

Cohen's Equivocal Attack on Rawls's Basic Structure Restriction

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Abstract

G.A. Cohen is famous for his critique of John Rawls's view that principles of justice are restricted in scope to institutional structures. In recent work, however, Cohen has suggested that Rawlsians get more than just the scope of justice wrong: they get the concept wrong too. He claims that justice is a fundamental value, i.e., a moral input in our deliberations about the content of action guiding regulatory principles, rather than the output. In this paper, I argue that Cohen's arguments for extending the scope of justice equivocate across his distinction between fundamental principles of justice, i.e., principles that tell us what justice is; and regulatory principles of justice, i.e., principles that tell us what is required of us all things, including justice, considered. Though Cohen initially had the regulatory sense of the word 'justice' in mind when critiquing the basic structure restriction, his replies to the problem of demandingness presuppose his own, fundamental sense of the word 'justice'. The upshot is that he escapes demandingness at the cost of sacrificing regulatory justice's capacity to provide clear guidance. I conclude the paper by considering Peter Singer's efforts to deal with demandingness in his own work on global poverty. Since Singer manages to deal with demandingness without giving up clarity, his work is a good a place to start in the search for regulatory principles that are suitable for the context of personal choice.

Key Words

Difference Principle, distributive justice, G.A. Cohen, Luck Egalitarianism, personal choice, Rawls

1. Introduction

G.A. Cohen is well known within contemporary political philosophy for his critique of economic incentives (Cohen 1992),ⁱ as well as for his related claim that the Difference Principle extends to the context of personal choice (Cohen 1997).ⁱⁱ More recently, he's also received attention for his conceptual

claim that justice is a fundamental value, i.e., that justice is one of the normative *inputs* involved in the justificatory process via which action guiding ‘regulatory’ principles are selected, rather than the *output* (Cohen 2008, 269-272 and chapter 7).ⁱⁱⁱ However, very little effort has been made thus far to explore the possibility of a relationship between these claims.^{iv} This is surprising. According to Cohen, the Difference Principle is a derivative, fact-dependent principle, and despite important factual differences between the personal and institutional contexts, he nonetheless maintains that its scope of justified application is wide enough to extend to both. Isn’t there a tension here, though? It may make sense to think that justice, if a fundamental value, applies to both of these contexts. By contrast, if, like John Rawls, one thinks of it as a set of fact-dependent principles, then the claim that principles of justice suitable for institutions have a wide scope of justified application is *prima facie* implausible.^v

In this paper, I argue that Cohen’s attack on the basic structure restriction equivocates across his distinction between fundamental principles of justice, i.e., principles that tell us what justice is; and regulatory principles of justice, i.e., principles that tell us what is required of us all things, including justice, considered. Though Cohen initially had the regulatory sense of the word ‘justice’ in mind when critiquing Rawls’s institutional focus, a number of Cohen’s replies to Rawls’s defenders presuppose Cohen’s own, fundamental sense of the word ‘justice’. More specifically, his replies to the problem of demandingness treat the Difference Principle as if it expresses a defeasible requirement that must be balanced against competing values, and as if considerations of measurability are external to its justification. By treating it this way, Cohen seriously compromises the Difference Principle’s clarity: he makes it such that citizens who follow it will often be unable to tell when they have or haven’t met its requirements. This lack of clarity, in turn, runs afoul of the requirements of publicity and also reduces the Difference Principle’s capacity for ‘regulation’, i.e., its capacity to guide action.

After making my case for the conclusion that Cohen equivocates, I move on to argue that lack of clarity in a distributive regulatory principle does more than compromise publicity and the capacity for action guidance: it leads to unchosen inequality of burden, too, as some of those who follow it will inadvertently do more than is required of them and some will inadvertently do less. Collectively, the difficulties associated with lack of clarity suggest we have good reason to prefer an alternative to the Difference Principle, at least for the context of personal decision making. In the final section, I consider Peter Singer’s public standard of assistance as a model for such an alternative (Singer 2010, chapter 10). Like Cohen’s version of the Difference Principle, Singer’s public standard is responsive to the problem posed by demandingness. Unlike Cohen, however, Singer manages to respond to demandingness without also sacrificing clarity. For that reason, Singer’s work is worth considering as we try to determine what are the regulatory principles best suited for the personal context.

2. Scope and Status in Cohen’s Critique of Rawls

Cohen's canonical objection to the exclusion of personal choice from the scope of distributive justice emerges from his critique of Rawls's use of economic incentives. As most readers of Rawls are aware, the theory of justice he proposes, though largely egalitarian, permits inequalities necessary to facilitate the development and exercise of economically productive talents. Such inequalities are consistent with justice, he claims, when they satisfy the Difference Principle, i.e., when they're necessary to maximally improve the position of the worst off group in society (Rawls 1971, 75-83). Cohen's critique of this position begins with the observation that 'necessary' admits of more than one interpretation. On an intention independent reading of it, inequalities are only necessary if the talented are literally unable to exercise and develop their talents without them, e.g., if those undergoing particularly stressful training required more costly forms of leisure in order to be capable of completing it. Interpreted this way, the word 'necessary' leaves very little room for inequality. On an intention relative reading, however, it allows for a great deal more, as inequalities created by incentives are now also acceptable (Cohen 2008, 68-69). As Cohen indicates, it is the talented themselves who make inequalities of this sort necessary, for it is only necessary to offer incentives if the talented would refrain from raising their economic productivity without them (Cohen 2008, 48-54). If this is the case, though, then in what sense can it be said that the talented members of a just society personally affirm its principles? If, as Rawls claims, the citizens of a just society affirm the Difference Principle and the arguments in favor of it (Rawls 1971, 453-454), then how can they consistently make their productivity contingent upon receiving greater benefits? Citizens who believe in the injustice of unnecessary inequalities presumably wouldn't choose to make them necessary by demanding incentives. As such, Cohen maintains that Rawls's endorsement of economic incentives is inconsistent with the ethos his conception of justice incorporates (Cohen 2008, 121-122).^{vi}

