiguous on the matter of specifically which institutions the basic structure includes and which features of an institution place it in the basic structure. This ambiguity informs the basis of Cohen’s argument that justice should be extended beyond the basic structure. Cohen’s argument against restricting justice to the basic structure is stimulated by his reading of Okin’s feminist critique of Rawls. Okin states that Rawls makes the mistake of not obscuring sex/gender⁹ behind the veil of ignorance and if this were to be corrected, the principles and institutions which would emerge from the original position would be more female-friendly, such as, she suggests, institutions which do not prejudice women for carrying children (see Okin, 1991, Chapter 8). But, partially defending Rawls, she argues that there is no reason why Rawls could not also obscure sex/gender behind the veil and, if he did, his theory of justice would provide suitable resources for a feminist critical examination of gender roles in society. Okin rightly demonstrates that there is some ambiguity as to whether Rawls means to obscure sex/gender but concludes that he does not because, while Rawls explicitly affirms the family as part of the basic structure, he does not treat it as such. The family is not treated as part of the basic structure because, unlike other institutions of the basic structure, he does not explicitly show how the principles of justice support the family.

Cohen, stimulated by Okin’s feminist critique of Rawls, also expresses a concern that there is an ambiguity over what the basic structure includes or what features define an institution as part of the basic structure. Cohen considers the ambiguity to concern whether the basic structure equates with the legal-coercive structure, understood as the constitution, the laws and their enforcement, and asks whether the basic structure “includes only coercive aspects of the social order or also conventions and usages that are deeply entrenched but not legally or literally coercive” (Cohen, 2008, p.125). Cohen’s “fundamental” objection demonstrates that

⁹ Okin appears to use sex and gender interchangeably.

justice requires something he calls “ethos” and which governs one’s everyday choices that are independent of structure-defining rules. A distinction between a just society and a just distribution is made, the former being a society in which citizens affirm and act from the principles of justice, and so there is an ethos of justice, while the latter is an egalitarian pattern of rewards (Cohen, 2008, p.128). A just distribution can therefore arise in a society that is not just, in the sense that individuals are not motivated by justice but rather from an ethos other than the egalitarian ethos Cohen has in mind. There is also the opposite problem, that a society might be just in the sense that people endeavour to act from the correct principles of justice but for reasons such as ignorance or collective action problems, a just distribution does not obtain. Justice *tout court* therefore requires both arms of justice: acting from an ethos of justice and attaining a just distribution. There is both a deontological aspect, which is a virtue of individuals, and a consequentialist aspect, which is a virtue of institutions.

This objection, says Cohen, responds to a “fatal ambiguity” in Rawls’s definition of the basic structure and to an inconsistency between Rawls’s specification of what justice judges and his restriction of justice to the basic structure (Cohen, 2008, p.132). This discrepancy arises when we ask specifically what the basic structure is. Rawls describes the basic structure as constituting a set of social institutions and so the principles of justice must therefore judge only those institutions and not the people who observe the rules of those institutions (Cohen, 2008, p.132). But Rawls is not at all clear quite what those institutions are. If a social institution is behaviour constrained by a system of rules, then one must consider how compliance with those rules comes about. Sometimes, says Cohen, it seems that they are only legally coercive institutions (or the legally coercive part of institutions) and, if this is right, the basic structure therefore consists of the constitution, the legislation in place to support it, and other legislation and policy that are of significant importance but are not formulated within the constitution (Cohen, 2008, pp.132-133). But the basic structure does not always appear to be so designated. At other times, it appears to designate not a legal structure but a structure dependent upon “convention, usage, and expectation” (Cohen, 2008, p.134). This ambiguity is exemplified by the family, which at times is said by Rawls to be inside the basic structure and at others outside of it.

Cohen makes the following distinction between the legal coercive structure and informal structures like the family: the coercive structure is independent of people’s interpersonal choices because it is constituted by specialised choices about what the law should be, while the family owes its character solely to the choices that family members consistently make. Thus, while the justness of the coercive structure is located in the decisions of legal experts, the justness of non-coercive structures must be located in the dispositions of individual agents when they choose to act in a way that either reproduces or alters the structure’s character

(Cohen, 2008, p.135). This distinction is dependent upon the following. One can separate the choices one makes which contribute to instituting and sustaining a coercive structure and the everyday choices one makes within that structure. But this separation is not plausible with informal structures because when one person chooses to conform to the informal structure's prevailing practices, the pressure is reinforced upon others to do so - without any conformity to such practices, the very practices which constitute the structure, and the pressure to conform to them, do not exist. Laws, on the other hand, can be constituted independently of whether anyone conforms to them¹⁰. So while we can distinguish conceptually between choice and structure, we cannot do so from the perspective of how principles of justice are applied to them - we cannot bring the consequences of applying justice to the norms of informal structures without also bringing in the actions which express these social norms and constitute much of their effect. If it is acceptable to ask of legislators if they act justly when they create the coercive structure, it must also be acceptable to assess the justice of the everyday choices and actions which sustain informal structures. Therefore, unlike the coercive structure, behaviour conforming to the norms of the informal structures is subject to those judgements of justice which also apply to the structure.

Thus, the only way justice can be restricted to the basic structure against this claim that the personal is also political is by strictly defining the basic structure as the legal coercive structure (Cohen, 2008, p.136). But Rawls cannot do so as he asserts the basic structure to be the site of justice because the effects of the basic structure are so profound. Rawls cannot drop this claim because it is necessary to show why the basic structure is the primary subject of justice. This insight is attributed to Mill who "taught us that informal social pressure can restrict liberty as much as formal coercive law does" (Cohen, 2008, p.137). Thus, Rawls cannot restrict justice strictly to the legal coercive structure because he would then ignore some of those structures which have a profound effect upon us. But he cannot alternatively drop the profundity-requirement because he states it to be a condition of the basic structure. Therefore, as quotidian behaviour also has a profound effect, Rawls must let chosen everyday behaviour into the object of justice. And not only liberty, as Mill states, but also the matter of distributive justice must concern itself with what goes on in the family as wives are often burdened with a greater allocation of the household chores than the husband because husbands often have more power than wives to determine who gets what within the family¹¹.

Cohen's incentives objection, the focus of the previous chapter, provides an example of why individual behaviour must be of the purview of justice. Rawls's maximising legislation is

¹⁰ As we will see later in this chapter, not only does Cohen express some doubt about this view, I do also.

¹¹ This suggests that Cohen sees the matter of distributive justice as distributing material goods only and not also liberties.

“consistent with a maximising ethos across society that, under many conditions, will produce severe inequalities and a meagre level of provision for the worst off” (Cohen, 2008, p.138)¹². If we are concerned with the distribution of benefits and burdens across an entire society, we must also be concerned about an ethos which permits both gender inequality and inequality-generating incentives (Cohen, 2008, p.138). What disrupts equality is the many instances of fortunate and unfortunate circumstances (Cohen, 2008, p.126) and these circumstances are the product of both the structure of society and quotidian interpersonal choices¹³. The problem for Rawls therefore is this: if full justice obtains when there is full compliance with the rules of the basic structure then when individuals also make choices which affect the distribution of benefits and burdens, Rawls is unable to say that the result is more or less just. But individual choices can make society more or less just than the justice which emits from the rules of the basic structure alone and therefore justice must contend with both structure and choice. And because individual choices are also part of the site of justice, social and distributive justice requires an equality promoting ethos (Cohen, 2008, p.127)¹⁴. While Cohen asserts an ambiguity as to whether Rawls includes non-coercively regulated institutions within the basic structure, the point he makes is that they ought to also have justice applied. And if they are included, an ethos which regulates the behaviour which reproduces the practices of non-coercive institutions must also be included.

Cohen’s main concern is of the distribution of income and wealth more generally. Whether such incremental reformative behaviour could apply to economic behaviour, Cohen admits he does not know. But he says that universal maximising cannot be a necessary feature of a market economy because the UK had a market-economy directly following the end of World War Two. During this period there was no universal maximising ethos evident in the UK because differentials in salary were both not as wide as they would later become and were not as wide as in the USA at that time (Cohen, 2008, p.142). The reason that universal maximising was not evident in the UK at that time was, he says, because there was a “social ethos of reconstruction” following the war, “an ethos of common project that restrained desire for personal gain” (Cohen, 2008, p.143) and this ethos is a type of egalitarian ethos (although not a maximally egalitarian ethos because some unjust inequality remains). Cohen also claims that in 1988, as the USA had a much wider pay differential between highest and lowest earning workers than West Germany, the situation in Germany was the outcome of an egalitarian

¹² As I argued in the previous chapter, I am doubtful that this would be the outcome in a Rawlsian well-ordered society when the principles of justice are considered together. I provide further support for this assertion in the following sections of this chapter.

¹³ This is why Cohen is referred to as a “luck egalitarian”, a nomenclature he happily accepts – the fundamental aim of justice is to address, regulate, compensate for the arbitrary distributions of luck.

¹⁴ Quite what an “ethos” is will be covered later in the following chapter.

ethos, one friendly to equality (Cohen, 2008, p.143). Cohen can say that Germany had a more just society than the USA at this time but Rawls cannot because it was the outcome of ethos rather than the institutions of the basic structure. If such egalitarian ethoses have existed in market economies then it shows that humans are not unable to be more egalitarian providing they are willing to be so.

Cohen says some more about the difference between the legally coercive and other social structures to further support his objection to Rawls's restriction of justice to the basic structure and to his claim that justice should be extended to ethos. All structures are a "set of rules" (Cohen, 2008, p.149) and there are two ways in which the legal coercive structure functions. The first is that it aims to prevent people from behaving unacceptably by both erecting barriers like fences, prison walls and the like, and by punishing those who succeed in transgressing. The second way the structure acts as a deterrent is that awareness of what might happen to people who transgress motivates them to comply (Cohen, 2008, p.144). There is not so much prevention going on in the informal structure but there is some and it "manifests itself in predictable sanctions such as criticism, disapproval, anger, refusal of future cooperation, ostracism, beating [...] and so on" (Cohen, 2008, p.144)¹⁵. Cohen also gives us an idea as to what an ethos is: "the ethos of society is the set of sentiments and attitudes in virtue of which its normal practices and informal pressures are what they are" (Cohen, 2008, p.144). The only pressure that sustains the informal structure is an expectation of normal compliance with the rules and this is particularly true of those pressures which can be said to be moral pressures.

Cohen admits that an objection that might be raised is that this delineation between legal-coercive structure and informal structure cannot be sustained, for the former, being a society's constitution and laws, are also characterised by a general compliance. A further objection might be that the legal-coercive structure maintains the social outcome it intends by general compliance with its rules (Cohen, 2008, p.145). If so, then Cohen's criticism that Rawls does not judge the behaviour of individuals is misplaced, because a clear distinction between "structure-sustaining and structure-conforming action" cannot be maintained. This, however, does not weaken, Cohen says, but strengthens his argument, for, if right, we can say that it is not only non-coercive-structure-supporting behaviour which must come under the purview of justice, but also legal-coercive-structure-supporting behaviour.

¹⁵ I presume beatings refers to parents disciplining their children, as other beatings would be legally prohibited.

4.2 Analysis of Cohen's objection: structure and personal decision

In this section, I will assess the first part of Cohen's critique of Rawls, that he excludes non-coercive institutions/structures and personal choice from the purview of justice.

4.2.1 The Basic Structure Excludes Non-Coercive Institutions

This subsection shows that the basic structure IS coercive institutions, or more precisely institutions which may ultimately and legitimately be enforced coercively. It mainly clears the ground for the following subsection, which considers Cohen's use of inequality between spouses to demonstrate that justice must also apply to extra-legal behaviour, and which is deployed to support his argument that incentives, also being extra-legal behaviour, must also have justice applied. I take it, however, that Cohen's consideration of justice within the family is not only intended to support his objection to incentives. For his objection to incentives is intended to contribute to his wider claim that Rawls is not sufficiently egalitarian and thus Rawls's principles of justice should also apply to the family's quotidian behaviour (more specifically to husbands within the traditional sexist patriarchal structure). The following subsection therefore shows that Cohen's claim that equality between spouses cannot be regulated coercively to be dubious. It also demonstrates that, contra Cohen, Rawls does already consider equality between spouses as part of the basic structure and so, in this matter also, Rawls is more egalitarian than Cohen realises. I then, in the next subsection, consider another element of the family, the equality of children as future citizens, which, I argue, cannot be coercively regulated directly, but which can be regulated indirectly. I demonstrate that there are good reasons, consistent with justice, why the difference principle, as Cohen claims, need not be applied to the institutions of the family. We might think that a family which teaches children to be unequal on gender grounds would be more just if they taught equality instead but, I will argue, this is not necessarily so.

But firstly, in this subsection, I am going to argue that, although Rawls could indeed have been clearer on the matter, it is my reading of Rawls that the basic structure is not intended to include non-coercive institutions. Cohen says that sometimes Rawls implies that the basic structure includes only coercive institutions and sometimes that it also includes non-coercive institutions, so let us take a look at the arguments that Cohen presents for this ambiguity. I shall first consider the former interpretation: that Rawls states the basic structure to consist only of coercive institutions. In favour of the first interpretation, when trying to identify what the basic structure is, Cohen says that "[s]ometimes it appears that the coercive institutions

exhaust it, or better, that institutions belong to it only insofar as they are (legally) coercive” (Cohen, 2008, p.132). As support, Cohen refers us to Rawls’s section in *Political Liberalism* concerning the “constitutional essentials” (Rawls, 1993, pp.227-230), but it is not at all clear to me why he references this section, as the difference principle is not considered by Rawls to be part of the constitution. However, Cohen also says, for further support of this first interpretation of the basic structure, that it is the “widespread interpretation” of what Rawls means by the basic structure, and the support offered here for this interpretation being “widespread” is that it is supported by Tan (Cohen, 2008, p.134, n40). Tan says that: “[t]he basic structure is indeed the coercive institutions of society, of which some aspects of the family are a part” (Tan, 2004, p.346, n.29), and that it is only parts of the family which are coercively regulated, this being the source of Cohen’s lack of clarity. One other source of support Cohen offers for the interpretation of the basic structure as coercive institutions is a quote from *A Theory of Justice*: “the law *defines* [emphasis added] the basic structure within which the pursuit of all other activities takes place” (Rawls quoted in Cohen, 2008, p.133, n.39) (Rawls, 1999, p.207). This quote from Rawls, I agree, does indeed appear to support the “widespread interpretation” of the basic structure.

In my view, Rawls is insufficiently clear about the issue of coercion within the basic structure but this first interpretation, I believe, is the right one. Rawls states explicitly that the basic structure has two roles: the first is to distribute, by the specification of the first principle, the basic liberties, and the second is the distribution of social and economic inequalities, specified by the second principle (Rawls, 2005, p.229). The basic freedoms are a “constitutional essential” – whether the basic freedoms are satisfied can be observed within constitutional arrangements (Rawls, 2005, p.229). There are various laws which realise and enforce constitutional arrangements and so clearly the first role of the basic structure is intended to be coercively enforced. As we have seen, the principle which judges social and economic inequalities, this being the basic structure’s second role, is the difference principle which “applies to the announced system or public law and statutes and not to particular transactions or distributions, nor to the decisions of individuals and associations, but rather to the institutional background against which these transactions and decisions take place” (Rawls, 2005, p.283). I take it that in stating the difference principle to apply to “public law and statutes” that Rawls is clear that he intends the second role of the basic structure to be coercively regulated.

But let us now take a look at the second interpretation of the basic structure: that it includes not only legally-enforced institutions but also conventions and practices. In support of this second interpretation, Cohen quotes Rawls’s preliminary comments about the basic structure and its institutions in *A Theory of Justice* which, Cohen says, does not identify whether

“coercion is the touchstone of inclusion [in the basic structure]” (Cohen, 2008, pp.133-134, n40). To help us assess this second interpretation, let us, again, remind ourselves what Rawls actually says about the basic structure and its institutions in these initial comments. I will here make extensive use of actual quotes as to best avoid accusations of misinterpretation. Recall from the first chapter that the basic structure is defined in *A Theory of Justice* as: “the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation”, and major institutions are the “political constitution and the principle economic and social arrangements” which explicitly includes “the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family” (Rawls, 1999, p.6)¹⁶. Together these major institutions define an individual’s “rights and duties and influence their life prospects, what they can expect to be and how well they can hope to do” (Rawls, 1999, pp.6-7). The effects of the basic structure upon how one’s life goes is therefore “profound” – the political system and the social and economic conditions one is born into, which vary for each of us, determine one’s expectations concerning how one’s life will go and this is not only unfair but often inefficient. The principles of justice are to “regulate the choice of a political constitution and the main elements of the economic and social system” (Rawls, 1999, p.7). A “social scheme” is deemed just depending on the way in which “fundamental rights and duties are assigned and on the economic opportunities and social conditions in the various sectors of society” (Rawls, 1999, p.7).

From the above, we should make a distinction between the basic structure and the major social and economic institutions. The basic structure is “the way” these institutions distribute rights, duties and social benefits and burdens, while an institution is “a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like” (Rawls, 1999, p.47), and includes “games and rituals, trials and parliaments, markets and systems of property” (Rawls, 1999, p.47). Rules are public in the sense that everyone knows what is expected of them and what they can expect of others because they are understood as the outcome of an agreement. The point of these rules is that they permit or forbid particular types of actions and they do so by allowing defences of action considered permissible and penalties for those deemed impermissible. Rawls thus considers social justice to be regulating “the institution as realised and effectively and impartially administered” (Rawls, 1999, p.48) and what it means for an institution to be realised is when, at a specific place and time, both the behaviour specified by the rules is performed and the public understand

¹⁶ There are two possible readings of this statement: firstly it could be that it is only “freedom of thought and liberty of conscience” which is legally protected (this was my initial reading); the second reading is that it is all these institutions which are legally protected (I now incline towards this reading).

themselves to be acting in accordance with those rules. Thus, an institution is not just the rules themselves but the understanding of and practices that express those rules. An institution is not likely to be constituted of one rule but as a coherent system of rules. As the basic structure is the way that institutions are organised into a scheme of cooperation, then the basic structure is something like a coherent system (structure) of a coherent system of rules (institutions)¹⁷. However, not all institutions (or associations) are part of the basic structure and what marks an institution as basic in relation to social and economic justice is that it is a system of public rules which has a profound influence upon one's social and economic circumstances. For instance, many "games and rituals" are unlikely to have an influence upon our social and economic standing, unlike competitive markets which clearly do influence such matters.

Here, I agree with Cohen; this initial defining of the basic structure and social institutions does indeed omit to tell us whether coercion is an *essential* condition of the basic structure. But omission simply means omission: that the issue of whether coercion is or is not a necessary condition of the basic structure has been left out of these initial passages. For clarity, it would, I believe, have helped Rawls's definition of the basic structure if he had included a brief account of its relation to coercion. If we are to set out a definition of institutions and structures as system of rules, we would think an essential element of understanding those rules would be how they are regulated so it is odd that this matter is neglected here. But I think Rawls says enough elsewhere about the basic structure being coercive to demonstrate that his neglect of the condition of coercion in these initial comments should not infer that coercion is not a condition of the basic structure. Cohen also refers to Okin to support this second interpretation of Rawls, that, as Okin says, the family appears to be omitted from the basic structure. But, for Okin, this conclusion about the family arises because the parties in the original position represent only males and so excludes females from that deliberative procedure and thus also from justice. This is not the same ambiguity which Cohen perceives, that it is not clear whether the basic structure is exclusively regulated by the coercive structure.

