

***Rescuing Justice and Equality* – a Critical Engagement.**

Helga Varden, University of Illinois at Urbana-Champaign

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Introduction¹

Rescuing Justice and Equality is a blast. It combines careful sympathetic interpretation and impressively tight philosophical argumentation with the characteristic Cohen wit. It is a peculiar fact, I think, that the only political philosophers who seem capable of combining philosophical seriousness with wit in the way Cohen does, are the libertarians. I do not know why Cohen and the libertarians – on the whole – are so much funnier than other political thinkers; it certainly doesn't seem to follow from their many shared philosophical premises. But whatever the source of this fact, I think there's no doubt that they are more amusing than the others. Rawlsians, Kantians, and Hegelians, for example, are simply not terribly funny. Consequently, having Cohen write what to date is probably the best critical engagement with Rawls's theory of justice as fairness is a gift both to Rawlsians and the profession as a whole. At long last we have a terrific critical engagement with Rawls that is actually a genuine pleasure to read.

It follows from what I have said so far that arguing against Cohen from a Kantian position, as I will do here, may appear particularly ill advised. Indeed, to make matters worse, my supervisor Arthur Ripstein once told me – although this was meant, I believe, as a compliment from one Kantian to another – that I'm the only person on the planet who thinks the main problem with Rawls is that he's not Kantian enough. Combined with my typical Kantian lack of wit, it follows that what I am about to say about Cohen's book will be both exceptionally dry and conceptually torturous. But as a faithful Kantian, as opposed to a *neo*-Kantians, I'll do it anyway.

¹ I am very grateful to Arthur Ripstein and Shelley Weinberg for their useful engagement with this commentary as it was developing.

My criticism is restricted to the first part (chapters one through five) of Cohen's book, where Cohen rejects Rawls's conception of equality, or redistributive justice. Although I agree that Rawls can be read as Cohen proposes, I will argue that Cohen's reading is not the best reading of Rawls. In addition, Cohen's suggested revisions to Rawls's theory in my view neither improve the theory nor capture Rawls's considered position. The better interpretations of Rawls, I will suggest, involve seeing Rawls's project as much closer to that of Kant than, as Cohen assumes, to that of libertarians and egalitarians of his own stripe. When we see Rawls's view in a more Kantian light, then we see that his theory applies only to what Rawls calls the 'basic coercive structure of society' (whatever that means) – and not directly to the citizens within it. As Cohen agrees (16, 116), if the theory really does apply only to the 'basic coercive structure of society', then it is no longer obvious that he can move as easily as he does between the perspectives of private persons and those of state officials when critiquing Rawls's main principle of distributive justice – the "difference principle". Cohen also accepts that due to textual ambiguities there are formulations in Rawls that support the 'basic coercive structure of society' reading, hereafter the 'basic structure' reading (129, 131).² Furthermore, he agrees that those statements by Rawls that appear to go against the 'basic structure' reading can be seen as textual and philosophical infelicities that any groundbreaking work in philosophy will contain (131). Yet, and this is Cohen's main point, if we take this strategy, it comes at considerable costs. As Cohen says "it means that the [Rawlsian] ideals of dignity, fraternity, and full realization of people's moral natures can no longer be said to be delivered by Rawlsian justice" (p. 131f.) So, on this reading certain values and moral virtue are beyond the reach of Rawls's theory of justice, which Cohen considers an unacceptable consequence. In addition, Cohen also asserts that the strategy results in problems capturing just family and market relations (137-8).

² All unidentified references in this paper refer to G. A. Cohen's *Rescuing Justice and Equality*, Harvard University Press: Cambridge, Massachusetts, 2008

Though I believe the ‘basic structure’ reading is the most sympathetic reading of Rawls’s theory of justice as fairness and that it comes closest to capturing the best understanding of Rawls, I agree with Cohen that this reading – and so Rawls’s own position – fails to solve certain problems. I do not, however, believe that Cohen has identified these problems correctly. First, what Cohen identifies as an unacceptable consequence, namely that ‘full realization of people’s moral natures’ falls outside the proper scope of a theory of justice, is a virtue of the theory rather than a problem. Second, though I agree that Rawls has a problem capturing just family and market relations in the right way, I don’t think the reasons are those Cohen identifies. Instead, I will suggest that Rawls needs a liberal account of private right, meaning an account of rightful relations between private individuals, in order to overcome the problems of family and market relations. I will suggest that he can borrow such an account from Kant. This is one way in which I think Rawls’s problems stem from not being Kantian enough.³ In contradiction to Cohen and other anarchists, Kant’s account of private right can show why justice is impossible in the state of nature or why, in principle, the state is a necessary precondition for justice. This is something lacking, but sorely needed in Rawls’s theory of justice as fairness. If successful, therefore, this argument shows that Cohen is wrong to think that the ideal society is stateless. The account of private right also shows, against Cohen, why Rawls cannot accept material equality as the natural starting point for the state’s redistributive justice system. Moreover, the addition of the account of private right sheds light on what are the real problems in Rawls’s critique of family and market relations. After outlining what Kant’s account of private right looks like and explaining why Rawls needs it, I will suggest Rawls’s actual theory of

