

Ronald Dworkin and the Question of Political Stability and Legitimacy

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Ronald Dworkin's political theory is an ideal theory, but it is interpretive for liberal communities. His legal theory is interpretive only, since it requires an already existing and pre-interpretive set of social practices. But the moral appeal of his legal theory derives from his political ideal of equality of respect and so the two theories are closely connected. Given the ideal nature of his political theory, and the relatively liberal assumptions that John Rawls builds into his conception of stability, Dworkin's political theory is, compared to Rawls's, uncompromising. In Dworkin's view, some stable societies are not morally justified, and that is the end of it. It follows that we must consider that the implications for stability in Dworkin's theories lie particularly in the appeal of equality, since that idea grounds for him, not just the general requirement of decent, non-discriminatory action, but the distribution of economic resources, and political power in a representative democracy. In addition, equality directs the principled application of law through its adherence to the legal virtue of 'integrity'. The major appeal of equality is that it should be understandable rationally by any mature person as a universal value. In Amartya Sen's words, '... the claim of a universal value is that people anywhere may have reason to see it as valuable'.¹ Here it is considered how Dworkin's theory, particularly his important theory of equality of resources, has implications for stability. It is concluded that he takes a more coherent and robust moral stance than Rawls.²

Like a number of contemporary American political philosophers, Dworkin draws a distinction between ethics, the morality of one's personal life, and morality, by which he means social morality. That distinction rests on the value of individuals having private space in which to act autonomously, in living according to their own convictions. That distinction captures the spirit of Mill's distinction between self- and other-regarding spheres of action. Although public morality requires the community as a whole (the state) to be impartial on matters concerning this private sphere, it is a mistake to suppose that Dworkin's view about state impartiality, or 'neutrality', as it is often called, rests on any non-moral default position. It is as strongly moral as the rest of his political and legal theory. On the contrary, the state has a strong moral duty of respect for individual autonomy. State 'neutrality' is therefore compatible with a communal duty of encouraging people to make responsible decisions.³ Dworkin's view is highly protestant. Since the state must respect conscience, it is an affront to dignity to make decisions for people in how to live their private lives.

The state has further duties, arising from the abstract duty to promote a just community to create and protect the ethical space in which people may act. The private space in which an individual has the freedom to act will be a function of this duty. It follows, in Dworkin's account, that the individual's integration with the community will be part of the individual's autonomous life. And so certain failures in an individual's life may be attributable to a failed communal duty towards them. In John Rawls's term, Dworkin's theory of liberalism requires that the liberal community be understood as 'continuous' with an

¹ Amartya Sen, 'Democracy as a Universal Value' *Journal of Democracy* 10.3 (1999) 3, 12.

² Democracy receives an extensive philosophical justification in his *Sovereign Virtue: the Theory and Practice of Equality*, (Harvard: Harvard UP, 2000), ch.4 'Political Equality'. More practical arguments, relating to appeal, are in *Is Democracy Possible Here?* (Princeton and Oxford: Princeton UP, 2006).

³ See Dworkin's response to the 24-hour 'cooling off' period for abortion on demand: *Life's Dominion*, (New York: Vintage Books, 1994) particularly his discussion of the abortion case of *Casey* at 123 and 175.

individual's view of the importance of personal autonomy and how it should act should be part of a 'comprehensive doctrine' of what constitutes 'well-being' for that person. So Dworkin does not subscribe to Rawls's later view that only a 'political' liberalism is possible, one that cannot be justified from a single 'comprehensive' point of view.

Given these remarks, it is a clear mistake to suppose that Dworkin's liberalism promotes 'selfish' or 'atomistic' values, the sort of charge that 80s 'communitarians' levelled against liberalism.⁴ Dworkin's right to autonomy is part of equality of respect, and its potential impact on others is part of the scope of autonomy. It is not that freedom is 'justifiably' restricted because of the equal rights of others to the exercise of their freedom. Equality does not restrict it at all. Rather, freedom is constituted, or defined, by the equal rights of others. So dignity – one's right to equality of concern and respect – requires the idea that freedom is defined (or 'parametered')⁵ by the rights of others. A significant definition of that private sphere arises from the state's duty to monitor the distribution of resources according to equality, discussed shortly.

The fundamental idea doing the work here is the notion of equality. Since it is an equality of treating people as equals the relationships between people are integrative. 'That's fair enough' one person might say to another, 'I'm not free to do that to you' but that's only because you, in same position, couldn't do the same thing to me'. Further, equality understood like this provides the solution to what Dworkin calls in *Law's Empire* 'the puzzle of legitimacy'.⁶ That puzzle is not solved by saying we 'consent' to the state, or community, because putting it that way is a fictional device for describing legitimacy: no one actually consents. Nor is legitimacy explained by simply saying 'justice requires it' because, he argues, justice extends beyond particular communities to the whole world.⁷ He also dismisses the familiar argument that because a community confers certain benefits on its members, fairness requires some form of return (sometimes called the 'fair play' argument, or the 'benefit-detriment' argument) because it presupposes that political legitimacy arises out of choice. Fairness instead suggests a reason for you to 'join in', but, Dworkin says, you have no such choice.

Dworkin's solution to the puzzle lies in the organic idea of 'fraternal obligations', the sort that arise from already existing relationships, such as the relationship between siblings. Such obligations are reciprocal and important – 'associative' - but do not arise out of choice at all. Because the idea of fraternity does not exclude hierarchical communities, the best form of communal obligation, for Dworkin, arises from a fraternal association in which the regard for each other member is based on the fundamental principle of equality of respect, what he calls a 'community of principle':

'A community of principle ... can claim the authority of a genuine associative community and can therefore claim moral legitimacy – that its collective decisions are matters of obligation and not bare power – in the name of fraternity.'⁸

Dworkin's theory behoves us to make the most of the community in which we happen to find ourselves. We should understand others as equal to ourselves, and that we should interpret the practices of that community in ways that are consistent with understanding the associative identity we share with others, expressed in the idea of equality, even although we have not

⁴ See Amy Gutmann, 'The Communitarian Critics of Liberalism', *Communitarianism and Individualism* eds. Avineri & de-Shalit (USA: Oxford UP, 1992), 132

⁵ Ronald Dworkin, *Sovereign Virtue*, (Cambridge: Harvard UP, 2000), chapter 6 'Equality and the Good Life'.

