

SYMPOSIUM
LIBERALISM AND SOCIAL JUSTICE



LIBERALISM AND DISTRIBUTIVE JUSTICE

A PRÉCIS

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Liberalism and Distributive Justice A Précis*

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I

Liberalism

Liberalism is the predominant social and political doctrine, in theory and in practice, in the Western world. Given liberals' penchant for disagreement, it is not surprising that liberalism is such a contested idea, standing for different principles and values depending upon one's political point of view. In American public political culture, "liberal" is often used as a term of abuse and is rarely embraced by the persons and political party to whom it refers: those moderately left of center, mostly Democrats, who advocate a broad interpretation of personal and civil liberties, the regulation of business, and the generous provision of public goods, including social insurance, anti-poverty, health and education, and other programs designed to improve people's lives. "Conservatives" in the United States reject most if not all of these ideas and advocate expansive economic liberties, robust rights of property, free enterprise with unregulated markets, low taxes, the privatization of public functions, and minimal redistribution of income and wealth

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except for national defense and domestic security of persons and their property.

The irony is that American conservatism strongly resembles nineteenth-century classical liberalism, which provided the theoretical background for laissez-faire capitalism. Liberalism in Europe is still regarded in this way. The term “neo-liberalism” lately has been applied to the resurgence of laissez-faire economic liberalism and its extension to international trade and the increasing globalization of capitalism. This resurgence is due in part to the influence that the economists Friedrich Hayek and Milton Friedman respectively had on Margaret Thatcher and Ronald Reagan and their political parties in the last quarter of the twentieth century.

Left-of-center American liberalism is sometimes compared with social democracy, but it really has no close parallel in European politics, largely because those left of center in the United States who survived McCarthyism and anti-communism were never seriously influenced by socialism, unlike social democrats in Europe and the Labour Party in the United Kingdom. The established liberal Left in the United States has long embraced economic markets with private ownership of means of production, conjoining their support for capitalism with the regulatory welfare state. The division between neo-liberal conservatives and left-of-center liberals in the United States thus parallels the division between laissez-faire and welfare-state capitalism.

Here I understand liberalism more broadly, in a philosophical sense that encompasses a group of related political, social, and economic doctrines and institutions encompassing both classical and left liberalism, and including liberal market socialism. Liberalism in this more general sense is associated in political thought with non-authoritarianism, the rule of law, limited constitutional government, and the guarantee of civil and political

liberties. A liberal society is tolerant of different religious, philosophical, and ethical views, and its citizens are free to express their views and their conflicting opinions on all subjects, as well as to live their lives according to their freely chosen life plans. In economic thought, liberalism is associated with a predominantly unplanned economy with free and competitive markets and, normally, private ownership and control of productive resources. In international relations, liberalism advocates freedom of trade and cultural relations, idealism instead of realism, international cooperation and institutions rather than isolationism, and the use of soft power instead of power politics. This is not to say that liberal governments are consistent in realizing these ideas in practice.

Certain values, principles, and ideals are also connected with social, political, and economic liberalism: liberty, of course, but also equality – of liberties, as well as opportunities and the civic status of citizens. Other liberal values commonly cited include tolerance, impartiality, fairness, consensus, non-interference, non-discrimination, free choice, entrepreneurship, and private property. To justify their position, liberals appeal to such abstract values and ideals as human dignity, equal respect, the moral equality of persons, autonomy, the public good, the general welfare, consent of the governed, diversity, human progress, and individuality. Liberals interpret some if not all of these values in different ways.

Liberalism is also a debate about how to interpret and structure certain basic social and political institutions that all liberals normally endorse: constitutionalism and the rule of law; equal basic rights and liberties; equality of opportunity; free competitive markets and private property; public goods and a social minimum; and the public nature of political power and (since the twentieth century) democratic government. In chapter 1, “Capitalism in the

Classical and High Liberal Traditions”,¹ I distinguish classical liberalism from liberalism to its left, which was called “new” or “modern liberalism” in the twentieth century but which I call the “high liberal tradition” – both because the resurgence of classical liberalism renders its neighbor to the left neither new nor modern and because high liberalism is, I contend, the natural development of fundamental liberal values of the freedom and moral equality of persons in a democratic society. I discuss the two liberalisms’ competing interpretations of these basic social and political institutions, and especially their attitudes toward capitalism. The chapter compares the two liberalisms’ different positions regarding the rights and liberties each regards as most basic, as well as their positions regarding equality of opportunity and the distributive role of markets in establishing distributive justice, the other major theme of this book.

