

**CHAPTER
THREE****Constructivism, Facts, and
Moral Justification***Samuel Freeman*

In justice as fairness the first principles of justice depend upon those general beliefs about human nature and how society works. . . . First principles are not, in a constructivist view, independent of such beliefs, nor . . . true of all possible worlds. In particular, they depend on the rather specific features and limitations of human life that give rise to the circumstances of justice. – (John Rawls)¹

Kant famously advocates an ethics of “pure reason” which says that the fundamental principles of moral conduct and their justification are not to contain any empirical concepts. No major twentieth-century moral philosopher was influenced by Kant more than Rawls. Yet Rawls rejects Kant’s idea that first moral principles are to be formulated and justified independent of contingent assumptions. Rawls’s position might be explained on general philosophical grounds: along with many contemporaries, he rejected the dualisms underlying Kant’s and other traditional philosophical positions, including distinctions between analytic and synthetic, pure vs. empirical reason, necessary vs. contingent truths, and a priori vs. a posteriori propositions.² But general philosophical reasons of the kind that Quine, Wittgenstein, Dewey and others relied upon are not the reasons Rawls gives for invoking general facts to justify his principles of justice. His reasons are specific to moral theory, as befits his claim of “the independence of moral theory” from metaphysics and epistemology. And these reasons relate to the one notable exception among Kant’s dualisms that Rawls retains: Kant’s sharp distinction between the theoretical vs. the practical uses of reason.

My aim here is to discuss some reasons why general facts should be relevant to a justification of fundamental principles of justice. G. A. Cohen argues the opposing position. He advocates

the a priori thesis that, if facts ground principles, then fact-free principles are at the foundation of the structure of the belief of anyone who is clear about what they believe and why they believe it, just as it is a priori that anyone who is rational maximizes, or satisfices, or whatever.³

Cohen's criticism is directed against constructivism in moral philosophy.⁴ He says, "Constructivists about justice . . . believe that all sound principles are, as I shall say, fact-sensitive, by which I mean neither more nor less than that *facts form at least part of the grounds for affirming them.*" Now strictly speaking, this is not true of Kant's constructivism, for whom the reasons for the Moral Law are a priori and based in "pure reason" alone.⁵ Nor does Rawls regard "all sound principles" as "fact-sensitive" (for example, the veil of ignorance and formal constraints of right are not). But Rawls does contend that his "fundamental principles of justice" are based in certain general facts about the human condition. Since Cohen's account of constructivism is closely tied to features of Rawls's constructivism, I will focus on that. I leave aside Rawls's later political constructivism, since it can take no position on the meta-ethical issues Cohen raises. Only justice as fairness regarded as a (partially) comprehensive constructivist position set forth in *A Theory of Justice* and "Kantian Constructivism in Moral Theory" is at issue here.

I discuss three reasons why the first principles of a moral conception of justice should be "fact-sensitive" or presuppose general facts in their justification:

- (1) First, a conception of justice should be *compatible with our moral and psychological capacities*. It should respond to basic human needs; moreover, given their natural tendencies, conscientious moral agents who affirm the conception should be capable of developing appropriate attitudes enabling them to normally act upon its demands.
- (2) Second, a conception of justice should provide *principles for practical reasoning* and fulfill a *social role in supplying a public basis for justification* among persons with different conceptions of their good.
- (3) Third, *a moral conception should not frustrate, but should affirm the pursuit of the human good.*

In order to meet each of these reasonable conditions, a conception of justice must take into account facts about human nature and social cooperation in justifying first principles of justice. I argue for this thesis in sections II–IV. Before that, I clarify what Cohen and I mean by "fundamental principles of justice" and what is at stake in this dispute.

I: What Are Fundamental Principles of Justice?

Suppose we were constructed by nature so that we had equal concern for everyone and cared no more for our own well-being than the next person's. We might then, as Hume says, have no need for property and other norms of distributive justice, for then we would be willing to produce and share goods and services without self-concern. Similarly, suppose nature were so bountiful that all our desires could be satisfied without anyone's labor or forbearance – the objects of our wants appear "like manna from heaven." Again we would have no need for property or distributive justice. But circumstances are different. We are characterized by "limited altruism" – we have attachments to particular persons or groups and care more for our own projects and commitments than for others'. Also there is "moderate scarcity" of goods – enough

to meet everyone's needs, but never enough to satisfy all their desires; thus humans must produce, save, and invest their product to satisfy present aims and future ambitions. These "circumstances of justice" give rise, Hume says, to the "cautious, jealous virtue of justice." Were general facts about humankind entirely different we might have no need for rules of property and principles of distributive justice that determine who should receive and control income and wealth in exchange for specified contributions. Rawls follows Hume in regarding justice as a particularly human virtue.

It might be replied that none of this shows that the *content* of principles of justice, or what they *require of us*, is either conditioned upon and or justifiable by appeal to facts about human nature. Whether justice requires that we maximize aggregate goodness, or distribute goods equally, or according to need, or effort, or contribution, or to maximally benefit the least advantaged, or to redress the effects of brute luck, or whatever the criterion – it's *this* question that is not dependent upon facts about human nature but rather upon moral considerations that ultimately are "fact-insensitive." Cohen says "Ultimate principles cannot be *justified* by facts"⁶ (FP 212, emphasis added), not that they cannot contain any allusions to facts. Yet Rawls explicitly appeals to general facts about human nature (our limited altruism and psychological tendencies of reciprocity) and social phenomena (the chain-connection and close-knitness of economic distributions) to argue that the difference principle is preferable to the principle of utility or a stricter egalitarian principle. As I understand Cohen, this is the problem, namely conditioning the *justification* of principles of justice upon general facts about human propensities, economic tendencies, and social institutions. The problem is that when facts are invoked to justify principles of justice, these principles then cannot be *fundamental* principles but rather must be the application or extension or "implementation" of fundamental principles to particular factual circumstances. For this reason, Rawls's difference principle cannot be the "fundamental," "ultimate," or "first principle" of distributive justice (all being terms Rawls's uses).⁷

In support of Rawls's position, the following four levels of normative principles can be distinguished. They are to be found not only in Rawls, but also Sidgwick, Mill, Kant, and other major moral philosophers:

- (1) *Substantive principles of justice*, which are among the *basic principles of conduct (for individuals or institutions)*; examples include Rawls's two principles of justice, the principle of utility, Kant's Moral Law, W. D. Ross's seven prima facie principles of Right, Nozick's entitlement principles. I contend that these principles of conduct are *fundamental* in that they are the ultimate standards that determine if and when actions, laws, and institutions are right or just.
- (2) *Principles of justification*, which are among the ultimate reasons and considerations which are used to justify the substantive principles of justice mentioned in (1). These justifying reasons have a different function than providing ultimate standards for right conduct or just distributions; they have primarily an epistemic role. Examples would be Rawls's ideal of free and equal moral persons, the formal constraints of right (universality, generality, publicity, etc.), and the veil of ignorance, all of which are part of the original position; or Kant's assumption of practical freedom in his "transcendental deduction" of the Moral Law; or Sidgwick's principles of impartial benevolence and of equity (treat similar cases similarly), used to justify the principle of utility; or Harsanyi's