In response to the above argument, Cohen contemplates a potential objection that Rawls' supporters might press. According to Rawls, "the primary subject of justice is the basic structure of society", i.e., its "political constitution and...principal economic and social arrangements" (Rawls 1971, 7). In other words, his principles of justice are specifically intended to apply to institutional structures. If this is so, then there would appear to be nothing inconsistent about affirming the Difference Principle while also demanding incentive payments. Since its scope is restricted, citizens who affirm it needn't apply it to their personal choices (Cohen 2008, 124-125).^{vii}

Cohen's reply to the above line of argument is relatively straightforward. First, he notes that Rawls's stated reason for making the basic structure the subject of justice is the profound impact it has on one's endowment of opportunities and resources, and thus on what one can reasonably expect out of life (Rawls 1971, 7). Second, he notes that citizens' personal choices collectively also have a profound impact on any individual's endowment of opportunities and resources, in part through their constitutive

relationship with informal institutions like the family (Cohen 2008, 134-135). His conclusion is that Rawls cannot consistently exclude personal choice from the scope of the Difference Principle (Cohen 2008, 137-137).^{viii}

It is the above claim in particular: the claim that Rawls cannot consistently endorse the basic structure restriction, which has attracted the most critical attention. Rawls's defenders frequently argue that profundity of effect, though important, is not the only factor relevant to the Difference Principle's scope of application. They claim that Rawls's endorsement of the basic structure restriction proves to be consistent once other pertinent considerations are taken into account, e.g., considerations such as the limits of what justice can reasonably demand from citizens,^{ix} the requirements of publicity (Williams 1998), the causal influence a society's institutions have over its ethos (J. Cohen 2002), etc.

In the next section, I further discuss the issues demandingness and publicity pose for Cohen's canonical critique. For the time-being, however, let's return to the present section's exegesis of his views. As I mentioned in the introduction, my argument in the next section is that Cohen's attack on the basic structure restriction equivocates across his distinction between fundamental justice and regulatory justice: though his canonical critique is about the scope of regulatory 'justice', a number of his replies to Rawls's defenders presuppose the fundamental sense of the word 'justice'. To better understand why, though, it will be helpful to first say a bit about the conceptual critique of Rawls that Cohen launches in the later part of his career.

According to Cohen's conceptual critique, Rawls is wrong to think that specifying the content of justice is a matter of specifying principles suitable for guiding political practice. On Cohen's view, justice is a fundamental value, i.e., one of the normative *inputs* involved in the justificatory process via which action guiding institutional principles are selected, rather than the *output* (Cohen 2008, chapter 7).^x This claim is embedded in a pluralistic picture of the meta-ethical universe. For Cohen, morality is comprised of a plurality of irreducible, fundamental values that sometimes conflict with each other (Cohen 2008, 3-6). As a result, any principle expressing the content of a fundamental value, e.g., a principle of efficiency, a principle of community, a principle of compassion, etc., is only indirectly normative on Cohen's view. Such a principle tells us how to evaluate a society with respect to one of the moral elements in light of which it is or isn't morally desirable, but it can't by itself tell a legislator what to *do* (Cohen 2008, 268 and 306-307).^{xi} To identify justice as a fundamental value, then, is to identify it as a tool directly useful for evaluating the justice or injustice of a society, but only indirectly useful for determining how a society ought to be run. Prescribing institutional arrangements requires formulating what Cohen calls 'rules of regulation', i.e., formulating derivative principles the content of which reflect considerations other than just justice, e.g., considerations of efficiency, stability, compassion, etc. (Cohen 2008, 253, 263-268, and 276-286).

Two characteristics of fundamental justice implicit in the above description are worth highlighting before we move on to the next section. It is in light of these characteristics that Cohen's replies to critics are sometimes equivocal. The first is that fundamental justice is defeasible. As one value within a pluralistic moral universe, fundamental justice is subject to trade-offs. Unlike regulatory justice, which represents the weightings we've assigned to competing values, fundamental justice is one of the values that must be weighed, and we must be careful not to accord it an excessive degree of moral significance.

The second characteristic of interest is that many considerations are external to fundamental justice. On Cohen's view, much that is morally significant is nonetheless irrelevant to justifying a conception of fundamental justice.^{xiii} Cohen's view on this matter is partially traceable to his value pluralism. Fairness, community, efficiency, compassion, etc., are all different values and it's important that considerations belonging to one be kept separate from the others when filling out their content. In addition, though, it's traceable to his exclusiveness about justice, i.e., to his view that justice is a relatively simple value rather than a complex value with many internal aspects. Undoubtedly fairness is an internal consideration: if something is unfair then it is also, to that extent, unjust (Cohen 2008, 6-8). Furthermore, on Cohen's view, egalitarianism supplies the right conception of fairness in distribution, specifically Luck Egalitarianism (Cohen 1989).^{xiii} Though Cohen sometimes seems to think that nothing but fairness is internal to justice, and thus that any conflict between fairness and other moral considerations is a conflict between justice and non-justice considerations, there are places where he relaxes this narrowness somewhat. In *Why not Socialism?* he expresses some uncertainty about whether community is internal to justice (Cohen 2009, 37), and in "Fairness and Legitimacy in Justice" he concedes that justice also has a historical component that he, as the title suggests, calls 'legitimacy' (Cohen 2011). Notwithstanding these exceptions, Cohen's view of what qualifies as a consideration of justice is a narrow one that excludes many considerations, e.g., efficiency, measurability, stability, etc. Such considerations are pertinent to justifying principles of regulation, on his view, but they are external to the project of justifying a conception of fundamental justice.

