

Cohen's Critique of Rawls: A Double Counting Objection

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This paper assesses G. A. Cohen's critique of Rawlsian special incentives. Two arguments are identified and criticized: an argument that the difference principle does not justify incentives because of a limitation on an agent's prerogative to depart from a direct promotion of the interests of the worst off, and an argument that justice is limited in its scope. The first argument is evaluated and defended from the criticism that once Cohen has conceded some ethically grounded special incentives he cannot sustain his critique of special incentives. But it is finally rejected as a subtle form of an unreasonably demanding moral rigorism. The second argument is interpreted as the more plausible of Cohen's claims. It has, however, to be defended via two subsidiary theses: the claim that Rawls endorses a moral division of labour and that this in turn grounds a further commitment to moral dualism as opposed to moral monism. This argument is assessed and rejected. Neither the moral division of labour nor moral monism supports the claim that in applying the principles of justice to a basic structure one does not thereby apply them to the individuals constrained to act within that structure in the marketing of their labour. Nor is it plausible to identify local aspects of social relations where the principles of justice are suspended. Such principles are presupposed, for example in market relations or the family, but limitation in scope of direct application does not limit the scope of justification. That scope extends at least as far as individual decisions to market one's labour. The latter are made fair in the only possible way they could be made fair. Rawls's commitment to the revisionary socialism of James Meade illustrates this point. It is concluded that no version of Cohen's critique succeeds. However, Cohen's critique identifies the most plausible version of Rawls's egalitarianism.

This paper assesses G. A. Cohen's critique of Rawlsian special incentives. Cohen's publications on this issue spanned a sixteen-year period culminating in the summative discussion in *Rescuing Justice and Equality*.¹ Now that Cohen's critical project is sadly complete, my aim is to come to some overall evaluation of his controversial critique

¹ Sixteen years measured in terms of published papers; Cohen (2008, p. xv) tells us that his critique originated in February 1975, adding up to thirty-three years of engagement with Rawls's views.

of Rawls's views.² I identify what I take to be Cohen's two best arguments and engage in some interpretative license as I do so. That is because my view of Cohen's best line of attack on Rawls differs from his own. I distinguish an argument based on the *limited scope of prerogatives* from an argument based on the *limited scope of justice*. Each is independently plausible and would be considerably strengthened if they could be defended together. However, the overall balance of reasons shows that neither is finally defensible.

This conclusion does not undervalue Cohen's achievement. To identify that, we need a broader perspective. Cohen's first argument will turn out to be wholly dependent on his second argument concerning the scope of justice. I will argue that the primary reason why Cohen's second argument fails is because it does not acknowledge the influence on Rawls's egalitarianism of the revisionary socialism of James Meade (1993; see also Krouse and McPherson 1988, Jackson 2005).³ Rawls's implementation of Meade's ideas casts significant doubt upon Cohen's claim that Rawlsian egalitarianism is insufficiently demanding. However, the real import of Cohen's critique is that an officially 'optional' aspect of Rawls's view, an example of a just political economy that could be realized in other forms, is more tightly bound up with a defensible version of Rawls's project than has hitherto been acknowledged.⁴ It is true that we are not *forced* to endorse Meade's and Rawls's vision of a property-owning democracy in all its details. However, if a view like this is not our final implementation of a Rawlsian political economy, something very like it will have to be.

I will challenge Cohen's internal critique of Rawlsian special incentives by, in a sense, inverting it: if a person who has elected to live in a society governed by Rawlsian egalitarianism is then also asked to supplement its implementation with an egalitarian ethos as Cohen

² Two important later arguments that I will not discuss are, first, Cohen's revised rejection of a Pareto argument for inequality and its implications for occupational choice in Cohen 2008, Ch. 5. Second, I will not discuss his extended engagement with Andrew Williams's 'basic structure' response to his critique of Rawls in Cohen 2008, Chs 3 and 8, save where the latter considerations have a bearing on the 'limited scope of justice' argument that is one of my primary targets here.

³ The relevance of the influence of these ideas on Rawls's work for Cohen's critique has, to my knowledge, only been significantly emphasized by Paul Smith (1998). I am very much indebted to his fine paper.

⁴ Except by Paul Smith (Smith 1998), who seems to me to have anticipated much recent work. For explorations of the potential of this line of argument as an interpretation of Rawls, see O'Neill 2008 and 2009; O'Neill and Williamson 2009 also offers a helpful survey, with comprehensive references, and lays out one particular development of Rawls's ideas.

requires, then the demands of justice have been 'double counted'. This makes Cohen's view unreasonably demanding in a particular way: the same demand is counted twice. It ought to be rejected for that reason. But the failure of Cohen's two arguments does not make his critique as a whole a failure. What Cohen's arguments show is that if one is to be a Rawlsian at all, then the difference principle commits one to being a 'Left Rawlsian'. Cohen (2008, p. 12, n. 13) tells us that Joshua Cohen and David Estlund insisted that he, Cohen, was a Left Rawlsian all along. Nothing less than a fully determinate implementation of the difference principle in a distinctive kind of political economy, exemplified by a property-owning democracy, will allow those sympathetic to Rawls to evade Cohen's critique. That is an important insight into the proper form of liberal egalitarianism.⁵

1. Cohen's early arguments: Cohen versus Rawls

The promise of liberal egalitarianism is to set up a structure within which we can live by the demands of common sense morality, presupposing the demands of egalitarian justice, where the latter is understood in Rawlsian terms. Both Thomas Nagel and G. A. Cohen have questioned whether this promise can be fulfilled. Nagel (1995) argues that this interface between a hybrid ethical theory and liberal egalitarianism is problematic because these two sets of commitments are in ineliminable tension with each other.⁶ Cohen (2000, 2008) argued, similarly, that this interface between politics and ethics is problematic because Rawlsian egalitarianism is demonstrably unable to realize its ostensible goals unless supplemented by a moral/social ethos. Cohen's strategy, surprisingly, inverts this usual presumption about the relative priority of a hybrid ethical view and Rawlsian egalitarianism. We have to take morality as a complementary corrective to politics. In developing these separate criticisms of Rawls's views both Nagel and Cohen assume that the correct ethical theory is a hybrid ethical theory. Such a theory, as canonically formulated by both Nagel (1999) and Samuel Scheffler (1984), involves an agent-centred prerogative that reflects the fact that each person has his or her own life to lead. Individuals have a

⁵ In a complementary discussion to this one I further argue that it offers good grounds for prioritizing those themes in Rawls that converge with the republican tradition in political theorizing, but I leave those arguments aside here (see Thomas forthcoming).

⁶ I assess Nagel's critique of Rawls in Thomas 2003 and Thomas 2008, Ch. 7.

personal point of view that shapes their evaluation of outcomes and permits principled departures from the objective requirement to produce the optimific outcome.

Cohen's much-discussed arguments have, through time, undergone significant developments. In this section I will describe some of his earlier arguments, as their failure clarifies two key issues in his critique. Cohen (1995a, 1995b, 1997) initially argued that a Rawlsian difference principle ought not to support the payment of special incentives to those who are better off under a given distribution in order for them to market their scarce talents in the most productive way. Special incentives can be dispensed with if we are all, instead, motivated by an egalitarian ethos. This ethos supplies a motivation to be just even in the case of one's 'personal' decisions, such as economic decisions to market one's labour.

Focusing on a contrast between what he called a 'lax' and a 'strict' reading of the difference principle, Cohen (2008, Ch. 2) argued that special incentives were required only because the talented chose to make it the case that they would be more productive only were they to be paid such incentives. This seemed, to Cohen (2008, pp. 38–40), a morally questionable stance little better than that of a kidnapper who combines demand with threat. For that reason, he argued that this deficiency in Rawls's view required supplementation by an egalitarian ethos to remove these anti-social preferences. This moral ethos 'enforces' the strict, rather than the lax, interpretation of the difference principle. Cohen (1997, p. 35) claimed that Rawls simply equivocated in his presentation of the case for the difference principle, leading to Rawls inadvertently undermining his own theory. This equivocation stems from a deeper one over how one defines those institutions that make up the basic structure of society: are they to be identified by their coercive imposition via the legal system? Or because of the depth of their impact on life prospects?

This critique is focused solely on the difference principle, canonically expressed by Rawls as follows in the context of his two lexically ordered principles of justice:

- (a) Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.

- (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society. (Rawls 1993, pp. 5–6)

Cohen made two claims: first, that the second part of the second principle is an acceptable justification of inequality only if it is supplemented by an egalitarian ethos to prevent it sanctioning incentives that motivate in 'the wrong way'. Second, if one adopts a certain conception of the worst off as absolutely badly off, the difference principle ceases to be an adequate justification for inequality at all. (My focus in this paper will be on the first of these arguments; I will not discuss the second.) A typical formulation sets out Cohen's unqualified rejection of the difference principle:

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. The difference principle can be used to justify paying incentives that reduce inequalities only when the attitude of talented people runs counter to the spirit of the difference principle itself: they would not need special incentives if they were themselves unambivalently committed to the principle. Accordingly, they must be thought of as outside the community upholding the principle when it is used to justify incentive payments to them.⁷ (Cohen 1995b, pp. 336–7)

This early passage expresses two thoughts: first, that those who are better off in a society that has chosen to implement Rawlsian justice, including the difference principle, are hypocritical if being better off takes the form of monetary incentives to exercise one's talents and capacity for effort over and above the average level of reward. Second, there is the interesting idea of social alienation. We cannot see such people as really part of the society to which they claim to belong because their actions speak louder than their words. Thus the difference principle is expressive of a vision of political community governed by a certain kind of egalitarian ethos. But the ethos and the difference principle are, Cohen claimed, inconsistent with each other in Rawls's theory of justice.⁸

⁷ Reprinted in Cohen 2008 but with new caveats in the footnotes: the passage should now be read in the light of n. 7, p. 30 and the wording as it appears on p. 32 is revised.

