Justice as Luck Egalitarian Fairness?

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ABSTRACT: *In* A Conceptual Investigation of Justice*, Kyle Johannsen maintains that the strongest version of John Rawls's theory of justice is one that incorporates the luck egalitarian conception of fairness developed by G.A. Cohen. He also contends that, once the theory is modified in this way, it becomes clear that the original position doesn't yield principles of justice but rather what Cohen calls 'rules of regulation.' I argue that the minimal conception of fairness that Rawls favours is the right one for his purposes, and that bringing in luck egalitarian fairness would render the outcome of the original position indeterminate.*

RÉSUMÉ : *Kyle Johannsen soutient que, pour être pleinement convaincante, la théorie de la justice de John Rawls doit incorporer la conception de l'équité associée avec l'égalitarisme des chances de G.A. Cohen. Il maintient également que, lorsqu'on modifie ainsi la théorie de Rawls, on voit que les principes choisis dans la position originelle doivent être ce que Cohen appelle des «règles de régulation». Je rétorque que la conception de l'équité qu'adopte Rawls est idéalement adaptée aux besoins de sa théorie, et que l'incorporation de la conception de l'équité que défend Cohen rendrait indéterminé le résultat de la position originelle.*

Keywords: luck egalitarianism, fairness, original position, G.A. Cohen, John Rawls

It is exceptional for a primarily critical contribution to have a major impact on the philosophical literature, but such was clearly G.A. Cohen's achievement with the sustained objections to John Rawls's theory of justice that he mounted over more than a decade, and ultimately brought together in his book *Rescuing Justice and Equality*. In part, this outsized impact can be traced to Cohen's extraordinarily probing and articulate way with philosophical arguments. Mainly, though, his arguments were influential simply because they raised

deep and difficult questions. When Cohen challenged Rawls's claim that principles of justice apply exclusively to social institutions, he forced us to consider the extent to which personal choices can be insulated from the demands of distributive justice. When he questioned how Rawls's principles of justice were tailored to specific empirical conditions, he prompted a broader investigation into the relation between normative principles and empirical facts. No shoddy philosophical issues, these.

Yet there was one point on which Cohen's critique could be somewhat frustrating. He often insisted that Rawls had misunderstood what a theory of justice was fundamentally *about*.[1] Famously, Rawls takes justice to be the first virtue of social institutions; the aim of his theory is to defend principles that tell us how, all things considered, such institutions should be organized. For Cohen, this whole setup signalled conceptual confusion. To reach his two principles, Rawls explicitly took into account values such as efficiency and feasibility—values that, although undeniably important, are clearly distinct from justice itself. Indeed, it's only because he took these other values into account that Rawls could plausibly reach principles concerning how society should be set up all things considered. But then, Cohen asked, how could the result be principles of *justice*? Justice, efficiency, and feasibility are different values. We must first understand what justice *is*; only then does it make sense to ask how the demands of justice should be modified in light of values such as efficiency and feasibility. Throwing all these values into one big mix and claiming that, by doing so, we can reach conclusions about justice is just muddying the waters.

It should be obvious why I said that this part of Cohen's discussion could be frustrating. It doesn't *really* matter how we use the term 'justice.' What matters is that we apply whatever definition we settle on consistently. Rawls does this, as does Cohen. They use different definitions, of course, so they're ultimately talking about different things. But there the story ends, it seems. If Cohen prefers to use the phrase 'rules of regulation' to refer to Rawls's subject matter, that's fine.[2] It may still turn out that these 'rules of regulation' are of great interest. Perhaps it will even turn out that we can establish conclusions about these rules that help answer some of our more pressing questions about how to organize society, and that do so better than any discussion of Cohen's abstract sort of justice could. Either way, nothing need be lost in the vocabulary adjustment.

It's a notable merit of Kyle Johannsen's impressive monograph *A Conceptual Investigation of Justice* that it confronts this problematic aspect of Cohen's critique head-on. Johannsen aims to show that, although the dispute between Rawls and Cohen on the nature of justice is partly conceptual—although the two

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1   See Cohen, Chap. 7.
2   See Cohen, pp. 263–272.

authors advocate using the term 'justice' to refer to different concepts—it is not merely verbal, since issues of philosophical substance underlie the disagreement.[3] At the most fundamental level, Johannsen suggests, Rawls and Cohen disagree about the conception of *fairness* that should feature in our theorizing about justice: Rawls favours a strictly procedural conception, Cohen a substantive one. That's where their conceptual disagreement stems from. Equating justice with the outcome of the original position, as Rawls urges us to do, is plausible only if we're operating with a strictly procedural conception of fairness; on a more substantive conception, Johannsen argues, the equation simply can't hold.