⁶ Dworkin, *Law's Empire*, (London: Fontana, 1986), 190.

⁷ Compare Tom Nagel's view in 'The Problem of Global Justice', *Phil. & Public Affairs* 33, No.2, (April 2005), 113.

⁸ *Law's Empire*, 214.

chosen those associations. As equality here is not an equality of outcomes,⁹ and the interpretation of the fraternal relationship must be consistent with the moral improvement of communal practices, fraternity in theory takes assumes the best senses of comradeship and none of the bad.

The meaning of stability

Before looking at the major plank of Dworkin's political theory of justice, it is important to consider the contemporary debate, begun by John Rawls, into the connection between justice and stability, and that requires getting some grip on the idea of stability, which is notoriously slippery. In general, stability implies solidity - as in 'difficult to be swayed' - and a dependable continuity; it may also imply relative lack of conflict and harmony. Relative lack of conflict suggest value, as that may enhance personal autonomy, although placing much value on it would suppose that autonomy is hindered by conflict and change, obscuring the sense in which conflict and change can be themselves values. Conflict in argument, particularly in the public realm, is crucial to democracy, and crucial to legal arguments about people's rights: without it, democracies would be poorer. So a community devoid of conflict would not obviously be morally justified. Aldous Huxley's *Brave New World* depicted a community in harmony achieved through genetic manipulation. In Richard Adams's *Watership Down*, the richest and most stable community was also the most sinister since the price was the sure knowledge of eventual slaughter. There is little doubt that in Nazi Germany, from about 1935 and well into the war years, there was surprising internal stability, part due to suppression, but also part due to consensus. All these communities has stability in some form, it seems, but gravely lack moral appeal.

If we build morality conceptually into the meaning of stability, these three communities are unstable. Would this moral conception serve a value? It does not mirror so many communities, and so there is a credibility gap. Further, there is an argument for clarity in distinguishing between the merely stable, and the stable-plus-moral. If the only stability were moral stability, for example, there might be a danger that people would slip sloppily into the view that a community's political structures were morally justified merely because most people were contented with them. But perhaps contentment itself is just a lazy form of moral endorsement. If so, the step from belief in moral justification to actual moral justification would not be great. Moral stability would invite arguments about whether that contentment was morally justified and, particularly, whose view counted. If it really were the case in the slave states of America in the 18th century that slave-owners and slave alike approved of slavery, it should have been in principle possible then to convince them that slavery was wrong, and that the society was, actually, unstable.

An objector who feels futility in this argument may claim that it is sufficient for stability that relatively large numbers support the political structure, and it does not matter that their reasons are poor, or that suppressed minorities do not agree. In favour of the objection, there is an identifiably brute sense in which communities exist merely as groups of people, associated with some identifiable territorial space, and relative lack of public conflict and likelihood of continuity. It is not clear, though, what use this brute sense has. The businessman who wishes to trade with a stable state irrespective of its morality will not be interested in non-moral stability. He will want that stability to include the honouring of commercial contracts and enforcement machinery that is fair; already, his conception of

⁹ Equality is unattractive if we think of it as a measure of outcomes, since it would be consistent with dramatic lowering of well-being or wealth for everyone. See, for example, Paul Johnson's diatribe on equality in *The Spectator* January 28th, 2000. He said it was the cause of Nazism, Communism and the current ills of the world but was not prepared to think of it as anything other than a lowering of standards. Equality is not like that at all. It is a principle of humanity

stability is the moral one. It is at least not clear that ‘community’, ‘state’, ‘legal system’, or even ‘group’¹⁰ are concepts that make perfect sense without moral justification. Each begs some explanation for co-operation, mutual forbearance and trust (however, minimal that is).

We can work with both conceptions. Brute stability lends to a particular interpretation of the relationship between the ideal and the real. The Nazi community was unjust in the following respects, we say, and then, separately, we propose ways for rectifying the situation. In the extreme Nazi-type case, rectification of the injustice may extend to wholesale destabilisation - destruction - of the community. In less dramatic cases, stability is merely a step towards the implementation of the ideal. Without calling to mind the possibility of the dramatic case, George Klosko assumes that measures aimed at achieving stability constitute an ‘instrumental’ approach to justice and that, therefore, measures aiming at achieving stability can only be ‘secondary to concerns of justice’.¹¹

The idea of political stability considerably exercised John Rawls, and these come particularly to the fore in his later writings. His views on stability are unique, for he saw in stability a desirable solution to damaging conflicts that arise when people hold fundamentally different points of view. His answer is that, in what he calls ‘political liberalism’, we establish requirements of justice in a supra-theoretical account of these different points of view, by finding at some fairly low level what he calls an ‘overlapping consensus’ to these points of view. An obvious objection is that this solution is merely, in spite of his vigorous denial, a *modus vivendi*, which constructs a theoretical compromise from all the points of view.¹² Justice cannot be a compromise, and it is of no help that Rawls confines his political conception to reasonable societies of a liberal cast, since that appears to beg all the questions of moral justification.¹³

How fair is this damning sounding attack on Rawls? In early Rawls - pre-overlapping consensus Rawls - the liberal theory of justice was clearly a moral conception, meaning that it arose from a moral point of view that he could wholly endorse. Particularly important components of his theory would lead to a ‘psychological’ disposition towards stability. These showed concern for each individual and placed great value on self-respect. These components suggest universal values. Who seriously would think that concern for others was not important, and that self-respect counted for little?¹⁴ These values clearly characterise something in democracy’s appeal, and there is abundant evidence that they appeal to many. They are also clearly preferable to utilitarianism because that theory, in any of its multiple forms, places primary value, not on individual respect, but on the good for the community as a whole. Utilitarianism does not hold out much hope of unanimity, by supplying good reasons for acceptance by all people.

One way of trying to make sense of Rawls is through the idea of agreement, and the suggestion above that, in bringing meaning to his idea of a ‘political’ conception of justice, Rawls was referring instead to the importance of unanimity in his theory. The values of concern for the individual, and of self-respect, are, we might say, deeper and more abstract values than the particular values that people might elaborate in any of their comprehensive moral views. This would at any rate explain why he denied a *modus vivendi* aspect to his

¹⁰ See Tony Honoré, ‘Groups, Law and Disobedience’ in Brian Simpson ed. *Oxford Essays in Jurisprudence, 2nd Series*, (Oxford: OUP, 1973), 1.

