AGAINST IDEAL RIGHTS
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The paper makes two related claims. The first is that an ideal theory of rights is mistaken. The second claim follows on from the first: if an ideal theory of rights is mistaken, then some ideal theories of justice are either implausible or impoverished.

In the first part of the paper I argue that ideal rights are not real rights. Put another way, my claim is that adopting an ‘ideal theory’ approach to the analysis of rights will yield an implausible and overly expansive catalogue of rights. Rights are unique in that they are associated with moral urgency and pre-emptiveness; to adopt an ideal account would leave us with rights that lacked these distinctive conceptual features.

The second part of the paper considers the implications of the first argument. If ideal theories of justice deny that facts about compliance, resource scarcity and history are relevant in determining principles of justice, I argue that they must also either (1) deny that rights are considerations of justice; or (2) defend an ideal theory of rights. Following the first course would lead, I argue, to an impoverished conception of justice; following the second would lead to an implausible one.

PART I: REAL RIGHTS

1. Rights in General and Human Rights
The language of rights is a language of entitlement, of priority and of immediacy. In the case of ordinary moral rights it is not typically the importance of the interests they protect, but the peculiar nature of the duties to which they give rise that accounts for their peremptory nature. Duties are not just good or adequate reasons to do things; they tell us what we must do, not what it would be good, reasonable, or rational of us to do. This does not mean, of course, that duties are absolute requirements of justice; nor does it mean that duties necessarily have greater weight than other moral reasons for action.

If I promise you that I will pick up your dry-cleaning then I incur a duty a duty to do so and that duty is owed to you. My duty is easily outweighed. If my child gets sick, or I get stuck in traffic and would need to break the speed limit to make it to the dry-cleaner’s before it closes, it doesn’t follow that I ought to breach these other norms and laws in order to comply with my dry-cleaning duty. What is true is that unless something extraordinary, or unexpected happens to me I am expected to fulfil the duty. It would be wrong to breach it if, say, I really wanted to go the movies or I was tired. It is when we talk of human rights that the peremptory feature of a right’s duties is combined with a sense of the moral importance of protecting the interest that it protects.
The precise nature of human rights is controversial. The largest and most persistent controversies centre on the nature of their grounds, the content of the catalogue and the agents who hold primary responsibility for ensuring that these rights are met. Are welfare rights genuine rights? Are human rights grounded in autonomy or dignity or basic needs? Do they hold against all states, my state or everyone in the world? I want to leave these questions aside. The urgency and priority associated with human rights are less controversial, and these features are the ones that make ideal rights particularly problematic.

2. Ideal Rights vs. Real Rights
The contrast between ideal rights and real rights is not the familiar one between moral rights and legal rights. A person can sensibly be said to have a right to borrow the dress you promised to lend her; the right is not any less real because it is not enshrined in law or likely to be enforced by the relevant authority. Rights are real when the duties they posit are binding on real duty-bearers. A moral duty is a real duty.

This is surprisingly controversial. Susan James has recently revived a positivism of rights that denies the reality of ordinary, unenforced moral rights. For James, a right is only real when social institutions have both the capacity and the will to enforce it. It seems to follow from her account that if social institutions fail to enforce my right to borrow your dress then I have no right to it. This is true even if you in fact comply with your duty to lend me the dress.

The advantage of the ‘Enforcement View’ is, according to James, that ‘we avoid the irony of announcing that a group of famine victims has a right to food, or that a group of women has a right to abortion, in circumstances where neither group has a significant chance of getting what they…are said to have a right to.’ We have a language of rights that is descriptive rather than critical or transformative. Lists of rights tell us what people are actually able to lay claim to in the social worlds in which they find themselves.

There is a cost to the reality of the rights that emerge from the enforcement account, however. The claim that a right’s existence is contingent on the will to enforce it makes speaking of a right’s having been violated difficult if not impossible. If the relevant duty-
bearer lacks the inclination to comply with the duties attached to a would-be right, then the right does not exist. The torturer does not violate the rights of his victim; the act of torture is itself evidence of the right’s non-existence.

The problem with the enforcement account is not its descriptive focus, but that it describes the wrong thing. A list of genuine rights does not detail the sum of what a person can realistically expect from the state or her fellow citizens; it describes what she is entitled to claim from them. And, what she is entitled to is importantly different from what she is likely to get from those who fail to recognise the force of her claims: the language of entitlement is inescapably normative.