Classical liberals characteristically consider economic liberties and robust rights of property to be as important as, if not more important than, basic personal liberties such as freedom of conscience, expression, association, and freedom of the person. For example, Hayek said that the most important rights and liberties for a person are freedom from involuntary servitude, immunity from arbitrary arrest, the right to “work at whatever he desires to do,” freedom of movement, and the right to own property. The liberties on this list were regarded as “the essential conditions of freedom” in the eighteenth and nineteenth centuries, and the list still “contains all the elements required to protect an individual against coercion.”² Notably absent from Hayek’s list of essential freedoms are the personal freedoms that J. S. Mill said were essential to individuality and the principle of liberty: freedoms

¹ This chapter is a revised and somewhat expanded version of the original article.

² Hayek 2011, 70-71.

of conscience, expression, association, and “tastes and pursuits”.³ Most contemporary classical liberals emphasize these important personal liberties too, along with economic liberties and rights of property, which together constitute what the nineteenth-century classical liberal Benjamin Constant called “the liberties of the moderns.” Classical liberals, though they now accept constitutional democracy as the safest form of government, characteristically assign less importance to equal political rights to participate in government and in public life – Constant’s “liberties of the ancients” – regarding political democracy as jeopardizing robust economic and personal liberties, but still preferable to other forms of government. Since high liberals assign greater priority to personal and political liberties than economic liberties, the priority that classical liberals assign to the economic liberties accounts for most of the differences between contemporary classical and high liberalism, including their conflicting positions regarding the justice of market distributions.

I introduce in this chapter the idea of distributive justice that was raised to prominence within the high liberal tradition in the twentieth century. Here I critically assess the classical liberal distributive principle that economic agents deserve to be rewarded according to their (marginal) contributions to economic product. The chapter concludes with some reflections upon the essential role that dissimilar conceptions of persons and society play in grounding the different positions on economic liberties and distributive justice that classical and high liberals advocate.

Chapter 2, “Illiberal Libertarians: Why Libertarianism Is Not a Liberal View,” examines a third political conception that is often regarded as liberal, since it appears to have much in common with classical liberalism, including the prominence assigned to property

³ Mill 1991, chap. 1, final paragraphs.

rights and economic liberties. I argue that the resemblance between liberalism and libertarianism is superficial: upon close examination, it becomes apparent that libertarianism rejects the most basic liberal institutions discussed in chapter 1 and here in greater detail.

A clarification: the term “libertarian” refers most often to those who fervidly defend robust laissez-faire economic rights and liberties and have full confidence in capitalist markets’ capacity to address social problems. The classical liberals Milton Friedman and Friedrich Hayek are sometimes called “libertarians,” as is Ayn Rand. The term is also used for liberals mostly on the left, called “civil libertarians,” who ardently defend personal and civil liberties, though not strong property rights and economic liberties.⁴ I use the term “libertarian” in a philosophical sense, to refer to economic and personal libertarianism in its purest form, which is grounded in a doctrine of absolute property rights in one’s person (“self-ownership”) and in one’s possessions. Libertarianism so construed is associated with its major philosophical spokesperson, Robert Nozick, and others who advocate similar social and political arrangements (e.g., Murray Rothbard and Jan Narveson).

One of the essential features of liberalism, I argue, is that it holds that legitimate political power is not simply limited: it is a public power that is to be impartially exercised and only for the public good. Libertarianism rejects each of these liberal ideas, conceiving of legitimate political power as a private power that is based in a network of economic contracts and that is to be sold and distributed, not impartially, but, like any other private good,

⁴ The position known as “left libertarianism” has been defended relatively recently and is still waiting to be more fully developed. It seeks to combine redistributive egalitarianism with self-ownership and near-absolute personal, civil, and economic liberties. I do not address that position here. See the essays in Vallentyne and Steiner 2000; Otsuka 2005, and my review of Otsuka’s book in Freeman 2008; and Steiner 1994.

according to individuals' willingness and ability to pay. Correctly understood, libertarianism resembles a view that liberalism historically defined itself against, the doctrine of private political power that underlies feudalism. Moreover, the primary institutions typical of the liberal political tradition – including inalienable basic rights and liberties, equality of opportunity, and government's role in maintaining fair and efficient markets, public goods, and a social minimum – are also rejected, I contend, by orthodox libertarianism.