¹¹ George Klosko, ‘Rawls Argument from Political Stability’, *Columbia L.Rev.* (1994) Vol.94:1882, 1890. See also Larry Krasnoff, ‘Consensus, Stability, and Normativity in Rawls’s Political Liberalism’, *The Journal of Philosophy*, XCV, 6 (June, 1998) 269, 289.

¹² See Klosko, above, and Jurgens Habermas, ‘Reconciliation through the Public Use of Reason: Remarks on John Rawls’s Political Liberalism,’ *The Journal of Philosophy* XCII, 3 (March, 1995): 109

¹³ Habermas makes this point, above.

¹⁴ We can include all the well-known religions for these strictures.

theory, but it would then make it unclear why he need to depict a special ‘political’ account of justice.

Let us say comprehensive views are inherently irreconcilable.¹⁵ Rationality cannot allow reconciliation because the ‘burdens of judgement’ prevent it (such burdens are what Rawls calls the factors that lead even sincere, disciplined reasoners to disagree). But rationality also tells us this, and so we recognise that, in constructing a comprehensive viewpoint, it may not prove persuasive; in short, it is not merely bloody-mindedness that stops people from agreeing.¹⁶ So the problem is how do we construct a theory of justice that is available to all? Larry Krasnoff thinks that in Rawls’s later account of justice suppose that there cannot be a rational justification for justice, and so Rawls’s project is to construct one on ‘reasonable’ grounds, meaning that it can be justified only in ways that all accept. Here, says, Krasnoff ‘... the requirement of reasonableness swings free of every comprehensive doctrine.’¹⁷ But the difficulty with this idea is that there are justifications under the guise of ‘reasonableness’ that will not appeal to some holders of comprehensive views, particularly those who hold religious convictions about unbelievers, or Nazi-type views about minorities. According to some of these views, in fact, some groups do not need ‘to be justified to’ at all, as they are regarded as inferior.

There are easier ways in which Rawls could have presented his argument. The impression he leaves is that one has to transcend any comprehensive viewpoint to establish the ‘political’ conception. Rather, he should have conceived his theory as a superior comprehensive viewpoint, one that took into account, in the right way, the disagreements between different viewpoints. That right way would include tolerance towards those others, based upon the superior values of individual concern and self-respect. That would be a way of dealing with fundamental disagreement, preserving the comprehensive nature of the viewpoint. You can still respect and feel concern for people whose views you strongly cannot endorse yourself and yet feel powerless to argue against. Further, you could say that your comprehensive view encompassed those other viewpoints in that tolerant way, thus encouraging an ethical psychology of tolerance. Proper tolerance must be more than a sort of adjustment ‘realigning’ one’s ‘comprehensive’ point of view to accommodate ‘the requirement of stability’. It should be the other way round: we should incorporate tolerance entirely into our comprehensive viewpoint.

The matter can go no further than that. First, there is a difficulty in thinking that all comprehensive moral views are rational. Some are clearly not, being appallingly cruel and irrational. It makes no difference that many people hold them. No manner of rational argument will dissuade a religious fanatic, and where there are sufficient such people, the possibility of any kind of stability fades. So an appeal to reason, from within a comprehensive standpoint, will get nowhere to establishing stability. Second, a better explanation for what Rawls was doing in appealing to stability as an internal component of a ‘political’ conception of justice is that he was referring to the moral psychology of an agreeable disposition to consensus, or unanimity, in the idea of concern and respect for the individual. If people realise that justice speaks ‘to them’ and that their own individual well-being, and their own sense of their self-worth, are important to a theory of justice, they will be inclined to accept it. Of course, whether they actually achieve that psychological, ethical motivation to consensus would be entirely contingent. Rawls can only say that they should.

¹⁵ See Joseph Raz’s discussion of ‘strong pluralism’ in *The Morality of Freedom*, (Oxford: OUP, 1986) ch.14.

¹⁶ See Krasnoff, who calls them ‘stubborn consensus-hindering facts’, 273.

¹⁷ Krasnoff, 282. At 291, he says, ‘Consensus is important for the theory because availability to consensus is a necessary condition for political justification under conditions of reasonable pluralism. It is on rational and not on instrumental grounds that Rawls claims that modern political justification must be reasonable.’

If that is what he is getting at, he is probably reiterating the Kantian form of his original arguments in *A Theory of Justice*.

In the sense thus far argued, no ideal normative theory of justice can link in the direct way that ‘political’ justice Rawls seems to suggest to actual political stability in the real world. This is at least clear for Dworkin’s theory of justice, which Dworkin regards, naturally, as distinct moral point of view. Speaking of Rawls’s ‘political’ conception of justice, he says:

I have ... great difficulties with the distinction between political values on the one hand and comprehensive moral convictions on the other. Rawls’s own conception of justice as fairness depends critically on what seem to be controversial moral positions ...¹⁸

It is important to consider what theory would appeal to those who take seriously the ideas of fairness, personal responsibility to consider reasons, and decency to all people. In Dworkin’s view, Rawls’s theory is interpretive. It is not that there are ‘practices’, such as legal practices, on which interpretation fixes for a theory of justice. Rather, the method of interpretation as Dworkin describes it displays itself in intellectual reflection on - ‘making the best sense of’ - our intuitions about what it is morally right.

Rawls’s intellectual roots, like Dworkin’s, are Kantian and rational, and compatible with the view that traditions themselves can be adapted, amended, obliterated and enhanced. Kant claimed that he was refining the way people engaged generally in moral reasoning, giving it a rational basis.¹⁹ It is consistent to think that intellectual reflection could modify moral practice and suppose an interpretive understanding of moral reasoning that is critical of moral tradition. It is all in the idea of ‘leading people to see’ by offering them ways of reflection on what they think to be unalterably right or wrong. New way ways can ‘embed’, and new practices can emerge.

Take a debate between a seriously religious believer in the Taliban, and a serious Western liberal. The Taliban supporter expresses the high degree of importance he attaches to the fact of his belief, and adds, say, his beliefs about the proper treatment of women. For him, the belief rules, and it expresses his commitment to his community, to himself, and to God. The Western liberal can draw from these remarks. He should be able to say in return: ‘You believe that one’s life and commitments spring from one’s deeply held beliefs; so you attach great significance to commitment. But to hold that means that others, to live properly, as you believe, should be committed to the beliefs that they hold; how then can you consistently impose your beliefs on them if they do not share them? To force them outwardly to conform to what you believe is right would be directly contrary to what you yourself think is most important.’²⁰ That sense of the importance of conviction, of endorsement, of commitment, is common to both Western liberal and Taliban supporter. Compare that rhetoric with an ‘ideal’ argument in which we bluntly ask the Taliban supporter to imagine a world of sexual equality. The imaginative leap is unnecessarily stark.