This suggests the possibility of a particularly forceful line of argument against Rawls. What if we could show that his strictly procedural conception of fairness is too weak for his own purposes? What if we could show that a plausible construal of the veil of ignorance can only be reached if we bring in something like *Cohen's* conception of fairness? Then, as Johannsen sees it, we would have shown that Rawls can't equate the outcome of the original position with justice. And, as a bonus, we would have shown that his view must take on board much more of luck egalitarianism than he himself would have ever allowed—to the point where we might consider amending his famous slogan to 'justice as *luck egalitarian* fairness.'

This is the most ambitious strand of argument running through Johannsen's book. It's an exciting and original attempt to unearth an unsuspected, potentially devastating power in Cohen's offensive against Rawls. But I don't believe the attempt succeeds. At a conceptual level, I don't think the possibility of equating justice with the outcome of the original position ultimately depends on our conception of fairness in the way that Johannsen suggests.

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[3] Johannsen doesn't just concede that the disagreement about the nature of justice is conceptual. He also suggests that some of the seemingly substantive disagreements between Rawls and Cohen turn out to be reflections of this basic conceptual disagreement. For instance, Cohen famously thinks that Rawls fails to accept the consequences of his own premises by failing to endorse luck egalitarianism. Johannsen thinks that whether this is right depends on how we decide the main conceptual disagreement. If we accept Cohen's pluralist view about justice, then luck egalitarianism is plausible. But if we adopt Rawls's institutionalist view, then luck egalitarian demands will have to be combined with various other considerations to yield plausible principles of justice. A similar point holds, on Johannsen's view, for the debate about whether principles of justice should apply to personal choices. See Johannsen, pp. 2–3 for a clear general statement of his position on this. I agree with Johannsen that it's hard to take luck egalitarianism seriously if it's meant to yield all-things-considered judgements about how social institutions should be set up. I'm much less sure that the debate about the 'site' of distributive justice (as Cohen calls it) boils down to a conceptual disagreement. On the contrary, I'm inclined to think that Cohen's challenge raises serious questions that Rawlsians must address (I grapple with some of these in Hodgson).

And, at a more substantive level, I suspect that grafting Cohen's luck egalitarian conception of fairness onto Rawls's framework wouldn't yield the fruit that Johannsen promises; if anything, it would probably kill the plant. Before I say more about these qualms, let me explain briefly why Johannsen thinks that Rawls's conception of fairness lands him in trouble.

The idea of fairness plays a key role in justifying our conception of the veil of ignorance, which itself crucially shapes the choice of the principles that takes place in the original position.[4] Johannsen thus strikes at the very heart of Rawls's theory when he contends that this whole framework can't get off the ground on the conception of fairness that Rawls himself favours. The idea, I take it, is the following. Rawls wants to operate with as thin a conception of fairness as possible—a conception closely linked to minimal ideas of reasonableness and of reciprocity.[5] But, Johannsen contends, such ideas can't justify the conception of the veil of ignorance that Rawls ends up endorsing. In particular, the thin conception of fairness can't decide between two ways to construe the veil of ignorance. The first is the one that Rawls favours: the veil conceals all information about particular matters, and we think of the parties in the original position as choosing based on individual rationality. On the second construal, the veil would let through *some* information about particulars—information about which talents a person has or about her social position, for instance—but on the condition that the parties use that information in a reasonable manner.[6]

How are we to choose between these two possibilities? Johannsen thinks there is an obvious way to break the tie in favour of the first option, and thus to reach Rawls's favoured conception of the veil of ignorance: we just have to take on board the luck egalitarian conception of fairness. As he puts it,

> Though reasonableness is indeterminate between placing such knowledge [about one's talents or social position] behind the veil of ignorance and constraining the manner in which that knowledge is used, luck equality is not. One's talents and social position are largely traceable to brute luck, after all. They belong as much to one's circumstances as they do to one's choices. Even when the arguments that better-situated contractors make are reasonable, using knowledge of one's better circumstances to secure a greater relative share is unfair from a luck egalitarian perspective. Luck egalitarianism can thus account for why securing a fair contract situation requires withholding knowledge of these particulars.[7]

In short, Johannsen believes that the strongest version of Rawls's theory is one that construes fairness along luck egalitarian lines. This doesn't mean that

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4   See Rawls, pp. 15–19 and 118–123.
5   See Johannsen, pp. 100–111.
6   See Johannsen, p. 107.
7   Ibid.