³ We find a similar suggestion, at least implicitly, in Arthur Ripstein’s “Private Order and Public Justice: Kant and Rawls”, 92 *Virginia Law Review* 1391, 2006. The main difference between us, as will become clear shortly, concerns my suggestion that adding an account of private right Rawls’s theory requires us to modify Rawls’s account of public right. Still, insofar as we emphasize Rawls’s comments that justice as fairness is one of a ‘family of liberal, political conceptions of justice in a modern liberal democracy’, and insofar as we pay careful attention to the three conditions such liberal, political conceptions of justice must meet (*Political Liberalism*, xlviii), this difference between our approaches does not seem particularly significant. On such an approach to Rawls, particular features of his account such as the original position and his formulation of the difference principle are not at the heart of what must be required of any theory of justice. But going into all of this is irrelevant for our purposes here.

justice as fairness really only captures an account of public right, meaning an account of the claims citizens have on their public institutions. The key to what I'm suggesting is that there is a distinction between private and public right, and a suitable theory of justice must have both. Private right captures rightful relations between private individuals, while public right captures citizens' claims on their public institutions. These are entirely different kinds of claims and relations. This is another way in which Rawls is not Kantian enough. Finally, I suggest that once Rawls has an account of private right as part of his theory of justice, it will be necessary to make certain adjustments to what I am calling his account of public right. With all the pieces in place, Rawls no longer incurs any of the problems facing defenders of the 'basic structure' interpretation, and we have good reason to side with Rawls's Kantian liberalism against Cohen's egalitarian anarchism.

Rescuing Equality: Cohen's Criticism of Rawls's Difference Principle

Let me begin with a brief exposition of Cohen's rejection of Rawls's principle of distributive justice, the difference principle. The main thesis defended in the first part of Cohen's book is that Rawls's justification of the difference principle fails and that when we rectify the mistake we must accept Cohen's egalitarianism instead. Cohen attacks the difference principle by attacking Rawls's alleged use of an incentive argument as justification. Rawls's argument, Cohen proposes, goes like this:

1. Inequalities are unjust unless they are necessary to make the worst off people better off, in which case they are just.
2. Unequalizing incentive payments to productive people *are* necessary to make the worst off people better off.
3. Therefore, unequalizing incentive payments are just. (p. 19)

It is important to emphasize that Cohen's project in the first part of the book cleverly attacks only this particular argument.⁴ For if Cohen succeeds, there is a double-jackpot: a successful internal

⁴ As Cohen explains, the first three chapters of the book aims at attacking the second premise, the fourth chapter attacks the first premise. The fifth chapter asks whether we encounter a loss of freedom if we accept Cohen's alternative, egalitarian route emerging from his criticism (p. 19).

critique of Rawls's egalitarianism undermines Rawls's conception of the ideal society and at the same time bolsters Cohen's own Marxist egalitarianism. This is why Cohen explains, in the opening pages of *Rescuing Justice and Equality*, that the dispute between Rawls and himself can be described as a difference between their conceptions of the ideal society. On Cohen's Marxist or "nonliberal/anarchist conviction" the ideal is a stateless society comprised of individuals whose 'ethos' supports Marxist egalitarianism. Cohen says:

In the ideal socialist society, equal respect and concern are not projected out of society and restricted to the ambit of an alien superstructural power, the state. If the right principles are, as Marx thought, the ones that are right for real, everyday, material life, and if they are practiced in everyday life, as the socialist ideal utopianly envisages that they will be, then the state can wither away. (p.1)

Like libertarians, Cohen argues that all justice really needs is virtuous individuals, but insofar as they are lacking, we need the state. The state, therefore, is fundamentally a remedial tool used to rectify failures of individual virtue.