The term “orthodox” suggests that there are other, more moderate accounts of libertarianism that do not reject all the basic liberal institutions I discuss and that regard themselves as versions of classical liberalism.⁵ I do not discuss these here, but do so elsewhere in more recent work.⁶ Characteristically, those who adhere to these non-orthodox positions, endorse, as liberals do, the inalienability of certain basic rights and liberties, especially freedom of the person, and reject the enforcement of contracts for involuntary servitude. But as libertarians they also usually reject the social safety net that is typical of modern classical liberal views and seek to privatize the provision of most public goods accepted by classical liberals. I regard these positions, including the minimization of government's role, which currently have a great deal of popular support in the Republican Party, as hybrid views, impoverished forms of liberalism that surrender consistency for the sake of certain fixed moral intuitions, especially moral revulsion to slavery and other morally repugnant practices even if voluntarily contracted into. Orthodox libertarians, such as Nozick, by contrast, take the idea of absolute property in one's person and possessions and absolute freedom of contract to the limit, and have no theoretical misgivings (whatever personal reservations they may

⁵ See the helpful Brennan 2012 and Id., van der Vossen and Schmitz 2017.

⁶ See Freeman 2017.

feel) about the complete alienation of all one's rights and liberties. This is what makes orthodox libertarianism a distinct philosophical conception of justice and ultimately distinguishes it from liberalism.

II

Distributive Justice

In the three chapters in part II of the book, "Distributive Justice and the Difference Principle," I analyze and apply to economic systems and the private law John Rawls's, conception of justice, which embodies the major account of distributive justice set forth in the twentieth-century high liberal tradition. "Distributive justice," when used to refer to the just or fair distribution of income and wealth produced by economic cooperation, is a relatively modern idea that gained considerable prominence only with the socialist criticism of capitalism starting in the nineteenth century. But before that, David Hume addressed the subject when he said that it would be irrational to organize the economy so that income and wealth were distributed either equally or to reward individuals according to their virtue. Both proposals would soon meet with failure, reducing all to poverty. Instead, Hume said, the conventions of property, markets, and other consensual transfers, and contracts and similar agreements, are and should be organized to promote public utility⁷. Individuals should be permitted to sell what they produce, retain economic gains from their efforts and contributions, and pass their property to their offspring, because these conventions are useful to society. Adam Smith's doctrine of the invisible hand provided the economic framework for Hume's utilitarian account of justice. These ideas have long been developed

⁷ Hume 1970, section III, 183-204.

by classical and neo-classical economists and have provided classical liberalism with the primary justification of market distributions in a capitalist economy.

Rawls presents his difference principle as an alternative to utilitarianism in order to structure economic institutions and productive relations and to distribute income and wealth. The difference principle requires that property and the economic system be organized so that income and wealth are distributed in a way that maximizes, not the welfare of society, but the economic position of the least advantaged members of society, making them economically better off than they would be in any alternative economic arrangement. Chapter 3, “Rawls on Distributive Justice and the Difference Principle,” provides a thorough discussion of Rawls’s account of distributive justice with particular focus on the difference principle. It begins with the requirements of distributive justice implicit in Rawls’s principle of equal basic liberties and fair equality of opportunity. Rawls argues that economic inequalities should not become so large that they undermine either the fair value of citizens’ equal political liberties or the fair equality of their opportunities to develop their capacities so they can compete for open occupational positions and enjoy the benefits of culture.

G. A. Cohen argued that the inequalities allowed by the difference principle are compatible with the vast inequalities typical of capitalism.⁸ For example, the difference principle might be used to justify tax reductions for the wealthiest, on the assumption that they will invest in new jobs that marginally benefit the least advantaged. Leaving aside the fact that the great inequalities in our capitalist economy violate the fair value of equal political liberties and also fair equality of opportunity, Cohen’s objection raises a problem in non-ideal theory that Rawls does not address. As I