Rawls's theory just morphs into luck egalitarianism, or at least that's not what Johannsen thinks; the concession concerns only the way in which the original position is set up. The principles we obtain from the original position may change slightly, of course, but the result is supposed to be a strengthened version of Rawls's theory, not a complete metamorphosis.

As I'll explain below, I'm not sure that Johannsen's proposed luck egalitarian graft can take; and, if it does take, I'm not sure it can be stopped from completely taking over the theory. But first I want to raise some questions about Johannsen's claim that the disagreement between Rawls and Cohen boils down to whether we should adopt a procedural or a substantive conception of fairness. There is something amiss in the way Johannsen characterizes the issue. To begin, note that his claim can't be about how we should understand fairness in general; what's at stake here is specifically how we should understand fairness *for the purposes of laying out the original position*.[8] The question is then, what does the contrast between substantive and procedural fairness amount to in that specific context? As I understand it, it refers to the *manner* in which a given conception of fairness is deployed—not to its content per se. Basically, if we apply our conception of fairness as we lay out the original position, and if we are satisfied that whatever comes out of this choice procedure must be acceptable to all, then we are applying our conception procedurally. By contrast, if we use our conception of fairness to evaluate the outcome of the original position—if we view the outputs as directly answerable to our standard of fairness—then we are applying it substantively.

Rawls's hope in setting up the original position is that we can do so in a way that allows our application of the idea of fairness to be mainly procedural. If we succeed, the original position will do the work for which it is intended. But presumably that is a hope that we may also entertain if we are drawn to a luck egalitarian conception of fairness: we may still hope that our conception of the original position will be sufficiently powerful to allow us to apply our idea of fairness procedurally.[9] It will, of course, be possible to ask whether the

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[8] There are moments in the book when Johannsen seems to say that Rawls generally thinks of fairness in purely procedural terms, but that's an implausible way to understand Rawls's position, and I suspect it's not Johannsen's considered view on the matter.

[9] I take this to be what Johannsen has in mind in the following passage: "The principle of luck equality, when applied to an assessment of the details of the original position, recommends that knowledge of social position and natural talents be withheld. Since one's social position and talents are largely products of brute luck, and since having knowledge of them would give some parties a bargaining advantage over others, luck egalitarianism requires that they be placed behind the veil of ignorance for the sake of ensuring a fair contract situation. … [U]sing luck egalitarianism at the procedural level … provides us with a resource in light of which to choose between possible descriptions of the original position without relying on antecedent moral judgments about which of the plausible regulatory options is best" (Johannsen, p. 109).

outcome of the original position lives up to our standards of fairness, and thereby to deploy the idea substantively. But that's also something we can do on Rawls's own view—indeed, it is something we *must* do to reach reflective equilibrium.[10] There is an important qualification, however. On a properly Rawlsian view, we should do this only to the extent that the judgements of fairness to which we appeal qualify as considered judgements. Since this won't be the case for most of our judgements of fairness, it follows that, on either version of the view, the substantive deployment will remain relatively modest.

If these points are correct, they cast doubt on Johannsen's contention that adopting the luck egalitarian conception of fairness (or any substantive conception of fairness, for that matter) must lead us to reject Rawls's claim that justice *just is* what comes out of the original position. The reasoning here is not as detailed as it might be, but I take the main idea to be that the principles chosen in the original position can't fully live up to the demands of fairness, since they are the result of a compromise that takes account of other values; accordingly, if we're operating with a conception of fairness that allows for a direct evaluation of the outcome of the original position, then we can't possibly view this outcome as identical with justice.[11]