- impartiality condition and assumptions regarding rational choice and equiprobability of outcomes, used to justify a principle of average utility; and perhaps (as he regards it) Cohen's luck egalitarian principle. Some account of practical rationality and moral reasoning and justification normally accompany principles of justification and is utilized in the justification of fundamental principles of conduct for individuals and institutions.
- (3) *Principles of application*, which are used to determine what (1) substantive principles of justice require; examples include "equal consideration is to be given to equal interests" in applying the principle of utility; or the final three stages of Rawls's "Four-stage sequence" for applying the principles of justice; or Kant's categorical imperative procedure for applying the Moral Law.
 - (4) *Secondary principles and rules of conduct*, which result from the application of first principles of justice in (1); examples are rights of freedom of speech and expression that liberals contend are justifiable by a principle of liberty; the rules of a constitutional, property-owning democracy that Rawls contends are justified by applying the principles of justice; or the rules of a capitalist welfare state; that welfare economists justify on grounds of the principle of utility; or duties of fidelity, veracity, and charity justified by many moral conceptions.

Within this four-part schema, epistemic principles of justification (at level 2) do not themselves determine when actions, laws and institutions are right or just. For example, there is nothing about Rawls's ideal of free and equal moral persons, the five formal constraints of right, the veil of ignorance, and the account of rational plans of life, taken by themselves, that would determine whether one distribution is more just than another, or whether socialism, property-owning democracy, welfare-state capitalism, or laissez-faire capitalism are required by justice. Instead, these justificatory principles are among the relevant reasons that must be taken into account in arguing for and justifying substantive principles of distributive justice by way of the original position. It is not the role of these principles of justification to provide the ultimate standard for just distributions. To know the standards to use to decide which economic institutions or distributions are more or less just, we have to look at the fundamental substantive principles of justice themselves (the difference principle, the principle of utility, libertarian entitlement principles, or some other account of distributive justice).

Cohen holds that so long as a principle has a justification via other "normative principles," it cannot be a fundamental principle.⁸ This implies that nothing can be a *fundamental* substantive principle of conduct unless it is itself self-evident, or follows from non-factual methodological principles. But the fact that normative justificatory principles (e.g. an impartiality condition implicit in the veil of ignorance) are needed to argue for ultimate substantive principles of justice should not deprive the latter of their status as fundamental moral principles. What *makes* a substantive principle of conduct fundamental is not that it is self-evident or otherwise without normative justification, but that *it is the ultimate standard for determining conduct and there are no more basic principles of which it is an application*. Thus, for Rawls distributions of income, wealth, and powers and positions of office are just when they result from an economy designed to implement fair equality of opportunity and

the difference principle. There is no more fundamental principle to which we can appeal to determine just distributions; the second principle is the limit.

Cohen himself distinguishes between “justifying principles” and “regulative principles.” He contends that Rawls’s principles of justice are regulative principles, and that *as such* they are non-fundamental: only justifying principles, like the principles informing Rawls’s ideal of free and equal moral persons, can be fundamental principles.⁹ But the regulative nature of the principles of justice should not make them any less “fundamental” than the principles used to justify them. For justificatory principles and regulative principles of conduct work at different levels. The former are the argumentative ingredients that combine to provide epistemic support for regulative principles. But importantly, they are *not adequate by themselves to tell us what we ought to do* or how we ought to structure social institutions and relations. Instead, justificatory principles provide *fundamental reasons* that enable us to decide what are the *equally fundamental substantive principles* of conduct that regulate what we are to do. This justifying role is taken on in Rawls by the conception of free and equal persons, the veil of ignorance and other assumptions that go into Rawls’s original position; they are among the “restrictions that it seems reasonable to impose on arguments for principles of justice, and therefore on these principles themselves” (TJ 18/16 rev.) Utilitarians such as R. M. Hare and John Harsanyi would argue the same is true of the impartiality assumptions and accounts of rational choice as utility-maximization that underlie their impartial choice arguments for a principle of utility. These fact-free principles are fundamental reasons for accepting fundamental substantive principles of conduct. Hence, the fact that substantive principles of justice have a justification should not undermine the claim that *substantive principles are the fundamental principles of justice to which we ultimately are to appeal in social and political relations in deciding how to structure institutions and make laws and other rules of conduct*. There are *no more basic principles*, including fundamental principles of justification, which taken by themselves can answer *that* question for us.

But this diverts us from the main issue; which is whether *factual* considerations can play any role in establishing what I am calling first principles of conduct. Cohen says, “Ultimate principles cannot be justified by facts” (FP 219). Rawls denies this and goes against a long tradition in philosophy which says that the justification of fundamental moral principles must depend only on a priori truths. Rawls says, to the contrary, that fundamental principles of justice must invoke and rely upon general facts about human tendencies and social cooperation. His opponents, including Cohen and Habermas,¹⁰ reply that once empirical considerations are invoked to support principles we have no longer a fundamental principle, but rather something less: an “application” (Habermas) or “implementation” (Cohen) of some fact-free fundamental principle(s). In the following three sections I address and take issue with Cohen’s and Habermas’s claims that only fact-insensitive principles can be fundamental principles of justice.

Why is this issue important? What’s the point behind Cohen’s “meta-ethical truth” that “Ultimate principles cannot be justified by facts” (FP 219)? It might be purely philosophical, akin to Kant’s ambition to discover the principles regulative of “pure practical reason” whatever its empirical conditions. Another reason is the fear that appeals to facts make moral principles contingent on circumstances, thereby raising the specter of relativism.¹¹ But if the facts Rawls appeals to are permanent and apply generally

to human beings as such, then there should be no threat of the cultural relativism of moral principles of justice (which is the kind of relativism that matters practically speaking). Finally, a third factor that might be motivating Cohen's critique is that, if his argument regarding facts and principles is true, then it might insulate his luck egalitarian thesis from recent criticisms. I return to this issue in the concluding section.

II. Justice, Human Needs and Moral Capacities

The first reason cited earlier for the relevance of facts to first principles of justice is:

- (1) *A conception of justice (like any moral conception) should be compatible with our moral and psychological capacities.* It should be responsive to basic human needs and interests; at least in so far as conscientious moral agents who affirm the conception should be capable of developing appropriate attitudes enabling them to normally and regularly act upon its demands given the constraints of human nature.

