ON THE CONCEPTUAL STATUS OF JUSTICE

by

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Abstract

In contemporary debates about justice, political philosophers take themselves to be engaged with a subject that's narrower than the whole of morality. Many contemporary liberals, notably John Rawls, understand this narrowness in terms of context specificity. On their view, justice is the part of morality that applies to the context of a society's institutions, but only has indirect application to the context of citizens' personal lives (unlike the rest of morality). In contrast, many value pluralists, notably G.A. Cohen, understand justice's narrowness in terms of singularity against a plural background. On their view, justice is one fundamental value amongst a plurality of fundamental values.

The purpose of my thesis is to establish that the pluralist conception of justice's narrowness is (a) theoretically significant and (b) true. To establish its theoretical significance, I argue that proper attention to the ways in which different understandings of narrowness inform the work of contemporary egalitarians explains a considerable amount of disagreement between them concerning the *content* and *scope* of distributive justice. On the one hand, I'll argue that if we understand justice's narrowness in the manner Cohen and other pluralists do, i.e., understand a conception of justice to be a conception of a particular fundamental value, then both luck-egalitarianism and the claim that justice extends to the personal context are compelling. On the other hand, I'll argue that if we understand justice's narrowness in a contextual manner, i.e., understand justice to comprise one or more all-things-considered principles adopted for the institutional context, then both luck-egalitarianism and the claim that justice extends to the personal context prove implausible.

To establish the truth of the pluralist conception of narrowness, I argue first, that the contextual understanding is only plausible if fairness should be understood procedurally instead

of substantively; and second, that substantive fairness cannot be eliminated, as specifying the content of procedural fairness requires a substantive criterion. The upshot is that justice's narrowness is best understood in terms of singularity against a plural background, rather than in terms of context specificity.

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Chapter 1

Introduction

1. The Point of the Project

In contemporary debates about justice, political philosophers take themselves to be engaged with a subject related to but distinct from morality. Though they acknowledge that justice is a normative topic, its subject matter is generally thought to be narrower than the general nature of right and wrong. This distinction has its origins in ancient philosophy. In *The Nicomachean Ethics*, Aristotle begins his discussion of justice by distinguishing between two different but related senses of the term: a narrow sense of the word 'justice' that refers to a part of morality, specifically the part pertaining to fairness, and which bears on matters of distribution and rectification; and a broader sense of the word 'justice' that refers to moral rightness in general.[1] My thesis argues that a disagreement over the sense in which justice is narrower than moral rightness implicitly lies at the heart of much debate between contemporary egalitarians. On one side of the disagreement is a view shared by many contemporary liberals, most notably John Rawls, which understands narrowness in terms of context specificity. On this view, justice is about the moral rightness of specifically institutions.[2] On the other side of the

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[1] Aristotle (1998) Book V, Sections 1-2. See also Waldron (2003) p. 274.

[2] Rawls (1971) pp. 7-8 and pp. 108-117; and Rawls (2001) p. 14. The claim that justice is the part of normative ethics concerned with institutions is sometimes understood in terms of 'enforceability.' On this view, duties of justice are specifically those moral duties which can legitimately be enforced by law. Of course, the state does more than just coerce people. It also, for example, provides non-coercive incentives and disincentives via tax policy and the like. The claim that the distinguishing feature of duties of justice is their enforceability thus entails the claim that duties of justice are institutional, but the claim that they're institutional does not entail that duties of justice are limited to that which is enforceable. For examples of prominent liberal philosophers (other than Rawls) who endorse either the institutional understanding or its narrower 'enforceability' counter-part, see Nozick (1974) p. 6; Kymlicka (2002) p. 5-6; Tan (2004b) pp. 21-9; and Miller (2007) pp. 248-9.

disagreement is a view held by many value pluralists, most notably Isaiah Berlin, which understands narrowness in terms of singularity against a plural background. On this view, justice is one fundamental value amongst a plurality of fundamental values.[3] When justice is understood as a value, to say that a society's institutions are just is not equivalent to saying that they are morally right, as moral rightness requires that they satisfy other values too. What's more, there's good reason to think that justice, when understood as a value, extends beyond institutional structures (or so I argue in chapter 5). Though Berlin is probably the most prominent 20th century philosopher to propound it, the most systematic and rigorous articulation of the pluralist view can be found in the later work of G.A. Cohen, especially in his recent book *Rescuing Justice and Equality*.[4]

The purpose of the present thesis is to defend the plausibility and theoretical significance of a pluralist understanding of narrowness. With respect to its significance in particular, I will argue that viewing the contemporary egalitarian literature on distributive justice through Cohen's pluralist lens sheds considerable light on two major areas of dispute: (a) the debate over distributive justice's *content* and (b) the debate over distributive justice's *scope* of application.

Much contemporary debate over the content of distributive justice revolves around the theory Elizabeth Anderson dubbed 'luck-egalitarianism'.[5] Luck-egalitarianism, broadly speaking, is the view that inequalities traceable to choice are just, while those traceable to a person's circumstances are not. Its proponents maintain that

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[3] Berlin (1992) pp. 172-3 and pp. 212-7. For other expressions of the pluralist understanding of narrowness, see Feinberg (1989) pp. 108-16; and Segall (2007) pp. 188-92.
[4] Cohen (2008). For a brief statement of the view, see pp. 2-6. For his full, systematic articulation, see chapter 6 and chapter 7.
[5] See Anderson (1999).

justice supports compensating a less well-off individual in so far as her disadvantaged status is no fault of her own.[6] Since its inception in the 1980s, luck-egalitarianism's coherence with certain core intuitive judgments long made it the dominant egalitarian alternative to John Rawls's theory of justice. On the one hand, the idea that inequalities traceable to circumstance are unjust explains why it seems unfair for one's endowment of natural talents or for the socio-economic class into which one is born to determine one's life prospects. It also explains what seems unfair about disabilities attributable to sheer misfortune. On the other hand, the idea that inequalities traceable to choice are just explains why it seems fair for those who gamble away their holdings or choose leisure over work to have less than others.[7] In recent years, however, critics of luck-egalitarianism have argued that it suffers from a number of serious deficiencies. They claim, for example, that it makes extravagant metaphysical assumptions about the nature of free will,[8] expresses a disrespectful attitude towards those it would seek to assist,[9] and has counter-intuitive implications.[10] What's more, critics argue that luck-egalitarians misunderstand the relationship between distributive justice and the justice of a society. They maintain that egalitarian social relations are what constitute a just society, and that distributive justice is only valuable insofar as it instrumentally contributes to the

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[6] The authors in the literature don't always use precisely this language, but it's generally not far off. According to Dworkin, "On the one hand, we must, on pain of violating equality, allow the distribution of resources at any particular time to be (as we might say) ambition-sensitive…But on the other hand, we must not allow the distribution of resources at any moment to be endowment-sensitive..." See Dworkin (2000) p. 89. Similarly, Richard Arneson said of his own position that, "When persons enjoy equal opportunity for welfare...any actual inequality of welfare in the positions they reach is due to factors that lie within each individual's control." See Arneson (1989) p. 86. Likewise G.A. Cohen describes the thrust of his position as aiming "…to eliminate *involuntary disadvantage*, by which I (stipulatively) mean disadvantage for which the sufferer cannot be held responsible, since it does not appropriately reflect choices that he has made or is making or would make." See Cohen (1989) p. 916.

[7] See Kymlicka (2002) pp. 75-9; and Kymlicka (2006) pp. 17-8.

[8] See Scheffler (2003) pp. 17-9; and Scheffler (2005) pp. 10-4.

[9] See Wolff (1998) pp. 110-5; and Anderson (1999) pp. 304-7.

[10] See Anderson (1999) pp. 295-300; Scheffler (2003) pp. 32-3; and Scheffler (2005) pp. 15-6.

realization of social equality. On their view, any plausible account of the *content* of distributive justice must be justified in light of its instrumental relationship with social equality.[11]

A second dispute also rages among contemporary egalitarians, this time concerning the *scope* of distributive justice. The central question is whether the principles of justice applicable to institutional structures are also applicable to the personal choices citizens make within those structures. According to John Rawls, for example, a society's institutions should be designed to benefit its worst-off citizens, but better-off citizens are not required to attend to worse-off citizens when making choices about employment, how to treat family members, etc.[12] However, critics argue that a truly just society requires more than institutional justice. It requires a social ethos that motivates citizens to act upon principles of justice in their daily lives.[13] They note, among other things, that the choices which constitute informal institutions, e.g. the family, have a profound impact on the distribution of life prospects (just think of how unequal the distribution of benefits and burdens is within the households of certain families, and the effect this has on those born into them).[14] In reply, supporters of the Rawlsian view have argued that requiring citizens to devote their everyday lives to benefitting the worst off is too demanding.[15]

In my thesis, I'll argue that proper attention to an implicit disagreement over justice's narrowness sheds light on both the dispute over luck-egalitarianism and the

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[11] See Anderson (1999) pp. 312-5; Scheffler (2003) pp. 21-4 and pp. 31-9; and Scheffler (2005) pp. 17-23.
[12] Rawls (1971) pp. 7-8 and pp. 108-117.
[13] Cohen (1997); Murphy (1999).
[14] Cohen (2008) pp. 136-7.
[15] For an articulation of the demandingness critique, see Pogge (2000) pp. 152-4 and pp. 163-4. For other discussions of this worry, see Van Parijs (1993); Tan (2004a); and Titelbaum (2008).

dispute over whether institutional justice extends to the realm of personal choice. For both disputes, I claim that the correct answer depends on what one means by the term 'justice'. On the one hand, I'll argue that if we understand justice's narrowness in the manner Cohen and other pluralists do, i.e., understand a conception of justice to be a conception of one fundamental value among many, then luck-egalitarianism is a compelling theory. What's more, I'll argue that identifying justice as a fundamental value entails its application to the context of personal choice. On the other hand, I'll argue that if we understand justice's narrowness in a contextual manner, i.e., understand justice to be the part of morality which bears upon how we ought to design a society's institutions, all-things-considered, then luck-egalitarianism proves inadequate. What's more, if justice is comprised of all-things-considered principles adopted for the institutional context, then it proves implausible to claim that those principles are also suitable for the personal context. If I'm right about the significance of the disagreement over narrowness, then a considerable amount of dispute between contemporary egalitarians is really just conceptual. Since disputants are either unaware that they are using the term 'justice' differently, or, as with Cohen, are generally aware of it but inadvertently equivocate when responding to critics, the result is that they frequently talk past each other. What's actually a disagreement over the conceptual identity of justice ends up manifesting as a dispute over content and scope.

Establishing that the disputes over content and scope are traceable to different uses of the term 'justice' does not by itself establish a philosophical issue, however. After all, there are many words in the English language that have multiple meanings. Though this sometimes makes it necessary to disambiguate how a term is being used,

there's nothing wrong with sometimes using the word one way and sometimes using it another way, and thus nothing wrong with claiming that *each* use is correct. To dispel the worry that there's no philosophical issue at stake between egalitarian disputants,[16] I'll argue that the disagreement between pluralists and contextualists is more than a disagreement over the sense in which justice is a part of morality. Were this the only difference between them, then it would be easy to conclude that pluralists are talking about narrow justice (fairness), and that contextualists are interested in what broad justice (morality) has to say about politics.[17] In other words, it would be easy to conclude that the difference between these camps is strictly verbal. Against the 'merely verbal' interpretation, I will argue that different uses of the term 'justice' reflect a theoretical disagreement. They reflect a disagreement over the manner in which *fairness* should be understood, rather than a failure to disambiguate the 'narrow' sense of the term justice from the 'broad' sense of the term.

By identifying the real issue at stake in egalitarian debates over distributive justice's content and scope, my thesis promises to help us better understand contemporary disagreement between egalitarians. It also promises to shed light on where focusing our theoretical efforts is most likely to secure a resolution. Though I myself will argue in favor of the view that justice, properly speaking, is a fundamental value, it is my hope that an appreciation for the theoretical significance of the question 'What is the conceptual identity of justice?' will motivate future work that confirms, expands upon, or even contradicts my view. Only when more work has been done to answer this question

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[16] I'm thankful to Will Kymlicka for comments that drew my attention to the importance of addressing this worry.

[17] In *Justice as Fairness: A Restatement*, Rawls states quite clearly that he does not understand justice to be the application of comprehensive moral theory to politics. See Rawls (2001) p. 14.

will we have a clear sense of what the plausible answers are or of the reasons for and against them.

2. Cohen's Framework

In order to get a handle on what my project aims to do, a bit of background on Cohen's meta-ethical framework is needed. Without this background, it won't be clear what is meant by the claim that justice is a fundamental value; or what is meant by the claim that justice is about how institutions ought to be designed, all-things-considered.

To begin, Cohen, as we've already noted, is a moral pluralist. For him, moral desirability is comprised of a plurality of values, many of which are irreducible to any other. As a result, normative reasoning is an extremely messy business, as far as he's concerned, for irreducible values can, of course, conflict with each other.[18] Second, Cohen takes considerations of moral *desirability* to be independent of *feasibility*. Both are essential to practice, but they're also conceptually independent of one another, on his view.

That the scope of what's feasible extends beyond what's desirable is an obvious enough point to make, as there are a great many feasible acts and policies which aren't also morally desirable. It's somewhat less obvious, however, that the set of morally desirable options isn't a subset of that which is feasible. After all, aren't we specifically interested in acts and policies that are possible to carry out? Though it's certainly true that action-guiding normative claims are subject to feasibility constraints, Cohen denies (quite reasonably) that claims about moral desirability are similarly confined.[19] In fact, it's precisely because considerations of desirability aren't constrained by considerations

[18] Cohen (2008) pp. 3-6.
[19] Cohen (2009) pp. 46-52.

of feasibility that it makes sense to regret compromises made in light of practical limitations. Thus, for instance, while it may be the case that a country with little in the way of resources ought not to implement an expensive public education system, the necessity of accepting a more modest system is nonetheless unfortunate, because high-quality public education is valuable. Similarly, we can agree that, all things being equal, a change in circumstances that makes a better education system feasible is a good one. It would be hard to make sense of this judgment, however, if the infeasibility of good education somehow extinguished its desirability.[20] The persistence of desirability in the face of barriers to feasibility also explains why a government unable to implement a high-quality education system ought nonetheless to take transitional steps that hold the potential to make such a system realizable in the future, e.g., consulting public service experts from foreign counties with good education systems, making incremental improvements in educational infra-structure, etc.[21]

By virtue of both his pluralism about desirability and the sharp line drawn between it and feasibility, fundamental values are, for Cohen, only indirectly normative. Any particular value is by itself incapable of guiding action, as answering the question 'What should be done, all-things-considered?' requires determining (a) the extent to which satisfying the demands of the value in question is feasible in the context to which

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[20] This would hold true even if it were impossible for good education to ever become feasible, as proponents of desirability's independence from feasibility maintain that desirability claims have a conditional structure, i.e., that to assert the desirability of X is equivalent to asserting, "If X is feasible, then X ought to be brought about." For comments on the conditional structure of desirability claims, see Gilabert (2011) p. 56; and Cohen (2008) pp. 250-4.

[20] See Cohen (2008) pp. 276-86, esp. 283.

[21] The idea of taking a "transitional standpoint" is something Pablo Gilabert explores a fair bit. See, for example, Gilabert (2008) pp. 431-8; Gilabert (2011) pp. 59-63; and Gilabert and Lawford-Smith (2012) pp. 821-3.

its being applied, and (b) the extent to which its demands compete with other values.[22] Rather than being action-guiding, it would be more accurate to say that a fundamental value provides a *pro tanto* reason for action. Or, to be more specific, that an agent ought to respect the requirements of a fundamental value to the extent that it's both possible and desirable to do so.[23]

In light of the above, any principle expressing the content of a fundamental value, i.e., anything Cohen would call a 'fundamental' or 'ultimate' principle, is, when directly applied, primarily evaluative. In the context of political philosophy in particular, an ultimate principle tells us what to *think* about a society with respect to one of the moral elements in light of which it is or isn't morally desirable, but it can't by itself tell a legislator what to *do*.[24] To identify justice as a fundamental value, then, is to identify it as a tool directly useful for evaluating the fairness or unfairness of a society, but only indirectly useful for telling us how a society ought to be run. Getting from an assessment of the extent to which a society's fair to action-guiding prescriptions regarding how to change it requires formulating what Cohen calls 'rules of regulation', i.e., formulating derivative principles the content of which reflect considerations of feasibility and values other than just justice.[25] With respect to considerations of desirability, values to be considered alongside justice when adopting regulatory rules include, for instance, efficiency, compassion, and community. With respect to feasibility, regulatory rules must take into account considerations of *accessibility*, i.e., considerations pertaining to

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[22] See Cohen (2008) pp. 276-286, esp. 283.
[23] Cohen (2008) p. 302. See also Gilabert (2011) pp. 55-9.
[24] Cohen (2008) p. 268 and pp. 306-7. For discussions of the distinction between evaluative claims and normative claims, see Lawford-Smith (2010) pp. 357-61; Gilabert (2010) pp. 55-9; Tomlin (2012) pp. 377-8 and pp. 383-5; and Valentini (2012) pp. 657-8.
[25] Cohen (2008) p. 253, pp. 263-8, and pp. 276-86.

the possibility of implementing a set of regulatory principles, as well as considerations of *stability*, i.e., considerations pertaining to the sustainability of the regulatory principles being proposed for adoption.[26]

I hope that the above described distinction between fundamental and regulatory principles makes clear that conceptions of justice that suppose justice to be a fundamental value and conceptions of justice that suppose it to be a matter of institutional regulation are *not in competition with each other*, or at least not in the usual sense. This follows from the fact that they differ with respect to the concept they're attempting to specify. For Cohen, justice is one of the normative *inputs* involved in the justificatory process through which we adopt optimal principles for regulating the basic structure. For contextualists, justice is the *output* of that justificatory process. As a result, there is nothing amiss with simultaneously endorsing the principles they put forward. One might agree that, for instance, distributive equality understood in the manner luck-egalitarians do is an important consideration to take into account when justifying rules for the regulation of shared institutions, while also agreeing that, for instance, Rawls's two principles are the best rules we can adopt for purposes of said regulation. What would be amiss, however, is simultaneously endorsing both as correct conceptions of *justice*. Compelling as luck-egalitarianism may be as an interpretation distributive equality, and compelling as Rawls's principles may be as an all-things-considered interpretation of how a society's institutions should be designed, a further question remains (or so I argue

[26] Cohen (2009) pp. 56-7.

in chapter 6) as to whether justice should be identified with the optimal set of institutional regulatory rules, or with one of the values justifying that set. [27]

3. The Structure of the Project

As I've mentioned, my thesis is concerned with the claim that justice is one amongst a plurality of fundamental values and with the understanding of narrowness that claim embodies. My goal is to defend this claim's plausibility as well as its importance for contemporary political philosophy. I attempt to establish its importance by arguing that the plausibility of the luck-egalitarian theory of justice and of applying principles of institutional justice to personal choice depends upon understanding justice's narrowness the way Cohen does.

One source of complexity associated with the claim that justice is a fundamental value is the controversial moral framework it presupposes. To say that justice is a single fundamental value in the sense Cohen intends is to assume (a) that there are a plurality of fundamental values, and (b) that the desirability of a fundamental value is independent of whether implementing it is feasible. Since the plausibility of Cohen's understanding of narrowness depends upon the plausibility of these two other claims, the purpose of part 1 of my thesis (comprised of chapters 2 and 3) is to explore the considerations supporting Cohen's pluralistic moral framework. In chapter 2, I interpret and subsequently defend Cohen's 'fact-insensitivity thesis', i.e., the claim that the relationship of support between a factual reason and the principle it grounds presupposes one or more principles not grounded by factual reasons.[28] Drawing on David Miller, I indicate that on a charitable

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[27] For discussions of the extent to which Rawls and Cohen are and aren't compatible, see Williams (2008) pp. 117-26; Tomlin (2012); and Valentini (2012) pp. 657-8.
[28] See Cohen (2008) pp. 232-6.

understanding of the thesis, a fact-insensitive principle explains a factual reason by completing an otherwise logically incomplete inference.[29] With Miller's interpretation of the fact-insensitivity thesis in hand, I then proceed to defend it against a series of recent criticisms.[30]

In chapter 3, I unpack the implications of Cohen's fact-insensitivity thesis for two other theses he's committed to: (a) the independence of moral desirability from feasibility, and (b) value pluralism. Drawing on an analogy with transcendental idealism, I argue that the fact-insensitivity thesis insulates conceptions of fundamental values from feasibility related criticisms, as well as from criticisms pertaining to the moral costs of implementation. Though the facts that create such issues limit our ability to feasibly and reasonably pursue the demands of a fundamental value, the fact-insensitivity such values possess protects their content from criticisms that invoke factual reasons. In other words, the fact-insensitivity thesis establishes that feasibility and the demands of other values constrain the regulatory *implementation* of a fundamental value, not its *content*. In addition, I argue that the fact-insensitivity thesis supports the assumption that there is a plurality of potentially conflicting fundamental values to deal with in the first place. Drawing on the work of Michael Stocker and Pablo Gilabert,[31] I argue that an appreciation for the difference between the formal structure of a fact-insensitive principle and the formal structure of an action-guiding principle reveals that conflict between fact-insensitive principles is less troubling than one might think. Unlike conflict between

[29] Miller (2008) pp. 33-4.
[30] The criticisms upon which I focus can be found in Jubb (2009); Kurtulmus (2009); and Ypi (2012).
[31] See Stocker (1992) and Gilabert (2011).

action-guiding principles, conflict between fact-insensitive principles does not entail incompossibility.

Part 2 of my thesis comprises chapter 4, which focuses on the claim that luck-egalitarianism supplies the correct account of distributive justice's *content*; chapter 5, which focuses on the claim that the *scope* of institutional justice extends to personal choices; and chapter 6, which focuses on the claim that the conceptual *status* of justice is fundamental. In chapter 4, I aim to establish two conclusions about luck-egalitarianism. The first is that luck-egalitarianism supplies a plausible account of distributive justice's content *if justice is understood as one fundamental value amongst a plurality*. This claim is supported in part by demonstrating that many of the major criticisms of luck-egalitarianism assume that the principle of luck-equality is regulatory, and thus that they do not apply when the principle of luck-equality is understood as fundamental.[32] However, my defense will also require addressing criticisms that make no such assumption.

The second conclusion I aim to establish is that luck-egalitarianism supplies an implausible account of distributive justice's content *if justice is understood as regulatory*. Arguing for this claim involves some overlap with arguing for the former one. By demonstrating that many of the major criticisms of luck-egalitarianism specifically challenge its regulatory adequacy, I also imply that at least some of them succeed in establishing that the principle of luck-equality should not be employed in a regulatory

[32] With respect to Jonathan Wolff, though, my aim is to clarify that the concerns he raises were never intended as criticisms of the luck egalitarian account of distributive justice's content. They were specifically meant to express reservations about the extent to which luck-equality can permissibly be implemented. For passages affirming my interpretation, see Wolff (1998) pp. 120-2; Wolff (2010) pp. 346-7.

fashion. However, firmly establishing my claim requires addressing the work of theorists who attempt to defend luck-egalitarianism without giving up its capacity for action-guidance.[33]

Chapter 5 of my thesis is concerned with the scope of institutional justice. It addresses the question of whether the principle(s) of distributive justice applicable to institutions justifiably extend to the context of personal choice. My aims in this chapter are mostly analogous to my aims in the previous one. First, I argue that any principle of justice applicable to institutions must also apply to personal choices *if justice is understood as a fundamental value*. In support of this claim, I draw attention to the relationship between *scope* and *status*, i.e., the relationship between a principle's scope of application and its status as either regulatory or fundamental. Over the course of my analysis, special attention is paid to the scope related implications of Cohen's claim that fundamental principles are fact-insensitive.

It should be noted that to conclude that fundamental justice extends to the personal context has implications for the relationship between pluralist and contextual understandings of justice's narrowness. My conclusion, if correct, shows that Cohen's pluralist narrowness not only supplies an alternative to the contextual understanding of narrowness, but actually *contradicts* that understanding. After all, the positive claim that justice extends to the personal context entails the negative claim that liberals are wrong to understand the narrowness of justice in terms of restricted scope. This negative claim against restriction of scope is important to take note of, for without it all we would have

[33] See Dworkin (2000); Dworkin (2002); Dworkin (2003); and Tan (2008).

is the claim that justice is one fundamental value amongst a plurality, a value the application of which might otherwise be restricted to the institutional context.

The second major claim made in chapter 5 is that the principle(s) of distributive justice suitable for institutions are inappropriate for the context of personal choice *if justice is understood as regulatory*. I argue that regulatory principles' fact-sensitivity, combined with the morally relevant factual differences that separate the institutional from the personal, entails that regulatory principles suitable for the former context differ from those suitable for the latter. In one important respect, this claim is analogous to my denial of regulatory luck-egalitarianism in chapter 4. In both cases, I argue that something which holds true when justice is conceived of as fundamental proves false when it is conceived of as regulatory. A major difference, however, is that while both sides of my argument concerning luck-egalitarianism coincide with what Cohen himself maintains;[34] only one side of my argument concerning personal choice is consistent with his position on that subject. More specifically, though Cohen agrees that the same principle of justice (understood as a fundamental value) that is applicable to institutions is also applicable to personal choices, he disagrees that different regulatory principles are required. He thinks that the difference principle, though a fact-sensitive regulatory principle, is nonetheless suitable for both institutions and personal choices.[35] As such, my main interlocutor is, in this case, Cohen himself. As we'll see, though some of his arguments for extending the difference principle are appropriate for regulatory debate,

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[34] For Cohen's comments about luck-egalitarianism as a conception of fact-insensitive, fundamental justice, see Cohen (2008) pp. 271-2 and pp. 300-2. For commentaries on luck-egalitarianism that voice agreement about its fact-insensitive status, see Swift (2008) pp. 382-7; and Barry (2008) p. 146.

[35] Cohen makes this clear in Cohen (2008) p. 276 and Cohen (2011b) pp. 252-3. That Cohen also thinks fundamental justice applies to personal choice is entailed by his claim that the difference principle does. The difference principle, as an all-things-considered distributive regulatory rule, presupposes it.

many only succeed if the difference principle is mistakenly thought of as fundamental. My strategy thus consists in separating the arguments appropriate for regulatory debate from those which aren't and subsequently demonstrating that the appropriate arguments are flawed on other grounds.[36]

Chapter 6 is focused on the concept claim itself, i.e., the claim that justice is a single fundamental value rather than a set of regulatory principles. There, I argue two points: (1) that divergent uses of the term 'justice' reflect a theoretical disagreement, and (2) that Cohen's on the correct side of that disagreement. As I'll explain in further detail, the primary motivation behind Cohen's concept claim is a commitment to the Aristotelian view that justice is the part of morality concerned with fairness. Cohen thinks that only a principle the content of which is sensitive to considerations of fairness but insensitive to other moral considerations can properly be regarded as an account of justice's content. An upshot of maintaining this connection between justice and fairness, he claims, is that regulatory rules cannot also be conceptions of justice. Their capacity for action-guidance necessarily requires that their fairness be qualified by considerations of feasibility and by the requirements of other values.[37] Cohen's commitment to the connection between justice and fairness is not idiosyncratic, however. Many contextualists who employ the regulatory use of 'justice' share that commitment. I aim to argue that the difference between them and Cohen is twofold. First, contextualists are more optimistic about the prospects of procedural fairness. They think an outcome that reflects considerations

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[36] The positive arguments I'll be dealing with can be found in Cohen (2008) chapter 3. I'll also be concerned with the various replies to critics available in Cohen (2008) chapter 8 and the general appendix. For some of the primary criticisms to which he is responding, see Estlund (1998); Williams (1998); Pogge (2000); J. Cohen (2002); and Tan (2004a).

[37] Cohen (2008) pp. 6-8 and pp. 279-86. See pages 156-61 as well for a discussion of the difference principle and why its deference to efficiency renders it only partially fair.

seemingly unrelated to fairness can nonetheless be thought of as fully fair if produced by a fair procedure.[38] Second, those who employ the regulatory use seem to think that principles of justice must reflect a variety of considerations in order for justice to have primacy. Otherwise justice would be subject to trade-offs and thus only one of the virtues of institutions instead of 'the first virtue'.[39] In chapter 6, I'll argue that the fact-insensitive principle of fairness upon which an optimally fair procedure depends also bars the output of that procedure from possessing full fairness. When this principle is directly applied to an assessment of the output, that output inevitably falls short. What's more, I'll argue that there's an interpretation of primacy consistent with the claim that fairness is both subject to trade-offs and 'the first virtue of institutions'.

4. Conclusion

Though I have not portrayed my thesis as a work of Cohen scholarship, it nonetheless remains true that each of my chapters is devoted to a thesis he develops over the course of his career, and that my work has implications for how these theses relate to each other. As Patrick Tomlin notes in his review of *Rescuing Justice and Equality*, the theses Cohen advanced in the later part of his career were developed in isolation from one another,[40] and though Cohen devotes some space to discussing how they fit together, that space is fairly minimal.[41] As a result, one of the achievements of my thesis is a more holistic understanding of Cohen's later work. The relationships I am interested in specifying are

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[38] For Rawls's comments on the original position as a fair procedure, see Rawls (1971) pp. 11-7. For a similar idea, see the discussion of Dworkin's hypothetical insurance market in Dworkin (2000) pp. 73-83.
[39] See Rawls (1971) pp. 3-4. For the quote, see page 3. For comments that more explicitly suggest identifying justice as a value is inconsistent with primacy, see Eddy (2008) pp. 476-80; Quong (2010) pp. 338-40; and Valentini (2012) p. 658.
[40] Tomlin (2010) pp. 228-9.
[41] For the comments he does make on how his claims relate to each other, some of with which I agree and some of with which I do not, see Cohen (2008) pp. 2-3, pp. 265-72, p. 276, and pp. 300-2. See also Cohen (2011b) pp. 252-3.

between the following theses: first, that the justification of fundamental principles is independent of factual reasons (the fact-insensitivity thesis);[42] second, that luck-egalitarianism correctly specifies the content of distributive justice;[43] third, that the principles of distributive justice applicable to institutions also apply to personal choices;[44] and fourth, that justice is one fundamental value amongst a plurality.[45]

The reason I'm reluctant to characterize my thesis as primarily a work of Cohen scholarship is because to do so would suggest that the interest of my work is restricted to the contribution it makes to our understanding of an important figure in political philosophy. Though I do hope my work will afford the reader a better understanding of how Cohen's body of scholarship fits together, characterizing my thesis as a piece of Cohen scholarship fails, in a sense, to do justice to the importance a better understanding of his work promises to have for contemporary political philosophy in general. As Jonathan Wolff notes in a memoir that presents a useful account of the different phases of Cohen's research career, the significance of Cohen's claims about fact-insensitivity and the conceptual status of justice are not yet well understood. He writes that "Although it is the fruit of several years of sustained endeavor, in contrast to most of his other work it is much less clear what the payoff is, as his opponents are not convicted of any substantive error regarding what is to be done…Nevertheless…it may well be that in time the significance of part 2 [of *Rescuing Justice and Equality*] will come to be better understood".[46] To a large extent, then, my thesis makes its contribution by providing an

[42] See Cohen (2003). For a revised version, see Cohen (2008) chapter 6.
[43] See Cohen (1989).
[44] See Cohen (1997). For a somewhat revised version, see Cohen (2008) chapter 3.
[45] See Cohen (2008) chapter 7.
[46] Wolff (2014) p. 341.

answer to Wolff's implicit question about the significance of the fact-insensitivity thesis and the claim that justice is a fundamental value.

As we'll see in chapter 3, the fact-insensitivity thesis serves to insulate conceptions of fundamental values from feasibility related criticisms and from criticisms pertaining to the moral costs of implementation. In doing so, it makes space for a species of philosophical theorizing that, though connected to political practice in important ways, is logically prior to it; a species of theorizing where justification is independent of the social and psychological facts that make it difficult (and sometimes impossible) to fully implement fundamental values in unison with each other. In Cohen's earlier work, we see hints of the idea that there's an important place within political theory for the formulation and application of fact-insensitive principles. For example, when reflecting upon the failure of the Soviet Union and its depressing implications for the future of socialism, Cohen argues that socialists should not conclude that capitalism, because apparently more feasible, is therefore more desirable. To do so would be akin to forming adaptive preferences, and though adaptive preferences are psychologically useful insofar as they help us cope with our limited capacities, they can also make us lose sight of what's valuable.[47] On Cohen's view, a successful socialist society would embody a number of core values much better than a capitalist society does; values such as justice and community.[48] And though a successful socialist society is not presently within reach, we should not lose sight of the superior desirability that the values it's responsive to confer. As Cohen puts it, "If you cannot bear to remember the goodness of the goal that you sought and which is not now attainable, you may fail to pursue it should it come

[47] Cohen (1995) pp. 253-5.
[48] Cohen (1995) pp. 259-64. See also Cohen (2009) pp. 12-45.

within reach, and you will not try to bring it within reach."[49] Though the claim that socialism is more desirable than capitalism is not one I'll be investigating in my thesis, I am interested in the claim that an ambitious but infeasible mode of social organization can be more desirable than a less ambitious but feasible mode. As we'll see, one of the functions the fact-insensitivity thesis is to establish the conceptual cogency of such a claim.

With respect to the claim that justice is a fundamental value, chapters 4 and 5, as we've already noted, will go a long way towards explaining its significance. In chapter 4, I'll argue that the plausibility of luck-egalitarianism as a theory of justice is contingent upon whether justice is a fundamental value; and in chapter 5, that the plausibility of applying the principle(s) of justice suitable for institutions to the personal context is similarly contingent upon justice's conceptual status. My conclusions about luck-egalitarianism are of particular interest to contemporary political philosophers, I think. As we noted earlier, luck-egalitarianism was and still is a very prominent, and thus also much criticized, theory of distributive justice. To establish the presuppositions needed for it to be a plausible theory is a significant theoretical accomplishment. Though understanding luck-egalitarianism as a conception of a defeasible value may seem to deprive it of much of its practical significance, we'll see that there are a variety of respects in which it is nonetheless integral to practical reasoning in politics. Uncovering the ways in which a defeasible principle of luck-equality can play an important practical role is another contribution my thesis makes.

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[49] Cohen (1995) p. 256.

Chapter 2

The Fact-Insensitivity Thesis: An Interpretation and Defense

1. Introduction

G.A. Cohen's now seminal article 'Facts and Principles' defends the radical claim that our most fundamental normative principles are justified independently of facts.[50] He maintains that without fundamental, 'fact-insensitive' principles, we cannot make sense of the justificatory relationship between factual reasons and context-specific, action-guiding regulatory principles.[51] Cohen's thesis, in his own words, is that "a principle can reflect or respond to a fact only because it is also a response to a principle that is not a response to a fact."[52] Understanding what Cohen means by this is a bit tricky, but Andrew T. Forcehimes and Robert B. Talisse have aptly suggested that Cohen's thesis is best understood as an explanatory one.[53] On the assumption that some fact F supports some principle P, explaining why F supports P requires invoking a further principle, P*. To use Cohen's own illustrative example, on the assumption that the fact 'keeping promises is necessary for promisees to pursue their personal projects' supports the principle 'people ought to keep their promises', some further principle is needed to explain the justificatory relationship, e.g., a principle such as 'people should help others pursue their projects'.[54]

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[50] See Cohen (2003). For a revised version of his 2003 paper, see Cohen (2008) chapter 6.
[51] Cohen (2008) pp. 265-7.
[52] Cohen (2008) p. 232.
[53] Forcehimes and Talisse (2013) pp. 373-4.
[54] Cohen (2008) pp. 234-6.

The purpose of the present chapter is to interpret and subsequently defend the claim that the relationship of support between a factual reason and the principle it grounds presupposes one or more principles not grounded by factual reasons. In section 2, I briefly explain Cohen's thesis and the premises he invokes in support of it. Drawing on David Miller,[55] I indicate that on a charitable understanding of the thesis, a fact-insensitive principle explains a factual reason by completing an otherwise logically incomplete inference. If the interpretation I advocate is correct, then the explanatory role such a principle plays is inseparable from its status as a (not necessarily successful) justificatory reason.

In section 3, I defend Cohen's thesis against three criticisms, two of which are concerned with the claim that factual reasons require explanation, the third of which is concerned with the justificatory significance of explanatory principles. The first of these criticisms, authored by Lea Ypi,[56] attempts to convict Cohen of an infinite regress. She claims that the assumptions embedded in the claim that justificatory facts require an explanation also require that any explanatory principle be explained, thus preventing Cohen from consistently stopping any chain of fact based justificatory reasoning at an ultimate principle. The second, put forward by Robert Jubb and A. Faik Kurtulmus,[57] claims that endorsement of a fact-insensitive principle is undermined by the denial of its factual *explanandum*. In both cases, I argue that the criticisms under analysis misunderstand the logical character of Cohen's thesis. Once this logical character is fully appreciated, it becomes apparent that the assumptions Cohen works with do not commit

[55] See Miller (2008).
[56] See Ypi (2012).
[57] See Jubb (2009) and Kurtulmus (2009).

him to an infinite regress of explanatory principles. It also becomes apparent that the agent's disavowal of a justificatory factual belief does not remove the need for explanation. Even when a fact is no longer believed, there is still a question about why the fact, if believed, supports one or more the agent's fact-sensitive principles, and thoroughly answering this question will require the discovery of one or more fact-insensitive principles.

The final criticism I address in this chapter, authored by Robert Jubb,[58] challenges Cohen on the grounds that his thesis pertains to the logical but not the epistemic sense of 'grounding'. An explanatory principle (one that explains why a fact is a justificatory reason for the agent who believes it), though needed to generate a valid argument, does not succeed in epistemically grounding a fact-sensitive principles unless it, i.e., the explanatory principle, and the factual premise or premises it serves alongside, are justified. In reply, I argue that Jubb's critique succeeds in showing that explanatory principles are not sufficient for the justification of fact-sensitive principles, but it does not succeed in undermining their status as necessary conditions for justification. An explanatory principle is required for there to be any sort of inferential relationship between a factual premise and the principle it supports, and thus an explanatory principle is needed to produce a sound argument.

2. The Fact-Insensitivity Thesis

Put very concisely, Cohen's thesis is that any factual reason to endorse a normative principle presupposes a fact-insensitive normative principle (like Cohen, I shall henceforth use the term "principle" for short). Put somewhat less concisely, the view

[58] See Jubb (2009).

states that for a fact to serve as a reason to endorse a principle, it is necessary that the agent for whom it is a reason be committed to a further, more fundamental principle that connects the fact in question to that which it supports. This implies that any fact-supported principle cannot be an agent's most fundamental principle. In order for the chain of reasoning that justifies a fact-supported principle to terminate, it is necessary that the agent be committed to one or more ultimate principles, not supported by facts.

Cohen is careful to define what he means by the terms 'fact' and 'principle'. He stipulates that "a normative principle, here, is a general directive that tells agents what (they ought or ought not) to do, and a fact is, or corresponds to, any truth, other than (if any principles are truths) a principle, of a kind that someone might think reasonably supports a principle."[59] With these definitions in mind, consider an example Cohen himself offers to illustrate his thesis. Suppose one were to endorse the principle that 'people ought to keep their promises'. Furthermore, suppose that one endorses this principle by virtue of the fact that 'keeping promises is necessary for promisees to pursue their personal projects'. Why does this fact serve as a reason to keep promises? Cohen's view is that one must believe something about personal projects in order for the fact in question to justify a promise-keeping requirement. One must be committed to a principle that connects the fact that 'keeping promises is necessary for promisees to pursue their personal projects' to the principle that 'people ought to keep their promises'. A likely candidate would be a principle stating that 'people should help others pursue their projects'. The endorsement of this second principle, in turn, may or may not itself depend on a fact. If it does, however, then explaining the justificatory force of this fact

[59] Cohen (2008) p. 229.

requires commitment to yet another principle.[60] In any such case, whether it is about promise-keeping, respecting property, etc., one will have to stop one's chain of reasoning at an ultimate principle, the endorsement of which does not depend on any fact.[61]

Cohen indicates that his thesis is grounded in three premises. The first is that whenever a fact serves as a reason to endorse a principle, there is always an explanation for why it does so. The second is that the explanation in question must be some further principle the endorsement of which is independent of the fact it explains. Interestingly, Cohen himself doesn't provide especially compelling reasons for the reader to believe that these premises are plausible. In support of the first, he offers the supposedly self-evident claim "that there is always an explanation for why any ground grounds what it grounds."[62] With respect to the second, he simply challenges the reader to try and come up with a plausible non-principle explanation for why a particular fact provides a reason to endorse a particular principle. Apparently he is confident that no one will be able to do so. I think it would have been more effective to say that a further principle is needed in order to establish a valid argument.[63] By way of example, suppose you're committed to the principle 'selfish people should take measures to overcome their selfishness'. Furthermore, suppose that the reason you think this is because of the fact that 'a selfish character makes utility maximization infeasible'. In order for the factual premise 'a selfish character makes utility maximization infeasible' to logically entail the principle 'selfish people should take measures to overcome their selfishness', we need a further principle to serve as a second premise. A good candidate would be 'people should

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[60] Cohen (2008) pp. 234-5.
[61] Cohen (2008) p. 237.
[62] Cohen (2008) p. 236.
[63] This is how David Miller explains Cohen's thesis. See Miller (2008) pp. 33-4.

maximize utility'. Explained this way, it is clear why any factual reason requires an explanation. Without a further principle to explain why the agent takes a fact to be justificatory, there can be no inferential connection between the fact and the principle the agent *thinks* it supports. And if there's no inferential connection between them, then the fact does not, in fact, qualify as a *reason* to endorse the principle.[64]

The third and final premise supporting Cohen's thesis states that one's chain of justificatory reasoning actually will stop at an ultimate principle, rather than continuing on indefinitely. Part of the reason Cohen thinks this is so is because he believes it's implausible for the reasons explaining one's endorsement of a principle to be infinite in number. If our minds are finite, then so too are the number of reasons we have for believing a proposition.[65] In addition, he also claims that that an infinite chain of reasons would violate what he calls "the clarity of mind requirement", according to which his thesis specifically applies to those with a clear grasp of why they endorse the principles that they do.[66] This stipulation makes sense if one keeps in mind that Cohen's thesis is about the doxastic explanation of belief. He is interested in the beliefs that explain why an agent believes in a principle (or, in some cases, what she must believe in order to believe that a fact supports a principle she is nonetheless somewhat uncertain of). As such, Cohen is specifically interested in cases of belief where a doxastic explanation is, in fact, available. If an agent can explicitly articulate her reasons for endorsing a principle, then we have an available explanation. Alternatively, she might hold a series of

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[64] My thanks to Mark Rosner, Phil Shadd, and Matt Taylor for conversations that helped me to realize that my interpretation of the fact-insensitivity thesis suggests it's a thesis about the conditions needed for a factual belief to qualify as a *reason* for an agent to endorse a principle.
[65] Cohen (2008) p. 237.
[66] Cohen (2008) p. 233 and p. 237.

inexplicit reasons that could potentially be brought to light with the help of an interrogator. If, however, she does not hold any reasons at all, or, at the other extreme, somehow holds an infinite regression of reasons, then there is no doxastic explanation available for why she endorses the principle she does.

Keeping in mind that Cohen's thesis is about explaining belief is also important for understanding why it is neutral with respect to realism vs. anti-realism in meta-ethics.[67] Contrary to what some authors have claimed, Cohen is not arguing for a version of platonic realism.[68] Unlike Plato's theory of forms, which asserts that mind-independent forms are needed to explain why particulars have the properties they do, Cohen's thesis is about the beliefs needed to explain one's other beliefs. Since it specifically concerns the presupposition of moral belief, rather than what moral beliefs do or do not refer to, his thesis is silent on the central question of meta-ethics. To be fair to his critics, the language Cohen employs is often suggestive of realism. Words like 'justification' and 'normative' have an objective flavor to them. The kind of justification and normativity he has in mind is compatible with anti-realism, though. If an agent endorses an action-guiding principle, then that principle is normative for her, even if it doesn't represent an objective moral requirement. Similarly, if certain higher order principles count among the agent's reasons for endorsing it, then those principles are justificatory for her, even if the justificatory force they supply is not independent of her believing them.[69]

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[67] The neutrality of Cohen's thesis does not mean that he himself is neutral. For a personal affirmation of the existence of objective normative principles, see Cohen (2008) pp. 229-30.
[68] Hall (2013) p. 179; Nielsen (2012) p. 218 and pp. 234-5. For a comparison of Cohen's and Plato's theses which avoids attributing realism to the former, see Ypi (2012).
[69] However, as Andrew T. Forcehimes and and Robert B. Talisse emphasize in a recent article, Cohen's thesis is meant to have implications for the structure of objective morality. Cohen thinks that his thesis, if

Before closing this section, it should be noted that the kind of 'fact-insensitivity' ultimate principles possess is fairly narrow. To characterize a belief as 'fact insensitive' in the sense Cohen intends is specifically to say that the person who holds it doesn't do so on the basis of any factual reasons. Such a characterization is compatible with various kinds of factual reliance, however. One role Cohen explicitly allows facts to play is in the explanation for what *caused* one to believe an ultimate principle in the first place. Though his thesis is inconsistent with invoking an agent's factual beliefs as reasons explaining her endorsement of an ultimate principle, non-doxastic causes associated with processes such as evolution and socialization can permissibly be invoked to explain how one comes to hold the values one's ultimate principles express.[70]

Another role Cohen permits facts is in the *discovery* of ultimate principles. Since an ultimate principle serves to explain why one takes a fact to be justificatory, it stands to reason that reflecting upon what morally significant facts justify and why they do so is a good way to make one's ultimate principles explicit.[71] That ultimate principles can require discovering is worth emphasizing. Just because one holds an ultimate principle does not mean one's conscious of holding it. It may be the case that one does not become conscious of a fundamental value until one is forced to invoke it as part of a justification, and even then one might be unable to accurately determine what principle(s) best characterizes it.

3. **Criticisms of the Thesis**

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true of the structure of moral beliefs, must also be true of the structure of the correct set of moral principles, if there is a correct set of moral principles. See Forcehimes and Talisse (2013) pp. 374-5 and p. 379. See also Cohen (2008) p. 233, footnote 6.

[70] Cohen (2008) pp. 254-6.

[71] Cohen (2008) p. 247.

(a) Fact-Insensitivity and the Third Man

In a fascinating paper entitled "Facts, Principles and the Third Man", Lea Ypi presents an internal critique of Cohen's three premises. She argues that the fact-insensitivity thesis is vulnerable to a version of the 'third man argument', i.e., an argument put forward in the Platonic dialogue *Parmenides* which tries to demonstrate that Plato's theory of forms generates an infinite regress. In the present context, an infinite regress of principles is allegedly generated by two of Cohen's claims. The first claim is that there is always an explanation for why a fact grounds what it grounds. Cohen straightforwardly states this as his first premise, so Ypi is certainly right to attribute it to him. The second claim, this time implicit in Cohen's second premise, is that the explanation for a ground must be something other than the ground itself.[72] A set of claims along these lines is evidently needed for Cohen's argument to take off. It is in light of the first that the justificatory force of a factual reason requires explanation, and it is in light of the second that something more than an appeal to self-evidence is needed. The problem arises when these assumptions are applied to principles and not just facts. If an explanatory principle also requires an explanation, one which is more than just an appeal to self-evidence, then it seems Cohen is stuck with an infinite regress. Any principle that explains a justificatory fact requires a further principle to explain its explanatory force, which in turn requires yet another principle, etc. There will be no non-arbitrary point at which one can stop the chain of explanatory reasoning.[73]

One possible reply would be to explicitly restrict the scope of the assumptions Ypi focuses on. Cohen might say that they only apply to facts, though I think he'd be

[72] Ypi (2012) pp. 200-1.
[73] Ypi (2012) pp. 209-13.

hard pressed to say exactly why. A more convincing response is available via an appreciation for the logical character of his thesis. As previously noted, the reason any justificatory fact requires an explanation is because no factual premise can entail a principle by itself. For the factual premise 'keeping promises is necessary for promisees to pursue their personal projects' to entail the principle 'people ought to keep their promises', we need a further premise such as 'people should help others pursue their projects' to fill the entailment gap. But what's involved in going even further? What would constitute an explanation of the explanatory principle itself? One possibility is to offer an explanation for why the agent endorses it. This is equivalent to asking whether the explanatory principle is ultimate, and if it isn't, what further facts and principles explain why the agent takes it to be justified. But none of Cohen's assumptions prevent him from eventually terminating this explanation at an ultimate principle. The claim that there's always a doxastic explanation for why a fact grounds what it grounds is not analogous to, and thus does not require Cohen to commit to, the claim that there's always a doxastic explanation for why an agent believes a principle. The former is a matter of what is logically required to complete an entailment. The latter is not.

Suppose, however, that we're interested in something other than explaining endorsement. Suppose we take endorsement of the explanatory principle for granted and instead ask why it explains the relevant fact's justificatory force. If Cohen's assumptions committed him to the position that the explanatory force of an explanation itself requires an explanation, then he would indeed find himself in infinite regress territory. Why? Because requiring explanatory force to be explained would put him in the same position as Achilles. As we've noted, an explanatory principle explains a factual premise's

justificatory force by completing the entailment. Since the fact that 'a selfish character makes utility maximization infeasible' can't logically entail a commitment to character reform by itself, explaining the agent's commitment to 'selfish people should take measures to overcome their selfishness' requires an additional premise. However, if Cohen's assumptions committed him to the position that explanatory force always requires an explanation, then pointing to the connection between Cohen's thesis and the concept of a valid entailment would not be enough. It would be necessary to go even further and explain how the concept of a valid entailment itself constitutes a successful explanation, and, as Lewis Carroll has illustrated, such an explanation would continue endlessly.[74] Thankfully, Cohen's assumptions do not commit him to this. What Cohen's thesis requires is explicating the implicit premise or premises in an otherwise logically incomplete justification. This requirement is patently different from the requirement that the explanatory force of an explanation itself needs explaining.

