FREE WILL, EGALITARIANISM AND RAWLS

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In 'Egalitarian Justice and the Importance of the Free Will Problem', *Philosophia* (1997), I argued that discussions of distributive justice, and in particular choice-based egalitarian ones such as G. A Cohen's (1989), need to take much more seriously than they do the dreaded free will problem. I also made certain suggestions in the direction of what such a free will-focussed distributive theory might look like (further developed in my 2000: 6.3). In 'Free Will and Distributive Justice: A Reply to Smilansky' (in the present volume) Sung-Hak Kang challenges these views.[1] His interesting paper weaves together various complex topics, not all of which can be discussed here in detail. His two main claims are, however, clear: first, that people like myself who put metaphysical issues such as the free will problem as posterior to ethics are mistaken. Secondly, that a realistic, moderate egalitarianism has better prospects with John Rawls' "non-metaphysical" orientation than with any free will-dependent view such as Cohen's or the one that Kang attributes to me.[2] Putting both claims together, he asks: 'Can't egalitarianism take care of itself as a matter of practical moral judgment without resorting to obscure resolutions of metaphysical issues, whether the personal identity issue or the free will issue?' (p. 116).

There is much to be said for Kang's claims, and he offers a significant challenge that needs addressing. I do think, however, that matters are somewhat more complicated than he presents them. Once this complexity is realized, we see that we should have greater doubts about the Rawlsian move of understanding liberal-egalitarian justice as 'political, not metaphysical'. I doubt if there are any knock-down arguments to be had

here, and instead will make ten brief points that should cumulatively incline us away from Kang's belief in the Rawlsian move, and perhaps towards greater sympathy towards the need to tackle the free will issue in order to deal with distributive justice.

1. The normativity of the metaphysical emphasis Kang presents the contrast as one between those who are much concerned with metaphysics and those who are concerned with ethics. There probably are people who are interested in the free will issue only as a metaphysical problem, but typically the interest is in large measure ethical: free will would hardly be as widely discussed were it not for the perceived implications for moral responsibility, desert and justice. A notion such as moral responsibility is, in my view, normative through and through: although there must be some metaphysical differences between the kleptomaniac and the common thief that make us view them differently, our concern that the first lacks a form of control over her actions that the second has, and indeed the sort of control we care about, are based upon ethical values. The contrast is thus not between "metaphysicians" and "ethicists" but among ethicists of different *ethical* starting-points.

2. The plausibility of the free will-related ethical starting point: why should we care about the free will problem? One way of quickly getting into the thick of things is by reflecting on the idea that "'Ought" Implies "Can"'. This can, admittedly, be interpreted in a merely pragmatic sense, available even to utilitarians, whereas there is simply no point in requiring people to do what they cannot. However, as has been pointed out often (the classic discussion is Hart 1970: 18f.), if that is our only worry, we are liable to do things such as punishing people who are innocent, not for their own use but for the sake of the useful influence on others. That this issue of the punishment of the innocent – the innocent being the most striking example of people who are clearly not blameworthy - is arguably the most intuitively persuasive Achilles' heal of utilitarianism, indicates that matters go much deeper than pragmatic concerns. Being blamed and punished for what one did not do, or did but could not help doing, is a paradigmatic example of injustice, and in

this and other ways some of our deepest intuitions posit agency and control at the basis of morality. Hence the nature of free will or "can", namely what are the morally required "cans" and whether we metaphysically have them, are basic for our "oughts", for normativity.

3. The centrality of free will for egalitarianism: egalitarianism comes in many shapes and sizes, and can defend itself and attack its opponents in a number of ways. However, concern with moral arbitrariness seems to lie at the heart of egalitarianism. As Cohen writes 'a large part of the fundamental egalitarian aim is to extinguish the influence of brute luck on distribution' (1989: 931). The major egalitarian move in confronting non-egalitarians seems, broadly, to consist of two stages: first, to make equality the baseline for the ethical discussion so that divergence from it requires justification (on baselines in the free will context see Smilansky 1996a; 1996b); secondly, to attempt to knock down any of the non-egalitarian's would-be justifications for the inequality. This is what Rawls seems to be doing, as Kang notes, when he dismisses hereditary talents or even hard work as a sound basis for inequality, holding them to be morally arbitrary since they are not ultimately within people's control (see e.g. Rawls 1971: 104). In other words, for the sake of establishing his egalitarian starting-point Rawls argues in hard determinist fashion.