⁸ Cohen 2008, chaps. 3-4; see e.g. 138

discuss here and in chapter 8 on ideal and non-ideal theory, Rawls's difference principle is chosen by the parties in the original position for an ideal well-ordered society where everyone accepts the same principles of justice and these principles are fully enacted into law. The difference principle can be narrowly applied in a well-ordered society in order to put in place measures that maximally benefit the least advantaged in those ideal circumstances. But in non-ideal circumstances that do not comply with the difference principle, such as a capitalist society with huge inequalities like those in the United States, the application of the difference principle is not as straightforward. If the best among the narrow measures currently available to maximally benefit the least advantaged only increase and permanently reinforce the gross inequalities that already exist, then, I argue, a society should forgo those maximin measures and instead adopt alternative measures which promote the eventual realization of just economic institutions that do not yet exist. This means that an unjust society has a duty to enact alternative measures that, even if they benefit the least advantaged less than the maximin measures currently available, reform unjust institutions in the direction of an economic system that eventually satisfies the difference principle. The difference principle must presuppose in non-ideal conditions a broad requirement that imposes on a society a duty of justice to reform its economic system so that eventually it makes the least advantaged class better off than does any alternative economic system. This may frequently require a society to enact measures in non-ideal conditions that, while they benefit the least advantaged, are nonetheless suboptimal for them in the short run. This is the appropriate response, I argue, to classical liberal trickle-down policies that increase and permanently solidify great inequalities in a capitalist society.

J. S. Mill was a fairly orthodox classical liberal when he first wrote *The Principles of Political Economy*, which Marx regarded

as the testament of capitalism. But Mill had made the transition to high liberalism by the seventh edition of his treatise. He argued for the redistribution of large estates, large taxes on profits from rentier income on land, and most notably workers' private ownership and control of the firms they labored in within a market economy. His proposal was an early version of what has since come to be called "property-owning democracy."

In chapter 4, "Property-Owning Democracy and the Difference Principle," I take up where the preceding chapter leaves off and address the question, what social and economic system is capable of best realizing the principles of justice and maximizing the prospects of the least advantaged? Rawls says the main problem of distributive justice is the choice of a social system. Property-owning democracy is the social system that Rawls thought best realizes the requirements of his principles of justice, including the difference principle (though he leaves open the possibility that liberal market socialism might do so as well under some circumstances). This chapter discusses Rawls's conception of property-owning democracy and how it differs from welfare-state capitalism and other economic arrangements. I explain why Rawls thought that welfare-state capitalism could not fulfill his principles of justice and discuss the connection between welfare-state capitalism and utilitarianism. I also discuss the crucial role of democratic reciprocity and the social bases of self-respect in Rawls's argument for both the difference principle and property-owning democracy.

Chapter 5, "Private Law and Rawls's Principles of Justice," which has not been previously published, continues the discussion of the application of Rawls's principles of justice to liberal institutions, in this case to what is known as "private law" – the law of legal relationships between individuals – including primarily property, contract, and tort law. It has been argued that Rawls's

principles of justice apply only to public law – laws affecting government’s relationships to individuals, and the benefits government provides and the burdens it imposes. Public law includes constitutional law, taxation, and redistribution to pay for public goods, social insurance, and welfare programs, also criminal law, administrative law, and procedural law. I contend that, in addition to public law, the first principle plays a crucial role in assessing and determining the private law of property, contract, and tort; moreover, fair equality of opportunity and the difference principle are to be applied to the assessment of rules of property and contract law. But the role of the difference principle in tort law and its determinations of fault and liability are more limited. The reason for this difference is that the difference principle addresses the question of how a society is to fairly design and efficiently organize the institutions that make economic cooperation possible among free and equal persons actively engaged in productive activity, including the fair and efficient allocation of resources and the production, transfer, and fair distribution of goods and services that enable individuals to freely pursue their life plans. Certain core legal institutions, including property, economic contract, and other laws enabling the sale and transfer of goods, are necessary for economic cooperation and are among the institutions covered by the second principle of justice. Other bodies of law, including criminal law and the private law of torts, restitution, and family law are not directly concerned with matters of economic justice, and so are not regulated by the difference principle. In this respect, the role of the difference principle differs from the role assigned to the principle of efficiency in law and economics, which by its terms applies to all of private law, including the law of torts and compensation for accidents.

III

Institutions

The four chapters in part III, “Liberal Institutions and Distributive Justice,” focus on the crucial role of liberal institutions and procedures in determinations of distributive justice. Social institutions in general and their laws and procedures play a fundamental role in defining a liberal government and society. We take for granted the rule of law and adherence to the rules and procedures of liberal social institutions – the constitution, the legal system, property, markets, and the economic system – since they provide background structure that affects nearly every aspect of social life. The importance of the rule of law and adherence to the procedures of a liberal constitution are especially palpable now that they are threatened by an administration in the U.S. that has no respect for them.