⁸ This suggests one interesting point of analogy between Cohen's critique of Rawls and one strand in the multi-faceted communitarian critique of Rawls. Sandel (1998) argued that Rawls's

Cohen further clarifies this notion of ‘community’: it is not literally a matter of people placing themselves beyond the pale of a particular political community construed as a social group. It is the metaphorical expression of a concern with the quality of social relations where people are treated merely as a means:

The incentive consideration ... produces an argument for inequality that presupposes a model of society as a noncommunity, in which relations among human beings are construed as strategic, with people taking one another into account as so many opportunities for, and obstacles to, gain, rather than as fellow citizens by whom they can be asked to justify the way they live. (Cohen 2008, p. 15)

Cohen’s (2008, pp. 41–5) appeal — both here, and later in his book — to a ‘justificatory community’ seems to me significant for two reasons. First, it shows clearly Cohen’s residual Marxist commitment to criticizing forms of social organization and their economic substructure in terms of the impact of the latter on the quality of social relations in a way that is distinctive of that tradition and its concern with ‘totality’.⁹ Second, it will prove important to what I will later call Cohen’s ‘overspill’ argument that permissibly self-interested behaviour, even in restricted social contexts, would have a damaging impact on the quality of social relations generally.¹⁰

egalitarianism required a strong sense of collective solidarity but that this commitment was undermined by a false theory of the self as ‘atomized’. The key difference is that Sandel sees clearly that Rawls’s view already expresses an ethos of collective solidarity that, from Sandel’s perspective, Rawls inadvertently undermined. Cohen sees his moral ethos as a corrective to Rawls’s theory. On that point, I will argue, Sandel is correct and there is clearly a Rawlsian ethos as argued in Titelbaum 2008; Cohen (2008, pp. 73) partially agrees.

⁹ This involves some interpretative license as Cohen (2008, p. 45) declares himself opposed to ‘soggy mega-*Gemeinschaftlichkeit*’. He invokes instead Rawls’s notion of ‘ties of civic friendship’ (2008, p. 45). But Rawls then connects ‘civic friendship’ to fraternity and solidarity, for example at Rawls 1999, pp. 90–1. Friendlier to my interpretation is Cohen’s (2008, p. 82) contrast between ‘a *bargaining* conception and a *community* conception of social relationships’. But then it is difficult to see how Rawls could ever be construed as in favour of the former conception.

¹⁰ As I will note below, this is strategically important if Cohen is to avoid a very direct, and hence very damaging, response to his argument from Norman Daniels (2003): the kind of scenario to which he objects is not a case of injustice, but a case where a just society *also* includes unethical choices by some individuals. That is less desirable than a different scenario where a just society is complemented by better individual ethical choices. But where in the former scenario is there any threat to the content of Rawls’s conception of *justice*? Cohen (2008, pp. 376–7) explicitly responds to Daniels but his reply seems to confuse what Cohen there calls ‘personal obligation[s] to promote justice’, a moral obligation, with a requirement of justice itself. That is precisely the equivocation that Daniels pinpoints. I suggest, instead, the overspill argument as a better response on Cohen’s behalf. It expresses the traditional Marxist

In this very general argument in the passage I have quoted Cohen does not dispute the difference principle itself, whose acceptability as a justification of inequality he provisionally accepts, but a further argument derived from it.¹¹ This argument is that people to whom nature has arbitrarily assigned both talent and capacity for effort in its development need to be further incentivized by monetary reward. Cohen does not believe that the difference principle supports incentives, but rather undercuts them. Those who are sincerely committed to the difference principle would not need such incentives; those who need such incentives are not genuinely committed to the difference principle. They are motivationally redundant.

Why are these early, unqualified arguments of Cohen's unsuccessful as a critique of Rawls? The answer, I submit, is that they make little sense as an interpretation of Rawls and are independently unattractive.¹² First, Cohen was wrong to represent those better off under an egalitarian distribution as public contractualists but private contractualists. The salient issue is not the opportunity for those who are talented and effortful to drive the hardest bargain they can in the marketing of their labour.¹³ That is certainly a hypocritical position, but it does not make much sense as an objection to Rawls. He could hardly be represented as favouring the degeneration of reciprocal

claim that in an alienated society everyone is harmed by the degeneration in social relations, worker and capitalist, exploited and exploiter, alike.

¹¹ An important change in Cohen 2008 (Ch. 4) is that the difference principle itself cannot function as a principle of justice *at all*. The nerve of Cohen's argument is that if requiring incentivization is a basic psychological fact about human psychology, then this allows an arbitrary fact to determine what is just in a way that is inconsistent with accepting the moral arbitrariness of the upshot of the natural lottery. For reasons of scope I will not discuss this argument here. I simply note that the radical anti-psychologism of Cohen 2008 (p. 155), while compatible with Cohen's later Platonism, would seem to face serious problems of its own. But it explains why Cohen (2008, pp. 161–2) treats the natural lottery and social disadvantage in precisely the same way.

¹² It is undoubtedly true that Cohen (2008) is sometimes a little vague in the identification of his target. So the reprinted material in Ch. 3 does not distinguish Brian Barry's Pareto argument from Rawls's. It does not reflect Rawls's retreat from the maximin argument for the difference principle between the two editions of *A Theory of Justice*, in 1971 and 1998, which reflected a major change in his views. See also the reference in Cohen 2008 (p. 138, p. 183) to 'maximizing legislation'. Cohen 2008 also refers on pp. 96–7 to 'Pareto improvements' as 'further benefits' to the better off.

¹³ Thus while Bertram (1998, p. 20) takes the point of Cohen's critique to be 'maximising behaviour by high fliers', this cannot be either Bertram's or Cohen's target under *that* description. But Cohen (2000) repeatedly identifies 'high flying marketeers' as his explicit target, for example in Cohen 2000, p. 123, and 2008, pp. 61, 72, 80, 85, 110, 118, and 352.

social relations into exploitative bargaining and would have to have been very confused to permit this as an inadvertent effect of his views.¹⁴ Williams (1995) and Van Parijs (2002) argue that in Rawls's view, it is the position of the worst off that has to be maximized, and anyone better off is permitted to do better only if that does not worsen the relative position of the worst off.¹⁵ As I will describe below, the issue about 'genuine incentive demands', as Joshua Cohen calls them, concerns the justifiability of marketing scarce talent at *above average* compensation, not maximizing compensation.

The second problem with Cohen's early arguments is not so much their interpretative inaccuracy as their excessive demandingness. They imply an unreasonably demanding purism or rigorism that would sweep away all of an agent's reasonable agent-centred prerogatives in a way that Cohen (2000, p. 213, n. 36; 2008, pp. 61, 71) later clearly rejected.¹⁶ In its unqualified form, Cohen's early formulation of his critique seems to make no room for special incentives grounded on reasonable ethical prerogatives. One way of interpreting the argument, which I shall call the *purist* interpretation, implies that those with scarce talents and a capacity for effort do not require any further incentive at all. Simply being talented and effortful is reward in itself. One's proper attitude ought to be gratitude that one is able to do more for the collectivity (and thereby do more for the worst off) by being able to make a larger contribution than others.

In an extension of the purist reading, one could argue (see Carens 1981 and 1986) that, if one is required to market one's labour via a competitive economy, because such a system has informational or resource-enabling advantages, the medium of exchange should not be money but some other social good such as status, admiration, or some surrogate for money such as vouchers. This purist interpretation is also compatible with Carens's argument that people owe a duty to their society to deploy their talents maximally productively — 'from each according to their ability, to each according to their needs', as the

¹⁴ This implausible interpretation is supposed to be ameliorated by the thought that Rawls's undermining of his own view was inadvertent. But as Baynes (2006, p. 188) has pointed out, in view of the many passages in *A Theory of Justice* where Rawls condemns precisely the same kinds of behaviour that Cohen condemns, this claim cannot possibly be considered plausible. To make this interpretation stick, Cohen needs unequivocally to resolve the ambiguity that I discuss in Sect. 5, and moreover to resolve it in his favour.

¹⁵ The idea that the better off ought to *maximize* their position at a *cost* even to the relative position of the worst off simply violates the difference principle.

¹⁶ But see n. 22.

phrase made famous by Marx would have it, and which is used as the epigraph for Carens 1986. This reading of Cohen's argument points to what looks like the discounting of special incentives *entirely* in the passage quoted.¹⁷ It remains compatible with the admission by Cohen of the existence of incentives to compensate those whose work is particularly difficult, dangerous, or lacks intrinsic rewards of its own. These compensatory incentives might fall outside the scope of Cohen's critique, but all other special incentives would not.¹⁸

Cohen conceded that this purist interpretation is unreasonably demanding and said the same for what I will call the rigorist interpretation. The rigorist interpretation takes Cohen's argument to be that an individual's personal decision to market his or her labour aims directly to benefit the worst off.¹⁹ People have no discretion in their economic decisions to market their labour. Everyone must willingly accept the 'strains of commitment' involved in always aiming directly at improving the situation of the worst-off group under any distribution. The objection to such rigorism is that it is not only unreasonably demanding, but also economically inefficient. It reduces the aggregate resources available for distribution. Rawls, by contrast, claimed that his understanding of the difference principle factored economic efficiency into justice, a claim further defended in Williams 1995 and 1998, and Van Parijs 2002.

The second error in these early formulations of Cohen's critique was to ignore the fact that Rawls's views come as an internally ordered package, not a set of disconnected principles, a claim made by a succession of Cohen's critics such as Smith (1998), Estlund (1998), Daniels (2003), Van Parijs (2002), Tan (2004), and Baynes (2006).²⁰ A serious difficulty for the purist and rigorist readings (and possibly for Cohen's

¹⁷ For Cohen's interpretation, and rejection, of purism, see his 2008, pp. 53, 189–91, 369–70. When Cohen apparently endorses a high level of taxation as the practical effect of the adoption of his preferred egalitarian ethos and gives it a Carens-style rationale ('[to] seek to preserve the information function of a market while *extinguishing its motivational function*' (Cohen 2008, p. 122, n. 13, emphasis added)), that is flatly inconsistent with the remainder of Cohen's arguments and, I assume, simply a mistake. But see n. 22, below, for another outbreak of Carens-style purism. Cohen's use of redistributive taxation is also discussed at Cohen 2008, pp. 345–6.

¹⁸ For Cohen's acceptance of compensatory incentives see, *inter alia*, 2008, pp. 56, 73, 103ff.

¹⁹ For Cohen's rejection of this view see his 2008, p. 73.

²⁰ In his revised version of *A Theory of Justice* Rawls noted that 'I continue to think the difference principle important and would still make the case for it, taking for granted... an *institutional background that satisfies the two preceding principles*' (Rawls 1999, p. xiv, emphasis added).

own views, early and late) is that we have to accept that there is a cost to adopting basic liberties that are lexically prior to the difference principle. It makes little sense to begin a critique of Rawlsian egalitarianism with a lexically subordinated principle such as the difference principle.²¹

It also follows that there is a cost to freedom of occupational choice.²² Cohen's critics argue that he offers only half a conception of justice: he omits the lexically prior basic liberties, their fair value, and the securing of equality of opportunity. Those liberties sustain a regime of liberty from which one can derive freedom of occupational choice but, obviously, that regime is costly when viewed from the perspective of the second principle alone.²³ Viewed solely from that perspective, interpreted in a purist or rigorist way (such as by Carens) *any* prerogative potentially imposes a sub-maximizing cost. So we either have a system with the basic liberties and/or prerogatives or we do not. If we do not, then we have an unreasonably demanding system with solely the second principle, no lexically prior basic liberties, and no limits to the 'strains of commitment'. That is true even if the latter are imposed morally, via an ethos, not via a coercive legal structure in the way described by Andrew Williams (1998). We may also have purchased our rigorism at the cost of reducing the overall aggregate of resources to be distributed, a situation avoided in a Rawlsian scheme justified by no-one being any worse off than he or she need be.