The last kind of explanation we might offer for an explanatory principle is one that explains why it functions as a ground. This question becomes intelligible once we've noted that explanatory principles serve as premises in arguments. Unlike the other senses of explaining an explanatory principle, Cohen's assumptions actually do commit him to requiring such an explanation. As is hopefully clear by now, though, explaining why a principle functions as a ground does not require an infinite regress. If we want to know why a principle is a reason to endorse another principle, then we just need to figure out which explanatory premise or premises would form a valid argument. Thus were we to be asked why the agent's commitment to helping others pursue their projects entails

[74] See Carroll (1895).

her endorsement of a promise keeping requirement, it would not be amiss to mention what we already know, namely that the agent believes the factual premise 'keeping promises is necessary for promisees to pursue their personal projects'. Just as the non-factual premise can be invoked to explain the factual premise's force, so too can the factual premise be invoked to explain the non-factual premise.

In summary, I've argued that 'the third man argument', though perhaps applicable to Plato's theory of forms, is not an effective criticism of Cohen's fact-insensitivity thesis. Of the three likely interpretations of what it means to explain an explanatory principle, not one forces Cohen into an infinite regress.

(b) Are Explanatory Principles Dependent Upon Their Factual *Explananda*?

According to Robert Jubb and A. Faik Kurtulmus, the second premise in Cohen's thesis, as Cohen states it, is unacceptable. Though it may be true that any factual reason supporting a principle presupposes an explanatory principle, they challenge the claim that endorsement of the explanatory principle is independent of the fact or facts it explains. They argue that if one endorses a principle because it supplies a good explanation, then removing the factual *explanandum* undermines the case for endorsement. Their general thought is that one has less reason to believe an explanation if an explanation is no longer required.[75] For instance, suppose you are a physicist attempting to explain some peculiar set of physical phenomena. In order to do so, you posit the existence of a new kind of particle. You have no way to directly observe this particle, and thus no way to definitively verify its existence. If it were to exist, however, then your theoretical framework would be able to accommodate a number of puzzles it had previously been

[75] Jubb (2009) p. 345; Kurtulmus (2009) pp. 497-8.

unable to account for. Now, if it were to turn out that the puzzling phenomena your framework had trouble with are actually illusory, the product of faulty observational equipment, say, would you still have reason to posit your particle? I presume not. The denial of the *explanandum* should have implications for your endorsement of the explanation.

Though plausibly applied to physical explanations, critics of Cohen are mistaken on two counts in their attempt to apply this argument to explanations arrived at through introspection. Introspective explanations (specifically doxastic ones) are constituted by the investigator's beliefs. This makes an important difference. Whether the explanation in question is one or more of the investigator's beliefs affects its relationship with the *explanandum*. For an introspective explanation to be adequate, it is necessary for the beliefs it features to be held in advance. In the promise-keeping example, the believer must have already held the factual belief 'keeping promises is necessary for promisees to pursue their personal projects' in order for it to explain her commitment to the principle 'people ought to keep their promises'. Similarly, she must have already believed in the principle 'people should help each other pursue their projects' for this belief to explain why she takes her factual belief 'keeping promises is necessary for promisees to pursue their personal projects' to be a justificatory reason. Though she may not have been fully conscious of these beliefs prior to introspection, they can only be explanatory if they were *discovered* through the explanatory process.[76] Had they been *produced* by it, they would be incapable of explaining the agent's temporally prior commitment to the principle 'people ought to keep their promises'. The upshot is that the beliefs

[76] For Cohen's brief comments concerning the introspective discovery of fact-insensitive principles, see Cohen (2008) p. 247.

constituting an introspective explanation are independent of their *explanandum* in a way that belief in a physical explanation is not. A physical explanation is something that is *to be believed*, and a good reason for believing in one is that it suffices to explain something in need of explaining. As a result, if the puzzling physical phenomena constituting the *explanandum* were to be removed from the equation, so too would a reason for believing the explanation. An introspective explanation, in contrast, is itself one or more of the investigator's beliefs and those beliefs must have already been believed by her in order for them to explain anything. The *explanandum* will likely have prompted the explanatory beliefs' discovery, but its subsequent denial does not undermine them. Thus neither denial of the principle 'people ought to keep their promises', nor denial of the fact 'keeping promises is necessary for promisees to pursue their personal projects', would undermine the investigator's endorsement of the explanatory principle 'people should help others pursue their projects.'

The second place Jubb and Kurtulmus go wrong is in thinking that repudiation of the factual premise removes the need for explanation. Though the investigator's disavowal of the factual belief 'keeping promises is necessary for promisees to pursue their projects' does, in a sense, eliminate the need for an explanatory principle such as 'people should help others pursue their projects', it does so in a superficial way. Her disavowal means that it is no longer accurate to say she is explaining one of her factual beliefs, but it would still be perfectly sensible for her to ask why she considered the factual statement 'keeping promises is necessary for promisees to pursue their projects' to be a justificatory reason back when she believed it. Put another way, she might ask why this factual statement would serve as a reason for her on the condition that she believed it.

Successfully investigating this matter would still turn up a principle the endorsement of which is independent of the factual premise it explains, and thus which she presumably still holds even if she no longer believes that factual premise to be true. Describing the *explanandum* in hypothetical terms makes the agent's actual avowal irrelevant. Asking why the factual statement would serve as a reason for the agent on the condition that she believes it shifts the focus from the statement's status as either believed or disbelieved to its logical relationship with the other elements in her belief set. As a result, eliminating the *explanandum* in this form requires undermining its logical power. It requires robbing 'keeping promises is necessary for promisees to pursue their personal projects' of its inferential relationship with 'people ought to keep their promises'. This reverses the relationship between explanation and *explanandum* asserted by Jubb and Kurtulmas, e.g., reverses the claim that disavowal of the factual premise 'keeping promises is necessary for promisees to pursue their personal projects' undermines endorsement of the explanatory principle 'people should help others pursue their projects'. Since the inferential connection between the factual premise 'keeping promises is necessary for promisees to pursue their personal projects' and the principle 'people ought to keep their promises' is contingent upon the explanatory principle 'people should help others pursue their projects', eliminating this connection requires disavowing the explanatory principle that explains it. Once the explanatory principle is disavowed, there is no inferential relationship between the factual statement and the principle 'people ought to keep their promises', and thus no longer anything to explain.

(c) <u>Fact-Insensitive Principles: Explanatory, Yes, but also Justificatory?</u>

Thus far, the criticisms I have responded to address the explanatory dimension of Cohen's thesis. However, Cohen's thesis is not just an explanatory one. Explanatory principles, fact-insensitive ones included, are also justificatory. This is so because explanatory principles are premises in arguments. They function to explain why one or more factual claims have the justificatory significance they do by *logically completing the justification* said fact or facts are premises in. Of course, logically complete justifications are not always successful justifications. As Robert Jubb notes, explanatory principles are needed to 'logically ground' fact-sensitive principles, but in cases where an explanatory principle is unjustified (or where the factual premise it serves alongside is unjustified), said principle does not suffice to 'epistemically ground' the fact-sensitive principle whose endorsement it explains, i.e., it does not suffice to give us good reason to accept that the fact-sensitive principle is true. By way of example, Jubb points out that the principle 'everyone who is evil should be killed', in combination with the factual premise 'all people under six feet tall are evil', would explain the agent's endorsement of a fact-sensitive principle which states 'everyone under six feet tall should be killed'.[77] However, it's clear that the principle 'everyone who is evil should be killed', though explanatory, does not justify the (independently implausible) fact-sensitive principle 'everyone under six feet tall should be killed', as neither the explanatory principle nor the factual co-premise it serves alongside are acceptable. The upshot, Jubb notes, is that a chain of reasoning that eventually terminates in a fact-insensitive principle explains the

[77] Jubb (2009) p. 344.

agent's endorsement of, but does not necessarily justify, the fact-sensitive principle with which one began.[78]

Jubb's point is well taken, but the extent to which the distinction between premises that logically ground a conclusion (justify it on the condition that they're true) and premises that epistemically ground a conclusion (actually justify it) threatens the justificatory significance of fact-insensitive principles depends on whether explanatory principles are necessary for logical grounding of *any sort*, or whether they are merely necessary for deductive validity. If explanatory principles are merely needed for deductive validity, then Jubb's point demonstrates not only the insufficiency of fact-insensitive principles for justification, but their lack of necessity as well. Since arguments can be sound without being deductively valid, fact-insensitive principles would not be needed for soundness, i.e., one might have factual premises that *inductively* support fact-sensitive principles, and no further explanatory principle(s) would be needed to account for this. However, if explanatory principles are needed to generate an inferential relationship of any sort, then fact-insensitive principles are at least *necessary* for justification. After all, an argument's soundness is comprised of (a) the acceptability of its premises and (b) the inferential relationship between its premises and its conclusion, so soundness requires, at the very least, that an argument's premises inductively support its conclusion, i.e., that the hypothetical truth of the premises make the truth of the conclusion reasonably likely.

As it becomes apparent upon reflection, however, a factual premise cannot even inductively support a principle without a non-factual co-premise to back it up. For

[78] Jubb (2009) pp. 344-5.

example, consider once more the principle that ‘selfish people should take measures to overcome their selfishness’. This time, though, let us say that the factual premise offered in support of it is the fact that ‘a selfish character is one of the factors that can potentially impede utility promotion’. Without a non-factual co-premise, the above fact provides no inferential support of any kind for the above principle. To invoke it in argument would be a complete non-sequitur. Some further principle is needed to produce an inference, and though one which supplies deductive logical grounding would do, e.g., one that states ‘people should remove all factors that can potentially impede utility promotion’, so too would one that supplies inductive grounding. For instance, the principle ‘people should promote utility’ suffices to tell us why the agent has reason to remove potential barriers to feasibility promotion, but it does not generate a deductively valid argument. The possibility that selfishness does not impede utility in some contexts, or that there may be other, more significant barriers that should be removed instead, demonstrates that the hypothetical truth of the premises ‘a selfish character is one of the factors that can potentially impede utility promotion’ and ‘people should promote utility’ supports but fails to guarantee the conclusion ‘selfish people should take measures to overcome their selfishness’.

4. Conclusion

In conclusion, I hope to have successfully defended what I take to be the most plausible interpretation of Cohen's fact-insensitivity thesis against objections. On my view, understanding Cohen’s thesis in terms of what is logically required for either an inductively or deductively valid inference empowers it to avoid a number of criticisms. As noted, Ypi’s infinite regress charge is deflected once we appreciate that the only sense

of explaining an explanatory principle Cohen's assumptions commit him to is the 'Why is it a ground?' sense. Explaining an explanatory principle in this sense requires nothing more than pointing to the factual co-premise it serves alongside. Similarly, Jubb's and Kurtulmas's claim that endorsement of an explanatory principle depends on endorsement of the fact or facts it explains can be deflected by noting that a fact's disavowal does not remove the need for an explanation. There's still a question to be answered about why the fact, if believed, logically supports one of the agent's fact-sensitive principles, and answering this question still requires the discovery of a fact-insensitive principle (as I note in section 3(b), though, the Jubb/Kurtulmas criticism is flawed on other grounds as well). Finally, acknowledging that explanatory principles are required for fact-grounded inferences of any sort, whether they be deductive or inductive, takes away some of the sting generated by Jubb's distinction between logical and epistemic grounding. So long as a fact cannot even inductively support a principle without one or more non-factual co-premises, then fact-insensitive principles are at least necessary for the soundness of arguments that employ factual reasons to justify principles.

Though the fact-insensitivity thesis may, at first glance, seem like a relatively trivial truth about the logical presuppositions of factual reasons, this is far from the case. As I hope to show in my next chapter, the fact-insensitivity thesis provides considerable support for a meta-ethical framework where moral desirability is understood to be (a) independent of feasibility, and (b) comprised of a plurality of fundamental values. We'll see that by helping to establish this framework, Cohen's thesis makes space for a type of theorizing where justification does not require taking either feasibility or value conflicts into consideration. Though *implementing* a conception of a fundamental value of course

requires attention to considerations of feasibility and moral cost, *justifying* that conception is a different matter.

Chapter 3

On the Theoretical Significance of Fact-Insensitivity

1. Introduction

In the previous chapter, my goal was to construct a charitable interpretation of the fact-insensitivity thesis and to defend it against criticisms. In this chapter, I continue my discussion of Cohen's thesis. Here, however, my primary goal is to explicate its theoretical significance, a matter which I address in part because a number of theorists have expressed concerns about its import. For instance, David Miller claims that even fundamental principles are 'presuppositionally grounded' in facts.[79] Somewhat similarly, Thomas Pogge has argued that fundamental principles need only be 'externally' fact-insensitive. He claims they can be 'internally' sensitive to facts, and that since the difference between 'internal' and 'external' fact-sensitivity is trivial, so too is the fact-insensitivity thesis.[80]

In sections 2 (a) and 2 (b), I attempt to explain what, precisely, is the theoretical significance of Cohen's thesis. For Cohen, much of the significance of the fact-insensitivity thesis lies in its ability to insulate conceptions of justice and other fundamental values (assuming justice is a fundamental value) from criticisms pertaining to feasibility and value conflicts.[81] By way of example, he indicates that the fact-insensitivity thesis can be used to insulate luck-egalitarianism.[82] Unfortunately, however,

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[79] Miller (2008) pp. 34-6.
[80] Pogge (2008) pp. 92-5.
[81] Cohen (2008) pp. 271-2.
[82] For canonical expositions of this view, see Arneson (1989); Cohen (1989); and Dworkin (2000) chapter 2.

Cohen does not provide a very clear explanation of how the fact-insensitivity thesis performs this insulating function. Even more problematically, he also does not explain why he is justified in assuming conflict between fundamental values in the first place. Conflict between fundamental values requires more than one, but what reason is there to think that there is more than one? Does the fact-insensitivity thesis give us any reason to believe that more than a single fundamental, fact-insensitive principle is needed, e.g., the principle of utility? In sections 2 (a) and 2 (b), I seek to fill the argumentative gaps in Cohen's framework. First, I use an analogy with transcendental idealism to explain how the fact-insensitivity thesis insulates fundamental principles, after which I respond to Pogge's worry concerning the triviality of the distinction between internal and external fact-sensitivity. Next, I attempt to show, with some help from Michael Stocker and Pablo Gilabert,[83] why the fact-insensitivity thesis supports a plurality of fact-insensitive principles instead of just one. In section 2 (c), I arrive at a somewhat surprising conclusion: if the fact-insensitivity thesis is transcendental, then Miller may very well be right. Fundamental principles, in so far as their justification is transcendental, are 'presuppositionally grounded' in fact.

In section 3, I wrap up with a discussion of the justification of fact-insensitive principles. I claim that articulating a conception of a fundamental value involves an introspective process similar to reflective equilibrium, the main difference being that the intuitive moral judgments one appeals to in the former are narrower. Whether the introspective process I describe is best thought of as merely part of discovering a

[83] Specifically Gilabert (2011); and Stocker (1992).

fundamental value, or whether it is also justificatory, is a question I leave for my reader to answer.

2. Feasibility, Value Pluralism, and Application Conditions: The Significance and Limits of the Fact-Insensitivity Thesis

(a) Independence from Feasibility

Philosophers often take the concept of feasibility for granted. The dearth of literature devoted to analyzing it suggests that many find both its significance and nature to be obvious. Only recently has feasibility been subjected to extensive philosophical analysis.[84] Not surprisingly, it turns out that the concept is fairly complex. As Pablo Gilabert's and Holly Lawford-Smith's sophisticated analysis demonstrates, feasibility conditions can be divided into two categories: hard conditions and soft conditions. Hard conditions, on the one hand, represent permanent barriers to implementation. They rule out some institutions and courses of action as impossible, and therefore play a binary role in political theory. If a principle requires more than people are biologically capable of, for instance, then it can presumably be deemed implausible.[85] Soft conditions, in contrast, are malleable. They constrain what we are able to accomplish in our present circumstances but are themselves changeable through human agency. For example, a culture of indifference might make it infeasible to redistribute a significant amount of wealth to the disadvantaged. Since culture can itself be changed, however, the fact that it prevents us from achieving greater redistribution need not deter us from indirectly pursuing redistributive reforms. We might focus our efforts on changing social attitudes

[84] See Gilabert and Lawford-Smith (2012); and Lawford-Smith (2013). For one of the few earlier pieces on feasibility, see Raikka (1998).
[85] Gilabert and Lawford-Smith (2012) p. 813.

in hopes that success will make reforms easier to accomplish in the future. Because of their malleability, soft conditions do not constrain moral theory across the board. They are only relevant to the assessment of fairly immediate prescriptions.[86]

Gilabert and Lawford-Smith claim that hard conditions, unlike soft conditions, apply to even abstract political principles. Rawls's two principles are explicitly invoked as prominent examples.[87] Interestingly, however, they do not think that feasibility constrains everything. In particular, they note that moral desirability is conceptually independent of it.[88] That they should think this is not surprising. As we noted in the introductory chapter, though action-guiding/regulatory claims are tied up with considerations of feasibility, it seems implausible to say the same of desirability claims. Consider the meaning of the word 'utopia.' When critics dub something 'utopian', the thought they are typically expressing is that the proposal in question, though very nice in theory, cannot be implemented (perhaps it expects more of people than 'human nature' permits). Their decision to call it 'utopian' suggests they believe that successful implementation, wonderful as it would be, is also impossible, and thus that the proposal cannot guide policy. This example probably seems trite, but it implies a threefold conceptual distinction between desirability claims, feasibility claims, and action-guiding claims. Something can be desirable without being feasible (a utopian proposal), or feasible without being desirable (examples abound), but it cannot provide guidance without being both feasible and desirable.

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[86] Gilabert and Lawford-Smith (2012) pp. 813-6. See also Gilabert (2011) pp. 59-63.
[87] Gilabert and Lawford-Smith (2012) pp. 819-20.
[88] Gilabert and Lawford-Smith (2012) pp. 816-8.

Once desirability's independence is acknowledged, one cannot help but wonder whether hard conditions apply to all forms of political theory. Might there be a form of political theory concerned strictly with considerations of desirability? For Cohen, the answer is yes. The project of unearthing fact-insensitive principles is precisely the project of unearthing that which we take to be fundamentally desirable, and thus that which is unconstrained even by hard conditions.[89] Let us explore this thought with an example. Consider the luck-egalitarian claim that a distribution of advantage is fair if and only if all inequalities between citizens are traceable to choice.[90] *Ceteris paribus*, the claim that people should bear the costs of their choices but be spared the costs of sheer misfortune is intuitively powerful. Compelling as it is, though, it only takes a bit of reflection to recognize that the full realization of luck-equality is not feasible. The causes of advantage and disadvantage are too complex for us to precisely determine the extent to which a person's level of advantage is attributable to her choices. For instance, a person's talents are simultaneously the product of both choice and genetic luck. Certain genetic preconditions must be met in order for her to have the array of talents she does, but she must also be willing to work hard and practice if she wants her genetic potential to be realized.[91] What is more, willingness to work hard is likely itself produced by a combination of choice and genetic circumstance. Thus even if we could somehow determine the extent to which a person's talents are the product of effort, we would still

[89] For explicit comments concerning desirability's independence from normativity, see Cohen (2009) pp. 46-52. See also Cohen (2008) pp. 250-4.
[90] Cohen himself explicitly claims that the principle of luck equality is best understood as fact-insensitive. See Cohen (2008) pp. 271-2 and pp. 300-2. For commentaries on luck-egalitarianism that voice agreement, see Swift (2008) pp. 382-7; and Barry (2008) p. 146.
[91] Dworkin (2000) pp. 90-1; and Kymlicka (2002) pp. 80-1.

need to determine the extent to which her efforts are themselves something for which she can be held responsible.

Informational complexities make it impossible to discern the requirements of luck-equality with accuracy. Does that mean the principle of luck-equality should be dismissed? Not if it is being proposed as fact-insensitive. Fact-insensitive principles reflect fundamental values. They capture the various elements that comprise moral desirability. As noted in chapter 2, they are also justified independently of factual reasons. A fact-insensitive distributive principle thus cannot be criticized on the ground that its *equalisandum* is unmeasurable. Even if it were true that unchosen advantage could be measured, the truth of that fact would be irrelevant to luck-egalitarianism's justification.

Suppose the objection were to run in a different direction, though. Suppose the objector was to allow that the infeasibility of comprehensively realizing luck-equality is a bad reason to reject the luck-egalitarian ideal. The problem with luck-egalitarianism, she claims, is that trying to approximate its requirements involves unacceptable moral costs. Jonathan Wolff's point about "shameful revelation" could be used this way.[92] He notes that overcoming luck-egalitarianism's informational difficulties, in so far as it is possible to do so, requires citizens to reveal demeaning personal details. With regard to involuntary unemployment, for instance, Wolff asks us to "think how it must feel – how demeaning it must be – to have to admit to oneself and then convince others that one has not been able to secure a job, despite one's best efforts, at a time when others appear to

[92] Wolff (1998) p. 109.

obtain employment with ease."[93] If approximating luck-equality requires shameful revelation, then it would seem that the luck-egalitarian ideal stands in tension with expressing respect for citizens.[94]

Does a conflict between fairness and respect suggest amending luck-egalitarianism? Not if the principle of luck-equality is fact-insensitive. As we noted earlier, facts about feasibility are irrelevant to the justification of a fact-insensitive principle. So too are the facts which determine whether a set of principles are in tension with each other. The justification of luck-egalitarianism, if fact-insensitive, cannot depend upon psychological facts concerning the association between natural talents and a sense of self-worth. Even if it were true that citizens' sense of self-worth is unrelated to their talents, this would have no bearing on the claim that a perfectly fair distribution permits only those inequalities for which citizens can be held responsible, i.e., the claim that luck-equality supplies the *content* of distributive fairness. The significance of psychological facts about self-worth lies in their impact on our ability to feasibly *implement* fairness and respect in unison.[95] If citizens are generally not able to dissociate their sense of self-worth from the possession of natural talents, then the pursuit of luck-equality may need to be compromised for the sake of respect. If citizens generally are capable of such dissociation, then it is possible that there are ways of pursuing luck-equality that avoid value conflict.

There is an important lesson to be gleaned from the contingent tension between fairness and respect. Though there is a distinction to be drawn between constraints

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[93] Wolff (1998) p. 114.
[94] Wolff (1998) pp. 115-8.
[95] It is worth noting that Wolff himself believes the concerns he raises bear on luck egalitarianism's implementation, rather than on its content. See Wolff (1998) pp. 120-2; and Wolff (2010) pp. 346-7.

imposed by feasibility and moral constraints imposed by other values, these kinds of constraints are also importantly related. The moral costs of implementation are best thought of as a particular species of feasibility constraint, as feasibility often constrains the simultaneous implementation of multiple values, rather than the implementation of particular values in isolation.[96] In later chapters, we'll see other examples of how facts can make it infeasible to implement a value without cost to other values. In some cases, the facts that create value conflicts are specifically *soft* facts, in which case the conflicts they create can be dissolved over time. The tension between equality and efficiency associated with economic incentives is arguably created by soft facts about the character of a society's social ethos.[97] In other cases, the facts that create value conflicts are specifically *hard* facts, in which case the conflicts they create are permanent.

The concept of a *category error* is essential to understanding the above examples concerning feasibility and moral costs. In them, the defender of luck-egalitarianism claims that the objector mistakenly treats luck-equality as if it were regulatory. Considerations of feasibility, though pertinent to the assessment of action-guiding principles, become irrelevant if the position under analysis is best understood as fact-insensitive. In this argumentative context, the function of the fact-insensitivity thesis is to make room for defenses of this kind. It blocks political theorists who prefer to restrict their attention to the realm of regulation from responding that all plausible moral principles are justified by factual reasons, i.e., it prevents them from claiming that no principles are fact-insensitive. If, as Cohen claims, fact-insensitive principles are a

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[96] For acknowledgement of the fact that 'the facts' create value conflicts, see Cohen (2008) p. 272 and p. 285. For similar comments, see Raikka (1998); and Swift (2008) pp. 385-6.
[97] See Cohen (2008) chapter 1.

precondition for the possibility of factual reasons, then regulatory theorists are forced to admit that some principles are justified independently of facts, and thus independently of feasibility too. Regulatory theorists cannot be skeptics about fact-insensitivity if, as a matter of logic, the justification of regulatory principles depends upon it.

It is worth noting that Cohen's defense of fact-insensitive principles against action-guiding moral and political theory is structurally analogous to Immanuel Kant's transcendental defense of metaphysics against empiricism. Kant thought that the empiricist case against metaphysical concepts such as space, time and causation commits a category error by subjecting them to empirical criteria of assessment. That the empiricists would do so is not surprising. For them, sensory experience is the basis upon which concepts and synthetic propositions are justified. They claim that if an allegedly intelligible concept cannot be traced back to a particular sensory impression, then it should be dismissed as nonsense. Similarly, they claim that if a synthetic proposition (one not true by virtue of the relationship between the concepts it contains) cannot be verified through experience as a 'matter of fact', then it cannot be rationally justified. It was on these bases that Hume attempted to undermine causation's rational credentials.[98] According to Kant, however, empiricists are wrong to assume that all synthetic propositions are empirical. He claims that some synthetic propositions are known *a priori*. To back up this claim, he argues at length that metaphysical categories such as causation are preconditions for the possibility of our having sensory experiences in the first place. They are, in a sense, the background against which sensory impressions are

[98] See, for instance, Hume (1993) pp. 16-20 and pp. 39-53.

situated.[99] If Kant is right about this, then the empiricist is forced to admit that some synthetic propositions are known *a priori*, and thus that the application of empirical criteria of assessment is sometimes inappropriate. Empiricists cannot be skeptics about the synthetic *a priori* if the possibility of empirical knowledge depends upon it.

Regardless of whether Kant's argument is successful, the analogy with Cohen's argument is worth noting.[100] For regulatory theorists, the measure against which principles of justice and morality are to be tested is whether or not they can successfully guide right action. If an agent cannot successfully follow or implement the requirements of a principle, say because of epistemic limitations or motivational incapacity, then this would be a significant problem. Likewise, if a principle cannot feasibly be implemented without incurring unacceptable moral costs, then this too would be a significant issue. A principle with these defects cannot serve as an adequate guide to ethical actions and policies. If, however, the endorsement of principles that need not guide action is a precondition for the rational endorsement of principles that do, then the former are invulnerable to the preceding objections. Problems associated with implementing a fact-insensitive principle can successfully restrict its functionality, i.e., tell against employing it as a guide to action, but they cannot be used to eliminate it.

This is perhaps a good place to discuss a prominent criticism of the fact-insensitivity thesis by Thomas Pogge. According to Pogge, the fact-insensitivity thesis does not have anything like the significance I've attributed to it here. Though it would indeed be significant if the thesis established that regulatory theorists are logically

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[99] For a quasi-accessible exposition of his thoughts on this subject, see Kant (2001).
[100] For excellent discussion of the structure and function of transcendental arguments, see Taylor (1995); and Stroud (1999).

committed to a class of principles substantively different from those used to guide action, he denies that it has this implication. According to Pogge, explaining factual reasons does not require uncovering anything such as, for example, an ultimate principle of utility maximization, or an ultimate principle of luck-egalitarian fairness. All we need to explain why a fact entails a principle is a trivial hypothetical principle.

Let's return to one of our examples from chapter 2. Suppose an agent is committed to the principle 'selfish people should take measures to overcome their selfishness' because it is supported by the fact 'a selfish character makes utility maximization infeasible.' Though the relationship of entailment needs to be explained, it's possible to do so via the principle 'if a selfish character makes utility maximization infeasible, then selfish people should take measures to overcome their selfishness'. According to Thomas Pogge, such a principle suffices to explain the factual reason, but it's also entirely trivial. He notes that it just internalizes the content of the factual reason into the content of the principle it justifies, i.e., it takes the fact 'a selfish character makes utility maximization infeasible' and transfers it to the antecedent of a conditional that contains the principle 'selfish people should take measures to overcome their selfishness' as its consequent. Whether the fact and the principle it supports are expressed separately or united into a single conditional seems inconsequential, though.[101] The fact-insensitivity thesis has not committed the regulatory theorist to anything she wasn't already aware of and prepared to accept.

To be fair, capturing the content of the fact and the principle it supports in a conditional premise is not entirely inconsequential. Adding the premise 'if a selfish

[101] Pogge (2008) pp. 92-5. See also Miller (2008) p. 35.

character makes utility maximization infeasible, then selfish people should take measures to overcome their selfishness' removes an ambiguity. It specifies that the agent takes 'a selfish character makes utility maximization infeasible' to be *sufficient* for the justification of 'selfish people should take measures to overcome their selfishness', as opposed to, say, only partially sufficient. Still, specifying the justificatory relationship is not the same thing as explaining it: a point which Pogge and Cohen miss.[102] What Cohen's thesis requires is a further principle to explain why the agent takes the fact to be a justificatory reason at all. Such an explanation is needed regardless of whether the fact provides necessary and sufficient support, merely sufficient support, or somewhat less than sufficient support; and providing it requires a principle that supplies fresh content, i.e., one that is not analytically contained within the justificatory relationship, properly specified, between the fact and principle it supports. In this case, the principle 'people should maximize utility' suffices. Unlike the above mentioned conditional premise, 'people should maximize utility' expresses a belief that does not recycle the content of the fact 'a selfish character makes utility maximization infeasible' and the principle ''selfish people should take measures to overcome their selfishness'. It reaches beyond the desirability of changing selfish character and says something about how people should generally behave regardless of the character traits they presently have. In doing so, the principle 'people should maximize utility' explains why 'a selfish character makes utility maximization infeasible' is a reason to believe 'selfish people should take measures to overcome their selfishness'. As a result, it also explains the appeal of the conditional principle 'if a selfish character makes utility maximization infeasible, then

[102] Cohen makes a mistake analogous to Pogge's in Cohen (2008) p. 244.

selfish people should take measures to overcome their selfishness'.[103] In sum, asking why a fact is a justificatory reason is different from asking what kind of justificatory reason it is, and as in most cases, separate questions have separate answers.

(b) Value Pluralism

(i) Fairness and Efficiency

In the present sub-section (section 2(b)), my primary objective is to show that the fact-insensitivity thesis supports value pluralism. Before getting to that, though, I must ask the reader to indulge a rather long digression concerning two of the values with which I'll be concerned at various points throughout my thesis: namely fairness and efficiency. There are a few different reasons for this digression. One is that, as I mentioned, these values will be discussed at a number of points throughout, and so I think it will be helpful for the reader to have a sense of what I have in mind as I write about them. In fact, I'll be employing the concept of efficiency during my discussion of the fact-insensitivity thesis's relationship with pluralism. The other reason for discussing them here, though, is because I assume throughout that fairness and efficiency are values that sometimes conflict with each other, particularly in cases where the implementation of distributive equality requires levelling down. On my analysis, an analysis shared by, for example, G.A. Cohen and Larry Temkin, levelling down for the sake of achieving distributive

[103] What 'people should maximize utility' does not explain is why the agent treats 'a selfish character makes utility maximization infeasible' to be one kind of justificatory reason rather than another, e.g., why an agent who takes this fact to be partially sufficient for justification does not instead take it to be fully sufficient, or why one who takes it to be merely sufficient does not also take it to be necessary. Explaining the particular kind of justificatory significance the agent accords it requires additional knowledge of her belief set. An agent who, for instance, holds only a single fact-insensitive principle is perhaps more likely to accord full sufficiency to the justificatory facts it explains. As I argue in section 2 (b) (ii), however, fact-insensitive monism's susceptibility to counter-examples suggests most people hold a plurality of fact-insensitive principles, not just one.

equality, though morally problematic, is nonetheless conducive to fairness.[104] The problem with levelling down is not unfairness, on this view, but rather inefficiency. However, analyzing fairness and efficiency as values that conflict with each other is controversial for a number of reasons. For starters, it might be argued that that efficiency is not a distinct value. Efficiency, according to some, is strictly an instrumental concept. If this is so, then arguably the relevant value in discussions of efficiency is whatever X or X's we're interested in efficiently promoting.[105]

Second, it might be argued that even if efficiency is a distinct value, it nonetheless cannot come into conflict with fairness, as the presuppositions which lie behind fairness prevent this from being plausible. On one version of this objection, fairness cannot conflict with efficiency because fairness presupposes efficiency. According to the objector, fairly distributing something is only of moral significance when the thing we want to distribute is something that should be efficiently promoted.[106] On another version of this objection, fairness cannot conflict with efficiency because both are grounded in a more fundamental value, namely concern for the well-being of persons. More specifically, since levelling down is patently at odds with concern for the well-being of persons, and since fairness is parasitic upon concern, it cannot be said that fairness is *ceteris paribus* in favor of levelling down while efficiency is not. Whatever is parasitic upon concern cannot also conflict with concern.[107]

Before addressing the above stated objections, two prefatory remarks are in order. First, the term 'levelling down', as I will use it throughout my thesis, refers to the

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[104] See Cohen (2008) pp. 315-23; and Temkin (2002) pp. 154-5.
[105] Macleod (1998) pp. 115-6.
[106] Christiano (2007) pp. 71-8.
[107] I owe thanks to Will Kymlicka for this objection.

selection of a state of affairs where everyone is worse off than they otherwise would be in some alternative state of affairs. The reason I mention this is because the term is sometimes used a different way in the philosophical literature. In some cases, 'levelling down' is used to refer to the selection of an egalitarian state of affairs where everyone is equally badly off over an alternative, unequal state of affairs where some are better off and no one is worse off.[108] My own use of the term is not idiosyncratic, however. Much of the literature on levelling down specifically employs the 'everyone's worse off' use of it.[109] My reason for using the term this way is because it is the version of 'levelling down' relevant to discussions about economic incentives. As we'll see in my fifth chapter, many liberals believe that the inequalities economic incentives create are morally necessary because doing away with incentives would leave us all worse off. Since I'm mainly interested in discussing levelling down as it pertains to incentives, I'll specifically be using the term in cases where a course of actions would leave everyone worse off than they otherwise would be.

Second, it should be noted that the characterization of fairness I'm going to offer is specifically meant to apply on the understanding that fairness is a substantive value that should be predicated of distributions to the extent that they satisfy the best principle of fairness. Noting this at the outset is important because there are common senses of the word 'fairness' to which my characterization of the concept is not meant to apply, a prominent example of which is procedural fairness. Much of what I'll say about substantive fairness is not true of procedural fairness. For example, while I think

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[108] See, for example, Partfit (2002) p. 98.
[109] See, for example, Chistiano (2007) pp. 71-2. For an instance where an author uses the term 'levelling down' in both of the above-mentioned ways, see Temkin (2002) pp. 130-1.

substantive fairness can come into conflict with efficiency, I do not think that it makes any sense to say procedural fairness does so. To the contrary, as I'll explain in chapter 6, the function of procedural fairness (at least in Rawls's framework) is to help us adjudicate between conflicting values by picking out a particular set of regulatory principles that reflect a specific balance between them. Understood this way, fairness is not one of the values that potentially conflicts with efficiency, and it would certainly never require us to level down, even in the *ceteris paribus* sense of the word 'require'. The reason I take myself to be justified in claiming that fairness conflicts with efficiency is because I think a substantive understanding of fairness, one that luck-egalitarianism supplies the content of (see chapter 4 for my arguments to that effect), cannot be replaced by a procedural understanding of fairness. In fact, I think substantive fairness is needed to non-arbitrarily specify the content of an optimally fair procedure, and is thus more fundamental than procedural fairness. It is not until chapter 6 that I will justify this claim, though.

Let's begin with the first objection, namely the claim that efficiency is not a value at all. The claim that efficiency is not a value is based on the idea that considering it to be such is inconsistent with the way we use the word in every-day language. The every-day concept of 'efficiency', as Alistair Macleod puts it, is an 'end-presupposing' rather than an 'end-incorporating' notion'. On his understanding, whether an agent's course of action is efficient is always relative to the pursuit of some X, where X stands for one of the agent's goals. To say that efficiency is end-presupposing, rather than end-incorporating, is to say that the content of the X depends on the agent's goal set, rather than on the concept of efficiency itself. As a result, we cannot know in advance of asking

the agent what end it is that she's interested in efficiently pursuing. According to Macleod, it is appropriate to predicate efficiency of a course of action when that action effectively and economically achieves the end at which it aims, and when it does so in a manner that's broadly consistent with the agent's other ends.[110]

Aside from a minor reservation about Macleod's 'other ends' constraint on judgments of efficiency,[111] I think his account does an excellent job of capturing the every-day concept of efficiency. What's more, I also think he's right to say that the every-day concept of efficiency is not a distinct value. After all, the every-day concept can be attached to just about any goal, including the pursuit of things which arguably *are* distinct values, e.g., to the pursuit of fairness, to the pursuit of community, etc. Thus I agree that the X to which every-day efficiency attaches, rather than efficiency itself, is the relevant value when efficiency language is used in discussions about justice and morality.

Where I disagree is with the claim that those who do think of 'efficiency' as a value have the every-day concept of it in mind when they use that word. On Macleod's view, proponents of, for example, the Pareto understanding of efficiency are importantly wrong because they're allegedly aiming at but failing to capture the every-day concept.[112] As far as I can tell, though, this is not the case. Instead, the Pareto conception of efficiency is aiming at a different concept, one that bears some resemblance to but

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[110] Macleod (1998) pp. 112-4.

[111] For my part, I'm not sure that it would be inappropriate to say of a course of action that effectively and economically achieves some goal X that, even though it hampers the pursuit of some goal Y, it is nonetheless efficient specifically with respect to the pursuit of goal X. It strikes me that we might want to say of such an act that it is *globally inefficient*, i.e., inefficient from the standpoint of the agent's entire network of goals, but nonetheless still *locally efficient*, i.e., efficient with respect to the particular goal at which it aimed.

[112] Macleod (1998) pp. 112-3.

nonetheless differs from the every-day one. Let's call this second concept of 'efficiency' the quantitative concept.[113]

What is the quantitative concept of efficiency? Characterizing it without presupposing any particular conception is a bit tricky, but I think it suffices to say that it pertains to increasing the amount of a quantifiable good.[114] It is this quantitative sense of the word 'efficiency' that, for example, Rawls employs when he claims that both a principle which mandates maximizing the aggregate amount and a principle which mandates the achievement of Pareto-optimality are appropriately dubbed 'principles of efficiency'.[115] The main way in which different conceptions of quantitative efficiency differently interpret the concept is with respect to the words 'increasing' and 'amount'. With respect to 'amount', at least two interpretations immediately present themselves: 'aggregate amount' and 'average amount'. The second of these is, for example, employed by the version of utilitarianism Rawls wrestles with in his efforts to show that his two principles are comparatively superior for regulating the basic structure of society.[116] With respect to the word 'increasing', two interpretations also present themselves more or less immediately. The first interprets the word in the strongest sense possible, i.e., 'increasing' is understood to mean 'maximizing'. The second, in contrast, interprets the word in a more qualified fashion. On this interpretation, the word is understood to mean 'increasing so long as no particular person incurs a loss.' This second way of interpreting 'increasing' is the sense employed by the Pareto-optimality

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[113] I owe thanks to Alistair Macleod for (implicitly) suggesting that I use the term 'quantitative' to distinguish the sense of 'efficiency' I'm interested in.
[114] For a discussion that describes this concept nicely, albeit in an indirect fashion that's meant to shed light on the concept of justice by way of contrasting it with a different concept, see Waldron (2003) pp. 275-7.
[115] See Rawls (1971) pp. 36-7 and pp. 66-7.
[116] Rawls (1971) pp. 161-75.

version of efficiency that Rawls claims hypothetical contractors in the original position would adopt to evaluate the efficiency of institutional arrangements.[117]

With respect to the goods to which the quantitative sense of efficiency might be applied, some are more easily analyzed as quantities of discrete units than others. Subjective welfare and flourishing, for example, perhaps defy being cardinally represented through the use of numbers. So long as we can intelligibly discuss these concepts via the use of quantity presupposing ordinal language, though - e.g., can intelligibly talk about differing 'levels' of flourishing or welfare, or about some people having 'more' or 'less' flourishing or welfare - then the concept of efficiency applies.

As I've described it, the concept of efficiency is largely, though not entirely, indeterminate. There's the indeterminacy I've mentioned with respect to the terms 'increasing' and 'amount'. There is also indeterminacy with respect to the quantifiable good to which this concept might be applied, e.g., we might speak of efficiency with respect to welfare, or of efficiency with respect to primary goods. As such, it would be fine for a person with a maximum aggregate conception of efficiency to substitute talk about maximizing resources for talk about efficiently promoting them. Unlike the every-day concept of efficiency, however, there is not enough indeterminacy within the quantitative concept for it to be applied to any X. For example, while it would be fine for someone employing the every-day sense of the term 'efficiency' to speak of efficiently pursuing a fair distribution of resources, it would not be fine for someone employing the quantitative concept to do so. Regardless of what one's conception of the quantitative concept might be, so long as the concept behind the term 'efficinecy' is understood to

[117] Rawls (1971) p. 67.

pertain to increasing the amount of a quantifiable good, then it makes no sense to speak of efficiently promoting a fair distribution of resources, nor, for that matter, of efficiency with respect to the promotion of anything that isn't a quantifiable good.

Of course, the quantitative concept can be appropriately applied in a secondary manner to non-goods, e.g., societies. A society that efficiently promotes the goods over which it exerts influence is appropriately described as efficient. In this same sense, were it the case, hypothetically speaking, that pursuing a fair distribution of a good is conducive to increasing the amount of that good, then it would make sense to say that the pursuit of fairness is efficient. It is to quantifiable goods, however, that the quantitative sense of the term 'efficient' primarily applies. Any application of the quantitative sense to societies or other subjects is only appropriate when those subjects are themselves efficient promoters of goods.

It might be objected that the distinction I've drawn between the quantitative and every-day concepts of efficiency does not suffice to justify the claim that there's a sense of the word 'efficiency' that refers to a value. According to my objector, the quantitative concept of efficiency is just as instrumental as the every-day concept. The only difference is that the range of X's to which the former might be applied is more restricted than the range of X's to which the latter might be applied. If this is so, then just as with the every-day concept of efficiency, it is allegedly incorrect to claim that the quantitative concept, rather than the X to which it is applied, is the relevant value. The values of interest when using the quantitative concept in normative deliberation are things like welfare, resources, flourishing ,etc.[118]

[118] I owe thanks to Christine Sypnowich for this particular objection.

While I agree that there's a sense in which the quantitative concept of efficiency is instrumental, I don't think it's correct to say that efficiency therefore isn't a distinct value. Efficiency certainly presupposes the importance of what it applies to. Why, for example, would we want *more* flourishing unless flourishing were something of value? However, to say that the value of efficiency *presupposes* the value of the X to which it applies is not the same thing as saying that it can be *replaced* by that X. The claim that flourishing is valuable is much vaguer than the claim that more flourishing is better, *ceteris paribus*, than less flourishing. Unlike the bald claim that flourishing is valuable, the claim that more flourishing is better, *ceteris paribus*, than less flourishing, tells us what we have reason to pursue given that flourishing is valuable, specifically that we have reason to pursue more of it.

That presupposing the value of an X is different from being replaceable by that X can be further demonstrated by noting that the importance of fairly distributing an X presupposes its value just as much as the importance of pursuing a larger quantity of it. As with efficiency, it does not make any sense to care about fairly distributing a quantifiable good unless that good is valuable. But that does not mean fairness isn't a value. The claim that we have a defeasible reason to pursue a fair distribution of some X is more specific than the claim that X is valuable. It tells us what we have reason pursue given the value of the X, specifically that we have reason to care that it be distributed in a fair manner.[119]

[119] Michael Stocker discusses the idea that some values are best understood as *functions*, i.e., as specific sources of information about how she should evaluate or act with respect to morally significant, quantifiable goods. See Stocker (1997) pp. 202-3.

This is probably a good place to discuss the concept I have in mind when I use the term 'fairness'. Following Jeremy Waldron, I think it's accurate to say that fairness is about "distributive information across individuals."[120] Or if that's a bit too obscure, that fairness is about who has what and why. To better see what he and I mean, it's helpful to contrast the concept of fairness with the concept of efficiency.[121] As we noted earlier, efficiency is about increasing the amount of a good. If we want to compare the efficiency of two distributions, then all we need to refer to is the relevant amount in each. If we're specifically interested in Pareto-optimality, then, assuming no individual in either distribution incurred a loss, the distribution with the highest amount should be considered the most efficient one. If we're specifically interested in maximizing the average amount, then the distribution with the highest average should be deemed the most efficient. Either way, the kind of information we're interested in when comparing distributions from the standpoint of efficiency is entirely impersonal. We don't need to know any information about the individual shareholders.

By contrast, suppose we're interested in comparing the extent to which two distributions are egalitarian. In order to make this comparison, information about individual shareholders is essential. More specifically, we need to know the number of shareholders in each distribution and the size of each individual's share before we can accurately calculate the extent to which either distribution is an equal one. Similarly, if we were interested in comparing the extent to which, say, two distributions allocate shares in accordance with considerations of desert or personal merit, then information

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[120] Waldron (2003) p. 277. Though Waldron uses the term justice rather than fairness, he's careful to note that he specifically has narrow justice in mind. Perhaps he would be fine with my using his account to characterize distributive fairness. See Waldron's comments on page 274.

[121] Waldron takes the same approach in his own discussion of fairness. See Waldron (2003) pp. 275-7.

about individual shareholders would again be essential. We would want to know the number of shares and the size of each, as well as the deservingness of each individual. In both cases, information about individual shareholders is essential to comparing the distributions, and thus both equality and desert can appropriately be considered conceptions of fairness.

Though I hope to have established that the objections I've addressed fail to undermine the claim that efficiency is a value, there are other objections that accept both efficiency as a value and yet reject the possibility that it conflicts with fairness. According to Thomas Christiano, fairness presupposes efficiency, and thus fairness cannot give us even a defeasible reason to level down. He points out that in all cases where it's reasonable to care about whether a good is fairly distributed (he specifically has egalitarian distribution in mind), it's also true that more of that good is to be preferred over less of that good. Were it not the case that more of a particular good is to be preferred over less of it, the good's distribution would be morally irrelevant. From this, Christiano infers that fairness cannot require levelling down. Since fairness is parasitic upon efficiency, it can only give us a reason to prefer the more egalitarian state of affairs among a set of equally efficient states of affairs. It cannot give us a reason to prefer the more egalitarian state of affairs among a set that includes less egalitarian but more efficient states of affairs.[122]

The mistake in Christiano's line of reasoning is analogous to what's referred to as the 'common cause fallacy'. The common cause fallacy is committed when someone thinks X causes Y because X and Y always coincide, and fails to observe that Z is the

[122] Christiano (2007) pp. 71-8.

cause of both. In Christiano's case, the analogous mistake is thinking that the importance of fairly distributing a good is parasitic upon the importance of efficiently promoting it because the two always coincide, and thereby failing to notice that it is simply the value of the good which accounts for why both fair distribution and efficient promotion matter. I've already devoted some space to discussing the idea that the fair distribution and efficient promotion of a good presuppose but are more specific than the notion that the good is valuable. I won't go on about it at too much length here, but I will say that we have good reason to think that fairness and efficiency apply because of a good's value, rather than that fairness applies to a good because efficiency applies to that good too. It's hard to make sense of why we have reason to prefer the fairer of two equally efficient distributions if fairness is parasitic upon efficiency. On the assumption that there is no difference between the efficiency of two distributions, efficiency, as well as anything parasitic upon it, is presumably indifferent between them. In contrast, if we understand both fairness and efficiency as parasitic upon the *value* of a good, then we have an explanation readily available. The fairer of two equally efficient distributions of a good is to be preferred because efficiency does not exhaust what's required in light of that good's value. In addition to implying that more is better than less, the value of a quantifiable good also implies that we have a defeasible reason to fairly distribute it.

The last objection states that fairness and efficiency do not conflict because both are derived from a more fundamental value, namely concern for the well-being of persons, and levelling down is inconsistent with concern. The general thought here is similar to Christiano's. If making everyone worse off is inconsistent with concern for their well-being, and fairness is derivable from concern, then fairness cannot give us a

reason to level down. A subordinate value cannot give us a reason to do something that the more fundamental value it's derived from condemns.[123]

In chapter 6, I'll be discussing the concept of concern as it appears in Dworkin's idea of abstract equality, i.e., the idea of equal concern for the fate of citizens.[124] Since I'll be discussing abstract equality at length there, I don't want to say too much about it here. What I will say, however, is that on my analysis, concern is best understood as a particularly compelling conception of efficiency, rather than as a separable fundamental value that underlies both fairness and efficiency. Understanding efficiency as specifically about increasing 'the good' of people, rather than increasing the amount of 'the good' in general, avoids the counter-intuitive implication that an efficient society is one which sacrifices existing people's good for the sake of increasing the total amount of 'the good' through population growth.[125] Thus while I agree that levelling down is inconsistent with concern for the well-being of persons, I don't think this shows that efficient inequalities are therefore fair. Fairness, understood as a substantive value (rather than procedurally), can conflict with concern for the well-being of persons, and one case where it does so is when levelling down is needed to achieve equality. That fairness is best understood as independent of and thus not derivable from concern is bolstered by the thought that concern is something which can be exercised unfairly. A government that, for example, devotes a great deal of resources to promoting the well-being of one social group but devotes very little in the way of resources to promoting the well-being of other social groups does not fail to express concern. It simply expresses concern unfairly. If fairness

[123] I owe thanks to Will Kymlicka for this objection.
[124] Dworkin (2000) p. 1.
[125] For a discussion of this problem, see Kymlicka (2002) pp. 32-7.

were parasitic upon concern, though, then we would not be able to make sense of this judgment, nor of the related judgment that concern should be constrained by considerations of fairness. A subordinate value tells us what the more fundamental value it's derived from requires of us: it does not constrain the more fundamental value.