Dworkin’s theory of law as integrity is different. That theory is explicitly one of interpretation of existing local social practices known as legal systems. Legal systems concern the operation of the central coercive power of the main institutions of the particular community. Justice cannot be localised in quite the same way, although this not to say that arguing about morality and justice must possess a universal status. The requirement of

¹⁸ Ronald Dworkin, *Justice in Robes*, (Mass: Harvard UP, 2006), 253.

¹⁹ This is abundantly clear from the early pages of his famous *Groundwork of the Metaphysic of Morals* (1785): Trans. and ed. Gregor, with intro. Korsgaard, (Cambridge: CUP, 1998) Section II.

²⁰ John Rawls uses the idea of ‘reasonableness’ to explain this sort of objection, which requires reciprocity, or consistency, between ‘free and equal’ people (*Political Liberalism*, (New York: Columbia UP, 446). The religious believer cannot ‘reasonably’ impose his belief about conscience on others. Reasonability for Rawls has liberalism built in. People who believe that women are inferior may think it reasonable to deny them more than basic education.

actually existing pre-interpretive local social practices and connection with the real world is prominent in his legal theory. Social practices constituting law have an empirical counterpart, to which the theory attaches significance, and to which the attention of others may be drawn. These would be the existence of legislative machinery, the courts and numerous very particular practices such as the acquiring of property, the making of contracts and the definition of criminal offences. These more particular social practices, rather than the equivalent pre-interpretive date of moralising – moral intuitions – present a more tangible promise of stability.

While it is true that, for Dworkin, there has to be an existing social practice upon which interpretation, and ‘making best sense of’ can fix, such practices may be morally unjustifiable. A Dworkinian interpretation, in making ‘the best sense’ of existing practice, may conclude that the existing practices make no moral sense, and not create moral obligations. In other words, the best moral sense any one may make of some brutal law is that it makes no sense at all. This possibility means that, behind the interpretation of existing legal practices for Dworkin, there lurks a moral ideal as independent of actual practices as the moral ideal of his theory of justice. It follows that the whole of Dworkin’s legal theory is hostage to the to and fro of Rawlsian reflective equilibrium.

The justice of resources

A powerful argument for the inculcation of a ‘moral psychology’ of stabilising force lies in Dworkin’s theory of resource equality. That theory uses an ‘envy’ test of distribution, something that is a background to Jeremy Bentham’s utilitarianism. Stability, for Bentham, was perhaps the most important, component of ensuring the ‘greatest happiness of the greatest number’. He considered it as close to the value of security. Security enhanced happiness, and the persistence of security increased it more. Envy compromised both security and stability, at least where there was persistent and deeply experienced envy. Bentham further thought it followed that the more secure a community was, the more likely that individual members were more closely equal in their share of the overall happiness. Equality would indicate that there was less motivation for insurrection, although Bentham’s view was a simple one as to what a moral principle of equality may demand.²¹ Nevertheless, like Rawls, for whom envy is a ‘disruptive attitude’ because the lack of self-worth that it can imply constitutes a threat to the stability of a community,²² Bentham fundamentally connected envy to stability.

In Dworkin’s theory, the ideal community structure employs envy by disallowing the distribution of material resources that any person could justifiably envy. He thus addresses the problems raised both by the moral psychology of Rawlsian self-respect and Bentham’s invocation of stability and security. If the community should treat people as equals, we must consider what the community ought to do to ensure that people are so treated. That idea

²¹ See Jeremy Bentham, *Principles of the Civil Code*, 1843 (CAWS digitalised website) chs.6 and 12. Bentham thought there was no sense in a moral ideal of equality as the only conception of equality he appeared to appreciate was an equality of outcomes motivated by envy. Since outcome equality is capable of ‘levelling down’ and so is potentially destructive, he was understandably against it. Nevertheless, he thought that a rough equality of outcomes might be the eventual result of continued security. In ch.12, entitled ‘Security and equality – means of reconciliation’, he said:

‘The ages of feudality are not long since passed by, in which the world was divided into two classes - a few great proprietors who were every thing, and a multitude of slaves who were nothing. These lofty pyramids have disappeared or have been lowered, and their debris has been spread abroad: industrious men have formed new establishments, of which the infinite number proves the comparative happiness of modern civilization. Hence we may conclude, that *security*, by preserving its rank as the supreme principle, indirectly conducts to the establishment of *equality*; whilst this latter, if taken as the basis of the social arrangement, would destroy security in establishing itself.’

²² Rawls, *A Theory of Justice*, 125 and 469.

cannot be to strive to make people equal in their welfare. People need some idea of the resources available to them with which they can achieve welfare. We cannot decide what our well-being would be before we knew what resources were available. That idea is inseparable from the injunction that other people count equally.

Imagine arriving with ten people on a desert island about which you know nothing. Imagine also that you are imbued with an 'egalitarian ethos' arising from a feeling of comradeship in part due to your recognition of the significant similarities people have in the matters that you regard as important. You believe you should be attentive to their interests in their own well-being, and you believe that each is entitled to your attention. This is what you mean by respecting them. It largely derives from how you yourself want to be treated. You loathe any action involving systematic contempt, class hatred, racial discrimination, and gross carelessness towards suffering groups. You flirted with communism once because that idea of getting rid of anything that smacked of class seemed so right, and the idea that all were 'comrades' in eliminating all forms of unjustified discrimination seemed so obviously right. You could see that, but for the grace of God, you yourself could have been at the sharp end of such unpleasant practices. You dislike that sort of 'elitism' in which people are somehow 'apart' and 'aloof' merely because they are more intelligent, or better at such things as sport or business or in artistic endeavour. Conversely, you dislike any thought that people who are poor, or lack education, or are ill or otherwise disabled, are thought to be not just disadvantaged but to be 'different' in some significant way. That is why you think in terms of an 'egalitarian ethos' and you have a natural distrust of the free market because not only is it liable to abuse – exploitation - but it encourages a morally unhealthy attitude of getting as much for oneself at the expense of others.

