

HOW GIFTS AND GAMBLES PRESERVE JUSTICE

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This paper examines G. A. Cohen's final criticism of Ronald Dworkin's theory of *equality of resources*, which targets its treatment of inequalities that arise when some individuals make luckier choices than others make. Rebutting Cohen's argument that such *option luck inequalities* fail to be just in an unqualified sense, the paper argues that choice does not merely render inequality legitimate but instead can sometimes make inequality just. It also examines the relationship between Cohen's criticism and the conception of equality developed in his earlier influential paper, 'On the Currency of Egalitarian Justice'.

Let there be no differences between human beings other than age and sex. Since all have the same needs and the same faculties, let there be . . . one fare for all.

Francois Babeuf and Sylvain Marechal,
Manifeste des Egaux (1794)

. . . in deference to fairness . . . the egalitarian says she's against inequalities in the absence of appropriately differential responsibilities (just as, she now realizes, she is also against equalities in the presence of appropriately differential responsibility).

G. A. Cohen, 'Luck and Equality: A Reply to Hurley' (2006)

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1. INTRODUCTION

G. A. Cohen played a seminal role in the rigorous reconstruction of Marxism and was among the most effective critics of Robert Nozick's influential libertarian theory of economic justice.¹ Even more importantly, Cohen engaged in depth with the liberal egalitarianism now dominant in political philosophy and the work of its foremost recent advocates: John Rawls and Ronald Dworkin.² This paper examines Cohen's final criticism of Dworkin's theory of *equality of resources*, which targets its treatment of inequalities that arise when some individuals make luckier choices than others make. Rebutting Cohen's argument that such *option luck inequalities* fail to be just in an unqualified sense, the paper argues that choice does not merely render inequality legitimate but instead can sometimes make inequality just. It begins by outlining the central features and appeal of equality of resources.

2. EQUALITY OF RESOURCES

Equality of resources describes how a political community should display equal concern for each of its members when designing its distributive institutions. According to the theory, the community should ensure that each member fares as well as she would have fared had a particular type of procedure been implemented.³ The procedure is hypothetical, and in its simplest form involves an auction distributing equally valuable shares of privately owned resources. The procedure also confers on the owners of those resources various rights to make decisions about consumption, investment, production and trade, as well as claims to reap rewards, and liabilities to bear costs, arising from those decisions.⁴ Summing up the central role that private property and the market consequently play within equality of resources, Dworkin writes that 'A free market is not equality's enemy . . . but indispensable to genuine equality. An egalitarian economy is basically a capitalist economy.'⁵

Even if, as resource egalitarians argue, a political community does not owe its members protection from deficits in *welfare*, the procedure would still clearly be unjust if it did not respond to inequalities arising from more specific personal misfortunes, including illness, disability and lack

¹ See Cohen (1978, 1988, 1995).

² See Cohen (2008, 2011)

³ See Dworkin (2000: 162–164) and Dworkin (2002: 109).

⁴ See Dworkin (2000: 65–183, 320–350) and, for a more recent summary of equality of resources, Dworkin (2011: 356–363). See too Dworkin (2002), defending equality of resources against various objections.

⁵ See Dworkin (2011: 357).

of marketable talent.⁶ When proposing how to deal with such variations in *brute luck*, which arise regardless of the choices of the less fortunate, equality of resources draws on the crucial assumption that the community should also recognize its members' rights to choose between different levels of risk. Moreover, the theory assumes that the exercise of those rights sometimes makes a difference to members' claims and liabilities; for example, if fairly situated competent adults choose, or decline, to enter a fair lottery then the inequality that emerges if the lottery proceeds can, at least sometimes, be made just by its voluntary history.

Relying on the assumption that the unequal outcomes arising when some individuals make luckier choices than others may sometimes be just, equality of resources then radically extends this type of voluntarist justification of inequality. Doing so, it proposes that the hypothetical procedure should also involve a *fair insurance market* offering coverage against differential bad brute luck, which individuals can choose to purchase in ways guided by their own attitudes to misfortune and risk. Unlike participants in actual insurance markets, however, those individuals have *equal* purchasing power and are subject to a *veil of ignorance*, which allows them to know only the overall distribution of brute luck rather than their own personal fate.

Due to its concern that individuals receive protection against misfortune that is sensitive to their own attitudes to risk, equality of resources requires that individuals' shares be equally valuable from an *ex ante* rather than from any *ex post* perspective.⁷ For illustration of this important feature, suppose some members of a group suffer relatively bad brute luck, and propose that the more fortunate share in their bad luck by funding transfer payments or the provision of certain non-excludable goods. In response, *ex post* resource egalitarians affirm a requirement to redistribute resources so that after misfortune strikes everyone's share still commands the same price or nobody prefers anyone else's share. In contrast, equality of resources requires the type of redistribution that either does, or would, emerge from a fair insurance market. It rejects *ex post* egalitarian requirements if individuals in such a market would have declined to purchase the type of insurance package they provide. Due to the absence of individualized information about those hypothetical preferences, in our world equality of resources provides the less fortunate with the level of protection delivered by the average package of cover purchased in such a market.

⁶ For his case against egalitarian welfarism, see Dworkin (2000: 11–64, 285–299; 2004: 339–350). For further discussion, see Clayton (2000), Cohen (2011: 81–115) and Williams (2002: 383–389).

⁷ See Dworkin (2002: 120–125).

The appeal of equality of resources derives in large part from its jointly securing some form of *endowment-insensitivity* and *ambition-sensitivity*.⁸ Thus, like familiar forms of egalitarianism, equality of resources provides individuals with some protection from relative misfortunes produced by the unequal way that various social and natural lotteries distribute, for example, marketable talents, disabilities, illness and inherited wealth. Affirming the importance of endowment-insensitivity, however, does not itself require any specific attitude to ambition-sensitivity, or individuals' choice-making claims and powers and their choice-based liabilities.