4. The plausibility of focussing on free will in order to move beyond fanatical egalitarianism: if we were to remain with Rawls' negative conclusion, we would end up with a fanatical egalitarianism that, as Kang says, cannot be a basis for social life. Rawls himself chooses at this stage to defend inequality through other means, namely that it would be better for those who are worse-off. We shall discuss Rawls shortly, but first we need to see that this is not the only plausible option. Since we are already at the baseline of equality and at risk of staying there as a result of hard determinist doubts, surely it makes sense to examine whether hard determinism is avoidable? For, even on the assumption that there is no metaphysical or libertarian free will, e.g. that the world is deterministic, this need not be the end of free will, moral

responsibility, desert and justice. Compatibilism, the view that moral responsibility and the concomitant notions are compatible with determinism (or with the absence of libertarian free will irrespective of determinism) might well be true, or partly true. More will be said below, but first we need to see why it matters. Again Cohen helps us here: if we can make sense of free choice, then we can remain egalitarians without being fanatical. For, inequalities can be justified so that, for instance, those who decide to work harder can justly be compensated for their efforts and contributions. Hence choice, the existence of meaningful spheres of control over one's life, and monetary motivation, can find a foothold within egalitarianism. As Cohen says, 'since effects of genuine choices contrast with brute luck, genuine choice excuses otherwise unacceptable inequalities' (1989: 931).

5. Difficulties with the Rawlsian model – fairness and justice: we seem then to have two approaches to justifying a measure of socially crucial inequality, a free will-related one and Rawls' "changing of the subject". One difficulty with the Rawlsian approach is that it is dubious whether indeed it delivers fairness and justice. In one sense perhaps it does, the sense in which the worse-off have no room for complaint, on the assumption that if the better off would not have more than the worse-off then the condition of the worse-off would become still worse. Hence, in certain constrained choosing conditions, the worse-off might choose this unequal social order. However, this hardly sums up people's intuitions about justice and fairness, particularly those of egalitarians. For, we recall, a major intuitive fountain for egalitarianism was the thought that distinctions in what different people have *must not be arbitrary*. But in the ideal Rawlsian order many people *will* be worse off than others for what in one deep sense does seem morally arbitrary – namely, for factors (such as inborn talents) that are arbitrary for the egalitarian. It is perhaps a fact of life that if you do not pay the talented (if they are greedy! See Cohen 1995) more than others, they will not be willing to, say, develop their talents and utilize them like others. The Rawlsian compromise addresses this fact, but at the end of the day many people will still get much less than the talented – for reasons beyond their control.

6. Difficulties with the Rawlsian model – the isolation of distributive justice: even if we set aside doubts about whether Rawls does indeed successfully address all the relevant concerns of non-arbitrariness, fairness and justice, following the Rawlsian move involves another serious price. This is that the rest of our moral life is directly concerned with the free will issue (as well as with personal identity, but I shall not challenge Kang there). As we have already noted when thinking about punishment of the innocent, desert seems inherently central for criminal justice. There we are not concerned only for maximizing the good (as utilitarians), or with what idealized self-interested contractors would prefer (as Rawlsians), but with free will-related justice and desert directly. To punish a person for something which he is not morally responsible for doing is morally monstrous, because he does not deserve to be punished. Similarly, a large part of our emotional lives is directly related to agency and free will. Central forms of self-respect and respect for others, for instance, are tied to the idea that people deserve respect due to their free actions (see Smilansky 1997b; Smilansky 2000: 6.4). The fact that so much of life operates while acknowledging the centrality of "metaphysics" should make Kang less worried about the urgent need to divest distributive justice of any measure of it. But in any case, it is clear that following Rawls here would set distributive justice at a curious and problematic isolation from central facets of our emotional lives, morality, and justice.

7. Difficulties with the Rawlsian model – practical concerns: the two sorts of worries about the Rawlsian model are not only theoretical. Consider Samuel Scheffler's important discussion (1992). Scheffler seeks to explain the political weakness of egalitarian liberalism (as shown, for instance, by the election of Reagan and Thatcher). Behind this weakness, Scheffler claims, lies the common thought that egalitarian liberals do not take personal responsibility - of criminals, unwed mothers, or the poor - seriously enough. Liberals suspect that a naturalistic view endangers moral responsibility, but - rather than share liberal scepticism - most people reject egalitarian-liberalism! Hence it is doubtful whether the "anti-metaphysical", desert-rejecting move headed by Rawls is a good pragmatic move to make for the sort of moderate egalitarianism

that Kang supports.