We have good reason then to resist the enforcement move and continue to insist that moral rights are real rights. This still leaves room for a contrast between real moral rights and ideal moral rights, but the contrast is not between those rights we in fact enjoy and those we do not. Of course, when a person is imprisoned by her government for anti-government speech, she might say ‘in an ideal world, I’d have the right to free speech’. Her right to free speech despite being a right that she is not in a position to enjoy is not ‘ideal’ in the relevant sense. For her government is under a duty to allow her to express itself in the real world; it has breached that duty and violated her right by imprisoning her. So what, then, would count as an ideal moral right?

The contrast between real and ideal rights is most apparent when it is not the duty-bearer, but circumstances, which conspire to deprive a person of what she would, in an ideal world, have a right to enjoy. In an ideal world we would have a cure to cancer and, providing the treatment was relatively inexpensive, cancer patients would have a right to it. As we don’t yet have a cure for cancer, the right to a cure for cancer is not a real right; it might exist in an ideal world but does not exist in our world.

Note the potential implications for the ‘right to health’. If, as is true, those who suffer from cancer are not healthy; the cure for cancer would (let us suppose) make them healthy, and the cure for cancer does not exist, does it follow that the right to health is an ideal right too? I think it does. Or at least, I think that if the right to health is understood as the right to be guaranteed the means to a healthy life then the right is an ideal right not a real one.

Consider an obvious objection to the distinction I have been drawing here. It assumes that there is a relevant difference between rights that are unrealisable through resource scarcity and those that unrealisable through wrongdoing. But what if the existing resource scarcity is the result of prior wrongdoing? What if, for example, the drug with which we could have cured cancer was wrongfully destroyed years ago? It would seem to me absurd to insist that cancer patients still had the right to a cure, despite the fact that the means to that cure no longer exist. Who could be said to hold the relevant duty? What matters in our analysis of whether the right exists is that the relevant duty is capable of being performed.

appeal, we shall probably conclude that the lack of a right to be heard by the lower court is an aberration, made less serious by the right to bring the case elsewhere. But if corruption is widespread among the judiciary, we may have to recognize that certain rights are only patchily and intermittently realized, and if the situation deteriorates still further these rights may disappear.’
Distinguishing between real rights – whose duties are performable – and ideal rights – whose duties are not – prompts a further objection: don’t rights sometimes act as reasons to develop our capacity to perform the duties required to fulfil them? We may not now have the cure to cancer, but our governments do seem to be under a duty to devote resources to the search for such a cure. Some take this duty as evidence for the existence of the right to health. For if we deny that there is a right to health, we seem to undermine the case for the existence of this forward-looking duty. And yet, by denying that the right to health is a real right we are not denying that there is an interest in health. The individual interest in health is present regardless of the feasibility of the duties that it grounds. The government’s duty to devote resources to the search for the cure is grounded in cancer-patients’ interests in benefiting from such treatment. If there’s a real right here it is a right to the search for a cure and not the cure itself. The right is a real right if the duty-bearers are capable of performing the relevant duty under normal circumstances in the world in which we happen to find her.

The ‘under normal circumstances’ clause is important. A right still exists even if the duties to which it gives rise are un-performable under certain circumstances. Put another way: universal feasibility is not a necessary feature of a right, even a universal human right. Take the right to vote. Imagine that a country has long been involved in a violent civil war which not only renders it impossible for its citizens to exercise the right to vote, but also makes the right’s core duties un-performable despite the best efforts of the duty-bearers; indeed, given the nature of the war it is at present unclear who the relevant duty-bearers are likely to be. The existence of such troubling cases cannot be taken to undermine the existence of the right to vote. On the account I have been offering, the interest in voting is sufficient to give rise to a duty under normal circumstances. The residents of the war-torn country have the right to vote, although the right they hold is not realisable or fulfillable in their special circumstances.

Real rights, then, need not be universally feasible in order to be genuine rights; they need to be generally feasible. The level of generality is dictated by the kind of right it is. If we ask: what are Susie’s rights, qua Susie, we are enquiring about the duties owed to Susie under normal circumstances. We will get a different answer than we would get if we were to ask about her rights qua human, or qua Canadian citizen, or qua child. When we are considering children’s rights against their parents, our focus is not specifically on what Susie may claim against her parents, qua Susie, but with what children, in virtue of being children, may claim against their parents in general. Thus, Susie might have a right, qua child, that her parents may not be able to fulfil. The impossibility of fulfilment in Susie’s case will not necessarily undermine the tenability of a general thesis about the normative relations between parents and children. It will only undermine the general thesis, say, that parents have duties to maintain their children insofar as Susie’s plight is representative of that of other children.