In the next section, I'll chart some of the literary terrain surrounding Cohen's critique of incentives and Rawls's basic structure restriction. In particular, I'll focus on the literature surrounding the worry that applying the Difference Principle in the context of personal choice is excessively demanding. Cohen's replies to this worry presuppose that when he uses the term 'justice', he has in mind a particular fundamental value. Unfortunately, the issue he and his opponents are debating is not whether a fundamental value extends to the context of personal choice, but whether the Difference Principle does, and the Difference Principle, as we've noted, is a regulatory *output* intended to guide institutional design, not a justificatory *input*.

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

An important difference between the contexts of institutional design and personal choice is that people, unlike institutions, have personal lives. In light of this, the requirement that citizens embody the Difference Principle in their everyday lives appears rather demanding. It seems to entail that well off citizens are morally required to devote a tremendous amount of their time and energy to helping the worst off.^{xiv} To fully appreciate this worry, it's helpful to consider the kinds of behaviour Cohen's ethos would motivate. On the one hand, an ethos can contribute to the justness of a distribution by supplementing institutional measures. Supplementation, according to Cohen, occurs when ethos motivated actions are pursued independently of public justice seeking measures, e.g., making personal donations or volunteering during one's spare time. Enhancement, in contrast, is ethos motivated action that's conjoined with public justice seeking measures. Such would include, for instance, continuing to work just as hard under a radical tax regime as one would under a less radical one, or choosing to take on an economically productive profession for which one's talents are well suited in spite of the fact that said tax regime disallows incentives (Cohen 2008, 375). Examples like these highlight just how pervasive Cohen's ethos would be if realized. It would ostensibly require one to prioritize the worst off whenever distributive considerations are relevant, and there are a great many situations where they are.

Cohen's reply to the above worry is not dismissive. He attempts to accommodate it by qualifying his ethos with a personal prerogative to pursue other matters, e.g., self-interest, expressing affection to one's loved ones, non-justice moral commitments, etc. (Cohen 2008, 70-72).^{xv} As such, an individual who finds him/herself in possession of extra cash might legitimately choose to keep a portion of it for some purpose other than benefitting the worst off, and someone who'd make an exceptional engineer might justifiably choose a different career, so long as these choices don't exceed the bounds of a reasonable (and unspecified) limit on the extent to which deviating from the Difference Principle is permissible.^{xvi} But even if his ethos were not so qualified, Cohen claims that it would only require a work-till-you-drop duty if one mistakenly leaves subjective welfare out of one's metric. If one's metric incorporates subjective welfare in addition to resources, then inequalities in resource endowment will sometimes be justified in order to compensate the talented for their labor burdens (Cohen 2008, 101-109). Furthermore, including welfare means those with greater talents needn't enslave themselves to the betterment of the worse off if doing so would require sacrificing too much of it. The talented, should they become sufficiently miserable, would themselves become the worst off group, so it cannot be said that a welfare inclusive metric would require them to utterly devote themselves to promoting the betterment of the untalented (Cohen 2008, 402-403).^{xvii}

In his article "Incentives, Inequality, and Publicity," Andrew Williams argues that Cohen's Difference Principle based ethos is incapable of meeting Rawls' publicity condition, i.e., that citizens who

embrace it will not be able to discern when and where the requirements of the ethos have been adequately satisfied. Williams offers a number of considerations in support of this conclusion, but many revolve around the inclusion of subjective welfare and Cohen's personal prerogative qualification. As Williams correctly notes, determining whether an individual with greater than average resources has satisfied her justice related duties requires checking to see if her extra wealth either compensates for labors burden or is consistent with a legitimate personal prerogative (Williams 1998, 238). In order to check the first of these, one must be able to interpersonally compare levels of job satisfaction. Unfortunately, doing so appears to be beyond our epistemic abilities. Distinguishing the effect of someone's occupation on her welfare from the effects of other welfare impacting factors in her personal life is very difficult. What's more, self-deception about job satisfaction is common (Williams 1998, 239). As a result, acquiring the information needed to reliably determine which of those with more resources are 'burdened' by their jobs is extremely difficult, especially on a society-wide scale.

Equally difficult is determining whether the greater resourced have exceeded the bounds of a legitimate personal prerogative. At what point does deviating from the pursuit of justice for the sake of other projects cease to be permissible? Cohen does not attempt to specify this, and the reason for that may be because the answer might vary from person to person depending on their personal history, circumstances, etc. (Williams 1998, 239-240).

In sum, Cohen's replies to the problem of demandingness make an ethos based on the Difference Principle more palatable, but at the cost of citizens being unable to determine whether their co-citizens are fulfilling their duties. In fact, the above mentioned difficulties suggest that a citizen will have difficulty telling whether she herself has fulfilled her duties (Am I 'burdened' by my job relative to others? When does the pursuit of *my* self-interest become impermissible?).