The difficulty for Cohen was that he could see the problems with the purist and rigorist interpretations. He explicitly argued that he wanted to permit reasonable ethical incentives so as to avoid them. But this has led his critics to argue that the inevitable result is the internal collapse of Cohen's argument. A critique of this general form

²¹ It is also worthy of note that Rawls believed that you cannot even address the rationale for the difference principle without the context supplied by the two prior principles. In that sense any critique of Rawls that treats the difference principle as self-standing fails to engage with Rawls's argument. See Rawls 2001, p. 43, and p. 46, n. 10.

²² It is Cohen's task (2008, Ch. 5) to deny this and to show the compatibility of his arguments with freedom of occupational choice. As I have criticized Cohen for persisting with criticisms of Rawls based on contested readings of the latter's texts, I will simply confess that I cannot interpret this chapter in a way that is not wholly inconsistent with the rest of Cohen's position. His solution to the trilemma of 'freedom, Pareto and equality' (p. 195) seems to me to lead directly to moral purism on p. 194 and rigorism on p. 198. Perhaps not all of his arguments are of a piece and it would be unreasonable to expect them to be.

²³ Cohen responds to arguments of these kinds at Cohen 2008, pp. 383–6, in the form put to him by David Brink in personal correspondence.

has been put forward by Estlund (1998), Williams (1998), Daniels (2003), Tan (2004), and Baynes (2006). Their composite critique is based on two critical points: the first is that once Cohen concedes the existence of agent-centred prerogatives they can be used to ground special incentives. The second point is that in order to block this inference from permissible prerogatives to special incentives Cohen needs to implement his egalitarianism via invasive detailed information about individual motivation. In summary, his argument is both impracticable and ignores an important constraint of publicity on a defensible conception of justice. I will set out these arguments in more detail in the next section before assessing Cohen's final response to them.

2. Cohen's later arguments: Cohen versus 'Rawlslund'²⁴

The upshot of this dialectic is that Cohen's arguments, through time, focused on a central issue for those concerned with the feasibility of Rawlsian egalitarianism, namely, how one negotiates the demands of such egalitarianism with an independently plausible case for the existence of agent-centred prerogatives of the kind defended in Scheffler 1994. My view is that Cohen identified an important ambiguity in how we think about prerogatives. This is a departure from his own views: he took a different line in response to his critics, and I will describe this line below.

We are now in a position precisely to state the issue, described in this very insightful passage by Joshua Cohen:

When I say that [people] 'demand incentives', I do not mean that because they possess scarce talents and a range of employment options they are able to bargain for compensation above the reservation wage for which they would be willing to work: this is not demanding an incentive but taking what you can get. In the case of genuine incentive demands, people would genuinely prefer not to deploy their scarce, productive talents unless they are compensated at a level *that turns out to be higher than the average compensation of others*. Consider a doctor who is perfectly able to doctor for the median wage of (say) \$30,000, and would live at least as well as everyone else if she did, but really values writing literary fiction and is therefore unwilling to doctor for less than \$100,000. Contrast this case with the doctor with scarce surgical talents who would fully willingly use them for \$30,000 if she thought she could not get more for doctoring, but knows

²⁴ I intend 'Rawlslund' to follow coinages such as 'Kripkenstein'. In Cohen's use it picks out that philosopher who holds the view that Estlund believes that he (Estlund) read in Rawls.

that others are willing to pay more than that, and bargains to capture more than the reservation wage for which she would be entirely willing to work. The latter case seems very important in the world, but the former presents the philosophical problem that occupies me here. (J. Cohen 2001, p. 4, emphasis added)

Thus the issue is *not* the opportunity for those who are talented and effortful to drive the hardest bargain. ‘Genuine incentive demands’ involve the marketing of scarce talent at above average compensation, not the maximizing of compensation, and the grounding of such a demand on ethical reasons. The question is whether demands of *that* specific kind can be supported by appeal to a range of agent-centred prerogatives.

Several of Cohen’s critics have argued that re-formulating his critique takes him from one unpalatable option to another: his critique of incentives and his commitment to agent-centred prerogatives make him vulnerable to a slippery-slope argument. David Estlund (1998) argues that once Cohen concedes the existence of reasonably grounded ethical prerogatives, it is difficult to see where one draws the line between the acceptable and unacceptable prerogatives. Cohen, after all, permits a limited degree of ethically grounded ‘self-interest’ or self-regarding behaviour. If so, then how, Estlund asks, can he object to a person not working for more than average compensation to respect the moral demands of friends, partners, children, and siblings? Or to not working directly to secure the maximal position of the worst off because you owe a duty of reparation to some particular individual you have wronged? If these ethically grounded agent-centred prerogatives make incentive payments ethically unobjectionable where does one draw the line between such incentives and those that Cohen regards as morally tainted?

Estlund (1996) generalizes from this point to an architectonic feature of Rawls’s overall theory: given the vagueness of what counts as a permissible prerogative-based incentive, the difference principle has a derived status in Rawls’s egalitarianism. It is not a constitutionally protected fundamental principle. The complexity of the underlying motivation will lead to reasonable disagreement as to the permissibility of such prerogative-grounded incentives.²⁵ He argues, as does

²⁵ I am grateful to an anonymous referee for suggesting a different interpretation of why the difference principle is not a constitutional fundamental, namely Rawls’s endorsement of judicial review such that ‘courts ought not to be in a position of second-guessing legislative determinations of economic policy under the difference principle (which the courts would have the authority to do if the difference principle were written into the Constitution)’.

Van Parijs (2002), that it is Rawls's prior principles of securing the fair value of the basic liberties and equality of opportunity that are both reasonably demanding and yet very costly in terms of redistributed resources.²⁶ Cohen is looking in the wrong place when he objects to Rawls's egalitarianism: its primary focus is the lexically prior principles and the fair value proviso, not the difference principle. Even so, his critique misfires as we can reasonably predict that it will be unclear exactly which incentives are morally tainted and which are not given the complexity of the ethical prerogatives that underlie them.

Andrew Williams (1998) concurs, but adds the further consideration that the relevant class of choices, like detailed motivations in wage bargaining, are simply unfeasible from an informational point of view for the purposes of a theory of justice. Accurate and detailed information about such choices is difficult to obtain.²⁷ I would add to Williams's argument the further point that such information would be intrusive and likely to violate a liberal right to privacy. That is why such decisions have to fall outside the basic structure whereas rules implementing a conception of justice, as Williams points out, have to be public, in Rawls's sense, in virtue of being based on verifiable facts and commonly known.²⁸

The charge is that once Cohen has conceded some ethical prerogatives, this concession has no natural stopping point. That general charge seems unfair. Cohen does raise an interesting issue about how we limit the scope of prerogatives in general that offers him a way of avoiding this criticism. He can block the claim that conceding

citing Rawls 1993, pp. 236–7, n. 23, and pp. 229–30. For the deeper significance of this point see n. 55 below.

²⁶ Kok-Chor Tan (2004) further argues that, in the actual inequality in our societies which is so troubling to Cohen, it is a failure to secure equality of *opportunity* that leads to the kind of inequality-generating incentives that most concern Cohen.

²⁷ Cohen agrees up to a point; see Cohen 2008, pp. 218–19, 353. This forms part of his case for not making his ethos coercive. However, the aim of Cohen 2008, Ch. 8, is to argue that Williams's 'publicity requirement' is overstated and on a reasonable construal a Cohen-style ethos can meet it.

²⁸ I accept, as Chris Bertram's (1998) paper points out, that this means there are two arguments here, not one, both grounded on the idea of 'publicity'. One invokes action based on commonly known rules, the other invokes the political values of transparency and a right to privacy. Bertram's defence of Cohen is that publicity is a value to be traded off against the value of equality. This is a rejection of a value grounded in the basic liberties that Rawls would not trade off against the difference principle. Bertram considers, as Cohen does not, making the egalitarian ethos itself legally coercive, but a full consideration of that radical strategy goes beyond the ambit of this paper.

any prerogative is going to lead to an unrestricted rationale for special incentives. (Slippery-slope arguments are, after all, notoriously unreliable.) But before setting out that argument on Cohen's behalf, I will first consider the actual response that he presented. One of the most significant new developments in *Rescuing Justice and Equality* was a detailed response to this slippery-slope argument. I will explain both Cohen's (2008, pp. 387–94) response and why, I think, a better line of argument was open to him.

Cohen's final strategy was explicitly to adopt a hybrid ethical theory and consequently to acknowledge the role played by agent-centred prerogatives in generating inequalities. However, Cohen (2008, p. 10) argued that such prerogatives can constitute a rationale for inequality only if one rejects a Rawlsian view about the scope of justice. Prerogatives operate within the domain of that which Rawls treats as 'the personal'.²⁹ Rawls argued that the scope of distributive justice is the basic structure alone in a way that excludes personal decision. So, Cohen's argument continued, Rawls cannot endorse prerogative-based incentives in order to undermine his critique because of his (Rawls's) prior separation of the personal from the political.

Furthermore, Cohen argued that there was no inconsistency between his critique of incentives and endorsement of prerogatives. It is only *after* the incentives argument has convinced you to abandon Rawls's restrictions on the scope of justice that you can then address the new issue of how much inequality arises from prerogatives located within 'the personal'.³⁰ Cohen's view is that, for Rawls, these two putative rationales for inequality would have to be seen as operative within two separate domains that are insulated from each other. That is why Estlund's strategy cannot save Rawls's view of incentives whatever its independent plausibility. Cohen, by contrast, does not separate the two domains of the personal and the political, so he can evade the

²⁹ '[E]conomic choices ... start ... where his personal prerogative stops' (Cohen 2008, p. 10).