My understanding therefore is that it is indeed the intention of Rawls that the basic structure be restricted to coercive institutions, or rather, to be more accurate, those parts of institutions (or its rules) which *it would be legitimate to coercively regulate*. There are a number of theorists who make this distinction between actually coercive institutions and legitimately coercive institutions. For instance, Chamber's analysis of Cohen is that he approaches coercion back to front (Chambers, 2013, p.90). The basic structure does not consist of those social institutions which *are* coercively regulated. We do not look around for those institutions which

¹⁷ Rawls states that both the basic structure and institutions can be understood as a public system of rules (Rawls, 1999, p.48).

are coercive and then assign them to the basic structure because of that condition. Rather it is those institutions which should be coercively regulated because they have a profound influence upon us. Thus, if it is indeed the case that equality between spouses is not coercively regulated (and with this I will disagree in the following subsection), this does not mean spousal equality is not a basic structure institution. Rather, justice assigns it to the basic structure and it is therefore legitimate for it to be ultimately backed by force. Neufield appears also to be generally in agreement here, by referring to her account of the basic structure as “the “legitimacy of coercion” account, meaning that “those institutions that have a profound effect on all citizens are those institutions that need to be organized and regulated by coercive means” (Neufield, 2009, p.42). The idea is that reasonable persons would recognise institutions which have a profound influence on our lives as those which *should* be regulated and therefore, in doing so, meet the “Liberal Principle of Legitimacy”. This applies to a well-ordered society because of the “assurance problem”, meaning that coercion is necessary to assure reasonable persons that their contributions to society will be reciprocated by others. It also applies to a society that is not well-ordered, to make sure that unreasonable persons do not undermine the scheme of social cooperation by their non-compliance (Neufield, 2009, p.42). Ronzoni also takes a similar position on the basic structure, criticising Cohen for adopting a model of society in which “the structure of an institutional framework is something fixed and given, that cannot be questioned” (Ronzoni, 2007, p.72). It is not that we start by looking at what is presently included in the basic structure but that we start with principles for assessing the justice of present basic structure institutions which certainly can be reformed or replaced.

While I generally agree with this view of the basic structure as those institutions it would be legitimate to coerce, I disagree, for two reasons, that Cohen just starts with what we already have. The first reason is that he believes a liberal society would not be respecting basic liberties by collecting information about the personal domain, to which he attributes the family. The second is informational. Cohen believes it is beyond the capacity of the state to collect such data.

The reason why I say that it is an institution’s status as being legitimately coercive rather than actually coercive is because different societies have different institutions. What is assigned to the basic structure in one society may not be in another. For instance, in a non-patriarchal society, there might be no need for gender equality laws. The issue of equality between spouses within the family therefore would not be coercively regulated in such a society but this does not mean the matter of equality between spouses would not be a legitimate case for coercive regulation if gender equality did not obtain. The traditional nuclear family is not a necessary feature of a liberal society and if other institutions were preferred, there would be

no need for any laws to regulate families. But this does not mean that the family as a social institution is not ultimately backed by force, for if there were traditional families, then, on account of their profound influence upon life prospects, the family would be an institution which justice judges to be legitimate for coercive regulation. In this sense, the family is not sometimes in and sometimes out of the basic structure. Rather, it is *always* in the basic structure as it would be a legitimate object of coercion even if the institution is only counterfactual. Regarding Cohen's claim that it would infringe upon basic liberties to collect the data needed to implement justice within the family, I simply do not agree. I do not at all believe this would be objectionable and in the following subsection I will demonstrate why this is so. On the matter of whether we can collect the relevant data, I believe we can. But say, we could not for technological reasons. This does not mean that the family is not part of the basic structure. For we would collect the data if we could, or we would do the best we can to collect the data.

That I concur that it is the institution's status as being legitimate for coercive regulation means that I am not in agreement with those who claim that *actual* coerciveness is an essential element of a basic structure institution, as Tan does (Tan, 2004, p.346, n.29). Furthermore, I disagree with those who argue that coerciveness is not, in any way, an essential element of institutions. For instance, Williams, who issued an early response to Cohen's concerns about the "basic structure objection", denies that coerciveness is a fundamental feature of basic structure institutions, stating that the fundamental feature is that they are "public rules" (Williams, 1998, p.234). While I agree that publicity is indeed an essential feature of social institutions, I disagree with Williams that their coerciveness, or coercive legitimacy, is not a basic attribute¹⁸.

This subsection demonstrates that, contra Cohen, the ambiguity about coerciveness can be resolved but that the answer is not either of the options that Cohen proposes. The first option is closest to my analysis, as I state that coercion is an essential element of basic structure institutions, but understood as the institution being one that it would be legitimate to regulate by force rather than actual coercion. Now my position on this has been clarified, I can move on to showing how Cohen misconceives the way in which the institution of the family fits into the basic structure.

¹⁸ Williams presents a later response to Cohen's distinction between fundamental principles of justice and what Cohen calls "rules of regulation", stating that "although Rawls employs similar terminology he does not aim to identify first principles of justice in Cohen's robust and pure sense" (Williams, 2008, p.490). Thus, the principles which Rawls determines are intended as, and ought to be considered as, principles of justice but not fundamental in the Cohenian sense. This distinction between principles of justice and rules of regulation is not one I attend to in this thesis and Cohen employs it mainly in his later meta-theoretical objection to constructivism which is not the focus of this thesis, although I do feel Williams might be right about this.

4.2.2 Equality of Spouses within the Family

As I have indicated in the previous subsection, the matter of coercion and its relation to the basic structure is more nuanced than Cohen (and also many of his and Rawls's interlocutors) realises. The matter of how the family fits into the basic structure is also more nuanced than Cohen realises and so this might explain his confusion. I will address this in both the present and the following subsections. Both this and the following subsection connect with two debates which have arisen from Cohen's critique of the basic structure. Firstly, there is the debate about the extent to which social institutions, or structures, influence our lives, both in terms of how well our lives go but also in terms of the types of people we turn out to be. Secondly, there is the monism/dualism debate, whether principles deemed fit for social institutions ought to be extended to personal decision.

Regarding the first of these debates, Rawls believes that social and political institutions play a greater role in our lives than many liberal philosophers. Recall, Barry's afore-mentioned assertion that the prioritising of the basic structure was an uncommon move for a philosopher in the liberal tradition and demonstrates the influence of social theorists such as Marx and Weber (Barry, 1995, p.214). Cohen, on the other hand, who is often described as a left-libertarian, although never precisely articulating his position on institutions, overlooks, I will argue, the extent of the pervasiveness of institutions. Furthermore, Cohen, at times, seems to subscribe to the familiar Marxist thesis of the state as a mechanism for capitalism or, in Cohen's normative adaptation, injustice, which must "whither away", while Rawls, on the other hand, holds a more optimistic view of institutions, that they can be structured to administer justice. My position on the first question concerning the pervasiveness of institutions, has been shaped by Scheffler who states not only that "much of family structure is coercive" (Scheffler, 2006, p.125), but also that it is unclear why Cohen believes "the government cannot by itself implement the strict difference principle" (Scheffler, 2006, p.115). What I add to Scheffler's insight is a sketch of the institutions which can indeed do this work. However, there are other parts of Scheffler's analysis which I do not agree with. For instance, Scheffler concedes that "[i]t is indeed unclear whether the difference principle should be given a strict or lax interpretation" (Scheffler, 2006, p.112) and in this and the following section I will attempt to show that this unclarity might dissipate if we consider its direct and indirect applications¹⁹. There is further support for the institutions first approach in the wider literature. For instance,

¹⁹ Scheffler also states that he does not agree with Cohen that Rawls's endorsement of incentives is as "unqualified as Cohen takes it to be" (Scheffler, 2006, p.114). As I hope should be clear from my previous chapter I agree here.

Pogge also states that Cohen underestimates the influence of institutions (Pogge, 2000, p.139), as does Roemer (Roemer, 2010, p.262). In this chapter, I am primarily concerned with how institutions regulate behaviour. In the following chapter I will also state that Cohen underestimates the extent to which institutions shape a society's ethos.

In the subsection following this one, I consider whether the reason Cohen perceives an ambiguity in the status of the family within the basic structure is due to the family having another role within social justice, the raising of children as future citizens. By doing so, it addresses the second of these debates between Rawlsians and Cohenians, which is the monism/dualism basic structure disagreement. This disagreement concerns whether the principles of justice which regulate the basic structure should also govern other sites of justice. Murphy, for instance, objects to Rawls's "dualism", "the specific claim that the two practical problems of institutional design and personal conduct require, at the fundamental level, two different kinds of practical principles" and advocates for its denial, which he calls "monism" and equates with Cohen's position (Murphy, 1998, p.254). In Murphy's view, Cohen's incentives argument demonstrates a reason for discarding dualism (Murphy, 1998, p.269). Similarly, Julius calls Rawls's approach the "separation view". It "commits you to exclude personal decisions from scrutiny based in justice for the reason that the decisions are personal and regardless of their causal upshot", and cannot endorse it (Julius, 2003, p.326). Pogge responds to both Cohen and Murphy by considering the form a redistributive tax system, an institution Cohen also considers, might take under monism. The monism argument, says Pogge, aims at a "common goal" but there are two forms. The first "common goal" he terms "mastergoal", and this is where the common goal is understood performatively, that the common goal should be promoted (Pogge, 2000, p.155), while the other is "supergoal", in which each person must be directly inspired by the common goal (Pogge, 2000, p.156). "Supergoal", he says, is Cohen's form of monism, while Murphy's appears to be a mix of the two. The distinction between the two is that in mastergoal monism it is only imperative that the goal is attained, while in supergoal monism it must also be attained in the right way. I agree with Pogge that Cohen's preferred monism is supergoal as not only must justice be an outcome but individuals must also be just. However, Pogge defends Rawls against both forms. As will be clear in the following chapter, I show that Cohen's supergoal monist critique of Rawls cannot be sustained, for, contra Cohen, Rawlsian citizens are indeed directly motivated by justice. Pogge also says that the reason that Rawls ought not adopt mastergoal monism is because it might turn out that the best way to achieve justice is by means we might consider to be unacceptable. Furthermore, the problem with supergoal monism is that it makes no sense to oppose a means of achieving a goal that is not unreasonable (Pogge, 2000, p.159). I entirely agree with Pogge here. Firstly, Cohen would not have the option of pressing the

mastergoal monist critique against Rawls if the rejection of the supergoal objection were upheld because the means by which goals are achieved is central to his objection. Secondly, Cohen's supergoal monism asserts that equality must be attained by egalitarians, those motivated by equality, and so would reject distributive equality as unjust if attained because people are motivated, for instance, by reciprocity, as they are in Rawls's account of justice. Reciprocity, I argue, is not an unreasonable means for achieving equality and we should not object to it.

Let us now turn to first considering Cohen's specific objection, that the basic structure cannot regulate equality between wives and husbands. Although at times he implies some hesitancy, Cohen seems to opt for the interpretation that Rawls intends to equate the basic structure with coercively-regulated social institutions and, as I have shown above, I am, with caveats, roughly in agreement with this interpretation. Of course, this does not mean that all legally-enforced institutions are part of the basic structure. For instance, I take it that there may be traffic laws which are not part of the basic structure because they are not social institutions which influence one's life prospects, although they are institutions in the sense of being a system of public rules. For example, it is a law (in the UK) that one should remain in the left-hand lane unless overtaking but this law does not have any influence over how one's life prospects pan out. Therefore, despite being part of the legal-coercive system, it is not part of the basic structure. We can say that the legitimacy of legal enforcement is a necessary but not sufficient condition of an institution being part of the basic structure. The other necessary condition, and Cohen is right about this one, is that it has a "profound" influence on one's life prospects.

But Cohen, as we have seen, wants to expand the site of justice, or more specifically the site of the difference principle's application, and his main argument for including non-coercive institutions concerns the matter of the equality of spouses, the issue of internal distribution of income, wealth and unpaid labour, within the family. He says that this equality cannot be coercively regulated but, as this has a profound influence on one's life, it must be considered relevant to the pertaining of social justice. There is therefore a contradiction: this aspect of the family has a profound influence upon one's economic standing and this is a condition of an institution's inclusion within the basic structure but it cannot be included in the basic structure because it escapes coercive regulation. Thus, because of the profundity condition, the basic structure cannot be the only site of justice – there are also non-coercive institutions, such as this aspect of the family, which have a profound influence and so ought to be regulated by justice, in this case specifically by the difference principle. Thus, once we cross the line and allow non-coercive institutions into the purview of justice, we must also admit other non-coercive institutions which have a profound influence upon our lives such as the convention of paying incentives to the talented.

This is a logically valid argument but there is a fundamental problem and it is that the premise stating that the difference principle cannot be coercively enforced within the family is demonstrably false. There is no reason why laws cannot be mandated to distribute wealth and income equally between spouses, as Rawls both supports and acknowledges (Rawls, 2005, p.473). Thus there should be no problem fitting spousal equality generating institutions into the basic structure, for the relative economic status of spouses has a profound influence upon one's life prospects and so ought to be, can be, and often is coercively regulated. Therefore, as it is part of the basic structure, Cohen's call for this aspect of the family to also come under the purview of justice is superfluous as it is already included. Cohen's argument here therefore fails because he misrepresents an aspect of the family as being a necessarily non-coercive institution. There are at least two reasons why Cohen might think that the family cannot be coercively regulated. The first is informational: extracting all the information needed to equalize the financial position of spouses might be extremely difficult. However, I presume we are not expecting absolute perfect equality here and it certainly would not be so difficult to make sure that wives are not too financially subjugated to husbands. The second reason is that it might be an unreasonable invasion of the family's privacy to do so and so is constrained by the priority of liberty. However, I do not think this holds either. For instance, if it were made mandatory that a husband must share half of his income with his wife for her doing the household labour by having half his pay automatically deposited in his wife's account (or vice versa of course) then this can be done without impeding upon privacy.

If justice should be expanded from coercive institutions, as Cohen argues, the demonstration that a coercive institution should be included clearly cannot make the case for its expansion beyond the coercive. One response that Cohen might offer here is that while income and wealth can be legally mandated to be shared between spouses, it might be the case that convention pressures the wife to do more of the share of labour in the home. So, while income and wealth is shared equally, the wife takes on more of this labour and so is in fact paid proportionately less than the husband. The law could not intervene in this matter, or at least if it did it would require great resources and information, and perhaps also greater access to our personal lives than modern beliefs about the separation of the personal and the political would endorse. Rawls states that if this is the case, "a reasonable constitutional democratic society can plainly be invoked to reform the family" (Rawls, 2005, p.470) and one way this might be done is that "the law should count a wife's work in raising children [...] as entitling her to an equal share in the income that her husband earned during their marriage" (Rawls, 2005, p.473). This he says, is regularly executed – when wives divorce their husbands they can claim a share of the husband's income and wealth due to her for unpaid labour within the home. Another way in which coercive institutions can deal with inequalities between the genders

would be by strictly enforcing equal opportunities. The example that Rawls gives here is that if women are not guaranteed equal opportunities with men (and this can indeed be proscribed legally) then the upshot will be that men are more likely to do paid labour with women than having to take on the unpaid labour (Rawls, 2005, p.471). Clearly, in such a situation, institutions can be reformed to promote equal opportunities because, if Rawls is right here, the cause of the unequal distribution of labour is institutional²⁰.

Clearly Rawls envisages the difference principle to be applied, and coercively regulated, to the family so that economic equality between spouses is the outcome. He also thinks that this is a commonly accepted convention (Rawls, 2005, p.473). We can see here that Rawls and Cohen appear to agree more than Cohen realizes. Cohen states that the difference principle should be applied to the family to establish equality between husband and wife and Rawls agrees. Where they disagree is that Cohen thinks this cannot be achieved by coercive institutions. But Rawls, and myself, would disagree. Therefore, if Rawls is right, Cohen's argument fails to establish that non-coercive institutions must be added to the site of justice because his example is not a necessarily non-coercive institution. It also shows that Rawlsian justice can indeed, by way of coercive institutions, address the concerns that Cohen raises about economic injustice within the family. Furthermore, Cohen again misunderstands Rawls – equality between spouses is certainly part of the basic structure. It is of profound influence upon how spouses lives go and, Rawls believes (and I agree), it may be coercively regulated.

4.2.3 Equality of Children as Future Citizens

As was shown in the previous subsection there is a disagreement between Rawlsians and Cohenians concerning whether the principles for institutions should be extended to individuals. I am now going to try to address this disagreement by considering how institutions and other associations might be regulated both directly and indirectly by the full set of Rawlsian principles²¹. Cohen's sense of ambiguity regarding the family might arise because there is another aspect of the family, albeit one which Cohen does not discuss, which Rawls states ought to be part of the basic structure but looks like it cannot be coercively regulated. If it cannot, it might therefore effectively challenge the claim by Rawls that his principles apply only

²⁰ Whether Rawls is right here or not I do not pursue. It is one of those complicated sociological questions that I am not sure sociology could provide a definitive answer to.

²¹ Brennan also makes a distinction between direct and indirect applications of principles but his distinction is not the same as mine (see Brennan, 2007)

to coercive institutions and so lead to the Cohenian conclusion that we must also let in non-coercive institutions, personal decision and ethos to difference principle regulation. While not explicitly identified as such, it might also be a plausible cause of Cohen's perception of ambiguity in Rawls. This aspect of the family is that, in addition to establishing equality between spouses, it also establishes the equality of children as future citizens. However, as I will show, there are good reasons of justice why the equality of children might not be necessarily applied within the family. Thus, this argument could also not be employed to show that the family be internally regulated by the difference principle. To be clear, Cohen does not use this argument but I raise it to show not only that Rawls does consider equality within the family, applied indirectly, but also to pre-empt a Cohenian response to the previous subsection's conclusion.

According to Rawls, "[t]he family is part of the basic structure, since one of its main roles is to be the basis of the orderly production and reproduction of society and its culture from one generation to the next" (Rawls, 2005, p.467)²². Because of this a "central role of the family is to arrange in a reasonable and effective way the raising of and caring for children, ensuring their moral development and education into the wider culture" (Rawls, 2005, p.467) and what this aims at is establishing the freedom and equality of children as future citizens. However, if it is right that aspects of the family are only part of the basic structure because they are legally coercive, this aspect of the family cannot be part of the basic structure. For we cannot, it seems, force parents, by the legal threat of punishment, to nurture their offspring with the requisite beliefs about equality which justice as fairness entails. Doing so would not only be impractical, encountering informational difficulties for instance, but would also likely be considered an unacceptable infringement of our personal liberties.

However, I think Rawls could respond to this. Firstly, he states that parents would be permitted to teach gender inequality if those beliefs are sincerely and freely held, such as for religious reasons, because holding such beliefs are permitted by the first principle of justice, which takes priority over the difference principle (Rawls, 2005, pp.466-474). But, secondly, as we saw in a previous subsection, it is the basic structure as a coherent system of institutions which must be just. Institutions therefore within the basic structure can be unjust when the basic structure is just. This means that, despite the family being unjust in the sense that it fails to furnish children with the appropriate sense of justice, the basic structure can be just providing that injustice is compensated for elsewhere within the basic structure by institutions

²² I find this statement a little confusing. Rawls seems to be saying that this is the only reason why the family is part of the basic structure. But he also includes in the discussion from which this quote is taken the issue of equality between spouses (as discussed in the previous subsection) which appears to be an additional (and independent) reason for the family's inclusion.

which are legally coercive. And the family, as it cannot legally withdraw children from those institutions, is indeed legally prohibited in its role of producing just future citizens even when it does not directly fulfil this requirement itself.

This might be a little unclear so let me try to explain. As we have seen, Rawls makes a distinction between the justice of the *basic structure* and the justice of *institutions*. The aim of social justice, says Rawls, is that the basic structure itself, as an overall coherent system of institutions, should be just, for “one or several rules of an arrangement may be unjust without the institutions itself being so [and] [s]imilarly an institution may be unjust although the social system as a whole is not” (Rawls, 1999, p.50). In other words, Rawls believes that it is the social system as a whole (the basic structure) which must be just and this can be achieved despite the institutions that constitute the basic structure themselves not being just. Cohen’s objection here, on the other hand, argues that there would be more social justice, and for Cohen this means greater economic equality, if institutions were all internally just, specifically in the sense of internally implementing the difference principle. However, as I will show, there are good reasons for resisting this presumption.