To understand the attitude to ambition-sensitivity that equality of resources expresses, it is worth noting a spectrum of theoretical views about how exercises of agency can make a difference to whether a distribution is just or unjust. Views at the ambition-insensitive extreme of the spectrum deny individuals any such choice-related claims, powers and liabilities; at the opposite end, extreme ambition-sensitive theories favour market procedures that reject all restrictions on their claims and powers to dispose of their holdings, and place no limits on the liabilities their choices may generate, at least provided individuals' choices leave others' secure.

For illustration of these two opposing theoretical tendencies, suppose that institutions have satisfied endowment insensitivity by ensuring that no individuals are relatively disadvantaged due to their greater misfortune and regardless of any of their choices.⁹ Echoing Babeuf's commitment to 'one fare for all', *extreme ambition-insensitive egalitarians* then favour preserving equality in holdings. There are at least two ways for them to achieve this result. They might deny individuals any claims to control their lives in a way that results in, or risks, them becoming worse off than others; they might instead, or in addition, favour making individuals liable to share in the consequences of each other's choices and not merely their fortunes and misfortunes. At the other end of the spectrum, *extreme ambition-sensitive egalitarians* would reject all restrictions on claims and powers to choose. For them, any outcome might qualify as just regardless of the level of inequality or insufficiency it involves, so long as it possesses the appropriate voluntary history involving sufficiently

⁸ See Dworkin (2000: 89): 'we must, on pain of violating equality, allow the distribution of resources at any particular time to be (as we might say) ambition-sensitive . . . those who choose to invest rather than consume, or to consume less expensively rather than more, or to work in more rather than less profitable ways must be permitted to retain the gains that flow from these decisions in an equal auction followed by free trade. But on the other hand, we must not allow the distribution of resources at any moment to be endowment-sensitive, that is, to be affected by differences in ability of the sort that produce income differences in laissez-faire economy among people with the same ambitions.'

⁹ For further discussion, see the trilemma discussed in Williams (2006: 501–503).

competent and well-informed agents exercising their rights to choose against an endowment-insensitive background distribution.

Critics of 'luck egalitarianism' sometimes assume that equality of resources affirms the latter type of extreme ambition-sensitivity.¹⁰ They then proceed to reject the theory because it permits voluntarily incurred absolute deprivation and excessive inequality in outcome. My aim is to argue to that variations in option luck can preserve fairness within limits rather than in general and thereby cast doubt on Cohen's more novel objection to equality of resources.¹¹ To set aside the more familiar objection to luck egalitarianism I shall therefore assume that an advocate of equality of resources can accept that there are sound reasons to limit individuals' decision-making claims and powers. Such an acceptance makes equality of resources more plausible than it would otherwise be, and can be justified by appeal to various considerations. These range from duties to live with dignity, to respect the value of rational agency in one's own life as well as the lives of others, and to protect valuable social relations, as some of Cohen's own remarks suggest.¹² We shall therefore focus on a *sufficiency-securing* version of equality of resources that limits the menu of options available for individuals to select, or stakes individuals may wager.¹³

3. THE 'ANTI-DWORKIN ARGUMENT'

Many egalitarians treat economic inequalities differently depending on whether or not they arise from variations in fortune rather than variations in choice amongst similarly fortunate individuals. Cohen was one of the leading exponents of this widely discussed tendency in contemporary political philosophy. His influential paper 'On the Currency of Egalitarian Justice' declares that on 'the right reading of egalitarianism . . . its purpose is to eliminate *involuntary disadvantage*', which he stipulates to mean 'disadvantage for which the sufferer cannot be held responsible, since it does not appropriately reflect choices that he has made or is making or

¹⁰ See Anderson (1999), which coins the term, and Dworkin (2002: 113–117) for a resource egalitarian reply.

¹¹ For other important objections to equality of resources based on its treatment of option luck inequalities, see Fleurbaey (2008: ch. 6), Lippert-Rasmussen (2001) and Otsuka (2002, 2004).

¹² See Cohen (2009: 37), where Cohen writes that 'certain inequalities that cannot be forbidden in the name of socialist equality of opportunity should nevertheless be forbidden, in the name of community' and considers the possibility that 'the relevant prohibitions . . . define the terms within which justice will operate . . .' For related discussion of 'fraternity-based egalitarianism', see Cohen (2011: 120–121).

¹³ For further discussion, see Williams (2006), Bou-Habib (2006), Casal (2007) and Olsaretti (2009), the last of which helpfully coins the term 'stakes'.

would make'.¹⁴ In a much later paper, entitled 'Fairness and Legitimacy in Justice, and: Does Option Luck Ever Preserve Justice?', Cohen adopted a more refined view of the capacity of choice to prevent inequality from constituting injustice, and argued that choices about exposure to risk lack this capacity.¹⁵ More specifically, Cohen targeted Dworkin's discussion of how the moral status of inequalities arising from variations in brute luck and option luck can differ.

To challenge whether variations in option luck can preserve distributive justice, Cohen draws a distinction within interpersonal political morality between what he terms 'two different kinds of justice', namely 'fairness' and 'legitimacy'.¹⁶ Cohen stipulates that a distribution is *fair* in the relevant 'broad' sense when it has all the valuable features that a distribution should possess when considered in isolation from how the parties involved have exercised their wills.¹⁷ In contrast, a distribution is *legitimate* in the relevant sense when no individual can justifiably complain that its production, or the non-enforcement of some alternative distribution, personally wrongs her.¹⁸ Judgements of fairness, then, abstract from considerations arising from exercises of will whereas

¹⁴ See Cohen (1989: sec. 4). See also Cohen (2011: 139, n. 27), where Cohen expresses his indebtedness to Temkin (1986: 101) which formulates egalitarianism as the view that 'it is a bad thing – unjust and unfair – for some to be worse off than others through no fault of their own'.