³⁰ On the issue of 'how much', Cohen's answer is 'not very much'. Cohen concedes to Estlund that a prerogative can act as the *basis* for an incentive. (So we have abandoned Rawls's putative separation of the personal and the political.) But Cohen adds that while this licenses an inequality to which he does not object it does not license much more inequality than the prerogative alone. Having more than one rationale for a departure from equality does not increase the degree of that departure by some fixed ratio. You can have two reasons for doing one thing and that does not translate into a departure from equality twice as extensive as a departure with only one rationale (Cohen 2008, pp. 391–2). I think that is a good argument, but one not wholly consistent with Cohen's immediately preceding discussion, in which he argues even the slightest departure from equality is in principle unacceptable and that issues of degree ought not arise (Cohen 2008, pp. 383–7).

slippery-slope argument levelled against him by Estlund and others. There can be no significant analogy between inequalities grounded on prerogatives and inequalities grounded on special incentives because conceding the former does not lead to the latter. They are simply two distinct sources of inequality; the former is justified, but does not justify very much inequality. The latter is not justified at all.

This looks like a powerful argument that disarms the slippery-slope objection. Why, then, do I think it is a strategically unwise response on Cohen's part? For two reasons. First, it begs the question, as it makes the argument from the limited scope of prerogatives entirely hostage to the success, or otherwise, of Cohen's *second* main argument from the limited scope of justice. That there is such a rigid demarcation between the personal and the political is precisely that which Cohen has to prove. I will later argue that this is by far his weaker argument.

Second, amongst the arguments Cohen proposes, there is a much better one than this second argument from the limited scope of justice. In his informal exposition of an argument based on prerogatives Cohen (2008, p. 13) quotes a passage from Henry Sidgwick. He believed that this passage was an anticipation of his objection to viewing social arrangements as just 'when and because it delivers the goods to everyone'. Sidgwick wrote of such a case:

The argument is, I think, decisive from a political point of view, as a defence of a social order that allows great inequalities in the distribution of wealth for consumption. [But] ... when we have decided that the toleration of luxury as a social fact is indispensable to the full development of human energy, the ethical question still remains for each individual, whether it is indispensable for him; whether, in order to get himself to do his duty, he requires to bribe himself by a larger share of consumable wealth than falls to the common lot. (Sidgwick 1998, pp. 108–9)

The reference in this passage to 'the toleration of luxury' suggests to me a more promising, and less question-begging, response to Estlund and Joshua Cohen. It runs as follows: those committed to the difference principle, who are also committed to paying incentives to those who would like to market their scarce talents at above the average market rate, must subsidize the cost of that free choice. They are also committed to subsidizing, at some cost to the overall level of resources, various agent-centred prerogatives with an ethical basis. But what I will call a 'limitation on prerogatives' argument claims that an agent's discretion in exercising this prerogative must itself be tempered. The disproportionate use of resources and/or prerogatives

should be placed on a sliding scale of acceptability at the level of individual, personal, choice.

This argument seems to be exemplified by passages in Cohen such as these:

Where the worst off are not too badly off, it looks more fanatical to assign absolute priority to their claims. But the stronger the case for ameliorating the situation of the badly off is, the more discreditable (if I am right) the incentive argument is on the lips of the rich. (Cohen 1995b, p. 37)

Or this:

My egalitarian rule says that no one should seek such compensation as makes him all things considered (*far*) *better off than anyone else*. (Cohen 2008, p. 370, emphasis added)

On this interpretation, a person's agent-centred prerogative gives him or her discretion to give undue weight to his or her own interests in the determination of outcomes and actions. The exercise of this prerogative ought to be tempered by the comparative distance between the better off and the worst off. The kind of justification afforded by the difference principle comes in degrees. Those who are much better off than the worst off have less and less of a case for incentivizing payment as the gap between the two parties widens. Thus, while the difference principle justifies the payment of incentives, the degree of justification that it offers is variable. In particular, the greater the relative gap between a worst-off person and a better-off person, the less justification the better-off person has in fully exercising his or her prerogative. A person's discretion ought to be tempered by a background commitment to an egalitarian ethos. Discretion can be more or less tempered in its *operation*.³¹

So a person who is talented and effortful is always permitted, but never required, to exercise his or her talents maximally productively without receiving a special incentive payment. Purism is never required and one can reasonably seek incentivization. But the exercise of that prerogative, which allows a person not to exercise their talents maximally productively and thereby to impose some cost to the collectivity and indirectly to the worst off, is governed by a background ethos. Exercise of it is more or less reasonable depending on how you are comparatively placed vis-à-vis the worst off. The prerogative is itself internally qualified. If the gap between a representative well-off

³¹ As I have noted, this argument is independent of the issue of the scope of justice, so I offer it on Cohen's behalf as a response to his honest admission that 'I do not know how to establish the truth about these prerogatives' (Cohen 2008, p. 392).

person and a representative badly off person is comparatively small, then the former has more of a reasonable claim to incentivizing payment than if the gap is comparatively large. As the gap widens so the claim that incentivizing payments are reasonable decreases.

Note that this argument that I am offering to Cohen is independent of the success, or failure, of the argument from the limited scope of justice. Cohen clearly presupposes that special incentives and agent-centred prerogatives are not isolated into separate spheres as he claims that they must be for Rawls. However, even if they were separated, this argument would still go through: the claim is that how we think about prerogatives is an appropriate analogy for how we *ought* to think about incentives. And that is true even if they operate in separate domains. According to this version of the argument, then, the representative well-off person should exercise her prerogative differently according to the difference between her position and that of the representative badly off person.³²

But while this does seem to pick out a distinctive argument on Cohen's behalf, I am not convinced that it is a defensible one. This is so even if it does highlight an interesting ambiguity in the idea of the limited scope of a prerogative. I have discussed this issue in more detail elsewhere, but, summarily put, a hybrid theorist can limit the scope of an agent's prerogative, but not its exercise (as argued in Thomas 2005). The view I have attributed to Cohen does precisely that. It involves giving a person a prerogative and then tempering its exercise in a way inimical, I would argue, to the very idea of a prerogative: discretion on a sliding scale is not discretion at all. Prerogatives, one might object, are of their very nature unfettered in their exercise even if not in their scope. If one does not have an absolute discretion, but a discretion marked off in degrees weighted by considerations of one's distance from the resources of the worst off, then the better off might reasonably protest that moral rigorism was back, but in a particularly subtle, second-order, form.

Cohen acknowledged the existence of prerogatives based on ethically self-regarding behaviour. I think it is misleading to call this 'self-interest' because self-regarding behaviour has to have a eudaimonistic basis. It has to be grounded in an ethical interest in the self that

³² More precisely, Cohen (2008, pp. 197–8) argues that the better off ought not to convert their prerogatives into *rights*: 'I do not question the right of the talented to decide... how much they will work at various rates of remuneration. I question whether it is defensible for them to exercise such a right... in a standardly self-seeking way, on the assumptions that motivate the entire Rawlsian enterprise.'

presupposes the legitimate interests of one's 'nearest and dearest'. A person may treat himself to buying a rare piece of Meissen porcelain at an auction after he has met his other responsibilities, but not if he has starved his children to save money to put towards the auction price. However, it *would* be objectionable if a legitimate interest in self became a form of self-interest that was potentially in conflict with other ethical considerations. The claim that there are such self-interested motivations concealed within the argument for ethically based prerogatives is the central claim of Cohen's second major argument: the argument from limitations on the scope of justice. I will consider that argument and some of the related arguments given in its support in the next section. All of the foregoing has shown its immense strategic importance in Cohen's arguments, both early and late.

3. The argument from the limited scope of justice

This second component of Cohen's critique of Rawls became the fulcrum of his whole position in the way that I have described above. Cohen believed that he could only defend himself from the 'slippery-slope' argument that conceding prerogatives leads to incentives if he proved that Rawls limited the scope of justice. This second argument seeks to prove that incentivization *is* morally suspect in those areas of social life where the demands of justice are merely presupposed. These are areas of personal life which are pursued outside the basic structure of society. Cohen clearly assumes that decisions to market one's labour are located within the personal. This aspect of Cohen's critique does not vary throughout the development of his ideas, early or late: Cohen claimed that Rawls's restricted focus on the basic structure establishes a dichotomy between his account of the scope of justice and Cohen's contrasting view. In the latter, sensitivity to the claims of distributive justice occurs both within the operation of the basic structure and the scope of the personal.

This argument can, in turn, be supported by two connected ideas: that of a moral division of labour and of a dichotomy between moral dualism and moral monism. These ideas did not originate with Cohen, and some who appeal to them — such as Nagel (1995) — have different aims from his. But they can play an important role in supporting Cohen's arguments. Cohen (1997, 2000, 2008) used carefully formulated versions of them himself. These two theses are used to

support Cohen's central claim that there are areas of social life where the demands of justice are interpreted in such a way as to permit morally and politically objectionable forms of inequalitarian attitudes. This is why, Cohen (1995a, 1995b, 1997, 2000) argues, the implementation of a conception of justice has essentially to be supplemented by an egalitarian ethos to correct for undesirable attitudes within the scope of the personal.

Cohen (2008, p. 1, n. 1) endorsed David Estlund's (1998) comment that Cohen was updating Marx's critique of liberalism as a veil for market-based and inherently exploitative social relations. (This interpretation of Cohen's critique of Rawls was independently put forward by Sensat (2003).) I have explored some of the difficulties involved in interpreting Cohen's critique of the difference principle in a way that discounts incentives entirely. However, those difficulties could be avoided if we did not examine an individual's ethical motivations but could find areas of social and political life where people were not motivated by considerations of justice at all. In those areas people are motivated by self-interest alone, in a way that discounts the demands of justice. (This argument construes 'interest' narrowly, restricting it to egoistic benefits to the individual.) If we can identify these areas, and argue that individual decisions to market one's labour occur within them, then Cohen's critique of special incentives would be back on track. But to do so, clearly, we need to prove that Rawls limited the scope of application of justice, and those ethical motivations that it permits, to certain areas of our collective life. That would create a social space in which the neo-Marxist critique can operate.

It has seemed to several philosophers, not just Cohen, that a promising route to finding areas in our life that fall outside the scope of justice in this way is to attack Rawls's claims about the subject matter of justice. Rawls *seems* to say that the principles of justice do not, in fact, apply to individuals and their market decisions, where the latter would, presumably, extend to decisions to market their own labour. The scope of the theory of justice concerns a certain class of social institutions that make up what Rawls calls the 'basic structure of society':

For us the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. (Rawls 1971, p. 7)

Taking his cue from these remarks, Liam Murphy (1998) has argued that they express a commitment to ‘moral dualism’ as opposed to ‘moral monism’. The moral monist believes, allegedly in opposition to Rawls, that, as Murphy (1998, p. 52) puts it, the very same normative principles that apply to ‘institutional design’ also apply to ‘the conduct of people’.³³

If Rawls can be convicted of a commitment to moral dualism, then Cohen can argue that Rawls’s restriction of distributive justice to the basic structure of society is arbitrary and unwarranted. By contrast, Cohen argued that justice extends to ‘the personal’, to relationships in families, for example, and to such personal decisions as the moral basis for demanding special incentives for the marketing of one’s labour. Cohen claims that those decisions, located outside the basic structure, are for Rawls beyond the scope of distributive justice. Cohen’s supplementary ethos extends justice to those areas of our collective life that Rawls excludes. That is the reason for preferring an ethos-based implementation of a conception of justice to an institutionally focused one.