(ii) The Fact-Insensitivity Thesis and Pluralism

In the previous sub-section (section 2 (a)), I argued that the justification of fact-insensitive principles is independent of whether their implementation puts them in tension with the values represented by other fact-insensitive principles. What I have not touched on is the assumption that there is more than one fact-insensitive principle to speak of. Though the fact-insensitivity thesis suggests there is at least one fundamental, fact-insensitive principle explaining an agent's action-guiding commitments, at first glance nothing about it favors pluralism. What reason is there to reject a fact-insensitive monism that identifies, say, the principle of utility as the only fundamental principle?

Though the fact-insensitivity thesis is consistent with there being only one fundamental principle, I nonetheless think it strongly supports a pluralistic framework. To see why, consider Cohen's illuminating discussion of the slavery objection to utilitarianism.[126] On one reading of this objection, the objector is rejecting the principle of utility as a viable regulatory principle. She is saying "I oppose utilitarianism because if we adopt utilitarianism then we might face circumstances in which (because it maximizes happiness) we should have to institute slavery, and I am against *ever* instituting slavery."[127] On this reading, the objector's concern is the factual possibility that utilitarianism could at some point end up prescribing slavery. Since she is unwilling

[126] Cohen (2008) pp. 264-5.
[127] Cohen (2008) p. 264.

to take this risk, she would rather society adhere to some other principle instead. As a result, if she were to be given conclusive evidence demonstrating that there is no such risk, then her objection would be defeated. Slavery is only a problem for regulatory utilitarianism if there is a possibility that happiness maximization will one day require it.

Implicit in the slavery objection to regulatory utilitarianism is a second objection not sensitive to actuarial calculations. Unlike the first, it leaves aside the question of utilitarianism's regulatory merit and specifically rejects it as a fact-insensitive principle. Were the objector to explicitly state it, she would say "I oppose utilitarianism because it says that if circumstances were such that we could maximize utility only by instituting slavery, then we should do so, and I do not think that would be a good reason for instituting slavery."[128] With respect to this second objection, whether there actually is a risk that utilitarianism will end up prescribing slavery is irrelevant. The objector's concern is not with the possibility that slavery and happiness maximization might someday coincide but with the moral force utilitarians ascribe the latter. She rejects the claim that, hypothetically speaking, slavery would be justified if it ever maximized happiness. While she may be fine with a regulatory version of utilitarianism if she's certain that maximizing happiness will never require slavery, she nonetheless denies that the principle of utility is a justified fact-insensitive principle.

The considerations fact-insensitive principles are and aren't sensitive to will be discussed at greater length in section 3 (c) and in section 4. For the time being, however, it suffices to note that the second objection implicit within the slavery example shows that fact-insensitive principles are sensitive to judgments about hypotheticals. Though

[128] Cohen (2008) p. 264.

facts about the likelihood that utility maximization could require implementing slavery are irrelevant to whether a fact-insensitive version of utilitarianism is justified, the judgment that utility maximization isn't sufficient to justify slavery is different. It isn't factual, but is rather a hypothetical that pertains to a normative claim (or, more accurately, is the negation of a hypothetical). It is equivalent to the claim that 'it is false that if utility maximization required slavery, then we ought to implement it'. The fact-insensitivity thesis thus does not bar statements like this from being relevant to the justification of fundamental principles.

Though Cohen does not quite present it as such, I think the second slavery objection is best interpreted as a rejection of utilitarian monism. What the objector seems to be saying is that the realm of moral desirability is more complex than utilitarians would have us believe. This interpretation is confirmed by the observation that the principle of utility can be rescued from her objection if located within a pluralistic framework. Within such a framework, utility maximization would still be identified as a valuable goal. It just would not be identified as the only valuable goal. Once this move is made, the defender of a fact-insensitive version of utilitarianism can reply that instituting slavery to maximize happiness is an efficient choice under circumstances where it actually accomplishes this, but that doing so is also incredibly unfair. It would involve dramatically sacrificing the interests of some for the interests of others and thus should not be permitted, all-things-considered.

Of course, utilitarianism may not be the best conception of efficiency. As I'll argue in section 3 (b), a major problem with any utilitarian conception of efficiency is its sole focus on the maximization of specifically subjective welfare. The point I'm making

here is simply that the slavery objection to utilitarianism is not an effective criticism when utilitarianism is understood as a conception of one particular value among many. Other objections, such as problems associated with its exclusive focus on subjective welfare, might, and in some cases do, remain effective.

The above point concerning the implications of the slavery objection for a fact-insensitive version of utilitarianism is generalizable. Take any putative fundamental principle, e.g., a principle of equality, a principle of autonomy, etc. If, after testing this principle against the considered intuitive judgments you have about a broad range of hypothetical cases, you find that you are unwilling to implement it across all of them, then you do not think the principle in question exhaustively occupies the space of desirability. Though I am unable to verify the commonality of this result with empirical evidence, I would hazard a guess that most people willing to go through such an intuitive test would find that no fact-insensitive principle they are committed to survives it, and that they are therefore committed to other fact-insensitive principles as well. If I am right, then fact-insensitive monism is introspectively vulnerable in a way fact-insensitive pluralism is not, a vulnerability that's attributable to the nature of fact-insensitive principles. Fact-insensitive principles, unlike regulatory principles, are uniquely vulnerable to hypotheticals, since the proponent of a particular fact-insensitive principle cannot reply to an objection by appealing to the *fact* that we are unlikely to ever find ourselves in the relevant hypothetical scenario.

Another way in which the fact-insensitivity thesis supports a pluralistic framework is through its connection with Michael Stocker's thesis in chapter 4 of *Plural and Conflicting Values*. In this chapter, Stocker discusses pluralism in relation to the idea

that ethics is rational, i.e., the idea that in any morally relevant situation there is always a correct course of action. According to Stocker, one of the major worries about value pluralism is that it seems to undermine the rationality of ethics. If value A requires an agent to perform action X in circumstance C, and value B requires her to perform action Y in circumstance C, and actions X and Y are incompossible, then what is the agent to do? She can't fulfill both of her moral requirements, and thus it seems she is doomed to moral failure. Value pluralism ostensibly entails that conflicts like this are common and inescapable. It fills our moral universe with imcompossible directives, and incompossible directives preclude a correct course of action.[129]

In reply, Stocker claims this worry presupposes that moral directives are always action-guiding. If there are directives that serve other functions, however, then he thinks moral conflict need not be so troublesome.[130] In support of the idea that there are non-action-guiding moral directives, Stocker comes up with various examples, many of which mesh nicely with Cohen's framework. Take culpable inability, for instance. Someone who borrows money from a friend but then squanders her resources may find she is unable to repay it. Perhaps the loan was quite large and her financial irresponsibility has put her in a position where she is now forced to live paycheck to paycheck. If this is the case, then it is false to say that she has an action-guiding responsibility to repay. As noted earlier, action-guiding ought claims are sensitive to feasibility conditions. In spite of this, it presumably remains true that there is a sense in which she ought to repay her

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[129] Stocker himself expresses the issue somewhat differently. As he puts it, the worry about a pluralistic framework and its associated value conflicts is that ethics becomes "impractical – telling us to achieve all the conflicting values. Or it would be incomplete – not telling us which value to achieve. Or it would be non-realistic – denying that here there is a fact of the matter (Stocker (1992) pp. 85-6)." All of this seems to boil down to the same basic question, however: does value conflict preclude a correct course of action? For a lengthy list of relevant references, see Stocker (1992) chapter 4, note 1.

[130] Stocker (1992) p. 86.

loan. She agreed to do so, after all, and it is entirely her fault that she is unable to honor her agreement. The fact of culpable inability just means that her obligation functions in a different manner, i.e., as a justificatory ground. It might justify, for instance, the action-guiding requirement that she make amends to her friend in some way.[131] Perceived through the lens of Cohen's fact-insensitivity thesis, the fact of culpable inability plays two roles here. On the one hand, it prevents the obligation to repay from playing an action-guiding role. On the other hand, though, it is also a premise which, when bolstered by the obligation to repay, justifies the action-guiding requirement to make amends.

Cohen's fact-insensitivity thesis supports Stocker's argument by supporting the claim that some moral directives are non-action-guiding. Though theorists attached to action-guidance might be initially inclined to reject the idea that there are plausible non-action-guiding directives, the fact-insensitivity thesis indicates otherwise. Action-guiding principles, by virtue of their fact-sensitivity, logically depend upon non-action-guiding principles for their justification. As a result, theorists attached to action-guidance must make space for directives that serve other functions, particularly explanation, justification, and evaluation.

What about the claim that allowing for non-action-guiding directives deflects the irrationality objection to pluralism? This claim is as essential to Stocker's argument as the claim that there are plausible non-action-guiding directives. Though Stocker himself focuses on the idea that an action-guiding directive can conflict with a non-action-guiding directive without entailing irrationality, I am going to focus on conflicts between non-

[131] Stocker calls this an obligation owed *faute de mieux*, i.e., an obligation one has because one is unable to do what one ideally ought to do. See Stocker (1992) p. 96 and pp. 102-3.

action-guiding directives. Conflict between principles that express opposing fundamental values is, after all, the real issue for value pluralists. Furthermore, conflict between fact-insensitive and action-guiding principles does not fit very well within Cohen's framework. In Cohen's system, fact-insensitive principles function to explain the appeal of action-guiding principles. The latter's sensitivity to feasibility means they fall short of the former, but it would be strange to conceptualize that as a kind of conflict. Instead, for Cohen, they are two different, though connected, universes of discourse.

Understanding the nature of conflicts between fact-insensitive principles will be easier if we are explicit about their structure. Expressing them in the same form as action-guiding ought claims is useful as a kind of shorthand, but accurately conveying their normativity requires building in qualifications. Pablo Gilabert's article "Feasibility and Socialism" provides a helpful analysis of this issue. He points out that action-guiding claims have a different structure than fact-insensitive ones. According to him, action-guiding claims can be accurately formalized as A (a set of agents) ought to X (perform a certain action) in C (a particular set of circumstances). In contrast, fact-insensitive claims require a formalization that explicitly recognizes the significance of feasibility conditions and competing values. Unlike action-guiding claims, it is their implementation, rather than their content, which is sensitive to such considerations. The result is that a fact-insensitive ought is somewhat different from an action-guiding ought. To use Gilabert's formalization, a fact-insensitive ought claim states 'A ought to X in C to the extent that they reasonably can', where 'reasonably' recognizes the significance of

potentially conflicting values and 'can' recognizes the significance of feasibility constraints.[132]

When the contrasting structure of fact-insensitive and action-guiding claims is made explicit, it becomes apparent that conflicts between principles of the former kind are not analogous to conflicts between principles of the latter kind. Conflicts between action-guiding claims are more troublesome because they involve incompossibility. To endorse the claims 'A ought to X in C' and 'A ought to Y in C', in spite of it being impossible to jointly X and Y in C, is to endorse an inconsistent set of claims. If value pluralism required this, then it would indeed entail moral irrationality. Thankfully, however, it does not. To endorse the claims 'A ought to X in C to the extent that they reasonably can' and 'A ought to Y in C to the extent that they reasonably can', in spite of it being impossible to jointly maximize X and Y in C, is not to endorse inconsistent claims.[133] The pursuit of X and Y, though in tension, is not incompossible when the form of the ought claims representing them has a built in allowance for trade-offs. Determining an optimal balance may be tricky, but there is no reason to doubt in advance that a rational compromise between the two exists.

(c) Independence from Application Conditions?

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[132] See Gilabert (2011) pp. 55-7. For the quote, see page 57.

[133] Though it would technically be a mistake to say that an agent ought to jointly maximize X and Y in C if doing so is infeasible, it would not be a mistake to say that jointly maximizing X and Y in C is nonetheless desirable. Gilabert's formalization of fact-insensitive principles is specifically intended to capture their normativity. To do this, it builds in qualifications that represent the constraints imposed by feasibility conditions and competing values. These qualifications only constrain the sense in which an agent *ought* to X or Y in C, however. They have no bearing on the *desirability* of Xing or Ying in C. Jointly maximizing X and Y in C is not normative if infeasible, but it is still desirable, and thus our inability to do so is regrettable and probably worth combatting in so far as the relevant feasibility constraints are malleable. I'm grateful to Alistair Macleod and Michael Vossen for comments that drew my attention to this.

If what I have said thus far is sound, then Cohen's thesis supports a plurality of fundamental principles that are unconstrained by even hard feasibility conditions. As David Miller persuasively argues, however, there is a certain kind of factual relation that even our most fundamental principles putatively depend upon. Miller claims that fundamental principles are presuppositionally grounded by facts. In cases of presuppositional grounding, belief in a fact is implicit in a principle's application. Consider, for instance, the principle 'people should promote each other's autonomy'. It would be peculiar for a person to invoke this principle if she did not believe that human beings, unlike ants, are constituted such that they have the capacity to perform autonomous acts. Consider also the principle 'people should maximize utility'. In the various examples from chapter 2, this principle functions to explain the justificatory significance of the fact 'a selfish character makes utility maximization infeasible.' Even if it is ultimate, though, applying this principle to support 'selfish people should take measures to overcome their selfishness' presupposes that one takes certain facts to be the case, e.g., that people exist, that they experience pain and pleasure and have subjective interests, etc. Unlike the fact 'a selfish character makes utility maximization infeasible', which serves as a fellow premise in the entailment, these facts serve as eligibility conditions. They are implicitly assumed when 'people should maximize utility' is invoked as an explanation.[134]

Interestingly, Cohen does not exactly deny Miller's claim. With respect to the autonomy principle, he agrees that without the fact that human beings are capable of performing autonomous acts, a principle requiring the promotion of autonomy could

[134] For a discussion of presuppositional grounding, see Miller (2008) pp. 35-8.

serve neither an explanatory nor action-guiding function. What he denies is that application has anything to do with justification. In support of this claim, he points out that the relationship between the capacity for autonomy and a principle of autonomy promotion is precisely the same as the relationship between the former and a principle of autonomy frustration. Just as the ostensibly desirable promotion principle could serve no explanatory or action-guiding role absent belief in a world populated by autonomous beings, so too would the ostensibly undesirable frustration principle lack any form of application. But if the capacity for autonomy has the same relationship with its promotion as it does with its frustration, then how can it support either? Would not that be contradictory?[135]

Before analyzing Cohen's reply, it should be noted for the sake of clarity that a principle's application conditions are distinct from feasibility conditions. Though it is true that a principle whose application conditions are not satisfied cannot be implemented, the reason why this is so is different when infeasibility is the subject. In the former case, implementation is unintelligible, while in the latter, it is merely unachievable. By way of illustration, suppose one endorses a sufficientarian principle that mandates securing a minimum level of welfare for everyone e.g., at least 10 units per person. Suppose, furthermore, that there are barriers in place that obstruct implementing such a threshold, e.g., lack of political will. The idea of such a threshold obtaining in circumstances characterized by barriers to feasibility is perfectly intelligible. One might not be able to identify a series of accessible steps that would suffice to reach the desired end state, but the end state itself, i.e., a sufficient amount of welfare for all, is easy

[135] Cohen (2008) pp. 335-6.

enough to envision. In contrast, securing a sufficient level of welfare for all in circumstances where the 'all' in question have no capacity for welfare is incoherent. What would it mean to envision a minimum of 10 units of welfare per individual for a pile of rocks? Securing welfare for a pile of rocks is impossible, but not because it is infeasible. To put it roughly, implementation is impossible in cases of unsatisfied application conditions because, in such cases, implementation makes no sense. I would even go as far as to say that a principle's application conditions must be satisfied before one can intelligibly predicate either feasibility or infeasibility of it. Continuing with the present example, it would make little sense to say that there are insurmountable practical barriers to adequately increasing the welfare of the poorly off if the members of the population in question are not even capable of having poor welfare.

Having distinguished application conditions from feasibility conditions, let us return to Cohen's response to Miller. A possibility the former does not consider is that a principle's factual application conditions might also relate to it as specifically necessary conditions for justification. If the conditions for intelligible application relate to a principle's justification in this way, then there is nothing problematic about claiming that a fact presuppositionally grounds two contradictory principles. Since a necessary condition does not supply a reason for endorsement, no contradiction is produced if the same fact underlies opposite conclusions. Only a premise that relates to a conclusion as either partially or wholly sufficient for justification generates a contradiction if invoked in favor of its opposite. By way of example, the fact that Muhammad Ali gave George Foreman a sound thrashing in the eighth round of "Rumble in the Jungle" is sufficient reason to judge him the winner of the match. To say that it also suffices to justify

judging him the loser would clearly be contradictory. In contrast, the fact that he participated in the match goes both ways. Without having participated, he could not justifiably be judged either the winner or the loser.

Conceiving of presuppositional grounds as necessary conditions saves them from Cohen's objection, but it does not settle the dispute between him and Miller. Do we have a positive reason to think that the facts presupposed by a principle's applicability are also necessary for its justification? Or is Cohen right to say that justification and application are unrelated? Though I do not hope to settle this matter here, the discussion in section 2 (a) sheds some light on it. I noted there that fact-insensitive principles are transcendentally associated with action-guiding principles. They are needed to doxastically explain the appeal of context specific action-guiding principles and thus enjoy a species of theoretical invulnerability.[136] This is why the concept of a category error can persuasively be used to protect certain principles, e.g., the principle of luck-equality, against feasibility objections. Since the regulatory theorist's use of factual reasons commits her to principles that are not themselves justified by such reasons, she is forced to entertain the possibility that the principle of luck-equality is plausible if understood as fact-insensitive, i.e., as a principle that accurately captures the content of one of her fundamental values.

The fact-insensitivity thesis can only be invoked to protect principles that can at least potentially feature as explanations, though. This requirement seems to rule out principles whose application conditions are not satisfied. In a hypothetical world where, for example, it is a widely known truth that autonomy does not exist, it would not be

[136] See Stroud (1999) for a discussion of the relationship between transcendental argument and 'invulnerability'.

persuasive to tell someone that she should accept a principle of autonomy on the grounds that it has an explanatory role to play in her belief set. Similarly, a person who knowingly lives in a world where no one but herself has subjective interests (preferences) is not in a position to accept that a principle of equal opportunity for welfare doxastically explains any of her commitments. Absent belief in the facts it presupposes, a principle cannot be a candidate explanation for any of the agent's action-guiding beliefs. As a result, the fact-insensitivity thesis's insulating effect cannot extend to such a principle, as it is not even a possibility that one or more of the agent's fact-sensitive commitments presupposes it. Noting that application conditions are necessary conditions for at least *transcendental justification* yields a welcome conclusion. Ultimate principles, in so far as they are grounded transcendentally, are not justified for all possible worlds. They may not function as guides to action, but their justification is nevertheless tied to our beliefs about the world we inhabit. Incorporating this amendment makes the fact-insensitivity thesis more palatable without detracting from the theoretical significance I claim it possesses. Ultimate principles need not be justified for all possible worlds in order to be plural and independent of feasibility.

3. Fact-Insensitive Justification

(a) Internal and External Intuitive Judgments

In the previous section, I hope to have established that the fact-insensitivity thesis has considerable theoretical significance. If my arguments are sound, then the fact-insensitivity thesis both insulates conceptions of fundamental values from feasibility constraints and helps to establish that a plurality of such values can plausibly be asserted. In this section, I address an issue I have only briefly touched on thus far, namely the

justification of fact-insensitive principles. Though it is clear that fact-insensitive principles are not to be justified by factual reasons, pointing this out only makes one more curious. How exactly are they to be justified? This question can be answered in part (but only in part) via reference to a point I've already discussed at some length: the transcendental relationship between fact-insensitive principles and fact-supported, action-guiding principles. As we noted, fact-insensitive principles are a precondition for the possibility of factual reasons. As such, if, as regulatory theorists do, we maintain that our action-guiding principles are indeed supported by factual reasons, then the truth of this claim (if it is indeed true) establishes a category of principle the members of which are unsupported by factual reasons. However, though the transcendental argument for fact-insensitive principles supplies an important form of justification, it is a form that is not principle specific. It establishes the *type*, i.e., fact-insensitive principles in general (with the exception of those whose application conditions are not met), but it does not establish that any particular *token* is justified.

Before we address the issue of justifying specific fact-insensitive principles, we should first distinguish the *justification* of a fact-insensitive principle from its *discovery*. Discovery is an introspective process via which one uncovers the content of one's fact-insensitive commitments. The most obvious means of accomplishing it is via the recursive interrogation process modeled by Cohen's promise keeping example. Either by herself or with the help of others, the agent uncovers the factual reasons supporting her fact-sensitive principles, as well as the antecedent explanatory principles commitment to which explains the force of those factual reasons, until eventually the process terminates in one or more fact-insensitive principles. In addition to being a useful technique for

uncovering fact-insensitive principles, the recursive interrogation process, when conducted across a range of fact-sensitive commitments, also gives one a sense of how much any particular fact-insensitive principle explains.

Reaching the end of the recursive process is an important part of achieving introspective clarity, but it is not the end of it. Even once one has gained awareness of a fact-insensitive commitment, the precise content of that commitment may not be transparent. For example, what does it mean to say that 'people should maximize utility'? Does one mean that people should maximize the attainment of pleasurable experience? Or perhaps by 'utility' one means preference satisfaction? And are we interested in maximizing aggregate utility or average utility instead? Recursive interrogation might suffice to yield a value *concept*, but it will not necessarily supply the agent with an adequate *conception* of that value.

To get a handle on what offering a conception of a fundamental value involves, it will be helpful to contrast it with a similar though importantly different process: reflective equilibrium. As Rawls and others characterize it, justifying action-guiding principles via reflective equilibrium involves seeking coherence between them and one's considered intuitive judgements about particular cases of right and wrong. For instance, if consistently applying one's conception of the best all-things-considered principles of institutional design requires prescribing slavery in our present circumstances, then that conception is out of sync with an important moral judgement. Faced with this inconsistency, the theorist has two options. The first is to revise her conception in order to render it consistent with the judgement that slavery is wrong. Doing so is the best choice available when it can be done without running afoul of other important

judgements. Alternatively, she can discard the inconsistent judgement, thereby leaving her original principles unmodified. This, however, should only be done if modification would be too costly.[137]

The above characterization of reflective equilibrium leaves out many of the relevant theoretical complexities, e.g., the filtration process an intuitive judgement must pass through in order to qualify as 'considered' and the distinction between 'wide' and 'narrow' reflective equilibrium.[138] However, for our purposes we can leave such complexities aside and focus on the main feature with respect to which reflective equilibrium, generally conceived, differs from the introspective method in question, namely the status of the intuitions one hopes to attain coherence with. With reflective equilibrium, the intuitions one is interested in achieving coherence with are those about what, all-things-considered, is right or wrong to do in particular situations we could plausibly find ourselves in. Such intuitions are important to take account of when adopting action-guiding principles, for a principle that runs afoul of them will ostensibly fail to provide morally adequate guidance in at least some cases. In contrast, the intuitions of interest when offering a conception of a fundamental value are, on the one hand, not restricted to those we have about situations we could plausibly find ourselves in (some intuitions of interest may be about strictly hypothetical scenarios). On the other hand, though, they are also fairly narrow. This means, in part, that they will tend not to be normatively decisive except in the *ceteris paribus* sense. It also means that there are

[137] For Rawls's characterization of reflective equilibrium, see Rawls (1971) pp. 19-21 and pp. 46-53. For an excellent collection of essays on both the theorization and application of reflective equilibrium, see Daniels (1996).
[138] Rawls (1971) pp. 47-50. See also Rawls (1974-75) p. 8.

many intuitive judgements which, though normatively significant, are external to the value in question and thus irrelevant to the project of articulating a conception of it.

Let us draw on a particular example. Consider the well-known conception of personal autonomy articulated by Harry Frankfurt in his piece "Freedom of the Will and the Concept of a Person."[139] According to Frankfurt, a necessary and sufficient condition for an action's autonomy is that it flows from a volition that is itself the object of a second-order volition, i.e., an action is autonomous if and only if the agent, upon critical reflection, decides that she wants to want to perform it.[140] Conceiving of autonomy in this way effectively builds upon Hume's classic form of compatibilism.[141] It requires that the 'nature' (first order desires) in accordance with which one acts be endorsed by the agent herself, thereby removing much of the counter-intuitiveness associated with the idea that one is free so long as one is not prevented from acting in accordance with desires that have themselves been determined by biological and sociological forces.

Since its publication in 1971, Frankfurt's conception of personal autonomy has been subjected to a significant amount of critical attention, much of which has focused on the idea that his subjective criterion must be (a) modified, and/or (b) supplemented with one or more objective criteria.[142] Without such modification and/or supplementation, the theory is unable to deal with a range of cases where the process through which one forms second order volitions is tainted by autonomy undermining influences, e.g., brainwashing.

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[139] Frankfurt (1971).
[140] Frankfurt (1971) pp. 14-20.
[141] See Hume (1993) pp. 53-69.
[142] See, for example, G. Dworkin (1976); and Christman (1991).

To amend a conception of autonomy in response to such cases is eminently reasonable. Brainwashing straightforwardly undermines the agent's ability to perform autonomous acts. As such, it is important to ensure that the content of one's criteria for autonomy not require deeming such cases to be compatible with autonomous action. Adding a condition that, for instance, places restrictions upon the process via which second order volitions are formed is one way to try to avoid this problem.[143] However, there are considerations pertaining to the formation of second order volitions which, though normatively relevant, need not be taken into account when formulating a conception of personal autonomy. For example, almost no one has an entirely optimal set of first order desires. Some desires would, if acted upon, cause harm to oneself (and perhaps others) over either the short or long term, e.g., a desire to over-indulge in sweets, drink too much, etc. From an outsider's standpoint, it seems clear that the agent ought not endorse, or subsequently act upon, desires that will predictably cause harm. However, cases where she fails to do so are not counter-examples to the claim that endorsement is necessary and sufficient for autonomy. Establishing that to endorse a desire for excessive chocolate consumption is to endorse something harmful to one's health is not to establish that the actions that flow from said desire are non-autonomous (at least not without assuming a considerable amount of philosophical artifice in the background). Instead, it draws attention to the fact that the action lacks another virtue, probably prudence. Considerations concerning which first order desires are consistent with prudence, though normatively significant, are ostensibly external to a conception of autonomy. They should be taken into account the by the agent when deciding which

[143] G. Dworkin (1976) pp. 25-6.

desires to identify with, as should considerations concerning which desires reflect virtues such as compassion, loyalty, etc., but they are irrelevant to the criteria that constitute autonomous actions.

If Cohen is right to claim that justice is a fundamental value (and I am not yet arguing that he is), then articulating its content with a fact-insensitive principle requires one to test one's conception of this value against one's intuitive judgments, but not all judgments are relevant. Many of the intuitive judgments trotted out in opposition to, for instance, egalitarian principles of justice, are ostensibly external.[144] For instance, consider the judgment that 'levelling down ought to be avoided, all-things-considered'. It is often thought to be a serious problem for a theory of justice if it requires us to make everyone worse off than they previously were. Though levelling down is of course to be avoided, is it to be avoided specifically because it is *unfair* for everyone to have less for the sake of equality? This isn't obvious. A far more obvious explanation is that we care about efficiency and levelling down is *guaranteed* to be inefficient. It is certainly always inefficient from the standpoint of Pareto-optimality, as any state of affairs in which there is unrealized potential for some to have more without others incurring a loss is Pareto-sub-optimal. More strikingly, levelling down is also always inefficient from the standpoint of a conception that mandates maximizing either the aggregate or average amount. Though losses for some people are consistent with increasing aggregate and average amounts in cases where those losses are offset by greater gains for other people, levelling down involves, by definition, losses to all shareholders. It is thus analytically true that levelling down is inefficient from the standpoint of all three of the above

[144] For Cohen's comments on what he takes to be external to justice, see Cohen (2008) pp. 156-61 and pp. 315-36.

conceptions of efficiency.[145] What's more, the cost involved in levelling down is not merely an opportunity cost. Sometimes when we speak of an outcome as being inefficient, what we mean is that it is less efficient than some other possible outcome we could have achieved, e.g., increasing the sum of a good by 20 units might appropriately be thought of as inefficient if we could have increased it by 40 units instead (though perhaps limiting ourselves to a 20 unit increase was preferable if it allowed us to achieve some other benefit, e.g., greater distributive equality). When we level down, though, the loss experienced is not an opportunity cost. Everyone has less than they originally did, so levelling down is a pure cost.

In contrast with the judgment that 'levelling down ought to be avoided, all-things-considered', there are a range of intuitive judgments that do pertain specifically to fairness and are thus relevant to discovering the content of justice. As we noted earlier, fairness pertains to distributive information across individuals, i.e., to who has what and why. Thus for a judgment to be appropriately deemed a judgment of fairness, its application must presuppose information about individual shareholders, e.g., information about the relative size of their shares, personal information about particular shareholders, etc. For example, the abstract judgment that 'it is unfair for the talented to have a greater share of resources on account of genetic fortune', when applied in criticism of a particular distribution, presupposes a certain amount of information about that distribution's individual shareholders. More specifically, it presupposes the following details: (a) ordinal information about individual shares, i.e., that some shareholders have

[145] Though as Christine Sypnowich points out, levelling down with respect to resources in particular can arguably have a number of benefits, .e.g., it can increases levels of trust and civility between citizens. See Sypnowich (2003) pp. 338-9.

more than others; (b) ordinal information about the physical and/or mental characteristics of shareholders, i.e., that the individuals with larger shares have superior natural talents; and (c) information about the extent to which shareholders are responsible for their differing shares, i.e., that their differing shares are in part traceable to differences of talent and that talents are largely the product of genetic luck. The judgment that it is unfair for someone to have more than others on account of natural talents is thus highly individual. By contrast, the judgment that 'levelling down ought to be avoided' is impersonal. It does not presuppose any information about the relative sizes of shares (Which shares are larger? By how much?), about the characteristics of shareholders (Who's the most deserving? Who has the greatest need?), or about the origins of shares (Are they traceable to genetic luck? To fully consensual transactions?). A judgment's application needn't presuppose all these kinds of individualized information in order to qualify as a judgment of fairness. It must, however, presuppose some of them. If it doesn't, then it is not a judgment about distributive information across individuals, and thus not a judgment of fairness. Taking note of this is important. Only judgments of fairness are internal to the project of articulating a criterion necessary and sufficient for the fairness of distributions, or in other words, a conception of fact-insensitive distributive justice.[146]

For the sake of clarity, it should be noted that the matter of internal and external intuitions is not about facts. To say, for example, that *the judgment 'levelling down ought to be avoided, all things considered' is external to articulating a fact-insensitive principle of justice* is not the same as saying that *justice is insensitive to facts that put equality and efficiency in tension with each other* e.g., the fact that in the absence of an egalitarian

[146] See Cohen's comments in Cohen (2008) pp. 6-8 and pp. 300-2.

ethos the talented members of a society will tend to be willing to accept economic incentives in return for exercising and developing their productive talents.[147] The second of the italicized statements concerns a fact that affects the extent to which realizing two particular values in unison is feasible, and it is thus covered by our earlier discussion in section 2 (a). The first of the italicized statements, in contrast, concerns the categorization and weighting of an intuitive moral judgment. 'Levelling down ought to be avoided, all things considered' is, first, a judgment grounded in the value of efficiency. We deem it important to avoid levelling down specifically because levelling down is inefficient. It is also a judgment with considerable weight. Levelling down is not just inefficient, but so inefficient that we should not level down even if to do so comes at the expense of important values, e.g., at the expense of fairness.[148] Of course, the judgment that 'levelling down ought to be avoided' is not entirely unrelated to facts. Applying this judgment to particular cases in practice presupposes facts about the lack of some good within a state of affairs relative to one or more alternative states of affairs. That intuitive judgments have certain factual application conditions shouldn't be surprising, considering that even fact-insensitive principles have application conditions.

What I've said thus far hopefully suffices to establish the plausibility of distinguishing between intuitive judgments that are internal to fairness and those which are external to fairness. Though I've mostly spoken of the distinction between efficiency

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[147] For Cohen's elaborate, canonical discussions of incentives and justice in personal choice, see Cohen (2008) chapter 1 and chapter 3.

[148] Though this is not always appreciated by his readers, Cohen does not advocate levelling down. In circumstances where a society's ethos makes it necessary to choose between equality and levelling down, Cohen thinks equality must give way to efficiency. He just thinks it is important to recognize the contingency of the circumstances that make this necessary, as well as the ineliminable regret associated with sacrificing equality for the sake of efficiency. For explicit discussion of both the unfairness and simultaneous all-things-considered moral importance of giving way to efficiency is some circumstances, see Cohen (2008) pp. 315-23

and fairness thus far, I also think that we can (and do) isolate judgments that belong to other discrete values, e.g., autonomy. Furthermore, I think that any effort to articulate a conception of a particular fundamental value must be informed by a sense of which judgments are internal to that value. This holds true regardless of whether the value one seeks to theorize is fairness, personal autonomy, efficiency, etc.

(b) Are Internality and Externality Post-Theoretical?

At this point, it might be objected that whether a judgment is internal or external to a value depends on one's conception of that value. According to my objector, it is not possible to pre-theoretically determine what does or does not belong to a value. Such a distinction putatively presupposes knowledge of the value's content, and if we know the value's content, then we already have a conception of it in mind when we claim that a judgment is consistent or inconsistent with it. Consider once more my claim that considerations of efficiency are external to fairness. Might there be a conception of fairness under which fairness and efficiency coincide with each other? There is, in fact, such a conception. A number of theorists have noted that it is possible to interpret utilitarianism as a conception of fairness. How so? Fairness yields the maximization of subjective welfare when we understand fairness to be a matter of giving equal weight to the welfare of every shareholder.[149] When fairness is understood to require equally weighing the promotion of each shareholder's welfare, the result is that achieving a fair distribution becomes a matter of achieving an efficient one. On a utilitarian understanding of fairness, anytime there is a choice to be made about distributing a unit of some good, e.g., income, fairness will always require that the unit in question be given

[149] See Sen (1979) pp. 198-205; Dworkin (2000) pp. 62-4; and Kymlicka (2002) pp. 32-3.

to the person who will derive the most utility from it. To do otherwise would require according the promotion of that person's utility less weight then the promotion of others' utility, and is thus tantamount, on the utilitarian conception of fairness, to treating that person unfairly. Our objector maintains that when fairness is understood in a utilitarian manner, it is then incorrect to insist upon a rigid distinction between considerations of fairness, on the one hand, and considerations of efficiency, on the other. On the utilitarian view, fairness and efficiency go hand in hand.

I have two points to make in reply to the above objection. First, using a conception of fairness to determine what counts as a judgment of fairness puts the cart before the horse. It is methodologically unsound to say that "seemingly unfair situations X, Y, and Z actually aren't unfair because my theory says so."[150] A pre-theoretical sense of what is or isn't internal to fairness, of what is or isn't internal to autonomy, etc., is necessary before one can go about theorizing the relevant value, and if a particular conception of a value runs afoul of a relevant pre-theoretical judgments, then so much the worse for that theory. Of course, if the theory is in all other respects a compelling one, then we might decide to treat the judgments that conflict with it as outlier judgments that should be put aside (though not forgotten about) for the sake of a principle that successfully coheres with most other relevant judgments. However, to maintain that our pre-theoretical judgments of fairness are not really judgments of fairness unless supported by our chosen principle of fairness is to deprive us of the materials needed to fashion a justified conception of fairness in the first place. After all, if the pedigree of

[150] Alistair Macleod has made similar points on one or more occasions when discussing how to go about doing philosophy.

our judgments of fairness depended upon our theory of fairness, then they could not be invoked in support of our theory of fairness.

Whatever prima facie plausibility my objector's objection has is, I think, traceable to a failure to appreciate how useful value *concepts* can be. Though my objector is right to say that we need to know something about a value before we can say which judgments belong to it, we do not need to have anything like a worked out *conception* of it in advance. It suffices to have a general sense of what that value is about. Of course, it is always possible for a dispute to emerge over whether or not a judgment is internal. The reason such dispute is possible is because we don't always have a perfectly adequate, pre-theoretical understanding of the value concepts we employ. When a dispute over the internality of a judgment emerges, there's only one way to resolve it: conceptual analysis. It is through conceptual analysis that a rough understanding of a value concept becomes more refined, and thus it is a tool that can be used to draw the boundary between judgments internal and external to a value with as much precision as possible.

Second, with respect to my objector's particular example, namely the example of utilitarian fairness, we need to be clear about the sense in which fairness and efficiency coincide here. On the one hand, it is true that implementing the utilitarian conception of fairness coincides with implementing a maximum average utility conception of efficiency. That utilitarianism is able to marry fairness and efficiency in this way makes it an aesthetically pleasing theory of morality. It is false, however, to say that a consequence of this marriage is the elimination of the distinction between fairness and efficiency. Equality of weight when promoting individuals' welfare, as a conception of fairness; and the maximization of average welfare, as a conception of efficiency; are still

two different conceptions, and the values behind them are still two different values. As a result, one can consistently reject one of these conceptions and yet embrace the other. Consider the utilitarian understanding of fairness in particular, namely that a fair distribution is one that gives equal weight to the promotion of each person's welfare. We should still distinguish between considerations of fairness and efficiency when evaluating this conception and it is specifically considerations of fairness that should be appealed to. For example, it might be thought that intuitive judgments about need support this conception. Those who are, for example, hungry, get far more utility out of food than those who have had their fill, so wouldn't it be unfair if we redistributed food in such a way that those who are hungry have little of it and those who are full have plenty? However, a bit of sustained reflection reveals that judgments about need often undermine this conception too, as needs can sometimes be very costly to meet. Someone with a severe congenital disability might require a great a deal of resources in order to function at the same level as those who are not disabled. Is it fair for someone born with such a disability to undergo the associated hardships without any help from the state? Most people would say that it isn't, and yet that's not the result utilitarian fairness yields. If promoting a disabled individual's utility requires a large amount of resources, resources that could be used to generate a greater amount of utility if distributed elsewhere, then utilitarian fairness would deprive the disabled individual of support. For some people, including myself, the judgment that it is unfair to neglect those with costly congenital disabilities serves as a decisive strike against the utilitarian conception of fairness.[151]

[151] See Sen (1979) pp. 202-5.

What about the maximum average utility conception of efficiency? When the utilitarian conception of fairness falls, does the maximum average utility conception of efficiency fall with it? Not necessarily. Efficiency is a value distinct from fairness. What is more, just as considerations of efficiency are external to fairness, so too are considerations of fairness external to efficiency. As a result, if maximizing the average amount of utility runs afoul of the above mentioned disability objection, then it makes sense to say that it has unfair implications. Presumably, however, it would not make sense to judge either a distribution or a society to be inefficient because it neglects those with expensive needs. We should recall that the concept of efficiency pertains to increasing the amount of a good. Total aggregate happiness, Gross Domestic Product: these are the sorts of things we might use to evaluate a society's efficiency. Does maximum average utility serve as an adequate evaluative criterion in this respect? If we want to determine the extent to which maximum average utility is an adequate judge of a society's efficiency, then we should draw specifically on judgments of efficiency in order to make the evaluation. For example, if we wanted to decide between a maximum aggregate utility conception of societal efficiency and a maximum average utility conception of societal efficiency, then we might compare a society with a large aggregate amount of but low average amount of utility, e.g., one with a large population of miserable people, to a society with a high level of average utility but low level of aggregate utility e.g., one with a small population of happy people. Does it make sense to say that a society with a very large but generally miserable population is more efficient than a society with a fairly small but generally happy population? Presumably not; and yet a maximum aggregate utility conception of societal efficiency has this consequence.

Understanding efficiency in terms of average instead of aggregate amount thus seems wise. The most obvious problem with using maximum average utility as a criterion to evaluate the efficiency of a society is with respect to the 'utility' part of it, I think, rather than the 'maximum average' part of it. This is because an impoverished society might nonetheless have a high average level of subjective welfare if its citizens have successfully adapted their preferences to their dismal circumstances, and yet to think of a society as efficient because its citizens have low expectations would be strange.[152] Thus while I think it's plausible to understand efficiency in terms of maximum average amounts, I don't think it's plausible to equate the efficiency of a society's distribution of subjective welfare with the efficiency of the society itself. There are other goods that must be efficiently promoted as well in order for a society to be efficient on the whole.

By way of concluding remarks on the subjects of fairness and efficiency, I'd like to point out that whether our conceptions of fairness and efficiency coincide or come apart has significant normative implications. If fairness and efficiency require the same thing in practice, e.g., maximizing the average amount, then even a radical value pluralist has a very powerful normative reason to pursue the maximization of whatever quantifiable good she thinks these values should be applied to. This reason might still be a defeasible one, but if the demands of fairness and efficiency exhaustively coincide, then it's likely that many of the competing considerations they could run up against will be trumped. The upshot for political practice would be that the content of the regulatory principles we adopt should be far more expressive of both fairness and efficiency than they otherwise would be. In contrast, if fairness and efficiency come apart such that they

[152] For a seminal analysis of adaptive preferences, see Elster (1982).

come into conflict with each other, then the extent to which either should be justifiably implemented in the content of our regulatory principles will be far more limited.

In future chapters, I assume that fairness and efficiency sometimes conflict. This assumption is partially grounded in my endorsement of a conception of fairness that sometimes conflicts with efficiency regardless of which of the three understandings of efficiency one prefers. In chapter 4, I'll argue that the principle of luck-equality supplies a compelling conception of fact-insensitive distributive fairness, and in chapter 5, I will extensively discuss issues surrounding the contingent conflict between fairness and efficiency associated with the character of a society's ethos.

(*c) Some Remaining Issues*

A noteworthy implication of my account of fact-insensitive justification is that conceptions of fundamental values produce, in the first instance, *is* statements rather than *ought* statements. They aim to supply conditions necessary and sufficient for the application of value predicates and are thus primarily concerned with evaluative descriptions, rather than normative directives. For example, a principle of fact-insensitive distributive fairness is concerned with specifying conditions the obtainment of which both guarantees and is required for the appropriateness of claiming that a distribution of X *is* fair. Similarly, a principle of fact-insensitive personal autonomy is concerned with specifying conditions the obtainment of which both guarantees and is required for the appropriateness of claiming that an action *is* autonomous. If I'm right, then the understanding of fact-insensitive justification I've expounded poses an issue for Cohen's fact-insensitivity thesis. As we noted in chapter 2, Cohen defines principles as ought statements and (correctly) claims that only ought statements can explain why

normative facts have the justificatory significance they do. As a result, it seems important that conceptions of fundamental values yield ought statements, else they be unable to serve their explanatory function.

The solution to the above problem is straightforward enough, I think. That which plays the explanatory role is not the value conception itself but rather a semantically entailed normative correlate of the form discussed earlier in this chapter (specifically in section 2 (b) (ii)). This means, for instance, that the statement 'a distribution of Y is fair if and only if it satisfies condition Z' semantically entails a statement of the form 'A ought to X in C to the extent that they reasonably can'. More tangibly, the statement 'a distribution of benefits and burdens is fair if and only if all inequalities are traceable to choice' might reasonably be thought to semantically entail the principle 'the better off ought to compensate the less well off in circumstances of unchosen inequality to the extent that they (the better off) reasonably can'.[153] In providing this solution, I take myself to be making an intuitively obvious claim. It strikes me as patently true that evaluative statements such as the above mentioned ones provide reasons for action, and that the normativity of those reasons can be cashed out via a formalization along the lines Gilabert suggests. However, accepting my solution does, admittedly, require accepting that, contra Hume, one can semantically derive a particular kind of 'ought' from an evaluative 'is'. As a result, my understanding of what it means to offer a conception of a

[153] Will Kymlicka has noted that what I say about semantically entailed normative correlates probably isn't true of all fundamental values. For example, it may be fundamentally desirable for a providential God to exist (or at least many people believe as much), and yet the desirability of this existence does not seem to entail any normative correlate. If so, then what I'm after here is presumably a sub-class of fundamental values. I think Will is probably right about this. The desirability of some values may operate in such a way that they have no normative upshot. The fundamental values of interest to moral and political philosophers do have normative upshots, of course, but the point that my account may only capture a sub-class of values is well taken.

fundamental value is not meta-ethically neutral. Thankfully, my understanding of fact-insensitive justification is not a part of the fact-insensitivity thesis, which limits itself to the claim that principles justified by factual reasons explanatorily presuppose one or more principles not justified by factual reasons. The upshot is that despite lacking meta-ethical neutrality, my understanding of fact-insensitive justification does not undermine the meta-ethical neutrality of the fact-insensitivity thesis itself. I posit that Cohen would have no reason to object to it.

There is an important question about whether the above-described method for articulating a conception of a fundamental value should be categorized as a form of justification or merely as another leg of the discovery process. On the one hand, for a subjectivist who thinks that all ought claims are hypothetical imperatives, i.e., that they depend on the contents of the agent's desire set, accurate introspection is seemingly sufficient for justification. Discovering that one is committed to a principle with specific content X is equivalent to discovering that one has a desire to X, and that would be enough to establish that one ought to X in the relevant, desire contingent sense. Cohen, however, is not a subjectivist, and yet it appears he would consider the above described process to be justificatory. In his discussion of how he understands the distinction between justificatory facts and factual application conditions, he claims that the former are justificatory and the latter are not because only the former bear on a principle's content.[154] Since the intuitive judgments used to articulate a conception of a fundamental

[154] See Cohen (2008) pp. 334-6.

value also bear on content, it stands to reason that he would deem them justificatory as well.[155]

It seems plausible that there is a relationship between introspective clarity and justification. Accurately answering the question "What are my fact-insensitive principles?" may be a sensible first step to answering the question "Which fact-insensitive principles are justified?" However, it also seems important to avoid collapsing the two together. The rationale for this is straightforward enough: the intuitive reasons we have for thinking that a fundamental principle to which one is committed has content A rather than content B or C are not necessarily reasons for thinking that objective morality requires adherence to the principle.

The relationship between introspective clarity and justification is relevant, but too big a question to be considered here. For now, I will limit myself to remarking that the problem faced by my account of fact-insensitive conceptions is not a unique one. Whatever distance lies between justifying a fact-insensitive principle and achieving coherence with the intuitive judgments internal to it, that very same distance also lies between justifying an action-guiding principle and achieving coherence with one's all-things-considered intuitions about right and wrong action. I thus leave questions about it to those more thoroughly concerned with meta-ethics and turn, in the next three chapters, to questions comfortably within the domain of political philosophy.

4. Conclusion

[155] Cohen's brief comments on justification suggest that fact-insensitive principles are justified via reflective equilibrium. Other comments he makes suggest that the introspective method I describe is what he had in mind, though. See Cohen (2008) p. 243, footnote 19, as well as the passages cited in footnotes 144 and 146 of the present chapter.

In this chapter, I hope to have demonstrated that the fact-insensitivity thesis is more significant than it might seem at first blush. If my arguments are sound, then the fact-insensitivity thesis, even if it does not establish a category of principle the members of which are justified for all possible worlds, provides considerable support for the claim that a plurality of fundamental, feasibility-independent principles is necessary to explain our action-guiding commitments. As we've noted, independence from feasibility is established via the transcendental relationship between fact-insensitive principles. Those who justify their action-guiding principles with factual reasons must admit, as a matter of sheer logic, that fundamental normative principles are justified independently of factual reasons. As a result, they must also admit that a principle vulnerable to feasibility and value conflict related objections is nonetheless justified so long as it adequately captures the content of one of her fundamental values (or, more accurately, so long as it is the semantically entailed normative correlate of an evaluative criterion that does so).

Plurality, in turn, was supported by noting that any principle a fact-insensitive monist puts forward as the only fact-insensitive principle cannot plausibly be thought to be the only fact-insensitive principle if its full implementation across hypothetical scenarios is ever undesirable. In any scenario where implementation is undesirable, there must be other fact-insensitive principles occupying the space of desirability that account for this. What's more, it was argued that once the form of a fact-insensitive 'ought' is made explicit, it becomes clear that conflict between fact-insensitive principles does not involve incompossibility. Understanding value pluralism in terms of a plurality of contingently conflicting fact-insensitive principles avoids the moral irrationality entailed

by conflict between action-guiding principles, thus robbing a monistic alternative of much of its theoretical appeal.

Over the course of the next two chapters, I'll consider some of the implications of fact-insensitivity for issues of justice. In both chapters, the claims I make are hypothetical. In chapter 4, I'll argue that *if* principles of justice are fact-insensitive, then luck-egalitarianism is a plausible conception of fundamental distributive justice. In chapter 5, I'll argue that *if* principles of justice are fact-insensitive, then the same principle of fundamental distributive justice (a principle of luck-equality, on my view) applies to both the institutional and personal contexts. It is not until my final chapter that I'll argue justice really is fact-insensitive.

Chapter 4

Fact-Insensitive Luck-Egalitarianism

1. Introduction

In the previous chapter, I fleshed out the significance of Cohen's fact-insensitivity thesis. More specifically, I argued that it supports two claims: (a) that fundamental principles are independent of feasibility and (b) that there is a plurality of fundamental principles (not just one). However, I also argued that an appreciation for the manner in which the fact-insensitivity thesis insulates fundamental principles from feasibility objections suggests that facts about applicability, contrary to what Cohen claims, are related to a fact-insensitive principle's justification. A particular kind of justification, specifically the transcendental kind, can only extend to principles whose factual application conditions are satisfied. Finally, in the last section of the chapter, I explained what's involved in articulating a conception of a fundamental value. The process I described is similar but not identical to reflective equilibrium.

In the present chapter, my goal is to defend the claim that luck-egalitarianism is plausible when the principle of luck-equality is understood to be a conception of a fact-insensitive, fundamental value. Throughout, I assume that the value fact-insensitive luck-egalitarianism embodies is appropriately dubbed 'fundamental justice'. It is not until chapter 6 that I attempt to justify this assumption.

I begin the present chapter by explaining the theoretical advantages and problems associated with luck-egalitarianism. I suggest that luck-egalitarianism's relative popularity among egalitarians is attributable to its coherence with certain core intuitive

judgments, e.g., the judgment that it's unfair for one's endowment of natural talents to determine one's life prospects, the judgment that it's fair for those who choose leisure over work to have less than others, etc.[156] I also go over the major criticisms critics have launched against it in recent years, e.g., the criticism that luck-egalitarianism expresses a disrespectful attitude towards those it would seek to assist, that it treats victims of bad option luck with excessive harshness, etc.