A primary example of a fact about human beings that is relevant to fundamental moral principles is the value that we put upon self respect. By "self respect" I mean a psychological attitude that includes a sense that our individual lives matter and are worth living, that our primary pursuits are also worthwhile, and that we are capable of realizing these pursuits. In traditional societies a shared religion often provided a principal basis for self-respect, but in a modern democratic society, self-respect generally depends upon others' recognition of a person as an equal citizen. If we were strongly disconnected selves, with little sense of our own good or even of our past or future, we would not be so concerned about either self-respect or others respect for us as persons; nor would we likely be so concerned about individuals' rights. As Derek Parfit argues, this might strengthen the case for the principle of utility. It is safe to assume that our sense of our personal identity is not based in our having a soul or being an immutable substance. It is a contingent fact whether we are psychologically dissociated, disconnected selves, or are "strongly connected" with a sense of our selves and our good. This suggests that self-respect is a contingent belief and attitude too.

Rawls says that self-respect is perhaps the "most important primary good" (TJ 440/386 rev.). The parties in Rawls's original position consider the effects of principles and institutions on their sense of self-respect in comparing and deciding on principles of justice. Among the bases of self-respect, Rawls contends, are principles and institutions that maintain persons' status as equal citizens, including equal political liberties, equality of fair opportunities, and other equal basic rights and liberties. Why should we be concerned about having *equal* liberties and equal fair opportunities, rather than *just enough* to do what we need or seek to do? Here the bases of self-respect and our desire to be regarded as equals play a central role in Rawls's argument for egalitarian principles and institutions. Principles of justice are responsive to the "basic needs" of persons who conceive of themselves as we do. Other primary goods Rawls recognizes (liberties, powers and opportunities, and income and wealth) also have an empirical basis in psychological and social tendencies.

It might be replied that the goodness or desirability of these primary goods is not contingent upon facts. Even if our desire for self-respect depends upon the psychological fact that we conceive of ourselves as strongly individuated selves with a past and a future, still it is *good*, independent of any such facts about ourselves, that we have such a strong sense of individual self and a concomitant desire for self-respect. If we met with a tribe whose members had no long-term aims or life-plans and little or no sense of individual self, but who lived like drones always selflessly serving some dominant communal end (maximizing the King's pleasures and offspring, for example), we rightfully would think this is a bad way for people to live since it results in their exploitation and violation of human rights. Even if they do not think of themselves as worthy individuals with their own purposes and separate lives to live, still they *should* since maintaining individual dignity, or free self-development and individuality (for example) are fundamental human goods. So, the objection continues, even if Rawls were to rely only upon psychological and social facts to justify the primary goods, they nonetheless have an independent philosophical grounding in moral values he does not invoke.

Rawls himself might be interpreted as providing (on the Kantian interpretation, TJ §40) a non-empirical grounding for the primary social goods. The Kantian interpretation suggests that our conception of ourselves as unified selves extending over time with ends and a life-plan of our own is not simply a contingent fact, but is rooted in the conditions of rational moral agency, the moral powers, which constitute our "nature as free and equal rational beings." For a person to act and have reasons at all requires having coherent plan of life and developed moral powers. Otherwise, like drones, one is a being to whom things just happen and whose behavior is aimless and without reason, or at most a being without self-awareness who does not act but rather engages in activities (like dogs digging bones – there is aim-directed activity but not action).¹² On the Kantian justification of the primary social goods, they are no longer contingent needs of persons who happen to conceive of themselves as we do. They are rather necessary conditions for fully realizing rational and moral agency.

Perhaps then the contingent grounding of primary social goods (and therewith principles of justice) might be replaced in some way by this or some other argument from their necessity. Still, it is not so clear that the relevance of other factual grounds to principles of justice are expendable. Suppose that principles of justice demand more of us than we are humanly capable of doing. It is often argued that the principle of utility makes extraordinary demands on people. A sincere and conscientious utilitarian is a person who should have no special concern for himself or herself and who impartially promotes everyone's interests. But it is beyond our capacities to forgo whatever aims and interests we have and develop a settled disposition *always* to take everyone else's interests *equally* into account and act to maximize overall utility. To contend that we nonetheless *ought* to do so when we by nature *cannot* is to make an unreasonable demand. How can a reasonable morality demand something realistically impossible for people?

One way to mitigate or neutralize the effects of the "ought implies can" requirement is via the indirect application of moral principles. Thus, the principle of utility might avoid the problem of imposing unreasonable demands by "effacing" itself (Parfit) and becoming "esoteric" (Sidgwick). Given the limitations of human nature perhaps the best way to maximize utility may be to inculcate in people a

non-utilitarian morality whose rules, when generally observed, in fact create greater utility than any other rules humans are capable of regularly observing. On this indirect and esoteric application of the principle of utility, it can be argued that we indeed are capable of complying with the demands of the principle of utility, by directly observing other moral rules designed to take our limitations into account.

The indirect and “esoteric” application of a moral principle is one way to reconcile “ought implies can” with an overly demanding principle that is beyond human capacities for regular compliance. Sincere conscientious moral agents then are those who are committed to acting on and from the secondary moral rules that best implement the overly demanding principle (e.g., of utility) in light of human nature. This may be one way to defend Cohen’s claim that “regulative” principles of justice are not ever fundamental but rather “implement” fundamental principles. Regulative principles might be regarded in the same manner as indirect utilitarians conceive of secondary moral principles; they are applications of more fundamental normative principles which are beyond our capacities regularly to comply with if directly applied. I do not think that Cohen himself would accept the “esoteric” approach to fundamental principles, largely for reasons I discuss momentarily. Next I will discuss features of a contractarian conception of justice that prevent the esoteric approach, and show why facts must be taken into account in the justification of ultimate principles of justice.

III: The Social Role of a Conception of Justice

- (2) *A conception of justice should provide moral agents with principles for practical reasoning and fulfill a social role in providing a public basis for justification among persons with different conceptions of their good.*

To orient discussion of this second methodological condition, consider Cohen’s and Rawls’s different conceptions of political philosophy:

- (i) “The question for political philosophy is *not what we should do but what we should think*, even when what we should think makes *no practical difference*” (G. A. Cohen, “Facts and Principles,” p. 243, emphases added).
- (ii) “A conception of justice is framed to meet the *practical requirements of social life* and to yield a public basis in the light of which citizens can *justify to one another* their common institutions” (“Kantian Constructivism in Moral Theory,” Rawls’s *Collected Papers*, p. 347, emphases added).

These statements reveal a significant difference between Rawls’s and Cohen’s conceptions of the role of a moral conception of justice. For Cohen its role is mainly theoretical; in the first instance a moral conception seeks the truth regardless of its practical consequences for social relations and cooperation. Of course, any moral theory seeks truth in the ordinary sense that it is an inquiry into, and justification of the *correct principles*. But if one thinks of moral truth and the role of a moral conception as making potentially “no practical difference” (Cohen, FP, p. 243), then it is hard to avoid the idea that principles of justice are prior to and independent of

our practical reasoning about them as moral agents who are situated and engaged in social life. Rawls suggests that philosophers who regard moral philosophy as a search to discover the truth of antecedent normative principles are not going to be in a position to see the possibility of constructivism as a distinct method in ethics.¹³ For the unmediated quest for true moral principles, pursued as if they are to be discovered by theoretical reason like any other basic theoretical laws or principles, leads to neglect of the arguably equally important conception of the person and its relationship to principles of justice, and neglect therewith the *social role* of moral principles.