In chapters 6, 7, and 8, I discuss the central role that basic social institutions play in determining the scope and requirements of distributive justice. Chapter 6, “The Social and Institutional Bases of Distributive Justice,” addresses the question of whether distributive justice is “relational” and based in cooperative social institutions or whether it is non-relational and global in the reach of its requirements. Many so-called luck egalitarians contend that it is morally arbitrary whether a person is born into a wealthy or a poor society, just as it is morally arbitrary whether a person is born to wealthy or poor parents or with more or less intelligence or physical prowess. Liberal social egalitarians such as Rawls and Ronald Dworkin, who seek to neutralize the effects of social class, natural talents, and misfortune, should also neutralize, many claim, the effects of national boundaries and extend the scope of their distributive principles to the world at large. Distributive justice knows no boundaries, cosmopolitan egalitarians contend.

Chapter 6 argues that distributive justice is institutionally based. Certain cooperative institutions are basic: they are essential to economic production and the division of labor, trade and exchange, and distribution and consumption. These background institutions require principles to specify their terms and determine the justice of their distributions. Primary among these basic institutions are the legal institution of property; laws and conventions such as markets enabling transfers and distribution of goods and services; and the legal system of contracts and related transactions that make production, transfers, and distribution possible and productive. Political institutions are necessary to specify, interpret, enforce, and make effective the terms of these basic economic institutions. I conclude that the basic institutions that make economic cooperation possible are thus social in nature; they are realizable only within the context of social and political cooperation—this is a fixed empirical fact about cooperation among free and equal persons. Given the nature of social cooperation as a kind of reciprocity, distributive justice, I conclude, is primarily a question of social justice too.

The institutional account of distributive justice recognizes that many requirements of justice apply to international relations and institutions as well and to people the world over regardless of our relations with them. These requirements include not only respect for human rights and the law of peoples, and procedural and fairness requirements in our dealings with other societies, but also substantive requirements of economic justice. Societies have a duty to maintain fair trade relations with each other, for example, which means that wealthier societies should not exercise their economic power to take unfair advantage of or exploit others. This is a requirement of global economic justice. Distributive justice, however, I regard as a distinct form of economic justice; it originates with participants who are engaged in social cooperation doing their fair share to sustain basic social institutions and

contribute to economic cooperation, and addresses the question of the fair distribution of the social product among those who contribute to its production. We cannot address the question of whether there are demands of distributive justice that stem from international/global institutions without investigating the particular nature and complexity of these institutions and their role in economic production and commerce. I do not rule out a global distribution requirement of economic justice that is in addition to societies' duties of assistance to burdened societies that are unable to provide for all their citizens' basic needs. But if there are international or global distribution requirements, they would not replace, but would supplement and remain dependent upon, the social and institutional bases of distributive justice.

Chapter 7, "The Basic Structure of Society as the Primary Subject of Justice," discusses the reasons Rawls assigns such a central role to social institutions and procedures in his liberal account of distributive justice. Rawls's liberal conception of free and equal moral persons, and of the social conditions necessary to realize fair reciprocity and citizens' fundamental interests, is integral to understanding why Rawls assigns such importance to principles of justice for the institutions of the basic structure of society. Rawls himself mentions two reasons for this primacy: the profound effects of basic social institutions on individuals' purposes and life prospects, and the need to maintain background justice in a liberal system that relies on pure procedural justice. In this chapter, I discuss the main reasons for the primacy Rawls assigns to principles of justice for the basic structure. First, it is necessary to apply the principles of justice to the basic structure instead of directly to individuals' conduct in order to maintain the freedom, equality, and independence of moral persons. Individuals are then left free to devote themselves to their special commitments and the pursuit of their conceptions of the good, secure in the knowledge that the achievement of the fair

distribution of income and wealth will take place without their having to sacrifice their purposes, plans, and special commitments.

Second, Rawls's focus on the basic structure is a condition of economic reciprocity and fair distribution in a competitive market among free and equal citizens, each of whom contributes his or her fair share to economic product. In addition to legitimate distributive inequalities based on differences in individuals' efforts and other substantial contributions, markets tend toward inequalities based on arbitrary factors, such as differences in natural talent and social position, life's accidents and misfortunes, and good and bad market luck due to myriad factors beyond anyone's control (natural and man-made catastrophes, fluctuations in the labor supply, a surfeit or shortage of particular labor skills, etc.). In a liberal society that seeks to take advantage of economic markets' productive efficiency and to distribute income and wealth on grounds of pure procedural justice, it is necessary to maintain background justice by correcting the arbitrary distributions of markets so that individuals are rewarded their fair share on grounds of fair reciprocity and mutual respect. This is the role of the difference principle in structuring the basic institutions that make economic cooperation possible and productive.