It seems that there are three tiers of rules which constitute social justice. The most basic is a rule. An example The next is an institution as a system of rules. The final tier is the basic structure as a coherent system of institutions. Each of these can be judged to be just or unjust. By prioritising the basic structure, Rawls thinks that it is the final tier, the basic structure, that has the most profound influence upon social justice. Thus, social justice is delivered by the basic structure and this may be achieved when the other tiers are judged not to be just. So, if Rawls is right, what examples might there be of this, where parts of, or the entirety of, an institution (or a rule) of the basic structure are unjust but the basic structure is just? Continuing with the institution of the family, as this is the issue that Cohen makes use of, some aspects of the family are part of the basic structure and some aspects of it are not. One aspect of the family, as we have also already seen in Chapter 2, which is a part of the basic structure is its role in producing just citizens with the appropriate sense of justice and so reproducing a just culture. Thus, the family would be unjust if it fails to produce just citizens, those who affirm and act from the principles of justice. But it is not only the family which has a role in producing just citizens but also other aspects of society. For instance, a publicly accessible education system also might have a role in producing and reproducing just citizens and culture. Therefore, some families might be permitted to be unjust in regard to this role if the public education system compensates for it by disseminating appropriately liberal views on gender. If a family is unjust in this way, this does not mean that it drops out of the basic structure because, recall, the institutions of the basic structure are those which have a profound influence upon our lives and this feature would not be lost despite *some* families failing to be

just in this regard. That some families fail to be just in this regard does not mean that a just basic structure is not achieved if there are satisfactory compensations. The argument that Cohen makes is that the family must also be internally just but there are good reasons consistent with justice as to why it need not be.

An example of how the family might fail to be just in this way might be the family which educates its children, as future citizens, to value traditional sexist gender roles. This is unjust as women and men should have equal freedoms and opportunities²³. It is also unjust because it might contribute to females, as adults, earning less than males in a pattern that would not be supported by the difference principle. But if this unjust practice is satisfactorily compensated externally to the family, such as by the education system, then the basic structure would be just. Children, who have been educated in both gender equality and gender inequality, should then be free to adopt either their parents view or the presumably more widespread belief in a liberal democracy of equality. Cohen might respond here that the family, and so also society, would be *more just* if the children were educated in gender equality. Therefore, we ought to, perhaps by the force or pressures of either the law or the ethos, promote parents' teaching of gender equality to their children. However, the problem here is that Rawls also wants to carve out space for freedom of belief and expression guaranteed by the first principle of justice (Rawls, 2005, p.471). Because citizens are conceived in terms of having and desiring autonomy, they ought to be allowed to appropriate "traditional" views of gender inequalities (providing, of course, that it is genuinely voluntary). Say, for instance, the parents teach gender inequality because of their religious beliefs. If freedom of belief and its expression is protected by the first principle of justice, it would be unjust to coerce or pressure parents into not expressing those religious beliefs or punish them in some way for doing so. Therefore, it would not necessarily be the case that coercing or pressuring parents into teaching gender equality makes the family more just – rather, it could make it less just. But if other aspects of the basic structure, such as the education system or other institutions, demonstrate to children that they are free not to adopt their parents views about gender then this might be more just than coercing or pressuring the parents to educate children in contradiction to their own deeply held beliefs. What parents cannot do is entirely insulate their children from the liberal idea of gender equality prevalent within society or to campaign for public institutions, such as a public education, which teach gender inequality. Cohen, on the other hand, does not seem to consider such matters because of his tendency to consider only the difference principle in isolation. Traditional sexist families, for him, are unjust and we are able to reform them by, preferably, spontaneous moral epiphanies. For Rawls the family need

²³ Or: Equality of the sexes is a considered judgement of which, in a modern liberal society, we have great certainty in.

not be internally just for there to be a just basic structure as other demands of justice may legitimately take precedence, but Cohen implies that both the family and the basic structure must be just for justice to prevail. Cohen might argue that a family which does teach gender equality is more just than one that does not. But Rawls would respond that, providing the choice to accept gender inequality is indeed voluntary, it is not more just if it breaches the prior requirement of freedom of thought, belief and expression.

It might be said then at this point that this aspect of the family cannot be part of the basic structure if it is not coercively enforced. However, this would not be so if the requirement that children not be restricted from education outside of the family is coercively enforced, as it usually is. Therefore, the family can be unjust in its basic structure role of fostering the appropriate sense of justice within offspring providing that coercive institutions, such as the legal requirement of education, compensates. While the family is unjust, justice is delivered by a basic structure which includes coercive measures - parents cannot legally prevent their children from participating in other educative institutions. This aspect of the family therefore is coercively regulated – while the law cannot enforce parents’ teaching of gender equality, they cannot legally prevent their children from being exposed to teachings concerning gender equality within the wider basic structure. The family here need not apply justice directly, or internally, but cannot legally resist its indirect application²⁴. Therefore, the family is coerced in its role of producing just citizens even when it teaches views counter to those which support justice. We might think of this in terms of negative and positive duty. Parents do not have a positive duty to teach gender equality but they have a negative duty of not preventing their children’s exposure to it more generally in the basic structure²⁵.

There are two questions that I now believe are relevant. The first asks who is right here. Is Rawls right that social justice requires justice only at the tier of the basic structure, or is Cohen right that justice must be achieved at each and every tier? We might say that, for Rawls, the basic structure has to be coherently just but for Cohen it must be entirely just at all three tiers. My answer here is that the example of the unjust family within a just basic structure set out in the previous few paragraphs would succeed as an objection to Cohen. This objection to Cohen shows that it is not necessarily the case that all institutions must be just in each aspect for the basic structure as a system to be just. In other words, Cohen states that the application of the

²⁴ The issue of direct and indirect application of justice to institutions remains a little unclear in Rawls, in my opinion.

²⁵ I am aware that children can be legally home schooled. But this may include, if the basic structure is to be just, gender equality included on the curriculum. This, I believe, would be enforceable. Home-schooling parents might try to persuade their children that the belief in gender equality is wrong but children don’t always accept their parents beliefs. That they are exposed to alternative views might well be enough for them to freely decide which view they wish to accept.

difference principle to the family will create more social justice, but the example above shows that this is not necessarily the case.

The second question that we ought to ask is, as Cohen is primarily concerned with income and wealth inequality, would Rawls's approach address these inequalities? Well, if the unjust family is indeed compensated elsewhere then there is no reason to think that the basic structure would be less effective at disseminating beliefs about gender equality, which in turn would support income and wealth equality, than one in which all families teach gender equality. And it is certainly the case that children raised in families which do practice indoctrination into traditional sexist beliefs which might reproduce economic inequalities between the genders have resisted those beliefs. There is a good chance, I believe, that they will choose equality if they are exposed to arguments in its favour. Furthermore, it is not uncommon that children of liberal parents adopt socially conservative views and so the teaching of liberal equality within the family may not necessarily attain difference principle approved outcomes. If I am right here about the family being part of the basic structure even when it fails one of the roles which appoints it to the basic structure, then there is no ambiguity about what the basic structure includes. The family can belong to the basic structure for roles which only their indirect application can be coercively regulated.

4.2.4 Justice is not Restricted to the Basic Structure

The previous subsections have digressed from the specific enquiry concerning incentives to considerations of intra-family justice but they have allowed us to see why Cohen might have been unclear about how the family fits into the basic structure. If we can see why inequalities might be permitted by justice within the family, we might also apply those thoughts to the issue of incentives. In the following subsection, I will consider whether the issue of justice in the family does indeed shed any light on the incentives issue. However, let us first consider a response Cohen might make to the previous subsection. He might say that even if he were to concede that I am right about the family fitting into the basic structure both directly and indirectly, a Cohenian egalitarian might respond that there would be more social justice if other non-basic structure associations were just and the argument therefore remains that justice must be extended beyond the basic structure.

But this response does not seem justified as, while Rawls restricts the basic structure to coercive institutions, Rawls does not restrict justice to the basic structure. Rawls agrees that the "personal is political", for he states that "[i]f the so-called private sphere is alleged to be a space exempt from justice, then there is no such thing" (Rawls, 2005, p.471). The basic

structure is the “*primary* [emphasis added] subject of justice” (Rawls, 1999, p.6) but not its only site. There are therefore two kinds of principles, those that apply to the establishment of background justice, the other to agreements and transactions between individuals (Rawls, 2001, p.54). As we have already seen, institutions within the basic structure are either coercive or ultimately backed by coercion but Rawls does also state that there are other institutions (sometimes Rawls calls these associations) that are not part of the basic structure and many of these should remain non-coercive. We have already seen, in our discussions above, how justice is applied indirectly but coercively to aspects of the family. The point was that it is not necessarily the case that there will be greater social justice when the family is internally just. However, while the family may not be internally just, it must have justice applied indirectly in order for there to be justice at the level of the basic structure. However, it is not only coercive institutions which have justice applied indirectly; non-coercive institutions also must have justice applied indirectly.

Rawls’s argument is that the basic structure is primary because it has a greater influence upon how our lives play out than other associations but other associations cannot escape justice. Take, for example, Rawls’s statement that universities and churches are not part of the basic structure (Rawls, 2001, p.10) (Rawls, 2001, p.26). Neither need conform to justice internally providing one can freely enter or leave those associations, and this membership is guaranteed by the first principle of justice, but they cannot erode background justice and so cannot be entirely incompatible with or undermine a just basic structure. This means, for instance, that universities and churches, like families, could also teach gender inequality, and so be unjust, providing they do not restrict members from accessing arguments in favour of equality. They could also practice gender inequality providing those subjected to it genuinely voluntarily agree.

The difference between institutions of the basic structure and other associations is that the former have a profound influence upon one’s social and economic status which, Rawls believes, the latter do not. Cohen might say in response that there would be more justice if all non-coercive institutions and other associations apply the difference principle internally but we have seen good reasons, such as within the family, why doing so might not be conducive to social justice. These reasons, such as the priority of the basic liberties, also apply to other associations. We might ask then, how does Rawls intend justice to apply differently to institutions than to other associations? Both can make internal rules which depart from the implementation of the principles of justice providing, at the level of the basic structure, how those rules combine into a coherent system (rules, laws and the like) do support the objective of the principles of justice. The difference between basic institutions and other associations is, Rawls believes, that institutions have a primary aim of establishing justice while associations do not (Rawls, 2001, p.20).

A Cohenian defence here might be that there is no reason why liberty should take preference over material equality. But the examples given about how the family, irrespective of whether it is a basic structure institution or not, or other associations like churches or universities²⁶ need not be internally consistent with the difference principle primarily consider whether those beliefs and practices genuinely are voluntary. It should therefore not be a crime to believe, teach, or practice that women are inferior to men in these private associations, providing that contrary beliefs are accessible elsewhere and membership is truly voluntary. Now, Cohen does certainly believe that what is of fundamental importance in justice is whether what people get reflects voluntariness, that distributions reflect choice. Therefore, if women do freely choose to be subordinate to men (or vice versa of course), then a justice understood in terms of voluntariness should not stand in their way. Of course, we do not think that children voluntarily choose their family but they do have the freedom to choose which beliefs they accept when they are exposed to beliefs other than those their family members teach them. Thus, I argue, if Cohen does believe that choice is the primary test by which distributions are just, then it seems he does prioritise liberty.

4.2.5 Cohen's Concerns about Incentives can be Addressed by Coercive Institutions

I agree with Scheffler when he says "it is not at all obvious why a government could not implement the strict difference principle itself" (Scheffler, 2006, p.116)²⁷ and here we return to my Scheffler-inspired critique of Cohen's unawareness of the effectiveness and pervasiveness of institutions. In subsection 4.2.2 and 4.2.3, the matter of how institutions shape justice within the family was considered and I argued that the matter which Cohen raises, justice between spouses, can indeed be coercively regulated. In this subsection, we consider whether incentive seeking can be restrained coercively and, again, we return to the critique explored in the previous chapter, the institutions which would be consistent with, not just the difference principle, but with each of the principles of Justice as Fairness and their lexical ordering. My analysis here does not suggest that there might be ways in which we can do more justice by way of our extra-legal choices and behaviour, but rather that the matter of incentives, which

²⁶ I presume that Rawls refers to private universities here. Universities that are publicly funded surely must fully endorse the difference principle.

²⁷ Scheffler also doubts whether Rawls mandates incentives. But in his subsequent discussion of the basic structure Rawls clearly states that some "inequalities, we may assume, are inevitable, or else necessary or highly advantageous in maintaining effective social cooperation. Presumably there are various reasons for this, among which the *need for incentives* is but one" (Rawls, 2005, p.270). [Italics added for emphasis]

was Cohen's primary concerns and which led him to discuss the matter of intra-family justice, can be regulated by the basic structure.

Let us consider then two obvious ways in which the legal-coercive structure might bring about egalitarian economic justice by regulating incentives. Firstly, in a well-ordered society, distributive justice can be achieved via a redistributive tax system and such a tax system is obviously part of the legal-coercive structure. As we have seen, Cohen, agrees that this is a possible method for addressing concerns about inequality in his discussion of Carenian markets (Cohen, 2008, pp.190-191). Secondly, the Rawlsian principle of fair opportunity ought to give each the chance to fully develop their natural talents and this could also be legally implemented. Therefore, the legal-coercive structure ought to be capable of redistributing wealth and income not only in a pattern with which egalitarians, as Cohen frames them and which he considers himself to be representative, ought to be satisfied. Of course, individuals need to support these legal measures. They must vote for parties who support them, for instance, but then such behaviour would be constitutive of the legal-coercive structure, in the sense that citizens vote for parties which would implement such laws and also in the sense that citizens are guaranteed democratic rights, and not of other structures or of structure-independent behaviour. The state has the capability to tax 100% of income above the average, or even ban incentives payments outright. The state can also implement laws which reflect the fair principle of equal opportunity. Thus, in my view, the coercive structure ought to be able to address the problems that Cohen raises.

Let us now consider, more specifically, how the legal-coercive structure can in fact mitigate the economic concerns Cohen raises by way of the incentives, Pareto and freedom arguments. Firstly, let us consider the incentives argument. Could the legal coercive structure, those mechanisms as just indicated, such as redistributive tax and laws promoting fair equality of opportunity, be implemented to mitigate any incentives claims by the talented? I argue that the legal-coercive structure can indeed mitigate against the sorts of economic injustices that motivate egalitarians' concerns. Say, for instance, our ill-ordered society has not pursued any implementation of policy addressing the sorts of inequalities that free-market conditions often bring about and which ought also to trouble egalitarians. Assuming political institutions are so instigated as to be democratic (and if they are not then, if we value democracy in the economic sphere, first implementing democratic political institutions would probably be a more pressing concern than economic equality), anyone claiming a right to govern, such as a political party, might propose implementing measures such as progressive taxation and fair opportunity for all. If they did, we might expect these measures to gain support because, as I have argued above and in the previous chapter, these sorts of measures should be able to restrict extravagant incentives demands. If not then I believe it would not be beyond the political

imagination to supplement these with other policies which would do so if the will (and the ethos) is there (which it would be if the party had been democratically elected).

What about the sufficiency of the legal-coercive structure for justice when we also consider the Pareto and Freedom arguments? If we are concerned with both maintaining freedom of occupational choice and obtaining Pareto efficiency, and Cohen thinks we should be, how would the legal-coercive structure also induce the talented to take on Pareto-superior occupations without infringing upon their basic liberties and upsetting equality? Cohen, as we saw in the previous chapter, suggests we solve this trilemma by a fully redistributive tax system and the talented being motivated by their egalitarian conscience, which is duly stimulated by the egalitarian ethos, to choose Pareto-superior occupations independently of the legal-coercive structure. As I have said already, the tax system is clearly part of the legal-coercive structure. Furthermore, Cohen only considers a tax system and such a tax system is not the only means by which the legal-coercive structure might regulate the economy. Take, for example the talented doctor-gardener from the previous chapter who prefers gardening but does not despise doctoring. How do we entice her into doctoring? Is there a way that the basic structure can attract her to doctoring without paying her more than others and upsetting equality? One way that the legal-coercive structure might entice her into doctoring is to remove what are the causes of the doctor-gardener's reservations about doctoring. For instance, it might be that she slightly prefers gardening because she has to spend so much of her time working and doctors often have to work very long hours, but if the working week were limited, say to 35 hours or even less, and this was legally enforced, she might be less reluctant to pursue doctoring. She would then have more leisure time to enjoy gardening as a hobby and this might be a satisfactory arrangement for her²⁸. This would probably mean that more doctors would need to be recruited than were previously which might cost society more, both in their *combined* salaries and in training costs. However, Cohen's objection is not about the cost of such matters but rather about the site of justice and my point is that the legal-coercive structure can and does implement such regulations concerning maximum working hours. My argument therefore is that it may be that if the legal institutions of the state can guarantee a decent work/life balance then doctoring would be more appealing to her.

There are other laws the basic structure might pursue to this end. For instance, the doctor-gardener might be reluctant to doctor because even working decent hours would be very stressful, much more so than gardening. Perhaps there could also be a legal requirement that

²⁸ Pogge suggests, in his critique of Cohen, that any principle intended to benefit the least well off requires any worker to do as many hours as they are able to (Pogge, 2000, p.153). However, Cohen does state that there ought to be a welfare component to distributive justice. Working all the hours that God sends would presumably not be a particularly well-faring existence.

her employer offer, as part of her reward bundle for doctoring, some therapeutic support which helps her deal with stress. One more way we might entice the talented into more socially-useful work is by heavily taxing well paid but socially-damaging jobs that she might be tempted to choose instead. For instance, we might want to entice someone into doctoring rather than becoming an extremely well-paid hedge fund manager. If doctoring is more socially useful than being a hedge-fund manager²⁹ and the only reason she prefers the latter is because of the greater pay, then under parity pay we should entice her into doctoring. This is obviously not the same as the doctor-gardener case, but if a society is able to entice people into more socially-useful jobs who would otherwise choose better paid but socially-damaging jobs then there is less need to entice people like the doctor-gardener into doctoring and the doctor-gardener may contentedly tend to gardens without upsetting Pareto. Other ways that the legal-coercive structure might take on economic inequality is to support strong trade union laws, or to support co-operative ownership, or to regulate housing costs. Furthermore, strong trade unions empower the bargaining position of the less talented³⁰. All in all, a bundle of measures as just suggested, and no doubt many more that I have not considered, might be implemented by legal-coercive institutions to address the objections that Cohen raises.

While I acknowledge that political theorists are not usually familiar enough with the workings of politics to assuredly offer policy recommendations, these recommendations do not seem unreasonable or implausible to me. It therefore does not seem beyond the imagination to think of ways in which the legal-coercive structure, motivated by an egalitarian ethos, may entice people into socially-useful jobs without neglecting their freedom or well-being and without rewarding them with pecuniary incentives. Therefore, in my view, Cohen does not do enough applied ethics, he does not give enough consideration to what the legal-coercive structure could potentially do to address incentive inequalities. We might doubt that, judging from the way our economies have developed this might seem unlikely. This might be because of the dominance of self-interest or something like a capitalist ethos or institutions which contort human nature, but this is not the issue here. What I am examining here is the claim that incentive justice requires non-coercive institutions to be just in addition to coercive institutions. Cohen might respond that it is precisely because there is not sufficient will that justice requires an egalitarian ethos, but if there is such a thing as an egalitarian ethos³¹ or an egalitarian conscience which is necessary for motivating individuals into socially-useful work, this does

²⁹ And I believe it is. If you do not agree, compare to another well-paid but socially-detrimental job of your choice. Perhaps one that contributes to significant environmental damage.

³⁰ Cohen assumes that it is only the talented who have bargaining power in labour relations (Christiano, 2020, p.185) but the less talented can also do so and more effectively when acting collectively.

³¹ And in the following chapter I will argue that Rawls does include something that looks very much like a Cohenian ethos.

not demonstrate that the legal-coercive structure could not implement the means to tackle inequality. If there is such a thing as an egalitarian ethos, it would, I think, rather express a desire for the removal of those barriers which free-markets present and which prevent talented individuals from choosing socially-useful jobs.

Conclusion to Chapter 4

This chapter has covered a lot of ground. My analysis of Cohen's objection to the basic structure argument can be summarised something like this. We can take his objection independently from his incentives objections, and thus it can be deployed to argue Rawls is not egalitarian enough because he excludes family equality. I have argued that this does not seem to be the case, as Rawls does consider family equality and also argues that justice between spouses, which is the example Cohen provides, can be regulated coercively by the basic structure. I then considered whether there might be another potential injustice within the family that might support Cohen's argument. This I suggested to be the equality of children as future citizens, but I demonstrated why applying the difference principle internally to the family would not be necessarily more just, and might be less just. My response attempted to show how justice is applied directly or indirectly within the basic structure and how justice is applied indirectly to other associations. If I am right, it is difficult to see how a Rawlsian basic structure fails to account for family justice. This second type of family injustice is not one that Cohen addresses but one, I speculated, might have been raised as a response to my previous response to the matter of spousal equality.