You arrive on the island with this egalitarian disposition. You are concerned for the well-being for others. On reflection, however, you will discover that, in crucial respects, it is not up to you, only each person themselves to be productive of their own well-being. It would be patronising, denying equality of autonomy to others, for you to suppose that you must make the important decisions about what would make you happy, but they cannot for themselves. You cannot, you must not, decide that another should do something she does not want to do because you think she has a poor conception of her own well-being. Perhaps it was this view of the importance of 'acting in accordance with one's own lights' that made you drop communism, finding that aspect of it paternalistic and authoritarian. You nevertheless reflect on what exercising an ethos of egalitarianism requires. It is at this point that realism creeps in. The extreme position will be that no one will have well-being if there is no food on the island, which shows that resources are a necessary condition for anyone's well-being. But less extreme cases also show that well-being requires resources because they enable us to exercise freedom. It follows that a practical first step in exercising an 'egalitarian ethos' is to investigate the resources available. This is not an argument to say that there are no other requirements of equality. It will be important how the community treats members of the group individually in matters other than the distribution of goods. Equality disallows discrimination, for example, in non-distributive matters, and the nature and operation of representational decisions, if they are needed, will be a more significant consideration the larger and more diverse the community becomes. On resources, however, in principle, it follows that the community's representatives must distribute the total resources available in equal amounts. We can achieve that by some mechanism that preserves equality throughout. Dworkin's suggestion is that of holding an auction in which, using a currency such as clamshells, each member may bid under conditions of equality for all those resources. Since each member has the same number of clamshells, when the bidding is finished, each member will own a bundle of resources and will not have any ground to envy any other member's bundle of resources.

A persistent and well-known protagonist of Dworkin's theory of equality of resources is Jerry Cohen. He is critical of equality of resources because he is suspicious, as Marxists mostly are, of the market having any say in justice. Instead, moved by the moral good sense of the slogan 'from each according to his ability, to each according to his need', and moved, like any Marxist, by the idea of an egalitarian ethos, he proposes that the egalitarian duty is to improve a person's needs 'for fulfilment in life', which means improving a person's 'potential for welfare'.²³ It is difficult to see exactly what this means. He regards himself as a welfarist, but 'potential for welfare' complicates matters. There are two interpretations. One is that he senses that 'giving a person welfare' is deficient because, as he surely believes, one's state of moral being has to be in large part dependent on what one makes of one's life. To be concerned directly with welfare seems too paternal. But if he thinks a person's construction of their life is important for their well-being, he needs to attend to the conditions under which a person can construct their life. In an ordinary and obvious sense, potential for welfare is not welfare at all, because an important way of supplying what people 'need for fulfilment in life' is resources, as the example of the injured islander shows, plus the ethos of non-discrimination, lack of prejudice and the like that equality requires.

A second interpretation is that Cohen does not think that there is a significant difference between potential for welfare, and welfare itself, and that both are really part of a continuum. On the island, before we know what resources it holds, we should deal with the immediate concern, the looking after and caring for one of the party who is injured as he arrives at the island. We should reassure him, starting to look for treatment by exploring the island and generally showing our concern for his well-being. While it would be wrong to say this does little to alleviate discomfort, the more the uninjured islanders investigate the resources on the island, the more they will realise that the egalitarian ethos will limit what they can do to treat the injured islander. The work of the 'caring' of the welfare ethos does not go far enough.

On the other hand, we can understand Cohen's dislike of market determination of what is just. In the real world, the free market can produce grossly unjust results. Living the communal spirit of the egalitarian ethos is attractive. If we were all decent, we might find that we acted with a view to other people's potential fulfilment in life in everything we did, as they would do to us. An ideal world would be one, as Marx thought, in which there is material abundance, and not the material abundance fuelled by capitalist induced consumerism. Any egalitarian sees the intuitive force in that idea, and should see why Cohen would not want to give it up. But when we apply the idea to the real world,²⁴ it does not help us, other than to say that we should *care*. It is completely opaque in Cohen how he would make the ordinary distributive decisions the NHS makes daily about expensive drugs. These cannot go merely to the patient who is suffering most, since the expense of the drug will mean that some other patient could suffer more as a result (wait longer, say, for a dialysis machine) and this could violate the principle of equality. Reference to comparative measurement is inevitable, and that requires a price mechanism.

The irrelevance of luck

At this point, the morality of equality intrudes further. The injured islander was unlucky in receiving his injury on arrival. It might not have happened, or it could have happened to

²³ 'The distributive norm that I favour takes part of its inspiration from the socialist slogan, "To each according to their needs – according, that is, to what they need for fulfilment in life," which is an antimarket slogan.' Jerry Cohen, 'Expensive Tastes Rides Again' in Justine Burley, ed. *Dworkin and his Critics* (Oxford: Blackwell, 2004) 3, 17.

²⁴ See Dworkin: 'Justice is relational: it is a matter of how people should treat one another, not of how the world should otherwise be.' In 'Reply to Cohen' in Burley, above, 339, 344.

someone else. A principle of treating all as equals would allow him more than one tenth of the total resources if that were necessary. Most people would share that powerful intuition. The community needs to build into its way of calculating what resources should be devoted to him because of his lack of responsibility for the injury. The intuition builds self-responsibility, which is a function of freedom, into the idea of equality. The egalitarian community should therefore redistribute, through compensation, those who are not responsible for their circumstances. The intuition behind compensation in such circumstances is clearly captured by the maxim ‘from each according to his ability, to each according to his need’. Given that in most cases, restitution is impossible, the best we can do, one might say, is to supply the unlucky person, as far as possible, with the freedom to get himself into the position that he would have been had the unlucky incident not occurred. Treatment of the injury might require amputation, perhaps replacement of a limb. We can cost that treatment, according to Dworkin, by working out what people would be prepared to pay in insurance to cover just that sort of situation. We could then use that calculation to establish a fair tax on the community to finance the medical treatment for the islander. In a community of limited resources, the compensation might not be much. That idea relies on the market, that of free trading with insurance companies. The fact that it is hypothetical does not matter, since although the market is ideal, it allows for calculating a fair distribution of resources, one that reflects the cost to the other islanders, or, in other words, the impact of the cost of treatment on the total resources that the island can draw upon.