Despite the usefulness of the ‘normal circumstances’ approach to rights, we have reason to be sceptical of interpreting the ‘under normal circumstances’ clause as a strictly empirical claim about the probability of a right’s permissible realisation. What if the empirical likelihood of a duty bearer’s present inability to perform its duty can be attributed to prior

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5 For the suggestion that human rights can serve as targets in this way, see David Miller’s forthcoming book, National Responsibility and Global Justice (Oxford, Oxford University Press, 2007), especially chapter 7.
breaches of duty by third parties? We might agree that if the school bully makes a habit of stealing Sally’s lunch money, then Sally will most likely not be able to pay for her own lunch on any given day. Though her inability to do so is empirically likely, do we really want to say that the circumstances Sally faces are normal?

The measure of whether a right exists should not be whether it is, at present, possible to realise it, but whether, under rights-respecting conditions, it would be possible to realise it. We should, when considering whether a right is feasible and therefore counts as a real right, exclude those instances of infeasibility that arise from prior breaches of rights. Call this the exclusion argument. We can draw out its intuitive force with the use of some examples. First, it seems obviously true that resource gains resulting from wrongful acts do not determine the content of a person’s rights. Consider the following scenario, relating to the right to in vitro fertilization treatment (IVF).

Assume it is possible to provide IVF treatment. The technology exists but there is a shortage of willing donors, and the treatment can only be provided by harvesting eggs from unwilling donors. Suppose we are agreed that the harvesting of eggs from unwilling donors would be wrongful. When considering whether a person has a right to IVF treatment we will obviously not want to include what could be gotten through rights-violation as a benchmark of entitlement: we would say that women do not have a right to IVF treatment because, though it is technically possible to proffer it to them, it is impossible to do so without violating the bodily integrity of others.

Does the same reasoning apply to resource deficits resulting from wrongful acts? Imagine, for example, the controversial case of the right to abort a fetus. Controversy aside, say that we are agreed that in a world where abortions were possible – one where we have the technology and the medical resources to perform abortions safely – a woman has a right to abort. Now imagine that in our world there are enough trained doctors willing to perform abortions for it to be technically possible for every woman who wants an abortion to have one. Suppose, however, that doctors, who would otherwise be willing to perform abortions, are unable to do so because their premises are continually sabotaged by extremist anti-abortion groups. In this case, would we not still want to say that a woman has a right to an abortion?

The justification of this right will not, notice, be that its duties are performable in the circumstances most likely to hold: as the example is described, the state’s duty to ensure that a woman has access to an abortion remains impossible to fulfil. So what is behind the intuition that the right exists despite the empirical likelihood of the duty being frustrated? The answer, I think, is this: the duty does hold under normal circumstances, but the situation described is not itself ‘normal’ but special. It is special in virtue of the wrongful acts that render its fulfilment impossible. There are of course limits to the exclusion argument. Insofar as resource deficits are long-standing and unalterable, though wrongfully caused, then we will have to treat the resultant scarcity as a feature of the normal case. The exclusion applies only to those resource shortfalls that are, by just action, ameliorable.

3. Human Rights as Real Rights not Ideal Rights
We have set up a contrast between ideal rights and real rights. Real rights, on the account I’ve been offering, impose duties on existing duty-bearers that are performable by those
duty-bearers under normal circumstances. An alternative account of rights to the one I have been sketching here, one grounded in ‘ideal theory’, would characterise rights not so much as justifiable claims made in the world in which the claimants find themselves, but instead as the building blocks of ideal justice. The nature and scope of a person’s rights can on the idealised account be identified independent of the circumstances in which she may happen to find herself. In order to generate a catalogue of human rights, we need only consult some context-independent threshold: an equitable distribution of interpersonal liberty, basic needs, or the means to an autonomous life. True, the precise content of these rights may change depending on the circumstances, but there will remain a minimum and identifiable core to which she retains a right, even if, under present circumstances, it is impossible and perhaps even inadvisable to proffer her the object of it. On this alternative account, we identify what a person has a right to without reference to the contingencies, institutional and resource constraints, and unfortunate circumstances she faces in the time and place in which she happens to live.