There is also the matter of incentives which Cohen's analysis of equality within the family is intended to support. I have demonstrated why I believe the basic structure could legally address the incentives concerns that Cohen raises. As should be clear by now, I do not believe that these concerns would arise in a Rawlsian well-ordered society anyway. However, let us assume that they would, and that an egalitarian ethos arises which opposes incentives. Why would the basic structure not have the ability to regulate those who do demand unjust inequalities? An ethos, as we will see in the following chapter, is one which is generally accepted across society. If it is generally accepted, we would assume that there would be support to implement laws to oppose unjust incentive demands. Furthermore, I argue, the basic structure, would do a better job of regulating unjust incentives than individuals will do because of the burdens of judgement which fall upon individuals, and the difficulty for

individuals in obtaining the necessary information for judging the reasonableness of their pay compared to others.

Chapter 5 – Rawls’s Egalitarian Ethos

Introduction to Chapter 5

Chapter 4 demonstrated that Rawls does consider justice to apply to non-coercive institutions, other associations and personal decision, albeit not necessarily directly and further supports my view that Rawlsian justice is far closer to Cohenian egalitarian justice than the latter realizes. Let us now consider the claim that justice requires motivation by an egalitarian ethos. This chapter will be divided into three sections. The first will initially expand upon what Cohen means by ethos before the second shows that an egalitarian ethos, by which Cohen means the general internalisation of and motivation by specific principles aimed at addressing inequality, is also apparent in Rawls. This convergence provides further support for my claim that Rawls and Cohen are far closer on the issue of equality than Cohen believes, and it also further undermines Cohen’s objection to incentives, as Rawlsian citizens ought not be motivated by the sorts of selfish income maximizing desires that Cohen imagines. The final section of this chapter will argue that Cohen’s claim that there was an egalitarian ethos following the second world war is difficult to substantiate because it is plausible that the differences in inequality between nations at that time were in fact due to unjust basic institutions. However, it is often said that there was a post-war spirit of equality, fraternity and the like, and if this is right, it would suggest that Cohen underestimates the extent to which institutions shape the ethos.

5.1. Why Ethos?

The reason why justice requires an ethos is because Rawlsian principles are intended only for the basic structure of society, its principle social institutions, and thus Rawlsian justice is regulated only by the legal-coercive institutions of the state (Cohen, 2008, p.124). But justice, says Cohen, requires individuals to do more than just obey the law. However, in regard to incentives and talents, the law in a sufficiently liberal state, cannot coerce, as it might do in an illiberal authoritarian “Stalinist” state, the talented into filling the roles to which they would be most socially useful. Liberalism mandates that all citizens should have the freedom to choose their occupation, and so, the dilemma emerges that, as an efficient society would need to

motivate the talented to fill roles for which their talents would be most socially useful, if it does so by economic incentives, the outcome would be an unjust economic inequality because of the arbitrary, and unfair, distribution of talents. How then might the talented be motivated to take on more socially useful roles without unfairly paying them more than the less talented or the state coercing them into these roles? The answer, says Cohen, is an egalitarian ethos in which all citizens internalize and act from principles of justice and which both motivates and regulates citizens' extra-legal choices, such as those concerning where and how to exercise one's talents. Thus, citizens will be directed to the occupations necessary for cultivating the most efficient society and there should be no resultant unfair, or unjust, income inequality. But Rawls, as he restricts justice to the basic structure, only requires citizens to obey the law; there is an ethos, Cohen says, of obeying the law but not an ethos of justice. Rawls therefore omits the ethos necessary to bring about a fully just distribution, which would prevent unjust incentive seeking, and this is why unjust incentive inequalities emerge.

Now, it should be clear from my preceding chapters that I do not believe unjust incentives would emerge within a Rawlsian well-ordered society. But let us independently consider this claim of Cohen's, that justice requires an ethos of justice and not just an ethos of following the rules. My main point in this chapter will be that, as I understand the features of a Cohenian ethos, Rawls's already includes one.

Much of the secondary literature relating to Cohen's critique of Rawls relates to the incentives argument or the basic structure argument and not so much has been said about Cohen's conclusion that a just society requires an "ethos". This might be because Cohen does not say much about the features of the ethos or the conditions pertaining to one. One paper that has engaged with Cohen's ethos conclusion is by Titelbaum who concludes that Cohen's intervention demonstrates that Rawls must add a "correlate" ethos to his theory. Like myself, Titelbaum compares Rawls's sense of justice and finds it "tame" compared to Cohen's ethos (Titelbaum, 2008, p.295), requiring not much more than citizens to comply with just laws. As should become clear in the remainder of this chapter, I do not agree with Titelbaum here as there is much more to the sense of justice than following laws. Thomas states the opposite to Titelbaum, that Rawls already includes an ethos informed by institutions (Thomas, 2011, p.1134). However, Thomas does not show how the features of Rawls's sense of justice should count as a specifically Cohenian ethos as I do. Casal states that there is more to the Rawlsian ethos than following the rules as Cohen claims but concedes only that it also includes the Rawlsian duty of civility, the duty to offer justifications for behaviour which do not conflict with the public reason requirement (Casal, 2013, p.8). Again, I will argue that there is more to the Rawlsian ethos, or sense of justice, than Casal believes. Carens, who unlike myself also

believes Rawls must add an ethos, does consider the features of an ethos. The reason for this is that he separates an ethos into two distinct components: principles for institutions and political actors, and principles for individuals (Carens, 2015, p.56). As should be clear from the previous chapter, I agree that the former ought to be distinct from the latter but, as I will argue in the following sections of this chapter, I believe they share a common ethos. Kukathas also considers the feasibility of an egalitarian ethos and, as I do in Chapter 3 when I consider fraternity, has doubts about its implementation over a large political community (Kukathas, 2015, p.245).

5.2. What is an Ethos?

Aside from the Rawls/Cohen debate, Cherniss mentions Cohen as one of three prominent ethos theorists. Firstly, there is Aristotle, who stated that “an ethos cannot be formulated in terms of general principles or laws, and is not reducible to matters of belief; it is informed by perceptions, reflection, personal dispositions, and reaction” (Cherniss, 2021, p.32). Secondly there is Foucault, for whom “an ethos is a style of life, “a mode of being . . . along with a certain way of acting, a way visible to others,” which finds its expression in action” (Cherniss, 2021, p.32). And thirdly there is Cohen, “who defines ethos as a “structure of response” constituted by “the attitudes people sustain toward each other in the thick of daily life” (Cherniss, 2021, p.32). Cherniss himself states that “because it is complex, the explication of an ethos (or of different, rival ethe) is a challenging task, for which many political theorists are ill-prepared” (Cherniss, 2021, p.34).

“Ethology, it is fair to say, is not a well-developed discipline” agrees Joshua Cohen: “[w]e do not know much about either the sources or consequences of a social ethos” (Cohen J, 2001, p.375). GA Cohen does not say much about ethos other than: “the ethos of society is the set or sentiments and attitudes in virtue of which its normal practices and informal pressures are what they are” (Cohen, 2008, p.144). In other words, it is a set of widely accepted normative beliefs which support and are expressed by behavioural social norms³². That these norms are supported by informal pressures means that they are not enforced legally but by further norms of “criticism, disapproval, anger, refusal of future cooperation, ostracism, beating³³ [...] and so on” (Cohen, 2008, p.144). An ethos is internalised (Cohen, 2008, p.73) but can be transformed

³² This differs to Wolff who attributes three “levels” to a group ethos: “values, principles, and practice, all of which are part of the group’s ethos” (Wolff, 1998, p.105).

³³ I presume Cohen is referring to the beating of children here. However, in my view, a just ethos would not endorse beating of children, or anyone else for that matter.

by moral pioneers (Cohen, 2008, p.142). By internalisation, we mean that the normative beliefs of the ethos have been incorporated by society and its members through education, learned behaviour, identification and so forth. Of course, it is unlikely that all members of society internalise the dominant ethos, or that they will do so to the same degree, but neither do they all need to, for an ethos may be produced and reproduced throughout society when *generally* internalised, when internalised by a sufficient number of its members to a sufficient degree. Because it is internalised, it may be that the ethos is unreflectively accepted or there is some reflective acceptance which is insufficient to change beliefs or behaviour perhaps because, for some, the practices which the existing ethos supports is of benefit or because, for others, burdensome practices and pressures are difficult to escape. To demonstrate how an ethos might be transformed, Cohen provides the example of the moral pioneer husbands whose egalitarian behaviour rejects the sexist practices of the traditional family³⁴. The husband's personal ethical beliefs are not reflective of his society's ethos on this matter and he resists convention. There is then incremental change as others adopt his outlook and behaviour and eventually the ethos is transformed. Pioneering moral thought and behaviour, then, if it is to be pioneering, must have reacted against a pre-existing prevalent unjust (and so inequalitarian) ethos supportive of and expressed by unjust practices which had been generally internalised. Cohen wants to find a similar mechanism for the economy, where the capitalist ethos might also be overturned incrementally by incentive-repudiating moral pioneers. We might think that women who internalise the sexist ethos of the family either mistakenly believe that their best interests are served by their subjugation or do not perceive their subjugation and we might consider this a form of false consciousness, the acceptance of beliefs which support conditions antithetical to one's interests. We might then also believe that workers that accept incentive-seeking, or capitalism more generally, have also internalised a subjugating ethos.

However, it is not, he says, simply a binary choice between blaming individuals when they are able but unwilling to perform justice, and excusing them because they are just socially-conditioned participants in a pre-existing social practice (Cohen, 2008, p.141). There are four considerations for judging social justice: "the coercive structure, other structures, the social ethos, and the choices of individuals, and judgement on the last of those must be informed by awareness of the power of the others" (Cohen, 2008, pp.141-142). This means that there can be unjust behaviour, such as the misogynist husband or the market maximiser, for which the perpetrator might not be blamed. Even when injustice cannot be denied, there may be good reasons to excuse the instigator, such as, perhaps, if there is a very powerful social ethos

³⁴ In my view, the claim that it is men who overturn sexist family practices rather than women challenging patriarchal norms is itself sexist.

which promotes unjust practices, but, even so, these excuses cannot also deny the occurrence of an injustice. Husbands within a society that has normalised misogyny are still free to be “moral pioneers” - they can change their behaviour and treat their wives as equals, even if we might not judge them blameworthy for not doing so. Once some have done it, it becomes easier for others to do it and eventually it becomes easier to do it than to not (Cohen, 2008, p.142). The social norm of this misogynist practice then undergoes a reformation.

Cohen does not provide an extended analysis of ethos. His account, summarized above, is fairly minimal. Ethos is a sociological idea that, I suspect, Cohen thought beyond the reaches of political philosophy, the latter being concerned with principles rather than empirics. There might be two interpretations of Cohen’s ethos critique of Rawls. The first is that by asserting the need for an ethos, he implies that Rawls omits an ethos entirely. The second interpretation is that: Rawls does not omit an ethos but it is the wrong kind of ethos – it is one in which individuals have externalised, rather than internalised, the principles of justice in the sense that justice is the concern only of the state. As we will see, it is the second interpretation which is the one which Cohen presents, but, as I will now argue in the following sub-section, neither interpretation are supported by a reading of Rawls. Rawls both includes an ethos and it is not simply an ethos of obeying the rules. Although he does not use the word “ethos”, something that looks very much like an ethos, a society in which citizens have internalised specific principles of justice, is necessary for Rawlsian justice. It is presented as an end of social justice – a well-ordered Rawlsian society produces and reproduces an ethos, or sense, of justice.

5.3 Rawls as Ethos Theorist

My understanding of Rawls as an ethos theorist comes from a reading of Chapter 8 of *A Theory of Justice*, titled “The Sense of Justice”. Rawls says that a sense of justice is an “acquire[d] [...] skill in judging things to be just and unjust, and in supporting these judgements by reasons” (Rawls, 1999, p.41) and we usually have both a desire to act in accordance with these judgements and an expectation that others will also. A moral theory sets out the fundamental principles which undergird those judgements. We do not fully understand our sense of justice until we have discovered and assessed these principles but, without this understanding, we are not unable to act justly, for a sense of justice is something like language: we are able to make use of the “ad hoc precepts” of grammatical rules without explicit knowledge of the language’s “theoretical constructions”. The sense of justice therefore is how we understand and make use of a specific conception of justice but it is not that

conception itself. Not everyone has a sense of justice, for in some it might remain undeveloped, but most of us have a capacity for a sense of justice and possessing this capacity is a necessary condition of being a moral person, someone who is owed justice (Rawls, 1999, p.446)³⁵. However, to be capable of thinking and acting justly, the mere capacity for a sense of justice is not sufficient, one must also have a developed sense of justice, although some have a better capability for justice than others. Rawls's aim in Chapter 8 is to show, not only, how a sense of justice might be acquired but also that the sense of justice corresponding to justice as fairness is stronger, in the sense of gaining our allegiance, than the sense of justice corresponding to other conceptions and therefore the most stable. It is his sketch of how the sense of justice might be attained in persons that indicates that he is theorising in terms of what Cohen terms an ethos, as the sense of justice leads to an internalisation of a conception of justice and a well-ordered society requires that conception of justice to be shared and generally accepted. I set out Rawls's account of the attainment of the sense of justice in the first chapter but let me now remind the reader what this entails, before showing why it demonstrates an ethos.

Over various sections, Rawls sets out his theory of how just citizens and a just culture are produced and reproduced. It is not intended to be definitive, but rather a sketch of how a sense of justice might be attained³⁶. It begins in the family³⁷ with the "morality of authority", in which children accept the authority of parents or guardians³⁸, because their parents or guardians express their love for the child by acting in the child's interest. When they do, the child loves their parents in return and accepts their authority. At this stage, morality consists of a series of precepts – a set of general rules which are accepted without justification - for the child does not understand the concept of justification (Rawls, 1999, p.405)³⁹. The child sees that by expressing their love for them, the parents act in the child's interests and nurtures their sense of self-esteem. As a consequence, the child grows to love the parents in return (Rawls, 1999, p.406), or develops what Rawls also calls "fellow feeling" for the parents (Rawls, 1999,

³⁵ Rawls acknowledges that some individuals do not have this capacity for justice (Rawls, 1999, p.443). If not, then they lack a condition of humanity and are not owed justice. But Rawls does not tell us how we should deal with these people (Rawls, 1999, p.446).

³⁶ In an earlier paper entitled *The Sense of Justice*, Rawls presents each stage in terms of different types of guilt: "The psychological construction by which the sense of justice might develop consists of three parts representing the development of three forms of guilt feelings in this order: authority guilt, association guilt, and principle guilt" (Rawls, 1963, p.286).

³⁷ Rawls "assume[s] that the sense of justice is acquired gradually by the younger generation of society as they grow up" (Rawls, 1999, p.405) but also states that this is not the only way one acquires it (Rawls, 1999, p.433)

³⁸ It is usually parents but can sometimes be other guardians. I will, however, resist adding "or guardians" in the remainder of this section.

³⁹ Despite not being justified to or by the child, as they arise in a well-ordered society, we can assume these precepts to be just and justifiable.

p.411)⁴⁰. The child has accepted the morality of authority not when they fear punishment from the parents due to transgressions against the parents' injunctions, but when they feel guilt about such transgressions (Rawls, 1999, p.407). Children adopt the morality of authority by "affection, example and guidance", not by "the prospect of reward or punishment" (Rawls, 1999, p.408).

The attainment of the sense of justice then progresses through the "morality of association", of which the family is one form of association. The child adds further content to their understanding of morality through their various associations with others, in which they learn the virtues of being a good son or daughter, neighbour, classmate or teammate, and perhaps also citizen (Rawls, 1999, pp.409-410). What the child learns at this subsequent stage, and which is not learned at the previous stage, is their role in a cooperative endeavour. The child learns to adapt morality to the requirements of each of their particular group memberships by the approval or disapproval of others in their group, by those in authority and by imitating "moral exemplars". By the morality of association, the individual attains an understanding of the principles of justice (Rawls, 1999, p.414). They also learn to see things from the perspective of others by interpreting their speech, behaviour and resistance, and to regulate their own conduct in return (Rawls, 1999, p.410). Appreciating the perspectives of others is a necessary pre-condition for the "morality of principles" which follows this stage. However, one may exploit such an understanding of the perspectives of others for one's own benefit and so a further necessary condition is an attachment to those we associate with and to social arrangements. This is acquired by participating in social arrangements and developing fellow feeling with, and confidence and trust in, others (Rawls, 1999, p.411). It is these bonds and attachments which secure one's allegiance to a social scheme and again one begins to experience guilt when one fails to do one's part in these schemes.

Finally, there is the stage of the "morality of principles" in which one's motives for complying with justice are expanded from a concern for the approval and acceptance of one's behaviour and intentions, originating from a sense of friendship or fellow feeling for those one associates with, to being "attached" to principles of justice themselves (Rawls, 1999, p.,414). "Attached" here means wanting to be a just person and this means that "[t]he conception of acting justly, and of advancing just institutions, comes to have for him [sic] an attraction analogous to that possessed before by subordinate ideals" such as the ideal of the good son, classmate and so forth. Those who have an interest in politics, and in particular those who hold legislative or judicial office, are required to interpret and apply their knowledge of the standards of justice

⁴⁰ We might say that love is a form of fellow feeling.

attained by the mutual fellow feeling evident in both familial and other social associations and by the practice of understanding the perspective of others to political associations more generally. When this is achieved, one attains a mastery of the principles of justice and understands how justice works to mutual advantage. Rawls believes that the fellow feeling and confidence we have towards and in those we associate with and whom benefit from just institutions induces a complimentary sense of justice (Rawls, 1999, pp.414-415). We appreciate that just institutions have benefited both our good and the good of those we care about and then come to value the ideal of general human cooperation⁴¹. At this stage, when we fail to act in accord with our sense of justice, we feel guilty in reference to the principles of justice rather than in relation to the acceptance or approval of others. We are aware that we have failed to behave in a manner conducive to those principles. Only at this stage, therefore, are individuals motivated by “a conception of right chosen irrespective of these contingences [of fellow feeling and mutual approval]” (Rawls, 1999, p.416)⁴². As stability is a necessary condition of justice, Rawls argues that possessing a sense of justice corresponding to justice as fairness would be more stable than the sense of justice corresponding to other conceptions of justice because it would be congruent with the good. In contrast, utilitarianism, which requires sacrificing one’s good for the good of others, would not be taken up.

Proceeding from this account of Rawls’s, his sketch of the development of moral and political psychology, the question therefore we must ask is whether the outcome of this sketch of how individuals appropriate a sense of justice would count as an ethos as understood in the previous sub-section. The three necessary conditions, I propose, would be: firstly, whether the sense of justice is “internalised”; secondly, whether the conception of justice to which the sense of justice corresponds, and the sense of justice itself, is “generally accepted”; and thirdly, whether the acquired sense of justice informs social norms, a society’s normal practices. In answer to the first of these questions, while Rawls does not use the term, the sense of justice does seem to be internalised⁴³. Citizens adopt and accept a conception of

⁴¹ Note that Rawls does not say that we ought to care about those outside of our associative circles. Cohen on the other hand, as we saw in Chapter 2, does say that we ought to duly extend fellow feeling to everyone we share a political community with. I find Cohen’s view implausible. What binds citizens instead, for Rawls, is “the acceptance of public principles of justice” (Rawls, 1999, p.415) and a love of mankind is not required by justice, rather it is supererogatory (Rawls, 1999, p.417). But we do not develop a sense of justice without first developing fellow feeling for those in our associative circles.

⁴² The bonds with family and friends are not replaced, but supplemented, by the bonds of citizenship. If one fails in one’s duty to a friend, the guilt of association is still present, as well as principle (or rational) guilt. This means that we, understandably, feel more guilty when we act unjustly towards friends (or family) than to other citizens. Similarly, the morality of authority remains as, of course, we often have relations with others which are authoritative.