8. Does Rawls really avoid free will? Rawls makes a dramatic decision with respect to the free will issue. He begins by accepting hard determinism as his starting point, and then severs the paradigmatic relationship between agency, concern for control, and desert of inequality. This move has the various unsavory implications we noted in points 5-7, namely that it is doubtful if it indeed evades a central sense of arbitrariness, unfairness and injustice, that it isolates distributive justice, and that it makes egalitarian justice widely socially unacceptable because of the "anti-moral responsibility" move. However, for all these losses, it is doubtful whether Rawls indeed escapes metaphysical dependence. For, once Rawls sets up his order in a seemingly free will-free way (except for the merely negative hard determinist rejection of "pre-institutional desert"), his book is thoroughly infused with the assumption of free will and moral responsibility. People are expected to fulfill their obligations, to take responsibility for their actions, and indeed to try to form their expectations, in a way that makes sense only if non-hard determinist positions on the free will problem are assumed. Rawls makes the strategic decision to throw "metaphysics" out of the door, but then quietly lets it in through the window, where it rightly (and perhaps inevitably) becomes dominant.

9. So what is going on here? That is a matter of interpretation. One possible interpretation is that Rawls simply became so morally overwhelmed by the partial validity of the hard determinist insights, by the ultimate level arbitrariness, that he went too far. Then, when the Rawlsian mechanism got going, the tacit compatibilism naturally crept back in. Another possible interpretation is that Rawls is not such a dogmatic hard determinist in the first place, but that the decision to avoid as far as possible any talk about desert based upon people's free actions is motivated by broadly pragmatic concerns: about the possible public contentiousness of "the metaphysics", or about the difficulties of calculating desert (inherently, or in a way that would win wide acceptance). I do not have the space to enter here into the various interpretative discussions of these issues in the literature on Rawls. The important thing is to see that here Rawls makes some fairly radical

decisions of great and highly problematic import, which I think Kang has not sufficiently realized.

10. Free will, Fundamental Dualism, and moderate egalitarian justice: in the first part of my book *Free Will and Illusion* (2000), I set out a position on free will, moral responsibility, desert and justice that I call Fundamental Dualism. I think that this position is strong and convincing independently of distributive justice, namely in terms of the traditional free will debate. It can be applied to distributive justice (see 2000: 6.3) and, given certain egalitarian assumptions about the basic normative starting point, can lead to moderate egalitarianism. What is Fundamental Dualism and what are its distributive implications? In a nutshell, Fundamental Dualism starts by accepting that there is no metaphysical-libertarian free will. People have thought that this means that we need to be either compatibilists or hard determinists. The compatibilists (sometimes called 'soft determinists') think that despite the absence of libertarian free will we can make good sense of moral responsibility and the concomitant notions. The reason is that the forms of control, or free will, we clearly do have even in a deterministic world – the capacity to deliberate, choose and act as we want – suffice for moral responsibility. In contrast to these optimists, the hard determinists are demanding and pessimistic: moral responsibility and the concomitant notions require libertarian free will, but since it is impossible so are these notions.

My claim is that the debate has been plagued by a too simplistic Assumption of Monism, according to which we must be either compatibilists or hard determinists. I argue that we need to take a dualistic approach concerning the implications of determinism: we have to be partly compatibilists and partly hard determinists, and to try to integrate their insights while avoiding their inadequacies. We need to form a Community of Responsibility based upon distinctions made in terms of local compatibilist control: this is at once both morally imperative, and deeply unfair. Philosophically, respect for persons requires both the establishment and maintenance of a basically-compatibilist moral order, and the acknowledgement that this order is morally problematic, so that attempts must be made to mitigate its harshness. To be blind to any one

of these two perspectives is to fail to see the case on free will. A decision, for instance, not to go to college because one does not like studying, would at once be seen as free on the compatibilist level (one does what one wants), and as ultimately beyond one's control (for in a deterministic world the sources of one's motivation, that lie behind one's compatibilistically-free decision, are not ultimately within one's control). One must be allowed to live with the economic consequences of one's decisions, when those decisions are free on the compatibilist level (i.e. when one's decision is not coerced or grossly misinformed). But if those consequences are particularly grim, the importance of ultimate hard determinist injustice would gain in importance.