The intuition about lack of responsibility is a striking one, and extends to the natural occurrence of different circumstances, in particular those of talents that people have. Just as one islander is injured - bad luck - another islander may have good luck. Let us imagine that not only has he special talents that the others lack he is the only islander not to have contracted malaria on getting to the island. He can build houses, and look after his plots of land, much more efficiently than the rest, because he is more intelligent and physically stronger than the rest. Instead of the bad luck of the injured islander, he has good luck. Each piece of luck was not a result of his exercise of freedom. He was born more intelligent and born physically stronger. It was luck that he did not contract malaria, and so he does not feel sick and tired most of the time. This person ends up with more resources than the rest, even when he works no harder than they do. That offends equality because the others can justifiably envy his extra resources because he has obtained them through luck alone. They cannot, however, envy someone who has done something more than they have, namely, worked harder than they have, or taken risks, and otherwise exercised their autonomy in accordance with equality.

In one sense, the market is not Cohen’s enemy. We can define the ideal market, as economists do, in ways that explain its operation. Exploitation is a classic market failure – see the draconian anti-trust law in the US and the EC law on competition - and so Cohen cannot make the market a Marxist bogeyman just like that. Bargaining and the exchange of value is an exercise of freedom, and permissible only where the freedom is genuine, and the playing field equal.²⁵ We can redefine the ideal of ‘the market’ in accordance with the principles of an egalitarian ethos. It must be an authentic market, of course, and each party to the trading should be independent. This is not to say so much, for the brute meaning of trading lies in the idea of free bargain. Fraud, misrepresentation, lack of discrimination, lack of duress, transparency of knowledge, and the other detail of market control are the driving

²⁵ See Dworkin and the market baseline. The ‘bridge’ principle connects the equality and freedom in the market place with equality and freedom elsewhere. The ‘bridge’ principle has significant implications for the non-economic rights of citizens in countries such as China. If freedom, transparency, enforcement and straightforwardness are required in commercial contracts, why not in other spheres?

force behind controls.²⁶ Rather, Cohen's concern should be with the unjust nature of distributions brought about through trading, distributions that reflect brute luck. Although we could develop a conception of the market that excluded certain luck variables from the market baseline itself, that conception would be different from that most commonly understood, and would lack some credibility as a result. It is clearer to say, simply, that we can end up with an unjust society even when the market procedures themselves are just.

What is fair bargaining power? It is not fair that one person have a share of the total resources available to a community that is attributable purely to luck. Why is that such a powerful intuition? As far as understanding Cohen, it is not necessary to go down that road, since he himself thinks that distribution should be governed by a principle of need, and the Marxist egalitarian ethos undoubtedly requires that those who, through no fault of their own, are 'down on their luck', through disability, or otherwise, should be compensated. But the intuition is a powerful part of understanding equality: we can so easily see ourselves in the position of the unlucky. You, I, could have been born without the ability to look after ourselves, let alone construct a positive sort of life for ourselves. Those people who are genetically gifted, with talents that enable them to acquire more of the community resources, are just lucky. The gifted sportsman, in a community in which many people are willing to give up part of their resources to see him play, will gain a significant proportion of the community resources from luck alone. It must follow that an equal and just distribution would not take into account luck in the distribution of resources.

Dworkin's view is that a just distribution of resources requires the market. Cohen, in favour of an egalitarian ethos, is vehemently against equality of resources, and the main driving force of his view is his Marxist distrust of the market. ('I believe that, for example, it is unjust if I have to pay more for figs than you do for apples simply because few people like figs and many like apples.')²⁷ He therefore concentrates on the importance of a person's welfare. In what seems to be a wanton denial of the egalitarian ethos, he vigorously supports compensation for people who have either acquired or been born with expensive tastes. His thinking breathes the central Marxist insight of 'each according to his needs'. Since he says that needs connect to 'fulfilment in life', the community has a duty to redistribute resources to those with expensive tastes. Of course, some people's needs are higher, as in intuitively appealing cases of suffering from serious disability. But Cohen's argument appears to interpret 'needs' to include the fulfilling of expensive tastes, which extends the idea of need considerably. It is highly unappealing to think that a seriously disabled person could have a 'taste' for artificial limbs. But Cohen's 'needs' gains its meaning from what would constitute one's well-being, and so we should say that every one whose needs do not go some way to being fulfilled is suffering from a disability. His example is that of a person who 'gags on chicken eggs', and must eat plovers' eggs instead. It follows, he argues, that the community has a duty to supply, where possible, plovers' eggs.

At one point, Cohen tries to link expensive tastes to what a person might identify with, as in 'I'm a person for whom only plovers' eggs are a possibility' taken in the same breath as 'I'm a person for whom the life of the wheelchair is the only possibility'. There is a

²⁶ See *Sovereign Virtue* ch.3, 'The Place of Liberty', which is too rarely studied, perhaps because it is highly abstract. But the main idea is straightforward. Equality and liberty should be the same for markets as they are elsewhere (the principles 'bridge' the market and the rest of the community). There should be 'authentic' transactions, so there should be no fraud, or duress, and the parties should be 'independent', that is, there should be no prejudice. Fraud, duress and oppression restrict freedom. Since the abstract principle of equality of respect crosses the 'bridge' to the market, that principle of 'abstraction' allows maximum freedom of bargaining. (In short, equality of respect means that it pervades the market in every detail). Only with that freedom can we ascertain true opportunity costs, and thus the justice of equality of resources. The argument is complicated but it is perhaps necessary to spell out the point that equality is not a form of liberty by definition. Rather, resources have to be available 'in as abstract a form as possible that is, in the form that permits the greatest possible flexibility in fine-tuning bids to plans and preferences.' 151.

²⁷ Burley, 18. See also, p.17: 'Because of the vagaries and variations of preference, markets do not deliver justice.'

sort of sense in this. An intuitively better example would be the poor and talented musician who ‘identifies’ with the life of a performing artist. Perhaps a failure to provide a good violin would be a failure of an egalitarian ethos (‘to each according to his ability’). At any rate, not being able to walk, or play the violin, is in a different category of seriousness from being unable to eat chicken eggs. Let us assume, however, that the inability to eat chicken eggs could be an impediment to well-being and the ideal world would have to find some way of compensating that impediment. In most worlds, lack of legs is a serious impediment to earning a living, a reasonable and sensible enough route to well-being. It is the sort of eventuality for which people take out insurance. Would people be prepared to take out insurance to provide plover eggs? It seems unlikely, of course, but in a world in which that would be a genuine impediment to well-being, an insurance test could quantify it in a way that measured the cost to other people of the provision of plovers’ eggs.