This can't be quite right. As we just saw, Rawls's view of fairness is also used to evaluate the outcome of the original position directly. Although our main deployment of the idea of fairness comes when we design the original position, we must also confront its outcome against our considered judgements of fairness to achieve reflective equilibrium. So it can't be Rawls's conception of fairness that pushes him to view the outcome of the original position as principles of justice. Rather, it's because he starts from the understanding that principles of justice are rules that social institutions should follow, all things considered, that he takes the outcome of the original position to consist of such principles. If he started from the view that justice is identical with equality or fairness, as Cohen does, then he would think of the outcome of the original position differently. In spite of Johannsen's best efforts, then, I find myself drawn back to the traditional construal of the disagreement between Rawls and Cohen about the nature of justice—and to the worry that Cohen's arguments on this point fail to get at anything of substance.

Even if I am right about all this, Johannsen could still be correct to claim that understanding fairness along luck egalitarian lines makes for an overall stronger version of Rawls's theory. But I have misgivings about this part of his argument as well. Let me start with a very general one. As I just explained, I don't think the disagreement between Rawls and Cohen really turns on how substantive or procedural our conception of fairness should be. A different way of understanding the contrast would be more accurate, but also less flattering

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10   See Rawls, pp. 42–44.
11   See Johannsen, p. 111.

for the luck egalitarian side. What motivates Rawls to adopt what Johannsen sees as an excessively thin conception of fairness is not that he wants to keep the conception procedural; it's that he wants to keep the view as *uncontroversial* as possible. And he proposes to do that by tailoring his conception of fairness to the problem at hand—that is, by ensuring that his conception of fairness does not commit him to more than necessary.

The key thought receives a particularly clear formulation in T.M. Scanlon's illuminating discussion of Rawls's views on justification:

> Conflicting claims against the basic institutions of a society are generally either disagreements about the way it distributes economic goods or disagreements about the opportunities it provides to pursue and promote various "conceptions of the good." So a mechanism for choosing among conceptions of justice will be fair if it is fair between people who stand on opposing sides of such disagreements.[12]

This underscores a crucial respect in which Rawls's conception of fairness is circumscribed: he is asking what would be a fair procedure for choosing principles of justice *as between persons who disagree about certain specific matters*. This is a much more modest aim than trying to put forward a general theory of fairness.

A possible rejoinder is that, although Rawls's aim has the advantage of being modest, the luck egalitarian conception of fairness has the advantage of being systematic. And, of course, as we saw already, Johannsen would add that, in any case, we need a stronger conception of fairness to reach the conclusion Rawls wants. Once we are clear about how Rawls uses the idea of fairness, however, it becomes hard to see what force these objections have. The question that allegedly poses a problem for Rawls is whether allowing the parties in the original position knowledge of their talents and social position would be fair. But once we interpret the idea of fairness to mean *fair as between people who disagree about how economic goods are to be distributed*, I am unsure what the difficulty is supposed to be: that allowing such knowledge wouldn't be fair seems entirely uncontroversial. Certainly—and this is the main point here—the claim by itself is considerably less controversial than the full-fledged luck egalitarian theory of fairness.

So the worry is that, by bringing in luck egalitarian fairness, as Johannsen advises us to do, we would be appealing to a principle that is far more controversial than the conclusion it is intended to support. This kind of move can be warranted, of course—sometimes, the greater systematicity is worth it. But it's unclear why that would be the case when the task is to set up the original position. We need to determine what restrictions on the information available to the parties in the original position would be fair to all members of society. If it's

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12   Scanlon, p. 154.

uncontentious that the availability of information about talents and social positions would be deemed unfair by people who hold different views about how economic goods should be distributed in their society, then it's unclear what there is to gain from bringing in a more systematic theory of fairness.[13]

I have been pointing to some very general reasons for being sceptical of Johannsen's claim that Rawls's theory would be strengthened by the addition of the luck egalitarian conception of fairness. I now want to argue that the proposal runs into a more specific and immediate problem, namely, that the luck egalitarian conception of fairness can't actually do the work that would be required from it in the context of Rawls's theory. Let me explain. Johannsen's contention is that luck egalitarian fairness would clearly yield the more robust veil of ignorance we seek, since "[o]ne's talents and social position are largely traceable to brute luck."[14] But if we really take the logic of luck egalitarianism seriously, can we just stop there? Don't we need to ask to what extent exactly talents and social positions are traceable to brute luck? And shouldn't the parties in the original position have information about their social position *precisely to the extent* that it results from their choices? If this information is completely blocked, aren't we allowing people who've made all the wrong choices to benefit from the careful thinking and self-control of those who've made all the right ones—an affront to everything that luck egalitarians stand for?