In section 3, I explain why the aforementioned advantages are specifically advantages for a conception of *fundamental justice*, and why the aforementioned problems are, in many cases, specifically problems for a conception of *regulatory justice*. For purposes of understanding my argumentative strategy in this section, it will be helpful for the reader to recall Aristotle's distinction between narrow and broad justice, i.e., the distinction between a sense of the word 'justice' that corresponds to a part of moral rightness, specifically the part pertaining to fairness, and a sense of the word 'justice' that corresponds to rightness in general.[157] In many places I contrast that which is *fair* with that which is *right* and that which is *unfair* with that which is *wrong*. Furthermore, I treat that which is fair but wrong as consistent with fundamental but not regulatory justice, and that which is right but unfair as consistent with regulatory but not fundamental justice. As we saw in the introductory chapter, and as we'll see in chapter 5 and chapter 6, the distinction between fundamental and regulatory justice is not entirely the same as the distinction between narrow and broad justice. It would be more accurate to say that the former distinction, when coupled with the claim that only fundamental justice, properly speaking, *is* justice, is a particular interpretation of the latter distinction.

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[156] See Kymlicka (2002) pp. 75-9; and Kymlicka (2006) pp. 17-8.
[157] Aristotle (1998) Book V, Sections 1-2. See also Waldron (2003) p. 274.

The reason I think this is because justice theorists concerned specifically with regulatory justice, e.g., Rawls, have their own view of justice's narrowness in mind, one which attempts, to an extent, to close the gap between fairness and rightness. For the moment, however, it suffices to treat the above mentioned pair of distinctions as identical.

In section 4, I consider some defenses of luck-egalitarianism that attempt to respond to major criticisms without sacrificing the theory's capacity for action-guidance. I argue that whether these defenses succeed is questionable. In particular, Kok-Chor Tan's position seems unable to deal with the levelling down problem, and Ronald Dworkin's position seems unable to adequately deal with the harshness objection. I also argue that even if these theories were successful, an action-guiding version of luck-egalitarianism would not obviate the need for a distinct, fact-insensitive version of the theory. As we'll see, only a theory that coheres with all our intuitive judgments of *fairness*, including those which come apart from *rightness*, can plausibly supply a criterion the satisfaction of which is necessary and sufficient for the fairness of a distribution.

Finally, in section 5, I explain some of the practical uses of fact-insensitive luck-egalitarianism. Much of my focus is on ways in which the principle of luck-equality can inform factually contingent improvements to the difference principle. For example, I note that eliminating existing inequalities between social groups creates the conditions needed to implement a greater degree of fairness without sacrificing respect. With that achievement accomplished, it becomes morally preferable to distinguish between imprudent members of the worst off group and those who are worse off through no fault of their own. Though a basic needs safety net should nonetheless be employed to

safeguard the imprudent, I will argue that inequalities should maximally benefit only those who are worse off due to bad brute luck. Before I get into this and the other arguments mentioned above, though, a couple of prefatory remarks are in order.

First, this chapter is, in a sense, myopic. It is concerned with the content of a single fundamental value, i.e., fundamental justice, and thus it only discusses other fundamental values in cases where the implementation of justice comes into conflict with them. My neglect of other fundamental values should not be taken to mean that I take them to be unimportant. Quite the contrary, the fact that I think fundamental justice should sometimes be compromised in cases of conflict presupposes that other values matter too. All my neglect signifies is this chapter's limited scope. Here, I'm interested in defending luck-egalitarianism as a plausible conception of fundamental justice. Articulating conceptions of other values is a project for a thesis other than mine.

My second remark concerns the term 'implementation'. Though I speak in various places of implementing fact-insensitive luck-egalitarianism, the sense of 'implementation' I have in mind is the indirect sense embedded in the relationship between fundamental principles and regulatory principles. Thus, for instance, when I claim that the implementation of fairness must give way to compassion when the imprudent are unable to meet their basic needs, what I mean is that the distributive regulatory principles we adopt in light of considerations of fairness and compassion (and presumably other considerations too) must not fail to compensate the imprudent when the satisfaction of basic needs is at stake. Regulatory principles that compensate the imprudent needy are less fair than they otherwise would be but are also better, all-things-considered.

2. Luck Egalitarianism: For and Against

(a) The Appeal of Luck-Egalitarianism

Originally given its name by critic Elizabeth Anderson,[158] luck egalitarianism, broadly speaking, is the view that inequalities traceable to choice are just, while those traceable to luck are not. Its proponents maintain that justice supports compensating a less well-off individual insofar as her disadvantaged status is no fault of her own.[159] Though this characterization makes the view sound rather simple, there are, predictably, a number of theoretical complexities attending it. One might wonder, for instance, how to address inequalities that emerge as a result of choice and luck in combination, e.g., inequalities between those who intentionally expose themselves to risky situations. Ronald Dworkin's distinction between option luck and brute luck speaks to this, the general idea being that the impact of bad luck needn't be compensated for insofar as it's associated with the outcome of deliberate gambles.[160] A second issue pertains to the metric of equality, particularly whether egalitarians should be concerned with luck's impact on resource possession, subjective welfare, or on the attainment of something broader than either of these. Take disabilities for instance. Are disabilities of concern to egalitarians specifically because of the material costs they impose? Or are they problematic because

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[158] See Anderson (1999) pp. 287-337.

[159] The authors in the literature don't always use precisely this language, but it's generally not far off. According to Dworkin, "On the one hand, we must, on pain of violating equality, allow the distribution of resources at any particular time to be (as we might say) ambition-sensitive…But on the other hand, we must not allow the distribution of resources at any moment to be endowment-sensitive..." See Dworkin (2000) p. 89. Similarly, Richard Arneson said of his own position that, "When persons enjoy equal opportunity for welfare...any actual inequality of welfare in the positions they reach is due to factors that lie within each individual's control." See Arneson (1989) p. 86. Likewise G.A. Cohen describes the thrust of his position as aiming "…to eliminate *involuntary disadvantage*, by which I (stipulatively) mean disadvantage for which the sufferer cannot be held responsible, since it does not appropriately reflect choices that he has made or is making or would make." See Cohen (1989) p. 916.

[160] Dworkin (2000) pp. 73-83. For some recent literature questioning the idea that inequalities produced by option luck are, from a luck egalitarian standpoint, entirely just, see Barry (2008); and Cohen (2011a).

they reduce a disabled individual's opportunities for preference satisfaction? Alternatively, egalitarians may wish to conceptualize the problem as a deprivation of physical or bodily resources. Finally, combinations of the above views are also possible, e.g., disabilities might be viewed as problematic from an egalitarian standpoint in so far as they represent a deprivation of physical resources, as well as in so far as they impact one's opportunities for preference satisfaction.[161]

Differences between luck-egalitarians aside, understanding why luck-egalitarianism has been an appealing theory of justice for many philosophers is easier when it is compared to Rawls's theory.[162] Arguably, much of the appeal of Rawls's theory of justice lies in the way in which it combines a commitment to equality with a commitment to responsibility. On the one hand, it expresses commitment to equality via a principle of equal opportunity that not only prohibits discrimination but positively addresses the effects of social inequalities on citizens' opportunities to succeed. On Rawls's view, if two people born into different socio-economic groups have the same set of ambitions and talents, then they should also have the same set of opportunities. For society to allow the socio-economic groups they were born into to create inequality of opportunity between them would be unfair, as the circumstances of one's birth is not a matter for which one can be held responsible. For similar reasons, Rawls's commitment

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[161] The first of these views is Dworkin's, the second Arneson's, and the fourth Cohen's. See Dworkin (2000) pp. 79-80; Arneson (1989); and Cohen (1989) pp. 15-9. Dworkin has a few different reasons for conceptualizing the problem of disabilities in terms of disability's impact on one's possession of material resources rather than in terms of its impact on physical powers, one of which is that transfers of material resources are often incapable of fully compensating for the physical and mental effects of different disabilities. For a discussion of justice in healthcare which reflects this concern, see Dworkin (2000) chapter 8.

[162] The following account of luck-egalitarianism's advantages over Rawls's theory of justice draws extensively upon the account provided by Will Kymlicka. See his discussion in chapter 3 of Kymlicka (2002).

to equality also extends to the distributive effects of natural talent. The natural capacity to develop different talents is just as much a part of the circumstances of one's birth as the socio-economic group one is born into. How, then, is it fair for differences in natural talent to affect one's life chances either? To mitigate the distributive impact of differential talent, Rawls requires that inequalities between the talented and the less talented work to the betterment of the latter. Despite his general commitment to equality, though, Rawls does not think all kinds of disadvantage are compensable. In particular, he rejects the claim that justice requires compensating people for subjective welfare deficiencies. His decision to opt for a primary goods metric instead of a welfare metric reflects his commitment to responsibility, as his rejection of the latter is premised on the claim that welfare egalitarianism fails to hold people responsible for their preferences by subsidizing expensive tastes.[163]

Luck-egalitarianism shares with Rawls's theory of justice a commitment to combining equality and responsibility. It too acknowledges that people should not be subsidized for their choices, and it too acknowledges that natural capacity for talents and the socio-economic class into which one is born are factors for which an agent cannot be held responsible. However, it takes that commitment even farther by extending it to areas Rawls's theory does not. For example, one area where Rawls's theory has been criticized is with regards to its ostensible neglect for those born with (or who accidentally acquire) disabilities. According to the objector, the difficulties associated with deficiencies in natural ability are deemed unfair under Rawls's theory only insofar as they impact one's socio-economic class. But don't deficiencies in natural ability matter in other ways too?

[163] Rawls (1982) pp. 168-9.

Ceteris paribus, a disabled member of the worst off socio-economic group is disadvantaged in a way that a normally functioning member of that group isn't (either by having lower welfare, extra material costs, or a deficiency in physical resources), so isn't it unfair for society not to endow the disabled individual with additional compensatory benefits?[164] Luck-egalitarianism responds to this issue by acknowledging that disabilities attributable to sheer misfortune, genetic or otherwise, are not something for which those who possess them can be held responsible, and thus that the inequalities which stem from it are unfair. For the luck-egalitarian, considerations of fairness are in favor of compensating for the disadvantages associated with disability just as much as they are in favor of compensating for disadvantages traceable to socio-economic class or lack of marketable talent.[165]

Another area where Rawls's theory has been criticized is with regards to its failure to distinguish between members of the worst-off whose disadvantaged status is

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[164] Kymlicka (2002) pp. 70-2. For similar comments, see Dworkin (2000) p. 113. Upon first encountering the 'extra material costs' version of this worry, it seemed to me that Rawls could readily reply to it. If the problem with disability is to be cashed out in terms of the additional costs it imposes, and the difference principle requires maximizing the position of those with the smallest bundle of social primary goods, then wouldn't it require topping up one's bundle of goods if the costs associated with disability cut into it sufficiently? It seemed like Rawls's principle would require topping up one's bundle whenever the size of that bundle becomes small enough. The reason this reply doesn't work, however, is because Rawls is interested in the distribution of goods across social positions over time, rather than the distribution across individuals at any particular instant (see, for instance, Rawls (1971) p. 7). This nuancing of his position makes him less vulnerable to libertarian critics who suggest that his principles would require constantly interfering with liberty in order to maintain a particular distributive pattern, but it also makes Rawls more vulnerable to critics on the left concerned with compensating the disabled.

[165] A further respect in which Rawls and luck-egalitarians differ is with regards to the particular way they address inequalities traceable to natural talents. Though Rawls is concerned with the potentially unjust impact of natural talents on the distribution of primary goods, he doesn't think that justice requires redressing the inequalities they generate. The difference principle leaves inequalities traceable to differential talents intact, but seeks to mitigate them by ensuring that they work to the advantage of the least well-off. In contrast, luck-egalitarians are ostensibly committed to redress. I refrained from drawing out this difference for two reasons, however. First, not all luck-egalitarians are even ostensibly interested in going beyond mitigation. Dworkin's insurance scheme compensates for bad brute luck, but only if and to the extent that hypothetical coverage requires it. Second, as I argue in sections 3 and 4 of this chapter, the most compelling interpretation of luck-egalitarianism denies that fairness has decisive normative significance, and thus denies that acknowledging the unfairness of inequalities traceable to natural talent necessarily entails an all-things-considered commitment to redressing them.

due to lack of natural ability and those whose status is traceable to choice. For example, some people prefer to gamble with their earnings and others like having an abundance of leisure. Why would it be unfair for one to have fewer material resources for reasons like this? To the contrary, isn't it unfair for society to subsidize gamblers and leisure seekers with the earning of those who have chosen to work hard and/or be prudent? Luck-egalitarianism corrects for this deficiency by acknowledging that those who are worse-off because of their choices are responsible for their status, while those worse-off because of deficiencies in natural ability are not. For the luck-egalitarian, fairness prohibits subsidizing the gambler or the surfer and at the same time requires compensating those with less natural ability.[166]

(b) Luck Egalitarianism's Critics

When the commitment to combining equality and responsibility is used as our criterion for theory comparison, luck-egalitarianism represents a clear improvement over Rawls's theory of justice. However, a number of egalitarian theorists have reacted negatively to this commitment's full generalization. They object that a form of egalitarianism which seeks to redress all and only inequalities beyond the scope of personal responsibility makes extravagant metaphysical assumptions about the nature of free will, expresses a disrespectful attitude towards those it would seek to assists, and has counter-intuitive implications.

According to Samuel Scheffler, any conception of justice that puts as much weight on the notion of choice as luck-egalitarianism relies on a radical understanding of agency. The plausibility of claiming that a citizen's entitlement to compensation is entirely

[166] See Kymlicka (2002) pp. 75-9; and Kymlicka (2006) pp. 17-8.

determined by whether or not her plight is traceable to choice requires that choice carry special significance. It isn't going to be enough to say that a decision was uncoerced. An agent whose decisions are uncoerced does not necessarily bear full responsibility for them, as there are a variety of circumstances that can sever the connection between choice and responsibility to various extents, e.g., misinformation, the effects of inebriation, temporary impairment caused by a bout of anger or depression, etc. Nor does it suffice to stipulate that luck- egalitarianism is specifically concerned with holding people responsible for choices made under normal conditions. For even under normal conditions people's choices are involuntarily influenced by biological and social factors over which they lack control. According to Scheffler, the luck-egalitarian is committed to an incompatibilist view of freedom that sees human decision makers as possessing the capacity to somehow transcend the influence of causal forces. Only someone who endorses incompatibilism could consistently claim that whether a disadvantage is or isn't traceable to choice suffices to determine its compensability.[167] Though Scheffler concedes that the presence or absence of choice is a factor plausibly carrying some significance when determining the compensability of disadvantage, he maintains that it only has the 'make or break significance' luck-egalitarians accord it if one accepts an implausible view of free will.[168]

Suppose we were to put the issue of free will aside and agreed, for the sake of argument or otherwise, that there's no metaphysical bar to making the presence or absence of choice the central consideration when determining whether compensation is justified. In order to secure a distribution consistent with luck-egalitarian requirements,

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[167] See Scheffler (2003) pp. 17-9; and Scheffler (2005) pp. 10-4.
[168] Scheffler (2003) p. 19; and Scheffler (2005) p. 13.

the state would have to go about acquiring the information necessary for making accurate interpersonal comparisons. But isn't this impossible? And even if it wasn't, wouldn't any attempt to accomplish it intrude intolerably on the privacy of citizens? Some of this worry applies only in so far as luck-egalitarians include welfare within their metric, as collecting information about resource levels is easier to do without invading privacy than collecting information about the extent to which preferences are satisfied.[169] However, luck-egalitarianism's emphasis on choice makes even a resource metric vulnerable to the invasiveness charge, as it would be necessary to determine not only the extent to which resources are unequal, but the extent to which individuals can properly be held responsible for inequalities.[170] As a result of worries about invasiveness, luck-egalitarians have been careful from the beginning to point out that they don't mean to advocate privacy violations. Despite his opposition to resourcism, Richard Arneson indicates that the epistemic accessibility of resource levels might justify using them as 'rough proxies' for welfare.[171] Similarly, Dworkin indicates that the impossibility of disentangling the portion of a person's resource level traceable to his or her circumstances from the portion traceable to his or her choices suggests modeling redistributive tax systems around the idea of a hypothetical insurance market. Such a tax system would strive to compensate a person for an instance of misfortune to the extent demanded by a hypothetical average coverage level set in light of factors such as a misfortune's severity, likelihood of occurring, and the cost of rectification.[172]

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[169] Arneson (1989) p. 87; and Cohen (1989) p. 7.
[170] Kymlicka (2002) p. 20.
[171] Arneson (1989) p. 87.
[172] Dworkin (2000) pp. 77-83, pp. 90-2, and pp. 99-109.

Though a proposal such as Dworkin's requires less data collection than a straightforward attempt to track the precise impact of brute luck on citizens' lives, it would still require that the state have access to sensitive personal information. In particular, the state would need to know who's suffered from misfortune and what the nature of that misfortune was, even if knowledge of the precise impact of that misfortune on one's relative status is unnecessary. The most obvious way to collect such data without an invasive state surveillance system would be to make compensation conditional on the recipient's willingness to demonstrate that she's been afflicted by a form of bad luck. Though such a method is comparatively preferable, Jonathan Wolff has argued that it nonetheless has worrisome implications. On the one hand, requiring disadvantaged citizens to prove their case ostensibly expresses a distrustful attitude. As if being a victim of misfortune weren't bad enough by itself, conditional compensation adds insult to injury by treating claimants as objects of suspicion.

What's more, proving that one has suffered bad luck sometimes requires what Wolff calls 'shameful revelation', i.e., providing personal information the disclosure of which would reasonably cause one to experience a sense of shame. An obvious example is the genetically unlucky being required to reveal lesser mental capacities, poor social skills, etc.[173] Even if the collection of data can be conducted in such a way as to avoid expressing distrust or requiring shameful revelation, though, Elizabeth Anderson insists that luck egalitarianism's very rationale is degrading for the recipients of compensation. For the state to award compensation to citizens on the basis of, say, their unfortunate lack of marketable talent or inferior social ability is to express pity towards them (specifically

[173] Wolff (1998) pp. 110-5.

of the condescending variety expressed by someone who feels superior to another). Awarding compensation out of pity is damning for the theory, according to Anderson, as it suggests that luck egalitarianism is incompatible with respect for beneficiaries' dignity.[174]

If the above criticisms are to be taken seriously, then luck-egalitarianism is in serious tension with respect for citizens. Good as luck-egalitarianism is at capturing philosophers' intuitive judgments about fairness and unfairness in distribution; it allegedly does so at the cost of demeaning those whom it would seek to assist. Of course, it's possible for a luck-egalitarian to bite the bullet here. She could perhaps argue that the theoretical benefits of luck-egalitarianism outweigh whatever tension there might be between it and respect. According to Anderson and Scheffler, however, this move isn't available. They claim that luck-egalitarianism can't even do what it's allegedly best at: namely capture our intuitive judgments about particular cases of compensability. With respect to the former, Scheffler indicates that it's not hard to think of cases where compensation would be counter-intuitive and yet still required by luck-egalitarianism. Consider, for instance, cases where people achieve differential levels of success due to differential talents. Would it be unjust for a naturally gifted philosopher to be more successful at her job then a less gifted colleague? Would it be unjust for a gifted athlete to receive greater reward than a less gifted one? Scheffler thinks most people's intuitions run contrary to the luck-egalitarian's in these cases.[175]

Similarly, both he and Anderson indicate that luck-egalitarianism's emphasis on holding people responsible for the outcomes of their choices is excessively harsh. Even

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[174] Anderson (1999) pp. 304-7.
[175] See Scheffler (2003) pp. 32-3; and Scheffler (2005) pp. 15-6.

when a person can be properly held responsible for the problems that befall her, most people would agree that the state should assist those whose risky behavior or lack of prudence has landed them in dire circumstances. Should, for instance, negligent drivers be denied emergency care when injured in car accidents? And should someone whose poor financial decisions lands her in extreme poverty be denied the financial assistance necessary to meet her basic needs? When cases like these are considered alongside those mentioned above, it seems to follow that luck-egalitarianism compensates those it shouldn't and fails to compensate those it should.[176]

In light of all this, critics of luck-egalitarianism propose that egalitarians are better off focusing on a society's relational character, rather than its distributive character. Instead of asking whether a society's citizens have equal access to X, they suggest we inquire into the manner in which they relate to each other. Is the society we're assessing one in which citizens relate to each other as members of equal status? Or are some relegated to a subordinate position and treated as inferiors? Supporting a society characterized by egalitarian relations between social groups requires opposing oppression and class hierarchy, not equalizing the distributive impact of luck. Of course, luck-egalitarianism's critics don't typically eschew distributive considerations entirely. The general consensus seems to be that creating a society of equals would require some degree of redistribution, e.g., a social minimum sufficient to ensure that no one would be vulnerable to economic exploitation, for instance. In so far as redistribution is desirable, however, it is on the basis of its instrumental contribution to a society where people relate

[176] For various examples produced in support of the harshness criticism, see Anderson (1999) pp. 295-300; Scheffler (2003) p. 33; and Scheffler (2005) p. 15.

to each other as equals, rather than on the basis of a distributive pattern's intrinsic significance.[177]

3. A Defense of Fundamental Luck-Egalitarian Justice; a Rejection of All-Things-Considered Luck-Egalitarian Justice

(a) The Appeal of Luck-Egalitarianism: Fundamental, not All-Things-Considered

In the previous section, I sought to explain two things: (a) why many theorists have found luck-egalitarianism to be an appealing theory of distributive justice, and (b) the reasons other theorists have offered for rejecting it. In this section, I'll use the theoretical resources developed in the previous chapter (chapter 3) to analyze both the advantages and criticisms I've canvassed. I will argue that understanding luck-egalitarianism as a conception of a fact-insensitive, *fundamental* value helps us to better understand the sense in which it is an improvement over Rawls's theory. I also argue that it helps us to see why many of the above described criticisms are only effective when luck-egalitarianism is (mistakenly, on my view) put forward as a conception of *regulatory* justice.

In chapter 3, I argued that the method via which one arrives at a conception of a fundamental value is similar to, but also importantly different from, reflective equilibrium. When using reflective equilibrium to justify a set of action-guiding principles, the goal is to ensure coherence with our particular intuitions about what's right or wrong, all-things-considered. Justifying a conception of a fundamental value, in

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[177] See Anderson (1999) pp. 312-26; Scheffler (2003) pp. 31-9; Scheffler (2005) pp. 17-23; and Hinton (2001) pp. 80-1 and pp. 85-7. Though Anderson and Hinton specifically endorse limiting redistribution to provision of a basic minimum, Scheffler is more open ended. Rather than committing himself to a particular redistributive scheme, he limits himself to specifying that whatever form of redistribution egalitarians endorse will have to be justified with reference to its instrumental significance for the creation and maintenance of egalitarian social relations.

contrast, involves drawing upon a narrower set of intuitive judgments. One must first be attentive to distinguishing between intuitive judgements internal to the value in question from those external to it, as the goal is to achieve coherence specifically with those internal to it. When offering a conception of fundamental justice, the intuitive judgments with which one is concerned are specifically judgments about what is fair or unfair, rather than judgments that belong to other values, e.g., judgments about what would count as autonomous or non-autonomous, compassionate or harsh, etc. They are also judgements that, in some cases, will only hold in the *ceteris paribus* sense of "ought". This is important. Some of our judgements of fairness, e.g., that it's unfair for employers to discriminate against applicants on the basis of irrelevant physical characteristics (such as eye color), are normatively robust. Other values tend not to conflict with them in most cases or, if they do, they are usually trumped by the value of fairness. As a result, the truth of the judgement that it's *unfair* to discriminate against applicants on the basis of irrelevant physical characteristics tends to successfully entail the judgment that it's *wrong* to do so. Other judgments, e.g., that it's unfair for society to subsidize the imprudent, are less robust. In severe cases, this judgement is trumped by the importance of alleviating severe suffering and meeting basic needs. As such, the judgment that it's *unfair* to subsidize the imprudent frequently fails to justify the claim that it's *wrong* to do so. The fact that this judgment of fairness lacks normative robustness, though, does not mean that it should be put aside when attempting to articulate a conception of fundamental justice. When articulating such a conception in matters of distribution, the goal is to formulate a criterion the satisfaction of which is necessary and sufficient for a distribution to count as fair. Insofar as there are cases that *do not* satisfy our criterion and yet we judge to be fair,

then our criterion is vulnerable to counter-examples that challenge its adequacy as a *necessary* condition. Insofar as there are cases that *do* satisfy our criterion and yet we judge to be unfair, then our criterion is vulnerable to counter-examples that challenge its adequacy as a *sufficient* condition.

Leaving out the judgment that it's unfair to subsidize the imprudent would have the latter effect. Any principle of fundamental justice that does not evaluate such cases as unfair is open to the charge that its satisfaction does not suffice to guarantee the fairness of a distribution. Of course, a justice theorist whose goal is something other than to provide a necessary and sufficient criterion might have reason to put this judgment aside when formulating her conception, at least in cases where the imprudent are in dire need. Doing so is wise if one's goal is the rather different goal of delineating the boundaries of fairness's capacity for action-guidance. I discuss this further in section 4.

When luck-egalitarianism's theoretical advantages over Rawls's theory of justice are understood in light of the above, it becomes clear that those advantages are of a very specific kind. By failing to distinguish those of the worst-off whose disadvantaged status is traceable to choice, and by failing to recognize that the unfairness of disabilities acquired by accident or at birth extends beyond their effect on socioeconomic class, Rawls's theory fails to adequately represent all our intuitive judgments of fairness. As a result, it fails to provide an adequate account of what distributive justice is, i.e., an adequate account of the content of fundamental justice in matters of distribution. Whether it fails to deliver an adequate account of how we should structure our institutions, all things (including justice) considered, is left open, though. After all, just because his theory fails to cohere with all our judgments of fairness doesn't mean that it

fails to incorporate them as much as an action-guiding theory of institutional design reasonably can.

Likewise, just because luck-egalitarianism does a better job of capturing our full range of fairness intuitions, and thus of telling us what justice is, doesn't mean that it does a better job of telling us how we should structure our institutions, all-things-considered. Cohering with our full range of fairness judgments includes cohering with judgments that may, upon reflection, fail to be normatively robust, a consequence of which is that a compelling conception of fundamental justice will tend not to be a compelling conception of regulatory justice. As I will now proceed to argue, many (but not all) of the objections to luck-egalitarianism I canvassed in the previous section show exactly this: that luck-egalitarianism is not a very good conception of regulatory justice. In what follows, I will address, one by one, the following problems: counter-intuitive cases invoked by Scheffler and Anderson where luck-egalitarianism allegedly requires compensation where it should withhold it and withholds compensation where it should be required, Scheffler's worry about an implausible conception of freewill, Anderson's concern about the expression of pity, Wolff's problems of distrust and "shameful revelations" , and the claim that luck-egalitarianism focuses on distribution at the expense of social relationships.

(b) Counter-Intuitive Implications

Let's start with the charge that luck-egalitarianism inappropriately requires compensation in some cases. According to Scheffler, luck-egalitarianism implies that it is unfair for some members of the same profession to be naturally better at it than other members. He also claims that luck-egalitarianism implies differentially rewarding

members of the same profession is unfair when the differential performance upon which it is based is due to differences of natural talent. The problem with these implications, according to him, is that most people find them counter-intuitive. Most people accept that it's fair for better philosophers to receive more accolades than their less talented colleagues, or for faster runners to be awarded larger trophies than slower runners. According to Scheffler, luck-egalitarianism is less intuitively compelling than its proponents think.[178]

I'm willing to grant that the cases Scheffler discusses are counter-intuitive. The problem with them is that they are bad examples of brute luck. In a society with freedom of occupation, inequalities between members of a particular profession are bound up with the choice to pursue that profession. As a result, a person who chooses to pursue a profession for which she's sub-optimally suited can, if she had access to the relevant information and the opportunity to pursue other professions for which she is well suited, be held responsible for her lesser success. Suppose we were to change the example, though. Suppose we live in a society where professions aren't chosen and are instead randomly assigned through a lottery mechanism. Such a society's infringement on liberty aside, would it be fair for a professional lucky enough to possess talents well suited to the career she was assigned to fare better in life than her colleagues? Most people would say 'no', and that's precisely the answer a luck-egalitarian would want them to give. Of course, cases of occupational success and failure usually fall somewhere in between these two extremes (between full control and no control over one's profession). Intuitions will vary across such cases, but in all of them, I think said

[178] Scheffler (2003) p. 33.

variance will track the extent to which choice accounts for the inequality. For example, inequality of success between two members of the same profession seems fair if one of those members doesn't care enough about her professional life to have put much thought into selecting a career her talents are suited to. It also seems fair if the difference between the two is attributable to the extent to which they choose to devote themselves to their work. In contrast, the difference seems unfair if each person was equally careful about selecting a career suited to her abilities and devotes an equal amount of time and effort to her work. In the first two cases, choice plays a big role in accounting for the relevant inequalities, hence they seem fair. In the last case, choice plays a much more limited role in accounting for the relevant inequality; hence it does not seem fair. All of this is perfectly consistent with luck-egalitarianism.[179]

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[179] One way a luck-egalitarian might reply to Scheffler, at least with respect to his discussion of differential professional success, is by arguing that the point of distributive justice, and thus of luck-equality, is is to provide the fair background conditions needed to pursue a meaningful life. On this understanding of the function (or rather one of the functions) of justice, luck-egalitarianism's role is to specify the institutional conditions that must be in place for the distributive inequalities that emerge between citizens as a result of choices and transactions over time to be just (see Rawls 2001 pp. 52-4). From this, it seems to follow that luck-egalitarianism is consistent with differentially rewarding members of the same profession, as one's profession (at least in many cases) is only meaningful if there is some way of recognizing the extent of one's contribution.

The reason I have chosen not to employ this reply is because the idea that justice is about setting background conditions for the pursuit of a meaningful life is a distinctly Rawlsian notion, one bound up with his belief that justice is specifically about setting up the institutional conditions needed to ensure a just distribution of goods across social positions over time, rather than about constantly interfering with liberty in order to continuously preserve a particular distribution across individuals (see Rawls 1971 p. 7; and Nozick 1974 pp. 160-4). Thus while this reply is likely appropriate if one conceives of luck-egalitarianism as a theory of institutional regulation, it is not appropriate if, like me, one understands luck-egalitarianism as a conception of a defeasible, fundamental value. The point of luck-egalitarianism, on my understanding, is to specify the conditions necessary and sufficient for a distribution to count as fair, and doing so requires achieving coherence with all our intuitive judgments of fairness, including those which aren't normatively robust. As such, fact-insensitive luck-egalitarianism must be responsive to the intuition that it is unfair when unequal levels of occupational success emerge between members of the same profession who were equally careful about selecting a career suited to their abilities and who devote an equal amount of time and effort to their work. This intuition may very well not suffice to justify withholding recognition of differential levels of contribution, and the reason for its insufficiency may very well be because withholding recognition of differential contribution would deprive many professions of their meaning, but that doesn't mean we should refrain from evaluating such cases as unfair. Though fact-insensitive luck-egalitarianism is certainly connected to the background conditions needed to pursue a meaningful life, its

Let's consider another counter-intuitive implication: abandonment of the imprudent. By now, it should be clear what my reply is. I don't deny that luck-egalitarianism implies it is unfair to subsidize the imprudent. I also don't deny that it would be counter-intuitive to let unsuccessful high stakes gamblers starve, negligent drivers die by the side of the road, etc. I just don't think that the intuitions behind the harshness objection are intuitions of *fairness*. If anything, *compassion* for the imprudent is what accounts for the judgment that they ought not to be abandoned (hence why it's the 'harshness objection' rather than the 'unfairness objection'). That compassion should sometimes trump fairness is not surprising. However, it would be a mistake to conclude that compassion is generally weightier. In many cases of conflict fairness is the value that wins out. For example, it would be absurd to say that the state should rush to my aid because I have a mild stomach ache from eating too much junk food, or, if you don't like welfare metrics, that it should top up my back account because I blew all my disposable income for the week on a crate of non-refundable Fritos. It's appropriate for people to feel sorry when they see me grimacing with discomfort or when they find out that I've had to miss out on some fun social event or another because I can no longer afford to buy tickets, but that's it. Despite the appropriateness of feeling sorry for me, it would be unfair to others if public funds were spent to subsidize my junk food related choices, and that unfairness successfully translates into wrongness in this case.

The cases discussed by proponents of the harshness objection, in contrast, are far more severe. They're cases that involve considerable suffering and/or an inability to satisfy basic needs. In severe cases like these, it's appropriate to feel *very* sorry for the

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role is not to set those conditions, but rather to partially justify the institutional regulatory principles that do.

imprudent, sorry enough to put aside considerations of fairness and provide aid to the point where a basic needs threshold has been restored. Of course, there may also be other reasons for aid too. For example, it might damage a society's sense of 'solidarity' or 'community' were it to ignore the needs of imprudent members.[180] Compassion is, however, the most intuitively immediate value at play.

Before moving on to the next sub-section, I'd like to address a problem Anderson raises for the implementation of state aid to the imprudent. The most obvious way to feasibly aid the imprudent in cases severe enough to warrant it is through a policy of compulsory contribution to public safety net programs that provide unconditional service to those who need it. According to Anderson, however, luck-egalitarians are unable to justify this approach without resorting to paternalistic reasoning. Since they are committed to holding people responsible for the outcomes of their choices, luck-egalitarians are therefore allegedly against aiding those who choose to opt out of public safety net programs and subsequently find themselves in dire straits. The rationale for compulsory participation would therefore have to be that the state should paternalistically prevent citizens from putting themselves in a position where it could not justifiably assist them, i.e., that it should protect citizens from themselves by prohibiting them from risking their basic needs.[181]

A convenient response to Anderson is available to luck-egalitarians who understand their view to be a conception of a fundamental value. They can claim that she incorrectly assumes luck-egalitarians are unable to accept a duty to provide aid to needy

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[180] See Cohen's discussion of 'community' in Cohen (2009) pp. 34-45; and Shlomi Segall's discussion of 'solidarity' in Segall (2007) pp. 195-8.
[181] Anderson (1999) pp. 300-1.

opt-outers. Why does Anderson assume this? She assumes this because she also assumes that the luck-egalitarian conception of justice is intended to be regulatory, and thus that the principle of luck-equality is not supposed to be defeasible. Once we have identified and dismissed her assumption about luck-egalitarianism's theoretical status, though, the justificatory terrain around compulsory participation changes. Despite the unfairness of aiding imprudent individuals who have chosen to opt out of safety net programs, luck-egalitarians who understand luck-egalitarianism as a conception of fundamental justice would still, out of deference to compassion, provide aid. They just prefer to set up state programs in such a way that the requirement to tolerate such unfairness need never arise. If participation in safety-net programs is made mandatory, then the tension between compassion and fairness is minimized, as there would not be any needy opt-outers to aid. For the luck-egalitarians of the stripe I'm defending, a fairness rationale for compulsory participation is therefore available. Their rationale is not about preventing citizens from exposing themselves to risk, but rather about mitigating the exploitation of the prudent by requiring that the imprudent contribute too. Though the imprudent would receive aid regardless of whether they participate in safety-net programs, it is comparatively less unfair to aid imprudent contributors than it is to aid imprudent opt-outers, and thus a policy that makes participation mandatory yields more fairness than a policy that makes participation optional.[182]

(c) An Implausible Conception of Freewill

[182] Carl Knight also suggests that luck egalitarians could employ fairness rather than paternalism to ground mandatory participation, though he doesn't explicitly realize that this is only possible if fairness is defeasible. See Knight (2005) pp. 62-3.

The most obvious advantage of interpreting luck-egalitarianism as a conception of fundamental justice is that it corrects for the normative excess associated with treating luck-equality as if it were the only thing that mattered for purposes of determining citizens' entitlements. As noted above, compassion, among other things, must be taken into account too. An additional advantage associated with this interpretation of luck-egalitarianism is that it addresses the metaphysical worry expressed by Samuel Scheffler. As noted earlier, Scheffler worries that treating the presence or absence of choice as a decisive criterion for justified redistribution presupposes an implausible picture of agency. He notes that on any compatibilist view of agency, a person's choices are acknowledged to be part of the same causal network that determines the circumstances she finds herself in. What makes a choice free on such a view is not insulation from external causal forces, but rather its relationship with the agent's values or second order preferences (on an internalist view), the absence of a special class of agency undermining influences (on an externalist view), or a combination of both.[183] Regardless of the particular compatibilist account endorsed, though, once one acknowledges that both the motivational springs of action and the circumstances one finds oneself in are determined by external causal forces, according 'make or break' normative significance to choice seems unreasonable. Put another way, if the distinction between genuine choice and circumstance is not a sharp one, then why should shortfalls traceable to choice be decisively exempt from compensation, while those traceable to circumstances decisively warrant it? Though a compatibilist can still say that the imprudent are responsible for the

[183] For influential internalist views, see Frankfurt (1971); and Watson (1989). For accounts emphasizing the importance of incorporating external conditions, see G. Dworkin (1976); Christman (1991); and Christman (2007).

disadvantages incurred by their behavior, the sense in which a compatibilist would hold the imprudent responsible is more watered down than the sense in which a metaphysical libertarian, i.e., someone who thinks autonomous actions are independent of external causes, would. On Scheffler's view, then, it isn't sensible for a compatibilist to accord the choice/circumstance distinction too much weight in practical reasoning.[184]

Though I imagine Scheffler wouldn't want to say that the truth of metaphysical libertarianism would suffice to justify luck-egalitarianism (his metaphysical objection is only one among several), he does seem to think that it's necessary. As we've seen, however, interpreting luck-egalitarianism as a conception of one value among many involves rejecting the claim that it has decisive normative significance. The presence of choice is considered to be a reason against compensation, and the absence of choice is considered to be a reason for compensation, but neither is a uniquely decisive reason. Instead, luck-equality is seen as a defeasible consideration: one that must be given weight when adopting institutional regulatory principles but which must also be compromised insofar as it is reasonable to defer to the values luck-equality conflicts with. As a result, the defender of fact-insensitive luck-egalitarianism need not exert herself when replying to Scheffler. It suffices to point out that the freewill criticism doesn't apply on this understanding of what luck-egalitarianism is a conception of, as the free will criticism presupposes that luck-equality is supposed to be normatively decisive, rather than defeasible.

(d) Expressing Respect

[184] In a number of passages, Scheffler suggests that he finds luck-equality much more plausible when treated as an ingredient in a distributive scheme instead of the sole principle. See Schefller (2005) p. 22 and p. 24.

Between Anderson and Wolff, the claim that luck-egalitarianism is in tension with respect for persons has received a considerable amount of argumentative support. However, the criticisms each offers are sufficiently dissimilar to warrant separate treatment. Let's start with Anderson. As explained in the previous section, Anderson maintains that the luck-egalitarian rationale for redistribution expresses pity (of the condescending sort) towards the disadvantaged. It allegedly implies that those with fewer natural gifts have "lives less worth living",[185] and that they "lay claim to the resources of egalitarian distribution in virtue of their inferiority to others".[186] However, as Carl Knight correctly points out, Anderson's criticism is straightforwardly untrue. Luck-egalitarianism isn't motivated by the thought that the unattractive, unintelligent, or socially inept are inferiors who warrant pity. Though it claims that there's often good reason to compensate those who are less well off, the basis for redistribution is not relative differences in individual worth. Quite the opposite: luck-egalitarianism is concerned with unchosen inequalities between persons of equal moral significance. It is precisely because people are moral equals with lives equally worth living that it is unfair for some to be worse off than others through no fault of their own.[187] Luck-egalitarianism thus explicitly discourages the thought that those badly off with respect to natural gifts are 'inferior' in any morally significant sense of the word to those with an abundance of natural gifts.[188]

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[185] Anderson (1999) p. 305.
[186] Anderson (1999) p. 306.
[187] Though I disagree with much of what Tan says about luck-egalitarianism, one matter about which I think he's correct is the relationship between it and moral equality. See Tan (2008) p. 665 and p. 667.
[188] For similar thoughts, see Carl Knight (2005) pp. 64-5.

Let's move on to Wolff. As we noted in section 2 of this chapter, Wolff suggests that there are serious concerns associated with the collection of data needed to make the interpersonal comparisons required for implementing luck-egalitarianism. Even if luck-egalitarians were to refrain from involuntary invasions of privacy, subjecting claimants to a screening process seems to express distrust at best, and at worst, requires the revelation of sensitive personal details that may be a source of shame for them. In chapter 3, I used the case of shameful revelation as an example of how facts about the world put values in conflict with each other. If citizens' sense of self-worth is contingent upon whether they have the talents needed to contribute to society, then implementing fairness without expressing disrespect for citizens will be tricky. Though facts such as these must be taken into account when deciding how far to implement a value, I argued that the fact-insensitivity thesis insulates the content of a conception of that value. Luck-egalitarianism, if fact-insensitive, cannot be undermined by psychological facts about citizens' sense of self-worth.

Here, my goal is to expand on the above point by drawing attention to how Wolff himself interprets the significance of the problems he raises. Though Wolff doesn't use the language of fundamental justice or fact-insensitivity, it's clear that his criticisms were never intended to challenge luck-egalitarianism as an account of justice's content.[189] His point, rather, was to draw attention to its normative limitations, i.e., to specify some of the ways in which its implementation should be qualified. As he makes clear in the "Egalitarian Methodology" section of his seminal article, luck-equality does a great job of capturing our intuitions about fairness in distribution. By employing the

[189] Wolff (1998) pp. 120-1; and Wolff (2010) p. 346.

choice/circumstance distinction, luck-egalitarians provide a rationale for why it's unfair for some to do better than their co-citizens by virtue of their natural talents, or for some to do worse due to disability or the misfortune of being born into a lower class. Conversely, they're also able to explain why inequalities generated by lifestyle differences are fair, e.g., the inequality between a full time surfer and a full time mason, and thus why eliminating those inequalities through redistribution is not fair (at least when those inequalities reflect genuine choice).

When generalizing our intuitions about cases of this sort into a principle, however, the content of the principle produced omits important normative information relevant to guiding public policy.[190] Though Wolff is especially concerned with respect, other information is absent as well, e.g., a concern for efficiency, as well as for the alleviation of suffering and satisfaction of basic needs. An appreciation for the information luck-equality leaves out is important because attempts to implement a fair distribution must be sensitive to the moral costs potentially associated with doing so. In some cases, costs are associated with bad strategies for implementation, and thus can largely be avoided by exercising a bit of ingenuity. For example, Wolff now acknowledges that methods of data collection capable of mitigating the experience of shame are available, e.g., sensitive interviews conducted in such a way as to draw special attention to what the claimant is good at while also screening out those whose disadvantaged state is traceable to choice.[191]

In other cases, costs are associated with contingent social circumstances, and thus policies that reflect an appropriate balancing of considerations are required for the

[190] Wolff (1998) pp. 98-103; and Wolff (2010) pp. 340-3.
[191] Wolff (2010) p. 345 and pp. 347-8.

moment but won't necessarily be required in the future. For example, Wolff is pretty clear that he considers his worry about distrust to be a socially contingent one. His thinks that in our presently unjust state of affairs the burden of having to reveal personal information would largely fall on members of the lower class, many (but not all) of whom are significantly disadvantaged through no fault of their own. Considering that the members of this group are already bearing the lion's share of society's burdens, it stands to reason that subjecting them to a disproportionately large amount of scrutiny would be experienced as disrespectful. In a society that already possesses a more or less luck-egalitarian distribution, however, the burden of revealing personal information would not be distributed the same way. Since the involuntary inequalities associated with class hierarchy and racial discrimination will already have been eliminated, promoting justice would not require subjecting any particular social or racial group to excessive scrutiny.[192] This suggests that society should initially provide more in the way of unconditional benefits than it otherwise would until it has reached a stage where scrutiny wouldn't be primarily focused on a particular social group.

Of course, some cases are not socially contingent. Some cases of value conflict are not just unavoidable at present but will presumably remain so regardless of the policies we implement. It will always be unfair to compensate a person whose inability to meet her basic needs is the product of genuine choice. Failing to do so, however, will also always infringe upon a society's obligation to ensure even its imprudent citizens are able to live a minimally decent life. Given the permanence of this conflict, policies

[192] Wolff (1998) pp. 110-3.

which reflect an appropriate balance, e.g., mandatory safety net programs, are unavoidable.[193]

(e) Distributive Equality vs. Social Equality[194]

Thus far, the present section of this chapter has analyzed the major criticisms of luck-egalitarianism on offer. Though I've argued that some of them are just bad criticisms, in many cases I've claimed that their effectiveness depends on what luck-egalitarianism is understood to be a theory of. On the one hand, if luck-egalitarianism is understood as a theory of *regulatory* justice, then many of the criticisms it faces seem compelling. On the other hand, if it is understood as a theory of *fundamental* justice, then said criticisms lose their bite. Harshness, conflict with respect, and the metaphysical dullness of the distinction between choice and circumstance; all limit the extent of the sway luck-equality should have over the distributive regulatory principle we choose to adopt. They do not, however, impinge upon luck-egalitarianism's adequacy as an account of the content of fundamental justice.

In this sub-section, I address the theoretical alternative critics of luck-egalitarianism typically advocate: social equality. On their view, luck-egalitarians are wrong about more than just the content of distributive justice. They also misunderstand the relationship between societal justice and matters of distribution. More specifically, advocates of social equality maintain that matters of distribution are specifically of instrumental significance to the justice of a society. A certain degree of redistribution from the well off to the less well off is needed to, for example, ensure that everyone is protected from domination and economic exploitation, but the feature which constitutes a

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[193] See my discussion of luck egalitarianism and paternalism on pages 16-17.
[194] See Anderson (1999) pp. 312-5; Scheffler (2003) pp. 21-4 and pp. 31-9; and Scheffler (2005) pp. 17-23.

just society is not its pattern of distribution. They claim that the constitutive feature is the quality of its social relations. On this view, a just society is one in which citizens relate to each other as equals. When describing her own proposed alternative to luck-egalitarianism, Elizabeth Anderson writes that "…democratic equality is what I shall call a relational theory of equality, it views equality as a social relationship…democratic equality regards two people as equal when each accepts the obligation to justify their actions by principles acceptable to the other, and in which they take mutual consultation, reciprocation, and recognition for granted."[195] For someone interested in social equality, then, the main thing justice theorists should be concerned with is the elimination of class hierarchy. What's objectionable about a society with a large amount of distributive inequality is not inequality in the distribution of goods per se, but rather the hierarchical class structure that tends to go along with it. When a particular social group has a monopoly over the wealth and power within a society, the result is a deformation of the relationship between it and other groups. Members of the upper class group come to see themselves as superiors to whom deference is owed, while members of the other classes come to see themselves as inferiors, a consequence of which is damage to their sense of self-respect.[196] It is this deformation of social relations that proponents of social equality claim to be fundamentally concerned with.

Critics of luck-egalitarianism are of course right to claim that social equality is of crucial significance to the justice of a society. The issue is not whether social equality is significant, but whether distributive equality has the comparative insignificance they claim it does. In reply to the claim that distributive equality, unlike social equality, is of

[195] Anderson (1999) p. 313.
[196] See Scheffler's description of the consequences of social inequality in Scheffler (2005) p. 19.

instrumental significance, I have two points to make. First, implicit within this claim is a conceptual separation between distributive equality on the one hand and social equality on the other. Is there really a rigid conceptual distinction between these two kinds of equality? Perhaps there would be if distributive equality were strictly concerned with the distribution of wealth. As anyone with even a cursory level of familiarity with the literature knows, however, theories of distributive justice rarely target wealth alone.

Rawls, for instance, is concerned with a wide variety of social goods. Among other things, he's also concerned with self-respect, a good which he acknowledges to be "perhaps the most important primary good."[197] On Rawls's view, the realization of self-respect requires (a) having a rational plan of life and (b) having a social relationship where the self-worth of those in the relationship is confirmed by those with whom they associate.[198] Admittedly, the idea that self-respect is a good to be distributed probably struck at least some of Rawls's readers as being a bit weird. It's thus not surprising to see a change of language in *Justice as Fairness: A Restatement*. There, he claims that institutions are to distribute "The Social bases of self-respect, understood as those aspects of basic institutions normally essential if citizens are to have a lively sense of their worth as persons and to be able to advance their ends with confidence."[199] This minor adjustment notwithstanding, once we allow for a metric that possesses the kind of heterogeneity Rawls's does, it's no longer so clear that social equality is conceptually distinct from distributive equality. What would it mean for a society to have social equality but not an equal distribution of the social bases of self-respect, or, conversely,

[197] Rawls (1971) p. 440.
[198] Rawls (1971) p. 440.
[199] Rawls (2001) p. 59.

for a society to achieve an equal distribution of the social bases of self-respect but not social equality? The possibility that certain goods are constitutive of social equality undermines the implicit claim that social equality is separable from the distributive paradigm it allegedly challenges.