¹⁵ See Cohen (2009) and Cohen (2011: 124–143) where the paper is reprinted.

¹⁶ Summing up the challenge, Cohen writes that 'In short, different kinds of justice get confused, and, so I shall argue, this may have a bearing on the question of whether option luck preserves justice.' See Cohen (2011: 125).

¹⁷ See Cohen (2011: 131), where Cohen writes: 'Consider distributions that are not actually willed by the relevant parties, including, therefore, those that *could* not be willed by the parties: such distributions count as 'fair', in the broadest sense of the word, when they are appropriate to everything to which a distribution ought to be appropriate (given, as it is given here, that how the parties will is not in question).' If efficiency is one factor bearing on the appropriateness of a distribution, then Cohen's statement implies that fairness in the broad sense depends in part on efficiency. I thank Peter Vallentyne for pointing out this implication but leave it unexplored.

¹⁸ See Cohen (2011: 128), where Cohen writes that 'the justice in question is the property that a situation has when no one has a right to complain against its character, when no one has a just grievance against it, and I shall call that property *legitimacy*, for short, here'. In the attached footnote Cohen adds that 'what I here call 'legitimacy' is not legitimacy in the usual sense: 'legitimacy' is simply the most (though imperfectly) suitable single word I could think of to denote what I mean. Legitimacy is, standardly, the right to exercise political power, and that is not the same thing as a universal absence of the right to complain against its exercise, or, *a fortiori*, against anything else.' Granting that his formulation 'needs refinement', he later adds (129) that 'We may have a right to complain when a legitimate outcome is unfair or ugly or costly and so forth, but that does not mean that we then have a right to complain in the sense that I contemplate. Zofia Stemplowska suggested that I should mean that we cannot complain if the outcome's reversal is not *enforced*. I mean that as a minimum, but more work is needed here.'

judgements of legitimacy may draw on such considerations. Moreover, the truth of judgements of fairness merely contributes to the truth of judgements about personal wrongdoing whereas the truth of judgements about legitimacy makes judgements about the absence of personal wrongdoing true.

Because of the existence of these two kinds of justice, Cohen proposes that a distribution might not be just in the first fairness-involving sense even if it is just in the second legitimacy-involving sense.¹⁹ The possibility arises because a distribution might lack one of the valuable features fairness depends upon but still be immune to reasonable complaint due to some exercise of will that leaves its unfairness untouched.

Cohen employs his 'different kinds of justice' proposal to cast doubt on Robert Nozick's principle that 'Whatever arises from a just situation by just steps is itself just', and the use of Nozick's famous Wilt Chamberlain example to undermine egalitarian principles.²⁰ His suggestion is that an egalitarian who recognizes that there are different kinds of justice can grant that just steps generate one kind of justice (i.e. legitimacy) but still coherently insist that those steps fail to preserve the other kind of justice (i.e. fairness) to which they are also committed. By equivocating over the two senses of 'justice', then, its proponents have exaggerated the anti-egalitarian power of the Wilt Chamberlain example. The main purpose of Cohen's proposal, however, is to enable him to target not Nozick but Dworkin.

What Cohen labels the 'Anti-Dworkin Argument' proceeds via a comparison between two further examples involving voluntary transitions from an equal initial distribution to an unequal outcome distribution. In what we can call the *Gamble Case*, two equally situated individuals both choose to gamble half of their \$100 000 assets on the turn of a fair coin. Alex makes a luckier choice than Bruce makes, and so becomes three times wealthier than Bruce becomes.²¹ In the *Gift Case*,

¹⁹ See Cohen (2011: 128–129), where Cohen states that 'it need not, in my view, be a contradiction . . . to say: 'This outcome is unjust, but nobody can complain about it.' That need not be a contradiction because 'unjust' need not mean 'susceptible to legitimate complaint'.

²⁰ See Cohen (2011: 126–127). For earlier brief remarks about the need to investigate 'the difference between injustice and unfairness' and the possibility that just steps away from a just initial situation produce a result that is 'not unambiguously just' see Cohen (1995: 48 and 49).

²¹ See Cohen (2011: 132). Cohen claims that Dworkin's view 'would claim that the resulting distribution is entirely just . . . however dire the resulting state that other person [i.e. Bruce] may be.' Some of Dworkin's remarks support Cohen's claim; see, for example, the discussion of the individual who declines insurance against blindness in Dworkin (1981: 296–297). However, as explained in Section II, since I aim to examine a sufficiency-securing version of equality of resources I shall assume the Gambling Case involves only relative disadvantage and not any dire outcomes.

a group of equally situated individuals (moved not by fairness but a concern to reward beauty) unanimously wills a transfer of half of each member's assets to Sarah and Jane. As a result, Sarah and Jane become wealthier than other members of the group do.

The starting point of the Argument is the claim that, contrary to Dworkin, the Gift Case involves the replacement of a fair initial distribution with a less fair but still legitimate outcome.²² The Argument grants that the use of force to preserve the initial equal distribution would be wrong given the unanimous preference for the unequal outcome. Nevertheless, Cohen claims we should not assume that the unequal outcome is just in both the legitimacy-involving *and* fairness-involving senses; instead, we should recognize the outcome as legitimate but unfair, and so not entirely just.

The Argument then extends the same diagnosis from the Gift Case to the Gamble Case. Thus, Cohen argues that since the shared preference to gamble makes the unequal outcome of the gamble merely legitimate rather than fair the outcome fails to qualify as entirely just. Given the Gamble Case is a paradigmatic example of an inequality arising from differential option luck, Cohen draws the general conclusion that variations in option luck never preserve justice in the fairness-involving sense.²³

4. CHOICE AND FAIRNESS: INTERACTIVE AND ADDITIVE ACCOUNTS

In defending his Anti-Dworkin Argument, Cohen casts doubt upon two interesting responses, which are 'discriminating' in the sense that they regard the Argument as sound only in part.²⁴ The first response claims

²² Describing the Gift Case, Cohen (2011: 135) writes that 'the upshot is unfair, and everyone must agree that it is not fair by the criteria that rendered the original distribution fair. Still, the result is legitimate, in the defined sense: no one has a right to complain about the outcome, since everyone voted for the transactions that brought the outcome about.'