The primary role of a conception of justice for Rawls is a *practical* (as opposed to theoretical) and *social* one. This means: (1) A moral conception is geared to provide, not all possible rational and reasonable beings, but rational and reasonable persons like us, who conceive of ourselves as free and equal moral agents and who are subject to the constraints of human nature, with *practical guidance* regarding what *we* ought to do. To fulfill this practical role, fundamental moral principles should provide us with *principles of practical reasoning* that we can reasonably accept and knowingly apply in our capacity as free and equal moral agents. (2) A moral conception has a *social role*, to provide beings like us with a *public basis for justification* regarding our moral, social, political relations. These two conditions on a conception of justice suggest that fundamental moral principles of justice ought to be *publicly knowable and generally acceptable* to those to whom these principles apply, so that principles can fulfill their practical and social roles as *principles of practical reasoning for free and equal moral agents, providing us with practical guidance and a basis for public justification suitable to our status as free and equal persons*.

Assigning priority to the practical and social roles of a moral conception rules out formulating a moral conception true of all possible worlds.

Some philosophers have thought that ethical first principles should be independent of all contingent assumptions, that they should take for granted no truths except those of logic and others that follow from these by an analysis of concepts. Moral conceptions should hold for all possible worlds. Now this view makes moral philosophy the study of the ethics of creation: an examination of the reflections an omnipotent deity might entertain in determining which is the best of all possible worlds. Even the general facts of nature are to be chosen. Certainly we have a natural religious interest in the ethics of creation. But it would appear to *outrun human comprehension*. (TJ 137 rev., emphases added)

Rawls's point is that there is something misguided in conjecturing a morality for all possible worlds. Moral philosophy should take up the *practical perspective of moral agents* engaged in deliberation about what he or she (or groups of which they are members) ought to do. This contrasts with an epistemological point of view of the detached observer who seeks moral truth by inquiring into the way the world (or all possible worlds) really is or ought to be. Constructivism situates the inquiry into moral principles practically by asking not (simply) "What moral principles should I believe correct or true?" but "What principles of justice ought I endorse and act upon in my capacity as a free rational moral agent with human propensities and situated in the social world?"

So conceived constructivism puts center stage a conception of the person as moral agent and seeks to discover principles of justice that are most appropriate for expressing/realizing this conception. A conception of the person as free and equal, reasonable and rational moral agent is then interwoven into the content of principles of justice. By contrast, rational intuitionism and related views, due to their direct inquiry into true moral principles unmediated by their social or practical roles, are led to eschew any conception of the person as a central feature of a moral conception. The *social role* of morality and the related *publicity* condition on first principles are relevant to this conception of persons. Rawls endorses the following: (A) *respect for persons as free and equal moral persons* requires that we *justify our conduct to them* on terms that they can *reasonably accept* in their capacity *as* rational moral agents; (B) the *freedom and equality* of moral persons requires that they be in a position to *know and accept* the fundamental moral bases of their social relations.¹⁴ I discuss the implications of (A) in this section, and of (B) in section IV.

Reasonable acceptability: How do general facts enter into the justification of moral principles, *given* the contractarian assumption of reasonable acceptability of principles to persons in their capacity as free and equal persons? What does attending to general facts have to do with respect for people as free and equal moral persons? Contractarians inspired by Kant (Rawls and Scanlon are the primary examples) contend that to respect persons as rational moral agents requires that the basic moral principles structuring and regulating their relations be *justifiable to them*. Rawls understands this idea (justification to a person) to mean that *principles are to be shown to be reasonably acceptable to persons in their capacity as free and equal moral agents with moral and rational capacities and a conception of their good, and in view of general facts about humans and their social relations*.¹⁵

There are a number of ways to work out the contractarian idea of “justification to a person,” suggesting potentially several different kinds of contract views. (For example, what kind of knowledge are people presumed to have to whom justifications are made? What are their desires and interests? Are people presumed to be situated in the status quo, a state of nature, or behind a veil of ignorance?) I will focus on but one issue, namely, whether we are to assume that the hypothetical moral agents to whom contractarian justifications are directed are subject to general facts of human nature and social life, and take these facts into account in comparing and deciding on the acceptability of alternative principles? Or are they to leave aside considerations regarding human capacities and social cooperation in deciding whether principles are more or less reasonable? On the one hand it might be argued that moral persons, who are by definition reasonable and hence morally motivated, should not take into account these facts, and instead should agree on principles that apply whatever the facts about their nature and circumstances turn out to be. Then they would be choosing principles true of all (or many) possible worlds. The principles that these hypothetical people could or would agree to would then be designated the most reasonable principles of justice for us. On the other hand, it might be argued that since all moral persons known to us are subject to human tendencies, in justifying principles *to them* we should take into account general facts about human nature such as our tendency to disagreement in philosophical, religious, and moral convictions, our different commitments and conceptions of the good, and the fact that our capacity to act on and from moral principles is constrained by natural psychological

tendencies (such as limited altruism). The principles of justice that free and equal moral persons would or could agree to, in light of their distinctly human tendencies and general social conditions, are likely to be quite different than if they did not take into account the human condition at all.

Rawls and Scanlon opt for this second position. Principles of justice are to be justifiable *to* reasonable and rational persons with natural human tendencies and who are subject to normal conditions of social life among beings with different conceptions of their good. It would be *unreasonable* to impose demands on people that did not take their natural propensities and limitations into account. One consequence of our human nature under free conditions is that we do have different interests and final aims as well as conflicting philosophical, religious and moral beliefs. For this and other reasons humans have different conceptions of the good and of what gives their lives meaning. Rawls seeks principles of justice which take these “subjective circumstances of justice” into account, and which can gain general acceptance within a *feasible social world* among reasonable and rational persons constrained by human propensities. The aim is to find the conception of justice that respects us, not simply as reasonable and rational beings, but as distinctly *human* persons who regard themselves as free and equal.

Assume it is a condition of the (philosophical) justification of a moral conception that it be able to fulfill the social role Rawls assigns to it – namely, it should be capable of providing a *public basis for justification* of social and political relations among persons who are reasonable and rational, who regard themselves as free and equal, and who have different conceptions of the good. To fulfill this role, reasonable people must find a moral conception “reasonably acceptable,” meaning (in part) (1) that their human capacities enable them to regularly comply with its demands, and (2) they can accept it for moral reasons and not simply because it is the best compromise they can reach in pursuit of their non-moral interests. A conception of justice must then engage our “moral nature,” including our capacities for a sense of justice. The crucial point here is that, to fulfill a social role of public justification, a moral conception cannot place such great demands upon people’s natural capacities or permissible conceptions of their good that it exceeds their capacities for compliance or consistently frustrates their pursuit of their reasonable aims and commitments. Any moral conception which exceeds these factual limitations is *unreasonable*.