How would the Fundamental Dualism lead to a moderate egalitarianism? Again, given some egalitarian basic assumptions, both sides of the dualism would provide contrasting and balancing input. The hard determinist ultimate perspective would emphasize the gross injustice and moral arbitrariness of any unequal social order for, ultimately, nothing is within people's control, and hence in any substantively unequal order some people will be worse off than others due to factors beyond their control. Hence, pace Rawls, a large measure of injustice is unavoidable, in a way perhaps akin to views about the possibility for genuine moral dilemmas (on unavoidable injustice see Smilansky 2000: 11.1).[3]

The compatibilist side of the dualism will nevertheless allow some validity to free will distinctions, and indeed mandate that we form our social order so that people have opportunities for productive agency and desert. It will emphasize, for instance, the distinction between getting less pay because one chooses to work fewer hours as compared to getting less pay because of factors beyond one's control. The former may be acceptable, for working fewer hours is up to one in various significant ways, and there might be nothing very wrong with living the life that one desires, namely having more free time combined with less pay. If, by contrast, the factor causing the inequality is not within one's control, this is pro tanto problematic. Hence even in compatibilist terms the latter sort of inequality is not fair, in the way that getting less pay if one decides to work less may be.

A view based upon the Fundamental Dualism would need to further

build upon these insights, distinguishing where the compatibilist side is more salient or where the hard determinist side is more worrisome. We need to establish and maintain a Community of Responsibility that follows compatibilist distinctions in terms of desert and justice, but acknowledge that because of the ultimate perspective much injustice will result, and would need to be mitigated and compensated for. A corresponding distributive order could operate within a market economy, but with particular sorts of emphasis within it and with correcting mechanisms added. A distributive order trying to accommodate the dualistic implications of the free will problem would hence allow a large measure of opportunity for people to become deserving according to their actions, permit them to benefit unequally as a result of their exercise of free choice, but also be sympathetic and provide a safety net if they failed. It would be broadly egalitarian in various ways: in emphasizing factors that are within people's (compatibilist) control as the basis for justified inequality, in seeking to broaden access to opportunities for active agency and desert, and in the sense that however justified the resulting free choice-based inequalities, they are also on one level unjust, so that people might merit compensation, because of the partial validity of the hard determinist perspective. Inequality would, however, be justified as a result of the need to set up a moral order providing opportunities for choice and desert, and as a result of the operation of such an order, without necessary dependence on the inequalities benefiting those worse-off as in Rawls' position.

There are numerous complications here, as well as room for various forms of scepticism – about the stability of the dualism, the possibility of reaching agreement about levels of desert, the chances for widespread acceptance, the fit with actual social and economic arrangements, and so on. Perhaps, as we suggested, it is such primarily pragmatic concerns about the feasibility of working with the notion of desert that led Rawls to go in the direction he did. These complications are beyond our scope here. But I do think that a dualistic view based on the implications of the free will problem can make good sense of many of our intuitions, not only about moral responsibility and criminal justice, but also about the distributive sphere.

Can distributive justice escape concern with the free will problem? Should it try? Are metaphysical-ethical views, such as various types of compatibilism or my dualistic model, robust enough as a basis for distributive justice? Should moderate egalitarians go back to such free will-related models? How do they compare in terms of fairness and justice with Rawls' model? And in terms of the chances for social acceptance? How do we rate the various advantages and drawbacks of the alternatives and decide among them? These and other related questions are difficult, and in need of much further work. Every step in our ten-point journey can, of course, be discussed at much greater length and thoroughness. What I hope to have done here, however, is, first, to point out some matters that need to be discussed within distributive justice much more than they are, and secondly, to cast doubt on the assurance that Rawls' model, and his unconventional metaphysical, ethical and pragmatic decisions, are so satisfactory.[4]

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NOTES

[1]   Another attack on my views about free will and justice, with certain parallels to the present one, is put forward by Lenman (2002). I reply to him in Smilansky (2003).

[2]   I would not wish to be classified as an egalitarian in the strong sense under discussion here because of the serious ethical and conceptual doubts I have about the idea of the baseline of equality, and because of my strong value pluralism. For a critical discussion of certain versions of egalitarianism, see Smilansky (1995). My aim in the paper that Kang responds to and in this one has been to try to help clarify the significance of the free will issue for distributive justice. Egalitarianism is particularly useful with this task for reasons pointed out in the papers.

[3] It might be objected that in my fifth point above ('Difficulties with the Rawlsian model – fairness and justice') I argued that Rawls' position is deeply faulty because within a Rawlsian order much unfairness and injustice remains, but here, when presenting my own, we end up with a similar result. This objection, however, is confused. My claim was that Rawls does not acknowledge central forms of injustice that would remain in an ideal Rawlsian order. There is, as it were, no room within the Rawlsian contractual setting for recognizing manifest arbitrariness, unfairness and injustice for what they are. My position does just that, namely, it recognizes the forms of injustice that are unavoidable.

[4] I am very grateful to Michael Gross, Iddo Landau, Kasper Lippert-Rasmussen, Daniel Statman and the Editor, for comments on drafts of this paper.

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