²³ Summing up, Cohen writes 'Accordingly, option luck never preserves the justice that precedes its operation. For, as I suggested . . . if option luck doesn't preserve justice in the entirely symmetrical two-person gamble case, then it doesn't do so anywhere.' See Cohen (2011: 134). Note that Cohen's final inference is questionable because the Gamble Case differs from other cases involving option luck inequalities in ways that arguably possess moral relevance. For example, the Gamble Case is a zero-sum situation where the initial distribution and the outcome are Pareto non-comparable. Thus, it differs from what we can label the *Investment Case*, where each individual's relative position depends on whether she made a more or less lucky investment decision yet *all* the unequal outcomes are Pareto *superior* to the initial distribution. Those more concerned with Pareto optimality than Cohen might argue that even if the outcome of the Gamble Case is more unfair than the initial distribution the same conclusion does not apply in the Investment Case. For one possible response, see the remarks about the relation between fairness and efficiency in Cohen (2008: 315–323).

²⁴ See Cohen (2011: 134–140).

that Cohen's Argument succeeds in showing that the outcome of the Gift Case is objectionably unfair but fails to show that the outcome of the Gambling Case is similarly unfair. Making exactly the opposite claim, the second response claims that the Argument fails in the Gift Case but succeeds in the Gamble Case.

To criticize Cohen's view about unfairness in one of the two cases, each of these responses appeals to considerations that do not undermine Cohen's claim in the other case. However, Cohen stipulates that both responses support his verdict in the other case, thereby making the responses not merely distinct but *incompatible*. It is puzzling that Cohen does not consider responses that criticize his view in one case and withhold judgement in the other case. It is also puzzling that Cohen does not consider a counter-argument that combines only the elements in both responses that are critical rather than supportive of his view. Providing this type of more comprehensive counter-argument, I shall contest Cohen's diagnoses of both the Gift Case and the Gamble Case, and argue that they fail to cohere with his own luck egalitarianism.

My criticism focuses on the fairness of the initial distribution in each case. It contrasts rival *interactive* and *additive* accounts of the relationship between the value of fairness and facts about choice, and applies the two accounts to the Gift and the Gambling Case.²⁵ The criticism rejects Cohen's assumption that fairness in the broad sense that abstracts from considerations about choice is a genuine but defeasible political value, and instead affirms an alternative interactive account of fairness, in part by drawing on claims Cohen affirms elsewhere.

To understand the *interactive account*, note that it is widely recognized that choice sometimes ensures that certain facts no longer provide individuals with the same reasons for action. We often assume, for example, that individuals possess powers to choose to release others from duties owed towards them, thereby modifying others' reasons. Drawing on this phenomenon, the interactive account claims that how individuals respond to their opportunities also sometimes makes a difference to what it is to treat them fairly. In doing so, it accepts that equality often matters, in part because the presence of an equal distribution may sometimes

²⁵ See Temkin (1993: 153–156) for illuminating remarks about the contrast between nonadditive, or what I term 'interactive', and additive accounts of the relationship between different morally relevant factors. See also the remarks in Temkin (1993: 17) about the nonadditive relation between value of equality and facts about deservingness: '... I think egalitarians are not committed to the view that deserved inequalities – if there are any – are as bad as undeserved ones. In fact, I think deserved inequalities are not bad *at all*. Rather, what is objectionable is some being worse off than others *through no fault of their own*. Thus, although there may be more inequality in one situation than another, that needn't be *worse* ...'; for a more recent extremely interesting discussion, see too Temkin (2011: 63).

be part of the background conditions that explain why choices produce certain normative consequences. Yet the interactive account denies that there is a general and robust reason to preserve an equal distribution regardless of what individuals prefer to choose. Instead, the equality present within an initial distribution is valuable only *provisionally*, and in ways dependent on the choices that individuals prefer to make. More specifically, the interactive account claims that choice may sometimes *cancel* certain fairness-based reasons for a political community to secure or preserve an equal distribution.²⁶

In contrast, the rival additive account assumes that the equality present within the initial distribution possesses a value that is worth preserving regardless of the choices about how to transform the distribution that individuals might prefer to make. The account is *moderate* and so sensibly grants that more weighty countervailing considerations may sometimes *over-ride* our reasons to secure that value. Consequently, individuals may have adequate reasons to make choices resulting in an unequal distribution; moreover, those choices may involve the exercise of rights that give others decisive reasons to refrain from interfering with them. Nevertheless, the additive account insists that when such equality-jeopardizing choices occur *something of genuine value is lost*, and the outcome is therefore in one respect worse than the initial distribution from which it emerged. Furthermore, and importantly, this loss leaves traces within *political* morality; for example, if an outcome is merely legitimate but not also fair then it may weaken the case for enforcing that outcome, or for granting the beneficiaries of unfairness certain powers of bequest or immunities from taxation.²⁷

5. THE INTERACTIVE ACCOUNT DEFENDED

According to the interactive account, whether the outcome of the Gift Case is not only legitimate but also fair depends on individuals' possessing moral powers to cancel fairness-based reasons to preserve the initial equal distribution. When assessing the case in favour of attributing those powers to individuals, and thus questioning the Anti-Dworkin Argument, we should bear in mind the specific egalitarian reasons to which they apply. The counter-argument I am developing claims only that choice can cancel those egalitarian reasons rather than reasons in general; it involves no reliance, for example, on the extreme view, often advanced by libertarians, that all our rights are alienable via voluntary waiver or transfer, and hence that even many of our weightiest reasons are

²⁶ For discussion of cancelling conditions on reasons, see Raz (1990: 27, 187 and 202).