This responds to the problem raised at the end of the preceding section, where I discussed how two-level moral conceptions might satisfy the “ought implies can” requirement by applying fundamental moral principles indirectly to conduct. The problem with this is that, given their *social role*, moral principles of justice have to serve free and equal persons with a human nature as *public principles of practical reasoning* that *agents themselves can apply as citizens* to determine and justify their institutions and actions. It is because of this *social role of fundamental principles of justice* that the “self-effacing,” “esoteric” approach to first principles of justice will not suffice. Sincere, conscientious moral agents have to be capable of understanding, accepting, applying, voluntarily acting upon and sincerely committing themselves to first moral principles. Their acceptance and commitment to principles assumes that principles are publicly known and fulfill a social role in providing a basis for public justification of laws and basic social institutions. Otherwise principles are unreasonable for free and equal persons; they fail to respect persons as free and equal with the capacities

to reason about justice and do what justice requires for its own sake. The idea that basic principles of justice should be publicly knowable and serve a social role by providing a public basis for justification among conscientious moral agents with different conceptions of their good is then implicit in recognition and respect for others as free and equal persons.¹⁶

To decide on the reasonableness of moral principles means that we need to know a good deal about human psychology, economics, and biology – including knowing the normal stages of development of peoples’ moral sensibilities – in order to determine what peoples’ moral and other capabilities are and the limits of their tolerance of restrictions upon reasonable conceptions of their good. For example, if a moral conception places such great demands on some people well beyond their capacities for willing compliance (the less advantaged, for example, are required to give up achieving their primary aims so that those more advantaged may enjoy still greater rewards), then this is a compelling, perhaps sufficient reason for disqualifying that moral conception. (Rawls rejects utilitarianism for this and other reasons.)

IV. Justice and the Human Good

- (3) *A moral conception should not frustrate, but should affirm achievement of essential human goods.*

There are different ways to construe this third condition, depending upon how the human good is conceived. I will elaborate the claim by reference to Rawls’s “full theory of the good” in *A Theory of Justice*. Accordingly, (3) becomes the thesis (3’): A conception of justice should enable us to realize (a) the *values of community*, and (b) our nature as rational moral agents, making possible the good of *individual and moral autonomy*. Non-Kantians may find these claims [(3’) (a) and/or (b)] unacceptable but might still accept the more general claim (3) on grounds of some other conception of the human good.

Rawls’s non-consequentialism presupposes that the concepts of “the Right” and “the Good” require different principles. He characterizes the good in terms of rational choice, or according to certain principles of rationality. Generally, a person’s good is the rational plan of life that person would choose under hypothetical conditions of deliberative rationality (with full knowledge of relevant facts, fully understanding the consequences of choice, etc.). Rawls contends other principles formally characterize morality and the concept of right. These “reasonable principles” occupy a different position within our practical reasoning than do the “rational principles” providing shape to rational life plans and individuals’ good. The role of reasonable principles is to regulate individuals’ and groups’ pursuit of their rational good and constrain their choice of ends. But if the Right regulates and subordinates the Good, how can acting right and justly according to reasonable principles be a good or rational activity for a person? The problem of “congruence” of the Right and the Good is to show that justice and reasonableness can themselves be rational and integral to a person’s good. Within Rawls’s framework, congruence requires a showing that it is rational for each person in a well-ordered society of justice as fairness to cultivate a willingness to do justice *for its own sake*.

A critic might reply that the congruence problem is not essential to deciding the content of first principles of justice.¹⁷ For what justice requires must be independent of the question whether it is good for us to do what justice requires. Some philosophers have argued that whether or not it is good for any person to do their duty is irrelevant to the question of what duty should be.¹⁸ This conception of morality, as detachable from the human good, led Nietzsche to regard “morality” as a calamity for us. For, being entirely independent of the human good, the constraints morality imposes must stunt the development and exercise of higher human capacities, thus undermining the realization of human flourishing. Why then should we not regard the promptings of our moral sense of justice as neurotic compulsions, resulting from a sense of weakness and inferiority, or a fear of authority? The requirement that a conception of justice be “congruent” with the good is responsive to these and similar criticisms. A reasonable constraint on a conception of justice is that its principles and ideals not undermine the human good, but be compatible with, and ideally even affirm it. If so, then the crucial point for my purposes is that general facts about human nature are integrally related to most any reasonable conception of the human good. For whether some activity or state of affairs is a good for a person depends upon that person’s capacities to engage in or enjoy it.

Now assume that the good for any person consists (at least in part) in their exercising and realizing their distinctively *human* capacities. This resembles a psychological claim that Rawls calls the “Aristotelian principle.” This “deep psychological fact” (TJ 379 rev.) suggests (roughly) that human beings generally enjoy activities that engage the exercise of their realized capacities, and their enjoyment increases the more the capacity is realized and the greater an activity’s complexity (TJ 374 rev.). (Thus (Rawls’s example) assuming a person is equally proficient at chess and checkers, he or she will normally prefer playing chess to playing checkers.) Absent special circumstances, to leave one’s mature capacities undeveloped normally results in a life that will be found boring and unsatisfactory. Rawls contends that “accepting the Aristotelian principle as a natural fact” (TJ 376 rev.), it is rational for individuals to realize and train mature capacities, and to choose plans of life that in significant measure call upon the exercise and development of their complex human capacities (id.).

Now, relying on the Aristotelian Principle, there are two *intrinsic human goods* Rawls appeals to in *A Theory of Justice* to confirm and thus justify the principles of justice:

(A) *The Good of Community*: The Aristotelian principle enables Rawls to argue that development and exercise its *own sake* of our social capacities for a sense of justice are integral to a person’s good since they enable a person to participate in a social union of social unions.

It follows from the Aristotelian Principle (and its companion effect) that participating in the life of a well-ordered society is a *great good* (§79). . . . Because such a society is a *social union of social unions*, it realizes to a preeminent degree the various forms of human activity; and given the social nature of mankind, the *fact* that our potentialities and inclinations far surpass what can be expressed in any one life, we depend upon the cooperative endeavors of others not only for the means of well-being but to bring to fruition our latent powers. . . . Yet to *share fully* in this life we must acknowledge the

principles of its regulative conception, and this means that we must affirm our sentiment of justice. . . . What binds a society's efforts into one social union is the *mutual recognition and acceptance of the principles of justice*; it is this general affirmation which extends the ties of identification over the whole community and permits the Aristotelian Principle to have its wider effect. (TJ 500 rev., emphasis added)

The details and soundness of Rawls's argument for the good of a social union of justice are beyond the scope of my discussion. But the general point can be made without the details. Rawls is trying to show how "the values of community" (which would include "solidarity" and "fraternity") are part of the human good. This is a central feature of many moral conceptions of justice, including G. A. Cohen's. Rawls contends that in order to realize the good of community, individuals must act on and from the correct principles of justice. Whether or not one accepts Rawls's justice as fairness, the general point is: Assuming that the values of community are partially realized by people *complying with correct principles of justice for their own sake*, then a moral conception that affirms that community is essential to the human good must in turn rely upon general facts about human nature and peoples' capacities to act on and from the appropriate principles of justice. Thus, when Cohen himself maintains that community, solidarity, or having an "ethos of justice" are human goods (as he suggests elsewhere)¹⁹ then it seems that his principles of distributive justice also must be responsive to human social capacities for justice and to pursue and achieve their good. Otherwise, the purported good of community and the ethos of justice would not be achievable and perhaps would be beyond human reach.