It should be fairly clear by now why the ideal theory approach to human rights is problematic. Imagine two worlds: in the first, HIV anti-retroviral treatment is inexpensive, and easily and widely available. In the second, HIV anti-retroviral treatment is scarce, difficult to administer to patients and very costly. I think it is fairly uncontroversial to assert that in the first world, the state would have a duty to provide the treatment to those in need; the relevant factors contributing to the existence of the duty are both the HIV-sufferer’s hugely important interest in the drug (she might die without it), and the ease with which it could be provided. But the possibility (even the future possibility) of a situation like the first world is not enough to establish the existence of a duty if we happen to find ourselves in a world like the second. If our world is like the second world where the drug is scarce and expensive, then it is not the case that the HIV sufferer has the right to the drug. She does not have the right because her world is one where it remains too burdensome for the state to fulfil the duty.

It is sometimes argued that a right must exist, even if it is unrealisable under the circumstances, precisely because there is a sense of moral loss or regret when the right goes unrealised. But we require more than a sense of regret in order to establish that a right has been infringed. In the second world, I may regret the fact that the state cannot provide all those who suffer from HIV with retroviral drugs, but that does not imply that they therefore have a right against the state to be provided with the drugs. The regret argument is simply incompatible with an account of rights that takes seriously the effect that resources and conflicting duties have on the existence of a right.

Most importantly, ideal human rights, so conceived, would no longer be associated with political priority and urgency. There is undoubtedly a loss when resources that could have contributed to Bill’s life-saving but expensive medical treatment are diverted to fund Sally’s basic shelter needs; but Sally’s shelter need takes priority. It takes priority not because shelter is more important to Sally than Bill’s expensive treatment is to him, but because shelter represents a claim that imposes a reasonable burden on others in the context of

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7 See Ibid.
resource scarcity. Put simply, it makes sense to think of the duty to provide shelter as binding (on states at least, but perhaps also on others) and peremptory; something that must be done and put before any other social or political objective.

Rights theorists – despite their avowed commitment to reining in the inflation of rights-discourse – are notoriously cagey about what would be excluded under their preferred conceptions of rights. What is agreed and avowed is that not every instance of injustice or unfairness can constitute a rights-violation. When A has less than B through no fault of A’s own, it remains an open question whether a right of A’s has been violated. Whether or not an instance of unfairness constitutes a rights-violation depends, importantly, on the relative importance and availability of what the agent is being deprived of, and this, in turn, depends on the level of prosperity in a given society.

To summarise the argument of Part I: I have offered an account of the distinctive features of a right, as well as the distinctive features of human rights. I have also set out a distinction between ideal rights and real rights, and defended the latter as the most appropriate way to think about human rights. Real rights, I have argued, are real insofar as their duties are performable under normal circumstances. What real rights there are depends on what resources we have, the extent to which others comply with their duties and the extent to which they have in the past. In the next Part of the paper, I will consider whether real rights are compatible with ideal theories of justice.

**PART II: REAL RIGHTS AND IDEAL THEORY**

1. What is Ideal Theory?

Much of the important contemporary work in political philosophy since John Rawls published *A Theory of Justice* in 1971 has been work in ‘ideal theory’. Though ideal theoretical accounts differ significantly in their methodologies, they are alike in focussing their analytical energies on the nature of a just society, rather than on what the distribution of benefits and burdens should look like now, given the resources constraints we face, the electoral preferences of the public, and the costs of political upheaval. Principles of justice and fairness are not, then, the principles that should govern the world however we happen to find it; they are instead principles that should guide some relevantly ideal world.

John Rawls tells us that he is interested in ‘the nature and content of justice for a well-ordered society’, where ‘everyone strictly complies with, and so abides by, the principles of justice’. Ideal theory is not just characterised by an assumption about how individuals will behave, it is also defined by the conditions under which their compliance would be required. The correct principles of justice are those which – assuming strict compliance - could be stable under the circumstances of justice. The circumstances of justice are ‘the normal conditions under which human cooperation is both possible and necessary.’ Following

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Hume, Rawls writes that the society to which these principles apply will be characterised by moderate scarcity and mutual disinterest; ‘natural and other resources are not so abundant that schemes of cooperation become superfluous, nor are conditions so harsh that fruitful ventures must inevitably break down.’¹¹ The citizens of the well-ordered society have their own ends and purposes which lead them to make ‘conflicting claims on the natural resources available.’¹² Without these assumptions ‘there would be no occasion for the virtue of justice.’¹³ Note, then, that the claim is not just that the best way to think about how to run our societies is to imagine the ideal case and aim for it; it is, instead, that we will only arrive at an account of what justice requires if we adopt appropriately idealised assumptions.