²⁷ For Cohen's account of how the distinction between fairness and legitimacy '*can make a practical difference*', see Cohen (2011: 141).

modifiable through choice. Moreover, we should also bear in mind the response assumes only that *some* rather than *all* choices can generate the relevant reason-cancelling consequences; for example, choices made by competent and well-informed agents who are responding to a sufficiently wide but still limited menu of options. There is no commitment, then, to indiscriminate claims about avoidable disadvantages *never* involving unfairness or inequalities arising because some individuals make luckier choices than others *always* being fair inequalities.²⁸ In order to question Cohen's allegation that variations in option luck never preserve fairness it is not necessary to rely on the diametrically opposed (but similarly implausible) claim that they always do so.

Having preempted some potential misunderstandings, we can now turn to the positive case for claiming that choice can sometimes render inequality fair by initially applying it to the Gift Case. Here it seems there are sound instrumental and expressive reasons for individuals to value such moral powers because they expand their capability to pursue what they regard as worthwhile goals and to manifest their evaluative attitudes.²⁹ Cohen's description of the Gift Case donors as moved by the fact that Sarah and Jane are 'fair' in the aesthetic sense may lead some to overlook the force of these reasons. If Cohen had instead referred to the donors' desire to save enough for their common descendants, Sarah and Jane, to enjoy a level of advantage higher than the donors had received, their relevance and force would have been more readily apparent.³⁰ Nevertheless, it is plausible to think that we have reason to value the powers in question even when used to pursue what are, arguably, foolish goals, like financially rewarding beauty. Those abilities are likely to be less secure and expansive, however, if institutional designers recognize reasons to maintain initial equality regardless of individuals' preferences to preserve or subvert it and reasons to decline to enforce an outcome merely because doing so is subversive. The same is true of reasons to deny powers of transfer to pass on the gifts one has received and reasons to subject income to higher rates of taxation merely because it flows from a gift or bequest. Donor-based reasons, then, provide weighty considerations in favour of individuals possessing a power to cancel the fairness-based reasons for political institutions to maintain the initial distribution in the Gift Case.

²⁸ Temkin (2011: 64) claims that some luck egalitarians who regard the distinction between inequalities in option luck and brute luck as morally relevant also believe that '*any* option luck inequalities . . . are unobjectionable' (italics added). This claim may be true of some luck egalitarians but the Dworkinian view this paper defends is not committed to so unqualified a belief in the consequences of choice.

²⁹ See Scanlon (1998: 251–256).

³⁰ See Gosseries (2001: 328–329).

Nevertheless, there are obviously other relevant considerations, including in particular reasons evident from the perspective of *non*-recipients, which have great weight and often push in an opposing direction. In our world, lack of restrictions on gifts and bequests has a severe corrupting effect on procedural fairness in the legal, educational and political systems, and produces inequalities that disadvantaged individuals regret and could not reasonably have avoided. Such effects, however, are absent in the Gift Case where, as Cohen himself explains, *each* individual prefers that Sarah and Jane receive everyone's gifts, and could have vetoed the resulting inequality but instead choose to support it.³¹ Moreover, these are *non-accidental* features of the Gift Case since without them Cohen's claim that Dworkin's view accepts its outcome as fair would be much less plausible: in the real world, Dworkin claims that equality of resources requires protection for procedural fairness and steeply progressive taxes on gifts and bequests.³²

There is a strong case, then, to regard the maintenance of equality in the Gift Case as valuable only provisionally. The presence of an adequate opportunity to avoid becoming less advantaged combined with the donors' unanimous choice to transfer their wealth to Sarah and Jane, cancels the reasons of fairness in favour of maintaining equality. In the absence of counterevidence, I suggest we should deny that anything of genuine political value has necessarily been lost merely because Sarah and Jane become wealthier than others, and so reject Cohen's assertion that the Gift Case's 'upshot is unfair'.³³

The case also casts doubt on Cohen's additional assertion that the upshot 'is not fair by the criteria that rendered the original distribution fair'.³⁴ To understand why this assertion is questionable, bear in mind that whether an individual's share is fair depends on its content and not simply a comparison with the shares of others: in other words, the fairness of the original distribution derives from *what* it distributes as well as *how* it is distributed. Appealing to the need for a conception of fairness to be ambition-sensitive as well as endowment insensitive, I have assumed that the original distribution would *not* be fair if it ensures merely that each individual's share is identical; for example, even when shares are all equally valuable everyone might still suffer unfairness if denied any control over their holdings. I have argued, moreover, that the criteria that render the original distribution fair favour granting to individuals powers to make choices that may disrupt particular distributive patterns, including equality. Contrary to Cohen, when these

³¹ See Cohen (2011: 133; 139)

³² Dworkin (2000: 346–349; 351–385).

³³ See Cohen (2011: 133).

³⁴ See Cohen (2011: 133).

powers are fairly distributed, their exercise through unanimous gift giving does not legitimize unfair inequality but instead *makes inequality fair*.

Although there are some differences between the Gift Case and some cases involving option luck inequalities the strategy just employed in the Gift Case is readily applicable to the Gamble Case.³⁵ Here it is also true that individuals have instrumental and expressive reasons to value their possession of moral powers to cancel certain reasons to maintain an equal distribution of resources. Under certain realistic conditions, maintaining an equal distribution gives no individual the attainable life they prefer or the opportunity to manifest their preferences in a decision that can really make a difference. Individuals might for instance value lives of leisure and creativity so highly that it is preferable for them to run some risk of increased drudgery in order to secure it. They might also sometimes attach such low value to the result of fully sharing in each other's fate that it is preferable for them to depart from complete solidarity in order to secure what they deem an acceptable outcome.