In contrast to both libertarians and Rawls, Cohen then argues that the state's coercive system is insufficient on its own to bring about the just society, since the just society also requires that the people affirm an 'ethos' in their daily, private lives. So in addition to the state, we need individual virtue. Moreover, Cohen argues that if Rawls is to remain consistent with himself, then he must make material equality amongst individuals the natural starting point for reflections on redistributive justice.⁵ Finally, in contrast to most Marxists, Cohen is committed to making some space for a liberal notion of freedom – or what he calls a "legitimate personal prerogative" (10). Consequently, Cohen thinks there are limits on state use of coercion to force people to do what is needed to bring about

⁵ This is the main topic of chapter four. Cohen summarizes this argument in the following way: "You cannot make equality that natural starting point, or default point, for justice, on the *ground* that nobody deserves more than anybody else and then depart from equality because the departure benefits the worst off *and then* declare that the result is unambiguously just" (p.19). By affirming premise one of the argument above ("Inequalities are unjust unless they are necessary to make the worst off people better off, in which case they are just."), Rawls is seen to affirm this incoherent thought. If one starts with material equality, then an argument, according to which the more resourceful must get more paid to induce them to work, is necessarily a bad argument – one that neither the more or the less resourceful virtuously would accept (as shown in chapters one through three).

the ideal, just egalitarian society. For example, the state (or anyone else) cannot justly force any of its citizens to change professions in response to need. Cohen emphasizes, however, that, ideally, such uses of coercion are unnecessary to bring about a just society because talented virtuous people would so change jobs if societal needs require it. They would not use their talent and the dependence of others on their productive power as bargaining chips.⁶ It follows that if there aren't sufficiently many virtuous people around, then we may use material incentives as a matter of public policy – including something like Rawls's difference principle – to induce the talented to share their resources. But by yielding to the will of the talented in this way, Cohen argues, we also give up on justice – ideally speaking. Rawls's difference principle is therefore, Cohen says, not a “principle of justice, but rather... a principle of intelligent policy” given non-ideal conditions (30n.7). Now we see that if Cohen succeeds in showing that Rawls's difference principle, namely his fundamental principle of redistributive justice, actually undermines the possibility of a just society, then we see that he has also set the stage for his own egalitarian solution.

Let me illustrate the structure of Cohen's argument against Rawls with the following example, which North American philosophers know all too well. The job market for philosophers is extraordinarily tough: it is common that there are between three and five hundred applicants for any university tenure track job. It is, as we say, a “buyer's market”, which entails, amongst other things, that many universities hire philosophers as instructors rather than in tenure-track positions and that the material terms of starting employment are fairly low compared with the applicants' level of education. Nevertheless, although philosophers have little choice of occupation, they still have some choice. For example, they can also take tenure track jobs at local or community colleges, which lack

⁶ As explained above, the second argument here is the main topic of chapter five. For example, here he argues that “The second argument is the main argument in chapters one through three. Cohen summarizes this argument as follows: “when the incentive consideration is isolated from all reference to desert or entitlement, it generates an argument for inequality that requires a model of society in breach of an elementary condition of community” (32). The resourceful may stronghold the less resourceful and politicians into accepting it, but they cannot with a straight face justify the claim that they need extra material incentives to work as hard as the less resourceful. Such strongholding is effectively compared to kidnappers' ransom demands to the hostage's family (38-41).”

faculty to teach their courses. This, however, is usually considered an emergency solution pursued only when all attempts at securing a decent university job have failed. For those of us lucky enough to land a tenure-track university job, there are two main ways by which we can increase our salaries: by annual merit pay increases (determined by one's success) and by negotiation after having obtained a job offer from a competing university. Though luck still plays an important role, such as how currently popular is one's particular area of philosophy, this system entails that those more talented are able to increase their salaries fairly rapidly. To see where Cohen takes issue with Rawls, we must make two assumptions, namely that all professional philosophers in North America have worked equally hard to develop their talents and that they work roughly the same number of hours per year. Now, as Cohen interprets Rawls's official position, the current usage of market conditions is unproblematic from the point of view of justice as long as it also benefits the worst off.⁷ If you are talented and the markets work in your favor, then as North Americans so characteristically say, "good for you!" But Cohen disagrees. First, one's merit and salary should not be determined by luck in these ways. Innate differences in talents and the current popularity of one's particular field in philosophy should not determine one's merit increase and salary. Universities' and professional philosophers' current uses of the job market, on Cohen's view, are therefore unjust. Cohen does not deny that our 'crooked timber', to use Kant's phrase, may force us – including the state – to tolerate such behavior by the powerful and talented, but in so doing, we fail to realize justice. No one ought not to behave in this way, and in a better world, the state would not permit anyone to behave like this.