Third, priority is assigned to the basic structure because it is required by moral pluralism to maintain the plurality of values and the diversity of reasonable conceptions of the good among free and equal persons. The values of justice clearly are not the only values worth pursuing, even if their requirements constrain and regulate the means individuals can adopt to pursue their valuable as well as merely permissible purposes. There are a plurality of values, moral principles, and reasons for acting in addition to those required by distributive justice. To morally require individuals themselves to directly apply principles of distributive justice, such as the difference principle, to their conduct and conform their

actions to its direct demands, would not just severely limit their freedom and independence to pursue their conceptions of the good; it also would severely interfere with and in effect diminish the importance of equally important values that constitute individuals' reasonable conceptions of the good. By applying the principles of justice to the basic structure and requiring individuals to comply with rules for individuals that are based on these principles but that leave them free to pursue a wide range of reasonable conceptions of the good, Rawls's theory enables what Samuel Scheffler has called "the division of moral labor," including individuals' realization of a plurality of values as they freely pursue their purposes and commitments.⁹

Liberal social contract doctrine characteristically seeks to discover principles that free and equal persons in society can all reasonably agree on and accept as a matter of justice. Its method assumes an ideal society that is well ordered in that everyone agrees to and accepts the same principles of justice and everyone generally complies with these principles. Given such "full compliance," the question Kantian contract doctrine asks is, which public principles of justice could or would free and equal rational and reasonable persons all agree to as the basis for social cooperation in such a well-ordered society? The general thought is that free, equal, and independent persons ought to be able to publicly recognize and freely accept and endorse the fundamental principles of their society that structure their relations and determine their future prospects and the kinds of persons they are and can come to be. In chapter 8, "Ideal Theory and the Justice of Institutions",¹⁰ I address Amartya Sen's argument against Rawls's reliance on such an ideal theory of "a perfectly just society." I argue that the principles of justice chosen for such an ideal society are not

⁹ See Scheffler 2010, chap. 4.

¹⁰ This chapter is a shortened version of the original article.

redundant or irrelevant as Sen contends. The principles of justice that would be agreed to and fully complied with in a well-ordered society of free and equal persons are needed to determine the just distribution of equal basic rights and liberties, powers and opportunities, and income and wealth in our non-ideal society.

I also address Sen's rejection of Rawls's primary focus on the basic institutions of society in favor of an account of "consequence-sensitive" evaluation of "comprehensive outcomes." I argue that Rawls's institutional approach, without being consequentialist, is also consequence-sensitive in that the principles of justice are designed to realize an ideal of persons and society. I discuss some potential problems with a consequentialist interpretation of Sen's own comparative method of evaluating comprehensive outcomes and suggest that a pluralist interpretation of his account (one that combines deontological with consequentialist principles) is not as different from Rawls's approach as Sen intends it to be.

Finally, Rawls relies upon social and psychological facts about humans to argue for his principles of justice, especially the difference principle. Some of his main arguments against utilitarianism are that, given natural human propensities and our moral sense of justice, the principles of justice realize our rational and moral nature; by contrast, the principle of utility imposes unreasonable demands on human beings, requiring the less advantaged to sacrifice their well-being for the sake of those already more advantaged by nature and circumstance. Aggregate or average utility cannot be widely embraced by all members of a liberal society, especially the least advantaged, as a dominant social end; as a result a utilitarian society will always be unstable. Chapter 9, "Constructivism, Facts, and Moral Justification," responds to G. A. Cohen's criticisms of Rawls's reliance upon empirical facts about human psychological and social tendencies to justify the

difference principle. Cohen contends that empirical facts are irrelevant to the justification of fundamental principles of justice and that Rawls's difference principle is not a fundamental principle but a principle of regulation designed to accommodate injustice due to human selfishness. I deny this interpretation and discuss three reasons why the first principles of a moral conception of justice should be "fact-sensitive," or presuppose general facts in their justification. First, a conception of justice should be compatible with our moral and psychological capacities. It should respond to basic human needs and our distinctly human capacities. Moreover, conscientious moral agents should be capable of developing appropriate attitudes enabling them to normally act upon and affirm the requirements of the principles of justice that structure society and determine their prospects. Second, a conception of justice should provide principles for practical reasoning and fulfil a social role in supplying a public basis for justification among persons with different conceptions of their good and diverse comprehensive religious, philosophical, and moral views. Third, a moral conception should not frustrate but rather affirm the pursuit of the human good, including the exercise and development of our moral capacities and sense of justice.

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