There are, of course, a range of ideal theories, and some are more ideal than Rawls's. This isn’t the place for an extensive comparative discussion of the nature of ideal theories but suffice it to say that different theorists make differing assumptions about the availability of resources, individual motivations and the history of the ideal worlds to which their principles of justice apply and from which they are derived. For example, G. A. Cohen has denied that we should we should set the standard of what we owe each other by making concessions to people’s tendency, in practice, to fail to internalise an egalitarian ethos;¹⁴ Rawls’s variant of ideal theory makes allowances for individuals’ needs to be encouraged to do what’s right through an incentive structure.¹⁵ Both purport to offer us principles of justice.

2. The Clash
Above, we set the constraints on real human rights. The argument was, in essence, that they should give rise to duties that are performable under normal circumstances. I want now to show why it is that real rights – so defined – are incompatible with some ideal theories of justice. I argue that if a theory of justice assumes that certain facts about the world cannot act as reasons for affirming principles of justice, then rights will not count as principles of justice. As was argued above, what rights there are depend on what resources there are, and, therefore, what rights there are depend on non-ideal and often regrettable facts about the world. There are at least two other non-ideal considerations that shape what rights exist: (1) facts about compliance and (2) facts about history.

The claim that facts about compliance shape the nature and content of our rights is controversial. Rawls, for example, favours ‘strict compliance’ in the derivation of principles of justice: persons are assumed to be willing to comply fully with the requirements of justice. Though the assumption is perhaps the most unrealistic facet of a realistic utopia, it is there for good reason. It seems counter-intuitive to allow the nature of a person’s moral entitlements – or, alternatively, what amounts to fair treatment of her – to hinge on whether others are willing to act fairly or rightly to her. Of course, if we formulate our principles of justice without any concessions to people’s unwillingness to uphold them – perhaps because they are too costly, or demanding - then we risk arriving at principles that are more aptly characterised as principles of super-rogation than the requirements of justice.¹⁶

¹² Ibid.
¹³ Rawls, A Theory of Justice, p. 128.
¹⁵ Rawls, Justice as Fairness, p. 63.
¹⁶ For a discussion of whether the imposition of ‘unreasonable’ demands should count as a constraint on a theory of justice see Andrew Mason, ‘Just Constraints’ British Journal of Political Science 34, pp. 251-268.
The assumption of ‘strict compliance’ poses a more specific difficulty for a theory of rights. It renders any discussion of the feasibility of a right virtually unintelligible. To illustrate: suppose that there exists a global principle of egalitarian justice: it is unfair for individuals in the world to be disadvantaged through no fault of their own. If we assume a world of strict compliance where all individuals cooperate to eradicate unfairness, then the question of whether or not the right to food is feasible all but disappears. If everyone in the world internalised and acted in accordance with the ‘no unfair disadvantage’ principle, then (given present resource availability) the right would be capable of being met. Now perhaps this is in itself a good reason for us to adopt a ‘strict compliance’ standard as the background assumption when determining whether or not a right exists: it certainly makes it easier to establish the existence of social or welfare rights. But note that in assuming full compliance we render the existence of a right conditional on the fulfilment of less urgent, less pre-emptive principles. The distinctiveness of rights as urgent and pre-emptive moral claims would be compromised.