(B) *Moral Personality and Moral Autonomy*: Rawls's second argument for congruence of the Right and the Good is more controversial, for it stems from Rawls's "Kantian interpretation of justice as fairness" (TJ §40). In general, Rawls's Kantian interpretation rests upon an account of human agency and practical reasoning: By virtue of the moral powers to be reasonable and rational (our capacities for justice and for a rational conception of the good), we are capable of engaging in practical reason and acting on the reasons that the Right (morality) and the Good (rationality) provide. These capacities also enable us to form and rationally pursue a conception of our good, and therewith they enable us to unify our lives and provide "unity to the self" (TJ §85). In *Theory* Rawls says the moral powers constitute our "nature as free and equal rational beings." The aim of Kantian Interpretation and of Kantian Constructivism is to depict the principles of justice as derivable from a "procedure of construction" (the original position), which itself "models," "represents," or "expresses" these capacities for moral and rational agency. Kant defines autonomy as acting from principles that reason legislates for itself. One point of Rawls's Kantian constructivism is to provide content to this troublesome idea. Since the principles of justice are "constructed," via the original position, upon the basis of the capacities that constitute our "nature and free and equal rational beings," Rawls can say that the principles of justice are among the principles that reason "gives to" or "legislates for itself" out of our nature as free and equal reasonable and rational beings.

The general point for my purposes is that, the justification and content of principles of justice are conditioned by the moral powers, these "*natural attributes*" (TJ 444 rev.). To be a morally autonomous agent who freely designs and acts upon a conception of the good in compliance with principles that are the product of our

moral powers for practical reasoning, we have to take into account the contingencies of human nature and the optimal conditions for the development and exercise of these same capacities. Again, suppose we were empirically constructed so that we did not expect reciprocity from others with whom we cooperate; instead, we have no more concern for our own well-being than that of complete strangers, and our sense of justice is more responsive to (Sidgwick's) principle of impartial benevolence than to Rawls's reciprocity principles. Then it may well be that the principle of utility would be the most suitable principle for the development and exercise of our capacity for a sense of justice, and therewith realizing this essential good. But given human nature, the principle of utility does not express or realize our capacities for justice and the good. It is beyond the capacities of even the most sincere and conscientious utilitarian to regularly act upon the demands of the principle of utility. As Rawls's psychological principles of reciprocity state, we tend to form attachments to principles and institutions that do not undermine, but rather support our pursuit of our good. This is good reason for preferring Rawls's principles of justice to the principle of utility, assuming that a conception of justice should be compatible with the human good. And the argument depends upon natural facts about our capacity for a sense of justice, including the fact that it is more likely to be developed and realized by the principles of justice than the principle of utility.

V. Methodological Remarks

Returning now to Cohen, first I will consider very briefly a potential defense of his thesis, and then will conclude with some remarks on the practical significance of this issue. Cohen's thesis is that fundamental principles are a priori and "fact-free" and that once facts are stated in support of any principles, they must be secondary principles that are implementations of fact-free fundamental principles. Consider the following defense of Cohen's thesis, suggested by Gideon Rosen.²⁰ Any allegedly "fundamental" fact-sensitive principle, such as Rawls's difference principle, can be incorporated as the consequent of a complicated conditional statement which has as its antecedent a priori justifying principles (P_n) conjoined with a (conditional) statement of all the facts (F_n) which together justify that fact-sensitive principle (D). (Grossly simplifying: $[(P_n \ \& \ F_n) \rightarrow D]$.) This complicated conditional statement does not itself assert the truth of any facts, and thus is itself "fact-free." Now given the added premisses F_n stating the facts in the antecedent of this complicated conditional, the fact-sensitive principle D follows (by modus ponens). But if so, then Cohen is correct: any fact sensitive principle D can be shown to presuppose a fact-free principle in the form of our complicated conditional statement.

I am not sure whether Cohen would accept Rosen's claim as a friendly amendment to his argument. It raises several questions and issues which I can only mention, but am not in a position to adequately address here. First, how are we to individuate principles? Is the complicated conditional $[(P_n \ \& \ F_n) \rightarrow D]$ a principle, or is it a concatenation of numerous fundamental and subordinate moral principles, methodological conditions, conditional facts, and logical connectives and operators? Second, how can this complicated conditional serve as a "fundamental principle" in Cohen's sense (see note 6)? (Could it really be, on anyone's account, self-evident, or follow from any

reasonable methodological principle?) Third, is the complicated conditional capable of serving a public social role as a principle of practical reasoning that individuals and deliberative groups apply (see Part III), or is it simply too long, complicated, and beyond normal comprehension for those purposes? Fourth, does Rosen's claim assume that Rawls's argument for the principles of justice is a deductive argument? If so wouldn't this mischaracterize the nature of the argument from the original position, which surely is not so linear and tightly drawn?²¹ Instead, the original position argument is a number of distinct reasons and arguments whose conjunction establishes a preponderance of reasons in favor of choosing the principles of justice over all the other alternatives principles considered. Finally, does Rosen's claim presuppose that logical connectives and operators and rules of inference that are part of the complicated fact-free conditional statement are themselves propositional? If so then this raises the question whether the logical form of sentences and rules of inference such as modus ponens can serve as premisses of arguments or objects of cognition from which we reason? Are they rather not the conditions of judgment and inference that make reasoning possible?²² Again, these and other questions would need be addressed to respond adequately to Rosen's claim. It would be interesting to see whether Cohen himself would welcome Rosen's suggestion, or regard it as contrary to his purposes.