What's more, switching critical attention from a resource metric to something more fundamental, e.g., a welfare metric, a flourishing metric, etc., doesn't do the advocate of social equality any good. If anything, understanding distributive equality in terms of equal welfare or flourishing reverses the alleged relationship between it and social equality, i.e., it becomes the case that social equality has instrumental significance for the realization of distributive equality, rather than the other way around. This finding is inadvertently confirmed by Scheffler in his efforts to explain why social equality matters, for he notes that a major problem with socially inegalitarian societies is that they "compromise human flourishing: they limit personal freedom, corrupt human relationships, undermine self-respect, and inhibit truthful living."[200]

For the sake of argument, let's put aside the worries I express above. Let's grant that there is indeed a clear distinction between social and distributive equality. Furthermore, let's grant that the relationship between these kinds of equality is such that redistribution is instrumental to the realization of egalitarian social relationships. Even if we grant these points, it should be noted there's a big difference between instrumental significance and *mere* instrumental significance. Though I agree that the distribution of certain goods, e.g., wealth, has an instrumental relationship with the elimination of class hierarchy, I also think it's a mistake to say that a society's pattern of distribution is

[200] Scheffler (2005) p. 19. For work that defends flourishing as the appropriate egalitarian metric, see Sypnowich (2003); and Sypnowich (2014).

therefore not part of what constitutes its justness. After all, a hypothetical society that somehow managed to implement social equality without also attending to matters of distribution would still be an unjust one. As Will Kymlicka rhetorically asks in his commentary on the subject, "…is it really unimportant that some people live in spacious houses while others are in cramped apartments; or that some people can afford month-long vacations overseas while others cannot afford to eat out at a local restaurant; or that some people have rewarding and fulfilling 'careers' while others have mind-numbing 'jobs', if they have a job at all?"[201] To say that these factors are merely of instrumental significance is implausible. We care about distributive equality not only because of its instrumental relationship with social equality, but also because of its constitutive relationship with the justice of a society.

The arguments I make above hopefully suffice to undermine the claim that social equality, and not distributive equality, is what's really essential to a just society. Before closing this sub-section, though, I would like to make note of two ways in which a fact-insensitive conception of distributive justice is especially well equipped to handle social equality. As we've repeatedly noted, fact-insensitive luck-egalitarianism is embedded within a pluralistic framework: it sees justice as one fundamental value amongst a plurality of fundamental values. It therefore acknowledges that values other than just justice must be accorded weight when trying to achieve an all-things-considered optimal society. Some of these values, e.g. efficiency, are not specifically about the character of a society's social relations. Others, however, are.

[201] Kymlicka (2006) p. 27.

A good example is 'community' or 'solidarity'. Community, as Cohen understands it, is a social relation that obtains when "people care about, and, where necessary and possible, care for, one another, and, too, care that they care about one another."[202] In fact, Cohen claims that maintaining this social relation is important enough to set a limit on the extent to which the imprudent should bear the costs of their choices. To illustrate how luck-equality and community can come into conflict, he discusses the ways in which having ten times more wealth than someone else impedes a shared sense of community with that person. Part of the difficulty is that radical inequality like this entails that the individuals in question will lead qualitatively very different lives, i.e., lives characterized by difficulties which only one of the parties will have to endure and luxuries which only the other can access. The idea here, I think, is that developing and maintaining a sense of mutual care is difficult when the pleasures and problems they face in their daily lives are of such a different character and magnitude.[203] Also of significance, though, is the fact that the richer individual has the means to provide assistance, but refrains from doing so. Since caring for the significantly less well-off individual is an option made possible by the better off individual's possession of greater wealth, it's clear that permitting the former person to fully suffer the consequences of bad option luck stifles the motivations which constitute community.

Once it is acknowledged that fact-insensitive luck-egalitarians are, among other things, concerned with realizing community, the claim that they ignore the character of a society's social relations becomes even more implausible. Community is straightforwardly concerned with social relations, as it's constituted by an attitude of

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[202] Cohen (2009) pp. 34-5.
[203] Cohen (2009) pp. 34-6.

mutual care for one another. In fact, the realization of a sense of 'solidarity' is one of the goods Scheffler points to when trying to explain the value of social equality.[204] Community is not the only value that bears upon the attitudes citizens have towards one another, however. So too does fundamental justice, and part of what makes a society just is the character of its *ethos*.[205] On Cohen's view, a society is not fully just unless people care about whether their co-citizens have a fair share and are to some extent motivated to act upon that attitude. In the next chapter, I'll argue that the fact-insensitivity of fundamental distributive justice entails its application to citizens' personal choices, and that this application in turn requires the adoption of distributive regulatory principles for the personal context. If the arguments I present there are sound, then the claim that luck-egalitarianism neglects social relations is even further challenged.

4. Alternative Defenses of Luck-Egalitarianism

In the previous section, I defended luck-egalitarianism against the most prominent criticisms of it. Among other things, I argued that a number of major criticisms, though seemingly effective against regulatory luck-egalitarianism, lose their bite when the theory under assault is specifically understood as a conception of *fundamental* justice. What's more, I argued that fact-insensitive luck-egalitarianism is uniquely well equipped to deal with the charge that luck-egalitarians are mistaken in choosing to focus upon distributive rather than social equality. Despite the benefits of understanding luck-egalitarianism as fact-insensitive, not all of its proponents would be comfortable with the distance such an understanding puts between luck-egalitarianism and action-guidance. In particular, Kok-Chor Tan and Ronald Dworkin have articulated defenses of luck-egalitarianism that seek

[204] Scheffler (2005) p. 19.
[205] Cohen (2008) chapter 1 and chapter 3.

to preserve the capacity for action-guidance that many critics assume the theory was intended to have.[206] The possible success of these defenses raises the issue of whether a fact-insensitive understanding of luck-egalitarianism is indispensable. Might a version of luck-egalitarianism, suitably qualified along the lines suggested by either Tan or Dworkin, plausibly obviate the need to interpret luck-egalitarianism as a fact-insensitive conception? As you might have guessed, my answer is 'no'. Before I explain why, though, I will briefly explain some of the defenses Tan and Dworkin offer.

Tan's response to the harshness objection relies upon a commonly accepted distinction in the global justice literature between duties of justice and duties of humanity.[207] The former of these duties, which, according to cosmopolitans (but not statists), extends to the global context, is an egalitarian one that requires redistribution for the sake of eliminating inequalities between the global advantaged and the global disadvantaged. The latter of these duties, which, according to statists (but not cosmopolitans), is the only thing owed by the global advantaged to the global disadvantaged, requires redistribution in cases of poverty for the sake reaching a suitably defined sufficiency threshold, but does not require any redistribution beyond that point.

According to Tan, this distinction also holds true in the domestic context. Duties of justice require redistribution between a particular society's advantaged and disadvantaged for the sake of achieving distributive equality between them, while duties of humanity, in contrast, require redistribution for the sake of ensuring sufficiency. On some understandings of distributive equality, the difference between duties of justice and humanity is a moot one except when there's a dispute over whether or not there really are

[206] See Dworkin (2002); Dworkin (2003); and Tan (2008).
[207] See, for example, Rawls (1999) pp. 113-5; and Nagel (2005) p. 118.

any duties of justice, in which case those who answer in the affirmative and advocate distributive equality appear more radical than those who answer in the negative and claim that it is enough to ensure that the less well-off have enough.

On a luck-egalitarian understanding of equality, however, the distinction gains significance even in the absence of disagreement over whether duties of justice are owed. On Tan's understanding of the distinction between humanitarian aid and egalitarian justice, duties of justice begin at the point where duties of humanity end and end at the point where duties of humanity begin. This entails, in part, that the duty to redistribute to those who are less well-off but who lie above the appropriate sufficiency threshold is a duty of justice and not also a duty of humanity. More interestingly, it also entails that the duty to redistribute to those who are less well-off and who lie below the sufficiency threshold is a duty of humanity and not also a duty of justice. Tan's understanding of the distinction between egalitarian justice and humanitarian aid offers luck-egalitarians a way out of the harshness objection. Just as there is no duty of justice to aid the less well-off who fall below the sufficiency threshold, so too is there no duty of justice to refrain from providing such aid in cases where a person falls below the sufficiency threshold due to her imprudence. Duties of humanity and justice occupy different domains and thus there is no space in which luck-egalitarianism could require the sort of excessive harshness Anderson and Scheffler contemplate.[208]

Furthermore (though Tan doesn't discuss this), Tan's approach suggests that a policy of compulsory contribution to public safety-net programs would not, contra Anderson's charge, need to be justified on grounds that the state should prevent citizens

[208] Tan (2008) pp. 669-71 and pp. 675-9.

from putting themselves in a position where they could not justifiably be aided in times of need. Since, on Tan's view, justice does not operate below the sufficiency threshold, his version of luck-egalitarianism is compatible with aiding even those who haven't contributed to such programs. Instead of paternalism, Tan could justify compulsory contribution on other grounds, e.g., grounds of cost avoidance (people who take advantage of safety-net programs without contributing are very expensive for society).

Dworkin's strategy for dealing with the harshness objection relies on his hypothetical insurance device.[209] He claims that the effects of any particular form of bad luck on the holdings of the disadvantaged are justifiably compensable insofar as a rational citizen would have hypothetically insured against it. As one might expect, considerations such as the likelihood of being afflicted by a particular form of bad luck, the severity of the consequences associated with it, and the cost of compensating the victims of said consequences; all factor into determining whether and the extent to which a person who suffers bad luck is to be compensated. According to Dworkin, however, his insurance market device covers more than just bad *brute* luck. It also covers bad *option* luck in cases where it would be rational to insure against it. To be sure, those cases will be fewer, as the problem of moral hazard would make the premiums associated with insuring against option luck higher on average than those associated with insuring against brute luck. Still, insuring against option luck would arguably be rational at times, especially where it threatens one's basic needs. For example, he maintains that a society seeking to redistribute in accordance with his insurance scheme would compensate for prolonged unemployment and extremely low income. These causes of poverty will in

[209] For discussion of his hypothetical insurance device, see Dworkin (2000) pp. 73-83.

some cases be unrelated to choice, .e.g., unemployment caused by a genetically produced lack of marketable talent, but in other cases it will be due to bad decisions about education, training, investment, etc. According to Dworkin, his insurance market would not fail to compensate the unemployed or low income earners in cases where their poverty is choice related.[210] Compensation for unemployment would to some extent be contingent upon willingness to work when work becomes available,[211] but unemployment (and low income) caused by poor decisions is presumably common enough, and its effects severe enough, to make paying the requisite insurance premium rational.

Returning now to the question at hand, do the defenses of luck-egalitarianism offered by Tan and Dworkin make a fact-insensitive understanding of luck-egalitarianism theoretically unnecessary? Perhaps we can dispense with fact-insensitive luck-egalitarianism in favor of a suitably qualified version of it that's both defensible and capable of playing an action-guiding role in politics? My reply to these questions is a twofold one. First, it's questionable whether Tan's and Dworkin's versions of luck-egalitarianism are capable of adequately responding to the full range of objections I claim a fact-insensitive interpretation can accommodate. Tan, for instance, does not address Scheffler's freewill related objection, and yet his account seems vulnerable to it. After all, Tan's view is that the principle of luck-equality, though limited in scope to inequalities located above the sufficiency threshold, is indefeasible within the domain in which it operates. In fact, he explicitly remarks in a footnote that defeating the harshness objection by making luck-egalitarianism subject to trade-offs constitutes a "Pyrrhic

[210] Dworkin (2002) pp. 113-4.
[211] Dworkin (2000) pp. 334-8.

victory".[212] Unfortunately, conflicts can occur above the sufficiency threshold too. For example, permitting those with genetically produced, economically productive talents to have a larger income than others is in tension with luck-egalitarianism, and yet efficiency seems to require incentives if it is the case that the talented would not otherwise choose to put their talents to economically beneficial uses. As a result, it is an implication of Tan's view that we should level down rather than permit economic incentives, an implication which seems all the more implausible when we take into account the claim that, on a compatibilist view of freewill, the difference between choice and circumstance is not sharp and thus should not be accorded decisive significance.

In contrast, and as we'll see in the next chapter, a fact-insensitive understanding of luck-egalitarianism has the capacity to deal with the problem of economic incentives in a satisfying and nuanced fashion. On the one hand, fact-insensitive luck-equality's defeasibility makes it possible to accord efficiency enough weight to justify economic incentives, thus avoiding levelling down. On the other hand, though, applying the principle of luck-equality in an evaluative fashion allows us to recognize the unfairness of such incentives, and thus the superior desirability of a society whose social ethos permits us to pursue a greater degree of equality without compromising efficiency. I will say more about this in the next chapter.

As for Dworkin, despite having an explicit reply to the harshness objection, he's nonetheless still vulnerable to it. As Tan himself points out, it isn't clear that the hypothetical insurance device can justify securing basic needs against bad option luck across the board. Though it's likely rational for hypothetical insurance buyers to insure

[212] Tan (2008) p. 679, footnote 25.

against the possibility that future imprudence might, at some point, endanger the satisfaction of their basic needs, Tan is perhaps right to say that an insurance policy which protects basic needs without any stipulations about disqualifying behavior would have extremely high premiums. A person who must be repeatedly bailed out is much more expensive to society than a person who must only be bailed once or twice in her otherwise prudent life. However, guaranteeing basic needs across the board requires protecting the former person as much a as it requires protecting the latter person. As a result, it may not be rational for a hypothetical insurance buyer to fully protect her basic needs against the possibility of bad option luck, and thus Dworkin's theory remains vulnerable to the harshness objection.[213]

If the arguments expressed in the above two paragraphs are persuasive, then it is reasonable to conclude that Tan's and Dworkin's versions of luck-egalitarianism, unlike the fact-insensitive interpretation I've defended, are unable to fully withstand the major criticisms. The claim that a fact-insensitive conception of luck-egalitarianism is dispensable can thus be rejected for that reason. Even if Tan's and Dworkin's versions were defensible, though, I don't think it's reasonable to conclude that said defensibility would obviate the need for fact-insensitive luck-egalitarianism. In their efforts to maintain a tight connection with action-guidance, Tan and Dworkin render their theories incapable of accommodating some pretty clear cases of unfairness. This is not a bad thing per se. However, it does require recognizing that the evaluative capacity of their theories is lacking. Since the criteria they provide do not recognize all cases of

[213] Tan (2008) pp. 678-9.

distributive unfairness, they also cannot play the evaluative role only a conception of fundamental justice can adequately fill.

Let's consider Tan first. As we've noted, Tan avoids the harshness objection by limiting the scope of luck-egalitarianism to inequalities that lie above the sufficiency threshold. On his view, our duties to those who fall below the sufficiency threshold are not duties of justice, but rather duties of humanity. It follows from this, he claims, that a correct understanding of luck-egalitarianism does not require harsh treatment of the imprudent in cases where basic needs are at stake. Since it is humanity (compassion), not justice, which gives us reason to redistribute to those in absolute poverty, justice also cannot be a reason to withhold distribution in cases where a person is responsible for being in absolute poverty. Justice and humanity occupy different domains, he thinks. Humanity covers absolute poverty, i.e., deprivation that falls below the sufficiency threshold, and justice covers inequalities that lie above that threshold.[214] In fact, as we noted earlier, Tan explicitly rejects the view that humanity 'trumps' justice in cases where absolute poverty is traceable to imprudence, and thus he explicitly rejects the claim that justice applies, even in a defeasible manner, below the sufficiency threshold. According to him, accepting the 'humanity trumps justice' reply to the harshness objection constitutes a 'pyrrhic victory' (a claim I challenge in the next section).[215]

Though Tan's importation of the duties of justice vs. duties of humanity distinction from the global justice literature affords him a convenient reply to the harshness objection, it doesn't take too much reflection to realize that considerations of fairness extend beyond the boundaries he sets. For example, consider a hypothetical

[214] Tan (2008) pp. 669-71.
[215] Tan (2008) p. 679, footnote 25.

society whose members all fall below the sufficiency threshold. Since no-one in this society is able to fully meet all of her basic needs, everyone is poorly off in absolute terms. Still, some of the members of this society are better off than others. Let's say that the members of one group, through no fault of their own, are unable to fully meet most of their basic needs and thus tend to die at quite a young age. The members of another group, in contrast, are able to meet most of their basic needs most of the time, but regularly suffer from malnutrition because they don't have enough of the right nutrients in their diet. This latter group still leads what we would consider to be a very hard life in absolute terms, but it is nonetheless considerably better off than the former group. Granted that the inequality between these groups is not traceable to choice, are we to refrain from judging it to be a case of unfairness simply because it occurs below the sufficiency threshold? Presumably not. Of course, we might be willing to grant that in circumstances of such dire need other concerns take precedence over fairness, all-things-considered. For instance, it might be more important to attempt to raise as many people as possible to the sufficiency threshold than it is to attempt to eliminate inequalities between those below it. That doesn't somehow remove the unfairness, though. It just makes it comparatively less pressing.

Let's consider a more conventional example. Consider inequalities of the kind egalitarians frequently address, namely inequalities between those who are quite poorly off through no fault of their own in both relative and absolute terms and those whose social and/or genetic luck have made them quite well off in both relative and absolute terms. On Tan's account, the duties owed by the well off to the poorly off in this case are, at least at first, strictly duties of humanity. It is only after the poorly off have been

raised above the sufficiency threshold that the duties owed to them become duties of justice. As with the previous case, though, there's an unfairness not captured by Tan's analysis. While it's true that considerations of humanity (compassion) favor aiding the poorly off who fall below the sufficiency threshold, and it's also true that considerations of fairness favor aiding the poorly off when they are above it, it would be strange to deny that the inequality between the well off and the poorly off is a source of unfairness when the poorly off lie below the sufficiency threshold. Presumably the unchosen inequality between them is unfair both prior to and after the cardinal point marked out by sufficiency. Why is recognizing this important? It is important to recognize because we would otherwise be unable to acknowledge the unfairness of inequalities between the rich and the poor in cases where the poor are *absolutely* poor, i.e., in cases where they fall below the sufficiency threshold. An upshot of being unable to acknowledge the unfairness of such inequalities is that egalitarians would be unable to say a lot of things that they obviously want to be able to say. For example, we would be unable to say that the inequality between rich group X and poor group Y is *less unfair* once poor group Y has been raised above the sufficiency threshold. In other words, we would be unable to say that our initial redistributive efforts have mitigated the unfairness between them. What's more, though we would be able to say that the inequality between rich group X and comparatively but not absolutely poor group Y is unfair, we would (absurdly) not be able to say that the inequality between rich group X and comparatively even poorer plus absolutely poor group Z is unfair. Since we obviously want to able to say these things, however, we must also admit that Tan's luck-egalitarianism lacks the capacity to identify certain cases of distributive unfairness.

The above cases suggest two things about fact-insensitive luck-egalitarianism. The first is that, for evaluative purposes, it cannot be ignored. Even if Tan's version of luck-egalitarianism can adequately specify our all-things-considered duties of justice, it cannot account for all the instances where we want to deem an inequality to be unfair. As such, and at the very least, fact-insensitive luck-egalitarianism should be preserved alongside Tan's action-guiding luck-egalitarianism for the purpose of filling in the evaluative gaps his theory leaves behind.

Second, the above cases, specifically the more conventional ones, also suggest that ignoring fact-insensitive luck-egalitarianism can lead to a mischaracterization of our all-things-considered duties. As I argued in the previous paragraph, the unchosen inequality between the well off and those below the sufficiency threshold should be recognized as unfair. This is important for evaluative clarity about the status of that inequality, but it's also important to how we understand the relevant duty. Once we recognize that the inequality is unfair, the all-things-considered duty to aid the poorly off becomes more than just a duty grounded in humanity or compassion: it becomes a duty grounded by fundamental justice too. Unlike the cases highlighted by the harshness critique, where fairness and compassion clash, cases where the poorly off are unable to meet basic needs through no fault of their own are cases where reasons of fairness and compassion overlap, providing mutual support for the conclusion that the needy should receive aid. This produces a significant difference between the kinds of all-things-considered duties we can owe to those below the sufficiency threshold. Some of our all-things-considered duties are solely duties of humanity because fundamental justice tells against a duty to redistribute but is trumped by compassion. Other duties, however, are

all-things-considered duties of justice because fundamental justice counts alongside compassion as one of the reasons justifying redistribution.

It's important to note that accurately classifying our duties to those below the sufficiency threshold is not merely a matter of nomenclature. Recognizing that some of our duties to those below the sufficiency threshold are duties of humanity but not justice while others are duties of humanity and justice should matter when ranking our distributive priorities in the real world. *Ceteris paribus*, when scarce resources leave one faced with a choice between helping either the imprudent needy or those who are needy through no fault of their own, the latter should take precedence. Characterizing all our duties to those below the sufficiency threshold as solely duties of humanity thus deprives us of important, normatively relevant information.

Predictably, Dworkin's hypothetical insurance device, like Tan's version of luck-equality, also excludes various cases of unfairness. For example, consider a hypothetical set of people who are in all relevant respects the same except that one member of the set is worse off economically because she has been seriously disadvantaged by bad brute luck. We can expect that Dworkin's insurance scheme would compensate the disadvantaged member, thus recognizing the unfairness of the inequality between her and the other members. It does not, however, recognize the unfairness of any residual inequality that remains after compensation has been awarded, given that one of the functions of Dworkin's insurance scheme is to set a limit on the amount of compensation owed to any victim of brute luck.[216] The disadvantaged are entitled to compensation, but

[216] See Dworkin's discussion of the contrast between his hypothetical insurance device and other approaches to compensating the handicapped in Dworkin (2000) pp. 79-80. See also Kymlicka (2002) pp. 76-7.

only in so far as they would hypothetically have insured against whatever befell them. As a result, the victims of bad brute luck are not always entitled to *full* compensation on his theory, i.e., to compensation that's sufficient to place them at the same level as their luckier co-citizens. The upshot is that Dworkin's theory, like Tan's, has limited evaluative capacity. In order to capture the unfairness of inequalities like this, fact-insensitive luck-egalitarianism is needed to fill in the evaluative gap.

Is the above analysis fair to Dworkin, though? Does Dworkin's theory really neglect residual inequalities? While it's clear in Tan's case that fact-insensitive luck-equality is being neglected in favor of an action-guiding version of it, it's less obvious that this is the case with Dworkin. In fact, an appreciation for the manner in which he derives his insurance device suggests that he would perhaps agree that something like fact-insensitive luck-egalitarianism is indispensable. According to Dworkin, it is theoretically desirable for a distribution to be "ambition-sensitive" but not "endowment-sensitive".[217] However, he thinks that various practical problems make it both infeasible and undesirable to attempt to fully realize such a distribution in the real world. Practical problems he discusses include our inability to discern which part of a person's talents is traceable to choice and which part to genetics,[218] as well the inefficiency of attempting to provide full compensation for bad luck in cases where doing so is expensive and unlikely to be effective (severe spinal cord injuries, for example).[219] To deal with such difficulties, Dworkin recommends that his hypothetical insurance device be used to guide political practice instead.

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[217] Dworkin (2000) p. 89.
[218] Dworkin (2000) p. 91.
[219] See Dworkin's discussion of healthcare and his rejection of the 'rescue principle' in Dworkin (2000) chapter 8.

From the above description, it does not seem unreasonable to conclude that Dworkin is employing a distinction very much akin to the distinction between fundamental, fact-insensitive principles and rules of regulation. The ideal of an ambition-sensitive but endowment-insensitive distribution, though unsuitable for purposes of guiding political practice, is nonetheless used to justify that which is suitable for guiding political practice, namely the hypothetical insurance device. After all, his hypothetical insurance device still makes room for brute luck to be compensated. It just places limitations on compensation in deference to the fact that the resources available to a society are finite. What's more, there's a sense (albeit an attenuated sense) in which cases of bad brute luck that the state refuses to compensate are in effect converted into cases of bad option luck. Under institutions designed to emulate a hypothetical insurance market, the state only refuses to compensate cases of bad brute luck that would be hypothetically irrational to insure against. Thus when a citizen is denied compensation for a disadvantage traceable to her circumstances, it is only because she would have hypothetically *chosen* not to buy coverage.[220] As a result, the hypothetical insurance device can justify withholding compensation on the basis of reasoning that's akin to, and in fact modeled after, justifications for disadvantage that invoke responsibility for choice as the basis for non-intervention. Given all of this, it is not unreasonable to interpret the ideal of an ambition-sensitive, endowment-insensitive distribution as Dworkin's fact-insensitive principle of fundamental luck-egalitarian justice, and his insurance market device, in turn, as his conception of all-things-considered regulatory justice.

[220] Dworkin (2000) pp. 73-7.

Were the above understanding Dworkin's own understanding of his theory, there would be little question about the place of fact-insensitive luck-egalitarianism within it. Interestingly, however, this is not how he understands his work. According to Dworkin, the hypothetical insurance market is not a pragmatic compromise. Though it is indeed responsive to facts about the real world, it nonetheless fully represents justice, rather than a compromise between justice and other considerations. To use Cohen's language, Dworkin's insurance market is supposed to be both a theory of what distributive justice *is* and a theory of what is politically required of us with respect to distribution, all-things-considered. The two are not supposed to come apart. Why? Because the insurance market device is just as much an interpretation of abstract equality, i.e., equal consideration, as the ideal of luck-equality is. According to Dworkin, for a theory to be a compelling interpretation of abstract equality is sufficient for it to be a theory of full, uncompromised justice.[221] If he's right, then pure luck-equality is more of a heuristic device in the context of his theory than anything else. As the correct conception of equal consideration for idealized circumstances, luck-equality can be used to help us discern what equal consideration requires of us in real world circumstances, but luck-equality is not itself the "sovereign virtue". Rather, equal consideration is, and it can be adapted to the circumstances we face in the real world by formulating an interpretation more practicable than the principle of luck-equality, namely the hypothetical insurance market (though, of course, there is still some distance between the insurance market and political practice in so far as a tax scheme cannot model it perfectly).

[221] Dworkin (2002) pp. 120-1; and Dworkin (2003) pp. 190-1.

The relationship between equal consideration, a conception of fundamental justice, and the implementation of fundamental justice in practice (regulatory justice) is a complex and important one. In fact, this relationship will be one of the topics discussed in chapter 6. Since I'll be dealing with it at length later, I will not discuss it too much here. I will say, however, that we should understand both the motivation to retain a close connection between luck-egalitarianism and action-guidance, as well as the related claim that a practicable interpretation of equal consideration (the hypothetical insurance device) is a full, uncompromised theory of justice; in relation to the idea of *primacy*. As Rawls puts it: "Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust."[222] This statement of Rawls's is sometimes associated with his focus on institutional justice, but its force goes beyond what justice applies to. It's also a statement about the supreme importance of justice relative to other virtues. It states that a society's institutions, regardless of the other virtues they might exhibit, must conform to the virtue of justice in order to be acceptable. For anyone who takes this idea seriously, it might be thought that an important element of any plausible theory of justice is that its principles be indefeasible.[223] A conception of justice that subjects itself to trade-offs, e.g., trade-offs with efficiency, for example, can at best be said to have delivered the content of *a* virtue of social institutions, not *the first* virtue of social institutions.

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[222] Rawls (1971) p. 3.
[223] See Quong, (2010) pp. 338-40; and Valentini (2012) p. 658. See also Katherine Eddy's discussion in Eddy (2008) pp. 476-80.

Of course, a proponent of fact-insensitive luck-egalitarianism who thinks a defeasible principle of luck-equality supplies the correct account of what justice *is* could always reply that institutional regulatory principles which adequately express what is required of us, all things, including justice, considered, would be able to satisfy a 'no trade-offs allowed' requirement. However, for regulatory principles to be indefeasible is not the same thing as meeting the primacy requirement. Regulatory principles, in order to fulfill their action-guiding role, reflect trade-offs between various values. Fairness (fundamental justice), compassion, efficiency, etc., must all be taken into account when determining their content. As a result, any adequate conception of regulatory justice is always imperfectly fair and thus imperfectly just from the perspective of a principle that correctly specifies what justice is. For the proponent of primacy, this analysis is unacceptable. Primacy, she would say, is just as much a part of the *concept* of justice as fairness is. If this is correct, then it seriously challenges Cohen's claim that conflicts with other values constrain the *implementation* of justice via derivative principles, and not its *content*. A primacy constraint on the content of justice would mean that any putative principle of justice that fails to trump the competing considerations it comes into conflict with is not a compelling conception of justice's content.

But what should take precedence when articulating a conception of justice, the requirement that a conception of justice cohere with our full range of intuitive judgments about fairness and unfairness, or the requirement that it have primacy? As things stand, these two features of the concept of justice, *fairness* and *primacy*, appear to be in dramatic tension with each other. A principle that coheres with our full range of intuitive judgments of fairness can supply necessary and sufficient conditions for the fairness of a

distribution, thus meeting the fairness requirement, but it will also thereby become vulnerable to counter-examples that make trade-offs necessary (the counter-examples in the harshness critique, for example). In contrast, a principle that's normatively robust enough to serve an indefeasible, action-guiding role can satisfy the primacy requirement, but it must also put aside certain judgments of fairness in doing so, e.g., the judgment that it is unfair to compensate the imprudent needy. Is it the case, then, that any principle satisfying the fairness requirement lacks primacy and that any principle satisfying the primacy requirement is imperfectly fair? The answer to this question will have to wait until chapter 6.

5. Fact-Insensitive Luck-Egalitarianism: Defensible, Yes, but Practically Significant?

In this chapter, I hope to have demonstrated that luck-egalitarianism is a plausible conception of fundamental justice. However, I also hope to have demonstrated that it is implausible as a conception of regulatory justice. Even when qualifications such as Tan's and Dworkin's are added to it, luck-egalitarianism still incurs serious moral costs when accorded an action-guiding role in political practice. Dworkin seems vulnerable to the harshness objection, and Tan to the levelling down problem. Though my reader may agree that I've accomplished my goals, she might nonetheless reasonably wonder what we're left with at this point. Sure, luck-egalitarianism is a defensible conception of fundamental justice. And sure, it supplies us with a useful evaluative criterion, one that captures intuitive cases of fairness and unfairness even in instances where the fairness of an inequality is not sufficient reason to leave it intact or where the unfairness of an

inequality is not sufficient reason to eliminate it. But what's the practical value of such a criterion? Can it contribute anything to normative deliberation?

The above question can be answered in part with reference to our discussion about recognizing considerations of fairness below the sufficiency threshold. Though it is true under normal circumstances that both the prudent needy and the impudent needy should be compensated, it is nonetheless practically significant to recognize that fairness supports compensating the former but not the latter. Why? Because our circumstances are not always normal, and reasons that are typically defeated can become effective when the relevant facts change. With respect to compensating the needy in particular, an important circumstantial factor is the availability of resources with which to provide compensation. When resources are sufficient to compensate both the prudent and the imprudent, recognizing the unfairness of compensating the latter does nothing to affect our course of action. When resources are no longer sufficient, however, recognizing that we have reasons of humanity and fairness to compensate the prudent needy but only reasons of humanity to compensate the imprudent needy becomes practically important. *Ceteris paribus*, if it isn't feasible to compensate both the prudent and the imprudent, then the prudent should take precedence. To borrow an example from Richard Ashcroft, consider a case where two patients with heart disease need a heart transplant, one of whom is a lifelong smoker and the other of whom is a lifelong non-smoker.[224] To simplify things, let's also assume that the smoker's decision to become a smoker was

[224] See Ashcroft (2011) pp. 89-90. Ashcroft himself concludes that health care practitioners should not take the patient's responsibility or lack of responsibility for poor health (he uses the word 'desert') into account when allocating health care resources. His reasons for this are pragmatic; however, e.g., he notes that doctors are not moral experts capable of judging the extent to which patients are responsible for their illness, that most cases of poor health have been influenced by lifestyle related causes to at least some extent, etc.

autonomous, and that the other relevant factors between the two are equal (they have similar diets, drinking habits, etc.). If there's only one heart available, wouldn't it be unfair to give the heart to the smoker instead of the non-smoker? Though the decision to smoke is probably not a fully autonomous one is many cases, e.g., when a smoker becomes addicted during her teenage years, and though relevant factors often won't be equal between the smoker and the non-smoker, the case I've described is nonetheless one where it is *right* to deny the smoker a heart transplant because it is the *fair* thing to do.

Of course, there are probably various considerations that make it unwise to try and distribute health-care resources in accordance with the extent to which patients are responsible for their poor health. Informational problems likely make it difficult to consistently render accurate judgments about which patients are at fault for their health problems. Furthermore, it may be the case that poor health choices are more common among disadvantaged social groups, in which case conditional health benefits would have the effect of further disadvantaging those who have already have less through no fault of their own.[225] The point of my example is merely that when deciding how to distribute an indivisible good, it make a practical difference if, all-things-being-equal, considerations of fairness and considerations of compassion mutually support distributing to a particular party. Though all things are probably not equal in matters of health-care, there may be other contexts where my observation carries more significance.

The practical value of fact-insensitive luck-egalitarianism will, I think, become further apparent via an analysis of its relationship with Rawls's difference principle. Though it has been argued with some plausibility that Rawls's theory of justice does not

[225] I owe thanks to Christine Sypnowich for highlighting the worry about disadvantaged social groups.

even implicitly rely upon luck-egalitarianism,[226] it must be admitted, nonetheless, that the difference principle has a lot going for it from the perspective of a luck-egalitarian who sees it as a regulatory principle that implements the requirements of luck-equality without exceeding the bounds of all-things-considered reasonableness.

First, the difference principle is responsive to the fact that one cannot be held responsible for the social group into which one is born, as it requires that the distribution of opportunities between individuals with different group membership, but the same talents and ambitions, be equal. Second, it recognizes that natural talents are largely the product of genetic luck, and thus that there are reasons of fairness to limit the extent of their distributive influence. Third, though the difference principle permits some inequality between the talented and the untalented, Rawls qualifies this with a caveat. The justifiability of inequalities consistent with the difference principle is contingent upon it being the case that those inequalities not be too great. If it turned out that the realization of equal liberty and fair equality of opportunity were not enough to limit the size of inequalities necessary to improve the position of the worst off, then the difference principle would not be justified.[227] In sum, the difference principle's commitment to fair equality of opportunity and the mitigation of genetic luck's distributive impact, combined with the justificatory assumption that inequalities will be limited in size, makes it a pretty reasonable regulatory principle from the perspective of fact-insensitive luck-egalitarianism.

Furthermore, it should be noted that the difference principle compares quite favorably when considered against the problems plaguing Tan's and Dworkin's attempts

[226] See Scheffler (2003) pp. 24-31; and Scheffler (2005) pp. 7-8.
[227] Rawls (1971) pp. 157-8.

to defend action-guiding versions of luck-egalitarianism. Unlike Tan's principle, the difference principle avoids the levelling down problem, as it permits incentives in cases where the talented would otherwise be less economically productive. Unlike Dworkin's hypothetical insurance market, the difference principle uncontroversially avoids the harshness objection, as all members of the worst-off group are the beneficiaries of compensation, regardless of whether they're prudent or imprudent. All-things-considered, the difference principle is a pretty compelling distributive regulatory principle.

As I'll now proceed to argue, however, the difference principle's regulatory optimality is, from the perspective of fact-insensitive luck-egalitarianism, temporary. When factual constraints that limit the extent to which luck-equality can be implemented on its own or in unison with other values are lifted, modifications to the difference principle are subsequently needed in order to restore its all-things-considered optimality. Pablo Gilabert's work is helpful for understanding this point. He notes that an appreciation for the malleability of *soft* feasibility constraints requires that we take a 'transitional standpoint'.[228] The main implication of his work for fact-insensitive luck-egalitarianism is that its implementation is not simply a matter of adopting action-guiding principles that reflect feasibility constraints and the requirements of other fundamental principles. It also requires paying attention to the ways in which our actions can affect our social and political context, and thus the ways in which they can affect the feasibility of realizing more desirable states of affairs in the future.[229] Since the content of a fact-

[228] See, for example, Gilabert (2008) pp. 431-8; Gilabert (2011) pp. 59-63; and Gilabert and Lawford-Smith (2012) pp. 821-3.
[229] Gilabert (2011) pp. 59-63

insensitive principle is not itself sensitive to the limitations created by popular political opinion, entrenched interest groups, existing inequalities, etc., fact-insensitive principles can be used as criteria in light of which to identity and transitionally address such factors in cases where they constitute barriers to moral improvement. For example, Wolff's concern about disproportionate scrutiny and distrust is a problem with respect to which taking a transitional standpoint makes sense. As we noted, Wolff worries that in a highly unequal society, the implementation of luck-egalitarianism will reasonably be experienced as distrustful and disrespectful by poorly off social groups, as the conditionality of luck-egalitarian compensation would require that they be subject to a disproportionately large amount of scrutiny. However, in a society with less inequality, one where no set of social or racial groups bear the lion's share of society's burdens, the situation is different. Implementing luck-equality in such a society would not require disproportionate scrutiny. The upshot of this observation is to take a transitional standpoint with respect to the implementation of luck-equality in a highly unequal society. Since the pursuit of unconditional redistribution promises to yield a context where the facts don't force a conflict between fairness and respect, unconditional redistribution should be pursued until conditional redistribution becomes more reasonable.

Getting back to the difference principle, the above discussion of disproportionate scrutiny suggests one area where that principle's optimality is temporary. Though considerations of humanity/compassion require securing a basic needs floor below which the poorly off should not be permitted to fall (except in situations like the heart transplant case), redistributively distinguishing between the prudent and the imprudent above this

point is reasonable so long as it does not require imposing disproportionate scrutiny. This suggests that Rawls's version of the difference principle serves as an appropriate goal in circumstances where it, along with equal liberty and fair equality of opportunity, has not yet been fully realized. However, once his principles have been realized, and, as a result, no particular social group would be disproportionately scrutinized (fair equality of opportunity will presumably have eliminated inequality between social groups), it in turn becomes possible to pursue a greater degree of fairness and respect in unison. In such circumstances, I suggest that instead of ensuring that inequalities maximally benefit the least well off in general, it is more appropriate to combine (a) a basic needs floor that covers the imprudent needy with (b) a commitment to ensuring that inequalities between the well off and the poorly off maximally benefit those who are poorly off through no fault of their own. The upshot would be a society where the imprudent have their basic needs met but, out of recognition of the unfairness of compensating them, do not receive maximal benefit. The victims of bad brute luck, in contrast, receive maximal benefit, and are thus better off than the imprudent. However, a certain amount of inequality between them and the talented well off is permitted in the form of incentives, when necessary, out of deference to efficiency and the importance of avoiding the levelling down problem. From the perspective of fact-insensitive luck-egalitarianism, this strikes me as the best institutional regulatory route.

As we'll soon see, the tension between fairness and efficiency associated with the need to offer incentives is, like the tension between fairness and respect, contingent. Whereas the tension between fairness and respect is contingent upon the *fact* of existing social inequalities, the tension between fairness and efficiency is contingent upon the *fact*

that the talented are not motivated to be equally productive under a fully egalitarian tax regime. Further discussion of the matter will have to wait until chapter 5; however, as it is there where I address Cohen's work on incentives and the scope of justice.

Gilabert's analysis shows how fact-insensitive principles' insensitivity to *soft* feasibility constraints makes them useful standards in light of which to transitionally adjust our regulatory principles. What about *hard* feasibility constraints, though? The content of a fact-insensitive principle is, we should recall, insensitive to feasibility in general. What practical role might principles insensitive to even ostensibly permanent features of the human condition play? Though I do not pretend to have a comprehensive answer to this question, at least some of the practical importance of general insensitivity is derivable from our epistemic limitations. After all, we aren't always able to determine which constraints are hard and which are soft. Technological and other advancements sometimes overturn the facts constituting a putatively hard constraint. In situations where such a constraint is lifted, it may be the case that previously optimal regulatory principles cease to be so. To be cognizant of this, however, requires an understanding of what one found appealing about those principles, an understanding that survives factual change and enables one to perceive that the formerly optimal principles now fall short.

Consider the implications of emerging genetic technology. This sort of technology, once it has reached a sufficiently advanced state, will predictably have the power to enhance human physical and mental abilities far beyond the present norm. This possibility raises questions of justice, among other things.[230] In the contemporary distributive justice literature, egalitarian theorists have generally considered it to be a

[230] For a stimulating book discussing various issues surrounding justice and genetic modification, see Buchanan et al. (2000).

hard fact that governments cannot influence the distribution of natural abilities. Nevertheless, they recognize that justice requires addressing natural inequalities. Some theorists, such as Cohen, think that unequal natural ability is an intrinsic source of unfairness.[231] Others, such as Ronald Dworkin and Kok-Chor Tan, think unequal natural ability is only normatively significant insofar as it is permitted to affect individuals' access to social goods.[232]

It's possible that the above disagreement can be chalked up to the fact that Cohen's interested in specifically fundamental justice, while Tan and Dworkin are interested in action-guiding principles. What's more, I suspect that it would not be difficult to cook up some intuitively compelling cases that show the intrinsic unfairness of unequal natural talent, cases which fact-insensitive luck-egalitarianism would need to account for. I will not argue for these conclusions, however. Instead, I will restrict myself to noting that the practical significance of determining whether unequal natural abilities are intrinsically or merely extrinsically unfair depends on the circumstances. On one hand, the answer to this question matters little for political practice if only social goods fall within the scope of government influence. If natural abilities can be affected, however, then a seemingly arcane dispute carries much more practical significance. For one who thinks natural inequality is intrinsically unfair, improvements in genetic technology may be a reason to adopt regulatory principles that target more than just the distribution of social goods. If certain ability-boosting genetic interventions are morally acceptable, considerations of fairness may suffice to ground a version of the difference

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[231] Cohen (1989) pp. 917-8. In addition to holding this view himself, Cohen attributes it (perhaps incorrectly) to Rawls. See Cohen (2008) pp. 96-7.
[232] Dworkin (2000) pp. 79-90; and Tan (2008) pp. 671-3 and pp. 679-80.

principle that targets not only the poorly off members of society's share of social goods, but their endowment of natural abilities as well. Noticing this, however, requires clarity about the fact-insensitive principle that explains why one supports addressing natural inequalities via the redistribution of social goods in the first place. If it is merely because one thinks the effect of natural inequality on the distribution of social goods should be either mitigated or eliminated, then the emergence of new genetic technology is seemingly unimportant. If, however, it is because one thinks natural inequality is unfair in part due to its social effects but also in and of itself, then the facts associated with technological advancement become normatively significant. Only when we are clear about the content of the principles that explain our regulatory commitments can we react appropriately to unexpected factual change.

6. Conclusion

In conclusion, the purpose of this chapter has been to defend the claim that luck-egalitarianism is plausible when the principle of luck-equality is understood to be a conception of a fact-insensitive, fundamental value. I began by explaining the theoretical advantages and problems associated with luck-egalitarianism. Next, I explained why the aforementioned advantages are specifically advantages for a conception of *fundamental justice*, and why the aforementioned problems are, in many cases, not problems for a conception of fundamental justice but rather for a conception of *regulatory justice*. In section 4, I considered some defenses of luck-egalitarianism that attempt to respond to major criticisms without sacrificing the theory's capacity for action-guidance. I argued that whether these defenses succeed is questionable. I also argued that even if they were successful, an action-guiding version of luck-egalitarianism would not obviate the need

for a distinct, fact-insensitive version of the theory. Finally, in section 5 I explained some of the practical uses of fact-insensitive luck-egalitarianism. Much of my focus was on ways in which the principle of luck-equality can inform factually contingent improvements to the difference principle.

In my next chapter, I address the *scope* of distributive justice. I'll argue that justice, when understood as a fundamental value, justifiably extends from the institutional context to the personal context. Though the claim that fundamental justice applies to personal choices is in accordance with Cohen's own view on the subject, the positon I take in my next chapter contradicts his in one important respect: I maintain we have good reason to prefer an alternative to the difference principle in the personal realm.

Chapter 5

The Scope of Justice

1. Introduction

In chapter 3, I unpacked the implications of Cohen's fact-insensitivity thesis for two others theses he's committed to: (a) the independence of moral desirability from feasibility, and (b) value pluralism. In chapter 4, I further unpacked the implications of the fact-insensitivity thesis, this time with respect to the luck-egalitarian conception of justice. More specifically, I defended the following hypothetical claim: *if* it's true of the *concept* of justice that it's a fundamental, fact-insensitive value, *then* luck-egalitarianism supplies a compelling *conception* of its content. The present chapter tackles yet another of Cohen's theses: the claim that Rawls (and liberal egalitarians more generally) cannot justifiably restrict the scope of principles of distributive justice to institutional arrangements alone. As with the previous chapter, the thesis I will defend here is hypothetical: *if* justice is a fundamental, fact-insensitive value, *then* the scope of distributive justice extends past institutions to citizens' personal choices. However, unlike the previous chapter, my view of this matter does not entirely coincide with Cohen's. I also make a further, internally critical claim regarding Cohen's position. I assert that the facts differentiating the personal context from the institutional context give us reason to think that the content of action-guiding principles suitable for the latter should differ from those suitable for the former. If I'm right, then the case for restricting the scope of practice-guiding institutional principles is stronger than Cohen allows.

In section 2 of the present chapter, I explain Cohen's well-known critique of Rawls's 'basic structure restriction' and the canonical critique of incentives from which it emerges.[233] I also explain four other related but distinct views of Cohen's: (a) that the incentives related tension between equality and efficiency is contingent upon the character of a society's ethos, (b) that equality should, to some extent, give way to efficiency in cases where the character of a society's ethos puts them in tension with each other, (c) that an ethos of justice is necessary for a just society, and (d) that considerations of efficiency are external to justice. An understanding of how these views differ from and relate to each other will prove helpful in the paper's subsequent sections, especially sections 4 and 5.

In section 3, I explore the theoretical relationship between a principle's status as either fundamental or regulatory and its scope of application. I distinguish between a principle's scope of intelligible application and its scope of justified application and explain that fundamental principles, though not intelligibly applicable to all contexts and possible worlds, are, by virtue of their fact-insensitivity, justifiably applicable in any context to which they intelligibly apply. Regulatory principles, in contrast, often experience a gap between their range of intelligible application and their range of justified application, i.e., there are contexts to which they intelligibly apply but do not justifiably apply. As a result, the scope of a fundamental principle's justified application will tend to be wider than a regulatory principle's. A consequence of this, I claim, is that there's a theoretical basis upon which to think that fundamental justice applies to both

[233] See Cohen (2008) chapter 1 and chapter 3.

institutions and the personal context, but that the regulatory principles suitable for institutions will differ from those suitable for the personal context.

In section 4, I assess Cohen's attempt to respond to the problem of demandingness via compensation for the welfare loss associated with special labor burdens and via the inclusion of a personal prerogative to legitimately deviate from the requirements of the difference principle to some extent. I argue that though these moves make perfect sense if one is defending the application of fundamental justice to personal choice, they become problematic when it's acknowledged that the issue at hand is whether the difference principle (an institutional regulatory rule) extends to personal choice, as they're inconsistent what Cohen says about regulatory rules. Furthermore, because it's so difficult for citizens to tell whether they've done enough to fulfill the requirements of a welfare-inclusive, prerogative constrained difference principle, unchosen inequality of burden inevitably emerges between those committed to it. All things being equal, a clearer regulatory principle or set of regulatory principles would be preferable.

In section 5, I discuss the 'profound effect' of a society's institutions on its distribution of benefits and burdens and Cohen's claim that profundity of effect doesn't exclusively pick out coercive institutions: informal institutions and a society's ethos also have a profound impact on distribution. I also discuss Thomas Pogge's and Joshua Cohen's attempt to defend restricting the direct application of the difference principle to institutions on the grounds that institutions obedient to the difference principle can satisfy its distributive demands, i.e., improve the position of the worst-off, in part by affecting

the character of its ethos.[234] I argue, not eccentrically I hope, that what's at stake in the choice between direct vs. indirect application of the difference principle to a society's ethos is whether citizens have a moral obligation to follow said principle in their daily lives. I also claim, on the same grounds as those employed in the previous section, that directly applying a regulatory principle that's clearer than the difference principle but still responsive to efficiency and fundamental justice is, all things being equal, a better way to improve the position of the worst-off. I conclude the section by discussing a response from Cohen which, like the personal prerogative and special labor burdens replies, problematically presupposes that the extension of fundamental justice is what's at stake in the issue.

In section 6, I wrap up the chapter with a brief discussion of the sense in which justice is a part of morality. For many liberal political philosophers, the relationship between the two is understood in a contextual fashion. Justice, though normative, is understood to be narrower than morality in the sense that it is the part of moral rightness that specifically pertains to a society's institutions. However, if Cohen's right to say that justice is a fundamental value, and I'm right to say that fundamental justice applies to personal choices, then justice's narrowness needs to be understood in a different fashion. I suggest that it should be understood in the following straightforward way: morality is comprised of a plurality of fundamental values and justice is one of them.

2. Justice, Incentives, and Personal Choice

Cohen's canonical objection to the exclusion of personal choice from the scope of distributive justice emerges from his critique of Rawls's use of economic incentives. As

[234] See Pogge (2000) pp. 164-6; and J. Cohen (2002).

most readers of Rawls are aware, the theory of justice he proposes, though largely egalitarian, permits inequalities necessary to facilitate the development and exercise of economically productive talents. Such inequalities are consistent with justice, he claims, when they satisfy the difference principle, i.e., when they're necessary to maximally improve the position of the worst off group in society.[235] Cohen's critique of this position begins with the observation that 'necessary' admits of more than one interpretation. On an intention-independent reading, inequalities are only necessary if the talented are literally unable to exercise and develop their talents without them, e.g., if those undergoing particularly stressful training required more costly forms of leisure in order to be capable of completing it. Interpreted this way, the word 'necessary' leaves very little room for inequality. On an intention-relative reading, however, it allows for a great deal more, as inequalities created by incentives are now also acceptable.[236] As Cohen indicates, it is the talented themselves who make inequalities of this sort necessary, for it is only necessary to offer incentives if the talented would refuse to raise their economic productivity without them.[237] If this is the case, though, then in what sense can it be said that the talented members of a just society personally affirm its principles? If, as Rawls claims, the citizens of a just society affirm the difference principle and the arguments in favor of it,[238] then how can they consistently make their productivity contingent upon receiving greater benefits? Citizens who believe in the injustice of unnecessary inequalities presumably wouldn't choose to make them necessary by demanding incentives. As such, Cohen maintains that Rawls's endorsement

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[235] Rawls (1971) pp. 75-83.
[236] Cohen (2008) pp. 68-9.
[237] Cohen (2008) pp. 48-54.
[238] Rawls (1971) pp. 453-4.

of economic incentives is inconsistent with the ethos his conception of justice incorporates.[239]

In response to the above argument, Cohen contemplates a potential objection that Rawls's supporters might press. According to Rawls, "the primary subject of justice is the basic structure of society", i.e., its "political constitution and…principal economic and social arrangements".[240] In other words, his principles of justice are specifically intended to apply to institutional structures. If this is so, then there would appear to be nothing inconsistent about affirming the difference principle while also demanding incentive payments. Since its scope is restricted, citizens who affirm it needn't apply it to their personal choices.[241]

Cohen's reply to the above line of argument is as follows: First, he points out that though Rawls at times seems to have only a society's coercively enforced institutions in mind when discussing the basic structure, there are other times where he includes informal, non-coercive institutions as well, e.g., the family.[242] Unlike the laws associated with coercive institutions, though, informal institutions and their behavioral norms are constituted by personal choices: they're created by individuals repeatedly choosing to behave a certain way and would vanish if those choices ceased to be made.[243] Applying principles of justice to informal institutions thus ostensibly requires applying them to personal choices as well.