Further support for interpreting Rawls as a moral dualist comes from a subsidiary thesis: the moral division of labour as developed in Nagel 1995 and Murphy 1998. It is Murphy who takes this idea from Nagel and uses it to support his dualist reading of Rawls in a way that indirectly supports Cohen’s argument. Introduced in *Equality and Partiality*, Nagel’s idea is grounded on his distinctive combination of a philosophical anthropology, which sees us as fundamentally internally divided, and his commitment to a hybrid ethical theory. Objective and impersonal demands set up a conflict within the person that is to some degree ameliorated by externalizing those demands in social institutions external to the self. Nagel aligns these demands with different metaphorical ‘parts’ of the self and sees us as genuinely divided between them. Nagel takes this ethical problem to have a correlative problem at the interface of morality and politics: he locates the demands of impartial justice in social institutions as a

³³ A terminological note: the moral monism versus moral dualism distinction concerns the scope of application of principles (do they apply to one thing, either individuals or institutions, or to two, individuals and institutions). Unfortunately this distinction puts to use terminology already used to characterize another issue, namely whether a moral theory takes there to be a single fundamental normative principle (monism) or several such principles (pluralism). These distinctions entirely cut across each other: thus, as I will set out below, Scheffler and Rawls are both moral monists in Murphy’s sense and normative pluralists in the second sense. There is no inconsistency here but the duplication of terminology is unfortunate.

measure convergent with, but not a replacement for, the objective part of ourselves. Through time, he hopes, the institutions themselves come to change our individual motivational structures to bring us into line with the demands of the impartial point of view. However, throughout the arguments in Nagel 1995 it is clear that Nagel sees the subjective point of view as occupying a different, non-institutionalized social space.

It takes some interpretative work to put this distinction to use in any critique of Rawls. But Murphy's basic idea is that we interpret Rawls as applying the same strategy of externalizing the demands of impartial justice in social institutions. These create an institutionalized context for individual decisions guided by 'subjective values'. But within that context those independent values are given free play and justice is wholly discounted.

Cohen's treatment of this whole range of issues in *Rescuing Justice and Equality* (2008) is subtle and insightful. He notes, first, that the idea of a moral division of labour has actually been deployed *against* his critique of Rawls:

Those who ... criticize my extension of the reach of distributive justice into personal choice might be disposed to cite ... the pregnant observation by Thomas Nagel that 'institutions' such as the state, 'unlike individuals, don't have their own lives to lead'. (Cohen 2008, p. 9, citing Nagel 1995, p. 59)

If one tries, instead, to put the thesis of a moral division of labour at the service of Cohen's critique, he notes that one has to be very careful about issues of scope. In particular, as argued in Cohen 2008 (pp. 9–11), one ought not to confuse the relation between the impersonal and the personal with the relation between the demands of distributive justice and the personal. Nagel's distinction, and by implication Murphy's, focuses on the former. But it is undeniable that the entire normative theory in Rawls 1971/1999, modelled as it is from the impartial perspective, encompasses the personal alongside the impersonal. For example, Cohen (2008, p. 10) points out that it includes natural duties to support just institutions and that those duties are properties of individuals. That broad normative theory is not Cohen's target, but rather a much narrower Rawlsian thesis about *the scope of distributive justice*.³⁴ Cohen believes it is the latter Rawlsian

³⁴ Cohen (2008, p. 10) argues as follows: 'We can, in fact, distinguish three possible views, with respect to who must see to distributive justice in particular, that are consistent with the Nagelian premises of the argument, each of which contradicts the view, often misattributed to

view that clearly demarcates the domain of Rawlsian justice from the domain of the personal.

That distinction seems to me very helpful, but it does not get Cohen's most fundamental argument about the scope of justice off the ground. I will argue that, from a Rawlsian perspective, any putative contrast between moral monism and moral dualism is a misleading and tendentious account of Rawls's intentions. Appealing to the idea of a moral division of labour does nothing to redeem this view however it is interpreted.

4. The rejection of moral dualism³⁵

Both Murphy and Cohen, in different ways, imply that Rawls's emphasis on the direct application of the principles of justice to the basic structure alone permits areas of our collective life where we can pursue our personal interests free from the demands of justice. Murphy seems to imply that Rawls aimed to reduce the demandingness of the requirement of justice; Cohen argues that this arose inadvertently. I share Scheffler's (2005) scepticism as to whether either claim can be sustained on either interpretative or philosophical grounds. It seems to me that Rawls can be clearly seen to hold a morally monistic view when his views are fully articulated. In the attempt to characterize him as a moral dualist various aspects of his views are overlooked or misinterpreted.

Scheffler has already pointed to various errors in Murphy's interpretation of Rawls's dualism, and I will not repeat in full his counter-arguments on Rawls's behalf. He points out that the passages cited by Murphy do not support the dualism/monism distinction, but rather contrast the generality of institutionally implemented rules and the

me, that the individual must be as dedicated to such justice as the state is. There is, first, the Rawlsian view that distributive justice is the task for the state alone. A second view would say that the individual must show some regard to what the state is fully dedicated to in this domain. Finally, there is my own view, which is that both the state, with no life of its own, and the individual, who is indeed thus endowed, must, in appropriately different fashions, show regard in economic matters both to impersonal justice and to the legitimate demands of the individual.'

³⁵ The following section of this paper has been completely revised to acknowledge the arguments proposed in Scheffler 2005, which seems to have been composed at the same time as an earlier version of the current paper, and many of the arguments overlap. I have simply cut out all of those arguments that Scheffler has already put forward and focused on those of mine that remain; but it also seems to me, as I shall explain, that there is a serious lacuna in Scheffler's response to Cohen that has to be addressed.

particularity of rules applied by individuals in particular circumstances, as is also pointed out in Williams 1998. The strategy of applying rules to individuals, via the implementation of those rules in social institutions, is not because the social institutions are one's exclusive focus. Pursuing this strategy is not at the expense of an appropriate concern for individuals. The pursuit of this strategy is motivated primarily because it guarantees generality in rules. Following on from that, this strategy adds certain functional aspects to those rules, such as being public and reflexive in the sense that they guide social interaction by being commonly known by all participants. But these functional aspects of rules do not change those to whom they ultimately apply — individual people. What they do influence is one's strategy of implementation. If one elects to go down the route of applying principles of justice to individuals via the social structures in which they lead significant parts of their lives, then there are various ways in which one can set up the relation between institutions and individual behaviour. But institutional implementation is a *way* of influencing individual behaviour: it is a strategy that at least includes individuals as well as the institutions of which they are a part. To this Scheffler adds the stronger argument that in the case of what Rawls calls the 'background regulation' of justice, an institutional structure is appealed to by Rawls to carry out a function that *could not* be carried out by individuals, namely, to make ongoing compensations for injustice. (I will return to the importance of this crucial argument below.)

To this basic argument Scheffler (2005) adds another: that Rawls is a pluralist who believes that different normative considerations apply to different areas of our individual and social lives and that he offers (what I have called) 'functional' arguments as to why the direct application of principles of justice should be to the basic structure. On this dual basis Scheffler then makes the excellent point that Rawls's functional arguments do not imply that these principles lack implications for the conduct of individuals. Nor is it plausible on exegetical or philosophical grounds to see Rawls as either having inadvertently licensed purely egoistic behaviour in the marketing of one's labour or to be deliberately attempting to reduce the demandingness of justice.

I agree with Scheffler that it is highly misleading to present Rawls's position as a choice between implementing principles of justice at the level of social structures (institutional design) or at the level of individuals. The choice more accurately described is, rather, between applying principles of justice to individuals (and not to social

structures) or to individuals *via* social structures.³⁶ Rawls is, it seems to me, clearly doing the latter. Electing, for the various reasons Rawls gives, to apply his conception of justice to the basic structure of society is not to avoid applying it to the decisions of each individual. It is to apply it to the decisions of each individual in a certain way. Whereas, contrariwise, it would have made sense to apply principles of justice to individuals alone but never to those social structures of which individuals form an incomplete part. (This is precisely the asymmetry I want to stress.) We can imagine, with some effort, a ‘libertarian Rawls’ who elected to apply his conception of justice to citizens solely via an ethos of justice and not via the basic structure, an ethos analogous, perhaps, to an altruistic ethos of philanthropy. I am very sympathetic, then, to Scheffler’s rebuttal of the claim that Rawls is a moral dualist. But while these arguments seem to me very plausible, as they stand they are damagingly incomplete for two reasons.

The first reason is this: for all that I have said so far, Cohen can respond that both Scheffler and I *may* have conflated Rawls’s broad normative theory with his more restricted account of distributive justice as expressed by the difference principle.³⁷ As I have noted, Cohen fully acknowledges that Rawls complements his theory of distributive justice as applied to the basic structure with further demands placed on individuals. Cohen cautions against confusing the impersonal/personal distinction with his distinction between the scope of justice and the scope of the personal. So Cohen could have placed his own interpretation on the claim that Rawls’s principles have, as I put it, ‘implications for the conduct of individuals’, such that his critique of Rawls remained unscathed. It is not enough, then, to say that Rawls also has principles for individuals. Scheffler and I have to prove that Rawls’s conception of distributive justice applies directly within the domain of the personal to individual decisions to market one’s labour

³⁶ Interestingly, the position closest to my own in the literature is that of Chris Bertram (1998) who takes himself to be *defending* Cohen; Bertram also wants to dissolve the ‘sharp line between structure and ethos’ but for the opposite reason to my own. Bertram wrote, ‘Sometimes forms of behaviour are taken by Rawls as consequences of social structure, sometimes as more or less given. I believe that it makes more sense to treat the two together as interacting’ (Bertram 1998, p. 20; and see also more generally pp. 16–20, the section entitled ‘Ethos and Structure’. Dissolving the ethos/structure distinction can cut both ways: that is why I add my argument about the scope of justice as extending to decisions to market one’s labour (below).

³⁷ I think I will show that Scheffler (2006) does not, in fact, make that mistake; see for example p. 127.

and that it does so via the impact of the basic structure on personal choice.