Admittedly, figuring out the contribution of choice to a person's lot in life is no easy matter, but it would be odd for luck egalitarian sympathizers to find comfort in that thought. In any case, let's put that worry to one side: let's assume that we can rely on a group of solid, Oxford-trained experts. We still encounter a serious problem: if the parties in the original position are granted access to this kind of information, then it becomes unclear what principles they can agree on. If they know the extent to which their choices have improved or worsened their social position, then those whose choices generally turned out well will presumably favour more responsibility-sensitive principles. Those whose choices turned out badly, however, will want to push in the opposite direction. How an agreement could be reached is hard to see—unless, of course, we assume that the parties in the original position adopt luck egalitarian fairness as their principle of choice. But if we do that, there will be

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[13] Note that the question here is not whether luck egalitarian fairness can plausibly be viewed as part of our shared political culture (Johannsen thinks it can be—see Johannsen, p. 107—although I would need to hear more to be convinced). The problem is that, in any case, luck egalitarian fairness is a much more controversial principle than we need for the purposes of setting up the original position. And, of course, the more controversial the ingredients we use to set up the original position are, the less this device can fulfil its role in our theory.

[14] Johannsen, p. 107.

nothing left standing of Rawls's theory—we'll have transformed it into a strangely ornate version of luck egalitarianism.[15]

Perhaps we should say, in a Rawlsian spirit, that the parties in the original position should know to what extent their social position has been affected by their choices (30%, say) but *not whether it was for better or worse.* This may help prevent the kind of stalemate I just described, but only at the cost of creating other problems. Most obviously, we run into a problem of coherence, since the information we propose to allow the parties to access is entirely arbitrary from a luck egalitarian point of view. After all, if the effect of choice on my position is not morally arbitrary, why should the veil of ignorance conceal any part of that information? Even if we leave that concern aside, I suspect that a problem of indeterminacy will remain, since it's still unclear what principles the parties should choose. Johannsen seems to think that they would choose principles that are more responsibility-sensitive than Rawls allows. But it's unclear on what grounds they would do so if we don't assume that they themselves accept something like luck egalitarian fairness. Nor is it clear why they should all choose the *same* principles, given that the extent to which their social positions were affected (for better or for worse) by choice will vary considerably. If we stick to the sort of reasoning that Rawls envisages taking place in the original position, what is most likely is that we will fail to obtain a solution.

The upshot of all this is that we can't take Rawls's approach more or less as it is and simply plug in the principle of luck egalitarian fairness. Doing so renders the outcome of the initial situation indeterminate. And if we take the obvious way out—if we assume that the parties in the original position base their choice on the luck egalitarian conception of fairness—then although the outcome of the original position is determinate, it isn't particularly interesting,

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15   It's true that Rawls himself leaves open the possibility of what he calls "ethical variations of the initial situation" (Rawls, p. 512). For instance, he suggests, "one might assume that the parties *hold the principle* that no one should be advantaged by unmerited assets and contingencies, and therefore they choose a conception of justice that mitigates the effects of natural accident and social fortune" (ibid.; emphasis added). Rawls doesn't explain how the reasoning would go exactly, but he suggests that this approach would "appear to confirm the difference principle" (ibid.). I am inclined to think that if we interpret the initial situation in this way, then it becomes unclear what role it is supposed to play. If we adopt this line, then we ought to dispense with the original position altogether, and consider directly the merits of the ethical principle we think the parties in the original position should follow. In any case, this does not affect the present point, which is that if we assume that they make their decision in terms of the full-blown luck egalitarian principle, then it is obvious (and therefore not particularly interesting) that Rawls's theory collapses into luck egalitarianism.

as it just reflects the old adage 'luck egalitarianism in, luck egalitarianism out.' The real question is then whether we want to rest our entire theory on the luck egalitarian conception of fairness in this way. Much as I am impressed by the detailed arguments and innovative proposals that Johannsen puts forward in his thoughtful book, I remain unconvinced that this would be a wise move.

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