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[239] Cohen (2008) pp. 121-2.
[240] Rawls (1971) p. 7.
[241] Cohen (2008) pp. 124-5.
[242] Cohen (2008) pp. 133-4. For an instance where Rawls explicitly includes the family in the basic structure, see Rawls (1971) p. 7.
[243] Cohen (2008) pp. 134-5.

Unfortunately for Rawls, back-pedalling to explicitly exclude non-coercive institutions is not a costless option. His main reason for making the basic structure the subject of justice is the profound impact it has on one's endowment of opportunities and resources, and thus on what one can reasonably expect out of life.[244] This criterion fails to exclusively pick out coercive arrangements, however, as informal institutions also have a profound effect on the life chances of those within them (just think of how unequal the distribution of primary goods is within the households of certain families, and the effect this has on those born into them). Cohen thus suggests that Rawls faces a dilemma. On the one hand, he could include informal institutions in the basic structure, thereby conceding the inclusion of personal choice. Alternatively, he could exclude informal institutions, but that would mean ignoring the demands of his own criterion.[245]

The above rendition of Cohen's views is, by this point, canonical. Any critic of Cohen's interested in challenging his view will typically start with an exegesis that mirrors the above rehearsed description of his engagement with Rawls. Though Cohen frames his criticisms as specifically internal criticisms of Rawls' theory of justice, it's worth noting that characterizing the issue as such is somewhat misleading. Restricting principles of distributive justice to institutions is not a feature unique to Rawls' theory: it's a background assumption shared by many liberal political philosophers. When these philosophers discuss justice, they take themselves to be engaging with a topic that, though normative, is narrower than the general nature of right and wrong. As we noted in the introductory chapter, the way they typically understand this narrowness is with respect to context. Justice, on their view, specifically pertains to the moral rightness of

[244] Rawls (1971) p. 7.
[245] Cohen (2008) pp. 136-7.

institutions.[246] To say that considerations of distributive justice bear directly on citizens' personal choices is thus to contradict a central background assumption concerning the difference between normative political philosophy and moral theory. It is to say, in effect, that justice is not a uniquely political subject. Justice, like the rest of moral theory, is also about what people should be doing in their daily lives.

In light of the above, I think Cohen's attack on the restricted scope of justice is best interpreted as being somewhat broader than an internal critique of Rawls. Cohen isn't just saying that Rawls is unable to consistently restrict the difference principle. He's saying that a central background assumption embraced by much of contemporary liberal theory is unjustified. Interpreting his position this way explains why Cohen's critique has generated such a staggering, largely critical response in the contemporary literature.[247] It also explains why, in cases where he thinks Rawlsian respondents have misinterpreted Rawls' position, Cohen is nonetheless unsatisfied with rejecting their replies on merely interpretive grounds. For Cohen, it isn't enough to say that an available defense of the basic structure restriction is inconsistent with *A Theory of Justice*, and thus unavailable to Rawls. Cohen also wants to say that the available defenses fail more generally.[248]

Before moving on to the next section, it will be useful to distinguish Cohen's critique of incentives and the basic structure restriction from 4 other views he holds about

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[246] For examples of prominent liberal philosophers (other than Rawls) who endorse either the institutional understanding of narrowness or its even narrower 'enforceability' counter-part, see Nozick (1974) p. 6; Kymlicka (2002) p. 5-6; Tan (2004b) pp. 21-9; and Miller (2007) pp. 248-9.

[247] For recent discussions of Cohen's critique of incentives and the basic structure restriction, see Estlund (1998); Williams (1998); Murphy (1999); Pogge (2000); J. Cohen (2002); Julius (2003); Tan (2004); Titelbaum (2008); Shiffrin (2010); and Schouten (2013).

[248] For example, Cohen thinks that the publicity constraint Andrew Williams endorses and attributes to Rawls is much stricter than the one Rawls actually endorses. Despite this, Cohen makes a thorough effort to rebut Williams's defense of the basic structure restriction on grounds unrelated to how Rawls should be interpreted. For Cohen's interpretive challenge to Williams, see the first few pages of chapter 8 in Cohen (2008). For his non-interpretive replies, see the rest of that chapter.

the same topics. The first of these views is straightforwardly implied by Cohen's distinction between intention-independent and intention-relative necessity. Since incentives are only required for efficiency insofar as the talented lack the motivation to be just as productive under an equal distribution, the tension between equality and efficiency associated with incentives is a socially contingent one. It's created by the existence of a certain kind of economic ethos and would cease to persist were that ethos to undergo a significant overhaul. This particular view is an instance of a more general view already discussed in chapter 3, namely the view that facts about the world determine the extent to which different values can feasibly be implemented in unison. In a society that lacks an equality inspired ethos, the simultaneous pursuit of distributive equality and efficiency is in tension. In a society that possesses such an ethos, the feasibility of achieving a high degree of both is greatly enhanced.

The second view concerns what should be done in cases where a society's social circumstances are such that there is a tension between equality and efficiency. If the prevailing ethos in a society makes the choice between levelling down and equality upsetting incentives necessary, which of these options should be chosen? For Cohen, the answer is clear. If a choice between permitting incentives and levelling down is inescapable, then permit incentives.[249] As with the previous view, this view is a specific instance of a more general view Cohen holds as an egalitarian pluralist. Equality, though important for Cohen because it supplies the content of fairness in distribution, is not the only fundamental value that must be given expression in political practice. We saw various applications of this view throughout our discussion of luck-egalitarianism in

[249] Cohen (2008) pp. 315-20.

chapter 4. Just as equality must to some extent give way in cases where its pursuit would require excessive harshness or impede the realization of a sense of community, so too must it leave sufficient space for efficiency: enough to avoid levelling down, at least.

The third view is closely related to Cohen's canonical critique, and is, in fact, expressed in the same piece where he attacks the basic structure restriction on the difference principle. It's the view that a justice-inspired ethos is necessary for a just society.[250] Since the difference between this view and the previously described critique of the basic structure restriction is subtle, it's perhaps worthwhile to devote some effort to articulating it.

In the aforementioned critique of the basic structure restriction, Cohen is specifically challenging the claim that principles suitable for a society's institutional structure should be restricted in scope. Since such restriction would block his claim that citizens' commitment to the difference principle is inconsistent with incentives, Cohen needs to defeat it in order to rescue his critique of incentives from Rawls' defenders. On the basis of Rawls' profundity of effect criterion and the constitutive connection between personal choice and informal institutions, Cohen concludes that institutional principles cannot be restricted in a non-arbitrary fashion. The present view differs from the one expressed in Cohen's canonical critique because it isn't committed to symmetry between the institutional and personal contexts. Unlike the canonical view, which advocates extending principles suitable for institutions to the context of personal choice, this view represents the somewhat weaker claim that a just society is necessarily characterized by an ethos of justice in addition to just institutions. Whether the content of the motivations

[250] Cohen (2008) pp. 128-9.

constituting an ethos of justice will be identical to, or somewhat different from, the content of institutional principles, is left open.

So why does Cohen think an ethos of justice is a necessary condition for the justice of a society? Part of his view seems to be that there's something inherent in an ethos of justice that makes it necessary for a just society[251]. The general idea seems to be this: take two societies, both of which have the same institutions and distribution of benefits and burdens, but only one of which is populated by a citizenry who are motivated personally to pursue a just distribution of benefits and burdens. Isn't the society characterized by the ethos of justice more just that the society that isn't? Cohen thinks the answer is 'yes', and thus that the character of a society's ethos counts alongside its institutions and distribution when determining its level of justice. In addition, though, Cohen also seems to think that an ethos of justice is necessary for the justice of a society because of its instrumental relationship with feasibly pursuing a better all-things-considered package of efficiency and equality.[252]

To appreciate this point, it will be helpful to recall the two views I recently described above: namely (a) the view that an incentive-related tension between equality and efficiency is socially contingent, and (b) the view that, when required, equality must give way to efficiency in so far as is necessary to avoid levelling down. When considered in tandem, this pair of views suggests that permitting incentives, though the best all-things-considered option under certain circumstances, is nonetheless regrettable, and, at least in the long-term, not strictly necessary. An ethos that would allow for a greater amount of equality to be pursued in tandem with efficiency is socially possible

[251] Cohen (2008) pp. 127-8.
[252] Cohen (2008) pp. 126-7.

and presumably worth pursuing. Given this, when one is asked to compare a society where incentives are necessary to produce the best all-things-considered outcome, to a society where, perhaps because of social change, they are not, shouldn't one be able to say that the latter is more just than the former? Both societies are all-things-considered optimal, but one society's ethos allows for the realization of greater equality in its all-things-considered package. Were the character of a society's institutions the only thing comprising its justice, however, we would be unable to recognize the differing degrees of justice exemplified by these two possibilities, i.e., the degree of justice exemplified by these societies would necessarily be identical.

The fourth and final view worth mentioning is the view that deviations from equality grounded in considerations of efficiency are also deviations from justice.[253] To get a handle on this, consider the levelling down problem once more. We noted earlier that on Cohen's view, permitting inequality in order to avoid levelling down is sometimes a regrettable moral necessity. However, to admit this is not equivalent to admitting that such inequalities are just. Efficiency based deviations from equality, though morally required, are nonetheless *unfair*, and thus also unjust. As with the second view, this view is, at least in part, traceable to Cohen's value pluralism. Justice, community, efficiency, respect, etc., are all different values, and it's important that considerations belonging to one be kept separate from the others when formulating conceptions of their content.

In addition, though, the view that efficiency is external to justice is traceable to what one might call *justice monism*, i.e., the view that only one value, equality, in Cohen's case, is internal to justice. The basic thought behind Cohen's justice monism

[253] Cohen (2008) pp. 156-61 and pp. 315-20.

can be broken up into two parts. First, justice (specifically narrow justice) and fairness are co-extensive. If something is unfair, then it is also, to that extent, unjust. Second, egalitarianism supplies the right conception of fairness in distribution, specifically luck-egalitarianism. The upshot is that justified deviations from equality, including those motivated by efficiency, are unfair, and thus inconsistent with justice. Such deviations can make a distribution morally better, all-things-considered, but they also detract from the extent to which it's just (thus also making it worse, one-thing-considered).[254]

3. The Relationship between Scope and Status

In the previous section, I sought to distinguish five different views Cohen has on the relationship between justice, personal choice, and incentives. Distinguishing these views was important in part because they concern the same topics and in some cases bear some resemblance to each other, but also because these distinctions will prove helpful when I proceed to analyze Cohen's arguments in sections 4 and 5 of this chapter. The purpose of the present section is to explore the relationship between (a) Cohen's claim that the principles of distributive justice suitable for institutions are also suitable for the context of personal choice (Cohen's canonical position), and (b) Cohen's claim that justice is a fundamental value. In this case, my concern is to some extent the opposite of my concern in the previous section. Rather than seeking to distinguish similar positions, my purpose here is to demonstrate that two ostensibly very different positions are in fact closely connected.[255] Before I can adequately address this matter, however, it will be necessary

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[254] Cohen (2008) pp. 6-8.

[255] Cohen claims that his two critiques are, in fact, quite distinct. His main reason for thinking so is that his critique of constructivism suggests constructivists are wrong about the concept of justice regardless of whether they permit the principles their procedures select to apply to personal choices. Though Cohen's right to point this out, sections 3, 4 and 5 of my paper demonstrate that his critiques are nonetheless intimately related. For Cohen's comments on the matter, see Cohen (2011b) p. 238 and pp. 252-3.

to investigate the relationship between a principle's scope of application and its status as either fact-insensitive or regulatory.

Two senses of a principle's scope should be distinguished from each other. In the first sense, a principle is or isn't wide with respect to its range of justified application. To say of a principle that it's wide in this sense is to say that one can justifiably apply it in a wide variety of contexts; much the way act-utilitarians believe the principle of utility to be the right moral principle for any and all circumstances.[256] In the second sense, a principle is either wide or narrow merely with respect to its range of possible application. To say of a principle that it's broad in this sense is to say that one can intelligibly apply it in a wide variety of contexts, irrespective of whether or not one is justified in doing so. Thus, for instance, a critic of act-utilitarianism might readily admit that attempting to maximize utility is perfectly intelligible so long as there are beings around with preferences to satisfy. What she would deny, however, is that doing so is always justified. Sacrificing an individual's rights for the good of the many is something most anti-utilitarians find objectionable. Similarly, requiring that citizens apply the difference principle to their personal choices, though intelligible, is something Rawlsians nonetheless protest for various reasons, some of which are discussed in the next section.

Keeping the above distinction in mind, then, what is the relationship between a principle's normative status and its scope of application in either sense? Though Cohen never provides an explicit answer, it's possible to discern an implicit one from the distinction between factual reasons and factual application conditions. As we already

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[256] However, a principle can justifiably apply to a wide variety of circumstances and yet cover only a fraction of what's morally relevant within those circumstances, i.e., it can be inter-contextually broad without being intra-contextually broad. See section 6 for discussion of the distinction between inter-contextual and intra-contextual breadth.

know, the content of fundamental, fact-insensitive principles, unlike the content of regulatory principles, is insensitive to facts that serve as justificatory reasons. As we also noted in our discussion of application conditions (section 3(c) of chapter 3), fact-insensitive principles are reliant on certain general facts for the intelligibility of their application. Examples we discussed include the relationship between a principle of autonomy promotion and the capacity for autonomous action, a principle of utility maximization and the existence of beings with preferences to satisfy, etc. Moreover, without the relevant factual beliefs, a fundamental principle is not a candidate explanation for any of an agent's action-guiding (regulatory) commitments, an upshot of which is that fact-sensitive principles' logical dependence upon fact-insensitive principles cannot be invoked to protect inapplicable principles from the regulatory theorist's skepticism. I concluded that factual application conditions are necessary conditions for specifically the transcendental justification Cohen's fact-insensitivity thesis affords.

In the present section, my interest is in the relationship between a principle's status as fundamental or regulatory, the manner in which factual application conditions and factual reasons bear upon it, and the effect this has on its scope of application in both the intelligible and justifiable sense. First, we know that the scope of a fundamental principle's intelligible application is limited by its factual application conditions. Fundamental principles cannot be coherently invoked as either explanations or justifications unless the agent holds certain factual beliefs, an implication of which is that they do not apply to all possible worlds, e.g., a principle of autonomy promotion has no application in a fictional world where there's no autonomy to promote (a world of robots, say). To say that fundamental principles do not apply to all possible worlds is not to say

anything especially restrictive, however. In so far as the facts determining a fundamental principle's scope of intelligible application are fairly general, the upshot is that it intelligibly applies across many of the contexts we find within the world in which we actually live.

Returning, for example, to a principle of autonomy promotion, the fact that it lacks application in possible worlds where autonomous beings do not exist does nothing to prevent it from intelligibly applying in our own world to the context of personal choice, the domestic institutional context, the global context, etc. What's more, if our principle of autonomy promotion is indeed a fundamental, fact-insensitive one, then factual reasons cannot be invoked to undermine its justification. Facts which, for instance, demonstrate that a principle is infeasible in a particular setting or that it cannot be feasibly implemented without unacceptable moral cost are, as we noted in chapter 3, irrelevant to a fact-insensitive principle's justification. This means that any context to which a fact-insensitive principle can intelligibly be applied, i.e., any context where its application conditions are met, is a context to which its application is justified (though if application conditions are not necessary for justification, then fact-insensitive principles are justified even in contexts where they're inapplicable).

This is important. The absence of a gap between intelligible application and justified application means that a fundamental principle with permissive application conditions justifiably applies to a great many contexts. In contrast, a regulatory rule can intelligibly apply to a great many contexts without also being justified in them. For example, regulatory utilitarianism can intelligibly be applied to contexts where maximizing happiness requires implementing slavery. Arguably, however, it cannot

justifiably be applied to those contexts. Additionally, as we noted above, though the difference principle intelligibly applies to the context of personal choice, it isn't necessarily justified for that context. In general, we can reasonably expect that the justified application of regulatory principles will be far more restricted than the justified application of fact-insensitive principles.

To be clear, saying that a fact-insensitive principle is justified in all contexts to which it intelligibly applies is merely to say that it must be given some weight in those contexts. As explained in the introductory chapter, the implementation of a fact-insensitive principle via the construction of regulatory rules must take into account various factors which limit the extent to which it can and should be realized, i.e., considerations of feasibility and the demands of competing values. Saying that such a principle's application is justified thus leaves open the extent to which it ought to be implemented in any particular context. With respect to distributive justice in particular, then, the claim that justice is a fundamental value suggests that the fact-insensitive principle representing it justifiably applies to a wide variety of contexts, the context of personal choice included. Difficulties specific to the personal domain presumably influence the extent to which distributive justice should be expressed in the content of regulatory rules suitable for that context, rather than restricting either senses of its scope.

It might be thought that acknowledging the significance of application conditions for transcendental justification, as I do, compromises the above claim. The examples I discuss concerning autonomy and utility involve only general facts, i.e., the fact that there are people around with preferences to satisfy, or that people have the capacity for autonomous action. However, might not the application conditions of justice include

somewhat more specific facts, e.g., those associated with the circumstances of justice?[257] If they did, then Cohen's understanding of justice as radically context-insensitive would be undermined. That there is putatively some danger of this can be made clearer by being more specific about the ways in which a principle's application can presuppose a fact. In the aforementioned examples of presupposition, it is specifically the *content* of the principles that presupposes the relevant facts. In other cases, however, the underlying *concept* a principle constitutes a conception of is what does the presupposing. Consider what is presupposed by Rawls's remarks on the concept of justice. In *A Theory of Justice*, he states that,

> it seems natural to think of the concept of justice as distinct from the various conceptions of justice and as being specified by the role which these different sets of principles, these different conceptions, have in common. Those who hold different conceptions of justice can, then, still agree that institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life.[258]

When the concept of justice is understood in this way, it's not surprising that the facts comprising the 'circumstances of justice' should be thought essential to the application of principles of justice. The idea of adjudicating between competing claims makes little sense unless one takes it to be the case that those whom principles of justice regulate are, at least for the most part, concerned with advancing their own interests. In a society where citizens are mutually interested in the advancement of each other's projects as opposed to 'mutually disinterested',[259] e.g., a society with a strong sense of community

[257] See Miller's comments on pages 36-8 of Miller (2008).
[258] Rawls (1971) p. 5.
[259] Rawls (1971) p. 128.

and an egalitarian ethos, then the language of 'competing claims' would be peculiar.[260] Similarly, the idea that justice is about divvying up the advantages of social cooperation presupposes that there is, in fact, social cooperation between those for whom principles of justice are intended. In a context where this fact did not obtain, .e.g., a world of self-sufficient Robinson Crusoes, or, more controversially, the international context, then justice, as Rawls understands the concept, would have no place.[261]

On the assumption that Rawls's take on the concept is to be accepted, conceding the justificatory significance of application conditions would ostensibly undermine Cohen's radically context-independent understanding of justice. The justification of principles of justice would suddenly depend on various facts about human behavior and motivations. In fact, Cohen's main reply to the claim that principles of justice rely upon the circumstances of justice for their justification involves a specific application of his general reply to Miller, i.e., Cohen distinguishes factual reasons from factual application conditions, denies that the latter have anything to do with a principle's justification, and claims that the circumstances of justice are specifically comprised of application conditions.[262]

Denying that the application conditions of a principle (or multi-member set of principles) form part of its grounding is not the only response open to Cohen, however.[263] As is hopefully clear by now, Cohen does not share Rawls's understanding of the concept of justice. For the former, a conception of justice specifies the content of an input.

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[260] For discussion of such a society, see Cohen (2009).
[261] For Rawls summary of the circumstances of justice, see Rawls (1971) pp. 126-8.
[262] Cohen (2008) pp. 334-5.
[263] Nor is it the only response Cohen provides. See Cohen (2008) pp. 331-4. In a recent article, David Estlund also denies that the circumstances of justice bear on its content. However, he seems comfortable with Rawls's take on the concept of justice and thus with the claim that said circumstances count among its application conditions. See Estlund (2011) pp. 225-9.

Cohen sees justice as a value that is distinct from, but forms part of the justification for, the action-guiding principles articulated by Rawls. Once this difference is taken into account, the concession I recommend no longer seems so threatening. So long as any further delineation of Cohen's view of the concept of justice avoids presupposing the social and behavioral facts associated with the circumstances of justice, then his context-insensitive understanding would not be overly compromised.

It's noteworthy that Cohen does, in fact, attempt to delineate justice's concept beyond noting that it is a fundamental value. According to Cohen, justice is a matter of "giving each person her due."[264] I'm personally skeptical of this characterization. It seems to me to be either saying that justice is a matter of giving each person what she deserves, or that justice is a matter of what we owe to each other by way of moral obligation. If the former interpretation is correct, then "giving each person her due" is better understood as an underspecified conception of justice, one that doesn't get around to formulating a principle that specifies the content of desert. If the latter interpretation is correct, then "giving each person her due" is a matter of broad justice (moral rightness in general), rather than narrow justice (the part of moral rightness pertaining to fairness), in which case it isn't describing the sense of the word 'justice' that both I and other political philosophers are primarily interested in. I prefer my own characterization of the concept of distributive fairness offered in chapter 3, a concept which, if the arguments I'll present in chapter 6 are correct, should be identified with the concept of narrow justice. Regardless of whether I'm right to reject Cohen's characterization, though, it's noteworthy that his description presupposes little other than that there exist beings with

[264] Cohen (2008) p. 7.

morally significant interests who may be owed their due and who may owe others their due. Admitting that this fact is a necessary condition for the justification of a principle of justice precludes that principle from being justified for all possible worlds, but it does not suggest anything more limiting than that.

When the term 'justice' is understood in the fundamental sense, the claim that it cannot be restricted to the basic structure is itself an extension of Cohen's conceptual critique of the identification of justice with institutional regulatory principles. It's tantamount to the claim that Rawls has confused a fundamental value for regulatory rules by mistaking constraints on the implementation of justice for restrictions on its scope of justified application. It's clear, however, that this isn't what Cohen originally had in mind. After all, his critique of the basic structure restriction predates his critique of regulatory conceptions. When first claiming that distributive justice extends to personal choice, Cohen hadn't yet formulated the distinction between fundamental, fact-insensitive principles and regulatory principles.[265] Furthermore, when using the term 'distributive justice' in the context of his first critique, it's clear that Cohen is referring to Rawls's conception. As such, when he claims that distributive justice extends to personal choice, he specifically has the difference principle in mind.

This isn't to say that Cohen thinks fundamental justice doesn't apply. The difference principle, as an all-things-considered distributive regulatory principle, presupposes fundamental justice. Thus if the difference principle applies to personal choice, so too does fundamental justice, albeit indirectly. This does, however, imply that

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[265] For Cohen's critique of the basic structure restriction, see Cohen (1997). This paper appears with minor revisions as chapter 3 in Cohen (2008). For work pertaining to constructivism, see Cohen (2003). This paper appears with revisions as chapter 6 in Cohen (2008).

we have an additional distinction to draw between views. The first view is that the scope of justice, understood as a fundamental, fact-insensitive value, is expansive enough to justifiably extend to personal choice. Let's call this the *fundamental justice extension claim*.

The second is that justice, this time understood as one or more institutional regulatory rules partially justified by but distinct from fundamental justice, is expansive enough to justifiably extend to personal choice. Let's call this the *regulatory justice extension claim*. As already mentioned, the regulatory justice extension claim presupposes the fundamental justice extension claim. One cannot intelligibly say that regulatory/derived principles of justice extend to personal choice unless one also thinks that fundamental justice does so (if fundamental justice did not so extend, then whatever derived principles we have in mind would not be derived principles of justice!). In contrast, the claim that fundamental justice extends to personal choice, though compatible with the claim that regulatory justice so extends as well, does not require it. The application of fundamental justice to personal choice requires that social regulatory principles reflective of justice be adopted for that context, but it does not require that they have the same content as the regulatory principles suitable for institutions. In fact, regulatory principles' context-sensitivity gives us a *prima facie* basis upon which to believe that the principles suitable for institutions will differ from those suitable for personal choice.

By committing himself to the extension of regulatory justice, i.e., the difference principle, Cohen takes on a heftier burden than if he merely stuck to the extension of fundamental justice. For his view to hold, it is necessary for him to successfully argue

that the factual differences distinguishing the institutional context from the personal context fail to exclude the difference principle as a justifiably applied regulatory principle for the latter. As I will now proceed to argue, Cohen can't manage this without equivocating with respect to his use of the term 'justice'. His arguments lose much of their force once we appreciate that (a) his opponents are replying to the claim that *regulatory* justice extends to personal choice, and (b) though Cohen originally had the regulatory extension claim in mind when penning his canonical critique of the basic structure restriction, his subsequent replies frequently presuppose the *fundamental* sense of 'justice'.

4. Demandingness, Subjective Welfare, and Cohen's Personal Prerogative

An important difference between the contexts of institutional design and personal choice is that people, unlike institutions, have personal lives. In light of this, the requirement that citizens embody the difference principle in their everyday lives appears rather demanding. Such a requirement seems to entail that in any set of circumstances where a potential choice is likely to benefit the least well off more than its alternatives, members of society will be required to consistently make that choice in spite of their personal preferences.[266] To fully appreciate this worry, it's helpful to consider the kinds of behaviour Cohen's ethos would motivate. On the one hand, an ethos can contribute to the justness of a distribution by supplementing institutional measures. Supplementation, according to Cohen, occurs when ethos-motivated actions are pursued independently of public justice seeking measures, e.g., making personal donations or volunteering during one's spare time. Enhancement, in contrast, is ethos-motivated action that's conjoined

[266] For an articulation of the demandingness critique, see Pogge (2000) pp. 152-4 and pp. 163-4. For other discussions of this worry, see Van Parijs (1993); Tan (2004a); and Titelbaum (2008).

with public justice-seeking measures. Such would include, for instance, continuing to work just as hard under a radical tax regime as one would under a less radical one, or choosing to take on an economically productive profession for which one's talents are well suited in spite of the fact that said tax regime disallows incentives.[267] Examples like these highlight just how pervasive Cohen's ethos would be if realized. It would ostensibly require one to prioritize the worst off whenever distributive considerations are relevant, and there are a great many situations where they are.

Cohen's reply to the above worry is not dismissive. He attempts to accommodate it by qualifying his ethos with a personal prerogative to pursue other interests.[268] As such, an individual who finds him/herself in possession of extra cash might legitimately choose to keep a portion of it for some purpose other than benefitting the worst off, and someone who'd make an exceptional engineer might justifiably choose a different career, so long as these choices don't exceed the bounds of a reasonable (and unspecified) limit on the extent to which deviating from the difference principle is permissible. What's more, even if his ethos were not so qualified, Cohen claims that it would only require a work-till-you-drop duty if one mistakenly leaves subjective welfare out of one's metric. If one's metric incorporates subjective welfare in addition to resources, then inequalities in resource endowment will sometimes be justified in order to compensate the talented for the burdensomeness of their efforts.[269] Furthermore, including welfare means those with greater talents needn't enslave themselves to the betterment of the worse off if doing so would require sacrificing too much of it. The talented, should they become

[267] Cohen (2008) p. 375.
[268] Cohen (2008) pp. 70-2.
[269] Cohen (2008) pp. 101-9.

sufficiently miserable, would themselves become the worst off group, so it cannot be said that a welfare-inclusive metric would require them to utterly devote themselves to promoting the betterment of the untalented.[270]

In his article "Incentives, Inequality, and Publicity," Andrew Williams argues that Cohen's difference principle based ethos is incapable of meeting Rawls' publicity condition, i.e., that citizens who embrace it will not be able to discern when and where the requirements of the ethos have been adequately satisfied. Williams offers a number of considerations in support of this conclusion, but many revolve around the inclusion of subjective welfare and Cohen's personal prerogative qualification. As Williams correctly notes, determining whether an individual with greater than average resources has satisfied her justice related duties requires checking to see if her extra wealth either compensates for labors burden or is consistent with a legitimate personal prerogative.[271] In order to check the first of these, one must be able to interpersonally compare levels of job satisfaction. Unfortunately, doing so appears to be beyond our epistemic abilities. Distinguishing the effect of occupation on one's welfare from the effects of other welfare impacting factors in her personal life is very difficult. What's more, self-deception about job satisfaction is common.[272] As a result, acquiring the information needed to reliably determine which of those with more resources are 'burdened' by their jobs is extremely difficult, especially on a society-wide scale.

Equally difficult is determining whether the greater resourced have exceeded the bounds of a legitimate personal prerogative. At what point does deviating from the

[270] Cohen (2008) pp. 402-3.
[271] Williams (1998) p. 238.
[272] Williams (1998) p. 239

pursuit of justice for the sake of other projects cease to be permissible? Cohen does not attempt to specify this, and the reason for that may be because the answer might vary from person to person depending on their personal history, circumstances, etc.[273] In sum, Cohen's replies to the problem of demandingness make an ethos based on the difference principle more palatable, but at the cost of citizens being unable to determine whether their co-citizens are fulfilling their duties. In fact, the above mentioned difficulties suggest that a citizen will have difficulty telling whether she herself has fulfilled her duties (Am *I* 'burdened' by my job relative to others? When does the pursuit of *my* self-interest become impermissible?).

Worrisome as Williams' objections are, they become even more worrisome when we're reminded that the difference principle, on Cohen's view, is a regulatory rule informed by but distinct from justice itself. Its function is not to tell us what justice is, but rather to connect justice to practice by telling us in a more or less specific way what it require us to do once competing values and feasibility constraints have been taken into account. If this is the function of a justice inspired regulatory principle, though, then being unable to tell whether one has successfully followed a regulatory principle clearly undermines its ability to guide action. This is especially obvious with respect to the idea of a personal prerogative in particular. To see what I have in mind, consider again Cohen's discussion of how feasibility and efficiency operate. Rawls's mistake, Cohen claims, is allowing these considerations to influence the content of his conception of justice. Since justice is properly conceived of as a fundamental value, considerations of

[273] Williams (1998) pp. 239-40.

feasibility and efficiency really just constrain its implementation by influencing the content of relevant regulatory rules.

If this is the way these and other constraints operate, however, then there's a tension between classifying the difference principle as regulatory and yet also claiming that the demands it imposes are constrained by a personal prerogative. Acknowledging the significance of a personal prerogative will presumably require modifying the content of the difference principle; otherwise we'd be giving up its action-guiding quality by having to balance it against other interests in much the same manner that we balance fundamental values. The result of this, however, is that it's no longer quite persuasive to claim that Rawls inappropriately restricts the application of the difference principle to society's basic structure. Though regulatory principles informed by fundamental justice will of course be needed for personal choice, their content will be different from those appropriate for the design of institutions.

The tension present in Cohen's move becomes clearer if one considers the kinds of motivations covered by a personal prerogative. While his initial discussion highlighted the importance of being able to legitimately exercise a certain degree of self-interest, he later acknowledges in his reply to David Estlund that various other reasons are, of course, permissible as well. One such additional reason is supplied by affection. It would be permissible in some cases to, say, spend one's extra cash on a gift for a friend instead of donating it. Other legitimate reasons also include competing moral considerations, e.g., loyalty, compassion, etc. As Estlund points out, and Cohen himself admits, denying the permissibility of affection or morality based deviations from the difference principle would be strange if one is willing to countenance those motivated by

self-interest.[274] In fact, Cohen points out that morally motivated deviations go beyond one's prerogative in cases where they're morally required, as the word 'prerogative' pertains to that which is permissible.[275]

By allowing competing moral considerations to weigh in on personal choices, Cohen makes room for a variety of values that block the demands of the difference principle in various circumstances. In doing so, however, he equivocates and treats it as if it's a fact-insensitive principle that must be traded off against other fact-insensitive principles in practice, i.e., makes the same sort of judgment about it that he does about fundamental justice when he says that it must give way to efficiency when circumstances make it necessary to choose between inequality and levelling down. Though acknowledging the significance of principles that express competing fundamental values is of course important when considering the extent to which fact-insensitive justice should be implemented via the content of action-guiding principles, the difference principle is not a fact-insensitive principle of justice. Giving weight to competing moral concerns thus requires modifying its content, i.e., requires adopting something other than the difference principle for the regulation of personal choice.

A further instance of equivocation is identifiable in Cohen's rationale for including subjective welfare in the difference principle's metric. In a footnote from chapter 2 of *Rescuing Justice and Equality*, Cohen writes: "Had I written the article that is the substance of the present chapter after I had reached the distinction drawn in chapter 6 between fundamental principles and rules of regulation, I would have said that labor burdens must come into the assessment of fundamental justice, however difficult it may

[274] Estlund (1998) pp. 101-2; and Cohen (2008) pp. 390-1.
[275] Cohen (2008) p. 391, footnote 39.

be to represent them, even by proxy, within rules of regulation."[276] Why does Cohen think that fundamental justice requires accounting for labor burdens? To understand the answer, it will be helpful to recall our discussion of what it means to offer a conception of a fundamental value (see chapters 3 and 4 for this), as well as the fourth view mentioned in section 2 of the present chapter (the view that efficiency is external to justice). As we've noted, articulating a conception of a fundamental value requires separating the intuitive moral judgments internal to it from the intuitive moral judgments external to it, and subsequently attempting to formulate one or more principles that cohere with the judgments internal to it. With respect to justice in particular, judgments of fairness are internal, while other judgments, e.g., the judgment that levelling down is impermissible, are external. As a result, if judgments of fairness direct us to include subjective welfare in the metric of our conception of fundamental justice, thus making it responsive to labor burden, then we presumably ought to do so.

Cohen's favored judgment to this effect is the one associated with the wheelchair bound individual in "On the Currency of Egalitarian Justice." This person is able to raise her arms, but is unable to do so without experiencing considerable discomfort. Since it makes no sense to represent this inability as a deficiency is physical resources, Cohen deems (correctly, I think) that the egalitarian intuition to compensate her, *ceteris paribus*, for the sake of fairness, is one grounded in subjective welfare.[277] Unfortunately for Cohen, though, all this observation amounts to in the present case is another instance of equivocation. Though there is a strong case for including subjective welfare in one's conception of fundamental justice, the difference principle is not a conception of

[276] Cohen (2008) p. 106, footnote 48.
[277] Cohen (1989) pp. 917-9.

fundamental justice. It is a regulatory principle, and regulatory principles, in order to be effective guides to action, must be concerned with accurate interpersonal comparisons, and thus sensitive to considerations of measurability.

I take the above points to be sufficient to demonstrate that Cohen's subjective welfare and personal prerogative replies to the demandingness objection are, at various points, backed up by considerations that equivocate across the regulatory and fundamental senses of 'justice', i.e., his replies ostensibly assume the fundamental sense, but the sense at stake when discussing the extension of the difference principle to personal choice (as well as the sense Cohen had in mind in his canonical critique of Rawls' basic structure restriction) is the regulatory sense. Nonetheless, in chapter 8 of *Rescuing Justice and Equality*, Cohen offers a reply to Andrew Williams that does not involve any equivocation,[278] and is thus especially worthy of discussion. Here, Cohen admits that publicity is indeed a consideration that bears upon the justification of regulatory principles, social ones included.[279] Though he doesn't specifically say so, I presume he would also admit that one's ability to determine whether one has satisfied the demands of a principle (and not just whether others have done so) also bears upon the justification of regulatory principles. What he denies is that the epistemic difficulties and vagueness associated with a difference principle inspired ethos is sufficient to render it implausible. Publicity, he notes, is of value largely because rules that meet it avoid the 'assurance problem'. Citizens worried about becoming 'suckers', and who are thus

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[278] Though not before arguing that publicity is not a consideration to which the content of fundamental justice is sensitive. In his own reply to Cohen's reply, Williams correctly notes that whether publicity bears upon the content of what Cohen calls 'fundamental justice' is irrelevant to whether the difference principle extends to personal choice. Why Williams fails to reply to Cohen's more pertinent rejoinder is beyond me. See Cohen (2008) chapter 8, especially pp. 348-51 and pp. 364-8; and Williams (2008) pp. 122-4.

[279] For explicit admission of this, see, for example, Cohen (2008) pp. 323-7, p.352, and p. 365.

disinclined to follow a regulatory rule unless others are following it too, need to be able to discern whether others are indeed following it. When they can and when it is, they can subsequently 'assure' themselves. According to Cohen, however, assurance does not necessarily require that a rule be formulated in 'crisp' terms. To back up his claim, Cohen uses the example of the social ethos that prevailed in Britain during the Second World War. At that time, British citizens were all expected to endure a certain amount of personal sacrifice in order to contribute to the war effort. The precise amount that individuals were expected to sacrifice was never specified, however, probably because that amount would vary from person to person depending on their circumstances, e.g., on their health, on the difficulties they faced in their personal lives, etc. Despite this inability to precisely determine whether one's self or others had done enough, people still generally contributed to the war effort**.** Some people probably did less than they should have, and some probably did more, but none of this prevented an ethos of contribution from prevailing and being more or less effective.[280]

Cohen's reply to Williams is refreshingly free of equivocation, and it strikes me as moderately effective. What it requires in order to be fully effective, however, is a comparative assessment of the different justice inspired regulatory principles that one might adopt for the context of personal choice. Why? Because all we know so far is the following: (a) that clarity is a desideratum the presence of which counts in favor of a regulatory principle and the absence of which counts against it, and (b) that regulatory principles can admit of a certain amount of imprecision without thereby ceasing to be justified, all-things-considered. In order to make the further judgment (c): that an ethos

[280] Cohen (2008) p. 353.

inspired by the difference principle is justified in spite of its demands being somewhat unclear; we need to know what the other regulatory possibilities are first. What other principles might we adopt that, like the difference principle, give a certain amount of weight to concerns of fundamental justice? And are any of these possibilities superior when judged against the bar of clarity?

To be sure, there are a limited range of cases where increased clarity is not, in fact, a desirable regulatory quality, e.g., rules regulating reciprocal drink buying between equally well off friends at the pub are probably best left somewhat vague lest they intrude upon the informality and lightheartedness of the social experience.[281] The context of a society wide ethos is not such a case, however. Assuming Cohen is right to say that an ethos based on the difference principle is sufficiently clear for purposes of assurance (and he may still be wrong about this), it remains true that the harder it is to tell whether one has done one's part, the more common errors in judgment will be. As with the British war ethos, lack of clarity means that some people will inadvertently do less than what's required of them while others will inadvertently do more, and though Cohen doesn't recognize it, such variation in ethos-related contribution is a source of unfairness.

A good way to understand this unfairness is in terms of my (and Cohen's) favorite conception of fundamental justice: luck-egalitarianism. When the luck-egalitarian standard is applied to an assessment of the effects of applying the difference principle to personal choice, it's clear that there's an important sense in which the difference principle falls short of it. Luck-egalitarianism, as we know, states that unchosen inequalities are unfair. Since committed citizens are unable to determine when they've done enough to

[281] See Cohen (2008) p. 354.

fulfill the requirements of a welfare-inclusive, prerogative constrained difference principle, the regulatory application of the difference principle to personal choice runs contrary to luck-equality in an important way. Its lack of clarity inevitably yields unchosen inequality in the distribution of burden, as some people will inadvertently take on a greater burden than is required of them, while others will inadvertently take on a lesser burden than is required of them. To be fair, the difference principle, as a regulatory principle, always falls short of fundamental justice. Taking all things into consideration means deviating from the requirements of fundamental justice when feasibility and, to an extent, competing values, e.g., efficiency, require it. The unfairness I've identified is distinct from this, however. It doesn't lies in the somewhat inegalitarian content of the difference principle (which permits necessary inequalities), but rather in the effect its unclear application to personal choice has on the distribution of burden. The difference principle, when applied as a regulatory principle to the context of personal choice, thus deviates from luck-equality in a way that's independent from the familiar, content specific way in which it does so.

It might be objected that personally committing to the difference principle is always a matter of choice, just as any legally unenforced moral requirement is. If so, then how are any resulting inequalities between the talented unfair? One chooses whether to follow the difference principle in one's personal life, and thus any inequality that emerges as a result of this commitment between citizens who share it is traceable to choice.[282] Alternatively, one might argue that one's level of required contribution is ultimately something each person must decide for herself. After all, people know the

[282] My thanks to Ryan McSheffrey for presenting an objection along these lines.

details of their own life better than others do, and are thus in a better position to determine for themselves whether their career is burdensome enough to justify extra compensation, or whether their deviation from the difference principle on grounds of self-interest, moral reasons unrelated to justice, etc., falls within the bounds of a legitimate personal prerogative. If so, then, once again, unequal contribution cannot be said to be unchosen, and thus cannot be said to be unfair, as it is the responsibility of each person to decide for themselves what their level of required contribution is.[283]

In reply to the second of these objections, it's probably true that if the difference principle were adopted, one's self would typically be in a better epistemic position than others to discern what one's own required level of contribution is. Unless we're willing to embrace moral subjectivism, though, it is not true that the correct answer to the question "What does a welfare-inclusive, prerogative-constrained difference principle require of me?" is determined by the answer a person gives. On the assumption that morality is objective, the correct answer is independent of, but may possibly coincide with, the answer a person gives. The upshot is that people can and, given our above discussion of the difference principle's lack of clarity, often will make judgements that either fall short of or exceed what's actually required of them.

In reply to the first objection, while it's true that citizens choose whether to apply the difference principle in their personal lives, it's not true that the mistakes they make are chosen. The inequality in burden I've described and am concerned with is not the product of choice, but rather the inadvertent product of mistaken judgments about what commitment to the difference principle requires. Of course, agents can sometimes be

[283] Many thanks to Christine Sypnowich for this objection.

held responsible for inequalities that are indirectly produced by choice, i.e., those associated with option luck. When one poker player wins and the other loses, we would say that the choice to play poker in the first place is enough to hold each player responsible for the outcome, even if the winner didn't choose to win and the loser didn't choose to lose. However, I don't think it's appropriate to treat inequalities indirectly associated with the choice to commit one's self to the difference principle as standard cases of option luck inequality, though. In standard cases of option luck, the choices made are not supposed to be morally obligatory. Whether the poker player decides to bet her money or merely play for fun is her prerogative. The naturally talented follower of the difference principle, in contrast, has an alleged moral duty to promote the interests of the worst off. What's more, unlike the voluntarily acquired duties associated with contracts or friendships, her duty is a product of her circumstances. After all, the talented person did not choose to have the natural capacities she does, and thus did not choose to be put in a position where doing the right thing would require that she make voluntary sacrifices. As a result, the inequalities in burden indirectly attributable to her choices and the choices of similarly talented individuals who share her commitment to the difference principle are not inequalities for which they can be held responsible in the usual way. I thus do not think inequalities produced by unclear application of the difference principle should be deemed fair.

Unfairness is always regrettable, but it may also be the case that a certain amount of unfairness in the distribution of regulatory burden is unavoidable in the personal context. If so, then so be it. Shouldn't we try to minimize this unfairness in so far as we can, though? Until regulatory options other than the difference principle are put on the

table and compared to it, it isn't obvious that clear rules sufficiently expressive of both justice and other fundamental values are not available to us. Perhaps the importance of values the difference principle is not responsive to and yet which must be given weight in the realm of personal choice, e.g., loyalty to one's friends and family, can be captured in the justification of an alternative to the difference principle that, by virtue of being so justified, does not require a vague personal prerogative constraint. An ethos inspired by the difference principle is unclear, and thus also unfair to those who try to follow it, and there may very well be unexplored possibilities that are both clearer and (in part because they're clearer) all-things-considered superior.[284]

5. Causing Justice

In the previous section, I hope to have successfully argued that Cohen's replies to the demandingness objection assume, for the most part, that the position under attack by his critics is the *fundamental justice extension claim*, rather than the *regulatory justice extension claim*. Though the inclusion of welfare in the metric of egalitarian justice is supported by considerations of fairness and would suffice to alleviate justice's demands on the choices of the talented, considerations of fairness don't have the same decisiveness for conceptions of regulatory justice that they do for conceptions of fundamental justice. Regulatory principles are sensitive to facts about measurability, and thus the difficulties

[284] Christine Sypnowich has pointed out to me that Cohen would likely say there's something to be gained from overlooking the inequalities of burden associated with an unclear ethos. It would arguably be more conducive to a strong sense of community if citizens did their part without worrying about whether they're inadvertently doing more than they're morally required to. Though I think Christine's probably correct, unchosen inequalities of burden are still unfair from a luck-egalitarian perspective. While I agree that citizens should do their part without dwelling too much on whether they might be inadvertently doing more than is required of them, I also think that regulatory principles designed to minimize the potential for unchosen inequality of burden are preferable in the personal context, *ceteris paribus*. Comparatively speaking, it's better if the inequalities of burden that citizens are to avoid dwelling upon are smaller, rather than larger. For Cohen's thoughts about the value of community, see Cohen (2009) pp. 34-45. For further commentary, see Sypnowich (2012) pp. 28-30.

associated with interpersonal comparisons of subjective welfare are a good reason not to directly include it.

Furthermore, though the implementation of fundamental justice is subject to trade-offs with the normative considerations represented by a personal prerogative, regulatory principles don't work this way. They're adopted in light of the various normative considerations that must be given weight in a particular context, and thus the significance of those considerations should be represented not as constraints upon or desiderata in competition with what's adopted, but rather in the content of what's adopted, much the way the content of the difference principle functions to strike a balance between the competing demands of fundamental justice (equality) and efficiency. Including welfare in and excluding important normative considerations from the content of the regulatory principles adopted for personal choice compromises their capacity for action-guidance by making their demands less clear than they otherwise would be. A clearer alternative to the difference principle is preferable for the context of personal choice, *ceteris paribus*.

Another issue that has received a notable amount of attention in the literature surrounding Cohen's canonical critique of Rawls is the causal relationship between a society's institutions, ethos, and distribution. Recall that Rawls' profundity of effect criterion plays a pivotal role in Cohen's argument. Cohen notes that Rawls's focus on a society's basic structure is justified by institutions' profound effect on the distribution of benefits and burdens, after which he goes on to argue that it also applies to informal institutions and citizens' personal choices and is thus too expansive to support the basic structure restriction. This criticism is interesting in part because it draws on a criterion

that Rawls himself endorses. For our purposes, it's also interesting because of its explicit regulatory character. As we've already noted, regulatory principles connect fact-insensitive principles to practice by telling us what's to be done once trade-offs and feasibility have been accounted for. Given that their function is to implement the applicable fact-insensitive principles insofar as each 'reasonably can' be,[285] it's natural that we should take into consideration their expected effects. In Cohen's words, "we adopt them [regulatory principles] in light of what we expect the effect of adopting them to be."[286]

Since designing our institutions in accordance with the difference principle would presumably generate a stable distribution that's largely egalitarian and reasonably efficient to boot, that's good reason to adopt it in the institutional context. If applying the difference principle to personal choice would likely have the effect of generating a distribution with these virtues plus an even greater degree of equality, then that's a good reason to adopt it for the context of personal choice too. Employing Rawls' profundity of effect criterion in the manner Cohen does thus straightforwardly supports the regulatory justice extension claim.

In well-known articles, Thomas Pogge and Joshua Cohen challenge the claim that the profundity of effect criterion is inconsistent with the basic structure restriction.[287] The main idea behind both of their arguments is that the basic structure's effect on distribution is partially mediated by the effects of a host of other factors. Institutions that successfully conform to the difference principle do so by producing a distribution in

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[285] See my discussion of fact-insensitive ought claims in chapter 3, section 2(b).
[286] Cohen (2008) p. 276.
[287] See Pogge (2000) pp. 164-6; and J. Cohen (2002) pp. 375-80.

which the least well off are as well off as they can be, but the manner in which it does so inevitably involves a variety of causal mechanisms, e.g., technology, demographics, *social ethos*, etc.[288] The relationship between institutions and the development of a society's ethos is especially important here. G.A. Cohen has certainly demonstrated that the character of a society's ethos has important distributive effects, but as J. Cohen explains at some length, the character of a society's institutions has a powerful effect on the character of its ethos.

By way of example, he explains that there's evidence suggesting that the choice between 'consensual' democratic institutions and 'majoritarian' democratic institutions has ethos related implications. Adopting new policies in a 'consensual' framework requires a greater degree of support across political parties and interest groups than it does in the latter framework and, as a result, consensual frameworks tend to foster an ethos of solidarity and inclusivity.[289] If Pogge's and J. Cohen's general point holds true, then Rawls can acknowledge the profound impact of ethos on distribution without thereby giving up either the basic structure restriction or the profundity of effect criterion. He can maintain that direct application of the difference principle is restricted to the basic structure, yet acknowledge that his conception of justice requires adopting institutional alternatives even when they improve the position of the worst via their influence on the prevailing ethos. The distributive significance of a society's ethos is thus accounted for without directly applying the difference principle to personal choice.

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[288] Pogge (2000) p. 165.
[289] J.Cohen (2002) pp. 377-8. For the source upon which J. Cohen draws when discussing consensual and majoritarian institutions, see Lijphart (1999).

The first move G.A. Cohen makes in reply to this criticism is to accept that institutions causally influence a society's ethos but to deny that they're causally independent of it. Just as institutions affect ethos, so too does ethos affect institutions, so why restrict the difference principle to institutions on causal grounds?[290] If the position of the worst-off can be improved by modifying a society's ethos in ways that will positively affect its institutions, then presumably the difference principle requires those modifications. To deny this, and yet maintain that the difference principle requires modifying institutions when doing so will affect a society's ethos in ways that benefit the worst-off, involves inconsistently applying the profundity of effect criterion.