Second, though people cannot be forced to take jobs other than their dream jobs – because, as Cohen says, it falls within their 'legitimate personal prerogative' not to do so – all philosophers ought seriously to consider it. In the case at hand, poor, local communities would greatly benefit if

⁷ Let us assume that the benefit is the production of more good philosophical work for all as well as wide support for the universities (privately and publicly).

the really talented (and hence very resourceful) professional philosophers made themselves available to them. Hence philosophers – employed or unemployed – ought to consider choices of this type as a serious means of pursuing a more just society. It is a direct way of making resources available to those who desperately need them and otherwise will not have them. After all, it may be argued, as I believe Cohen would readily acknowledge, that teaching rich kids at places like Oxbridge and Ivy League universities with their extraordinarily favorable material conditions, sustains the unjust society rather than moves it towards justice.⁸ Rather than ‘good for you!’, it’s ‘shame on us!’ – and especially the very powerful and successful ones amongst us! The aim of the first part of the book, then, is to “rescue equality” from this kind of injustice by showing how Rawls’s justification for the current situation, namely the difference principle, fails, and how Cohen’s egalitarianism solves the problem.⁹ He employs two main arguments: first, the state can enforce equal salaries for all independent of luck, and second, though it cannot force people to choose particular jobs in response to societal needs, the talented *ought* to do so rather than selfishly pursue their own careers. Because the talented are not forced to share their talents with the needy and because doing so, rather, is demanded by virtue, such choices are, for Cohen, truly free choices. To be virtuous in this particular way is freely to create the just society.

Cohen’s Rejection of the ‘Basic Structure’ Reading

As Cohen is fully aware, a weakness of his interpretation of Rawls concerns his inattentiveness to Rawls’s repeated claims that the theory of justice as fairness governs only the basic coercive structure in society.¹⁰ This is an important objection against Cohen because his attack on Rawls’s

⁸ In addition, of course, this would open up work opportunities for junior philosophers at Oxbridge and the Ivy League universities – something desperately needed for young scholars still struggling to find a foothold in the profession.

⁹ Cohen argues: “This book attempts a rescue of the egalitarian thesis that in a society in which distributive justice prevails, people’s material prospects are roughly equal: distributive justice does not tolerate the deep inequality, driven by the provision of economic incentives to well-placed people, that John Rawls and his followers think a just society displays” (p. 2).

¹⁰ Arguing against it is the main purpose of most of chapter 3, or pp. 124-150.

argument for the difference principle requires that Rawls's theory include more than just an account of the basic coercive structure of society. Before we get to this objection to Cohen, let's take a quick look at Cohen's argument against Rawls. As Cohen has interpreted Rawls's argument, the second premise states, 'Unequalizing incentive payments to productive people *are* necessary to make the worst off people better off' (p.19). Cohen, in chapters one through three, argues that this is false since there are other options than unequalizing payments to make the worst off better off and that virtuous people do not need or want 'unequalizing payment incentives' to act virtuously. If so, then the first premise, namely that 'Inequalities are unjust unless they are necessary to make the worst off people better off, in which case they are just,' (ibid.) is also undermined.¹¹ In chapter four, Cohen continues by arguing that the idea behind the first premise is also internally incoherent. He argues that individuals who really take this premise seriously would make "equality the natural starting point, or default point for justice, on the *ground* that nobody deserves more than anybody else." (10) Therefore, they would never accept a departure from equality to benefit the worst off in the first place, and consequently, they would never say, "because the departure benefits the worst off... the result is unambiguously just" (19). Cohen's argument hinges on his interpretation of Rawls as appealing to private individuals' reasoning and behavior to justify the difference principle. Moreover, Cohen insists, when Rawls appeals to the reasoning and behavior of private individuals, he cannot include an appeal to what *non-virtuous* private individuals would think and do (as the second premise does). As a matter of *ideal* theory, Rawls must restrict his argument to what *virtuous* people would affirm and do (as we find in the first premise). And when we restrict Rawls's argument to what virtuous people will affirm and do, we see that the difference principle must be rejected because it is inconsistent with what virtuous persons actually will do.

¹¹ Cohen summarizes this argument by saying that "the unequalizing payments aren't *strictly* necessary, since they reflect the will of incentive seekers, who would not, moreover, require the incentives in question to produce as they do if they acted in conformity with the conception of justice that is stated in [this] premise" (p. 19).