The best egalitarian response to these reasons and preferences is not to insist that individuals have an inalienable but defeasible claim to an equal share. Egalitarianism is more coherent, plausible and politically promising if it embraces an interactive account of the relationship between choice and the value of equality, and relinquishes any attempt to show that existing market societies are objectionable merely because they take for granted that differential option luck is capable of preserving justice. Egalitarians should instead condemn those societies because they deny their less-privileged members opportunities to take so many of the gambles readily available to those more fortunate. They might also point out that whilst the stock of resources, as noted earlier, remains constant in the Gift Case the same is not true in our world where market institutions that produce option luck inequalities have at least the potential to increase everyone's level of advantage.³⁶ Under such conditions, the interactive account's concern for the value of choice is congruent with a more pedestrian concern for economic efficiency.

6. 'LUCK EGALITARIANISM': ENTITLEMENT-BASED NOT PATTERNED

For additional support, and an *ad hominem* objection to Cohen's use of the Anti-Dworkin Argument against option luck inequalities, it is now

³⁵ The cases can differ, for example, because in the Gift Case those who become relatively disadvantaged could have vetoed any inequality-generating donations, and so had an opportunity to avoid becoming worse off than others. In contrast, in the Investment Case individuals might lack the power to veto others' making inequality-generating risky investment decisions. If so, although they have the same opportunity to run those risks they lack the opportunity to guarantee being as well off as others.

³⁶ See the earlier discussion of the Investment Case in note 23.

worth recalling how some of his earlier luck egalitarian statements about the value of equality fit uneasily with his later claims but cohere more closely with my conclusions about the Gift and Gambles Cases.

In his classic 1989 paper 'On the Currency of Egalitarian Justice', Cohen influentially claimed that the egalitarian aim is 'to eliminate *involuntary disadvantage*' and endorsed a form of egalitarianism that did not require, or even favour to some degree, redistribution towards those who suffer relative disadvantage if they 'could have avoided it or could now overcome it'.³⁷ These statements affirm what we can term the *minimal luck egalitarian thesis*: there are reasons to eliminate unavoidable disadvantage that do not apply to the elimination of avoidable disadvantage. This thesis does not itself *oppose* the elimination of avoidable as well as unavoidable inequality; nor does it entail that fairness sometimes favours *inequality* in outcome. However, in a later reply to Susan Hurley, cited in the epigraph, Cohen went further by explicitly opposing redress for avoidable inequalities. There he declared that fairness-based egalitarians, like him, are 'against *equalities* in the presence of appropriately differential responsibility'.³⁸ In doing so, Cohen affirmed what we can term the *strong luck egalitarian thesis* that variations in choice sometimes provide reasons of fairness for inequality and against the removal of avoidable disadvantage.

On the natural assumption that both luck egalitarian theses express claims about fairness, there are reasons to doubt that either thesis is consistent with Cohen's later claim that the inequalities that emerge in the Gift Case are unfair, and so fail to be just in an unqualified sense. Since every donor is competent, fairly situated, and could have easily avoided any disadvantage by exercising a veto on the group transfer to Sarah and Jane, each donor's eventual disadvantage clearly fails to qualify as the type of unfair inequality opposed by the minimal thesis. Thus, if the minimal thesis is sound and expresses all the demands of fairness there seem to be no grounds for a fairness-based objection to the outcome of the Gift Case. Worse still for advocates of the Anti-Dworkin Argument, if the stronger thesis favouring inequality in outcome is sound then reasons of fairness might even positively support upholding the unequal outcome rather than maintaining the equal initial distribution. It seems, then, that those sympathetic to Cohen's position must choose between his earlier luck egalitarian claims and the Anti-Dworkin Argument. Insofar

³⁷ See Cohen (2011: 13 and 18). For a more recent statement, see Cohen (2008: 7): 'an unequal distribution whose inequality cannot be vindicated by some choice or fault or desert . . . is unfair, and therefore, pro tanto, unjust, and that nothing can remove that particular injustice.'

³⁸ See Cohen (2011: 121, italics in original).

as the earlier claims are more plausible, they supply some defence for my rejection of his later Argument's treatment of gifts and gambles.

It is worth noting that Cohen himself became aware of the tension between his longstanding commitment to luck egalitarianism and his later espousal of the Anti-Dworkin Argument. Prompted by a sapient observation from David Miller, Cohen anticipated that a critic might object that if the Anti-Dworkin Argument is successful then he should revise his commitment to luck egalitarianism by conceding that it provides, at best, an account of legitimacy *rather than fairness*.³⁹ With characteristic honesty and good humour, Cohen recognized that he lacked any conclusive reply to the Millerian Objection: 'So, back to the drawing board, later! I would be there now, but *Festschriften* have deadlines, and this one's has come.'⁴⁰ Nevertheless, Cohen also made some revealing and suggestive remarks in response to the Millerian Objection, which are well worth bearing in mind.

Those remarks imply that when starting his paper Cohen had assumed that luck egalitarianism advances what Nozick terms an *end-state* or *patterned* theory of what makes a distribution just,⁴¹ and consequently leaves unaddressed the supposedly 'quite separate' issue of what constitutes the 'just steps' by which distributions ought to be brought about.⁴² In addition, Cohen admits that he realized only later that some natural statements of luck egalitarianism endorse the contrary view that we should not treat what makes distributions just and how distributions should arise as separate issues. On this alternative construal of luck egalitarianism, the doctrine itself encompasses an account of just

³⁹ See Cohen (2011: 142), where he writes that 'David Miller has claimed that luck egalitarianism is inconsistent with the principal distinction that I try to draw in the paper, because luck egalitarianism says: distribute equally, compensating appropriately for luck-induced deficits, and then whatever arises from people's choices is just. If I am right in what I say in the paper, so Miller's argument goes, luck egalitarians shouldn't call whatever arises 'just', but merely 'legitimate' ...'.