Cohen is concerned with people’s well-being. That is what comradeship is about, and what drives him to his expensive tastes argument, since it appears to be consistent with concern for well-being. This places him in a serious limbo, for no egalitarian, and in fact very few people, would deny that the well-being of a member of a community should be a concern of that community.²⁸ The philosophical point to be addressed concerns what to do about well-being, given that one of the major means to securing it, given limited resources, impacts on other people, and there is clearly an egalitarian issue about the extent of that impact. In other words, as Dworkin says, under any definition of welfare, a ‘metric’ of resources is required, and the most obvious is that of some trading mechanism, controlled by equality, such as the market or the auction, according to which people’s preferences and concerns are measured by their impact on others (their ‘opportunity costs’).

A true egalitarian ethos, contrary to what Cohen thinks, requires a metric of impact, as well as proper recognition of the exercise of freedom. Equality controls the baseline distribution of resources so that luck²⁹ plays no part in the question of what resources a person should have at any time, for equality requires that no person should be in a lesser or better position for reasons beyond their control. Those who are disabled are compensated; those who are gifted are taxed. Since the question concerns the distribution of resources, forced by the requirement of a metric, ‘disabled’ means that one cannot earn as much as those who are not disabled and ‘talented’ means being able to earn more than those who are not talented. We measure disablement and talent by their effect on the acquisition of resources. We then determine the level of taxation and compensation by a test that takes into account the economic importance to which an individual would attach to disabilities and talents if he or she had them. In principle, we should be able to say what monetary worth it would be for us not to have those particular qualities, and that calculation could be used as the basis of redistributive taxation.³⁰

The egalitarian vision that Dworkin inspires in the economic sphere is a community that considers all members of that community as equal in their entitlement to the total resources available to the community, which couples with a sensible seeming account of personal responsibility, that of personal control. No one is denied self-respect, and the freedom of each is acknowledged, after redistributive taxation, by eliminating any resource gathering abilities over which each has no control. People are free to engage in resource gathering where it is in accordance with equality trading rules, and this will mean that hard

²⁸ See Dworkin, ‘Equality, Luck and Hierarchy’, *Phil. & Public Affairs*, vol.31, Spring 2003, 190.

²⁹ Bad luck here does not mean the non-occurrence of hoped for investment decisions (Dworkin calls this ‘option luck’). If my lottery ticket wins, or my investment is successful, these are the result of choices I made – risks I took – and so are not a matter entirely out of my self-control.

³⁰ Dworkin uses the idea of a ‘hypothetical insurance market’ to determine pricing of particular talents. If a person was prepared to insure *against* what Cohen seems prepared to call an expensive ‘taste’, that would be a good argument to show that the taste was a disability, and something, as Dworkin says, to be ‘regretted’.

work is not taxed. So Dworkin's utopia is far from one in which people have the same amount of money. Since trading, which seems natural to the human instinct, is free exercise of choice, some people will make more money. But no one will be in a worse position than others merely because they lack talent. And no one will be in a better position merely because they are talented.

This ideal community will be one in which there will not be exaggerated rewards. The talented pop musician will earn a lot less and his extra income will depend on his propensity and willingness to work. 'Greed' will come to have more tempered meaning than it has in Western societies today. It will be greedy for a person to work so hard at making money that he neglects his family, or he becomes obsessive, supposing that the making of money was all that there was to constitute his well-being. It will no longer have the meaning of making the most of an unjust society, or represent the gloating of a 'celebrity' society. The idea of 'earning', too, will change since there is only a limited amount of work a person can do. Compare a person who works hard in a small rural building trade, and makes £15,000 a year, working eight or nine hours a day, most weeks of the year, with another person who works exactly the same hours, and gets just as sweaty, at a London merchant bank and makes £800,000 a year. It is distorting to think that the enormous difference in money between them is attributable to hard work alone. If that is so, it is Marxist 'false consciousness' to suppose that the London merchant banker 'earned' his money. Rather, he obtained it, although he will probably have earned some of it. Where did that extra money come from? It will be a mixture of different sorts of luck, and market failures in the form of unseen monopoly, ignorance and a sort of mystique that distorts the customer's understanding of the true cost.

The kind of society would have far less of a ratio between the higher earners and the lower earners. Would that contribute to the right kind of stability? It is a different vision for Western communities, in which at its worst, people are valued for the quantity of resources they have amassed, with all the distortions that luck brings about. With those distortions removed, with the egalitarian ethos firmly established in an ideal of humanity and responsibility that has neither the naïvety nor authoritarianism of Cohen's world, this would undeniably be a better community than the present. It would value comradeship in the right way: as fraternal concern in the context of maximum freedom.

Sustainability and morality

Sustainability refers to the ability to maintain something over time. In political contexts, it refers to success in obtaining the right balance in the reciprocal relationships between social, economic and environmental needs. Like 'stability', 'sustainability' awaits moral refinement because of the assumption that it is desirable that communities should be sustainable as well as stable (when moral). History suggests strongly that unpleasant societies, ones that the world could do well without, are nevertheless capable of remaining stable over significant periods. As argued earlier, there is a useful understanding of stability in the loose idea of bringing about through treating others as equals, a 'moral psychology' that would encourage a stable consensus. That idea strongly rests for Dworkin on the idea of rights, and, in its most abstract form, in the right to be treated as an equal. But stability of the right sort can be encouraged in other ways. Sometimes a community is better when it promotes certain values in the right way, and these values need not necessarily be expressible in terms of rights. It seems difficult to say that people have rights to a friend, let alone a life-long partner, and yet there is clearly a value in friendship. And it is not clear that people have rights to all sorts of thing, the provision of public art, for example, or a beautiful environment, or even to fresh air. There is value in the future of the human race, and to the quality of life lived by all those people yet to be born, yet it not only seems wrong, but clearly would have all sorts of

practical disadvantages, to talk seriously as if people who are not yet in existence had such rights.