The second reason that more needs to be said is this. In the passages that Scheffler cites from Rawls in support of the feasibility argument — or 'functional argument' — that gives a rationale for limiting the direct application of the principles of justice, the target is libertarianism. It is Rawls's formulation of the familiar point that a libertarian account is self-undermining over time:

The role of the institutions that belong to the basic structure is to secure just background conditions against which the actions of individuals and associations take place. Unless this structure is appropriately regulated and adjusted, an initially just social process will cease to be just, however fair and free particular transactions may look when viewed by themselves.³⁸ (Rawls 1993, p. 266)

In other words, it is simply not feasible for individuals directly to apply considerations of justice to each and every transaction that they engage in that may have consequences for economic justice. The appropriate response is to locate compensatory mechanisms elsewhere, in the basic structure, to redress these injustices at the level of a market as a whole.

The problem is that in his emphasis on Rawls's normative pluralism, Scheffler goes to some lengths to emphasize how different normative principles apply to different areas of our life. Combine that with the functional arguments for how one may feasibly apply the conception of justice as fairness to individual market transactions and a loophole emerges in Scheffler's arguments that Cohen could have exploited.

It would be departing entirely from a Rawlsian view to take his conception of justice to apply to all areas of our personal and social life. Rawls (1971, pp. 54–5) denies that and for good reason. But the key area for locating a dispute between Rawls and Cohen is in the marketing of one's labour, hence, contractual relations between individuals (even if one party to the transaction is a legal person, such as a corporation). It looks as if Rawls precisely does *not* extend justice, as applied to the basic structure, to individual market transactions in the passage quoted. In the distinction I have pointed out in Rawls's critique of libertarianism, we are to contrast individual market transactions with a market as a whole, where the latter introduces compensatory mechanisms to eliminate emergent injustices. However, it is

³⁸ Cited also by Scheffler (2005, pp. 238–9).

clear that decisions to market one's labour are far more similar to individual economic transactions than they are to global and systemic features of a whole market and the economic system in which it is embedded. So it does look as if decisions to market one's labour do not simply fall outside the direct application of the principles of justice as fairness; they fall outside their normative scope of application, too. Nothing that Scheffler says can rule this out, given his emphasis on Rawls's pluralism, but it seems to me to give Cohen all that he needs to sustain his critique of Rawls.³⁹ Scheffler's arguments, then, get us no more than half way to an acceptable defence of Rawls.

5. Social relations and market relations: a holistic view

Scheffler's argument is very convincing, but seriously incomplete. A further argument is needed to rebut Cohen's critique. I have offered, on functional grounds, a principled reason why the indirect application of principles of justice to individual conduct by means of a basic structure is preferable to its direct application to such conduct. But, in addition, it also needs to be demonstrated that a restricted scope of *implementation* for principles of justice is not a restricted scope in their *application*. Justice as fairness does not apply universally, and if Scheffler's pluralism is solely at the service of that point I agree with him. But it must apply *at least as far* as individual market transactions in the restricted sense of decisions to market one's labour.⁴⁰ I think a view of this kind is both a legitimate reading of Rawls and independently plausible.

There are two ways of understanding Rawls's remarks about the unfeasibility of directly regulating individual conduct. On the first reading, individual market transactions can simply discount justice, as they take place in a context with mechanisms that compensate

³⁹ Cohen formulates his view this way: 'There is not, then... as there is in Rawlsian perception, an economic structure that is organized to achieve a certain form of justice and, on the other, a set of individual economic choices that need show no respect for that justice' (Cohen 2008, p. 2, emphasis added).

⁴⁰ I say 'at least as far' as, unlike Cohen, I do not need a principled boundary to either 'the personal' or 'the political'. Notably, Kok-Chor Tan, who is one of Cohen's critics, also needs to set such a boundary (Tan 2004, p. 336). Tan tries to insulate his conception of the personal from encroachment by Cohen; my alternative tack is to leave the boundary vague but argue that economic decisions to market one's labour fall within the scope of Rawlsian distributive justice. However, I do have to prove that this interpretation of the scope of distributive justice differs in principle from the merely 'indirect' regulation of associations by the basic structure described in Rawls 2001, p. 10.

elsewhere for emerging inequalities. On the second reading, individual market transactions, by presupposing justice, are themselves just because their effects are made just. Once again, Cohen has identified an important ambiguity in Rawls's position and evidently wants to argue for the first interpretation. On this interpretation of Rawls, individual market decisions are permissibly unjust if there are compensatory mechanisms elsewhere in the system (of which those decisions form a part) that make the system as a whole just. Individual decisions to market one's labour have to fall under this general description. Therefore, to bring them within the scope of justice we need to appeal to a supplementary ethos that applies directly to this class of decisions by going through individual motivation, within 'the personal' as Cohen conceives of it.

This distinction allows one to make sense of Cohen's claim that Rawls's undermining of his own view was inadvertent: by electing to implement egalitarianism by the indirect strategy of tolerating economic behaviour that is *prima facie* unjust and then making systemic compensatory adjustments, Rawls overlooked the fact that he was thereby permitting anti-social attitudes that run the risk of spreading from those local areas of social life in which they are tolerated to corrode the bonds of social solidarity as a whole. But, with those bonds corrupted, the very commitment to justice that underpins this strategy of implementation is undermined.⁴¹

I would argue that this ignores a better interpretative possibility more consonant with how Rawls's egalitarianism is actually implemented. We can, with the cold eye of the economist or sociologist, try to isolate a market functionally as a set of transactions with its own autonomous logic of operation, that which Habermas (1981) calls a 'blind steering mechanism' that has a level of description that does not represent it as sensitive to reasons. However, what we are really interested in is the bearing of economic relations on social relations. The nerve of Cohen's critique is precisely that anti-social attitudes permitted in market transactions are a threat to collective solidarity.

⁴¹ This issue of inadvertence is important, because Cohen (2008, pp. 73–5) cites many passages from Rawls suggesting that the motivation of justice directly impacts the personal motivations of the citizens of a well-ordered society. This leads Cohen to pose the rhetorical question 'How could they act like maximizing incentive seekers if in "*their daily lives*" they act "from" a principle that directs primary concern for the badly off?' (Cohen 2008, p. 75, see also p. 131). But Cohen does not ask if there is a better interpretation of Rawls's account of the scope of justice that drops the assumption that the better off are, indeed, 'maximizing incentive seekers', thereby making his rhetorical question redundant.

But Rawls's point is that market transactions can be placed in a suitable context of political arrangements so that we can make them fair in the *only* way that it is possible to do so, namely, by making their effects fair. Given the scale and complexity of economic transactions in a mass society an individual cannot implement justice by regulating her individual decisions and transactions, conceived of atomistically, that is, independent of descriptions of those transactions made available by their context.

We can, at the level of theory (and allowing for a great deal of indeterminacy and vagueness) distinguish market relations between individuals from social relations as a whole. But Rawls treats the former in an implicitly holistic manner. He assumes that market transactions whose effects are rigged to be made fair presuppose justice rather than discount it. On Cohen's rival interpretation of Rawls, discounting justice involves setting up a context in which its operations are suspended at the level of individual transactions. Within that context one is permitted not simply to have motivations that do not directly refer to justice (but presuppose it), but in addition motivations that are contrary to justice. An egoistic notion of self-interest is introduced which precisely contrasts with other-regarding motivations. It is then argued that market transactions as a whole, and decisions to market one's labour in particular, are self-interested decisions in a sense that discounts justice.

But this argument is unsuccessful, because to presuppose justice in the way that Rawls does is not to discount it. To participate in a system in which individual decisions are collectively balanced by built-in systemic mechanisms that make the upshot of those decisions fair is *what acknowledging the demands of justice amounts to in this case*. (And it is worth re-stating the feasibility argument that this is the only way in which they can be made fair.) To focus solely on individual decisions without the commitment, on the part of that same individual, to participate in an institutional design that incorporates the presupposed demands of justice is to miss the point.⁴² To be self-interested in a system with built-in correctives for justice and to be self-interested in a system without is not the same thing. It seems to me, in fact, to be an equivocation on the term 'self-interest'. The former is to return to the embedding of what I have called

⁴² And that commitment goes beyond the natural duty to support just institutions although it is clearly not incompatible with it. (It would, indeed, be odd to have the commitment without the prior natural duty.)

eudaimonism, an ethically legitimate interest in one's own life going well, within an application of the principles of justice to the background basic structure; the latter is the self-interest embedded in exploitative market relations that Marx claimed liberalism sought vainly to legitimize. Cohen aims to resurrect Marx's critique of liberal egalitarianism. However, attempting to do so by contesting Rawls's account of the subject matter of justice does not seem to me accurate.

The interpretation of Rawls that I am presenting here does not aim to abandon his pluralism and to extend his two principles into every area of social life. However, I do aim to explain how these principles extend at least as far as individual decisions to market one's labour.⁴³ The constitutive goods of sport are a well-worn but appropriate analogy for this second interpretation of Rawls's strategy, for example, as discussed in Nagel 1970 (pp. 131–2). There are many areas of social life that you do not have to enter, but if you commit yourself to them, you are subject to inescapable normative demands. (It is in that sense that Foot (1972) argued that etiquette is as 'binding' as morality.) If you commit yourself to playing a competitive sport, you commit yourself to certain binding requirements that set up a context within which you are permitted to play to win in an 'egoistic' way. But the competitive, self-interested, reasons of a boxer do not mean that he or she can behave in an utterly unconstrained way—for example that he or she ought to put an undetectable lethal poison on his or her boxing gloves. The point of the analogy is that presupposing norms is not to discount them. Actions that occur within their scope ought to be interpreted in the light of these presupposed norms: a particular action in a boxing match might look like a common assault in a different context, but it is not in its own rule-governed context. That which Cohen *interprets* as naked egoism in economic behaviour takes on a very different interpretation if it is permitted by a set of

⁴³ I have interpreted the nerve of Cohen's argument as the 'overspill' effect of exploitative market relations on social relations as a whole. To block that effect all one needs is the pervasive effect of justice, in a form compatible with Rawls's normative pluralism, not a universal effect of justice. Baynes (2006) offers an argument along similar lines, contrasting a notion of justice as 'all constraining' with justice as 'all controlling' (pp. 190–1). However, Baynes argues only that, in his expanded 'basic structure' response to Cohen, Rawls's institutional focus is 'likely to shape positively the intentions of those acting within them' (Baynes 2006, p. 191, emphasis added). Cohen (2008) formulates a response to Joshua Cohen that I think (G. A.) Cohen would have extended to Baynes's view: 'The question before us is not the sociological one of whether the state can influence the ethos, and, if so, by how much' (2008, p. 380).

norms that the context of a Rawlsian market presupposes, but does not discount.