As worrisome as Williams' objections are, they become even more worrisome when we're reminded that the Difference Principle, on Cohen's view, is a regulatory principle that reflects but is distinct from justice itself. Its function is not to tell us what justice is, but to tell us what we ought to do, all things, including justice, considered. If this is the function of a distributive regulatory principle, though, then being unable to tell whether one has successfully followed it clearly undermines that function. This is especially obvious with respect to the idea of a personal prerogative in particular. To see what I have in mind, consider again Cohen's discussion of how competing values operate. Rawls's mistake, Cohen claims, is allowing non-justice considerations to influence the content of his conception of justice. Since justice is a fundamental value, other values such as efficiency or compassion specifically limit the weight it can reasonably be accorded when adopting distributive regulatory principles, i.e., they constrain justice's *implementation*, not its *content*. If this is the manner in which external values relate to justice, however, then there's a tension between Cohen's conceptual critique of the Difference Principle

and his claim that the demands it imposes are constrained by a personal prerogative. Since the Difference Principle is regulatory and thus allegedly distinct from justice itself, its content should be justified in light of the various considerations that must be given weight in the personal context. If, upon reflection, we decide that strictly adhering to the Difference Principle would not leave enough space for self-interest, affection, and the various moral considerations that stand prominent in the personal context (loyalty to friends, for example), then we have reason to adopt another principle better tailored for the personal realm instead. Cohen's strategy of retaining the Difference Principle but constraining it with a personal prerogative is responsive to the importance of leaving space for self-interest, personal moral commitments, etc., but his strategy also deprives the Difference Principle of its capacity for action guidance by requiring us to balance it against competing considerations in much the same manner that we balance conflicting values against each other. As a result, Cohen's personal prerogative qualification treats the Difference Principle as if it is a principle of fundamental justice, and thus it constitutes an equivocal reply to the demandingness objection.

A further instance of equivocation is identifiable in Cohen's rationale for including subjective welfare in the Difference Principle's metric. In a footnote from chapter 2 of *Rescuing Justice and Equality*, Cohen writes: "Had I written the article that is the substance of the present chapter after I had reached the distinction drawn in chapter 6 between fundamental principles and rules of regulation, I would have said that labor burdens must come into the assessment of fundamental justice, however difficult it may be to represent them, even by proxy, within rules of regulation (Cohen 2008, footnote 48 on p. 106)." Why does Cohen think that fundamental justice requires accounting for labor burdens? To understand the answer, it will be helpful to recall our discussion of internality and externality in the previous section. As we've noted, Cohen thinks it's important that considerations belonging to one fundamental value be kept separate from considerations belonging to others when formulating conceptions of their content. With respect to justice in particular, judgments of fairness are internal, while most other judgments, e.g., judgments of efficiency, are external. As a result, if judgments of fairness direct us to include subjective welfare in the metric of our conception of fundamental justice, thus making it responsive to labor burden, then we presumably ought to do so. Cohen's favored judgment to this effect is the one associated with the wheelchair bound individual in "On the Currency of Egalitarian Justice." This person is able to raise his arms, but he is unable to do so without experiencing considerable discomfort. Since it makes no sense to represent this inability as a deficiency in physical resources, Cohen deems (correctly, I think) that the egalitarian intuition to compensate him, *ceteris paribus*, for the sake of fairness, is one grounded in concern for his subjective welfare (Cohen 1989, 917-919). Unfortunately for Cohen, though, this observation amounts to another instance of equivocation in the present case. Though we have good reason to think that subjective welfare is part of the metric of

fundamental justice, the Difference Principle is not a conception of fundamental justice. It is a regulatory principle, and regulatory principles, in order to be effective guides to action, must be concerned with accurate interpersonal comparisons. Unlike with fundamental justice, measurability is not external to regulatory justice, and thus we have good reason to exclude subjective welfare from our regulatory metric.

The above points hopefully suffice to demonstrate that Cohen's subjective welfare and personal prerogative replies to the demandingness objection equivocate across his distinction between fundamental and regulatory justice. Though Cohen's initial discussion of the scope of justice concerned the extension of institutional regulatory principles to personal choice, a number of his replies to critics suggest that by the term 'justice' he has in mind a fundamental value, i.e., a relatively simple, defeasible concept that must be balanced against competing considerations before arriving at an all things considered conclusion about what to do. As I've already noted, including welfare and adding a personal prerogative deprives the Difference Principle of its capacity for action guidance. Difficulties with interpersonally comparing levels of job satisfaction make it impossible to accurately judge when compensation for labor burdens is warranted and determining the extent to which a personal prerogative justifies deviating from the Difference Principle is nearly as difficult. In short, the requirements of a welfare inclusive, prerogative constrained Difference Principle are not sufficiently clear for those who follow it to be able to tell when they've done enough for the worst off.

It should be noted that Cohen's reflections on the relationship between publicity and fundamental justice confirm that he ought to be sympathetic to my worries about clarity. On the one hand, he denies that publicity is a constraint on the content of fundamental justice. He correctly notes that an action or policy may qualify as just even if it is not possible to tell that it is, in fact, just. He does maintain, however, that publicity is a desideratum relevant to the implementation of justice, or in other words, that it is a consideration which good regulatory principles must be responsive to. He even notes that it is sometimes appropriate to prioritize publicity over fundamental justice in cases where the two come into conflict. As such, the lack of clarity associated with a welfare inclusive, prerogative constrained Difference Principle is problematic in light of a desideratum that Cohen himself affirms.^{xviii}

To be fair, the fact that a regulatory principle lacks clarity is not necessarily a decisive strike against it. Clarity, because of its relationship with publicity and action guidance, is an important desideratum of regulatory principles, but that's different from being a strict constraint. As with other desiderata, it is reasonable to trade-off clarity against competing considerations, and thus it might be argued that Cohen's version of the Difference Principle is justified in spite of the difficulties I've raised.^{xix} However, it must be acknowledged that lack of clarity is a drawback. *Ceteris paribus*, a clear regulatory principle is better than an unclear one.^{xx} Furthermore, I think that lack of clarity is a more significant

problem than it may appear to be at first glance. Combined with the concerns I've raised in this section, the connection I draw in the next section between clarity and distributive fairness should suffice to undermine Cohen's claim that the Difference Principle is suitable for the context of personal choice.