It is better to conclude that the value in these things is categorically different from the value of human rights. Instead, they constitute a class of value by virtue of which people have indirect and limited rights against their representatives that they work to preserve the values of this class. A person's life is of better quality when the goals and choices that the person makes are not frustrated unfairly, and does not sink to a significant level of poverty. A normal life span is therefore significant to the quality of life in the sense that what people plan to do may extend over relatively large periods, say, decades. That people are continuously born and die provides a good reason, deriving from the value in people having reasonably lengthy lives, that the community pay attention to the sustainability of the conditions into which people not yet born should live.

Take abortion. We can make easy sense of the value of the existence of a foetus before having to take up a position as to whether we best express that value in terms of rights. A foetus is a living part of being a human being. Its value is not just its unique and intricate nature but the possibility of its developing into a mature human life. It overstates the value to say its life is of value to the extent that a person's life can be. It is not yet sentient, cannot feel pain, or frustration, or form opinions, has not yet discovered the possibilities of which it may be capable, requires nurture and guidance, education and many, many other things, many supplied by the community into which it will grow. If we deny it has rights, and we take the ascription of rights to be of fundamental worth, that means the value of the foetus is less than the value of protecting those matters that go to the heart of human dignity. You cannot affront a foetus's dignity; it cannot register, understand, or feel such an affront. That does not mean that the value of protecting the foetus is minor. The pre-sentient foetus is human. It would be a devaluation of that aspect of its humanity if people used them for theatrical purposes, in obscene displays, or the testing of chemicals. The idea of 'using' them suggests expendability.

The freeing of the idea of the human value of a foetus from the shackles of its having to have rights, until sentience, would allow us to suppose that there is a value to human affairs that goes beyond the protection of individual dignity. It may be that the value we ascribe to foetuses, perhaps employing some idea like their seeming innocence, or their total physical dependence upon their mothers, outweighs the value of human dignity upon which the idea of rights is predicated. On the other hand, the value of humanity transcends analysis in terms of rights. The individual person's life is not fully expressed in terms of his having particular sorts of rights. That expresses the value in his living his life according to his own lights – to the exercise of his autonomy, which the foetus even after sentience has occurred, cannot exercise - independently of the community. That right, as we know, may be exercised badly, so badly in fact, that the life thus created has little value. But the possession of the right itself, the right to genuinely autonomous activity, represents a peculiarly human and extremely fundamental value.

That analogy with abortion should show us that the value of sustainability consists of two kinds, one detachable from rights, the other deriving from rights. What is useful and important about rights is two-fold. Rights are a restrictive value in one sense, since they focus centrally on the sentient individual, perhaps more specifically on the mature individual, and on his or her capacity for autonomous thought and decision-making. But they are unrestrictive in the weight they place on that value. It is unashamedly the most important value, ranking over all others. What would be of immense value that was not reducible to the value of individual autonomy? Take a great monument, the Cheops of Egypt. Imagine that we are forced to choose between the permanent and complete destruction of that monument and the amputation of the limb of an unwilling and flea-ridden drug addict and beggar from a

Cairo street. That is a test case of whether one believes in the fundamental nature of a right to dignity, which focuses on the importance of the individual. That he is flea-ridden and a drug addict and a beggar is of no relevance; but that he is unwilling is everything.

Someone might be tempted to argue that there was something of the most immense value of all: the continuance of the human race. Could that be balanced against the right of the unwilling potential amputee? No one, surely, has a right to the continuance of human life in general. The example brings out the difference between the two kinds of value that are involved. First, there is the value of 'human beings continuing to be alive' to which no one has a right. Second, there is the value contained in the right to continue to live possessed by all sentient human beings. That second value places great weight on the individual and contends, in a grim contest of rights, with the right someone has not to be amputated against his will. If we have a choice as to whether one person dies or another loses his arm, or both die, and only we can make that choice, then the argument must primarily concern the merits of the distribution of rights to autonomy. That is not to conclude that the non-right value has nothing to do with the value of ascribing rights to individuals, since they are clearly linked. It is part of the value of human life that it is lived individually, and we protect that value by the ascription of rights. It would hardly make sense then to deny that there was a value in there being human life at all; but it also would not follow that there was a right to the continuance of human life possessed by any person.

If we accepted the general thrust of this argument, which we find in Dworkin (*Life's Dominion*), the value of sustainability becomes clearer. The community has a duty to promote and sustain those features of the environment that will affect the quality of people's lives. In the abortion case, the pre-sentient foetus does not have a right to continue to live which we can weigh against the degree of lack of respect one would have to show to its mother if she genuinely believed that would not be in her best interest. But, should she decide to continue with her pregnancy, she has duties to ensure that the quality of life of her child will be the best it can be. That the foetus, in other words, has no right to a sustainable future, does not mean that its future environment is unimportant. The foetus who survives to become a mature adult may rightfully complain that the community had failed to maintain a suitable environment in which he or she has had to live their life.

This argument establishes that sustainability has a value that transcends people's rights and that value is of importance because of its contribution to the quality of people's lives. In practice, it provides an argument against those who say that because no one has a moral right to a particular environment, the creation and destruction of the environment is subject to ordinary economic processes, determined entirely through the market operations of property ownership and transfer. The argument shows that there are values that a community as a whole must sustain because of the value that they will have to future members of the community.

There is another argument, however. At any time in a reasonably sizeable community, a child is born with a maximum life expectancy of around a century. That child must, as a matter of community integrity, be treated as much an equal as any other sentient member of the community, and that implies a duty to provide a stable and sustainable conditions of living for a century. That is another way of saying that communities have duties to protect and enhance the quality of life of their existing members, plus duties to ensure quality of life for those generations beyond the approximately century long life span of the youngest existing member. One example would be decisions made now about the proliferation of radioactive waste, the effects of which future members of our community might not feel severely for several hundred years. Another would be decisions that affect the preservation of art, and art collections, historic sites and other cultural entities.

Conclusion

Stability is almost certainly necessary but not sufficient for a good moral community. In the economic sphere, a distribution of total resources depends upon a moral principle the appeal of which arises primarily from that of seeing others as ourselves, in the idea of equality of respect. The egalitarian ethos is the only decent 'moral psychology' that should motivate the institution of political structures, as it promotes a reduction in justifiable envy. This ethos is perfectly consistent with a system of trading that continuously monitors the impact of decision-making on others. A community in which no person has a justifiable reason for supposing that some other has had an unfair share of the total resources available must be a community that has great appeal.