⁴³ Rawls uses the term “acceptance” which I take to have the same general meaning as “internalisation”.

justice and feel guilt about their own misdemeanours and indignation at the misdemeanours of others. Although they learn the virtues and vices or various association roles from the approval and disapproval of others, it is not approval or disapproval which motivates just citizens to act but the principles of justice themselves. If conduct is specifically motivated by seeking approval or avoiding disapproval, the principles of justice have not been accepted or internalised. In answer to the second of these questions, as Rawls is working in ideal theory then there must indeed be full or strict compliance with justice if justice is to obtain. Thus both the conception and the sense of justice is indeed shared and generally accepted. Precisely what “generally” means here I will not pursue but it should suffice to say that it implies that a sufficient number must accept it for it to be regulative or effective. And to answer the third question, justice obtains in a well-ordered society, one in which “its members have a strong and normally effective desire to act as the principles of justice require” (Rawls, 1999, p.398). A sense of justice is not only affirming a particular conception of justice but understanding that the principles of that conception should be normative, to guide judgements and action. Taking these three answers into account, it appears that Rawls does indeed believe that there must be an ethos of justice, if ethos is understood as the internalisation and motivation by a specific conception of justice by a sufficient number of citizens, for justice is to be effective. Furthermore, the best conception of justice is justice as fairness. Thus, for Rawlsian justice to take hold, a sufficient number of citizens must comply specifically with the directives of Rawls’s principles. If they do, then this ought to count as an *egalitarian* ethos. Justice as fairness attributes equal basic liberties to all, and permits deviations from material equality only on accepted reciprocal grounds. Justice as fairness therefore aims to reduce the great inequalities with which Cohen is concerned by the general acceptance of the principles of justice and requires an ethos to do it.

Where Rawls and Cohen might appear to diverge is that Rawls is explicit that individuals acquire a sense of justice only when institutions are just (Rawls, 1999, p.398). It is assumed that “to some degree at least human nature is such that we acquire a desire to act justly when we have lived under and benefited from just institutions” (Rawls, 1999, p.399). Cohen, on the other hand says of the relation between individuals and institutions only that individuals must reform institutions. Therefore, it seems that, for Rawls, institutions shape persons’ morality, while, for Cohen, persons’ morality shape institutions. As we will see in the following section, it seems that Rawls might be right here. However, irrespective of who is right about this relation, it seems that Rawls does indeed require a just society to inhere an ethos of justice.

Titelbaum’s analysis of the ethos argument differs to mine by concluding that Cohen demonstrates not only that Rawls omits an ethos but that he needs to add one. Titelbaum’s

initial approach is to consider whether the disagreement is only semantic, that the sense of justice is just the Rawlsian term for a Cohenian ethos. It should be apparent that, in the preceding paragraphs, I have argued that the sense of justice ought to count as an ethos providing it is internalized by a sufficient number of citizens. But Titelbaum dismisses the equivalence of ethos and the sense of justice because it does not fulfil my third condition, that it informs social norms and practices. The reason for this is that: “the difference principle is meant to apply only to the basic structure of society, and to interpret it as mandating an egalitarian ethos for individuals would be a serious misreading both of Rawls’s intent and of the place the principle occupies in his theory” (Titelbaum, 2008, p.293). It is then agreed with Cohen that the sense of justice mandates only a duty to follow just laws and to vote according to one’s sense of justice (Titelbaum, 2008, pp.294-295). Now, Rawls does indeed define the sense of justice as “a normally effective desire to apply and to act upon the principles of justice, at least to a certain degree” (Rawls, 1999, p.442) and Titelbaum then concludes that the sense of justice cannot be an ethos because a desire to act upon the principles of justice applies only to the basic structure and thus is not applicable to the sorts of extralegal decisions that concern Cohen.

However, I offer several rejoinders to this conclusion. Firstly, it seems unlikely that persons possessing a desire to act upon principles of justice will not, where they are able, apply those principles to extralegal decisions, albeit applied indirectly. Secondly, that Rawls shows that a sense of justice is necessary for the direct application of justice via the basic structure does not mean that it is not also thought of as applying indirectly to other associations. Thirdly, the sense of justice directs citizens to support the basic structure *only when it is just* and so, in an unjust society, one in which there is only partial compliance, the sense of justice can, and should, direct citizens towards supporting alternative social norms and practices supported by one’s conception of justice. The moral duty of individuals is therefore primarily to justice, not the basic structure. Take, for example, Rawls’s turn to non-ideal theory and his comments about the duty to comply with unjust laws: there are cases where “it is evident that your duty or obligation to accept existing arrangements may be sometimes overridden” (Rawls, 1999, p.309). Rawls says that “[w]hen laws and policies deviate from publicly recognized standards, an appeal to the society’s sense of justice is presumably possible to some extent” (Rawls, 1999, p.310). This shows that, under partial compliance, the sense of justice does not equivocate with the duty to support the basic structure as the sense of justice functions as an independent standard for assessing the justice of those basic structure institutions. The sense of justice therefore can provide a justification for disobeying the law and thus not complying with the (unjust) basic structure.

But if a societal ethos, or the sense of justice, arises from social institutions, such as the family, how might a non-ideal theory be plausible? Say, for instance, that social institutions are not just and having a profound influence upon our moral development, individuals turn out, for the most part, to hedonistically pursue only self-interest? Such a situation seems implausible to me. It would seem difficult to imagine institutions set up in such a way that everyone is raised independently of parents or guardians, that individuals do not learn about the benefits of cooperation by other associations, and so forth⁴⁴. Furthermore, Rawls assumes, for his non-ideal theory, not non-compliance but partial compliance. Under partial compliance, one presumes that many share the sense of justice. Those who possess a sense of justice therefore are under no moral obligation to the law and are expected to seek its reform.

Why then does Cohen miss the Rawlsian ethos? It is odd that he does not even consider whether the sense of justice might count as an ethos. In the introduction of *Rescuing Justice and Equality*, Cohen poses the disagreement between himself and Rawls thus:

“The Marx-inspired question is whether a society without an ethos in daily life that is informed by a broadly egalitarian principle for that reason fails to provide distributive justice. To that question, Rawls, being a liberal, says no: here is the deep dividing line between us” (Cohen, 2008, p.2)

But, as I have argued, Rawls does require an ethos informed by a broadly egalitarian principle, the difference principle, to be operative in a just society. Therefore, Rawls’s answer to the “Marx-inspired question” would in fact be yes. Citizens must internalise the difference principle (and other principles of justice). Without internalising the difference principle, distributive justice will not obtain. It might be that liberals often do favour the externalisation of justice to the state but Rawls does not. Elsewhere, Cohen says that “[a] society that is just within the terms of the difference principle [...] requires not simply just coercive rules, but also an ethos of justice that informs individual choices” (Cohen, 2008, p.123). But this does not appear to be an objection to Rawls – as I have demonstrated above, Rawls neither commits only to regulation of coercive rules and nor does he omit an ethos of justice.

Cohen states that one reason why we cannot regulate, for instance by a redistributive tax system which provides the same post-tax income to everyone, is epistemic – we cannot tell whether a demand for incentives is or is not justified. For instance, because we might want a

⁴⁴ Those who are sent away to boarding school, for instance, might not properly develop the sense of justice. The children of wealthy parents might not learn about reciprocity if they have servants.

talented individual to be persuaded into accepting a more socially useful job that she has a lesser preference for, we might accept her request for compensation on “special burden” grounds (Cohen, 2008, p.123, n.16), “special burden” being a situation in which she would genuinely be unable to do the job without compensation and, as we saw in the Chapter 2, Cohen argues that compensation on such grounds is indeed justified. The problem is that she might simply be lying – it might not be that she is unable to do the work without compensation but rather that she is unwilling without greater rewards, which would not be justified. Therefore, says Cohen, an ethos is required in which the talented individual has internalised the difference principle and so is motivated not to seek such unjustified rewards. But in a Rawlsian society, as we have seen, citizens are motivated by an ethos of justice. Therefore, they should not seek such unjustified rewards and ought to accept institutions, such as, for instance, a tax system which redistributes to parity, when they are unable, perhaps because of the burdens of judgement, to make a decision about income rewards congruent with justice. They would accept this because they have learned the virtues of reciprocal cooperation; they know that it is both rational and reasonable to cooperate with others. Now, Cohen is indeed right that we might not know, in actual real-world cases, when another’s request for additional financial income is justified or not but this does not contradict Rawls. Just individuals who have internalised the morality of principles would not be deceitful in this way. If they were, they would not be acting from the principles of justice. The reason why Cohen’s response to Rawls misses the Rawlsian ethos is because, from either interpretation of the basic structure, he thinks Rawls misses (inter)personal decision form the purview of justice and thus, if he wants justice to obtain across society, he must stress the need for an ethos to regulate practices which cannot be coercively enforced. However, as I have shown, that ethos is already part of Rawls’s account of justice. Citizens do internalize justice and do act from it. It is not simply an ethos of obeying the law because the ethos of justice justifies non-compliance when institutions are unjust.

5.4. Historical Conditions of the Egalitarian Ethos - Why Ethos Tracks Institutions

In the previous section, I argued that there is an independent ethos of justice at work in Rawlsian justice which can be invoked when institutions are not just. However, in this final section I want to consider whether Cohen’s factual claim that an egalitarian ethos was apparent in the post-war period can be substantiated. Considering this claim of Cohen’s might assist us in adjudicating whether Cohen is right that institutions track the ethos, or whether Rawls is right that institutions inform the ethos. Recall Cohen’s claim that the egalitarian ethos was apparent in the post-war German and British economies because, in those countries,

CEO pay was relatively lower than in the USA. How might we measure whether this claim of Cohen's is correct – that this indication of greater equality resulted from a shared egalitarian ethos? This is important because Cohen's claim that an egalitarian ethos is feasible is heavily dependent upon this claim. His claim, as I understand it, is that there is something about the second world war that led to a generally accepted ethos of equality, and this is evidenced in the stated pay disparities.

John Roemer, responding to Cohen's final and posthumously published monograph *Why Not Socialism?* does try to provide a plausible explanation for the post-war. Roemer, rather, contends that it is the levelling down which arises from economic depression and war rather than any moral beliefs or moral pioneering which reduces inequality because, by obliterating much of a nation's wealth, both place much of the population in the same dire circumstances (Roemer, 2010, p.262). When this is the case, the self-interest of each aligns more closely with the interests of others and it is more likely that citizens will collectively demand mutually beneficial policies of social insurance. The motivation therefore would not be a Cohenian concern for others but a shared and overlapping self-interest that may dissipate when prosperity returns.

If Roemer is right, this provides additional support to my scepticism, expressed in the previous chapter, that inequality can be reduced by mutual compassion and sympathy across society. Roemer's analysis would be endorsed by Thomas Piketty who states emphatically: "To a large extent, it was the chaos of war, with its attendant economic and political shocks, that reduced inequality in the twentieth century. There was no gradual, consensual, conflict-free evolution toward greater equality. In the twentieth century it was war, and not harmonious democratic or economic rationality, that erased the past and enabled society to begin anew with a clean slate" (Piketty, 2014, p.275). In short, large wars are extremely costly. Not only does widespread destruction obliterate wealth and resources, but funding an expansive war needs increases on taxation for those who can afford to fund it, the wealthy, and so their wealth, and the opportunity to make returns on that wealth, is reduced.

One obvious challenge to Roemer and Picketty would be to ask why the post-war consensus did not come about following the First World War. But according to Walter Scheidel, there was indeed a general trend of levelling from 1914 to the 1970s resulting from "total war", a period he calls the "great compression" (Scheidel, 2017, p.7) but, unfortunately, data from the inter-war period is, he says, of far inferior quality than later decades (Scheidel, 2017, p.134) and so requires greater interpretation. This lack of data may therefore be why Cohen specifically relates to the post-second world war period where, because an economy's reaction to great

economic shock can be slow, the consequences of and response to the great compression had become more apparent. However, there does not seem to be any evidence to back up Cohen's claim of the egalitarian ethos manifesting during this later period, at least not one which embodies beliefs about community and fraternity or in which a morality of principles has been generally accepted or internalised. To take his specific example of CEO salaries following WW2, the ratio between workers and CEOs salaries was likely low in that period because corporations, following the economic devastation of the war, would not be as profitable and so could not reward their CEOs so handsomely. Additionally, income tax had been raised to fund the war and so higher rates became more normalised and acceptable, and this would have reduced CEO's post-tax pay.

Therefore, it seems that the evidence points towards the post-war reduction in inequality being contingent and structural and not, as it would need to be for Cohen to be correct, due to the personal choices of CEOs either as moral pioneers motivated by justice or pressured by an egalitarian ethos. This is not to say that there certainly was not at least some change of ethos following the war – it seems inconceivable that there was not. Rather, it is difficult to show that any change of ethos was the cause of the reduction in inequality. Thomas Pogge, directly responding to Cohen, indeed states that the actual explanation for the discrepancy in salaries between those of West Germany and the US was in fact due to institutional factors. Not only were higher rates of tax much lower in the US than in Germany but there were also very favourable tax rates for stock options which were kept off corporate balance sheets - those holding stock paid less tax on its returns than workers would for returns on their labour (Pogge, 2000, p.139). If this were the case then it would not have been necessary, as Cohen claims, and which further supports the argument made earlier in the previous chapter, that justice be applied to everyday choices, for the basic structure may adjust tax policies and corporate accounting laws accordingly and may well do so to such an extent that an acceptably equal society would be the outcome. However, we might ask, as the USA also took part in the second world war, if Roemer's hypothesis is correct, why then was, as Cohen claims, the USA less egalitarian than other countries in the post-war period? An explanation might be that the impact of war on the German economy, considering it took place partially on their territory, would have been considerably greater than that of the USA, whose territorial proximity was far more remote. Similarly, the UK was involved in the war for longer than the USA and was directly attacked far more frequently.

A further critique of Cohen's historicity was made by Bernard Williams. As part of a public debate about the future of the left, Williams brought Cohen to task for his analysis of the historical conditions of the post-war period in which the principle of community was expressed.

What Williams claims was peculiar to the earlier Labour movement in the UK was “perhaps a special combination of a sense of class solidarity with a wider sentiment of national community. This was significantly different from something which had existed earlier and lasted longer, rough coincidence between the interests of the organised working class and the interests, more generally, of the worse-off” (Williams, 1997, p.55). “Social deprivation”, says Williams, did not just produce the “bad things” such as “xenophobia, brutality and sexism, the public surveillance” but also “good features” such as the sense of community Cohen supports and which diminished when this deprivation was alleviated (Williams, 1997, p.55). In other words, Williams, like Roemer, believes that community during this post-war period depends on a widespread shared state of deprivation in which self-interests more closely align with the interests of others and so motivate the Labour movement towards enhancing social insurance. Without these conditions, community might not be effective at addressing inequality. That is not to say that we will not see such conditions again, but we should not want to initiate a program to recreate them.

Similarly, the claim that the family ethos has been transformed by moral pioneer husbands rather than by contingency might seem troubling. For instance, during wars, when men were drafted, women were called upon to do the work they were previously excluded from doing and once women demonstrate they can do this work, the genie is out of the bottle. Furthermore, the changes to economies in recent decades might have made it difficult for many families on lower incomes to survive on only the husband’s income. When wives bring home their own wages, they have a greater say in how the finances of the household are used⁴⁵. And if they are also employed, there is a stronger case for men sharing domestic labour because women just will not have time to do it all anymore.

If the previous paragraphs are right then it looks like Rawls is right about the institutions of the basic structure shaping our lives; that greater equality came about because of a shared deprivation caused by institutional failures. It is often said that there was indeed a shared ethos of reconstruction following the second world war, a period when many countries were indeed less unequal than they are now, but if Cohen’s claim is that it was the new social ethos which led the revolutionary wave towards greater equality then it does not appear to be supported by empirics. It might be that, again if there was something we could call ethos, any reformation of the ethos was brought about by institutional reform necessary to support the basic needs

⁴⁵ There is, of course, the familiar critique that working class women have always had to work. The thesis that women are the “handmaiden” of capitalism because they have taken on more paid work is a privileged perception of the middle and upper classes, who could support families on only a husband’s income.

of a significant number of citizens⁴⁶. My instinct is to agree with Carens, that the relation between ethos and institutions is more complex and reciprocal. Cohen does not seem to see this reciprocity, while Rawls, I argue, does. Another way to put it, perhaps, is that it looks like ethos is far more influenced by social and political institutions than Cohen realizes. Thus, institutions which are unjust, are not only unjust because they do not deliver just outcomes but also unjust because they do not incubate the appropriate sense, or ethos, of justice within us.

Conclusion to Chapter 5

Cohen says that, because of the inclinations of incentive-seeking maximisers, there must be an egalitarian ethos which regulates incentive-seeking if we are to address inequality. But I have argued that, firstly, Rawls's position does meet the conditions of a Cohenian ethos and, secondly, if the ethos is present, citizens would not seek maximising incentives anyway. I have also argued that Cohen's claim that there was an egalitarian ethos following the second-world war and which was the source of reduced inequality is difficult to substantiate but according to many economists, greater equality was not the result of a shared belief about justice but of institutional failures. If this is right, it supports Rawls's assertion that it is institutions which most profoundly affect economic change, not ethos, and that focus on the basic structure should be the priority of justice. This chapter contributes to the overall aim of this thesis by showing that the sense of justice is overlooked by Cohen and that a Rawlsian society is more just, or egalitarian, than Cohen realizes. A Rawlsian society produces just citizens who strive to act justly more comprehensively than Cohen realizes. That Rawls requires only an ethos of following the rules is a misreading of Rawls.

⁴⁶ I do not attempt to assess whether historical or economic accounts of the post-war period are right. This is beyond the scope of a thesis in political philosophy. My point is that Cohen's claim looks unsupported by empirics. If he wants to show that an egalitarian ethos is feasible then he has failed to do so.

Chapter 6: The Content Contradicts the Case – the Difference Principle Objection

Introduction to Chapter 6

The first three chapters in Part 1 of *Rescuing Justice and Equality* were revised earlier papers. The point, in these chapters, was that the difference principle, understood fundamentally as a directive to make the least well off as well off as possible, must also be applied to personal decisions regulated by an equality-promoting ethos. In other words, Rawls's principles of justice, principles concerning the virtues of social institutions, ought also be applied to normative judgements about the virtue of individuals, if justice is to be attained. These principles ought to be internalised by individuals and if individuals fail to do so, both the law and the prevailing ethos may compel compliance, either by threats of punishment or disapproval, and if the prevailing social ethos fails to be just, individuals may, and ought to, pursue its incremental refinement. The conclusion drawn is that the difference principle is justice-mandated but only in its intention-relative strict form. Compensating for an *inability* to exercise one's talents would be justified by (egalitarian) justice itself, for it would be equalising against an accrued welfare deficit, welfare being asserted as a metric of justice. But one who is only *unwilling* to exercise one's prodigious productive abilities unless they are more handsomely rewarded than the less prodigious cannot have accepted, internalised or be acting from the difference principle. Therefore, the lax difference principle, which permits incentives to motivate *both* the unwilling and the unable and is applied only to the basic structure, is not sufficient for justice because incentives to the unwilling talented perpetuate an injustice. Justice must apply the strict difference principle which permits only incentives for those *unable* to otherwise behave justly. But to obtain justice, the strict difference principle cannot be restricted only to acts of government. It must also be applied to the decisions and actions of individuals which remain beyond the purview of government legislation. If individuals genuinely are unable to be productive without incentives and the law cannot regulate such demands, due to informational constraints or because it would restrain personal liberty, there must be a regulatory egalitarian ethos if justice is to be attained.

Cohen's overall argument in these chapters, as summarised in the previous paragraph, was therefore intended as an objection to Rawls's incentives argument, which, he says, cannot be legislated against, but not the difference principle itself, for he supported the strict form which permits an incentive when the individual is genuinely unable but willing to contribute to society

without it. However, Cohen later came to realise, by way of others' misinterpretation of his arguments, that the materials to make the argument against the difference principle, in both forms, were contained in those objections to incentives and so ripe for redeployment. The reason for doing so looks something like this: Cohen had previously stated that the strict principle ought to be permitted by justice when genuinely enabling the talented's prodigious production. While it is not made entirely clear what should count as an inability to labour, it seems Cohen has in mind mental burdens that the deployment of one's labour may impart, such as the matter of fulfilment in one's work or how one's identity might be realised through work. I presume he would also compensate for burdens caused by physically taxing work – perhaps some individuals might only be incentivised into taking on certain forms of physical labour if there were compensations for any physical harm they might suffer. Thus, a significant welfare burden of this form would count, for Cohen, as an inability to act justly – if someone were unable to undertake a more socially useful job because they would otherwise suffer some harm or distress, then this counts as being unable to do that job.