4. Clarity and Fairness

Thus far, we've discussed two reasons for why the clarity of a regulatory principle matters. One reason is that the function of a regulatory principle is to guide action, and a lack of clarity undermines this. Another reason is that a lack of clarity compromises publicity. A further reason not yet discussed is that attempting to follow an unclear principle has distributive consequences. Some people will inadvertently do more than is required of them and some will inadvertently do less, and this in turn leads to unfairness. A good way to understand the unfairness I have in mind is with reference to Cohen's (and my) favorite conception of distributive fairness: Luck Egalitarianism. Luck Egalitarianism, as the reader may know, states that inequalities are unfair unless they're traceable to choice.^{xxi} It is a highly controversial position: one that has been extensively criticized and defended.^{xxii} Though it is beyond the scope of my paper to defend the claim that Luck Egalitarianism is compelling when understood specifically as a conception of distributive fairness, I employ the principle of luck equality here for two reasons. My first reason is that Cohen himself maintains that Luck Egalitarianism is a compelling conception of the fairness input that comprises part of the Difference Principle's justification (Cohen 2008, 7, 271, and 300-302), and thus using it in my internal critique of his assault on Rawls's basic structure restriction is appropriate (internal to Cohen's contemporary body of work, that is). Though it might seem odd to claim that luck equality supports the Difference Principle, the claim is more plausible than it appears at first glance. First, the Difference Principle is responsive to the fact that one cannot be held responsible for the socio-economic group into which one is born, as it requires that the distribution of opportunities between individuals with different group membership, but the same talents and ambitions, be equal. Second, it recognizes that natural talents are largely the product of genetic luck, and thus that there are reasons of fairness to limit the extent of their distributive influence. Third, though the Difference Principle permits some inequality between those with productive talents and those without them, Rawls qualifies this with a caveat. The justifiability of inequalities consistent with the Difference Principle is contingent upon it being the case that those inequalities not be too great. If it turned out that the realization of equal liberty and fair equality of opportunity were not enough to limit the size of inequalities necessary to improve the position of the worst off, then the Difference Principle would not be justified (Rawls 1971, 157-158). In sum, the Difference Principle's commitment to fair equality of opportunity and the mitigation of genetic luck's distributive impact, combined with the justificatory assumption that distributive inequalities traceable to genetic luck will be limited in size, makes it a pretty reasonable regulatory principle from the perspective of luck equality. It does not, in various respects, mirror the requirements of luck equality precisely, e.g.,

it allows for ‘necessary’ inequalities between differently talented citizens;^{xxiii} and it is insensitive to the fact that some citizens are worse off due to imprudence or to life-style choices, rather than to lack of talent. But as a regulatory principle, it is not supposed to precisely mirror the requirements of distributive fairness. Good regulatory principles must reflect a variety of considerations, and thus it is a virtue of the Difference Principles that it’s responsive to not only distributive fairness, but also to considerations of efficiency, community, stability, measurability, etc.

My second reason for employing Luck Egalitarianism is that it does a good job of capturing what’s morally problematic about adopting unclear regulatory principles for the personal context. When the Luck Egalitarian standard is used to evaluate the effects of applying the Difference Principle to personal choice, it’s clear that there’s an important sense in which the Difference Principle falls short of it. Since committed citizens are unable to determine when they’ve done enough to fulfill the requirements of a welfare inclusive, prerogative constrained Difference Principle, the regulatory application of said principle to personal choice runs contrary to luck equality in an important way. Its lack of clarity inevitably yields unchosen inequality in the distribution of burden, as some people will inadvertently take on a greater burden than is required of them by the Difference Principle, while others will inadvertently take on a lesser burden than is required of them. Of course, the Difference Principle, as a regulatory principle, always falls short of perfect fairness. This is because taking all things into consideration means deviating from the requirements of fairness for the sake feasibility and competing values. The unfairness I’ve identified is different, however. It doesn’t lie in the fact that the Difference Principle is insensitive to differences between members of the worst off group, or in the fact that it allows for necessary inequalities between differently talented citizens, but rather in the effect its unclear application to personal choice has on the distribution of burden. An ethos based on the Difference Principle thus deviates from luck equality in a way that’s independent from the familiar, content specific deviations.

It might be objected that ethotic commitment to the Difference Principle is always a matter of choice, just as any unenforced moral requirement is. If so, then how are inequalities in the level of ethotic contribution to the worst off unfair? Citizens choose whether to commit themselves to the Difference Principle, and thus any accidental inequality in the associated distribution of burden is produced by option luck.^{xxiv}

Though it’s true that citizens choose whether or not to apply the Difference Principle in their personal lives, I don’t think it’s appropriate to treat inequalities indirectly associated with the choice to commit one’s self to the Difference Principle as standard cases of option luck inequality. In standard cases of option luck, the choices made are not supposed to be morally obligatory. Whether the poker player decides to bet her money or merely play for fun is her prerogative. The naturally talented follower of the Difference Principle, in contrast, has an alleged moral duty to promote the interests of the worst off.