In spite all of this, if Rawls's argument is limited to the 'basic structure', then, as Cohen admits, his objections are foreclosed. For Cohen's objections to succeed, Rawls's (considered) theory of justice must be taken to appeal to both private individuals' perspectives on justice and the institutional perspective of the state.¹² In addition, since Cohen interprets Rawls's account as not limited to the basic coercive structure of society, Cohen must also give up Rawls's emphasis that the theory of justice specifies only what is enforceable. This is not such a problem, Cohen thinks, since Rawls's affirmation of this point is ambiguous in his texts (pp. 130-1), and since Rawls's considered view cannot possibly restrict the state's proper sphere to what is enforceable. As anticipated above, Cohen provides two reasons for holding this view. First, if the Rawlsian account limits the theory of justice to what is enforceable, then it pays the price that "ideals of dignity, fraternity, and full realization of people's moral natures can no longer be said to be delivered by Rawlsian justice" (p. 131f). That is, certain values (dignity and fraternity) as well as virtue in general ("the full realization of people's moral natures") are out of reach of justice and the state. Second, if Rawls is limited to what is enforceable, then, Cohen argues,

Rawls is in a dilemma. For he must either admit application of the principles of justice to (legally optional) social practices, and, indeed, to patterns of personal choice that are not legally prescribed, both because they are the substance of those practices, and because they are similarly profound in effect, in which case the restriction of justice to structure, in any sense, collapses; or, if he restricts his concern to the coercive structure only, then he saddles himself with a purely arbitrary delineation of his subject matter. (p. 137)

Cohen illustrates these points by reference to two social institutions: the family and the market economy. On the one hand, Cohen employs the feminist argument that 'the personal is political' and argues that even if we assume a sex-neutral family law, actual sexist families may have "informal sexist force... which profoundly affects people's life chances" (p. 137). But if restricted to what is

¹² Though Cohen's objection requires Rawls's (considered) theory to identify both the private and state perspective, this does not mean that Cohen denies the distinction between these two perspectives. Instead, he affirms Nagel's point "that 'institutions' such as the state, 'unlike individuals, don't have their own lives to lead'" (9), and hence that private individuals and states have different roles and functions with regard to realizing justice.

enforceable, Rawls's account cannot give due importance to the profound political force of 'informal' private family life. On the other hand, a restriction to only what is enforceable fails to appreciate the flaw in Rawls's incentive argument, for justice, then, will permit people to maximize material gains resulting in "severe inequalities and a meager level of provision for the worst off" (138). Hence, Rawls's considered view, Cohen argues, must encompass more than the coercive system. It must capture everything that greatly impacts ('benefits and burdens') citizens' lives, including both the coercive system and "the ethos that sustains gender inequality and inegalitarian incentives." (138)

Why Cohen is Wrong about Rawls – and Everything Else

I find Cohen's arguments against the 'basic structure' reading of Rawls unconvincing for three reasons. First, I do not see it as a weakness of Rawls's theory that certain values, such as dignity and fraternity, and virtue generally are beyond the scope of justice.¹³ I believe Rawls is right to distinguish justice from virtue. Let me illustrate this by means of the example mentioned earlier. If philosophers choose to work at local colleges to help the poor because this is the right thing to do, I think there is no doubt that they are virtuous. But I do not think that 'legitimate personal prerogative' is the only reason why the state cannot force them to do so, as Cohen claims. Another reason is that the state cannot coerce virtuous action. Virtuous action requires a moral motivation, namely doing something because it is the right thing to do. But moral motivation is beyond the scope of the law, which means that 'legitimate personal prerogative' is not the only reason the state cannot force people to take these jobs. A state that attempts to enforce virtue would necessarily fail, since the moral motivation cannot be coerced. So, if the state did force its citizens to help the poor, then the result would not be virtuous actions.

¹³ I understand 'dignity and virtue' as virtuous respect for and unity with other persons, whereas I understand 'the full realization of persons' moral powers' to refer to virtue generally (virtuous actions and character)

Second, contrary to Cohen, I believe that individual responses to societal needs contribute to creating a better world, but not a more just world. Cohen emphasizes that the talented ought to choose jobs in response to societal needs. They ought to share what is theirs – their talents or resources – with the less fortunate. The problem is that if these resources properly belong to the talented, then holding on to them is not unjust, but stingy or ungenerous. If something really is yours, then no one else has a claim of justice on it, and therefore it cannot be a matter of justice when you give it away. Rather, giving it away would be a matter of beneficence, care or generosity.¹⁴ In addition, I believe that a world in which the poor are dependent on the virtue of the resourceful persons in the way Cohen proposes, is not a just world. It is a world of unjust dependency. The fact that the more powerful and resourceful live up to their virtuous responsibilities in Cohen's ideal world does not alleviate this dependency and therefore does not make it a more just world. In order to make the world more just, we have to overcome the situation in which some are dependent on the virtue of others in this way.