However, Cohen now wants to revise that conclusion due to his realisation that if those disabilities were eradicated and the talented came to produce prodigiously without compensation then that situation would be *more just* than one in which they do require compensation. Therefore, not only the lax principle but also the strict difference principle cannot produce justice. For instance, a society in which, all else being equal, a talented doctor-gardener is able to pursue doctoring over gardening would be more just than one in which the talented doctor-gardener requires strict difference principle approved incentives to compensate for an inability to doctor. What Cohen is now saying is that what is feasible, such as one's ability to do something, must not constrain justice. If our doctor-gardener does not possess a severe hatred of doctoring which constitutes an inability to doctor, society would be more just than one in which she or he hates it and so requires an enabling incentive or some sort. In other words, the strict difference principle is proposed as a response to a fact, this being that individuals are unable to labour prodigiously without incentives. If that fact were absent, there would be more justice. If this is right, justice might then be entirely counter-factual.

This conclusion demonstrates that Cohen believes he had been wrong previously to presume that “the bounds of possibility contain the bounds of justice” (Cohen, 2008, p.154). But while he argues that we need not restrict justice to only the set of what is feasible for humans, he also says that not all such injustices can be “attached” to humans. Take for example, he says, a situation where distributions are unjust for informational reasons – this would be unjust but the injustice would not be attached to humans – the fault does not lie in humanity. On the other hand, take a situation where the cause of the injustice is “insurmountable cupidity” (Cohen,

2008, p.155) for which humans cannot be blamed because this is just the way humans are. In the latter situation, the injustice can be attached to humans for, unlike the informational case, it is a “flaw in human nature” (Cohen, 2008, p.155). If humans are inherently too selfish to behave justly then justice will remain unobtainable⁴⁷ because, if human nature is incompatible with justice, what counts as justice cannot be manipulated to make it cohere with humanity. Rather we must acknowledge that humans are just not, and so blamelessly, compatible with justice.

In this chapter, I will set out various arguments Cohen presents for this new conclusion. The first is that he rearticulates the argument that the case for the difference principle, which, he says, is equality, betrays the content of the principle, which, he says, produces unjust inequalities. As this argument is a rearticulation of previous arguments, much of my response to it will echo those presented in Chapter 3 and so I will not repeat that response here. However, I do present a new analysis motivated by Cohens’ rearticulation, which is whether equality in itself should be considered a good (or a primary good) and so be part of the metric of distributive justice. Although interesting, and I concur that equality is a good in itself, I, again, find this argument difficult to appreciate as an internal critique of Rawls as only just inequalities ought to be the outcome of Rawls’s principles.

Cohen then moves on to presenting three “Rawlsian” arguments from Nagel, Parfit and Scheffler which make similar cases for equality in support of the difference principle. Again, I think these arguments can mostly be addressed by showing that Rawls’s well-ordered society would be far more egalitarian than Cohen realises. However, one new debate that Cohen raises here, as a response to Scheffler, is whether individuals can believe (accept, internalise) the difference principle but fail to act upon it. Finally, Cohen argues that the reason that Rawls goes astray can be laid at the door of constructivism, for making concessions to human nature and so to concerns of feasibility. There are two possible responses here. Firstly, whether this is indeed a fair assessment of constructivism, and secondly, whether we ought to attend to feasibility constraints when constructing principles of justice. On the former, I argue that it is not. On the second, I argue that principles are intended to be action guiding and so cannot avoid making sensible concessions to what is feasible.

This chapter contributes to the overall aim of this thesis by arguing that Cohen, again, while reaching a stronger conclusion here, is again susceptible to the same complaints articulated in previous chapters, that Cohen’s misconstrues Rawls’s reasons for allowing incentives and

⁴⁷ Estlund writes that there are two forms of “impossible” applied to feasibility critiques in political theory. One is as “unlikely” and, Estlund says, theories of justice should not be constrained by this form. There is also “impossible” as “unable” and justice must be constrained by inabilities (Estlund, 2014, p.119). This is not how Cohen sees the problem – both forms, says Cohen, should not constrain our understanding of justice.

why Rawls accepts that there will be inevitable inequalities. And it, again, attempts to demonstrate that a Rawlsian society is far more egalitarian than Cohen realises.

6.1 Case versus Content in Rawls

Cohen redeploys a number of arguments against the difference principle. His principal objection is that the argument which is presented in favour of it contradicts the principle which emerges from the argument⁴⁸. A problem with the Rawlsian argument is that it competently expresses “conflicting values in our liberal democratic political culture” (Cohen, 2008, p.156), for there is contained within the difference principle an affirmation of two generally held conflicting values⁴⁹. The first value is the claim of moral arbitrariness “which conjoins a post-medieval principle that none should fare worse than others through no fault of their own and modern sociological sophistication about the actual sources of how people fare”⁵⁰ (Cohen, 2008, p.156). The second value is that of Pareto “which welcomes inequality that benefits everyone whatever, including sheer accident, may be its cause” (Cohen, 2008, p.156). Between them, there is inconsistency as these two values contain both an affirmation and a disavowal of the intuition that accidents should not justify how one fares. What Rawls ends up with from combining these two principles is a principle of justice, the difference principle, whose content contradicts that intuition because those with talents, under the difference principle, are permitted, because of Pareto considerations, to fare better than others. The claim that morally arbitrary causes, those causes of how a person fares which that person cannot be said to be responsible for, and which motivates an initial starting position of equality in the original position suggests that justice ought to consider relational (in)equality, the relation between what people get compared to others, but the difference principle that emerges from the reasoning procedure is blind to such comparisons. The difference principle therefore permits an unfairness which the case for the difference principle, that arbitrary advantages are unfair, ought to rule out.

⁴⁸ I use “argument” here rather than “procedure”, because, as we will see, Cohen mainly responds to the reconstructed “intuitive” two-stage argument rather than the original position procedure (although the latter is also referred to).

⁴⁹ Cohen says the argument is “competent” because it well expresses two conflicting values, not because it competently reconciles the values.

⁵⁰ I take it, because it is not explained, this “sociological sophistication” means something like a rejection of aristocratic beliefs and perhaps also meritocratic beliefs. Cohen does not say what he means here.

To help explain this blindness to relational inequalities, Cohen identifies two forms of the difference principle in Rawls. The first is the “lexical” form and, he argues, the difference principle, in this lexical (or canonical) version, excludes considerations of the value of equality. Cohen’s concern is that the lexical difference principle tells us that a distribution of 5,10⁵¹ is superior to 5,8 even though the latter has greater equality (or less inequality). This is objectionable because it does not consider that equality, or at least a reduced inequality, might be a good in itself. Therefore, in the lexical form of the difference principle, equality, says Cohen, is abandoned in favour of Pareto-superior inequality. By lexical, Rawls means that there is some lexical ordering to the procedure starting with the least well off and proceeding one by one up to the most well off. We make the least well off as well off as possible before next making the second worst-off as well off as we can, then the third and so forth (Rawls, 1999, p.72). The lexical version of the difference principle, Rawls says, is only assumed in situations when the changes in prospects of the better off do not affect change in the prospects of the worse off. Rawls, however, thinks that such a situation is unlikely, as when the expectations of the most advantaged increase there will be some way of also increasing the expectations of the least advantaged. Thus, for Rawls, it is likely that actual situations will display the features of “connectedness” and “close-knitness”, and when they do, the lexical form of the principle would be unnecessary, as, by lifting the prospects and expectations of one class, the other classes will also have their prospects and expectations raised.

However, while, according to Cohen, the canonical/lexical version is indifferent to (in)equality, there is also, says Cohen, an “unofficial” non-canonical/non-lexical version implied by Rawls and the Rawlsians which is not indifferent to inequality. For these versions state that inequalities must make the worst off better off (Cohen, 2008, p.157), and so the value of equality appears to persist in this form of the principle. For support of the non-canonical/non-lexical version, Cohen refers us to a passage in Rawls which states that “an inequality is allowed only if there is reason to believe that the practice with the inequality, or resulting in it, will work for the advantage of every (emphasis in original) party engaging in it” (Rawls quoted in Cohen, 2008, p.157, n.14) (Rawls, 1999a, p.167). For further support we are also referred to the claim of Rawls’s that acting upon the difference principle demonstrates a desire of “not wanting to have greater advantages unless this is to the benefit of others who are less well off”, which Rawls interprets as a form of the principle of fraternity (Rawls, 1999, p.90). While Cohen’s use of “lexical”, “canonical”, “non-lexical” and “non-canonical” terminology is a little confusing and in my view incorrect⁵², the fundamental point he wishes to make is this. The difference principle articulated in its canonical form, as set out formally, is indifferent to

⁵¹ By 5,10 we mean 5 of x to one person and 10 of x to another person. For Rawls, x would be primary goods.

⁵² I will explain why later in this subsection.

(in)equality, because a more unequal distribution can be endorsed providing it does not make the worst off worse off. But (non-canonical) statements elsewhere concerning the difference principle by Rawls make the case that the principle is not (in)equality-indifferent. In other words, there is some inconsistency as to whether the difference principle, when those with more productive abilities generate greater social product, mandates the worse off being better off or only not becoming worse off when others become better off.

Therefore, there is, Cohen says, contrasting rationales in each of these forms of the difference principle. The rationale of the non-lexical/non-canonical form is that, as there must be an inequality which is of positive benefit to the least well off, the inequality is “unfair” but permitted on the grounds that it would be “absurd” to prevent an inequality from which all benefit (Cohen, 2008, pp.157-158)⁵³. The injustice remains but the Pareto improvement compensates for the injustice. But the lexical form permits improvements to the better off which do not improve, providing they do not make worse, the expectations of the least well off and so the rationale here is that we ought to endorse movements which are good for some providing they are bad for none. Not only does the injustice remain in the lexical form but there is no compensation for it. The argument that supports the canonical/lexical form of the difference principle therefore engages with some faulty reasoning – we begin with making a case against accidentally-caused inequalities but conclude that such inequalities are permitted without any compensation to those at the bottom of the socio-economic order. Because the canonical difference principle has no concern for equality but the non-canonical expressions of it do, Rawls is therefore a repressed egalitarian, says Cohen. Rawls is motivated by equality and fairness, and so makes the case for equality and fairness, but abandons it when Pareto is introduced and so produces a principle with content that is both inegalitarian and unfair⁵⁴. The content of the canonical version does not actually express justice because it shakes off its initial egalitarian concern and motivation.

Thus, Cohen objects to the Rawlsian difference principle claim that an inequality that benefits (or at least does not harm) the worst off is more just than a prior equality. For instance, a distribution of 6,10 would be supported by the difference principle if the alternative were 5,5 but 6,10 would remain unjust because it remains unfair if the cause is morally arbitrary (Cohen, 2008, p.159)⁵⁵. We can consider 6,10 to be preferable or more reasonable but also unfair (and

⁵³ Thus, the difference principle is a reasonable “rule of regulation” but cannot be a principle of justice.

⁵⁴ Cohen seems to treat fairness and equality as synonymic. When distributions are fair, what people get is equal to each other. Here I interpret “fairness” expressed by Cohen as “redress” expressed by Rawls.

⁵⁵ For Cohen, 6,10 would be more just than 5,5 if it correctly reflected the effort of each - B exerting more effort than A.

so unjust) but Rawls cannot because the (lexical) difference principle states the greater inequality to also be more just.

Cohen continues to press the argument. As well as there being lexical/canonical and non-lexical/non-canonical statements of the difference principle, there are also two arguments for the difference principle made by Rawls, says Cohen. These are the intuitive case and the contractual case, both of which Cohen finds problematic. The intuitive case presents a direct argument for justice as fairness. It relates to considered judgments (which are basically somewhat like intuitions) about justice from which a conception of justice emerges. The contractual case then chooses justice as fairness from a list of alternatives - it is a thought experiment within which parties choose a conception of justice for regulating a mutually beneficial social system⁵⁶. Cohen says that in the intuitive case, the claim about moral arbitrariness plays a “central role” (Cohen, 2008, p.159). What is meant here is the argument running through the preceding sub-section that it is a necessary condition of justice that circumstances for which one cannot take responsibility, such as class, race, gender, natural talent and so forth, ought not to influence the distribution of justice. However, he says, the moral arbitrariness claim also plays an essential role in the contractual case because the parties reject the desert principles on moral arbitrariness grounds (Cohen, 2008, p.159). In other words, when the parties to the original position are asked to choose between competing conceptions of justice, social systems which distribute according to desert or entitlement are ruled out because these are dependent upon morally arbitrary inequalities. But, Cohen says, the original position makes no consideration of relative equality – what one gets in comparison to others – and those who support the value of relational equality therefore ought to be wary about the original position as a reasoning device⁵⁷. The parties to the original position therefore, being mutually disinterested, “lack the very concept of justice” (Cohen, 2008, p.160). If they did not lack the concept of justice, they would understand that fairness is an essential condition, and would reject the difference principle because it permits unfair advantages. There is a discrepancy, he says, between concerns about “interpersonal fairness” which motivate concerns about justice and the difference principle which abandons such concerns.

⁵⁶ The “intuitive argument” is made in Chapter 2 of *A Theory of Justice*, while the original position argument is made in Chapter 3. As I stated in previous chapters, I do not agree with this framing of the argument as being intuitive. Rawls presents what Cohen calls the “intuitive argument” where he sets out his conception of justice but Cohen specifically refers to Barry’s two-stage reconstruction of the argument for the difference principle. In this reconstruction, the argument is presented in contractualist terms, that the difference principle would be chosen by parties motivated by fairness and economic efficiency. But this is not how Rawls presents the argument, for it is chosen in the subsequent original position argument laid out behind the veil of ignorance not because of concerns for efficiency but on grounds of reciprocity

⁵⁷ It should be said here that “relational equality” for Cohen does not mean the relational equality of relational egalitarians like Anderson and Scheffler. For the latter “relational equality” concerns how one thinks about others, such as the respect one holds for others.

Cohen anticipates the Rawlsian response that relational equality is delivered by the other principles of justice: the equal liberty principle and the principle of fair opportunity but, he objects, the liberty principle is only “superficially egalitarian” for “the liberty it confers is something that is owed to each person, whether or not others have it” (Cohen, 2008, p.160). I understand this to mean that what each person gets in the form of basic liberties is not dependent upon what anyone else gets. Contrast this with the difference principle which tells us that those at the bottom of the economic hierarchy should get more (or at least should not get less) when those at the top also gain and so its inherent inequality possesses a relational quality. And, while the principle of fair equality of opportunity is interpersonal, says Cohen, it is “improperly derived” because, he claims, it would not be chosen by the parties because, as they are mutually disinterested, they would not care how much opportunity others have.

The basic idea of Cohen’s objection here is that the various cases for the difference principle, meaning the various arguments which are deployed by Rawls in its favour, at least as Cohen interprets them, is not delivered by the content of the difference principle. In other words, Cohen is saying that the difference principle does not do what Rawls (and also Cohen) wants justice to do. The case here is that Rawls presents arguments which demonstrate that justice ought to give consideration to relational, or interpersonal, equality – what one gets compared to others - but the content of the difference principle, what comes out of it, does not deliver relational equality, for it allows for unlimited inequality between the least and best off which arise from incentives, even if those incentives would count as enabling incentives.

Cohen presents three arguments to support this objection. The first objection to Rawls is presented in familiar terms, that the introduction of the Pareto justification for the difference principle betrays the initial justification for starting with equality, which is that talents should be considered morally arbitrary. The difference between this argument and its previous articulation is that the conclusion is stronger, that the difference principle should be objected to as unjust, whether lax or strict. Cohen’s next tactic is to argue that there are inconsistent interpretations of the canonical/lexical difference principle, the principle’s content, and the non-canonical/non-lexical principle, the case for the former. Let me say firstly that I am perplexed by Cohen’s equivalence of canonical and lexical principles, as my reading of Rawls does not support Cohen’s reading. While it is clear to me what Cohen means by the lexical principle, I am not quite sure why Cohen also calls this the canonical version. He might mean that the canonical version is that which is set out explicitly as the difference principle but, if this is what Cohen means, the “canonical” version also assumes that cases of the lexical principle will not arise (Rawls, 1999, p.72). If this is indeed what Cohen means by “canonical”, my understanding is that the lexical difference principle is not the canonical difference principle. However, I think we can detach Cohen’s point from this confusing use of terminology. The

point Cohen is trying to make is that the stated form of the difference principle permits improvements which do not benefit the least well off providing they do not burden the least well off, while there are passages in Rawls which support another understanding of the difference principle, which is that the least well off must benefit. In my view, Cohen's point would have been clearer if he had abandoned this distinction between lexical/canonical and non-canonical principles, and rather stated that there are inconsistent premises stated in support of the difference principle. Cohen's third reproach to Rawls is that in both the "intuitive" and the "contractual" arguments, again, there is the case made that relational equality should be a concern of justice but the difference principle abandons this concern. The three objections all present the same general objection, that justice should care about what people get compared to others but the difference principle does not.

It should be clear from previous chapters that I do not agree that the outcome of justice as fairness betrays the initial arguments in favour of equality and that Cohen's reading of Rawls is an unfair one. It appears, again, to be that Cohen takes issue with introducing concerns about efficiency, by way of the Pareto considerations, but, as I hope should be clear from Chapter 3, I do not find this a persuasive argument. If Pareto must be a consideration of justice because justice requires humans to produce things, and Pareto requires incentives and those incentives are just, as I argued they should be, then there ought to be no objection to incentives. In fact, Cohen implies that he agrees when he states that the other two principles are only superficially egalitarian. While I find this objection unclear, this distinction appears to be dependent on the observation that distributions of income and wealth, being relative, are dependent upon production.

Another way that Cohen frames this objection is that the parties to the original position lack the very concept of justice, which is an understanding that the success of the morally arbitrary is unfair. It is no wonder then that they choose the difference principle which is unfair in content. Cohen says that the parties are blind to equality because "what I get by comparison with others finds no representation within that [the original] position" (Cohen, 2008, p.160). The complaint that Cohen seems to be making is that the parties are "mutually disinterested: nobody cares what others get, as such" (Cohen, 2008, p.160). And furthermore, the problem, as Cohen sees it, is that "[t]he interpersonal-fairness aspect of justice, which motivated the whole enterprise, is therefore dropped at the front door, and there is no back door by which the equality favoured by fairness might be introduced" (Cohen, 2008, p.160). To respond to this I state firstly, again, that if the outcome of the difference principle is indeed, and I apologise for labouring the point once again, only just inequalities then the outcome cannot be the problem here. However, if Cohen were persuaded by the arguments I, and others, have already presented to

demonstrate that the outcome in fact would not be unfair (or would not be unacceptably unequal), his response might be that this would remain unsatisfactory, as the parties to the original position are not specifically motivated by a concern for relational equality. If this is so then the parties might be said to act performatively, in the Poggean sense that they aim for a desirable end but the reason for doing so is not that end in itself. In response, we can again refer to Pogge's supergoal/mastergoal response to Cohen (see Chapter 4), in particular that it should not be considered problematic if good outcomes result from not unreasonable, or not morally objectionable, motivations. In the original position, the parties rationally choose a distribution which is intended to best further the aims of everyone and are motivated to choose the scheme of social cooperation that achieves that end. It is therefore not that the parties lack the concept of justice, as Cohen's conception of justice, the concern for the moral arbitrariness of social and natural contingencies, is modelled by the veil of ignorance. Rather, the parties primary motivation is to choose a social scheme which best achieves the end of furthering each's personal conception of the good. As I have already made this point in previous chapters, I will not pursue it further here. In my, view this part of Cohen's difference principle objection offers nothing new to his previous argument.

However, there remains an interesting argument in Cohen's objection which seems to be new, this being that we might prefer a less prosperous equality over a more prosperous inequality. We can therefore now turn to Cohen's claim that a Pareto-inferior equality might be chosen over a Pareto-superior inequality (or, responding to Parfit's argument, that citizens might veto an inequality in favour of an inferior equality). Cohen says there are good reasons why a distribution of (5,5) might be preferred over a distribution of (6,10) despite both classes being better off in the latter. One reason that the former might be preferred (or that the latter might be vetoed) is the "badness (the unfairness) of being relatively deprived" (Cohen, 2008, p.165). The idea is that the parties in the original position have good grounds to veto the latter distribution on grounds of it being unfair, presuming of course that a distribution of 5 would not make them absolutely deprived. The question we might want to ask here, because there is no explanation offered, is why is being relatively deprived bad and unfair?