What's more, unlike the voluntarily acquired duties associated with contracts or friendships, her duty is a product of her circumstances. After all, the talented person did not choose to have the natural capacities she does, and thus did not choose to be put in a position where doing the right thing would require that she make voluntary sacrifices. As a result, she cannot be held responsible in the usual way for the consequences of her choice to follow the Difference Principle.

The problem I've raised here is similar to a problem raised by Susan Hurley. Like me, Hurley argues that there's a tension between Cohen's luck egalitarianism and his canonical critique of Rawls. More specifically, she claims that there's a tension between (a) claiming that inequalities traceable to choice should remain intact, and (b) claiming that justice prohibits providing incentives and yet requires the talented to work just as hard as they counter-factually would have (Hurley 2003, 212-216). On the plausible assumption that the productivity of the talented is at least partially traceable to their choices (an assumption that's actually presupposed by the claim that the talented are morally required to work just as hard without incentives), doesn't luck egalitarianism suggest that the talented are entitled to a larger portion of the extra goods generated by their efforts? It seems that luck egalitarians are committed to saying as much since it is unfair, on their view, to eliminate inequalities traceable to choice.

Cohen's reply to Hurley is fairly simple. He maintains that a choice-based justification for socio-economic inequality is different from an incentive-based justification, and that his critique of incentives only condemns the latter (Cohen 2008, 403-406). In other words, while a personal commitment to the Difference Principle would not permit talented workers to *make* incentives necessary by refusing to work just as hard without them; nothing prevents those workers from concluding that they are entitled to more resources than those who work less. Of course, such a justification would also apply to hard working citizens who lack productive talents, and thus it is a justification for socio-economic inequality between those who choose to work hard and those who choose not to, rather than a justification for inequality between the talented and the untalented.

Though Cohen is right to distinguish choice-based justifications for (non-luck) inequality from incentive-based justifications, it seems to me that citizens committed to the Difference Principle are required to reject the former just as much as they are required to reject the latter. After all, the Difference Principle does not distinguish between those who are worse-off due to choice and those who are worse-off due to bad luck. Though fair equality of opportunity and a concern for mitigating the distributive effects of the genetic lottery are broadly consistent with the requirements of luck equality, the Difference Principle is not a form of luck egalitarianism. Unlike a principle of luck equality, it is insensitive to choice related differences between members of the same socio-economic class: it simply specifies that any inequalities must be necessary to benefit those who have less, regardless of why they have less. As a result, the Difference Principle condemns unnecessary inequality of any sort, not just those between the

talented and the untalented, but also between those who work hard and those who don't. The upshot is that citizens who accept reward on the ground that they've chosen to work harder than others would be permitting an unnecessary inequality. In light of this, it seems to me that we have yet another way in which an ethos based on the Difference Principle deviates from the requirements of luck equality. Not only would such an ethos create unchosen inequality in the distribution of burden between those committed to it, but it denies them a choice-based justification for retaining extra resources. Of course, Cohen's version of the Difference Principle is a bit different from the standard version. As we've noted throughout, his Difference Principle is a welfare inclusive, prerogative constrained principle. As such, it is consistent with both personal prerogative and labor burden justifications for retaining extra resources, even if it isn't consistent with incentive or choice-based justifications. Whether or not the amount justified by a personal prerogative or by compensation for labor burden would be less than the amount justified by a choice-based justification is difficult to say. However, the fact that the hardworking talented are able to retain extra resources via alternative justificatory routes suggests that unchosen inequality of burden is the more pressing deviation from luck equality.

Unfairness is always regrettable, but it may also be the case that a certain amount of unfairness in the distribution of regulatory burden is unavoidable in the personal context. If so, then so be it. Shouldn't we try to minimize this unfairness in so far as we can, though? Is it possible to leave space for affection, self-interest, loyalty, etc., without also sacrificing clarity? In what follows, I examine Peter Singer's public standard of assistance in hopes of shedding some light on what a clear, easy-to-follow alternative might look like. My goal is not so much to defend Singer's standard, but rather to draw attention to its virtues so that they might be taken into consideration in future efforts to determine what, exactly, are the regulatory principles best suited for the personal context.

5. Regulatory Principles for the Personal Context

In *The Life You Can Save*, Peter Singer acknowledges that the moral principle he famously defends in "Famine Affluence and Morality" is, in a sense, too demanding (2010, 151-173). Though he continues to maintain that we are morally required to prevent bad occurrences, e.g., starvation and preventable disease in the Global South, whenever we can do so without giving up anything of comparable moral importance,^{xxv} he also admits that using such a standard to determine whether a person should be blamed for their behavior is likely to have a discouraging effect. Since the principle he defends requires the psychologically prodigious task of giving to the point where one is nearly as impoverished as those one seeks to help (at least in the absence of widespread compliance), blaming those who fall short is likely to discourage many people from trying at all. To address this problem, Singer suggests that praise and blame should be accorded with reference to a more modest standard. More specifically, better off individuals should be publicly expected to donate a determinate and comparatively small percentage of

their income to poverty relief. The percentage they're expected to donate depends on their particular income bracket, and rates are set progressively in order to ensure that those at the bottom end of a higher bracket are not expected to accept a lower net income than those at the upper end of the bracket immediately below them. The following table provides an example of the sort of standard Singer has in mind.^{xxvi}