Third, I find Cohen's 'personal is political' objection unconvincing as a matter of ideal theory. After all, if it is illegal to act in sexist ways towards one's family, then it is not the case that 'informally' one can still act in sexist ways. If one is legally required, say as a legal guardian, to act towards one's children in non-sexist and respectful ways, then acting in sexist ways is to break the law. Of course, it is true that if men act in sexist ways towards their families each time they think they can get away with it, then it is very hard to realize justice. But notice that there is nothing inconsistent or particularly problematic in holding that the proper state response is to strengthen the

¹⁴ To put the point differently, if these resources are not yours in the first place, then it would be wrong to describe this as 'sharing your resources' with the others. In this case, the resources simply don't belong to you and it could not be a question of your discretion whether or not to share them. Holding onto them would be an issue of justice, because you have no claim on them. If they are correctly described as 'yours', which Cohen's argument presumes, then you do have a claim on them, which is why sharing moves beyond justice and into the sphere of virtues like beneficence, care and generosity. Let me put a third spin on this. If the state doesn't have the right to force you to share your resources in this way, then the resources actually are yours. Again, giving away your own resources entails that the relevant virtues are those of beneficence, care or generosity.

dissemination of information about and the enforcement of family law. What those subject to such sexist tyrants need more than anything, as far as I can tell, is proper protection, which is legal protection that in principle is backed up by the state's force and material resources. Naturally, we can easily grant that men who refrain from acting in sexist ways only to avoid punishment are still bad people, and their actions are not virtuous. Nevertheless, as a matter of ideal theory their actions are just in the sense that they are rightful. Alternatively, if we want to speak of justice as a virtue, which had its virtues, we must draw a distinction between rightful actions and just actions. In this case, just actions are rightful actions that are done from the moral motivation, whereas merely rightful actions are done from any motivation. But again, although the state can enforce rightful actions, it cannot enforce just actions since it cannot enforce the moral motivation.

The reasons above outline why I think Cohen's objections to the basic structure reading of Rawls fail. Now I will move on to why I think he's wrong about everything else, that is, his claim that his nonliberal socialist/anarchist project is to be preferred over a liberal state-based conception such as a revised Rawlsian one. To see this, we must first explain why Cohen is wrong to suggest that Rawls should accept the starting point of material equality amongst all citizens. As Cohen is fully aware, Rawls explicitly rejects material equality as the starting point for his theory,¹⁵ but this is not Cohen's point. Cohen's point is that Rawls *ought* to affirm it. And much is at stake for Cohen, since, as we saw above, his argument against Rawls's difference principle succeeds only if we presuppose this starting point.¹⁶ So, should Rawls assume an original material equality amongst

¹⁵ In *Political Liberalism* (Columbia University Press: New York, 1996), after having restated the two principles of justice as fairness, Rawls emphasizes that "Finally, as one might expect, important aspects of the principles are left out in the brief statement given. In particular, the first principle covering the equal basic rights and liberties may easily be preceded by a lexically prior principle requiring that citizens' basic needs be met, at least insofar as their being met is necessary for citizens to understand and to be able fruitfully to exercise those rights and liberties. Certainly any such principle must be assumed in applying the first principle" (p. 7). For our purposes here, the important point is that Rawls here emphasizes that citizens' basic needs must be met – he does not say that they must start from an equal level of material resources.

¹⁶ Cohen's argument to support his claim that Rawls ought to affirm this starting point goes as follows: Rawls's claim that "Inequalities are unjust unless they are necessary to make the worst off people better off, in which case they are just" has, Cohen maintains, an 'incoherent' thought behind it, namely that 'You cannot make equality the natural starting

citizens? I do not think that he should, but neither do I think that Rawls provides a sufficient explanation why he shouldn't. That explanation has to be elicited from an account of private right – or an account of rightful relations between private individuals – which Rawls doesn't provide. The good news is that he can borrow one from Kant. Moreover, if he does borrow Kant's account, then he can show why a liberal statist theory is better than Cohen's nonliberal, anarchist alternative. With Kant's account of private right, Rawls can explain why the state cannot assume material equality amongst its citizens as the natural starting point for a theory of justice; he can explain why the state is constitutive of justice, and finally why the state's perspective is not simply impartial like any other institutional perspective, but is a uniquely *public* perspective. Moreover, with these pieces added to Rawls's own account, it becomes clearer why Rawls's difference principle involves neither an incoherent thought nor an incentives rationale.