It seems to me very implausible to interpret Rawls's view as exemplifying a structure in which justice is restricted to setting up a context within which naked egoism is permitted. Rawls (1999, pp. 49–50, and esp. p. 173) discusses a view of this general kind in his remarks on Bentham's idea of a wholly artificial identification of interests. However, he notes this kind of view in order to contrast it with his own. Cohen interprets him in a way explicitly contrary to his intentions, even comparing him at one point to another historical exemplar, Mandeville's 'Fable of the Bees':

It is as though both the Rawls of 1958 and the Rawls of 1971 agree with Bernard Mandeville (and with Adam Smith) that what Mandeville called 'private vices' make for what he called 'public benefits'... human selfishness can be made to benefit everyone, but that the Rawls of 1971 is unwilling to acknowledge that it is indeed vices that are in question. I agree with Mandeville, and against *A Theory of Justice*, that that's what they are. (Cohen 2008, p. 179)

That does seem to me simply an interpretative mistake. The reasons for not interpreting Rawls this way are manifold but, at the very least, one can point to the inconsistency between this interpretation and Rawls's concluding discussions in *Justice as Fairness* (2001, pp. 52–5) of the two kinds of principle involved in an 'Ideal Social Process View'.

Rawls there describes his objections to those libertarian views that take their cue from a contrasting Lockean 'ideal historical process view'. Views of this general kind set up fair initial conditions, and rules for fair individual contracts, and assume that all outcomes over the long run are thereby made fair. Rawls (2001, p. 53) argues that this view neglects the background conditions to individual agreements that may seem fair, but which are actually undermined by concentrations of wealth that are 'likely' to undermine 'fair equality of opportunity, the fair value of the political liberties, and so on'. That is why, in order to 'preserve these conditions', we appeal to 'pure procedural background justice' (2001, p. 53). This characterizes an 'Ideal Social Process View' of which Rawls claims that justice as fairness is one version:

Justice as fairness focuses first on the basic structure and on the regulations required to maintain background justice over time for all persons equally... we rely on an institutional division of labor between principles required to preserve background justice and *principles that apply directly to particular transactions between individuals and associations*. Once this division of labor is set up, individuals and associations are then left free to

advance their (permissible) ends within the framework of the basic structure, secure in the knowledge that elsewhere in the social system the regulations necessary to preserve background justice are in force. (Rawls 2001, p. 54, emphasis added)

I will describe the particular implementation of an ideal social process view that Rawls prefers in some detail in the remainder of this paper.

However, I also want to note the further implausibility of Cohen's interpretation of Rawls as a latter-day Mandeville. This view is also inconsistent with Rawls's moral psychology, particularly his account of the sense of justice as involving a highest-order desire to regulate one's action in accordance with the principles of justice.⁴⁴ Furthermore, if this view is incompatible with Rawls's moral psychology the impact of that fact ramifies into Rawls's account of the congruence within the individual between her conception of the good and the sense of justice and, more seriously, into the stability of a conception of justice in a well-ordered society. Rawlsian agents simply will not engage with each other on the terms that Cohen offers to them. Those terms are incompatible with their highest-order regulative desires and corrosive of a well-ordered society and its bonds of civic friendship and fraternity.

The best way to develop my counterargument to Cohen is to examine the details of the way in which Rawls suggests his egalitarianism might be implemented in a just political economy. This is not simply independently interesting: it is a concrete demonstration of how Rawls intends to make the market fair by rigging the context in which it operates. This serves the overall end of preventing an aspect of our collective life — namely, market relations — damaging the overall fabric of social relations in the way that Cohen fears Rawls inadvertently allowed. This is a concrete application of the idea of an 'ideal social process view' in the specific guise of a conception of justice as fairness.

6. Meade, Rawls, and a property-owning democracy

Social relations between individuals can be pervasively fair if we so structure our social institutions that the market, which is not of its nature sensitive to fairness, is embedded in wider structures that *make* its outcomes fair. Rawls (1971, pp. 85 f., 274, 277, 279) presents us with

⁴⁴ I am grateful to Tom Baldwin and an anonymous referee for suggesting I highlight this point. For an insightful discussion of Rawls's moral psychology as a whole see Baldwin 2008.

a clear example of how he sees his strategy of implementation working in precisely such a way. 'Officially', he simply suggests two schematic sets of political and economic arrangements as implementations of justice as fairness. He is committed to the market and to the institution of private property, but he is officially agnostic over whether the means of production ought to be privately or socially owned. Furthermore, as Krouse and MacPherson (1988, p. 80) point out, Rawls is *not* committed to capitalism if a capitalist society is understood as one divided into a property-owning class and a property-less labouring class.⁴⁵ However, in his account of a property-owning democracy, adapted from the revisionary egalitarianism of James Meade (1993), there is a clear example of how Rawls structures institutions around the market to make its effects fair.

This is an aspect of Rawls's views that received increasing prominence as he revised the presentation of his ideas, first for the German translation of *A Theory of Justice* and, later, for the compressed exposition of his ideas in *Justice as Fairness*.⁴⁶ The latter work makes it clear that a welfare-state society of the kind with which we are most familiar is simply unjust by Rawls's lights: the two just political economies that Rawls countenances are a form of democratic socialism or a property-owning democracy. As Wolff has argued (1977, p. 195), Cohen's critique (2008, p. 179) is in a tradition that sees Rawls as permitting market inequalities that generate income inequalities which then require redress via the redistributive taxation policies of a welfare state.⁴⁷

However, that was never Rawls's view. Rawls consistently argued (1971, p. 272; see also Krouse and MacPherson 1988, p. 81) that markets

⁴⁵ Cohen (2008, p. 163) claims, on the contrary, that the difference principle 'allows capitalism'. As an interpretation of Rawls's own views that claim seems incorrect in the light of his later work.

⁴⁶ In Rawls 1999 he noted that 'Another revision I would now make is to distinguish more sharply the idea of a property-owning democracy ... from the idea of a welfare state' (p. xiv). In that book Rawls discusses the contrast at pp. xiv–xvi. In the later *Justice as Fairness* it is discussed extensively (Rawls 2001, pp. 135–40, 158–62). The incompatibility between both welfare state capitalism and laissez-faire capitalism and Rawlsian justice is established there at p. 137. Generally, the trend is that the more concisely Rawls expresses his ideas, the more prominence he assigns to expounding the idea of a property-owning democracy.

⁴⁷ One of the many ironies of Cohen's putative critique of Rawls is that the only practical policy effect that Cohen explicitly identifies on the part of his egalitarian ethos is a very high taxation rate. Cohen (2008, p. 70, n. 41; see also pp. 122–3) states that the 'more important relevant effect [of an egalitarian ethos] is to induce agents to accept very high rates of taxation' (emphasis added). This highlights how far removed Cohen's egalitarian ideal is from Rawls's ideal of a property-owning democracy.

operate in a context of state intervention to supply public goods and counter negative externalities, but also to impose the background conditions to market transactions that make their outcomes fair. In some ways markets do this extrinsically, via predictable but unintended side effects. These include the decentralization of economic power to protect the values of free association and free equality of opportunity and the way in which competitive markets protect freedom of occupational choice by giving rise to earnings differentials. But markets can only implement 'pure procedural justice' — in which justice can be 'left to take care of itself' — with the right background context, hence the need to implement 'pure adjusted procedural justice' (Rawls 1971, p. 87; Krouse and MacPherson 1988, pp. 82 ff.).⁴⁸ These adjustments enforce the fair value of political liberty, then equality of opportunity, then the operation of the difference principle.

In Rawls and Meade's ideal system, private ownership takes the form of widely dispersed holdings of land and capital, removing the capitalist distinction between a property-holding class and an exploited labouring class. No sector dominates the control of resources. There are strongly egalitarian inheritance laws, incentives for small savers, substantial investment in the education system, and all citizens are endowed with income from property and the opportunity to invest. The overall result works to increase the supply of skilled labour, where each person is less vulnerable to exploitation in the labour market, with the overall effect that residual incentives are transformed into compensatory incentives.

It is this latter point, emphasized by Rawls, that was developed by Paul Smith (1998, p. 221) and applied to Cohen's critique: those individual decisions to market one's labour, which Cohen believes fall outside the scope of justice, do in fact take place in a context where they have been *made fair* by equalizing the bargaining power of the parties. I concede to Cohen that the status of the difference principle makes its implementation the proper subject matter of democratic politics as opposed to a constitutional fundamental. However, as Scheffler (2006) points out, it is unclear why Cohen is so reluctant

⁴⁸ This bears directly on Cohen's (2008, p. 220) contrast between prerogative-based inequality and incentive-based inequality, as he understands the latter solely in terms of 'pure procedural justice'. The full passage reads '[The personal prerogative] falls short of the absolute moral privilege conferred on personal economic decision by the Rawlsian view that market results, in a difference principle constrained market, bear the stamp of justice as a matter of *pure procedural justice*' (emphasis added). Cohen simply misses the point that the transition to adjusted procedural justice works to erode the incentives to which he objects.

to coercively impose his *own* preferred egalitarian ethos. So he has no grounds for objecting to this aspect of Rawls's views.

As Smith argues, the key issue is that with the supply of labour tending towards a more egalitarian distribution, Rawls has only a derivative reliance on the mechanisms of progressive taxation or a guaranteed basic income.⁴⁹ Any residual non-compensatory incentives (perhaps reflecting the natural lottery of the distribution of talents in a given society) can only effectively be flattened out by equalizing pre-tax incomes. That is where, Smith claims, Rawls's interest in Meade's 'property-owning democracy' comes into play:

The idea that the equalization of property ownership would transform the labour market, by equalizing bargaining power and eliminating the economic coercion to accept drudge jobs at low pay and thus forcing employers to make all jobs attractive, all things considered, is crucial to Rawls's idea that, in a competitive labour market located in a just basic structure, income inequalities would tend just to compensate the costs of different jobs, that is, tend to equality, all things considered. (Smith 1998, p. 225)

Rawls follows Meade in rejecting welfare-state capitalism by equalizing property ownership prior to the corrective effects of progressive taxation or a guaranteed income. The consequences of this for Cohen's vestigial critique of Rawls are profound:

Economic equalization is more likely and reliably to be effected, as Rawls thinks, by institutions and policies that equalize bargaining power than by an egalitarian ethos restraining the exercise of unequal bargaining power (and egalitarian institutions and their distributional results are what, if anything, could produce an egalitarian ethos. (Smith 1998, p. 227)⁵⁰

My aim here is not to recapitulate Smith's arguments, but to bring out the relation between them and Cohen's view about the limited scope of justice. I noted above a loophole in Scheffler's rebuttal of Cohen's critique. It is now clear that this loophole can be closed. Not only does Rawls *not* envisage individual decisions to market one's labour as falling outside the scope of justice, he goes to great lengths

⁴⁹ Cohen's (2008, pp. 202–3) misrepresentation of Rawls as a high-taxing welfare-state theorist vitiates his '*tu quoque*' argument that Rawls's views enslave the talented only as much as Cohen's view does. For an early rejection of this 'Left' critique of Rawls see the prescient arguments of DiQuattro 1983.