A problem, of course, with preferring (5,5) over (6,10) is that the former is less efficient. If the move to the latter would be, as Rawls states, the outcome of free choices, such as whether to develop one's natural talents or whether to work more productively than others and so forth, why would the parties choose the former? It would not be reasonable to resent one's position at the bottom of the socio-economic hierarchy if it reflected only free choice. For instance, say that Amanda has only 6 because she refrains from developing her natural abilities and works minimal hours as her needs and interests are inexpensive. Why would she prefer 5? It cannot

be because of envy as Amanda has the same opportunity to develop her talents as those who get 10. If, as Cohen says, any badness about being in the lowest socio-economic class would arise from a resentment about unfairness then it is difficult to see any unfairness in the Rawlsian distributive system. If Bob gets 10 because he has worked harder then there should not only be no objection but Amanda ought not feel bad about having less, for she has chosen to have less. Again, although this argument might look new at first, it again covers familiar territory, for it is, I argue, not unfair to be in the least well off class of people in a Rawlsian society. Thus, this argument, like the others covered in this subsection, have been addressed more comprehensively in previous chapters, and so I refer the reader to those chapters and the secondary literature which I have referred to there.

6.2 Rawlsian Arguments for the Difference Principle

Cohen also engages with Rawlsian arguments presented in favour of the difference principle, rather than those presented by Rawls himself. The first comes from Nagel who, says Cohen, presents a “Pareto-like” argument in favour of the difference principle. Nagel says that the same reasoning which generates the principles of equality of fair opportunity generates the difference principle. The argument for the former is based upon the intuition that “the social system should not assign benefits or disadvantages solely on the basis of differences between people for which they are not responsible and which they have done nothing to deserve” (Nagel quoted in Cohen, 2008, p.161). Nagel then says that “[t]he same reasoning” leads him to the difference principle because “people are not equal in natural ability”. What Cohen objects to here is that Nagel’s argument in fact does not employ “the same reasoning”. Class inequalities are *fully compensated* by the opportunity principle while inequalities in natural abilities are not fully compensated by the difference principle. The point therefore is that, again, the concern for morally arbitrary causes of inequality is not carried through the entire argument.

However, Nagel states that the intuition that supports equality of opportunity does not rest “solely” on underserved differences, and I disagree with Cohen therefore that the same reasoning is not also applied to the difference principle. I demonstrated in Chapter 3 that justice should not be concerned solely with redress for unearned differences. I will therefore not repeat it here. In Nagel’s original text, however, he says a little more than Cohen references, acknowledging that there is, in fact, a disagreement between liberals. Some, like Cohen, believe the social system ought to mitigate all accidental inequalities, while others

think that it should be only social differences and not natural differences which are compensated for in the social scheme (Nagel, 2003, pp.79-80). Interestingly, Nagel, disagreeing with Cohen, assigns Rawls to the former “strong egalitarian” group, but Nagel is not taking sides with Rawls here as Cohen seems to imply. Rather he discusses a conflict between two precepts: the first is the strong egalitarian view that rewards should not align with genetic endowments, the second is that it might not be more just to sacrifice the benefits of the favourably endowed for the sake of the less favourably endowed. Nagel judges it a virtue of Rawls’s liberalism that he distinguishes political theory from personal morality, and so agreeing with Cohen that Rawls allows citizens to pursue selfish acquisitiveness in their personal lives (Nagel, 2003, p.82). As should be clear from previous chapters, I do not agree with Nagel here, as, while I agree that Rawls is right to make a distinction between politics and personal morality, I do not read Rawls as permitting selfish acquisitiveness. However, I do agree with Nagel that there is a conflict between the two afore-mentioned moral precepts, the reconciliation of which is not obvious. My attempt to resolve this conflict in previous chapters was to say that a levelling down of the more favourably endowed also contains some injustice, in terms of unfairness (in the Cohenian sense), and so to arbitrate between the two we need to appeal to some other measure. One way to do this is to argue, as Rawls does (and I agree), that a levelling down of the better endowed is in nobody’s interest and so would be undesirable on grounds of reciprocity. Again, I do not see that Cohen’s brief discussion of Nagel brings anything new to the table.

There is another objection to the difference principle, says Cohen, and it objects to Parfit’s interpretation of it. Parfit’s interpretation, and the objection to it, specifically concerns the nature of vetoes: who is entitled to veto a distributive arrangement and why. The Parfitian interpretation runs thus. We start with the thought that natural inequalities are the outcome of the natural lottery. Next, we move to allowing inequalities which do not make the worst off worse off. The worst off therefore have a veto to block against arrangements that make them worse off (Cohen, 2008, pp.163-164). The starting rationale here is that justice, because of the moral arbitrariness condition, does not entitle anyone to more of a share than others so we begin with equality, but we move to inequality because nobody would veto a move if at least some are made better off. But Cohen asks why the parties might not veto an inequality as there are reasons to object to an inequality even when some are made better off, as being at the bottom of the socio-economic hierarchy may well assign disadvantages that one might prefer to avoid even if one is better off. Furthermore, if a Pareto-superior distribution would not be vetoed, why might it be said to be just, rather than legitimate? It might be legitimate if all consent to it, but that would not make it just if the value of equality or fairness were abandoned in the process.

It should be clear, I hope, from my response in the previous subsection, why I do not believe a more equal but less prosperous distribution would be chosen over a more prosperous unequal (but just nonetheless) distribution. I shall not repeat that response here. A new argument however that Cohen raises here is to make a distinction between justice and legitimacy. Consensus, he says, entails legitimacy but it does not entail justice. One of Cohen's last published papers addressed this issue and his conclusion was that just steps from a just starting position does not necessarily entail justice but only legitimacy (Cohen, 2011, p.83). In this paper, Cohen does not relate his thoughts on legitimacy to Rawls but to Dworkin and Nozick. However, the implication appears to be, if we relate it back to the difference principle objection, that the strict difference principle, being intention-relative, consists of just steps because incentives are genuinely enabling, but the outcome, being unequal, would be only legitimate and not just. There seems now then to be an added condition of justice. Cohen previously stated that individuals should act from their egalitarian conscience, that they should have internalised justice. I have argued that, in Rawls, individuals do indeed do this. Cohen also previously stated that outcomes should be just and therefore preserve the justice of the initial position. I have also argued that, although Cohen disagrees, Rawlsian justice does indeed preserve this. However there is now an additional requirement that the means by which justice is preserved by just citizens must also be just. This is an interesting thought and Cohen considers, non-conclusively, whether agreements can be fair but produce injustice. However, for the purposes of this thesis, which argues that Rawls is much closer to Cohen than Cohen realises, Cohen's new insight should not prove controversial as he agrees that a consensus, as Rawls believes would appear in the contract from the original position, should indeed be considered incrementally just.

Cohen next responds to a Schefflerian objection to Cohen which disputes the role the arbitrariness of talents plays in Rawls's argument. First it is brought to our attention that Rawls's theory of justice, says Scheffler, is explicitly stated to differ from the "principle of redress", this being that "since inequalities of birth and natural endowment are undeserved, these inequalities are somehow to be compensated for" (Rawls quoted in Scheffler, 2003, p.25). Claims for redress should be accounted for, but this is not *solely* what justice aims at⁵⁸. The purpose of the moral arbitrariness of talents in Rawls, says Scheffler, is not, to action redress for the effects of natural abilities⁵⁹ but is twofold. Firstly, it is to meet an objection from meritocracy, that the more talented deserve greater rewards on grounds of being more

⁵⁸ Rawls also says that: "the principle of redress has not to my knowledge been proposed as the sole criterion of justice, as the single aim of the social order" (Rawls, 1999, p.86). However, this is indeed what Cohen argues for.

⁵⁹ Cohen would call this the effects of "brute luck". Talents are a type of brute luck – circumstances that we cannot take responsibility for.

talented, and to rule it out. And, secondly, the arbitrariness of talents is also introduced to rule out another alternative distributive principle, the system of natural liberty which “allows people's material prospects to be influenced by their natural assets and the social circumstances into which they are born” (Scheffler, 2003, p.26). The system of natural liberty, in Rawls, is morally indefensible because it prevents many from forming and carrying out a rational plan of life, but this does not mean we must then move to a position of distributive equality. In a system in which the difference principle is operative in conjunction with the other principles, all will be better able to form a rational plan of life, so Rawls would say. In other words, the moral arbitrariness rules out the system of natural liberty but it does not then endorse the eradication of all effects of heterogeneous talents, as talents can be apprehended to work for the good of all, as they would not under the natural liberty system or a meritocracy.

Cohen raises a number of responses to this Schefflerian understanding of the relevance to Rawls of the moral arbitrariness of talents. The first is that Rawls, says Cohen, “flatly contradicts it”, because, in regard to the natural liberty system, Rawls objects that “the liberal conception of the two principles of justice [...] *permits* [emphasis in original] the distribution of wealth and income to be determined by the natural distribution of abilities and talents” (Rawls quoted in Cohen, 2008, p.166). The second response from Cohen is that the Schefflerian interpretation of Rawls cannot account for the proposition that the procedure starts with an equal distribution (Cohen, 2008, p.167), for it is the arbitrariness of talent differences which justify that initial position. Here, Cohen refers us again to Parfit who says, according to Cohen: “if talent differences do not justify inequality, one might as well begin with utility maximisation as with equality” (Cohen, 2008, p.167)⁶⁰.

Cohen then weighs up both his and the Schefflerian interpretation of the “moral arbitrariness claim”, and states that neither his nor Scheffler's interpretation would deliver the difference principle. The Schefflerian interpretation, Cohen says, rules out an entitlement or desert justification for unequal distributions, as would be delivered by the system of natural liberty, when those are caused by talents, but it does not rule out Pareto-endorsed inequalities (Cohen, 2008, p.167). Thus, it rules out the first stage of the two-stage argument. This means that the second stage of the argument is just a Pareto argument in favour of inequality because, under Scheffler's interpretation, there can be no presumption of an initial situation of equality. From

⁶⁰ However, my reading of Parfit is that he does not say this. Rather he says that utilitarians “claim that, if some distribution of resources has an arbitrary natural cause, it is not justified. Since that is so, they would claim, there can be no objection to redistribution. But, on their view, the best distribution is the one that would maximize the sum of benefits. Such a distribution would not be morally arbitrary. But it may not be an equal distribution” (Parfit, 1991, p.12). My reading of Parfit here is that in a similar two-stage argument, utilitarians, like Rawls, would start with equality but then argue for utilitarianism rather than Justice as Fairness. They would not be starting with utility maximisation, as Cohen says.

Cohen's own interpretation, the initial situation can be endorsed but cannot answer why it is dropped at the second stage of the argument (Cohen, 2008, p.167). If the moral arbitrariness claim is an argument against inequality, why does it stop being an argument against inequality when the Pareto argument is introduced as a reason in favour of inequality? These two contrasting reasons for and against inequality cannot be easily resolved. "Fairness fanatics" will favour equality but Cohen himself would tolerate the inequality despite its remaining unfair and unjust⁶¹. There are good reasons for moving to Pareto approved inequality but there are also good reasons for remaining with equality, and these are unresolvable at the fundamental level of justice.

Again, we should respond that Scheffler also states that Rawls's rationale is not, as Cohen claims, to rule out all morally arbitrary effects but to rule out effects which are solely morally arbitrary. A should be clear by now, I do not see an inconsistency in Rawls as the difference principle is not solely based upon this rationale but balances it against other rationales, such as that of rationality. Again, I believe I need not repeat that response here. And Sheffler, I believe is indeed right about Rawls here. Scheffler claims, says Cohen, that the sole point of the moral arbitrariness of talents is not to produce a fair and equal outcome but rather to rule out distributions based *solely* on morally arbitrary causes. What ultimately justifies the difference principle is reciprocity, the idea that "social and economic inequalities are just only if they result in compensating benefits for everyone" (Rawls, 1999, p.13), and distributions which are dependent upon morally arbitrary causes, such as talents and class, cannot be endorsed by reciprocity. Rawls's aim is to interpret what is meant by an "unequal distribution of any, or all, of these values is to everyone's advantage" (Rawls, 1999, p.54), and this, it appears, is what Rawls calls a "considered judgement", that it is generally accepted that a just society, understood as a scheme of social cooperation, delivers advantages to all. However, there are a number of distributions which might be interpreted as to everyone's advantage. Rawls considers a meritocratic distribution which he calls "natural aristocracy", a distribution he calls "natural liberty", in which "careers are open to talents", and another called "liberal equality", this being that "those with similar abilities and skills should have similar life chances" (Rawls, 1999, p.63) and finds that these are unstable (Rawls, 1999, p.64). By unstable, Rawls means that we acquire the appropriate sense of justice and do our part in maintaining the appropriate social institutions (Rawls, 1999, p.398). These alternative distributive schemes are unstable because the distribution of shares in each are dependent upon, in the first system, entirely social circumstances; in the second social and natural circumstances and in the third, only natural circumstances. All of these would be rejected in the original position as being at odds with reciprocity. It turns out that they are in fact not to everyone's advantage after all.

⁶¹ Cohen thinks that Pareto is sensible although not part of justice.

Thus we do rule out inequalities which arise solely from natural and social differences but ultimately because they do not service the principle of reciprocity. The principle of redress as a sole principle of justice which Cohen advocates would also be ruled out because it is also at odds with reciprocity. It would fail the requirement of reciprocity as the more talented will have the development of their talents suppressed (in comparison to a society regulated by Justice as Fairness). Doing so would not be to “everyone’s advantage”. Furthermore, I have also argued that Cohen’s egalitarianism is also unjust by his own standards.

Finally, Cohen considers a similarity between a Rawlsian argument in favour of the difference principle and a Rawlsian objection to Nozick. Nozick, says Cohen, makes a similar mistake to Rawls and the Rawlsians. In his Wilt Chamberlain argument, Nozick assumes an initial distribution which conforms to a principle of justice, such as the difference principle and calls this distribution D1. But Nozick then argues that a more desirable distribution, D2, would be endorsed when it is “reached by impeccable steps from D1 as a starting point” (Cohen, 2008, p.169). Rawlsians, says Cohen, would condemn this move because Nozick “fails to see that the principles that enjoin D1 also prohibit the move to D2: Nozick takes D1 as established, and he succeeds in disestablishing it only because he ignores what established it” (Cohen, 2008, p.170). But this criticism can also be levied at the Rawlsians who begin with establishing that all accidentally caused inequalities are morally arbitrary but then abandon that principle when they favour the Pareto principle. Why, then is it condemnable that Nozick abandons the reason for establishing an initial distribution but not for Rawls?

It appears that one Rawlsian who offers such an argument is, again, Nagel (see Nagel, 1975). But again, as should be clear from my previous responses, I do not believe that Rawls does abandon his initial justification for starting with equality, this being social and natural contingencies. They are not abandoned because to do so would be at odds with reciprocity.

To conclude this subsection, I state that I do not believe that Cohen furthers his case by critiquing these “Rawlsian” arguments. They are, for the most part, just cases of the Pareto argument which were presented previously, and he does not show why these arguments now support his stronger conclusion of rejecting the difference principle entirely.

6.3 Can one believe the difference principle but not act upon it?

Next, Cohen re-introduces his concerns about whether an affirmer of a principle can legitimately fail to act from it. In particular, he asks whether “someone who professes a belief in the difference principle but who goes for a disequalising salary thereby act[s] in contradiction

of the principle she professes [...and...], [i]f so, can she really believe in the difference principle?" (Cohen, 2008, p.171). There is a Schefflerian answer to this second question, says Cohen, and it is yes. It is perfectly plausible for humans to acknowledge and regret their weaknesses, that they might be unable to act from the difference principle in their everyday choices while happily supporting and voting for economic policies which enforce the principle (Cohen, 2008, pp.171-173). The answer reflects the insight by some liberals that we are often conflicted about social justice. We want to do what is right but also find ourselves not wanting to do what is right. Thus, assigning what is right to the state makes it easier for the right to be endorsed and enacted. But, Cohen objects, this type of society drops the Rawlsian requirement of well-orderedness and, if people are not themselves just, the society in which they live cannot be said to be just, even if they approve legislature to that effect. To counter this, I state what will by now not doubt be a familiar response here. The question is not really relevant to Rawls, as Rawlsian citizens do, as I demonstrated in the previous chapter, accept and act from the principles of justice.

6.4 Constructivism

Finally, Cohen suggests that the, as he sees it, problematic justification of the difference principle can be laid at the door of constructivism. What he specifically criticises here is that constructivism wants to constrain its moral recommendations by what is feasible, specifically by human nature and Cohen worries that Rawls thus makes concessions to human selfishness. While I have taken the view that the preceding arguments in his difference principle objection are susceptible to the same criticisms raised in previous chapters, the feasibility argument looks more interesting.

In earlier writings on justice as fairness, Rawls tells us that inequalities justified by the difference principle make "concessions to human nature" (Rawls quoted in Cohen, 2008, p.177) but this is dropped in later work (Cohen, 2008, p.178). The reason for this, Cohen speculates, is because of his later embracing of constructivism, which tells us that "justice consists of the rules on which we would agree in a privileged choosing situation, in the light, *inter alia*, of (what are taken to be given) facts about human nature" (Cohen, 2008, pp.179-180). The problem with constructivism, Cohen continues, is that it cannot accept that humans might just be inherently unjust (or unfair). Because, if humans are indeed inherently selfish, they cannot be just. Just behaviour and thought would therefore be something that humans just cannot do. To construct justice upon such human vices as selfishness, and which

constructivism cannot admit to being vices, delivers principles which might best accommodate unjust behaviour but do not entail justice. They do not reveal what justice is or how to attain it but what to do to best minimise injustice's effects.

Cohen objects that the parties in the original position are selfish but it is not clear where the concession to selfishness is made. One explanation might be that the parties in the original position are conceived of as being selfish but I cannot see why this might be so. The parties are indeed conceived as self-interested but I interpret selfishness to mean egoism, that one prioritises one's own interests to the exclusion of the interests of others. Thus, if egoism means excluding the interests of others, one cannot act as an egoist if one is not at all aware of the interests of others as, being mutually disinterested, the parties to the original position are. In fact, elsewhere Cohen describes selfishness as "desiring things for oneself, and for those in one's immediate circle, and being disposed to act on that desire, even when the consequence is that one has (much) more than other people do, and could otherwise have had" (Cohen, 2002, p.118). But this is not what motivates the parties to construct principles in the original position. They do not desire to have more than others for they have no knowledge of what others have. What motivates them is rather that they desire to be as well off as possible under the condition of uncertainty.

Another explanation might be that this concession to selfishness emerges because the principles which are chosen allow the more talented to act as market maximisers by the way of incentive demands and indeed, elsewhere, Cohen does explicitly say that the only explanation for the inequality permitted by the difference principle is anti-egalitarian selfishness (Cohen, 2002, p.121). Once again, however, I repeat that I have demonstrated in previous chapters that I believe this not to be the case. Furthermore, this does not seem like an argument against constructivism. If principles constructed in the original position are not motivated by selfishness but do not do enough to mitigate selfishness when applied, then the problem is not necessarily the constructivist method but that the initial situation has not been set out to properly mitigate for selfishness.

Even if there is no selfishness in Rawls's constructivism, Cohen makes a more general point about feasibility. The problem with this critique is that, as constructivism is presented as a procedural account of practical reasoning, it seems impossible to exclude facts about humans that will enable them to reason about what they ought to do. Two elements of practical reason are rationality and reasonableness. Both of these are, and, I argue, must be, modelled within the original position. Even if Rawls is right that we are motivated to pursue justice because it is fundamentally rational, and so in one's interest, to do so, why should this be problematic? If his psychological sketch is right and we internalise and act from justice because of a prior

stage where we recognise the personal benefit of cooperation, then the original position models this by showing that it is rational to cooperate with others on conditions that are fair and just.

Conclusion to Chapter 6

To briefly conclude this chapter, the arguments which Cohen raises here have mostly been addressed in previous chapters. I therefore refer the reader to those chapters for my response and my imbedding of that response within the secondary literature. Where Cohen does offer a new argument is in his objection to the constructivist method but it is not at all clear what Cohen is objecting to here. The objection seems to be that constructivism accepts human selfishness as Cohen believes, plausibly in my view, that human selfishness is a product of an ethos of selfishness which is not an ineradicable fact of human society. However, I cannot see where Rawls does accept selfishness as a fact of human society. The original position is not laid out in a way that models selfishness, nor is selfishness a necessary explanation for the inequalities that the difference principle generates. I also think that Cohen's extremely minimal differentiation between justice and legitimacy is an interesting one but I do not agree that the difference principle is only legitimate rather than just.