Why does Kant's account of private right show that Rawls's theory of justice should not affirm an original material equality amongst citizens? Let me illustrate this by means of an example, with which any anarchist (libertarian or egalitarian) will have sympathy. Assume that one hundred years ago, for whatever sad, but good reason you have to flee from the south to the north of Norway¹⁷ and that Norway at that time was not a state. It's September, and as you're sailing northward up the coast, having crossed the Arctic Circle, you see a beautiful, large island in one of the fjords. It seems uninhabited, it has a forest and fresh water, and there is a wide bay protected from the northern wind where you can dock your boat. You decide this would be a good place to settle. You do what any sensible person would do in this situation. During the next few weeks, you quickly build a hut for shelter, you collect berries, you hunt and you fish. The winter comes, and due to your fabulous survival skills, you survive. Late spring finally arrives and along with it the midnight

point, or default point, for justice, on the *ground* that nobody deserves more than anybody else and then depart from equality because the departure benefits the worst off *and then* declare that the result is unambiguously just." (19)

¹⁷ For example, assume that you had to flee the powerful and intolerant people in the south of Norway.

sun and bliss. Then one day, three boats full of native people – the Samis – and their reindeer arrive. This is their island, they explain, as it has been for centuries. I take it that at this point, Cohen would argue that both the Sami people and you should realize that from now onwards, life as you knew it changes. You ought to form an egalitarian community together. You get a right to equality with regard to all the resources the Sami people own – including the inland plains (‘Finnmarksvidda’) they use to graze their animals in the winter. In addition, if needed to create material equality, you should start working for one another. Now, to me to common sense as we have found it throughout history, this is a fundamentally unintuitive response to the situation. No one in history, as far as I know it, has ever responded to the classical conflicts between reindeer owners and farmers or fishermen in the north of Norway in this way.¹⁸ But more importantly, why should they? Why shouldn’t we say that both you (the newcomer) and the original native population in the area should rather have the right to go about your lives separately even if you must now (somehow) interact? Also, why should everything by means of which you and the natives have created a life for yourselves now be up grabs? It seems very strange indeed to say that unless you agree to give up much of what you’ve worked, to work for others, and to abandon your solitary, yet interactive existence, you act unjustly. In other words, contrary to Cohen, I believe that if we start with historically deep-seated intuitions, it is unclear why anyone, including the state, should assume original, material equality amongst people.

Now on to why justice is impossible without a state. One way to see why the state is necessary for rightful relations, involves considering how to resolve the land dispute arising between the newcomer and the natives. It is clear that both parties have a reasonable, if not equally reasonable, claim to the land.¹⁹ They have both appropriated by incorporating the land into their

¹⁸ Given Cohen’s commitment to deep-seated intuitions of justice (p.4), this fact should at least worry him.

¹⁹ The natives clearly seem to have a better claim in that they were there first and are still using it. Still, since in the state of nature there is no public record of land ownership, the newcomer cannot be seen as required to take the natives on

lives, and neither party knew about the other. So how can the dispute be resolved without resorting to mere might? Kant's Rousseauian suggestion is that only by establishing an authority that represents both parties, but none of them in particular, can the parties reach a rightfully enforceable solution. That is to say, only by establishing a public authority representing the general, united will of the parties to the conflict do we have the possibility of determining and enforcing restrictions that are not mere might. Hence, the resolution of land disputes – or private property in general – require the state.²⁰ Of course, Cohen may simply deny that we should have private property and with it any liberal notion of individual freedom. Yet his incorporation of a 'legitimate personal prerogative' shows Cohen's resistance to reject any liberal notion of freedom. After all, the alternative is a world in which everyone is always subjected to everyone else's arbitrary choices. It is a world in which it is in principle impossible to create a life for oneself that is one's own and not one that is subject to others' consent. Unless Cohen's 'quasi-freedom' comes with its own proper protection, it is not clear why anyone ought to accept it over a full-blown liberal notion of freedom. Moreover, even if we accept the legitimate personal prerogative over a liberal notion of freedom, Cohen still needs to specify in principle enforceable restrictions protecting it. But specifying these restrictions re-invites the problems we just saw with resolving reasonable disputes. Cohen's quasi-liberal conception of justice, it seems, also needs the state.

But private property is one category of private right. The other categories are contracts and what Kant calls 'status relations', which are relations in which persons have standing within each other's private lives as for example in families. To see why these relations also require the state to be rightful, let us go back to the example. Assume that the island was unowned. When spring arrives

their word. The newcomer also cannot be required to abandon the life he has established for himself – a life that, to the best of his knowledge, he has established without taking anything that belonged to anyone else. The state, once established, must decide how to adjudicate these various facts, based, for example, on evidence that the natives have been using the land for centuries.