Yearly Income	Donation
65, 000 - 100, 000	2.5%
100, 001 - 150, 000	2.5% of the first 100, 000 and 5% of the remainder
150, 001 - 400, 000	2.5% of the first 100, 000; 5% of the next 50, 000 and 10% of the remainder
400, 001 - 1, 000, 000	2.5% of the first 100, 000; 5% of the next 50, 000; 10% of the next 250, 000 and 15% of the remainder
Over 1, 000, 000	2.5% of the first 100, 000; 5% of the next 50, 000; 10% of the next 250, 000; 15% of the next 600, 000 and 20% of the remainder

What Singer's after with his public standard is similar to what I'm after in my search for a compelling alternative to the Difference Principle. There are also important differences, though. First, Singer's standard targets global poverty, whereas the standard I'm after is concerned with what co-citizens owe to one another. Though questions about what we owe to distant strangers are certainly important, they lie beyond the scope of my paper. Second, I don't endorse Singer's distinction between what morality actually requires and what we ought to be publicly supporting. For Singer, demandingness is a problem primarily because of its discouraging psychological effects. According to him, promoting a less demanding standard is a more effective way of encouraging people to give than promoting a more demanding standard. As such, Singer's public standard is an indirect strategy for (partially) implementing the more demanding standard's requirements (Singer 2010, 150-154). By contrast, I think the factors that make an action guiding standard too demanding also undermine its claim to moral correctness. My worry is not that the Difference Principle's demandingness will discourage compliance, but rather that said principle doesn't leave sufficient space for affection, self-interest, loyalty, etc. An alternative is needed because the Difference Principle misrepresents what citizens are obligated to do for each other in their daily lives, not because promoting some other principle is a more effective way to implement the Difference Principle's requirements.

Despite the above differences between Singer and myself, I think his efforts to formulate a standard the content of which is responsive to the problem of demandingness provides a useful starting point when thinking about alternatives to Cohen's welfare inclusive, prerogative constrained Difference Principle. Widespread commitment to a standard modeled on Singer's would benefit the worst off socio-economic group and reduce the size of the inequality between differently talented citizens. What's more, it would provide clear guidance and thus avoid creating any unchosen inequalities in the distribution of regulatory burden. Rather than trying to guess how much is required of them, citizens need only refer to the above table and perform some relatively simple calculations to determine how much they should be donating to the worst off.

One worry is that Singer's public standard asks too little of talented citizens. Arguably those who are modestly rich ought to give more than just 5% or 10% of their incomes to the worst-off (I assume the highest brackets in the above table aren't applicable, since a society whose institutions conform to Rawls's principles of justice shouldn't have any 'super rich' citizens). Though it may indeed be the case that 5% or 10% is too low, it's worth noting that Singer's standard isn't meant to be static. He's careful to note that what counts as too demanding is socially and culturally relative, and thus that the standard's demands can reasonably be increased in so far as we succeed in cultivating a culture of giving. One simple and easy way to promote such a culture is by talking (and perhaps tweeting) about the standard with one's friends, family, co-workers, etc. Discussing the standard, one's reasons for following it, and the sense of fulfillment one (hopefully) gets out of giving will encourage others to follow it and also help to normalize the ideas that voluntary giving is an important part of leading a morally fulfilling life. In so far as citizens begin to see giving as one of the personal goals that make life meaningful, rather than as a burdensome moral task in conflict with those personal goals, then the requirements of our standard can be increased without being unreasonably demanding (Singer 2010, 150-154). In fact, it may be the case that a culture of giving is likely to prevail under Rawlsian institutions.^{xxvii}

In spite of its virtues, whether a standard modeled on Singer's is the best alternative to a welfare inclusive, prerogative constrained Difference Principle is still an open question. I merely offer Singer's standard as a promising example of how we might make space for affection, self-interest, loyalty, etc., without also compromising clarity.

6. Conclusion

In conclusion, the purpose of this paper has been to assess Cohen's attack on the basic structure restriction, particularly his replies to the problem of demandingness. I argued that it makes sense to include subjective welfare in the metric of fundamental justice and to balance considerations such as affection, self-interest, and loyalty against fundamental justice when applying it to the context of personal choice; but I also argued that these moves become problematic when it's acknowledged that the issue

being debated is whether the Difference Principle – a principle of regulatory justice - extends to personal choice (hence my claim that Cohen equivocates). As Andrew Williams persuasively argues, a welfare inclusive, prerogative constrained Difference Principle is not sufficiently clear to meet Rawls's publicity condition. What's more, it is incapable of providing clear guidance to those who would seek to follow it. Considering that action guidance is a key function of regulatory principles, the latter problem is perhaps especially concerning. Finally, lack of clarity leads to unchosen inequality of burden, as some followers of the Difference Principle would inadvertently do more than is required of them and some would do less. As a result, the Difference Principle is less fair in the personal context than it is in the institutional context. In light of the various problems that attend lack of clarity, I concluded that we have good reason to look for an alternative to Cohen's welfare inclusive, prerogative constrained Difference Principle. Since Peter Singer's public standard of assistance manages to respond to the problem of demandingness without also sacrificing clarity, his work seems like a good place to start in our search for distributive regulatory principles well-suited to the personal context.

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ⁱ Reprinted with minor revisions as chapter 1 of Cohen (2008).

ⁱⁱ Reprinted with minor revisions as chapter 3 of Cohen (2008). For recent discussions of Cohen's critique of incentives and the basic structure restriction, see Estlund (1998); Williams (1998); Murphy (1999); Pogge (2000); J. Cohen (2002); Julius (2003); Tan (2004); Scheffler (2006); Titelbaum (2008); Shiffrin (2010); and Schouten (2013).