⁴⁰ See Cohen (2011: 143). Cohen's paper originally appeared in a celebration of the work of his friend, and leading left-libertarian, Hillel Steiner; for Steiner's appeal to the Will Theory of rights in reply, see Steiner (2009: 238–239, 242–244).

⁴¹ See Nozick (1974: 153–160). There Nozick writes (p. 156) that 'a principle of distribution [is] *patterned* if it specifies that a distribution is to vary along with some natural dimension, weighted sum of natural dimensions, or lexicographic ordering of natural dimensions ... Almost every suggested principle of distributive justice is patterned: to each according to his moral merit, or needs, or marginal product, or how hard he tries, or the weighted sum of the foregoing, and so on.'

⁴² See Cohen (2011: 142), where Cohen explains that when 'I embarked upon this paper, it was my thought that patterned and end-state theories of justice do not themselves say what just steps are, the latter being an intuitive matter quite separate from such theories of just distribution. But luck egalitarianism's statement ... seems to comprehend a doctrine of just steps and therefore, perhaps, to confer the title of justice itself on the outcomes that it endorses.'

steps that might serve in explaining what makes a distribution just or unjust.

Cohen's somewhat surprising statements about his evolving attitudes are important in part because they offer one ready explanation of why certain egalitarians might be tempted (mistakenly) to endorse the Anti-Dworkin Argument. The egalitarians I have in mind assume that fairness involves satisfying sound patterned, or proportional, principles of distributive justice, and that such principles should, perhaps tempered by countervailing considerations, guide the design of political institutions. It is perhaps unsurprising, then, that they experience a residual dissatisfaction with the outcomes of the Gift Case and the Gambling Case even if they recognize the outcomes as defensible on balance. For when institutions empower individuals to make donations or to expose themselves to different levels of risk there is no guarantee that such patterned principles will be satisfied fully. On the contrary, there is always the possibility that a group of donors will bestow more on some individuals, like Sarah and Jane, than others no less deserving, like themselves; or that some individuals, such as Alex, will make luckier choices than others, such as Bruce, who have exactly the same attitudes to risk and are also no less deserving. As a result, some egalitarians may conclude that the outcomes of the Gift and the Gamble Case fail to exhibit some appropriate pattern, and so affirm the Anti-Dworkin Argument's conclusion that those outcomes are not fully just.

In contrast to proponents of the Millerian Objection, I have recommended another way for egalitarians like Cohen to resolve the tension between the Anti-Dworkin Argument and his earlier statements: they should jettison the Argument and affirm a (sufficiency-securing) luck egalitarian rather than a patterned account of fairness.

As I have already suggested, there are *positive* grounds for doing so that derive from the value of choice and choice's role in making outcomes fair rather than merely legitimate. Moreover, these grounds are ones that Cohen once appeared to recognize; for example, in his well-known statement in 1989 that 'Dworkin has, in effect, performed for egalitarianism the *considerable service* of incorporating *within it* the most powerful idea in the arsenal of the antiegalitarian Right: the idea of choice and responsibility'.⁴³ If the appeal of the Anti-Dworkin Argument derives from some commitment to patterned principles of distributive justice, there may also be *negative* grounds for resisting the Argument by questioning whether that commitment is defensible. Before concluding, we shall briefly explore one such ground.

⁴³ See Cohen (1989: 32, italics added).

7. THE LIBERAL OBJECTION TO EGALITARIAN PATTERNED PRINCIPLES

The patterned principles most attractive to contemporary egalitarians avoid reliance on such heavily endowment-sensitive desert bases as productivity, and instead usually support public policies that distribute goods in proportion to the qualities of an individual's will, such as her prudence or moral virtue. When Larry Temkin voices his opposition to option luck inequalities he invokes this type of proportional principle. Doing so, Temkin writes,

I believe it is objectionable if Mary takes a *prudent* risk, and John an *imprudent* one, yet Mary fares much worse than John, because she is the victim of bad, and he the beneficiary of good, option luck. Likewise, I believe there is an egalitarian objection if Mary and John are equally deserving, and choose similar options, but John ends up much better off than Mary because he enjoys vastly greater option luck. As with paradigmatic cases involving brute luck, in such a case Mary ends up much worse off than John, though she is in no way less deserving. This seems patently unfair.⁴⁴

Many share Temkin's intuitive opposition to option luck inequalities that are significantly disproportionate to individuals' prudence or moral deservingness. There is, however, a less immediately vivid but perhaps still forceful case for resisting such opposition, at least when advanced as 'relevant to many public policy issues', as Temkin recommends.⁴⁵

The case draws on two plausible assumptions familiar from Rawls's defence of *political liberalism*.⁴⁶ The first assumption is that modern political communities have decisive reasons to treat their members as *free* and *equal*. They must, therefore, protect the expressive and associative *basic liberties* of each individual, and learn to live with the disagreements about prudence and virtue that invariably accompany such protection. The second assumption is that political communities have weighty reasons to secure a particular ideal of *social unity*. Thus, they should ensure that only values capable of becoming *shared ends* amongst individuals who conceive themselves as free and equal animate their most profoundly influential political activities. As a corollary, they should refrain from guiding their political decisions by various divisive normative claims even if those claims are sound, and relevant to members' decisions about their personal lives.

Relying on these assumptions, what we can term the *Liberal Objection* does *not* contest whether egalitarian pattern principles should play some role in explaining how a sound *comprehensive doctrine* should evaluate distributive outcomes. It argues instead that our reasons to care about

⁴⁴ See Temkin (2011: 64).

⁴⁵ See Temkin (2011: 64), which treats as such.

⁴⁶ See Rawls (1996) and Clayton (2006).

freedom, equality and social unity jointly provide a strong case for denying that egalitarian pattern principles that rely on divisive claims about prudence and virtue should govern our decisions *as a political community*. As such a community, we should refrain from appeal to those principles because their employment would require that the community publicly endorse divisive comparative judgements about its members' differential responsiveness to reasons, as Temkin appears to do when he describes Mary as more prudent than John. Even if those judgements are defensible, and do provide good reasons for various private activities, a liberal political community should avoid expressing them because of the deeply alienating effects of its telling some of its members that their lives display less prudence or virtue than the lives of others.