Finally, what of practical significance is at stake in Cohen's "meta-ethical" argument? Again, Cohen says:

Certain recent critiques of the "luck egalitarian" view of justice . . . are disfigured by failure to distinguish between rejection of the luck egalitarian view as a proposed principle of regulation and rejection of it at the fact-insensitive fundamental level at which the view is properly pitched. . . . [D]ifficulties of implementation, just as such, do not defeat luck egalitarianism as a conception of justice, since it is not a constraint on a sound conception of justice that it should always be sensible to strive to implement it, whatever the factual circumstances may be. (FP 244)

Oddly, this argument parallels Rawls's own remarks regarding luck egalitarianism, or what he calls "the principle of redress" – "to redress the bias of contingencies in the direction of equality" (TJ 86 rev.). Rawls like Cohen says this principle cannot be used by itself to decide distributions, but only in conjunction with other considerations. But rather than contending that the principle of redress is a "fundamental principle" as Cohen does, Rawls says, "It is plausible as most such principles are only as a *prima facie* principle, one that is to be weighed in the balance with others" (TJ 86). Rawls regards the luck egalitarian principle as a component of moral intuitionism (in his sense), the view that there are a plurality of *prima facie* principles that are to be taken into account and weighed against one another to decide what right or just to do. This seems to be Cohen's contention too; in deciding on the regulative principles of distributive justice for structuring economic institutions and distributing income and wealth, we are to assign appropriate weight to undeserved contingencies, along with other principles, and then redress peoples' situations as much as circumstances allow. But why call these luck egalitarian considerations, "fundamental principles"? What if the luck egalitarian intuition is grounded in some more fundamental principle; perhaps, as Rawls conjectures, the difference principle?²³

Here Sidgwick's account of first ethical principles is relevant. Sidgwick says first principles (i) must be at least as *certain* as any other moral principles, (ii) of *superior*

validity to other principles; and (iii) *really self-evident*, deriving their validity, or evidence, from *no other principles*. This closely resembles Cohen's criteria for fundamental principles. Like Cohen's argument against Rawls, Sidgwick's account of justice (*Methods*, Bk. III: Ch. 5) is designed to show that none of the principles of justice found in common sense morality meet his criteria for first principles, and hence must be "middle axioms," or subordinate principles.²⁴ Suppose Cohen's luck egalitarian principle, suitably elaborated, meets Sidgwick's conditions listed above. Still, there are further requirements Sidgwick imposes that Cohen's principle cannot meet: (iv) First principles must contain *no limitations, or exceptions, or restrictions*, unless these are self-imposed; that is, follow from the principle itself, and are not simply appended as unexplained provisos; (v) First principles *cannot be prima facie principles* but must yield judgments of "actual rightness," all things considered; (vi) First principles must *systematize* subordinate principles to organize them into *a complete and harmonious scheme*; (vii) They must serve for rational agents as *an actual guide to practice*, and *cannot be vague, imprecise, or ambiguous*; (viii) a first principle must be one that *corrects our pre-reflective judgment*.²⁵ Rawls's principles of justice meet these further conditions much better than Cohen's luck egalitarian principle. (For example, note the parallel between (vii) and the publicity requirement, which requires that first principles serve reasonable and rational agents as principles of practical reason. Sidgwick's requirement in (vii) that first principles be actual guides to practice is one that Cohen's luck egalitarian principle, regarded as a justificatory principle, cannot meet.) Sidgwick argues of course that the principle of utility satisfies all conditions better than any other alternative he considers. But Rawls rejects (iii) the requirement of self-evidence because of his constructivism and reflective equilibrium (and rejects perhaps (i), (ii), and (iv) depending on how they are construed), and argues that the principles of justice are superior to the principle of utility when measured by conditions resembling (v)–(viii), *plus* other appropriate conditions discussed above in sections II–IV.

This is not an argument against Cohen. But it raises the questions, (1) what other methodological conditions, in addition to those he mentions, he imposes on a conception of justice; (2) whether and if so why he rejects the four further conditions, (v)–(viii), which are accepted by both Rawls and Sidgwick as conditions on first principles; and more generally (3) what conception of practical reasoning underlies Cohen's conception of justice and moral justification?

Finally, Cohen's claim that the luck egalitarian principle is a fundamental justifying principle leaves open the possibility that Rawls's account of distributive justice may be true when regarded as principle of regulation in Cohen's sense. This is not far off from Rawls's claim:

Although the difference principle is not the same as that of redress, it does achieve some of the intent of the latter principle . . . The difference principle represents, in effect, an agreement to regard the distribution of natural talents as in some respects a common asset and to share in the greater social and economic benefits made possible, by the complementarities of this distribution. Those who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out. (TJ 87 rev.)

Unlike intuitionists, for whom the luck egalitarian principle is to be weighed against other relevant principles to decide a just distribution, for Rawls the principle of redress

is regarded as a “common sense precept of justice” (TJ §47) which, along with other precepts (to reward people according to their needs, their efforts, and their contributions, among other considerations) is to be accounted for by the difference principle when all relevant considerations are taken into account in reflective equilibrium.

The likelihood that some version of the difference principle is consonant with Cohen’s luck egalitarian principle is also suggested by Rawls’s political liberalism.²⁶ According to it justice as fairness can be regarded as a “political conception of justice” that fits as a “module” within reasonable comprehensive moral doctrines, which are in an “overlapping consensus” about justice in the ideal conditions of a well-ordered society. So regarded justice as fairness would be, within these doctrines, clearly derivative and non-fundamental. But political liberalism is not a concession to Cohen’s argument. Rather, it avoids such meta-ethical issues and provides another way to regard justice as fairness as the correct conception of justice without disturbing Cohen’s anti-constructivist position. I on the other hand have tried to make the philosophical case for rejecting Cohen’s argument against constructivism, based in an alternative account of moral justification than the one he endorses.²⁷

Notes

- 1 “Kantian Constructivism in Moral Theory,” The Dewey Lectures 1980, in John Rawls, *Collected Papers*, Samuel Freeman, ed. (Cambridge, MA: Harvard University Press, 1999), p. 351 (cited as CP in text).
- 2 Rawls specifically notes at the beginning of the Dewey Lectures that there “There are a number of affinities between justice as fairness and Dewey’s moral theory which are explained by the common aim of overcoming the dualisms in Kant’s doctrine” (Id., CP 304).
- 3 G. A. Cohen, “Facts and Principles,” *Philosophy and Public Affairs* 31 (3) (2003): 211–45, at 233 (cited as FP in text).
- 4 Cohen indicates that “Facts and Principles” is part of a larger project he calls “Rescuing Justice from Constructivism.” This manuscript is to be published by Harvard University Press, where he restates the argument in “Facts and Principles.” All my remarks here are based on that earlier paper and do not take into account any changes or additions Cohen makes in the subsequent manuscript.
- 5 Here I assume the “Moral Law” is Kant’s fundamental principle. It’s true that the categorical imperative, an instance of the Moral Law, applies to “beings with needs.” Similarly, the principle of utility applies to beings like us who are capable of experiencing pleasure and pain. But as I understand Cohen, this factual limitation in the range of application of these principles does not mean that they presuppose empirical facts in their justification. Cohen’s position is that *if* there are sensuous beings who have these experiences, their pleasures are to be maximized in the aggregate. This does not require that any such beings actually exist.
- 6 “Ultimate principles cannot be justified by facts. . . . [These] fact-free principles might be self-evidently true, or they might for some other reason require no grounds, or they might need grounds and have grounds of some non-factual sort (they might, for example, be justified by some methodological principle that is not itself a normative principle but a principle that says how to generate normative principles), or they might need grounds but lack them, or . . . they might be judged to be outside the space of grounds.” (FP 219)
- 7 To support his claim that Rawls’s principles of justice are not “fundamental principles,” Cohen points to the assumption of free and equal persons behind the original position

(FP 238) and other fact-free justifying principles implicit in Rawls's argument for the difference principle, such as "one ought not cause too much inequality" (FP 236). This suggests (to Cohen) that Rawls himself relies on more fundamental fact-free principles to justify his principles of justice (that moral persons ought to be treated equally, etc.). Other "fact-free" fundamental justifying principles Rawls invokes that Cohen might have mentioned are the formal requirements of right (including generality, universality, ordering of claims, finality and publicity), as well as the strong impartiality condition implicit in the veil of ignorance.