ⁱⁱⁱ For Rawls's comments on the difference between the concept of justice and conceptions of justice, see Rawls (1971), 5-6. That there's a disagreement between Rawls and Cohen over the concept of justice is something Thomas Scanlon suggested back in 2006. Since then, Cohen's book *Rescuing Justice and Equality* has made this abundantly clear, and authors commenting on it have voiced agreement. See Scanlon (2006), 85-87; Williams (2008), 122-124; Quong (2010), 336-340; Ripstein (2010), 669-687; Tomlin (2010), 228-235 and 240-246; and Tomlin (2012).

^{iv} For my earlier thoughts about the relationship between Cohen's theses, see Johannsen (2013).

^v Though the relationship between fact-dependence and a principle's scope of application is relevant to my paper, I've discussed that subject at some length elsewhere. Here, I concern myself with the particular details of the debate between Cohen and his opponents, and the manner in which those details relate to the distinction between fundamental values and regulatory principles. For a discussion of the general relationship between fact-dependence and scope of application, see Johannsen (2013), 139-43.

^{vi} For an interesting paper exploring the possibility that eventual widespread access to genetic technologies may have positive or negative implications for the cultivation of an egalitarian ethos, see Feeney (2012), esp. 93-98.

^{vii} The above exegesis of the 'basic structure objection' and Cohen's critique of incentives appears in Johannsen (2013), 136.

^{viii} Cohen's critique of the basic structure restriction is not entirely internal, however. In addition to the above described internal criticism, he also suggests (at least implicitly) that, conceptually speaking, it is problematic to claim that only a society's institutions are relevant to assessing the extent to which it is just. To see why, compare a society with both just institutions and an ethos of justice to a society which only possesses just institutions. Isn't the former society more just than the latter one? If so, then whether citizens possess an ethos of justice is pertinent to whether the society they live in is just. This may be true instrumentally via the casual relationship between a society's ethos and the distributive pattern that obtains within it, and/or it may be non-instrumentally true via a constitutive connection between the character of a society's ethos and whether that society counts as just. See Cohen (2008), 124-129 and 377-381.

^{ix} For an articulation of the demandingness critique, see Pogge (2000), 152-154 and 163-164. For other discussions of this worry, see Van Parijs (1993); Tan (2004); and Titelbaum (2008).

^x I borrow the terms "input" and "output" from Patrick Tomlin. See Tomlin (2010), 232.

^{xi} For discussions of the distinction between evaluative claims and normative claims, see Lawford-Smith (2010), 357-361; Gilabert (2011), 55-59; Tomlin (2012), 377-378 and 383-385; and Valentini (2012), 657-658.

^{xii} See, for example, Cohen (2008), 315-330

^{xiii} See also Cohen (2008), 7, 271 and 300-302.

^{xiv} See endnote 9 of the present paper.

^{xv} See also David Estlund's comment about the breadth of Cohen's personal prerogative in Estlund (1998), 101-102. For Cohen's reply, see Cohen (2008), 390-391.

^{xvi} The above description of the demandingness objection and Cohen's personal prerogative appears in Johannsen (2013), 143.

^{xvii} It's worth noting that Cohen makes a further qualification in light of the below discussed issues of clarity and publicity raised by Andrew Williams. In particular, Cohen notes that it is unreasonable to expect citizens to do something when, because of informational barriers, they are unable to tell that the Difference Principle requires it of them. Though noting as much serves to remove the worry that an ethos of justice requires blaming citizens who fail to fulfill epistemically inaccessible obligations, a number of additional problems attend lack of clarity. I discuss these problems at length throughout the present paper. For the above mentioned qualification, see Cohen (2008), 371.

^{xviii} See Cohen's discussion of publicity in Cohen (2008), 323-327.

^{xix} For his argument against the claim that clarity is a strict constraint on regulatory principles, see Cohen (2008), 351-354.

^{xx} I concede, however, that there are certain cases where clarity is not a virtue, e.g., it's probably good, all things being equal, that the norms governing drink buying between friends at the pub are somewhat vague. For his discussion of such cases, see Cohen (2008), 353-354.

^{xxi} For canonical articulations of Luck Egalitarianism, see Arneson (1989); Cohen (1989); and Dworkin (2000).

^{xxii} For prominent criticisms, see Wolff (1998); Anderson (1999); and Scheffler (2003). For some recent defenses, see Brown (2005); Knight (2005); Barry (2006); and Tan (2008).

^{xxiii} Here, I assume that "necessary" socio-economic inequality between differently talented citizens is a deviation from luck equality. The extent to which my assumption is true, however, depends on the extent to which differences of talent are a matter of circumstance, as well as on the extent to which socio-economic inequality between differently talented citizens is traceable to the fact that they're differently talented. Since one's endowment of talents is partially the product of choices about training and education, and since whether to engage in productive work is itself a choice, it's reasonable to claim that *some* of the inequality between differently talented citizens is not luck inequality.

^{xxiv} I owe thanks to Ryan McSheffrey for raising this objection.

^{xxv} For the original statement of this principle, see Singer (1972), 231.

^{xxvi} The table I've created is similar to one that Singer himself uses. For Singer's table, see page 164 of Singer (2010).

^{xxvii} For a discussion of the causal relationship between just institutions and the development of an ethos of justice, see J. Cohen (2002). For G.A. Cohen's thoughts on the matter, see Cohen (2008), 377-381.