I hope that the Liberal Objection just sketched suggests that there might be sound reasons to limit political appeal to egalitarian patterned principles that rely on divisive claims about prudence or virtue. If so, assuming the Anti-Dworkin Argument relies upon some commitment to the political relevance of such principles, the Objection casts at least some doubt on the Argument. Faced with this challenge, proponents of the Argument have at least two responses to the Objection that are worth considering.

They might grant the Objection's force and retreat from making political claims, affirming only an axiological claim that failure to satisfy the relevant pattern is a distributive imperfection that makes an outcome in one respect worse than it might otherwise be. Taking this option, however, amounts to withdrawal from the relevant battlefield, even if such withdrawal remains disguised by using of the term 'injustice', as Cohen does, to describe the imperfection. It does so, because equality of resources is *not* a complete theory of the value of outcomes but, as noted at the outset, a theory designed to govern the conduct of a political community. As a result, the theory's proponents need to deny only the axiological claim's political relevance rather its plausibility. To defeat them, then, their critics must not merely advance the axiological claim but also use it to resist Dworkinians on their own political terrain, and so avoid any charge of *ignoratio elenchi*. To his credit, Cohen attempts to do so in his discussion of the tax liabilities and powers of bequest and enforcement involved in gambling, and I have attempted to resist his proposals.

Proponents of the Anti-Dworkin Argument might instead confront the Liberal Objection more directly, and deny its second core assumption that social unity disfavours political appeals to egalitarian patterned principles. There may be good reasons to conclude that taking this option will also prove unsuccessful but I certainly have not supplied any. I have simply attempted to raise the stakes by enlisting political liberalism in the service of equality of resources, and suggesting that for proponents of the

Anti-Dworkin Argument to succeed in their campaign against equality of resources they also need to take on Rawls.

8. CONCLUSION

Having returned to Rawls it is fitting to conclude with some observations about the relationship between Cohen's Anti-Dworkin Argument and his more sustained critique of Rawls's constructivist approach to distributive justice. As explained, Cohen's Argument assumes that there are 'different kinds of justice', and that the inequalities arising from variations in option luck and differential receipt of gifts accepted by equality of resources at best satisfy the demands of justice only in a legitimacy-involving sense and not in the fairness-involving sense. In response, I have argued that in the examples under consideration the additive account of fairness Cohen's Argument relies upon does not identify a genuine value relevant to the design of political institutions. Thus, the Argument does not show that there are reasons of justice that conflict with any reasons specified by equality of resources.

Those who share the Rawlsian aspiration to devise a more systematic theory of distributive justice that economizes on appeal to intuitive judgements about how to balance competing values should welcome my conclusion. For them, Cohen's position is unsatisfying because it does so little to meet political decision-makers' need for some principled verdictive guidance, and rests content to express regret at the presence of an alleged distributive imperfection. If my conclusion holds, then egalitarian political morality can plausibly disregard at least some of Cohen's claims about what constitutes imperfection, and to that extent have less need to rely on unsystematic balancing judgements. To close, I shall suggest that as well as being unsuccessful the Anti-Dworkin Argument also sits uneasily with one of the central charges of Cohen's *Rescuing Justice and Equality*.

To understand the suggestion, recall that Cohen thinks his rescue mission is necessary partly because Rawls, and other constructivists, have mischaracterized the very concept of distributive justice. More specifically, according to Cohen, they have failed to recognize that *justice* makes certain distinctively pure and fact-insensitive demands, and consequently seriously underestimated the extent to which justice favours the elimination of inequality.⁴⁷ One defence against these allegations takes seriously Cohen's observation that 'people talk past one another in political philosophy' by rejecting Cohen's own assumption that he and

⁴⁷ See Cohen (2008: 279–292).

Rawls are both making judgements that employ the very same concept of justice.⁴⁸

According to the *Subject Changing Reply*, Rawls and Cohen are making judgements about justice in different senses, and so for that reason, contrary to Cohen, the dispute between them is not over some 'deep truth about our concept of justice' (305). Instead, the dispute is a normative disagreement about what role, if any, justice in Cohen's sense should play in assessing how plausibly Rawls's principles treat institutional design and workers' decision-making. While their respective positions clearly involve conflicting accounts of our reasons for action, Cohen has exaggerated his disagreement with Rawls by casting it partly in conceptual terms. The Anti-Dworkin Argument, I suggest, provides some support for this line of argument. If there are 'different kinds of justice', as the Argument assumes, then it becomes more difficult to accept Cohen's view that 'justice' expresses a single concept, which is widely shared amongst his readers and across the history of philosophy, and that our interest in Rawls's work derives, in large part, from him advancing claims that employ that very same concept.⁴⁹ Just as a distribution might not be just in the fairness-involving sense without failing to be just in the legitimacy-involving sense, so a distribution might not be just in Cohen's sense without failing to be just in the sense that exercises Rawls. For adequate assessment these suggestions requires some further study. If they are sound, then Cohen's final critique of Dworkin, even if unsuccessful, helps us to understand the true nature, and force, of his critique of Rawls. As usual, Cohen's work repays detailed study, and is likely to do so for decades to come.⁵⁰

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⁴⁸ See Cohen (2011: 231) and Williams (2009: 122–126).

⁴⁹ See Cohen (2008: 304).

⁵⁰ On a more personal note, let me add that that Jerry was not only one of the most illuminating political philosophers of the twentieth century but also an exceptionally lovable human being, who combined an acute intelligence with a passionate concern for other individuals and a memorable sense of humour. Like many others, and despite our occasional philosophical disagreements, I benefited hugely from his generous support, and his example remains an inspiration.

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