- 8 See the quotation from FP 219 in note 6 above. Cohen says that what makes principles (or reasons) "ultimate" or alternatively "foundational" is that they are at the "summit" (a term he uses) in the chain of reasons that justify substantive (or regulative) moral principles. Seemingly for Cohen only (some) justifying principles can be "ultimate" or "foundational" principles. Also, Cohen says that "constructivists about justice" hold that "*all* sound principles are . . . fact sensitive [and that] facts form at least part of the grounds for affirming them" (FP 213). But in the quote from Rawls that Cohen uses to support this claim (FP 213n), Rawls says that "*Conceptions* of justice must be justified by the conditions of our life as we know it or not at all." Conceptions of justice for Rawls consist of both substantive and justificatory principles regarding morality and practical reason. For Rawls's it is *substantive principles of justice* that must be fact-sensitive, and not all justificatory principles. As Cohen himself notes (see note 7 above), many of the assumptions in the original position (the conception of free and equal moral persons, the veil of ignorance, etc.) are not fact sensitive in Cohen's sense. On the other hand, *if* Cohen's claim that "[for constructivists] *all* sound principles are . . . fact-sensitive" is meant to be a point about Rawls's *reflective equilibrium*, then it may be true. For Rawls there are no fact-free foundational principles that are taken as self-evident, necessary, or dogmatically unrevisable whatever new information we might encounter. This is in the nature of establishing a reflective equilibrium of moral principles with considered moral convictions, including fact-sensitive moral convictions, at all levels of generality. Cohen rejects such "holism" but says "even if true, holism (and quasi-holism) do not threaten my proceedings" (FP 223).
- 9 Cohen says that his argument "refutes Rawlsian constructivism as a meta-theory of justice" (FP 243). One reason he gives is that Rawls fails to distinguish between "principles of regulation and the principles that justify them" (FP 244). Consequently, "he misidentifies the question 'What is justice?' with the question 'What principles should we adopt to regulate our affairs?'" (Id.) Rawls's principles of justice cannot be fundamental principles of justice, for these must be principles of justification on Cohen's account.
- 10 Habermas rejects Rawls's stability argument as part of the justification of the principles of justice, since it appeals to a number of facts about human nature and social cooperation. See Jürgen Habermas, "Reconciliation Through the Public Use of Reason," *Journal of Philosophy* 92 (March 1995). Rawls replies in Lecture IX of *Political Liberalism*, "Reply to Habermas."
- 11 Thanks to Sebastiano Maffetone for pointing this out.
- 12 David Velleman draws a distinction between action and activity in his *The Possibility of Practical Reason* (Oxford: University Press, 2000), Ch. 1, and Christine Korsgaard similarly distinguishes between actions and acts in her Locke Lectures.
- 13 "A consequence of starting with methods of ethics defined as methods that seek truth is not only that it interprets justification as an epistemological problem, but also that it is likely to restrict attention to the first principles of moral conceptions and how they can be known. First principles are however only one element of a moral conception; of equal importance are its conception of the person and its view of *the social role of morality*. Until these other elements are clearly recognized, the ingredients of a constructivist

- doctrine are not at hand" ("Kantian Constructivism in Moral Theory," Rawls's *Collected Papers*, p. 342).
- 14 Here freedom is to be taken, among other ways, in the sense of persons' rational autonomy as authors of their life plans and their moral autonomy as authors of moral laws. Knowing and accepting moral principles is of course a precondition for acting for the sake of moral laws, which is required by moral autonomy.
 - 15 Scanlon has a somewhat different conception of justification to a person, that is tailored to his more general project of providing an account of moral duties we owe to each other.
 - 16 The social role of principles is closely related to T. M. Scanlon's idea that correct moral principles are those that could not be reasonably rejected as a basis for general agreement and justification among people who are conscientious and morally motivated.
 - 17 Brian Barry makes this criticism in his review of Rawls's *Political Liberalism*, in "John Rawls and the Search for Stability," *Ethics* 105 (4) (July 1995): 874–915.
 - 18 H. A. Prichard, "Does Moral Philosophy Rest on a Mistake?" (1912) in his *Moral Obligation* (Oxford: Clarendon Press, 1949), Ch. 1.
 - 19 See *If You're an Egalitarian How Come You're So Rich?* (Cambridge, MA: Harvard University Press).
 - 20 This reconstructs my understanding of Rosen's argument, which he suggested at the 2006 UNC Philosophy Colloquium. No doubt he could make the argument more persuasively than I do here.
 - 21 I am grateful to Michael Williams for this suggestion.
 - 22 I am grateful to R. Jay Wallace and to Mark LeBar for discussion of this point.
 - 23 There's nothing on its face that makes the difference principle "fact-sensitive." One might contend that it should be intuitively obvious or "self-evident" that, since the social product is jointly produced and the most advantaged rarely work as hard or experience the gravity of risk that the least advantaged do, then fairness requires that the economy be designed to maximize the share going to the least advantaged over their lifetimes. Whether this is an appropriate way to regard the difference principle – as an intuitively obvious fundamental principle (in Cohen's sense) that accounts for our luck egalitarian intuitions – Cohen's account does not seem to rule it out.
 - 24 Among the subordinate principles Sidgwick discusses are a principle of equal freedom, *Methods*, pp. 274ff.; and principles of distribution according to conscientious effort, actual contribution, "fair price," and free market value, *Methods*, pp. 283ff., etc.
 - 25 For an account of these conditions see the "Lectures on Sidgwick," Lecture I, in Rawls's *Lectures on the History of Political Philosophy* (Cambridge, MA: Harvard University Press, 2007).
 - 26 Cohen has other arguments against the difference principle elsewhere. But his arguments do not appear to invalidate the difference principle itself but only Rawls's interpretation of it as applying directly to the basic structure, and only indirectly to individual actions. "Why not apply it directly to both?" (Cohen asks in effect).
 - 27 I am grateful to: Andrews Reath for his extensive comments, and to Tom Hill, Gideon Rosen, Philip Kitcher, and other participants at the 2006 University of North Carolina, Chapel Hill Philosophy Colloquium; to Michael Williams, Steven Gross, and other members of the Johns Hopkins Philosophy Department; to Bruce Brower and others at Tulane University, to Mark LeBar, Alyssa Bernstein, and other members of the Philosophy Department at Ohio University; to Sebastiano Maffetone and Ingrid Salvatore and others at LUISS in Rome; and to Kok Chor Tan, Samuel Scheffler, and R. Jay Wallace, all for their helpful remarks and criticisms.