⁵⁰ Smith goes on to add, 'There is a certain irony in the fact that it is the liberal Rawls who conceives economic equalization effected by a structure of institutions to equalize economic bargaining power and it is the Marxist Cohen who conceives equalization effected by morality restraining the exercise of unequal power' (1998, p. 227).

to make it clear that such decisions are fair precisely because they take place in a context that is pervasively structured by fairness so as to make their effects fair. Cohen has overlooked the holistic connection between an action in a context structured by a background presupposition of justice and how that action is described. Social relations in a market do not fall outside the scope of justice if its demands have been built into how that market functions and constrains the permissible outcomes of market transactions.

How might Cohen have responded to my argument? In this section I have developed two responses to Cohen's limited scope of justice argument: the first argument is that Cohen has misdescribed Rawls's view of economic behaviour as permissibly egoistic within a just structure and the second is that Rawls believed that the only feasible way to make the marketing of labour fair was to rig the effects of the labour market. Now, it seems to me that Rawls believed that the particular way in which he implemented the second policy, namely, via a property-owning democracy, would tend to eliminate special incentives. Cohen's objection to this kind of argument focuses on the *tendency* for such incentives to be eliminated. He quotes and endorses Krouse and MacPherson's objection (Rawls 1971/1998, p. 305/269; Krouse and MacPherson 1988, p. 93) that Rawls does not prove that 'in equilibrium the relative attractiveness of jobs will be equal, all things considered' because Rawls believes that natural endowments of talent will vary.

I have four points to make in response to this rejoinder: first, the aim of a Rawlsian view is to redress, not eliminate, inequality. (Cohen can object to that view if he chooses, but he cannot represent that as a criticism of the internal consistency of Rawls's position.) Second, all three of Krouse, MacPherson, and Cohen (2008, pp. 386–7) (unlike Paul Smith) focus solely on Rawls's treatment of equality of opportunity and neglect the important impact of the equalization of capital holdings that reduces dependence on income from labour. Third, Rawls's reference to the attractiveness of jobs concerns the attractiveness of the *job*, not its attractiveness to a particular individual given the labour burden imposed on him or her by individual talents. Rawls's justifications are always systemic and put in terms of representative classes of people, not in terms of justifications owed to individuals. Finally, even if Cohen is right about the persistence of incentives in a property-owning democracy, he is still wrong about the limited scope of Rawlsian justice. His dispute with Rawls now becomes, as I have argued elsewhere (in Thomas forthcoming) an

internecine dispute about policy. Which form of political economy will bring about a desirable normative goal that he and Rawls share?

7. Rawls's ethos of justice

I have presented the above argument as a critique of Cohen. Now that the argument is complete, however, the deep point of agreement between my own view, which I take to represent a reasonable interpretation of Rawls, and Cohen's ought to be apparent. A Rawlsian society will seem highly demanding to its citizens and these demands will take the form of an egalitarian ethos. A Rawlsian egalitarianism will engage in what Van Parijs (2002, p. 230) calls 'motivation conscious institutional engineering', in the sense that it is implemented in the distinctive form of an institutional framework in which individual conduct is shaped on the understanding that 'the motivation guiding individual conduct cannot be assumed to be given exogenously, independently of institutions'.⁵¹ Once the relationship between institutions and individuals is freed from ambiguity and misunderstanding, one can see institutional implementation as precisely the means by which a Rawlsian society inculcates social solidarity and an egalitarian ethos.

With this context in place, we can revisit Cohen's first argument for the limited scope of prerogatives and find a parallel argument in Rawls. But Rawls's argument is set in a very different context:⁵²

Yet sometimes the circumstances evoking envy are so compelling that given human beings as they are, no one can reasonably be asked to overcome his rancorous feelings. A person's lesser position as measured by

⁵¹ The unlovely phrase 'Motivation Conscious Institutional Engineering' is the title of Section E of Van Parijs's contribution to Freeman's *Cambridge Companion to Rawls* (2002), pp. 230 ff. Van Parijs there tries to establish that 'the difference principle ... can remain exclusively focused on institutions but must bear in mind that institutions can be a powerful influence on individual motivation'.

⁵² Two caveats: first, I have noted a degree of slippage as to whether Cohen criticizes the difference principle in its Rawlsian formulation or a non-Rawlsian formulation in which we formulate a dialogue between a rich and a poor person where 'rich' and 'poor' represent absolute and not relative levels of well-being. Cohen defended his rhetorical strategy as follows: 'the incentives argument is quite general. It should therefore apply no matter how badly off the badly off are, both absolutely and relatively to the well off' (Cohen 2008, p. 62). But this argument commits the fallacy of equivocation if it fails to differentiate which version of the difference principle is under discussion. Second caveat: in his tendentious focus on the Pareto arguments from which Rawls later distanced himself, notably maximin arguments for the difference principle, Cohen simply ignores the Rawlsian argument that excessive distance between the better off and the worst off violates the self-respect of the latter. For example, see Cohen 2008, p. 165.

his index of objective primary goods may be so great as to wound his self-respect; and given his situation we may sympathize with his sense of loss. Indeed, we can resent being made envious, for society may permit *such large disparities in these goods that under existing social conditions these differences cannot help but cause a loss of self-esteem* ... Since self-respect is the main primary good, the parties would not agree, I shall assume, to count this sort of subjective loss as irrelevant.⁵³ (Rawls 1971, p. 534, emphasis added)

Cohen argued that Rawls's overall approach is self-undermining as it seems to permit motivations that are insensitive to justice and whose corrosive effects may become pervasive. I have argued that the appearances are deceptive. Placed in the context of a commitment to justice those motivations can be reinterpreted. But I agree with Cohen that if they could *not* be so interpreted they would be objectionable.⁵⁴ I am also happy to concede that this reinterpretation of them is only feasible in a society in which Rawls's principles have been fully implemented. In a different context, such as the egregiously unjust societies that currently exist, such a reinterpretation would not be possible.

Cohen has a ready counterargument available too: I have argued that we can only defend the interpretation of Rawls that I have outlined in the context of a specific implementation of 'adjusted procedural justice' of which Meade's seems to be the best available exemplar. I have represented a Rawlsian ethos as implemented at the level of individuals and their motivations via an institutional focus. However, not even the difference principle is a constitutional fundamental. As David Estlund noted, the motivations underpinning it are the subject

⁵³ This passage is cited also by J. Cohen (2002, p. 372) and Baynes (2006, p. 188). Cohen (2008, p. 34) supplies an extended quote from Rawls (1971, p. 537) ostensibly to prove that a fully just Rawlsian society will contain substantial inequalities, combined with a sociological speculation as to how this will be non-transparent to many citizens because of the fact that people tend to form associations only with those similarly located in terms of class and interest. However, Cohen was so quick to criticize Rawls that he failed to place sufficient emphasis on the proviso that, in the situation Rawls describes in the quoted passage, 'the disposing conditions for envy are removed' (Rawls 1971, p. 537). This proviso gives adequate reason to reject Cohen's (2008, p. 34) conclusion that Rawls here *justifies* 'secluded roads for liberal limousines'.

⁵⁴ I also note that, dialectically, the argument that excessive inequality would not be selected in the original position as it would harm the basis of self-respect would be disarmed if Cohen's thesis concerning the limited scope of justice were correct. In that sense I agree with his response to David Brink who seems to have put the point to him in personal correspondence; see Cohen 2008, pp. 185–6. But if my argument in Sect. 6 is correct then Cohen is wrong about the limited scope of justice and Brink's objection retains its force with Cohen's presupposition undermined.

of reasonable disagreement. Cohen's 'supplementary' role for an ethos of justice is squarely located within morality, presumably a location from which it influences the conduct of democratic politics. Where is my proposal located? Are the distinctive commitments of a property-owning democracy going to be placed outside democratic deliberation or within it, such as in the constitution or something functionally equivalent (such as set of entrenched conventions)?⁵⁵ This is a very good question to which I can only offer a speculative answer: this is another respect in which Rawls's views require supplementation by arguments from the superficially competing tradition of republicanism. That tradition directly ties conditions of legitimacy to the nature of effective political agency in a way that offers a more robust defence of the latter than Rawls's own work. Developing that argument, however, lies outside the scope of this paper (see, however, Dagger 2006, White 2003 and 2006, Thomas forthcoming). Now that the argument has come full circle, the convergence between Cohen's egalitarianism and Rawls's is clear.

Conclusion

Within a Rawlsian society, where no-one is any worse off than they need be and the worst off are doing maximally well, there will be a range of ethically grounded prerogatives that support the payment of incentives. From a eudaimonistic perspective, in which people take a legitimate interest in their own lives going well or badly on the understanding that this extends to others to whom one stands in a special relationship, including members of one's own political community, there will be an incentive grounded on such legitimate interest in self. But there will be none grounded on purely self-regarding benefits to self without regard for the impact on others—none based on mere selfishness on which such benefits are pursued at a cost to others. To make it plausible that there will be incentives of this last category that will morally taint the resulting inequality, Cohen has to represent areas of our collective life as simply beyond justice. But this is not true of the relevant area, namely decisions to market one's labour.

⁵⁵ At this point the deeper significance of the referee's observation in n. 25 above becomes apparent: given Rawls's view of the relation between constitutional legislation and judicial review 'there is not a problem in Rawls with the protection of certain institutional features of a property owning democracy within the Constitution ... hence they could not be legislatively prohibited'. I am very grateful for that observation which is obviously very helpful to the larger project that I want to pursue.

If I am correct then Cohen is double counting the demands of justice in this sense: a representative individual who elects to live in a Rawlsian society which implements justice as fairness via institutional design is subject to the application of those principles to her personal decisions to market her labour via institutional design. She does so, in those personal decisions, by presupposing justice. If she is now asked by Cohen to reapply the principles directly to her own economic decisions to market her labour if she finds herself to be in the 'better off' group (or groups) then she is being asked to take the demands of justice into account twice over. That counts as unreasonable demandingness on any view of justice. I conclude, therefore, that no aspect of Cohen's critique of inequality-generating special incentives succeeds.⁵⁶ The real import of Cohen's critical project lies elsewhere, in what it shows about the proper form of a Rawlsian egalitarianism.

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