G.A. Cohen's first reply to J. Cohen and Pogge has the virtue of being free of equivocation, but I don't think either he or his critics really to get to the heart of what's at stake in the issue. First, I presume that any Rawlsian who takes Rawls's 'natural duty of justice' even half-seriously would agree that a society's ethos is capable of affecting its institutions. Were it not, then a civic duty to "further just [institutional] arrangements not yet established" would be infeasible.[291] The question at hand is not so much whether a society's institutional arrangements are causally independent of its ethos (which they almost certainly aren't), but whether the difference principle should directly regulate citizens' personal choices. What does it mean for the difference principle to directly regulate personal choice? As far as I can tell, the difference between direct and indirect regulation lies in what citizens are obligated to do. If the difference principle applies directly to personal choice (in the sense of 'justifiable' application), then citizens who fail to follow it in their personal lives have failed to fulfill an all-things-considered moral

[290] Cohen (2008) p. 378.
[291] Rawls (1971) p. 115.

requirement. As such, direct application of the difference principle to personal choice entails that it's appropriate to condemn the behavior of those who don't comply with it.

In contrast, indirectly applying the difference principle to personal choice via the ethos affecting impact of institutional change lacks this implication. Behavior that has the effect of promoting the same state of affairs at which the difference principle aims would presumably be widespread in a society whose institutions were chosen on the basis of their causal relationship with a worst off improving ethos, but one could not say that individuals who choose not to apply the difference principle, or who apply it on some occasions but not others, have thereby done something wrong. At best, one could say that those citizens who do choose to adhere to the difference principle are praiseworthy, and that it's regrettable some citizens have chosen not to. Of course, if there's an alternative institutional arrangement that would successfully promote an even greater degree of worst off improving behavior, then the difference principle would require implementing it. Still, to say that a society's institutions have failed to meet the requirements of regulatory justice is not the same as saying that its citizens have, except in so far as its citizens have failed in their responsibility to implement better institutions.

With this understanding of the distinction between direct and indirect application in mind, the best reasons available for rejecting that the difference principle justifiably applies in a direct fashion to personal choice are, in my opinion, those I've already gone over in the previous section. As I hope to have established, an ethos that's both based on the direct application of the difference principle and capable of escaping the demandingness objection is also unclear in its demands, and thus it has a reduced capacity for action-guidance. What's more, a practical upshot of this lack of clarity is

unfairness in the contribution levels of those committed to it (some will inadvertently do more than their fair share and some will inadvertently do less). All things being equal, whichever regulatory principle(s) we do adopt for the direct regulation of personal choice should be clearer than a welfare inclusive, prerogative constrained difference principle. In contrast, indirect commitment to the difference principle avoids this issue. Since the talented are not morally obligated to follow it in that case, they cannot say that their circumstances put them in a position where rightness required voluntary self-sacrifice of them. Any inequality in contribution produced by the difference principle's lack of clarity would be no more unfair than inequality in contribution to a charitable cause.

An interesting issue for the above mentioned account is raised by the possibility that an alternative institutional arrangement could further improve the position of the worst off via deception. After all, if everyone thought that they had to follow the difference principle as a matter of moral obligation, then presumably the position of the worst off would be better improved than if everyone knew that such behavior is praiseworthy but not all-things-considered required. Thankfully, Rawls's publicity condition can be used to rule out this unsavory possibility. Any attempt to raise the position of the worst-off via deception can presumably be ruled out on the same publicity related ground as government house utilitarianism. At the same time, though, an institutional framework that encourages commitment to the difference principle in one's personal life on the ground that commitment to it is merely praiseworthy seems unlikely to be very effective.

The combination of these points suggests to me that the most effective, publicity-consistent way for institutions to improve the position of the worst off via impact on

ethos is by encouraging commitment to the regulatory principles citizens actually are morally obligated to adhere to, principles the effects of which will overlap to some extent with what commitment to the difference principle would achieve (these principles must still give weight to equality and efficiency, after all). For example, it may be the case that better off citizens should, amongst other things, adopt a norm that requires them to donate a determinate percentage of their income, with the richest of the better off being required to donate the highest percentage and the less wealthy among them being required to donate a lower percentage.[292] Widespread commitment to such a requirement would presumably succeed at improving the position of the worst off, would provide much clearer guidance than a directly applied difference principle, and would likely be more effective at helping the worst off than a non-obligatory difference principle. Interestingly, promoting an obligatory alternative to the difference principle that has overlapping effects simultaneously counts as indirect application of the difference principle and direct application of an alternative to it, thus unifying the regulatory principles for institutions with the regulatory principles for individuals in a way that permits different content for each.

Thus far I've argued that G.A. Cohen's reply to Pogge and J. Cohen, i.e., his claim that a society's ethos affects its institution too, misses what's at stake in the issue between them. On all counts, citizens have a civic responsibility to ensure that their institutions conform to the difference principle, and thus whether an ethos can causally affect institutions is not at issue. What is at issue is whether citizens have a moral obligation to pursue the difference principle, rather than some other distributive

[292] Peter Singer's public standard of assistance is similar to this. See Singer (2010) pp. 151-73.

regulatory principle, in their daily lives. I've argued that we have reason to doubt this. However, G.A. Cohen has a second reply to Pogge and J. Cohen, a reply that I will now proceed to address.

According to G.A. Cohen's second reply, questions about the causal relationship between a society's institutions and its social ethos are not at the heart of the issue. The real question at hand in the debate over whether justice extends to personal choice is not what *causes* a society to be just, but rather what *constitutes* its justice. He claims that even if it's true that the basic structure is the primary causal factor determining both the character of a society's ethos and the distribution of benefits and burdens, this doesn't mean that the justice of a society is constituted *solely* by the justice of its institutions. What's at stake in the constitution question is whether the justice of other features of a society must be taken into account when assessing whether the society is just as a whole.[293]

To better perceive the distinction between causing and constituting justice, recall our discussion (in section 2) of Cohen's two reasons for thinking that an ethos of justice is necessary for a just society. The first of these reasons was that there's something intrinsic to an ethos that makes it necessary. If we take two hypothetical societies, both of which have the same institutions and distribution of benefits and burdens, but only one of which is populated by a citizenry who are motivated to pursue a just distribution of benefits and burden via the choices they make in their personal lives, it seems that we should evaluate the society characterized by an ethos of justice as more just that the society that isn't. This consideration supports the claim that the justice of a society's

[293] Cohen (2008) p. 378.

ethos is part of what *constitutes* the justice of the society. On the other hand, part of what makes an ethos of justice necessary for the justice of a society is its instrumental relationship with a better all-things-considered package of efficiency and equality. If we compare a society where incentives are necessary to produce the best all-things-considered outcome to a society whose ethos makes incentives unnecessary, it seems that we should evaluate the latter society as more just than the former. Both societies are all-things-considered optimal, but one society's social circumstances allows for the realization of greater equality in its all-things-considered package. This consideration supports the claim that an ethos of justice, because of its impact on a factor that partially constitutes the justice of a society (its distribution), is an integral part of what *causes* the justice of a society.

To illustrate how this point applies to Pogge's and J. Cohen's defense of the basic structure restriction, G.A. Cohen asks us to imagine a society whose institutions are governed by the difference principle in the manner Pogge and J. Cohen have in mind. This society's institutions seek to eliminate any inequality in benefits and burdens not needed to improve the position of the worst-off, and it sometimes does so through its influence over the society's ethos. Suppose that certain inequalities in this society are ineliminable because certain features of its ethos cannot feasibly be changed. On the J. Cohen and Pogge view, this society is perfectly just, as there is no feasible institutional change that could cause more equality without worsening the position of the worst-off. That their view requires deeming this society to be perfectly just is, according to G.A. Cohen, a serious drawback, though, for recognizing the fact that a degree of unfairness persists in this society, and thus that it is sub-optimally just, is important. Insofar as the

society is sub-optimally just because the ineliminable problems with its ethos are intrinsically regrettable, the Pogge/J. Cohen position is problematic because it fails to recognize that a society's ethos is part of what constitutes its justice. Insofar as the society is sub-optimally just because the ineliminable problems with its ethos are extrinsically regrettable (regrettable because we cannot improve the prevailing distribution without changing the society's ethos), the Pogge/J. Cohen position is problematic because it fails to recognize that a society's distribution affects its justice independently of what its institutions can or cannot feasibly cause.[294] Either way, the problem is supposed to demonstrate that a society's justice is constituted by more than the justice of its institutions.

G.A. Cohen's distinction between what causes and what constitutes the justice of a society is sound, and his reply to Pogge's and J. Cohen's defense of the basic structure restriction is sharp. Unfortunately, it represents another instance of equivocation on his part. Recall, once more, that the difference principle is a regulatory principle, and that regulatory principles are sensitive to feasibility constraints. Though Cohen's right to emphasize the importance of recognizing that ineliminable inequality renders a society imperfectly just, this only holds true in the fact-insensitive sense of justice. The content of fundamental justice is insensitive to facts about what is or isn't feasible, so fundamental justice recognizes the unfairness of even those inequalities which cannot feasibly be removed. Regulatory justice, in contrast, is about what, all-things-considered, ought to be done or implemented, and one of the things that must be considered when adopting all-things-considered principles is feasibility. A society with an ineliminable

[294] Cohen's reply focuses specifically on the extrinsically regrettable status of an unmodifiable, inequality preserving ethos. See Cohen (2008) pp. 379-80.

inequality traceable to unmodifiable features of its ethos, e.g., widespread psychological incapacities that are impossible to overcome, is still all-things-considered optimal as long as that ethos is as just as it can feasibly be, and so long as all eliminable inequalities have been removed. Ineliminable intrinsic unfairness in a society's ethos should be recognized via the evaluative application of fundamental justice, but such unfairness cannot be said to constitute an all-things-considered regulatory shortcoming. Similarly, ineliminable extrinsic unfairness in a society's ethos, i.e., ineliminable unfairness in the distribution of benefits and burden traceable to its ethos, should also be recognized via the evaluative application of fundamental justice, but such unfairness cannot be said to constitute an all-things-considered regulatory shortcoming. Put another way, you can't reasonably condemn people for failing to pursue justice past the point where it's psychologically impossible for them to do more.

To further drive the point home, let's return to the intuitive thought experiments meant to support the claim that an ethos of justice is necessary for the justice of a society, but let's be explicit this time about when we have regulatory justice in mind and when we have fundamental justice in mind. First, we noted that if we take two hypothetical societies, both of which have the same institutions and distribution of benefits and burdens, but only one of which has an ethos of justice, that we should evaluate the society with an ethos of justice as more just than the society without this ethos. Is this true when we have specifically the regulatory sense of justice in mind? It seems not. From a regulatory perspective, the difference between these two societies is that the citizens of one do not aim to promote distributive justice via their personal choices, while the citizens of the others do, but are entirely ineffective. Given that regulatory rules are

assessed in light of their effects, it would be strange to say that the society that impotently extends its regulatory rules to the personal context has achieved anything greater than the society that doesn't bother to do so. In other words, the fact that the pursuit of regulatory principles in citizens' personal lives is ineffective in this case undermines the justified application of the relevant principles to the personal context, i.e., citizens in the ethos-possessing society are not obligated to follow the rules they do. However, there is something admirable about the intentions of those who try to promote distributive justice despite the futility of the rules they follow. They value and are motivated by a concern for fairness, i.e., by a concern for the promotion of fundamental justice, and it seems natural enough to acknowledge the desirability of this when evaluating their motives. From the perspective of fundamental justice, then, there seems to be a difference between how these societies should be evaluated, even if the effects of their regulatory measures are identical.

With respect to the second intuitive thought experiment, i.e., the one where we compare a society in which incentives are necessary to produce the best all-things-considered outcome to a society whose ethos makes incentives unnecessary, the comparative judgments we render will depend on how different these societies are. On the one hand, suppose that the citizens in the society with more inequality cannot, for some reason or another, feasibly do more in their personal lives than they currently are (perhaps they all share some psychologically limiting gene that citizens in the more equal society lack). In that case, there is literally no regulatory difference between these societies. No feasible institutional alternative could be implemented in the less equal society to change its ethos, and its citizens cannot be obligated do that which is

psychologically impossible for them, so the less equal society is all-things-considered optimal, just as the more equal society is. The only morally relevant difference between them is that one, regrettably but only regrettably, has a sub-optimal ethos and thus a less equal distribution. The less equal society exhibits less commitment to fairness in its ethos and less realized fairness in its distribution, and is thus less just when measured against the bar of specifically fundamental justice.

On the other hand, suppose the society with less equality can feasibly improve its ethos but just hasn't taken the measures necessary to do so. In that case, in so far as those measures could be implemented institutionally, the society's institutions fall short of what the difference principle requires. Furthermore, since citizens are psychologically capable of doing more, we can also condemn them insofar as they have a reasonable moral obligation that they're failing to fulfill. This moral obligation may not be constituted by an obligation to directly comply with the difference principle, though. Directly following a clearer principle the effects of which overlap with the intended effects of the difference principle (one that promotes equality and is reasonably consistent with efficiency) has advantages I've already discussed.

In summary, Cohen's second reply to Pogge and J. Cohen supplies intuitive support for the fundamental justice extension claim, but it does nothing to support the regulatory justice extension claim, i.e., does nothing to support the claim that the difference principle applies directly to the context of personal choice.

6. An Alternative to Contextual Narrowness

In the preceding sections, I hope to have successfully argued that the plausibility of the claim that the principles of justice that apply to institutions also apply to personal choice

depends on how that claim is understood. If by 'justice' we mean *fundamental justice*, then the claim that it extends to personal choice is defensible both on theoretical grounds independent of the literature that has emerged around Cohen's canonical critique of incentives and the basic structure restriction (grounds I cover in section 3), as well as in light of that literature. If, by contrast, we mean *regulatory justice*, then there are reasons to be skeptical of the claim that principles for institutions extend to personal choice, some of which are independent of the existing critical literature and some of which come to light only after having reflected upon it (as I do in sections 4 and 5). Despite my critical attitude towards the claim that regulatory principles for institutions also apply (directly) to personal choice, I do think that regulatory principles responsive to fundamental justice are needed for the latter context. I just think that, *ceteris paribus*, something clearer than a welfare-inclusive, prerogative constrained difference principle would be better.

In section 2, I suggested, among other things, that Cohen's canonical critique has attracted so much critical attention in part because it challenges a central background assumption that Rawls and many other liberal political philosophers share. This assumption is that the relationship between justice and morality should be understood in terms of context. Justice, on their view, is the part of moral rightness that specifically pertains to a society's institutions, and which bears only indirectly upon citizens' personal lives, e.g., via Rawls's natural duty of justice or in the manner Pogge and J. Cohen suggest. Though I've expressed skepticism about the claim that the principles of regulatory justice suitable for institutions are suitable for direct application to the context of personal choice, I've also argued that fundamental justice applies to both contexts and

thus that regulatory principles of justice, though not necessarily those suitable for institutions, are needed for the personal context.

This suggests a different understanding of the relationship between justice and morality. Since fundamental justice must, on my view, be taken into account when adopting regulatory principles suitable for the personal context, justice's relationship with morality is not to be understood in a contextual fashion. Instead, it is to be understood in terms of the following conjunction: (a) justice is a fundamental value, and (b) morality is comprised of a plurality of fundamental values. As we noted at the beginning of the introductory chapter, this understanding of narrowness is not a new one. In addition to Cohen, prominent 20th century philosophers such as Isaiah Berlin and Joel Feinberg embrace it too.[295] On their understanding, justice is a part of morality in the sense that it's one value amongst many.

The difference between a pluralist understanding of the relationship between justice and morality and a contextual understanding of this relationship represents more than just two different senses of narrowness. It also represents two different ways a theory of justice can be broad or, to use Rawlsian language, *comprehensive*. In the first sense, a theory of justice can possess or lack comprehensiveness with respect to the range of contexts to which it justifiably applies. Let's call this the *inter-contextual* sense of comprehensiveness. As we've seen, fact-insensitive principles are oft times inter-contextually comprehensive, as they justifiably apply in any context to which they intelligibly apply. It is specifically the inter-contextual sense that Rawls has in mind

[295] Berlin (1992) pp. 172-3 and pp. 212-7; and Feinberg (1989) pp. 108-16. See also Segall (2007) pp. 188-92.

when he uses the term, as he claims the limited scope of his two principles entails that his theory of justice is not a comprehensive one.[296]

There is, however, a second sense as well. In this second sense, a theory of justice can possess or lack comprehensiveness with respect to the normative force it carries within a given context. Let's call this the *intra-contextual* sense. As we've seen, regulatory principles are intra-contextually comprehensive, for though their scope of justified application is typically limited to a narrow range of contexts, their content nonetheless reflects a broad range of normative considerations bearing upon the context or contexts to which they do justifiably apply. Keeping this distinction in mind, it's evident that Rawls's principles of regulatory justice, fact-insensitive luck-egalitarianism, and utilitarianism, all stand in different relationships to breadth. Rawls's principles, on the one hand, are intra-contextually comprehensive, as their content incorporates a wide variety of considerations bearing upon the design of a society's institutions. Fact-insensitive luck-egalitarianism, on the other, is inter-contextually comprehensive, for though it only explores the requirements of a single value, the scope of that value extends across contexts. Utilitarianism, however, is both inter-contextually and intra-contextually comprehensive, as it purports to have sole authority over right and wrong in any and all moral contexts.

7. Conclusion

In conclusion, I hope to have established that proper attention to the different ways in which justice's narrowness can be understood sheds light on the dispute over whether institutional justice extends to the realm of personal choice. One the one hand, I've

[296] Rawls (2001) p. 14.

argued that understanding justice's narrowness in the manner Cohen and other pluralists do, i.e., understanding a conception of justice to be a conception of one fundamental value among many, entails its application to the personal context. On the other hand, I've argued that if we understand justice's narrowness in a contextual manner, i.e., understand justice to be a set of all-things-considered principles adopted for the institutional context, then it proves implausible to claim that justice extends to the personal context. If I'm right, then the dispute over justice's scope of application is really a conceptual one. Since Cohen and his critics have by and large been talking past each other, a dispute over the conceptual identity of justice has manifested as a dispute over its scope. When combined with my earlier findings about the conceptually contingent plausibility of luck-egalitarianism, this makes answering the question 'What is the conceptual identity of justice?' a particularly pressing one.

Here are the specifics of what we've covered in this chapter. In section 2, I explained Cohen's critique of Rawls's 'basic structure restriction' and the canonical critique of incentives from which it emerges. I also explained four other related but distinct views of Cohen's: (a) that the incentives related tension between equality and efficiency is contingent upon the character of a society's ethos, (b) that equality should, to some extent, give way to efficiency in cases where the character of a society's ethos puts them in tension with each other, (c) that an ethos of justice is necessary for a just society, and (d) that considerations of efficiency are external to justice.

In section 3, I explored the theoretical relationship between a principle's status as either fundamental or regulatory and its scope of application. I distinguished between a principle's scope of intelligible application and its scope of justified application and

explained that fundamental principles, though not intelligibly applicable to all contexts and possible worlds, are, by virtue of their fact-insensitivity, justifiably applicable in any context to which they intelligibly apply. I also explained that regulatory principles, in contrast, typically experience a gap between their range of intelligible application and their range of justified application, i.e., there are contexts to which they intelligibly apply but do not justifiably apply. The stated upshot was that there's a theoretical basis upon which to conclude that fundamental justice applies to both institutions and the personal context, but that the regulatory principles suitable for institutions will differ from those suitable for the personal context.

In sections 4 and 5, I assessed Cohen's commentary on two issues concerning his critique of the basic structure restriction: the demandingness problem and the causal relationship between a society's institutions and ethos. I argued that though many of his replies to critics make sense if one is defending the application of fundamental justice to personal choice, they become problematic when it's acknowledged that the issue at hand is whether the difference principle (an institutional regulatory rule) extends to personal choice, as they're inconsistent with what Cohen says about regulatory rules. In both cases, I concluded that a regulatory principle that's clearer than the difference principle but still responsive to efficiency and fundamental justice is, all-things-being-equal, better suited for the context of personal choice.

In section 6, I wrap up with a brief discussion of the different understandings of narrowness that divide Cohen and his critics, as well as with a related distinction between inter and intra-contextual comprehensiveness. Were the distinction between inter and intra-contextual comprehensiveness the end of the story about how Cohen and Rawlsians

differ, then the contrast between their understandings of what it means to give a conception of justice would be fairly superficial. Cohen, when offering his own luck-egalitarian conception of justice, has the fundamental, inter-contextually broad but intra-contextually narrow sense of 'justice' in mind. Rawls, when offering his own two principle conception, has the regulatory, inter-contextually narrow but intra-contextually broad sense of 'justice' in mind. Since the word 'justice' is being used in different but perfectly compatible ways, the difference between them would be strictly semantic. Upon closer inspection, however, the matter appears to be more complicated. As I proceed to argue in the next chapter, the heart of the disagreement between them is that Rawls thinks, and Cohen disagrees, that a conception of what justice *is* (as opposed to a conception of what we are required to do once justice and all other things are taken into consideration) can reflect a fairly wide variety of normative considerations without sacrificing full fairness.

Chapter 6

Fundamental Justice

1. Introduction

The primary purpose of chapters 4 and 5 was to establish the theoretical *significance* of understanding justice as one fundamental value among many. I argued that the plausibility of two theses about justice, one a thesis about its content, the other about its scope, depend upon whether justice's narrowness is understood this way. More specifically, in chapter 4, I argued that if justice is a fundamental value, then luck-egalitarianism provides a compelling account of its content, whereas if justice is regulatory, then luck-egalitarianism is a poor conception of it. Similarly, in chapter 5, I argued that understanding justice as a fundamental value entails that the same fundamental justice input must feature in the justification of both institutional and personal regulatory principles. However, I also argued that we have good reason to think that the distributive regulatory principles suitable for the personal and institutional contexts are different, and thus that justice, if identified with optimal institutional regulatory principles, should not be extended to the personal realm.

In the present chapter, my goal is to establish the *plausibility* of understanding justice as one fundamental value among many. In section 2, I explain the reasoning that motivates Cohen's conceptual claim. He maintains that justice itself must be distinct from optimal, all things considered institutional regulatory principles because the all things considered optimality of those principles requires that their content reflect more than just considerations of fairness. After explaining this view, I consider the alternative

view that justice is a complex of values, and thus that sub-optimal fairness does not represent sub-optimal justice when fairness must be compromised for the sake of other justice values. In response, I argue that once the distinction between broad justice (moral rightness in general) and narrow justice (the part of moral rightness pertaining to fairness) is appreciated, the view that fairness is one of the defeasible values comprising justice cannot supply a sustainable alternative. This view, if understood as a view about broad justice, collapses into Cohen's position, and if understood as a view about narrow justice, is incoherent.

In section 3, I address the worry that the dispute between Cohen and Rawls over the conceptual status of justice is merely verbal and thus of little philosophical interest. To deflect this worry, I argue that taking a position on the conceptual correctness of using a word one way instead of another is non-trivial when divergent uses of a word reflect an underlying theoretical disagreement. I indicate that the underlying disagreement between Cohen and Rawls is about whether fairness is best thought of as procedural, and thus prior to narrow justice; or as substantive, and thus co-extensive with narrow justice. I also discuss a second kind of case where arguing for the correctness of a concept is non-trivial. Arguments intended to show that a particular concept underlies competing theories are non-trivial because correctly specifying that concept is relevant to the assessment of those theories. The upshot, I note, is that if Ronald Dworkin is right to say that 'abstract equality' unites most contemporary theories of justice, then Cohen's use of the word is inconsistent with the way it's used in much (but not all) of the contemporary literature. Abstract equality, upon further analysis, turns out to be a complex value, not a simple value. Despite this, I maintain that Cohen is only wrong about the concept of

justice if he's wrong to interpret the fairness component that partially comprises 'abstract equality' as a defeasible value.

In section 4, I analyze the Rawlsian case for adopting a procedural understanding of fairness. Drawing upon his comments on 'intuitionism' and on Dworkin's critique of the positivist understanding of judicial interpretation, I argue that an account of procedural fairness is needed because arbitrarily selecting institutional regulatory principles from among the plausible set is inconsistent with the legitimate exercise of state coercion. However, I also argue that specifying the details of our procedural device in a non-arbitrary way requires appealing to a fundamental, luck-egalitarian criterion of fairness embedded in our shared political culture. If I'm right, then narrow justice is both a defeasible value *and* the 'first virtue of institutions'.

2. The Concept of Narrow Justice: Fundamental or Regulatory?

Cohen's take on the concept of justice is grounded in the relationship between (narrow) justice and fairness. His position is that justice and optimal rules of institutional design must be distinct from each other by virtue of the fact that some of the considerations said rules reflect are distinct from fairness, e.g., considerations of feasibility, efficiency, compassion, etc.[297] The externality of various considerations to distributive fairness has already been discussed in a number of places throughout this thesis. Consider once more the harshness objection to luck-egalitarianism. Though it is indeed *harsh* to let the imprudent bear burdens that they are responsible for having incurred, is it also *unfair* to let them to do so? It doesn't seem so. Redistributing from those whose *genuine choices* (choices for which they can properly be held responsible) have been careful and

[297] See Cohen (2008) chapter 7.

conscientious to those whose genuine choices have not been is certainly *compassionate* when done to alleviate suffering or satisfy basic needs, but it is also unfair to those who have exercised prudence. Fairness and compassion can come into conflict, and though fairness must give way in cases where its pursuit would be excessively harsh, considerations of compassion, though normatively important, are nonetheless external to the content of fairness.[298]

Consider again the leveling down objection to egalitarianism. Almost no one would endorse implementing distributive equality if it meant that everyone, including those on the bottom end of a currently unequal distribution, would become worse off. According to Cohen, however, the reason for this aversion has nothing to do with fairness, and thus nothing to do with justice. Instead, it's about efficiency. On this basis, Cohen claims that Rawls's permission of incentivizing inequalities is also unrelated to fairness. The reason inequalities in social primary goods traceable to natural talents are merely mitigated, rather than fully redressed, is because redressing them allegedly requires leveling down under certain 'real-world' conditions. The content of the difference principle thus reflects a trade-off between considerations of fairness and efficiency, which in turn means that Rawls's principles are not identical with distributive justice.[299] Distributive fairness, and thus distributive justice, though an important normative input for Rawls, is distinct from the principles he endorses.

In chapter 3, section 2 (a) (i), I offered a conceptual analysis of fairness and efficiency that, if accurate, lends credence to the view that efficiency is external to fairness. First, I claimed that fairness and efficiency are distinct values. I noted that

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[298] See section 3 (b) in chapter 4 of my thesis.
[299] Cohen (2008) pp. 156-61.

efficiency, on the one hand, pertains to increasing the amount of a good, and that fairness, on the other hand, is about "distributive information across individuals,"[300] or in other words, about who has what and why. Third, I argued that, given the above characterization of fairness, judgments internal to the project of articulating a conception of fairness must, when applied, presuppose individualized information in order to qualify as 'judgments of fairness'. Possibilities include information about the relative sizes of shares (Which shares are larger? By how much?), about the characteristics of shareholders (Who's the most deserving? Who has the greatest need?), or about the origins of shares (Are they traceable to genetic luck? To fully consensual transactions?). Judgments about the wrongness of levelling down lack such features and are thus external.

Given my description of the concept of distributive fairness, it's clear that the wrongness of levelling down and the wrongness of harshness are external to fairness in different ways. Whereas the applicability of the judgment that levelling down is wrong does not presuppose individualized information about shareholders, making that judgment unrelated to fairness, the judgment that it is excessively harsh to ignore the needs of the imprudent is not like this. Its application straightforwardly presupposes information about the relative sizes of shares and about the characteristics of shareholders (some have the characteristic of 'neediness' while others do not), and thus this judgment cannot be rendered external on the grounds that its subject matter is unrelated to the concept of fairness. Instead, I think the case against this judgment lies in the intuition that the extent to which shareholders are responsible for the relative size of their shares is

[300] Waldron (2003) p. 277.

also internal to fairness, as well as in the intuition that the connection between fairness and need is sensitive to this responsibility. Since there's an obvious fairness-related difference between compensating the prudent needy and subsidizing the imprudent needy, the easiest way to account for this difference is by stipulating that the moral requirement to respond to need is only a requirement of fairness when it is compatible with holding people responsible for their genuine choices. When responding to need is incompatible with responsibility, the best way to account for the remainder of the moral force it retains is with reference to its association with compassion.

In the remainder of this section, I will describe two challenges to Cohen's claim that considerations of efficiency, compassion, feasibility, etc., are external to the fairness of a distribution and are thus external to distributive justice. According to the first challenge, fairness is indeed a value distinct from efficiency and compassion, but that does not mean efficiency and compassion are external to justice. Justice, according to the objector, is a complex value, and fairness is but one of the simple values comprising it.

According to the second objection, Cohen is wrong to think of fairness as one amongst a plurality of sometimes conflicting values. Fairness, according to the objector, is a procedural concept. It's the criterion we employ to adjudicate between conflicting values, rather than one of the values in conflict. When fairness is understood procedurally, considerations such as efficiency and compassion are not external, since any fair procedural output will give some weight to all the relevant values.

Though I bring up the first challenge because I think it's one that any defender of Cohen should respond to, I bring up the second challenge because it will help shed light on where the first one goes wrong. It is not until section 4 that I will respond to the

second challenge, i.e., to the claim that fairness is a procedural concept, rather than a value.

The first challenge is endorsed by a number of contemporary political philosophers, many of whom agree with much of the view that I defend in chapter 4. They think that luck-egalitarianism is plausible on the condition that it be understood as a conception of a particular value, one that's situated within a picture of the moral universe that includes a plurality of other important values.[301] However, these theorists also reject what, in chapter 5, I called 'justice monism'. They think that equality is a part of justice but not the whole of it. For example, in his critical notice on Cohen's *Rescuing Justice and Equality*, Jonathan Quong insists that justice is action-guiding, and that its capacity for action-guidance is contingent upon its being a "complex value", i.e., a value whose content reflects a wide variety of normative considerations.[302] He correctly notes that principles which do not take into account a wide variety of considerations cannot plausibly serve as a criterion for determining what political actions to take, all-things-considered.[303] Similarly Pablo Gilabert, in his discussion of Cohen's *Why Not Socialism?*, suggests that justice is best thought of as being constituted by a plurality of reasons that must be weighed against each one another when determining what our duties of justice are. Instead of thinking of compromises between luck-equality and, say, community, as a compromise between justice and community, Gilabert recommends that we instead of think of them as compromises between two different considerations of justice, considerations that must be weighed against each other when determining what

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[301] See Segall (2007) pp. 188-91; Swift (2008) pp. 382-7; Tomlin (2010) p. 244; Quong (2010) pp. 315-6 and pp. 336-40; and Gilabert (2012) pp. 112-4.
[302] For the term 'complex value', see Quong (2010) p. 337.
[303] Quong(2010) pp. 337-40.

justice itself requires. The alternative is to think of justice as a "non-trumping value", and Gilabert finds that implausible.[304]

It is noteworthy that Gilabert and Quong do not equate luck-egalitarianism with fairness. Quong, for example, seems more inclined towards the Rawlsian view of fairness that I will be discussing shortly.[305] Despite this, many of the philosophers who understand luck-egalitarianism as part of but not the entirety of distributive justice explicitly identify it as the fairness element of justice, namely Shlomi Segall, Adam Swift, and Patrick Tomlin.[306] It is specifically their understanding of the relationship between luck-equality, fairness, and justice that I will henceforth be addressing.

The distinction between broad and narrow justice poses a serious problem for the view that a plurality of values, fairness included, are internal to justice. As the reader may recall, Aristotle begins his discussion of justice in *The Nicomachean Ethics* by distinguishing between two different but related senses of the term: a narrow sense of the word 'justice' that refers to a part of morality, specifically the part pertaining to fairness, and which bears on matters of distribution and rectification; and a broader sense of the word 'justice' that refers to moral rightness in general.[307] Though I think it's sensible to assume that in most cases political philosophers employ the narrow sense of the term 'justice', let's drop that assumption and inquire into which sense of the word is intended by proponents of the view that fairness is but one of the values internal to justice.

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[304] See Gilabert (2012) p. 107 for the term "non-trumping value". See pages 106-8 for his general discussion of justice's plural grounds.
[305] See Quong's comments in Quong (2010) pp. 321-6.
[306] Segall (2007) p. 188; Swift (2008) p. 382-3; Tomlin (2010) p. 244.
[307] Aristotle (1998) Book V, Sections 1-2. See also Waldron (2003) p. 274.

Suppose the above view is meant to pertain to narrow justice. If so, then it makes no sense. If the view that fairness is but one of the values internal to 'justice' is a view about specifically 'narrow justice', then it is the view that fairness is a part of fairness. Assuming that a part of something is always to be contrasted with the whole of it, the claim that fairness is a part of fairness is analytically false. Instead, then, suppose that justice pluralism is a view about broad justice. If this is the way it is interpreted, then it is equivalent to the view that fairness is but one of the considerations that must be taken into account when determining what, all-things-considered, is the right course of action. A broad interpretation of justice pluralism has the virtue of not producing an analytically false position. Unfortunately, however, it also has the vice of being trivially true, at least for any value pluralist who thinks of fairness as a value that can come into conflict with other important values. It is obvious that fairness, as one value among others, has only *ceteris paribus* normative force. Determining the correct all-thing-considered action of course requires taking other normative factors into consideration, factors that will often require striking a compromise. If all the justice pluralist means to do is draw attention to is fairness's *ceteris paribus* normative status, then her position is not really an alternative to Cohen's. After all, Cohen also thinks that fairness may be compromised for the sake of other values. It's just that the justice pluralist, if using the term 'justice' in its broad sense, is referring to a different concept than Cohen is when he uses the term.

On the assumption that justice pluralists are not just talking past Cohen, I think the source of confusion for at least some of them is an uncritical marriage between two views. The first is the Cohenian view that narrow justice is a value that sometimes conflicts with other values. The second is the Rawlsian view that narrow justice is the

most significant normative consideration in matters of institutional design. In Rawls's words, justice is the "first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust."[308] It is because justice pluralists embrace the first view that it is plausible to think these theorists and Cohen are talking about the same thing, namely about what considerations are internal to a particular value. It is because they hold the second, however, that they find themselves pushed towards the view that considerations of more than just fairness are internal to justice. To say that justice is the first virtue of institutions is to say that a society's institutions must conform to the virtue of justice in order to be acceptable. It ostensibly follows that for a normative requirement to be a requirement of justice, it must possess a considerable amount of weight in the institutional context. A straightforward way to try and account for this weight is by interpreting justice to be a value whose content reflects a plurality of normative considerations. If the requirements of justice are interpreted as the output of practical political deliberation, rather than as a defeasible input to be balanced against other defeasible inputs, then justice can reasonably be accorded the kind of weight it seemingly needs to have in order to be the first virtue. The problem, however, is that these views are in tension with each other. They embody different understandings of justice's narrowness, and thus different understandings of the way fairness works in matters of distribution.

[308] Rawls (1971) p. 3.

On the first understanding of narrow justice, fairness is a value that sometimes conflicts with other values. As I argue in chapter 4, luck-egalitarianism supplies the best conception of this value, and problems such as those posed by the harshness objection represent constraints on the extent to which fairness can permissibly be implemented in practice, rather than problems that require amending the content of our conception of fairness. The problem holding this view poses for justice pluralists, as we've already noted, is that on this understanding, fairness and narrow justice are the same thing. It makes no sense to say that fairness is a part of narrow justice.

On the second understanding of narrow justice, fairness operates somewhat differently. It operates as a procedure for rationally determining which institutional regulatory principles accord correct weights to our conflicting values. In Rawls's critical discussion of 'intuitionism', i.e., value pluralism,[309] he claims that it is not acceptable to arbitrarily select a society's institutional regulatory principles from among the set of plausible alternatives. He sees it as a serious failure of value pluralism that it is to some extent indeterminate between alternatives. Any adequate theory of justice must, on his view, make use of a criterion that non-arbitrarily identifies particular regulatory principles as the best. His own solution to what one might call 'the problem of arbitrariness' is the original position. Via this device, Rawls attempts rationally to select institutional principles from among the plausible set, principles that despite reflecting a variety of normative considerations are nonetheless entirely fair by virtue of having been chosen through a fair procedure.[310]

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[309] See Rawls's and Cohen's discussions of the term 'intuitionism' in Rawls (1971) p. 35; and Cohen (2008) p. 4.
[310] See Rawls (1971) pp. 12-3 and pp. 118-20.

The second understanding of fairness, unlike the first one we discussed, can make sense of the idea that fairness is a part of narrow justice. On this view, fairness and justice are related but not identical. Instead of saying fairness is justice; it would be more accurate to say that fairness is prior to justice.[311] Procedural fairness is the part of a theory of narrow justice that we employ to select its principles. The problem this poses for justice pluralists, however, is that it no longer makes sense to think of fairness as conflicting with other values anymore. Procedural fairness is not one of the defeasible values that our regulatory principles must partially live up to. Instead, it is the means via which one chooses from among the plausible set of regulatory alternatives. It is for this reason that Rawls's theory is appropriately thought of as a theory of specifically narrow justice. Understanding fairness procedurally, rather than as a value subject to trade-offs, makes it reasonable to predicate full fairness of his regulatory principles, and thus to consider them principles that tell us what justice *is* (as opposed to a theory of what justice requires of us once all other things have been taken into consideration). On Rawls's view, principles that, for example, allow some to receive a greater share of society's resources on the basis of morally arbitrary natural talents, or which compensate those who are poorly off due to voluntary expensive tastes, are still entirely fair if selected via a fair procedure.

So those who hold the position that fairness is one amongst a plurality of values internal to justice are stuck between a rock and a hard place. On the one hand, they can keep the view that narrow justice is a value and concede that fairness *is* narrow justice, and thus that it is only a part of all-things-considered rightness. Were they to do so, then

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[311] See Rawls's comments in Rawls (1971) pp. 12-3.

their view would just collapse into Cohen's. Their understanding of narrow justice would be the same as his, i.e., it would be the view that justice is a fundamental value that's co-extensive with fairness. Alternatively, they can keep the view that narrow justice is a 'complex value' but give up the view that fairness is a substantive, defeasible value that luck-egalitarianism plausibly captures the content of. If narrow justice is complex, then fairness needs to be understood procedurally, for only then can a principle that reflects a plurality of considerations be plausibly thought of as fully fair, and thus as a principle of what justice *is*. Principles that embody a compromise between luck-egalitarian fairness and the values with which it conflicts cannot be thought to possess complete fairness and thus can only be thought to convey what narrow justice requires of us once all other things have been taken into consideration.

In my own view, marrying the idea that justice is a value to the idea that it is also the first virtue of institutions is a worthy theoretical goal. However, I don't think interpreting it as a complex value is the right way to achieve that goal. Instead, the approach I'll take is to argue that luck-egalitarian fairness has two roles to play with respect to the selection of institutional regulatory principles. On the one hand, I'll maintain that it is a defeasible value that must be accorded at least some weight by any of the plausible regulatory alternatives from among which a choice is to be made. On the other, though, I'll also argue that it has an important role to play at the procedural level too, and that it is by virtue of its procedural role that luck-egalitarianism is appropriately considered the 'first virtue of institutions'. This thought will be discussed at greater length in section 3.

As mentioned earlier, the second way of opposing the Cohenian view that considerations of efficiency, feasibility, etc., are external to the fairness of a distribution and thus external to distributive justice is by arguing that they actually aren't external to fairness. Whereas the justice pluralist acknowledges that many of the considerations bearing on political practice are external to fairness and yet denies that they are external to justice, the Rawlsian adopts an understanding of fairness that permits her to deny that considerations of efficiency, community, feasibility, etc., are external to it. She notes that hypothetical contractors in the original position would not select principles that fail to reflect a variety of considerations. On that basis, she maintains that a variety of considerations are internal to the project of selecting fair institutional regulatory principles.

In section 3, I will consider the above articulated Rawlsian position and its associated picture of justice's narrowness. One of my goals in that section will be to explain the connection between procedural fairness and a contextual understanding of justice. What is it about the institutional context that makes fairness so important? Another of my goals will be to show that the Rawlsian view cannot adequately deal with the problem of arbitrariness unless it draws on a fundamental, non-procedural standard of fairness. For the moment, however, I turn to a fresh worry, namely the concern that the dispute between Cohen and Rawls over justice's narrowness is merely verbal.

3. Cohen vs. Rawls on the Concept of Justice: A Merely Verbal Dispute?

The purpose of the present section is to address two problems. The first is the above mentioned worry that the dispute that between Rawls and Cohen over the conceptual status of justice is merely semantic, and thus not of any philosophical interest. The

second is Ronald Dworkin's claim that the concept of justice is 'abstract equality', and that any plausible conception of abstract equality is both a full, uncompromised theory of justice *and* an indefeasible standard in light of which institutions should be designed. Aside from the fact that both pose challenges for Cohen's position, the first and second issues are related because addressing them will involve an exploration of the different ways in which an understanding of a concept can be 'correct'.

Non-trivially establishing that one understanding of a concept is better than another is tricky. It's a truism that the meaning of a word is determined by convention. As a result, a word whose standard use involves a particular meaning at present can easily lose that meaning in the future. For instance, in contemporary English the word 'cause' is almost always used in its efficient sense. If someone says 'X causes Y', she probably means that X either brings about or contributes to bringing about the occurrence of Y. The ancient Greeks, in contrast, associated 'cause' with a number of different meanings. Though they sometimes had the efficient sense in mind, often the word was used in other ways, e.g., to refer to something's material composition. To say that X causes Y in this sense is to say that X is what Y is made of. When used in these different ways, the word 'cause' reflects two very distinct concepts. Though retaining both uses will sometimes make it necessary to disambiguate how the term is being used, there's nothing particularly amiss with sometimes using the word one way and sometimes using it the other, and thus nothing peculiar about claiming that *both* uses are correct. Of course, it is possible that a dispute could nonetheless emerge over the proper use of the word. The disputants might perhaps disagree over which use of the word is consistent with contemporary linguistic convention (in which case the champion of its efficient sense

would be correct). Such a dispute would be merely linguistic, however, and thus of little interest to philosophers.

On one interpretation, then, Cohen's disagreement with Rawls over the narrowness of 'justice' is merely a linguistic one and thus does not constitute a substantive issue. For Rawls and other liberals who hold a contextual view of narrowness, optimal institutional regulatory principles are identical with what 'justice' is. In contrast, for Cohen and other value pluralists who understand 'justice' to be a fundamental value, institutional regulatory principles specifically tells us what we should do, all things, including 'justice', considered. Cohen maintains that, properly speaking, 'justice' is fairness, and thus only a conception of the content of distributive fairness is a conception of the content of distributive 'justice'. But isn't this just a verbal dispute? Would we lose anything by dropping the term 'justice' altogether?[312]

In some verbal disagreements, it isn't right to say that the nature of the dispute is *merely* linguistic. Sometimes divergent uses of a word reflect a theoretical disagreement, one that manifests itself linguistically but is deeper than a dispute over standard usage. Moral theorists' use of the word 'morality' is arguably a good example of this. For most moral theorists, a conception of morality is a conception of right action. Proponents of different conceptions, e.g., utilitarians and deontologists, disagree over the principles that spell out morality's content, but they implicitly agree that the concept of 'morality' is to be understood as 'right action'. The proponents of virtue ethics are ostensibly an exception to this. For virtue ethicists, a conception of morality is a conception of virtuous character. Different virtue ethicists sometimes disagree about how particular

[312] For discussions of the extent to which Rawls and Cohen are and aren't compatible, see Williams (2008) pp. 117-26; Tomlin (2012); and Valentini (2012) pp. 657-8.

virtues should be understood or about the relationship between them, but they implicitly agree that the concept of morality is to be understood in terms of the virtues that constitute a virtuous character. To treat these different uses of the term 'morality' as merely a verbal disagreement is to miss that they reflect a significant theoretical disagreement. Virtue ethicists and other moral theorists disagree over how the relationship between character and action should be understood. For the virtue ethicist, right action can only be understood with reference to an account of moral character. Right actions are those which flow from virtue, and thus identifying them presupposes an account of the virtues. Other theorists, in contrast, see moral character as parasitic upon right action. For them, the value of a character trait depends upon the value of the actions it's conducive to, making an account of right action more fundamental than an account of moral character.[313]

The above considerations suggest that offering a non-trivial defense of the claim that justice is a fundamental value requires demonstrating two things: (1) that divergent uses of the term 'justice' reflect a theoretical disagreement, and (2) that Cohen's on the correct side of that disagreement. Accomplishing these tasks is the purpose of my next section. As I've already suggested in the previous section, Cohen's "one value among many" understanding of narrow justice and the Rawls's "first virtue of institutions" understanding differ with respect to the way fairness is construed. On Cohen's understanding, fairness is substantive, and the term justice, understood in its narrow sense, is just another word for it. This understanding of justice entails that to provide a

[313] As far as I know, my understanding of the difference between virtue ethics and the other major moral theories is the standard one. See, for instance, Hursthouse (2012), especially the discussion of the application problem in section 3.

theory of what justice *is* requires supplying the evaluative principle that we think best specifies the content of distributive fairness, e.g., a principle like the principle of luck equality. On Rawls's view, however, a theory of narrow justice is not the same thing as a theory of fairness. Justice is of course substantive, but fairness is not. Here's a helpful quote:

> The original position is, one might say, the appropriate initial status quo, and thus the fundamental agreements reached within it are fair. This explains the propriety of the name "justice as fairness": it conveys the idea that the principles of justice are agreed to in an initial situations that is fair. The name does not mean that the concepts of justice and fairness are the same, any more than the phrase "poetry as metaphor" means that the concepts of poetry and metaphor are the same.[314]

It is Rawls's procedural understanding of fairness that licenses him to locate the concept of narrow justice at the level of institutional regulatory principles, i.e., licenses him to say that institutional regulatory principles express what justice *is*, not just what it requires of us, all-things-considered. As such, an implicit disagreement about the nature of fairness underlies Cohen and Rawls's differing understandings of justice's narrowness. It is to that disagreement that I turn in the next section. Before I do so, however, I would like to explain a second kind of non-trivial argument for the correctness of a concept. The pertinence of this kind of argument to a defense of Cohen's understanding of narrowness will become apparent when I get to the particular example I'm going to use, namely the idea that 'abstract equality' unites contemporary theories of justice.[315]

The second kind of non-trivial argument for the correctness of a concept is, in a sense, the opposite of the first kind. Whereas the first kind involves identifying the theoretical disagreement that explains two different uses of a word, the second kind

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[314] Rawls (1971) pp. 12-3.
[315] See Dworkin (2000) pp. 1-4; and Kymlicka (2002) pp. 1-5.

involves identifying that which disagreeing theorists implicitly agree about, and which thus unites their differing theories. When one's goal is to identify that which unites competing theories, saying that a particular sense of a word is the 'correct' sense is the same as saying that it is the sense theorists are actually talking about and attempting to interpret.[316] Though arguments of this sort are similar to arguments that claim a particular way of using a word is more consistent with standard usage than another, the reason they are non-trivial is because they have implications for the way competing theories are to be understood and assessed. For example, when comparing the merits of the principle of average utility to Rawls's theory, it makes a difference whether we understand them to be competing conceptions of institutional regulation; or whether we understand them to be competing conceptions of comprehensive morality, understood in both the inter and intra-contextual sense. Though Rawls's two principles arguably have various theoretical advantages over the principle of average utility, at least some of those advantages dissolve when his principles are thought to be intra-contextually comprehensive in not only the institutional context, but the personal context as well. A version of the difference principle that possesses all-things-considered normative force within the realm of personal choice, and is thus not constrained by a personal prerogative, would be extremely demanding. As was mentioned in chapter 5, such a principle would require that in any set of circumstances where a potential choice is likely to benefit the least well off more than its alternatives, members of society will be required to consistently make that choice in spite of their personal preferences. Interpreted this way, Rawls's theory might not fare much better than the principle of average utility would.

[316] See Tomlin (2010) pp. 233-4.

A great example of this second sort of concept argument is Ronald Dworkin's 'egalitarian plateau'. According to Dworkin, contemporary theories of justice are united in their efforts to interpret the same concept, namely 'abstract equality'. As is often the case with concepts, characterizing the concept of abstract equality in a way that doesn't presuppose any particular conception of it is perhaps a bit tricky, but Dworkin and others have suggested a number of characterizations that arguably work. In *Contemporary Political Philosophy*, Will Kymlicka writes: "A theory is egalitarian in this sense if it accepts that the interests of each member of the community matter, and matter equally."[317] In *Sovereign Virtue*, Dworkin himself writes: "No government is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance."[318] The claim that an abstract version of equality underlies even inegalitarian theories of justice may seem implausible at first blush, but Kymlicka has given the idea a fair amount of credence in his analyses of the various theories of justice covered in *Contemporary Political Philosophy*. For example, it might initially seem implausible to think of utilitarian theories of justice as interpretations of equality. As we noted in chapter 3, however, utilitarianism, or at least maximum average utilitarianism, contains within it the egalitarian thesis that each member of the political community's welfare is to be accorded equal weight when being promoted. Though equal weight is not a form of distributive equality, it is nonetheless an interpretation of a more abstract idea of equality,[319] and this abstract idea should arguably be associated with other contemporary theories of justice as well.

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[317] Kymlicka (2002) pp. 3-4.
[318] Dworkin (2000) p. 1.
[319] Kymlicka (2002) pp. 32-3.