Chapter 7 – Summary and Conclusion

7.1 Summary of Chapters 2-6

The overall aim of this thesis is to argue that Cohen's reading of Rawls, intended as an internal critique, is an inaccurate one and that both the society and the citizens which Rawls imagines to be the outcome of his principles of justice are far more egalitarian than Cohen realises.

As we have seen, a principal mistake that Cohen makes is that he presumes that it is only the difference principle which regulates the distribution of wealth and income. While this is understandable considering the way Rawls presents his principles and the reasoning that supports them, this is not the case and all principles influence material distributions. When we take the other principles into account, and their priority over the difference principle, we see that Justice as Fairness, taken holistically, should generate institutions which would not produce the sorts of incentive based unjust inequalities which concern Cohen. This is not to say that Cohen is wrong to be worried about such inequalities, but rather that he is wrong to state that Rawls permits them. Strangely, because he overlooks the role the other principles play, Cohen, being a socialist, entirely overlooks the matter of the ownership of the means of production in Rawls, something that is usually of crucial importance to the left. Cohen also does not pay ample attention to the role of education and training in contributing to the development of one's natural abilities. Cohen often talks about abilities as being natural, as if one is just lucky to be born with the skills that society demands or needs. This is obviously not the case as skills must be honed and developed and I have therefore criticised Cohen for not making a clearer distinction between natural endowments, such as intelligence or strength, and talent, the development of natural endowments into useful abilities which may be traded for the talents of others. To be fair to Cohen, however, I do not think Rawls is at all clear on this matter either and I have attempted to clarify the distinction in this thesis.

Once we begin considering how individuals develop their talents, then we must start considering efficiency, which Cohen wishes to exclude from considerations of justice. I have argued that efficiency, and perhaps other economic concerns, should not be considered as external to *distributive* justice. It is not only that efficiency requires training the best placed individuals, as if there is a way to make more of something with less labour then justice requires us to do so. Thus, entrepreneurship is also a consideration of efficiency, and so also of justice, because justice requires the efficient organisation and management of productive processes.

Cohen also overlooks the other part of the difference principle which permits some social inequality. This means that some might have greater responsibilities than others and that better prospects to those who take on these responsibilities should be expected, assuming positions with greater responsibility are usually more demanding of us. There must also be allowances made for what Cohen calls the personal prerogative and I have argued that such a prerogative is more expansive than Cohen concedes.

There is therefore far more distributive equality than Cohen realises in a Rawlsian society. That Cohen overlooks much of what constrains large material inequalities, both from the perspective of principles and institutions, shows that Cohen's critique of Rawls should not count as an internal one.

While I have argued that incentives should not be considered unjust and that Pareto and perhaps also other economic principles ought to be considered elements of justice, a puzzling element of Cohen's objection is his community objection. This is the claim that incentives demands show that those who demand them do not consider themselves to be part of a justificatory community with their compatriots. The main objection to this is that the inequalities upon which the community dismissal rests just would not arise and that Rawlsian incentives can, contra Cohen, be comprehensively justified. Furthermore, it is also not clear to me why he believes that the incentives argument is more or less persuasive depending on who presents it to whom. This is not to say that I disagree with Cohen's insight that justification must account for the relation of the speaker and audience, but rather that the form in which, specifically, the incentives argument is presented is irrelevant to its acceptance.

Probably the most well-known aspect of Cohen's critique is his objection to restricting the difference principle to the basic structure. However, I have argued that there is no reason why the issue which exercises him, the issue of equality between spouses, cannot be regulated by the basic structure, and so it is not a persuasive argument if its deployment is to show that justice must also apply to the personal. As Cohen bases his objection upon a perceived ambiguity in Rawls regarding the family, I considered whether there might be other associations within the family which escape basic structure regulation. However, by way of that investigation, I concluded that Cohen ought to have considered how Rawls conceives of the difference between direct and indirect regulation. I argued that there are good reasons of *justice* why the difference principle ought not to be implemented directly to all internal associations within the family. There are also, I argued, and Rawls is clearer about this, good reasons of justice why the difference principle ought not be implemented directly to other associations. However, these associations, while they might not need to be directly regulated, must be indirectly regulated by the difference principle. It is the basic structure as a whole

which must be just and it is not necessarily the case that the direct implementation of the difference principle to all institutions and associations will produce a just basic structure. If Cohen had addressed the difference between direct and indirect implementation of justice or Rawls's assertion that it is specifically the basic structure rather than individual institutions that must be just, he may well have conceded that the right principles of justice can vary between structure, institutions, parts of institutions, and other associations. After considering the family, Cohen then argues that the basic structure cannot regulate incentives, which leads him to the conclusion that the economy requires individuals to act from justice when considering their wage expectations analogous to the moral pioneer husbands incrementally overturning pre-existing structural spousal inequalities. However, this also is unpersuasive, for it is not at all clear why the basic structure cannot regulate wages to ensure against incentive demands. The two together, the matter of the family and incentives, suggests that Cohen seems to significantly under-estimate the regulatory capacity of the basic structure.

Because of non-basic structure inequalities, says Cohen, society requires an ethos of justice. Cohen, despite his conceptualising of ethos being under-determined, is right, I think, that societies have an ethos which exerts a powerful influence upon our beliefs, our behaviour and how we treat and think of others. I also do not disagree with Cohen that there is indeed extra-legal behaviour which would benefit from an ethos of justice. But Cohen's objection is that Rawls misses an ethos of justice, that the only ethos in a Rawlsian society is one of following the rules (or the laws) and I have argued this not to be the case. Rawls anticipates individuals to possess a sense of justice, that they accept and act from a morality of principles which develops from natural human interaction and existing social institutions, and indicates how it might be acquired. When we consider the features Cohen attributes to an ethos, the sense of justice looks like the sort of ethos Cohen has in mind. Furthermore, individuals have an obligation to obey the law only when it is just. Therefore, their loyalty is fundamentally to justice, not to the basic structure (or to legally regulated institutions).

I have argued throughout this thesis that Rawlsian incentives ought to be considered just. Yet, while I have argued that in a Rawlsian society any inequalities which arise from incentives ought to be constrained by the other principles and just institutions, this does not mean that Cohen would be entirely content with the outcome. This is because the better prospects which Rawls says the better endowed can expect are not *entirely* dependent upon effort. Those who are able to develop their natural endowments into useful talents have the good fortune that nature has provided them with those natural endowments. Thus, if Cohen equates justice with fairness, some residual unfairness will remain.

However, I have argued not only that a principle of redress which does address justice when understood simply as fairness would be infeasible, it would be both unjust and inefficient. Forced to choose between them, my inclination is that Rawlsian justice is *fairer* than Cohenian justice. It might well be that we will one day find a solution which both Rawlsian and Cohenian justice would find entirely acceptable, but Rawls's method is to make pair-wise comparisons between considered judgements about justice and if we compare Cohen to Rawls, I believe that Rawls's is closer to our considered judgements on justice. In fact, Rawls states that the principle of redress should not even be considered a considered judgment, although I disagree with this.

Cohen's later re-articulation of his objection(s) is that he now objects to all incentives, including enabling incentives to those who would otherwise be *unable* to labour prodigiously towards contributing to the common good. A problem with Cohen's objection here is that he makes similar oversights to his earlier objection. However, here he more clearly identifies a methodological problem, that Rawls, because of his constructivism, makes concessions to human nature. I argued that it is difficult to see where Rawls does make such a concession and, furthermore, it is not quite clear to me where Cohen thinks this concession is made. Similarly, Cohen's re-articulation makes it clearer that his objection to the inclusion of concerns about Pareto efficiency can also be laid at the door of constructivism. However, while I have argued that Pareto ought to be a consideration of justice, it is not clear to me why this is specifically a problem of constructivism. There is no reason, as I understand it, why initial situations, like the original position, cannot exclude economic concerns. As I understand it, Cohen's camping trip argument is a type of initial situation which excludes Pareto efficiency and from which principles of strict equality of opportunity and community are constructed. If the camping trip does indeed count as an instance of constructivism then constructivism cannot be the root of Cohen's worries.

I have tried to be charitable to Cohen throughout this thesis by trying to understand why he might have misread Rawls. To be fair to Cohen, Rawls is often not as clear as he could be. But to also be fair to Rawls, his work is extremely ambitious. Cohen's method is to try to exploit ambiguities in Rawls's work to show that the conclusions Rawls makes are unsound for being based upon conflicting premises. The ambiguities which he considers, such as the purpose of incentives, the role of Pareto, justice within the family, the definition of the basic structure, are indeed not as clear in Rawls as they could be. Even in his later work in which he tries to clarify these ambiguities, they often remain a little unclear. But to, again, be fair to Rawls, he was not in the best of health when these later works were written. A problem an interlocutor might have with Rawls is that he covers a lot of ground. *A Theory of Justice* is not a short book. It is therefore sensible to want to address only part of it, which Cohen does by considering only

the difference principle. But the problem with doing so is, as I have stated, that the difference principle is not the sole regulator of income and wealth, and it is the distribution of income and wealth which Cohen is primarily concerned with. However, although I can understand these oversights of Cohen's, what I find very odd is that Cohen does not at all discuss Rawls's explication of the sense of justice. This, as I have argued, looks very much like the ethos of justice Cohen has in mind.

An unexpected outcome of my analysis is that I have asserted a fairly leftist reading of Rawls. It is not uncommon that Rawls is read as supporting capitalism but I have argued that this is not the case. If the problem, as I understand it, of capitalism is that capital, understood as the means of production and property, is concentrated in the hands of a minority, then Rawls rules this out as being unsupported by the equal distribution of basic liberties and the principle of fair equality of opportunity, and the ideal of reciprocity. Thus, only a liberal socialism or a property-owning democracy can be endorsed. Compared to actually existing models of western capitalism, Rawls's proposal is a radical one. We often think of the leftist solution to capital as common ownership, but the idea of property-owning democracy has traditionally also been considered a leftist alternative to capitalism. According to Jackson it is a radical and more plausible way of progressing egalitarian ideals (Jackson, 2012, p.43).

To sum up then, Cohen misses many aspects of Rawls which, I have argued, produce a far more egalitarian society, both in terms of distributions and in terms of ethos, than Cohen believes. It might not be perfectly just by Cohen's standards but a Cohenian society would also entail some unfairness and there are good reasons of justice for preferring a society regulated by Rawlsian principles than by Cohen's luck egalitarianism.

7.2 What actually is the disagreement between Rawls and Cohen?

Recall that I said in the introduction that Smith's analysis, applied to the initial incentives objection, was close to my own but that I disagreed with him about what the disagreement between Rawls and Cohen actually consists of. I agreed with Smith that Cohen does not really consider how the institutions of a Rawlsian well-ordered society, regulated by the full array of principles, would constrain inequality but, I would consider this more an oversight on Cohen's part. Rather, my view is that, firstly, Cohen just disagrees with Rawls about what justice is. For Cohen equates justice with what many of us might call fairness⁶², that what we get should not

⁶² And Cohen himself uses the terms "justice" and "fairness" interchangeably in his later chapters.

be dependent upon morally arbitrary factors. Rawls on the other hand thinks justice, more specifically *social* justice, is reciprocity. This is the idea that justice works towards some conception of the common good in which all cooperate to make everyone better off than they would be if they did not cooperate. In my view, fairness and reciprocity are both rationales for justice and Rawls attempts to reconcile them, while Cohen, on the other hand, consigns reciprocity to the category of community without explaining why he disagrees about the categorisation. The reason might be, I hypothesise, because Cohen might believe you could have a just society that should not be considered a community. But he also says that he thinks that individuals that have internalised and act from justice ought to work to the maximal benefit of others and so, here, he also seems to say that reciprocity is part of justice, at least as a virtue of persons.

Another fundamental disagreement between them might be about what counts as a fundamental principle. Cohen consistently claims that Rawls understands his principles to be fundamental, or first, principles. Yet, and Williams makes a good case for this (see Williams 2008), it is possible that Rawls did not conceive of his principles as fundamental principles as Cohen understands the term.

It might also be that Rawls's enquiry concerns *social* justice and social justice is not simply justice. If we are concerned with *social* justice, then surely facts about what society is and what its constituents are like must be included. Say, by analogy, we conceive of something called football justice. In the big local derby, Brown the striker has his shot handled on the goal line by Smith the defender but the referee fails to award a penalty. This would rightly be described as an injustice but it can only be described as an injustice when we include facts about the rules of football. If the rules were not as they are and any player in the penalty box were allowed to handle the ball then the referee's mistake would not be considered an injustice. Without including the relevant facts about what counts as the game of football, we are unable to say whether the incident is either just or unjust. This does not mean that anything goes. Football incorporates ideas about what would count as a sport and ideas about how individuals demonstrate their superiority in the sporting domain. If, for instance, we conceived of football as awarding victory to the player who fell over most frequently, then we would think this to be an abandonment of our beliefs about what counts as a sport or what the point of sport is. Furthermore, football justice would not make much sense if we did not incorporate facts about the sort of creatures that would play the game. For instance, we presume that human nature is such that we have an element of competitiveness, a desire, or motivation, to demonstrate our superiority. Without competitiveness, I doubt the players would bother to try

to win the game⁶³. This might be entertaining for other reasons but it would not, I believe, count as a sport. Thus football justice, and also social justice, cannot be simply justice, however justice is understood. We have to include facts about what the thing that justice is applied to is. Of course, these might be controversial, but excluding them altogether, as Rawls states, prevents us from making a decision about what the principles (or rules) should be for a type of justice and thus how we judge the justness of a specific instance of it.

7.3 Further research

7.3.1 Ethos

Let me finish up by suggesting some areas for further research. An obvious one is Cohen's idea of ethos, of which analytical anglo-american political theory has to date said little. Cohen clearly thinks the ethos is of great importance and seems to suggest, although he is not particularly clear about this, that socialism represents the natural ethos of humanity and society and therefore that the ethoses of capitalism or liberalism are in some way unnatural, that they get in the way of justice. I take this to be his view not only because of his claim that moral pioneering husbands are capable of resisting an unjust patriarchal system and so transforming it into a just system. Further evidence for this view is the framing of his critique of Rawls around the Marxist thought that the state can "wither away" when the right principles are practised in "everyday life" (Cohen, 2008, p.1). My criticism of Cohen has not only been that he misses an ethos in Rawls, but also, firstly, that he underappreciates how political institutions can do much of the work he attributes to the social ethos, secondly, how political institutions shape the ethos, and thirdly, how the ethos shapes political institutions. However, I do not think he is wrong about the need to think more about ethoses and he is right to encourage us to do so.

Rawls, on the other hand, considers how one's morality might be shaped positively by social and political institutions and also other associations. He is therefore far more optimistic about the way in which political institutions shape individuals and society than Cohen. Yet, for Rawls, morality is not only forged by social institutions, it is also an outcome of basic human needs, the need for nurture, protection and interaction which social institutions, the family being the preeminent example, provide. If this is right, then the sense of justice, like the Cohenian ethos,

⁶³ They might still play because it is enjoyable or because it is good for one's physical fitness but a game in which no one wants to win seems to be missing an essential feature of the concept of a sport.

might also be, for Rawls, the natural ethos of humanity and society. Like Cohen's ethos, Rawls's sense of justice has not gained much attention and so I think warrants further investigation. My feeling is that the relation of ethos, personal choice and institutions is far more complex than in either Cohen's or Rawls's accounts and that there will certainly be more thorough accounts available outside of anglo-american political theory. For instance, feminist thought has far more to say about the politics of the personal than Cohen, for his, in my view, engagement is relatively superficial

7.3.2 Meta-ethics

There is also, I believe, still work to be done on Cohen's meta-theoretical objection, his objection that constructivism cannot produce fundamental principles of justice because it admits controversial facts and non-justice principles. While I have argued that this objection can be taken independently of the objections against the content of the difference principle, it might, I believe, provide further insight into the fundamental disagreement between Rawls and Cohen. Much of the secondary literature responds to the question as to whether Cohen is right that principles must be ultimately fact-independent but what is usually missed is that Cohen also frames this objection as an internal critique of Rawls. For he says that Rawls also supports his facts and principle thesis but betrays it in his constructivism. It is also often overlooked that Cohen says that his theory about facts and principles is not a unique one and that he believes it is generally supported, although he does not, however, tell us who also supports his theory. As I have argued in chapter 6, I do not find it convincing that the problem that Cohen attributes to Rawls, that he includes inappropriate facts and principles, is due to constructivism, for constructivism can certainly omit setting up its initial situation without the facts and principles which Cohen objects to.

7.3.3 Realism

Another avenue for further research might be a realist critique of Rawlsian and post-Rawlsian egalitarianism. There are several variants of realism but a popular, and perhaps seminal, one is that of Bernard Williams who proposes realism as an alternative to the dominant "moralist" paradigms of Rawls and utilitarianism. Thus, while Rawls objects to utilitarianism on grounds

such as its lack of attention to the distinctiveness of persons, Williams objects to both utilitarianism and Rawls (both early and late) because they each share features of “moralism”. In my view, Williams is a little unclear as to what moralism consists of precisely but his objection seems to be that it is something like applied morality in which an ideal moral system is worked out in abstract from any facts about contingencies, aiming to bend social and political institutions to fit that ideal. What realism aims to do instead is to start with the inclusion of contingencies, such as a plausible political and moral psychology or the historical conditions or beliefs of the specific society, and also from the basic need for regimes to mitigate fear and be accepted, and so be considered legitimate, by its subjects (and also perhaps external onlookers). It might, says realism, be that morality plays some role in mitigating fear and justifying a regime which claims to do so, but it is not the only concern of politics as moralism appears to suggest.

Williams specifically objects to the moralist paradigm of Rawls which he says starts with, perhaps controversial, moral ideas about the person, such as Rawls’s assertion that individuals possess the two moral powers and prioritise autonomy, upon which principles of justice are constructed (Williams, 2005, p.6). The realist critique of Rawls might be thought, on first blush, to be in some way opposite to Cohen’s. Realists want to include relevant facts, contingencies, or non-moral values when judging the claims of a regime and Cohen, as we have seen, thinks that facts and non-moral values pollute justice. Yet Cohen is also clear about what he considers the distinction between “rules of regulation” and justice and might say, I believe, that realists are concerned with theorising the former rather than the latter.

I think there are some problems with Williams’s analysis of Rawls. Realists, like Cohen, have not at all grappled with the Rawlsian sense of justice, which is odd because they argue that his moral and political psychology is not plausible. I also do not think that Rawls sees his work as ahistorical fact-free “applied ethics”. Rather Rawls should be thought of in terms of presentism – he is attempting to work out how contemporary subjects of liberal democracies understand the idea of social justice. Furthermore, Rawls does provide a historical narrative for liberalism in *Political Liberalism*, and he also says that a stable regime must be prioritised before we turn to justice.

Having somewhat defended both Cohen and Rawls here against the realist critique, I do think that it would be worth asking what a realist alternative to Cohenian, Rawlsian and post-Rawlsian egalitarianism would look like. This is certainly a question which has received little attention to date. My feeling is that Rawlsian egalitarianism is more realist than realists realise and, again, like Cohen, I feel their critique of Rawls misses some of the nuances of Rawls. I also think that Cohen is not quite the moral idealist that some realists portray him as. But I do

think that both do not sufficiently consider the historical trajectory of the intuitions, precepts, considered judgements, and moral presuppositions that each takes for granted. Furthermore, Cohen's use of moral and political psychology is, as I have stated elsewhere in this thesis, extremely incomplete.

7.4 Conclusion to the Conclusion

We now reach the end of this thesis. I hope it has been interesting and in some way enlightening. I want to express how much I have learned from studying Cohen's critique of Rawls. It has required me to become familiar with the work of two leading contemporary scholars. While I have sided mostly with Rawls in the debate, Cohen's critique has certainly helped me in understanding Rawls. More generally, it has helped me understand what we might mean by liberalism, socialism and capitalism, how equality and liberty might be reconciled, how morality might connect with politics. I have much more to learn about all this but what I know now towers head and shoulders above what I knew when I started on this project and, while the project has at times been difficult, it has been extremely rewarding.

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