²⁰ In addition to this indeterminacy argument, Kant provides an assurance argument. I provide an interpretation of both arguments in my "Kant's Non-Voluntarist Conception of Political Obligations: Why Justice is Impossible in the State of Nature", in *Kantian Review*, vol. 13-2, 2008, pp.1-45.

you decide to take a trip up the coast. You see a village, so you stop. Quickly a friendly relationship between you and the village people, and it is not long before you have begun to trade. You then fall in love with a wonderful man from the village who comes to live with you on the island. On Kant's account, establishing a public authority – or a state – with standing in contractual and status relations is constitutive of making them rightful. There will be reasonable conflicts in both relations, and having contract and family law set the boundaries within which they function is the only way to ensure that right rather than might rules. So unless Cohen imagines that there are no contracts and families in the ideal society – which would be odd – we have more reasons why we need the state.

We have now seen several reasons why Cohen is wrong to think that material equality can be assumed as the natural starting point, why the state is constitutive of justice and why the state perspective is not just an impartial perspective, but an explicitly *public* perspective. In the final sections, let me briefly outline Rawls's considered theory of justice once we incorporate an account of private right. To do so, we must focus on what the state must do once it establishes its rightful monopoly on coercion. First, the state must enable private right by positing, applying and enforcing private law to make private relations between citizens rightful. On this revised Rawlsian account, this is why the legal and political institutions of property law, contract law, and family law are properly a part of the basic coercive structure of society. Importantly, too, in establishing property, contract and family law the state also sets up related public authorities whose use of coercion is governed by public law. Because public law governs the offices of public authorities, it establishes claims citizens have on their public offices in virtue of being citizens. Since Rawls's own account does not include an account of private right, he struggles with making clear these features of the basic structure. We see this quite clearly in his comments on the family. As Cohen points out (134), sometimes he

identifies the family as part of the basic structure and sometimes not, and it is unclear how he considers the family with respect to the original position.²¹

The establishment of the state, however, does not involve merely enabling private right. The state must also assume control over those systems, such as the economy, which citizens use as a means of interaction. And to fulfill its role as a public authority, the state must ensure that the systems are justifiable from a public point of view, or from the point of view of all citizens and yet no one in particular. It does this through enacting public right. It is because Rawls's account starts here that I suggest his account – properly speaking – is an account of public right rather than an account of both public and private right. Anyway, Rawls cashes out part of this systemic control by means of his difference principle, meaning that when the public authority considers legislation and policies, it must ensure that the systems benefit everyone, including those who are worst off. Therefore, the difference principle is not justified by an incentives argument. Rather, it points to how the public authority – to be properly a *public* authority – must ensure that the systems take each person's interests into account when legislating. Moreover, since Rawls shouldn't, as we have seen, presuppose original material equality amongst citizens, there is no incoherent idea behind the difference principle.

Still, I do believe Rawls could have gone further in his account of public right. He could have argued, again in a Kantian spirit, that once the public authority permits its people to become dependent upon systems, it must also ensure that the systems are not under private control and that the systems enable people to interact without the possibility of such interaction being subject to any private person's control. It is not just that the systems must benefit all, but the systems must not endorse or permit dependency relations inconsistent with everyone being able to pursue interests of their own. In order to accomplish the first task, the state must set up institutions such as legal

²¹ I expand on this point in my "The Priority of Rightful Care to Virtuous Care: A Kantian Critique of the Care Tradition" (unpublished paper).

tender, legal control over the markets, financial institutions and the media. In this way, the state excludes the possibility that systems, upon which people are dependent, are controlled by any one private person.²² To fulfill the second task, namely to avoid private systemic dependency relations, the public authority must ensure, as Rawls says but does not justify, that everyone has a certain minimal level of material resources.²³ The reason is that the public authority cannot allow any one of its citizens to be trapped in a situation where any action whatsoever is conditioned by someone else's choice, such as their choice to be beneficent or generous in the way Cohen describes. Finally, as Rawls points out, the public authority must ensure conditions in which fair opportunities exist – it must be possible for people to work their way out of poverty and into resourceful jobs, including public offices. The state may do this in many ways, such as by providing special loans for education and housing – and it has the right to do so even if no one private individual has the corresponding right.

By providing Rawls with an account of private right and by making some smaller, related adjustments, as suggested above, the account overcomes the problems facing current basic structure defenders. And such a liberal Rawlsian society, it seems to me, is more appealing than Cohen's nonliberal – or quasi-liberal – anarchist society.

²² In the US, we have recently seen a terrible failure to enact the relevant legislation to ensure that the systems are not subject to private persons in this way. Not only is there insufficient access to reliable and unbiased media, but the economy and financial institutions were permitted to become dependent upon certain private agents – their choices and existence – which meant, amongst other things, that the state couldn't afford to let them fail when the market demanded this.

²³ See citation from *Political Liberalism* above.