With respect to his own luck-egalitarian theory of justice, Dworkin uses the idea of abstract equality to accomplish at least a couple of noteworthy theoretical functions. One was already discussed chapter 4. There, we considered the possibility of interpreting the ideal of an ambition-sensitive, endowment-insensitive distribution to be Dworkin's fact-insensitive principle of fundamental luck-egalitarian justice, and his insurance market device, in turn, as his conception of all-things-considered regulatory justice. However, we also noted that such an interpretation is contrary to Dworkin's own understanding of his theory. According to Dworkin, the hypothetical insurance market is not a pragmatic compromise. Though it is indeed responsive to facts about the real world, it nonetheless fully represents justice in his view because it is an interpretation of abstract equality.[320] Abstract equality thus allows Dworkin to say that the hypothetical insurance market is a theory of what justice *is*, despite the fact that it deviates somewhat from full luck-equality.

In addition to allowing him to say that the hypothetical insurance market is a full theory of justice, the idea of abstract equality is also used as a resource when explaining why the hypothetical insurance market is a necessary part of his theory. For example, when responding to the worry that his theory unpalatably implies we should level down, Dworkin notes that one of the functions of moving from an ambition-sensitive, endowment-insensitive distribution to the hypothetical insurance market is to avoid this consequence, for it would indeed be problematic if there were no cut-off point at which those with very costly illnesses or disabilities cease to be compensated. Furthermore, he notes that avoiding levelling down is important precisely because no plausible

[320] Dworkin (2002) pp. 120-1; and Dworkin (2003) pp. 190-1.

interpretation of abstract equality would permit it. A government that completely impoverishes its citizens in a futile effort to fully compensate all forms of bad brute-luck is not showing equal concern for their fates, and any theory of justice that would require as much can therefore be rejected on egalitarian grounds, according to Dworkin.[321]

What, then, are we to make of the idea of abstract equality and Dworkin's use of it? Is Dworkin right to say that abstract equality rules out any theory of justice that requires levelling down? And is he right to say that interpretations of it fashioned for real world circumstances are full, uncompromised theories of justice? Addressing the question is important, for they seem to threaten Cohen's understanding of narrow justice, as well as the conception of it that he and I defend. After all, when justice is understood as a defeasible value that must be compromised in practice, the upshot is that any all-things-considered theory of institutional design is considered a morally necessary departure from justice, not an interpretation of it. Furthermore, though fact-insensitive luck-egalitarianism does not strictly speaking *require* levelling down, as its defeasibility permits room for the competing demands of efficiency, it does nonetheless provide an ineliminable *reason* to level down, as permitting inequality for the sake of efficiency is considered a regrettable departure from fairness. If Dworkin's right, though, and all plausible theories of justice are interpretations of abstract equality, then a defeasible theory of justice is, in a sense, just as bad as one that would require levelling down. Why? Because a defeasible interpretation deprives abstract equality of its status as the 'sovereign virtue'. This problem should seem familiar. In the last section, we noted that

[321] Dworkin (2002) pp. 122-4.

a concern for preserving justice's status as the 'first virtue of institutions' was motivating the idea that justice is best thought of as a complex value.

In order to see whether the above worries have any bite, an analysis of the idea of abstract equality is called for. As I noted earlier, one possibility is to think of abstract equality as the claim that each member of the community's interests matter equally. Another possibility is to think of it as equal concern for the fate of citizens. Regardless of the particular wording we use, the value concepts employed are the same. First, there's the idea of citizens' *fate* or *interests*. Second, there's the idea that the interests of citizens *matter* or are appropriate objects of *concern*. Third, there's the idea that the interests of citizens matter *equally*. We have three concepts, then. *Equality*, *concern*, and *interests*. The concept of *interests* is fairly straightforward. It's just another word for citizens' good.[322] Furthermore, for a government to be *concerned* for citizen's interests is to say that the realization of their good matters to it, i.e., that it, in some sense, cares whether citizens successfully achieve their good. Though it's possible that some ways of understanding concern come apart from the concept of efficiency, i.e., come apart from the idea of increasing the total amount, concern for the realization of citizens' good and the efficient promotion of their good are certainly similar concepts. The main difference, I think, is that the concept of concern is somewhat more specific. Concern is specifically concern for 'the good' of people, and thus for the amount of the 'the good' that they enjoy, rather than for increasing the amount of 'the good' in general. This seems to rule out the possibility of understanding 'concern' in an aggregative fashion, since an

[322] The concept of citizens' good is expressed consistently across the interpretations of abstract equality Kymlicka explores in *Contemporary Political Philosophy*. Sometimes other words are used, e.g., preferences, ends, etc., but the concept is still there. See, for example, Kymlicka (2002) pp. 32-3, pp. 64-5, pp. 75-8, and pp. 107-10.

aggregative understanding ostensibly requires that we sacrifice people's good for the sake of increasing the total amount of 'the good' through population growth.[323] As I indicated in chapter 3, aggregative interpretations of efficiency strike me as implausible for precisely this sort of reason. On the assumption that most other political philosophers share my intuition, I am willing to accept the claim that efficiency, when applied to 'the good', is only of common interest to political philosophers in so far one has in mind the efficient promotion of people's good, rather than the efficient promotion of 'the good' in general.

Finally, the idea that a government should not only be concerned for the realization of its citizens' good but *equally* concerned for all citizens suggests that a standard of fairness must constrain the manner in which governments go about realizing their citizens' good. Governments cannot just go about ignoring the good of some citizens and promoting the good of others, they must do so in a way that is fair, or to be more specific, in a way that is equal.

If the above understanding of the concept of abstract equality is correct, then abstract equality is a *complex value* comprised of three concepts, namely of equality, concern, and the good. Furthermore, if Dworkin's correct to say that abstract equality serves as an 'egalitarian plateau' in contemporary political theory, then it's the complex value that contemporary political philosophers are referring to when they use the terms 'justice'. Perhaps Dworkin is right about abstract equality. Though it strikes me that Rawls's conception of justice in particular is operating with various other value concepts

[323] My thoughts about the difference between 'efficiency' and 'concern' to some extent mirror Kymlicka's thoughts about the difference between egalitarian and teleological versions of Utilitarianism. See Kymlicka (2002) pp. 32-7.

too, e.g., fraternity (community), publicity, etc., perhaps some of those values are not common to all of the literature and should thus be omitted from our characterization of the concept that allegedly captures what everyone is talking about. If there's one thing that comes out quite clearly in the previous section, however, it's that on Cohen's picture of justice's narrowness, a picture shared by philosophers such as Isaiah Berlin and Joel Feinberg, justice is not a complex value. It is one fundamental, irreducible value among a plurality of irreducible values, rather than a composite of values. As such, the concept underlying their use of the term 'justice' is not the concept of abstract equality. In all likelihood, it is instead one of the concepts that partially comprises the concept of abstract equality, specifically the standard of fairness that constrains the manner in which a government may show concern for its citizens' good.

An upshot of the above is that Cohen's use of the word 'justice' is arguably at odds with much (but not all) of the contemporary literature. However, this does not necessarily mean that he's wrong to be using it that way. As I noted earlier in this section, there's more than one way to non-trivially argue for the correctness of a concept. Though there's a sense in which a particular way of using a word is correct if it accurately captures what theorists are talking about, there's another sense that isn't contingent upon linguistic usage. A particular way of using a word can be correct in this second sense if (a) there's a theoretical disagreement underlying divergent uses of the word, and (b) if the particular way of using it in question is on the correct side of that disagreement. And as I've already argued, I think the crux of the disagreement between Cohen and those who use the word 'justice' in its complex or regulatory sense lies in the way in which they understand the fairness part of institutional regulation. Rawls, as

we've already noted, has an explicitly procedural understanding of fairness. The principles a society adopts for purposes of regulating the design of institutions are fair, on his view, as are any distributive inequalities subsequently produced, so long as those principles would hypothetically be adopted in the original position. Similarly Dworkin, as we've already noted, employs a procedural understanding of fairness when he employs his hypothetical insurance device. On his view, the manner in which institutions distribute resources is fair so long as any inequalities traceable to brute luck are consistent with the insurance packages citizens would hypothetically purchase. Cohen, in stark contrast, sees any inequality traceable to brute luck as unfair, full stop. Procedural devices like the original position and hypothetical insurance market may or may not be fruitful approaches to institutional regulation, but even if they are, they do not have the power to transform a seemingly unfair inequality into a fair one, and thus they do not have the capacity to confer full, uncompromised justice upon either a distribution or a set of distributive principles. He thinks that fairness just is the right understanding of distributive equality, and if this means justice must be understood as a defeasible value, one that conflicts with and thus must be balanced against concern and other values, rather than as the 'sovereign' output of that balancing act, then so be it.[324]

In the next section, I address the procedural vs. substantive fairness divide that separates Cohen's understanding of justice's narrowness from the contextual understanding of narrowness we find in Rawls and Dworkin. Though I'm sympathetic to the concerns that I think underlie a procedural interpretation of fairness, I also think that choosing to substitute a procedural understanding in place of a fundamental value

[324] For Cohen's discussion of the claim that justice is the first virtue of institutions, see Cohen (2008) pp. 302-6.

understanding reflects a failure to appreciate the full scope of the problem that makes a procedural interpretation necessary in the first place. What's more, I will argue that there's an important sense in which fairness can be both a defeasible value *and* the first virtue of institutions.

4. Contextual Narrowness and the Problem of Arbitrariness

In his discussion of the view he calls 'intuitionism' (otherwise known as value pluralism),[325] Rawls considers a way of understanding justice that, at least on the face of it, looks rather like Cohen's understanding. More specifically, he considers the possibility that the way we should go about deciding how to order our society's institutions is by striking a balance between a plurality of competing principles, one of which is an egalitarian principle of justice or fairness.[326] Though Rawls acknowledges that intuitionistic balancing is not an irrational approach, he also indicates that we should hope for more. While weightings that drastically favor one desideratum over another can be ruled out as implausible, e.g., one which accords great significance to justice but only minimal significance to efficiency (or vice versa), intuitionistic balancing provides no standard in light of which to decide between trade-off packages that fall along a moderate spectrum. Rawls does not dwell long upon why he finds this problematic, but he does mention that the choice of trade-off packages is not insignificant. Quite the contrary, citizens may deeply disagree over how competing desiderata should be weighted, and when they do, they are far from indifferent towards the choice of weightings made by the

[325] See Rawls's and Cohen's discussions of the term 'intuitionism' in Rawls (1971) p. 35; and Cohen (2008) p. 4.
[326] Rawls (1971) pp. 36-7.

state.[327] What's more, the choice of weightings is something different citizens have a personal stake in. For example, when deciding the appropriate trade-off point between efficiency and justice, it makes a difference to different citizens whether a more efficiency heavy or justice heavy trade-off point is selected. For those who lack economically productive talents, a more justice heavy trade-off point could make a significant difference to how well their lives end up going. For those who possess economically productive talents and could potentially benefit from incentives, it makes a difference whether the trade-off point selected permits them to keep a larger share rather than a smaller share of the additional wealth their talents generate. The thought then seems to be that a fair way of adjudicating between the different trade-off packages populating the plausible set is necessary and, though Rawls doesn't explicitly say it, that we therefore need a procedural understanding of fairness. Ostensibly a principle of fairness that is itself one of the principles being traded off cannot help to fairly decide between trade-off packages, and so a different understanding of fairness that can serve this function is called for.

But why is it so important to have a fair way of adjudicating between trade-off packages? What would be wrong with arbitrarily selecting a particular package and saying "Tough luck!" to those who would have preferred a different one? The answer, I think, lies in the familiar liberal idea that state coercion needs to be justifiable to those who are coerced. After all, the function of the particular trade-off package selected will be to serve as the guide in light of which a society's set of institutions, many of which are *coercively imposed*, will be designed. If the choice between plausible trade-off packages

[327] Rawls (1971) p. 36 and p. 41.

is an arbitrary one, however, then how can that choice be justified to citizens? Intuitionism provides the moral resources needed to determine what the plausible set of trade off packages is, and thus offers a basis upon which to justify restricting the range of options from which to choose, but it seemingly does not supply the resources needed to justify choosing one particular package over another. It provides us with nothing to say to the talented individual who claims that a tax scheme which provides her with a somewhat larger allotment of incentives is equally justified on grounds of efficiency, or, in the event that a more efficiency heavy package is adopted, nothing to say to the untalented individual who complains that further taxing the talented is equally justified on grounds of justice.

Ronald Dworkin's critique of H.LA. Hart on judicial interpretation provides some insight into the nature of this worry. In *Taking Rights Seriously*,[328] Dworkin famously criticizes Hart for holding the view that the considerations in light of which judges interpret legal rules are 'extra-legal' and thus needn't be appealed to in any particular way for an interpretation to be valid. Though Hart acknowledges that it's possible for interpretations of laws in "penumbral" cases to be poorly justified, he doesn't think that poorly justified interpretations are any less legally valid than well justified interpretations.[329] The problem with this, according to Dworkin, is that it separates the concept of law from the concept of legitimately enforceable obligation. After all, in order for the enforcement of a judicial decision to be legitimate, we need to be able to say that those who are coerced in light of it have an obligation to do what they're being coerced to do. Similarly, in order for a judicial decision to be a legitimate basis upon which to

[328] Dworkin (1977).
[329] Hart (1958) p. 612-5.

punish an offender, we need to be able to say that she had a prior obligation (prior to the making of the judicial decision) that she failed to fulfill. If this is right, though, then how can we say a judicial interpretation arbitrarily chosen from among the range of plausible interpretations is a legitimate basis for coercion? If another, equally plausible interpretation that doesn't require the offender to be punished was available, then it cannot justifiably be said that the interpretation actually adopted is the one that specifies the offender's pre-existing obligation.[330]

The problem associated with making an arbitrary choice from among the plausible set of institutional regulatory principles is roughly analogous to the problem of legal interpretation Dworkin highlights. Since the trade-off package a chosen set of regulatory principles represents will serve as the basis upon which to coercively enforce a particular distribution of benefits and burdens, it's important to be able to say that said package accurately specifies the distribution that citizens are collectively obligated to realize through their shared institutions. Thus, for example, it is important to be able to say to the talented that the reason they aren't being taxed less (assuming a justice heavy package was opted for) is because taxing them less would violate a collective obligation owed to the less well off. Only then can the state legitimately punish a talented individual for choosing to evade taxation to the extent allowed by her own, more efficiency heavy and yet still plausible regulatory conception. Unfortunately, such an obligation cannot be established if the choice between principles that require somewhat more taxation and principles that require somewhat less is an arbitrary one.

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[330] Dworkin (1977) pp. 158-65. For further discussion of the problems plaguing positivist accounts of judicial interpretation, see Sypnowich (1990) pp. 37-41.

If the above analysis is correct, then what's at stake between Cohen's understanding of fairness as one value among a plurality of values and Rawls's procedural understanding of fairness is the possibility of justifiably using institutional regulatory principles as a basis for coercion. The worry is that arbitrarily choosing from among the set of plausible regulatory options is inconsistent with justified coercion, and thus that understanding fairness as one of the values to be traded off is the wrong approach. Instead, only a procedural understanding of fairness provides us with the resources needed to non-arbitrarily make a choice.

Given that the function of a procedural interpretation of fairness is to solve the problem of arbitrariness, it's natural to wonder whether it succeeds in doing so. Does Rawls's original position actually provide a non-arbitrary basis upon which to decide between the regulatory options populating the plausible set? Though it certainly provides a basis upon which to select a particular regulatory option, that basis is non-arbitrary only if there's good reason to use it and not some other basis. As Rawls himself notes, more than a single description of the original position is possible. More information could be allowed past the veil of ignorance, the psychological description of the contracting parties could be altered somewhat, etc. What's more, the details of the particular description one opts for can potentially affect the choice of principles it will be rational for contracting parties to agree to.[331] It arguably wouldn't make sense for everyone to agree to a principle that maximally benefits the least well off if the parties knew something about the talents they possess and thus about the likelihood that their skills will be in high demand. Given that various descriptions of the original position are possible, it's

[331] Rawls (1971) pp. 17-22.

important that the particular description we decide upon is itself selected on a non-arbitrary basis. Otherwise we'd just be pushing the problem from the level of regulatory principle adoption up to the level of procedure selection.

So what underlies Rawls's description of the original position? One possible answer can be found in his post *Theory of Justice* discussion in "Justice as Fairness: Political not Metaphysical."[332] There, Rawls indicates that the original position is a "device of representation" intended to model the conditions under which fair terms of cooperation could be adopted for a society when society is understood as a "fair system of cooperation between free and equal people."[333] Given his understanding of the function of the original position, it might be thought that the ideas comprising Rawls's understanding of society are the basis upon which the particular details of the original position are justified. I think this is true to some extent. Much of the article is devoted to explaining what he means when he characterizes citizens as free and equal, as well as to specifying the sense in which this conception of the person is supposed to be political rather than metaphysical. For persons to be free and equal in the Rawlsian sense of these terms is more or less to say that they are able to reason about, formulate a conception of, and subsequently pursue what they take to be the good (hence the predicate 'free'); that they are able to understand and follow their society's principles of justice, albeit indirectly via an institutionally focused 'natural duty of justice';[334] and that they are all able to perform the aforementioned tasks to the extent necessary to fully participate in the

[332] For other discussions of the original position, see Dworkin (1989); and Nagel (1989).
[333] Rawls (1985) p. 237 for the first quote and p. 231 for the second quote.
[334] Rawls (1971) p. 115.

economic, social, and political life of their society (hence the predicate 'equal').[335] With this conception of the person in mind, a conception that Rawls claims is embedded in our shared democratic political culture, some features of the original position seem to straightforwardly follow. Rough equality with respect to their capacity to function as members in their society suggests that, among other things, contracting parties in the original position should all have an equal say over which principles are adopted. But what constitutes having an equal say? It isn't obvious that the idea of citizens as full participants in society means that they should be deprived of all information regarding their class background or talents. These are a pretty important part of anyone's identity, after all, so why shouldn't the parties have this information?[336]

Perhaps some of the ideas embedded in the idea of society as a 'fair system of cooperation' will help us here, specifically the idea of 'fair terms of cooperation'. When describing this idea, Rawls writes:

> Cooperation involves the idea of fair terms of cooperation: these are terms that each participant may reasonably accept, provided that everyone else likewise accepts them. Fair terms of cooperation specify an idea of reciprocity or mutuality: all who are engaged in co-operation and who do their part as the rules and procedures require, are to benefit in some appropriate way as assessed by a suitable benchmark of comparison. A conception of political justice characterizes the fair terms of social cooperation.[337]

In light of the above, it's clear why Rawls would think that a device like the original position is an important component in a theory of justice. If reasonable acceptability is a part of how he understands fair terms of cooperation, then it makes sense that to think of optimally fair terms of cooperation as the output of a hypothetical contract.

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[335] Rawls (1985) pp. 233-4.
[336] For work critical of the claim that the self can be stripped of its properties, especially its conception of the good, see Sandel (1982) and Sandel (1984),
[337] Rawls (1985) p. 232.

Unfortunately, however, nothing in Rawls's characterization serves to justify the particular details of the original position. That the idea of fair terms of cooperation should fail to accomplish this is not surprising. It's obvious from the last line of the quote that Rawls understands 'fair terms of cooperation' to be a characterization of the *concept* of justice, one that adds further content to his characterization of that concept in a *Theory of Justice*.[338] It seems reasonable that an understanding of the concept of justice should have enough content to explain why a fair way of selecting institutional regulatory principles is important and yet not have enough content to specify the precise details of that procedure. After all, the activity of articulating a *conception* of justice is precisely the activity of specifying (and justifying) the various details that one's characterization of the concept deliberately leaves out.

There are a number of interesting questions one could ask about Rawls's understanding of the concept of justice. One might wonder, for example, how it relates to Dworkin's understanding. For fear of straying from the purpose of this section, however, I am going to put such questions aside and instead continue the search for a non-arbitrary basis upon which to justify the particular details of the original position. The ideas of 'free and equal citizens' and of 'fair terms of cooperation' were not especially helpful, so what would be? A possibility we can immediately reject is that we should be looking for a procedural device that selects procedural devices. Such an answer threatens to create an infinite regress of arbitrariness problems and should thus be avoided. The answer I

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[338] In *A Theory of Justice*, Rawls writes "it seems natural to think of the concept of justice as distinct from the various conceptions of justice and as being specified by the role which these different sets of principles, these different conceptions, have in common. Those who hold different conceptions of justice can, then, still agree that institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life." See Rawls (1971) p. 5

would like to propose instead is that, like Rawls, we look to the contents of our shared democratic political culture for answers. More specifically, if there is an idea of fairness embedded in that political culture that can function to identify which aspects of the parties' identities would, if included in the original position, make it an unfair contract situation, then we would have a clear answer to the arbitrariness problem. What's more, the fact that the idea of fairness employed is drawn from among the ideas embedded in our shared political culture functions to cut off the threat of regress. Were anyone to question why we are using this particular idea of fairness, it would be enough to say that it's the idea of fairness we find in our shared political culture and is therefore a suitable resource to draw upon when specifying a fair procedure to select the regulatory principles we'll use to design our coercive institutions.[339]

The idea of fairness I think we should draw upon to justify (a number of) the details of the original position is the idea specified by fact-insensitive luck-egalitarianism. It might seem implausible at first to think that luck-egalitarianism is embedded in our shared political culture, since there are many political philosophers who have found luck-egalitarianism implausible. However, I think the plausibility of identifying luck-egalitarian fairness as part of our shared political culture increases dramatically when it is understood to be a conception of a fundamental value. As I argued in chapter 4, many of the objections theorists have offered in criticism of luck-egalitarianism are only damaging to the theory when it is understood as a theory of institutional regulation. Anderson's concerns about harshness, Scheffer's worries about an implausible conception of freewill, and Wolff's concerns about a conflict between luck-equality and

[339] For a discussion of the role our shared political culture plays in political theory, see Rawls (1985) pp. 228-31.

respect, though collectively quite powerful against a regulatory version of luck-egalitarianism, instead just constrains its implementation when luck-egalitarianism is understood as a conception of a fundamental value. Furthermore, I've argued that fact-insensitive luck-egalitarianism does an admirable job of achieving coherence with a core range of central, widely shared intuitive judgments. On the one hand, it contains the idea this it is unfair for someone to be less well-off through no fault of her own. As a result, it accounts for the judgment that it's unfair for the social group or economic class into which one is born to negatively affect one's life prospects, as well as for the judgment that it's unfair for disabilities attributable to misfortune to do so. What's more, luck-egalitarianism also contains the idea that it's unfair to subsidize people for their choices, thereby accounting for the judgment that it's fair for the unlucky gambler or the leisure loving surfer to have less than others. Considering that all of these are widely shared judgments embedded in our political culture, I don't think it's unreasonable to conclude that the value which explains their intuitive force is also embedded in our political culture. Furthermore, since fact-insensitive luck-egalitarianism is specifically an account of that value's content, I don't think it's unreasonable to conclude that if luck-equality accurately captures that value (as I've argued it does), then it too is a part of our political culture.

This is perhaps an appropriate place to note that when discussing the details of the original position, Rawls himself explicitly draws upon a rather luck-egalitarian judgment. He writes:

> one of our considered convictions, I assume, is this: the fact that we occupy a particular social position is not a good reason for us to accept, or to expect others to accept, a conception of justice that favors those in this position. To model this conviction in the original position the parties are not allowed to know their social

> position; and the same idea is extended to other cases. This is expressed figuratively by saying that the parties are behind a veil of ignorance.[340]

As I acknowledged in chapter 4, it may very well be the case that a luck-egalitarian reading of Rawls is incorrect. Samuel Scheffler, for example, has argued with some plausibility that Rawls should not be understood this way.[341] However, luck-egalitarianism does supply an account of why the above judgment has the power it does, and the plausibility of this account is not contingent upon whether Rawls himself accepts it. The social position one finds oneself in is, after all, largely a product of luck.[342] The social group and economic class one's born into, as well as the natural talents one happens to have the capacity for, play a huge role in determining the position one ends up occupying. As a result, permitting well-positioned parties to use the leverage associated with their social position as a basis upon which to bargain for an unequal share would give brute-luck a great deal of influence over the principles agreed to. Luck-egalitarianism can thus account for why ensuring the fairness of the hypothetical contract situation requires withholding knowledge of social positions. In light of this, and of the defense of fact-insensitive luck-egalitarianism I provide in chapter 4, I think it's appropriate to justify withholding knowledge of social position and natural talents on the ground that luck-egalitarian fairness gives us a good reason to do so.

It might be objected that using luck-egalitarianism to specify the content of the original position is inconsistent with a fact-insensitive interpretation of the former. If luck-egalitarianism is fact-insensitive, then why should the *fact* that it is a part of our

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[340] Rawls (1985) p. 237.
[341] See Scheffler (2003) pp. 24-31; and Scheffler (2005) pp. 7-8. For a view contrary to Scheffler's, see Cohen (2008) pp. 156-61.
[342] This is perhaps why Rawls so frequently refers to social position and various other details concealed behind the veil of ignorance as 'arbitrary contingencies'. See Rawls (1971) pp. 18-9; 120; 137; and 141-2.

shared political culture make any difference to how we use it?[343] The answer to this question lies in an appreciation for the different ways facts can affect the implementation of fact-insensitive principles. As we noted in chapter 3, it is the *implementation* of fundamental principles, rather than their *content*, that morally significant facts affect. In most of the cases we've discussed, morally significant facts specifically *constrain* the implementation of fundamental principles by either posing standard feasibility barriers or, somewhat more complicatedly, by making it infeasible to implement one principle without cost to another. In some case, however, facts can create areas of overlap between principles. For example, we noted near the end of chapter 4 that fairness and compassion overlap in cases where those below the sufficiency threshold are poorly off through no fault of their own. In such cases, the fact that a poorly off individual isn't responsible for her situation creates the overlap, and the overlap, in turn supplies us with an especially powerful set of reasons to provide compensation. Similarly, I think the fact that luck-egalitarianism is embedded within our shared political culture creates a case of value overlap. Its place within our shared political culture means that luck-equality can be used as a conceptual resource when justifying coercively imposed institutional principles to those who will be coerced, and thus as a resource that can help us to secure legitimacy. In other words, luck-egalitarianism's place within our political culture creates overlap between fundamental justice and legitimacy.

Interestingly (though not surprisingly), the principle of luck-equality also plays a role in specifying the details of Ronald Dworkin's chosen procedural device. Recall that though Dworkin deems the ideal of an ambition-sensitive but endowment-insensitive

[343] I owe thanks to Christine Sypnowich for this objection.

distribution to be unsuitable for purposes of guiding political practice, he nonetheless models his hypothetical insurance device after it. His thought is that hypothetical insurance provides a fair way to place limitations on compensation, as there's a sense in which hypothetical insurance converts cases of incompensable bad brute luck into cases of bad option luck. After all, cases of bad brute luck are only incompensable if and in so far as one would, hypothetically, have *chosen* not to insure against them.[344] Though hypothetical insurance supplies a form of procedural fairness that appeals to fact-insensitive luck-egalitarianism, there are difficulties with it that nonetheless make a suitably described version of the original position a better option, in my opinion. As we noted in chapter 4, Dworkin is vulnerable to the harshness objection, as it isn't clear that hypothetical insurance can justify securing basic needs against bad option luck across the board. Though it's likely rational for hypothetical insurance buyers to insure against the possibility that future imprudence might, at some point, endanger the satisfaction of their basic needs, Kok-Chor Tan is probably right to claim that an insurance policy which protects basic needs without any stipulations about disqualifying forms of imprudence would have prohibitively high premiums.[345] The problem with the insurance device, then, is not that it fails to satisfy the requirements of fact-insensitive luck-egalitarianism. The problem is that its output doesn't give enough weight to compassion, and that it thereby fails to choose from within the range of plausible outputs. Just as the choice between outputs is specifically a choice between plausible outputs, so too is the choice between procedural devices specially a choice between those that select from the set of plausible outputs.

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[344] Dworkin (2000) pp. 73-7.
[345] Tan (2008) pp. 678-9.

If luck-egalitarianism supplies the fairness criterion we use to non-arbitrarily specify the details of our hypothetical contract situation, then it enters a theory of regulatory justice in two places: first, as one of the competing fundamental values that must be weighed against each other when formulating the regulatory principles that constitute the set of plausible options, and second, as a criterion in light of which we non-arbitrarily specify the details of our procedural device. It might seem peculiar that the same value should enter our theory in these two different places. One worry is that using luck-equality in both the procedural and trade-off levels makes us vulnerable to what some have called the "rigging objection", i.e., the objection that it's circular to specify the details of our procedural device in such a way that it yields the regulatory outcome we wanted to achieve in any case.[346] This objection has sometimes been pushed against Rawls in light of the fact that he also justifies his principles via the method of reflective equilibrium, and thus that his contract device seems designed to yield principles he antecedently decided had the best fit with our all-things-considered judgments. However, I think that the rigging objection is unfounded when applied to my use of fact-insensitive luck-egalitarianism. Specifying the details of the original position in light of a luck-egalitarian standard is not the same thing as, say, deciding upon a more equality heavy trade-off package in advance and then rigging the details of the original position to ensure that it picks out that package. If rigging the procedure in order to get a more equality heavy outcome is what we cared about, then there are lots of ways we could go about doing that. We might, for example, describe the parties to the contract as being so risk averse that they would be inclined towards equality even when in possession of

[346] For an excellent discussion of the rigging objection, see Daniels (1996) chapter 3.

knowledge of their talents and current social position. We might also characterize the parties as envious beings who strongly dislike the prospect of other people potentially having more than them. The reasons we don't make these adjustments is because using luck-egalitarianism to choose between different descriptions of the original positions is not the same thing as rigging our description so that it produces a more egalitarian output. The principle of luck-equality, when applied to an assessment of the details of the original position, recommends that knowledge of social position and natural talents be withheld. Since social positions and talents are largely products of brute luck, and since having knowledge of them would give some parties a bargaining advantage over others,[347] luck-egalitarianism requires that they be placed behind the veil of ignorance for the sake of ensuring a fair contract situation. In contrast, nothing about luck-egalitarianism suggests that the fairness of the contract situation requires parties to be motivated by risk aversion or envy. Though risk aversion and envy would have the effect of producing a more egalitarian regulatory output, such motivations do not make the original position a fairer contract situation. I thus do not think the rigging objection should prevent us from employing luck-egalitarian fairness as both a value present in the trade-off packages we're adjudicating between and as a criterion in light of which to justify our description of the original position. To the contrary, using fact-insensitive luck-egalitarianism at the procedural level helps to answer the rigging objection, as it provides us with a resource in light of which to choose between possible descriptions of the original positions without relying on antecedent moral judgments about which of the plausible regulatory options is best.

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[347] See, for example, Rawls's comment about 'threat advantage' in Rawls (1971) p. 141.

It might be objected that, in spite of my best efforts, I have not actually avoided the rigging objection. After all, I devote a fair amount of space in chapter 4 to arguing that the difference principle is a plausible principle of institutional regulation, and I do so on the grounds that it gives a considerable amount of weight to fundamental justice without sacrificing too much in the way of other values. Thus I seem to have decided in advance that the difference principle is the best choice.[348]

Though the objector is right to claim that I find the difference principle plausible in advance of any procedural exercise, I don't think that the difference principle is the only plausible option. It's worth noting, I think, that the difference principle is a particularly egalitarian way of striking a balance between fairness and efficiency. Though it permits inequalities in the form of incentives, it only does so to the extent that they *maximally* benefit the worst off group. As a result, given the choice between (a) an institutional change that would improve the position of both the better off and the worst off by, say, 10 units of primary goods and (b) an institutional change that would improve the position of the worst off by 11 units but only improve the position of the better off by 1 unit, the difference principle would require the latter change. Of the available options, the second improves the position of the worst off more than the first, and thus it must be selected, even though the first option is far more efficient. Of course, the difference principle would also require a change that guarantees huge gains for the better off and only marginal gain for the worse off if it were the case that this is the only way to improve the position of the latter. As Rawls's notes, however, if implementing the difference principle required too much inequality, it would consequently be an

[348] I owe thanks to Christine Sypnowich for the objection.

implausible principle. We are thus supposed to include it among the plausible alternatives on the assumption that implementing it would not afford large, equality upsetting gains to the better off.[349]

In light of the above, it's reasonable to ask why the difference principle should be chosen over a principle that gives more weight to efficiency. What would be wrong with a principle that only requires *some* benefit to the worse off, instead of *maximal* benefit? We might opt for a principle that mandates selecting the most efficient state of affairs consistent with maintaining a sufficiency threshold, but which is qualified by the condition that any gains must tangibly benefit the worst off. Given a choice between this and the difference principle, I think the best way to make a decision is via a procedural criterion. If an optimally fair procedure would select the difference principle, then we have a non-arbitrary basis upon to make our decision, and thus a solution to the problem that arbitrariness poses for legitimacy.

An account of procedural fairness is an important part of solving the arbitrariness problem, and thus it is also an important part of justifying the coercive imposition of institutional regulatory principles. It should be noted, however, that there are some situations where we can make justified decisions about regulatory principles without using a procedure. Procedural fairness is specifically useful for non-arbitrarily deciding the right trade-off points between conflicting values. It is therefore not needed in cases where we can increase the extent to which one or more values are realized without also decreasing the extent to which other values are realized. Such a case was discussed near the end of my fourth chapter. There, I argued that the regulatory appeal of the difference

[349] Rawls (1971) pp. 157-8.

principle is importantly contingent. Among other things, I argued that once the implementation of Rawls's liberty and fair equality of opportunity principles has achieved a society where inequality between racial and social groups has largely been eliminated, the scrutiny needed in order to distribute benefits conditionally would no longer fall disproportionately on particular groups, and thus the tension between luck-equality and respect that Jonathan Wolff highlights would no longer be such a worry. I recommended that in such circumstances, a version of the difference principle that maximizes the position of those with bad brute-luck but only provides a sufficientarian floor for the imprudent would realize a greater amount of fundamental justice without loss to either respect or compassion and would thus be preferable, all things considered. Since the recommended modification would achieve an increase in fundamental justice without a corresponding decrease in values that normally conflict with it, procedural fairness has no role to play.

To summarize my argument thus far, I've claimed that a disagreement over the way fairness should be understood lies at the heart of Rawls's and Cohen's different understandings of justice's narrowness. Cohen, on the one hand, thinks of fairness as a substantive fundamental value, one that is necessary but not sufficient for the justification of institutional regulatory principles. Though he thinks fairness must have some say over the content of optimal regulatory principles, he also thinks it must leave room for the requirements of other important values too. It follows from his view that there's an important distinction to be made between a conception of what justice is and a conception of what it requires of us, all things considered. Since optimal institutional regulatory principles are imperfectly fair by their very nature, they are also imperfectly just (in the

narrow sense of the word) and are thus not identical with justice itself. To give an account of the content of justice itself is to give an account the fairness input that regulatory justice only partially reflects, an account that must either implicitly or explicitly draw a line between considerations internal and external to that input.

Rawls, in contrast, understands fairness to be procedural. Though he also thinks fairness is central to the justification of institutional regulatory principles, he doesn't think of it as one of the competing values expressed in value trade-off packages. Since there's more than one plausible weighting of the different values institutional regulatory principles reflect, some method via which to non-arbitrarily choose between packages is needed. Without such a method, we would not be able to say that the package we select reflects citizens' collective political obligations, and thus would not be able to legitimately impose its requirements in a coercive manner. In light of this, Rawls understands fairness not as a property that regulatory principles possess to a greater or lesser degree depending on the extent to which they conform to a fundamental principle of distributive fairness, but as a property that regulatory principles either do or don't possess depending on whether they would be hypothetically selected in an optimally fair contract situation. When fairness is understood this way, it is no longer inappropriate to think of a conception of institutional regulation as a conception of what justice is. Since the source of regulatory fairness lies in the procedure via which regulatory principles are selected, rather than in a substantive principle of pure distributive fairness that they only partially conform to, Cohen's distinction between what justice is and what it requires once all other things are taken into consideration seemingly breaks down. There is no longer a more fundamental principle of distributive fairness that institutional regulatory

principles fall short of and thus no longer a sense in which to say that they are non-identical with distributive justice itself.

If my analysis of the problem of arbitrariness is correct, however, then the above-described Rawlsian rejection of the distinction between fundamental and regulatory justice is ill-advised. Though a procedural understanding of fairness is indeed needed in order to solve the problem of arbitrariness and thus to confer legitimacy upon our institutional regulatory principles, it cannot do the job by itself. A thorough solution to the problem requires a non-arbitrary way to specify the details of the hypothetical contract situation, and fundamental justice, specifically fact-insensitive luck-egalitarianism, gives us precisely that. It provides us with a criterion in light of which to judge the fairness of the contract situation itself, and thus with a basis upon which to address the problem of arbitrariness at the procedural level. The conceptual situation changes when substantive fairness is used in this way. If Rawls's principles are allegedly fair because they're chosen in the original position, and the original position is fair only in light of a more ultimate principle of distributive fairness, then the output of the original position, if found wanting in light of that more ultimate principle, can't be completely fair. In other words, to think that the original position confers unqualified fairness upon its output involves a failure to evaluate that output in light of the more fundamental criterion of fairness which the original position itself relies upon. If I'm right, then Cohen's distinction between a conception of what justice is and a conception of what justice requires, all-things-considered, holds. The output of the original position can't be identical with distributive justice because it relies upon and only partially conforms to a more fundamental principle of distributive fairness.

A further upshot of my solution to the problem of arbitrariness is that it reconciles two seemingly conflicting ideas: (a) the idea that narrow justice is one fundamental value among many, and (b) the idea that narrow justice is the first virtue of institutions. As we noted in our discussion of 'justice pluralism', attempting to merge these ideas by turning narrow justice into a complex value lands us in a morass of conceptual confusion. Though understanding narrow justice as a complex value gives it the weight it seemingly needs in order to qualify as the first virtue of institutions, it makes no sense to think of luck-egalitarian fairness as one of the simple values comprising narrow justice. If fairness is a simple value, then narrow justice just is that value, and whatever weighty, all-things-considered principles we think are best for the institutional context will be principles expressing what broad justice (or rightness) requires in that context. However, if my understanding of the theoretical role of luck-egalitarian fairness is correct, then understanding narrow justice as a simple value needn't prevent us from also understanding it as the first virtue of institutions. On my understanding, fundamental justice is unique among the values institutional regulatory principles reflect because it enters a theory of regulatory justice at the both the procedural and value trade off levels. Unlike the other values that must be traded off against each other, e.g., efficiency, compassion, etc., fundamental justice plays a key role in determining the shape of the hypothetical contract situation. As such, it also plays a key role in solving the arbitrariness problem, and thus in ensuring the legitimacy of coercively enforcing the institutional regulatory principles selected. There's thus a very real sense in which fundamental justice is of primary significance in the institutional context. Unless our conception of regulatory justice is hypothetically selected in an optimally fair contract

situation, the coercive legitimacy of the institutions deigned in light of it is jeopardized. But unless the contract situation satisfies the requirements of fundamental, luck-egalitarian justice, then the fairness of that situation is itself jeopardized. Fundamental justice is thus a particularly key value with respect to the justification of institutional regulatory rules. Not only does their moral desirability depend upon whether they give adequate weight to it, but their coercive legitimacy depends upon whether the procedure that hypothetically selects them meets its requirements.

5. Conclusions

In conclusion, the purpose of this chapter was to establish the plausibility of understanding justice as one fundamental value among many. In section 2, I explained that Cohen thinks justice is distinct from all-things-considered institutional regulatory principles because the all-things-considered optimality of those principles requires deviating somewhat from fairness. I also rejected the alternative view that fairness is one of the defeasible values comprising justice, as that view either collapses into Cohen's or is incoherent. In section 3, I argued that the dispute between Cohen and Rawls over the concept of justice is more than verbal because it reflects an underlying theoretical disagreement over the way fairness should be interpreted. I also indicated that so long as Cohen is right to interpret fairness substantively, then his understanding of the concept of justice is nonetheless correct, despite being out of sync with the way the term 'justice' is used in much of the contemporary literature. Finally, in section 4, I argued that the rationale for rejecting a substantive interpretation of fairness in favor of a procedural interpretation, when consistently applied to the selection of procedural devices, requires us to employ substantive fairness at the procedural level. Without a substantive principle

of fairness, we cannot justify the claim that our procedural device is itself fair and thus cannot resolve the problem that arbitrariness poses for the justified exercise of state coercion. If my analysis is correct, then narrow justice is both a defeasible value *and* the first virtue of specifically *coercive* institutions.

Conclusion

The goal of my thesis has been to establish the plausibility and theoretical significance of understanding justice to be a fundamental value. On my analysis, conceiving of justice as a value is the better of two possible ways to understand its relationship with moral rightness. According to the first view, justice is narrower than moral rightness in the sense that it is context specific. On this view, justice is about the moral rightness of specifically institutions. According to the second view, narrowness is a matter of singularity against a plural background. On this view, justice is one amongst a plurality of fundamental values. Though Isaiah Berlin is probably the most prominent 20th century philosopher to propound the pluralist view of narrowness, I chose to focus on the work of G.A. Cohen in particular, as he offers the most systematic version of it.

To establish the plausibility of Cohen's view, I devoted chapter 2 to a defense of his fact-insensitivity thesis, i.e., the claim that the relationship of support between a factual reason and the principle it grounds presupposes one or more principles not grounded by factual reasons. After establishing that numerous criticisms are unconvincing once the logical character of Cohen's thesis is appreciated, I proceeded, in chapter 3, to connect the fact-insensitivity thesis to the pluralistic meta-ethical framework presupposed by Cohen's understanding of narrowness; a framework comprised of a plurality of fundamental, feasibility-independent values. Drawing on an analogy with transcendental idealism, I argued that the fact-insensitivity thesis insulates conceptions of fundamental values from criticisms pertaining to the moral costs of implementation, i.e., from criticisms pertaining to the infeasibility of implementing a conception without costs to other values. I also argued that the fact-insensitivity thesis supports the assumption

that there is a plurality of potentially conflicting fundamental values to deal with in the first place.

Next, I established the theoretical significance of Cohen's pluralist understanding of narrowness by connecting it to two major debates between contemporary egalitarian political philosophers: the debate over luck-egalitarianism and the debate over justice's scope of application. In chapter 4, I argued that the harshness objection, Samuel Scheffler's concerns about freewill, and Jonathan Wolff's worries about respect are critically effective against luck-egalitarianism as a theory of institutional regulation. When luck-egalitarianism is understood as a fact-insensitive conception of a fundamental value, however, these problems merely limit the extent to which luck-equality should be implemented via derivative regulatory principles.

With respect to justice's scope of application, I argued, in chapter 5, that Cohen frequently equivocates when responding to the demandingness problem and to criticisms related to the causal relationship between a society's institutions and ethos. Though many of his replies make sense if one is defending the application of fundamental justice to personal choice, e.g., his personal prerogative qualification and the inclusion of subjective welfare in one's metric, they become problematic when it's acknowledged that the issue at hand is whether the difference principle (an institutional regulatory principle) extends to personal choice. I concluded that fundamental justice justifiably applies to the context of personal choice, but that a regulatory alternative easier to apply than a welfare inclusive, prerogative constrained difference principle would be truer to fundamental justice and thus also preferable, *ceteris paribus*.

To complete my case for the plausibility of pluralist narrowness, I argued, in chapter 6, that the Rawlsian case for replacing a substantive understanding of fairness with a procedural one is ill-advised. I claimed that the legitimacy related worry about arbitrarily adopting regulatory principles, when applied to the selection of procedural devices, requires us to employ substantive fairness at the procedural level. Without a substantive principle of fairness, we cannot justify the claim that our procedural device is itself fair and thus cannot resolve the problem that arbitrariness poses for the justified exercise of state coercion. An important upshot of my argument is that justice is both a defeasible value *and* the first virtue of specifically *coercive* institutions.

It should be apparent from the above summary that my dissertation has implications for how Cohen's views relate to each other. Cohen himself devoted only a small amount of space to discussing how his views fit together,[350] and so I think that one of the achievements of my dissertation is a more holistic understanding of his later work. The relationships that my dissertation bears upon are between the following theses: first, that the justification of fundamental principles is independent of factual reasons (the fact-insensitivity thesis); second, that luck-egalitarianism correctly specifies the content of distributive justice; third, that the principles of distributive justice applicable to institutions also apply to personal choices; and fourth, that justice is one fundamental value amongst a plurality.

Beginning with the most obvious relationship, one of the main goals of my thesis has been to establish that the plausibility of luck-egalitarianism, and of the extension of

[350] For the comments he does make on how his claim relate to each other, some of with which I agree and some of with which I do not, see Cohen (2008) pp. 2-3, pp. 265-72, p. 276, and pp. 300-2. See also Cohen (2011) pp. 252-3.

institutional justice to personal choice, depends upon understanding narrowness the way Cohen does, i.e., upon the claim that justice is a fundamental value. However, it should be explicitly noted that the fact-insensitivity thesis plays a key role in my arguments. As we saw in chapter 3, the fact-insensitivity thesis provides considerable support for value pluralism and for the independence of moral desirability from feasibility. Furthermore, as we saw in chapter 4, value pluralism and the independence of moral desirability from feasibility provided the basis upon which to defend luck-egalitarianism. It is only when luck-egalitarianism is understood as a fact-insensitive conception of a particular fundamental value, one insulated from objections pertaining to the feasibility of implementing it in unison with other values, that problems such as harshness and Wolff's worries about respect can be interpreted as constraints on implementation, rather than as objections that require modifying or rejecting our conception.

The fact-insensitivity thesis also played an important role in my argument in chapter 5. There, I noted that one of the implications of the fact-insensitivity thesis is that the principles representing fundamental values often have a fairly wide scope of justified application. Though a fundamental principle is not applicable in cases where its application is unintelligible (a principle of welfare maximization cannot be applied to a pile of rocks, for example), any circumstance to which it intelligibly applies is one to which it justifiably applies. This follows more or less immediately from the claim that fundamental principles are justified independently of factual reasons. If fundamental principles are justified independently of factual reasons, then the facts which differentiate circumstances cannot undermine an applicable fact-insensitive principle. This gives us

reason to suppose in advance that fundamental justice applies to both the institutional and personal contexts.

One area where we uncovered a tension is between fact-insensitive luck-egalitarianism and the extension of the difference principle to personal choice. Cohen, we noted, thinks that both fundamental justice and the difference principle apply to the personal context. In order to escape the demandingness objection, however, it was necessary for Cohen to qualify the application of the difference principle with a personal prerogative constraint and to make room for the compensation of special labor burdens. As a result, accurately discerning whether one has done enough to satisfy the requirements of the difference principle in one's personal life is a very difficult task for citizens to accomplish, and this leads to unchosen inequalities in the distribution of burden. The application of the difference principle to the personal context thus requires deviating from luck-equality more so than it does in the institutional context, and this gives us a good reason to look for a clearer alternative.

Finally, the story comes full circle when I use luck-egalitarianism as a criterion in light of which to justify a particular description of the original position. As we noted in chapter 6, the case for replacing substantive fairness with procedural fairness was grounded in the claim that pluralistic reasoning can only specify the plausible set of regulatory options, as well as in the claim that arbitrarily choosing from among the plausible set is inconsistent with the legitimate exercise of coercion. If the legitimate exercise of coercion also requires non-arbitrarily specifying our account of procedural fairness, though, and luck-egalitarianism gives us the resources to do so, then luck-egalitarianism plays an important role in justifying the conceptual claim that justice is a

fundamental value. There's certainly a circle here: the claim that justice is a fundamental value supports luck-egalitarianism and luck-egalitarianism supports the claim that justice is a fundamental value, but I don't think the circle is vicious. The claim that justice is a fundamental value supports luck-egalitarianism mainly because it justifies regarding a series of important concerns as constraints on the extent to which luck-equality should be expressed in the content of regulatory principles. In contrast, the support luck-egalitarianism lends to Cohen's conceptual claim comes from another source: specifically luck-egalitarianism's coherence with a set of widely shared intuitive judgments about fairness and unfairness in matters of distribution: e.g., the judgment that it is *not* fair for the social group or economic class one's born into to negatively affect one's life prospects, the judgment that it is *not* fair for disabilities attributable to misfortune to pose a disadvantage, and the converse judgment that it *is* fair for the unlucky gambler or the leisure loving surfer to have less. It is because of its coherence with these widely shared judgements that luck-egalitarianism is appropriately thought to capture an element of our shared political culture, and that it is thus an appropriate resource to draw on when specifying the content of the procedure used to select the regulatory principles that will govern our coercively enforced institutions.

In light of the above, I think one of the major contributions made by my thesis is a plausible and practically useful understanding of luck-egalitarianism. As we've noted, understanding luck-egalitarianism as a conception of a defeasible value is an effective means of replying to criticisms. At first glance, however, adopting this defensive strategy also deprives luck-equality of its import. According to Kok-Chor Tan, defeating

objections by depriving luck-equality of primacy constitutes a "Pyrrhic victory."[351] As we've seen, though, fact-insensitive luck-egalitarianism has a significant practical role to play, despite its defeasibility. For example, in chapter 4, it was in light of fact-insensitive luck-egalitarianism that I recommended amending the difference principle once inequalities between social groups have been sufficiently reduced. If there are no significant social inequalities, Jonathan Wolff's concern about an unequal distribution of scrutiny and the resulting expression of disrespect towards disadvantaged social groups would no longer be operative. The amendment I suggested making once such a state of affairs has been achieved is that the difference principle specifically maximize the position of those who are less well-off through no fault of their own, and that a sufficientarian standard be used to safeguard the basic needs of the imprudent. Such a principle would implement a greater degree of fundamental justice without sacrificing other values of interest.

Furthermore, in chapter 6, I argued that there's an interpretation of primacy compatible with understanding justice as a fundamental value. If an account of procedural fairness is needed to solve the problem that arbitrarily selecting institutional regulatory principles poses for legitimacy; and fundamental, luck-egalitarian justice is needed in order to non-arbitrarily specify our account of procedural fairness; then fundamental justice is essential to legitimate coercion. By making luck-equality integral to the achievement of legitimacy, my thesis successfully combines the ideas that justice is luck-egalitarian, a fundamental value, *and* the first virtue of institutions.

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[351] Tan (2008) p. 679, footnote 25.

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