The relevance of history is similarly more important in the argument over who has rights to what than it is in the derivation of other principles of distributive justice. If a feature of the past made the provision of some life-saving good impossible then this would change what an individual was entitled to in the present day. There is another sense in which history can affect what rights exist: there are general or universal rights and there are also rights that exist solely in non-ideal and particular contexts. When considering whether the right to food exists, we argue over whether there is a right that applies generally: under normal circumstances, to all persons, in all contexts. But we can also make sense of rights – and duties – that are equally stringent and urgent, and generated as the result of contingent and particular circumstances. Though the argument is controversial, those rights that hold against wrong-doers and are generated as a direct result of previous wrongdoing may be said to be more stringent than our universal rights. If I run over you in my car, I incur a strong, and peremptory duty to come to your assistance; it is stronger than the duty that I would otherwise have had had I not been the cause of your accident. The intuition is sometimes extended to explain the nature of global justice duties: if your poverty has been caused by me then (and perhaps only then) do you have a right against me that I contribute to its alleviation.17 The existence of some rights – and some of our strongest rights – is conditional on the existence of historical wrongs.

3. Implications
I have so far been outlining the nature of the non-ideal assumptions made in the analysis of rights. I have argued that what rights there are is closely related to the reality of available resources, rather than an idealised conception. I have argued that the assumption of ‘strict compliance’ poses problems for the analysis of fundamental rights. I have further argued that some of our more stringent and important rights arise only in non-ideal contexts. In what follows, I consider the implications of the analysis of rights offered here. If ideal theories of justice deny that facts about compliance, resource scarcity and history are relevant in determining principles of justice, they must also either (1) deny that rights are considerations of justice; or (2) defend an ideal theory of rights.

Ideal theorists might, if they are unpersuaded by the integrity of rights discourse argument advanced in Part I, want to pursue the second option and hold on to an idealised conception of rights. The more promising strategy would be to concede that the analysis of what rights there are requires us to consider non-ideal circumstances, but point out that these rights are derived from (and only hold in light of) some more ultimate principles of justice that do not reflect the non-ideal assumptions.

This, I think, would be G. A. Cohen’s response. On Cohen’s argument theories of justice worthy of the name identify our most ultimate, fundamental normative commitments, and these ultimate principles are necessarily fact-independent; i.e., facts do not form part of the reasons for affirming them. Rawls’s claim that some facts about the world and its residents are necessary to inform our choice of principles of justice is in Cohen’s view mistaken. Cohen shows that if facts support principles, they only do so in light some more ultimate, fact-independent principle that tells why the fact supports the principle. To illustrate: one might think that the principle ‘we should not resort to torture’ is grounded in the fact that ‘torture causes extreme pain’. But there is a more ultimate principle ‘we should not cause pain’ that explains why the fact that torture causes pain is a reason not to engage in it. The pain-averting principle might be grounded in some further fact (‘pain is bad’), in which case the most ultimate, fact-insensitive principle is that ‘we ought not to cause bad things to happen’. If we agree with Cohen here. What follows for our analysis of rights?

Rights are fact-sensitive; they lack the required degree of ultimacy to count as principles of justice. Perhaps this need not worry us. It could be that rights and ideal theory are compatible; it’s just that rights represent an application of fact-insensitive principles to non-ideal facts. The ultimate principle grounding rights would, on Cohen’s view, be the one that tells us what rights we would have if there were no scarcity, no prior wrong-doing, and so on. For, he tells us:

> When a fact…about human incapacity, excludes a principle (because it cannot be obeyed), then we may ask what we should say about the excluded principle on the counterfactual hypothesis that it could be obeyed. And it is only when we thus clear the decks of facts about capacity, and get the answer to that counterfactual question, that we reach the normative ultimate. Anyone who rejects “One ought to do A” on the sole ground that it is impossible to do A, anyone, that is, who would otherwise affirm that principle, is committed to this fact-insensitive principle: “One ought to do A if it is possible to do A.”

It looks like we can apply the same logic to our analysis of rights. The principle ‘X has a right to food’ is only true if there is enough food to go around and the duty itself is not overly burdensome on the duty-bearers. There is, then, a more ultimate principle ‘X has a right to food if there is enough food and the duty is not overly burdensome on the duty-bearers’, that (let us suppose) would count as an ultimate principle. Notice, however, that this principle does not tell us what rights there are, just what rights there might be.

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Principles which tell us what rights there are will still not count as principles of justice on Cohen’s account.

There seem to me to be two other plausible responses to this line of argument. The first is to point out that ideal theories of justice do more than simply identify principles; they make claims about the nature of justice. Cohen’s disagreement with Rawls is not just about what justice requires but what justice is. Rawls, in Cohen’s view, has ‘made a fundamental error’ in identifying ‘first principles of justice with the principles that we should adopt to regulate society.’\(^{20}\) But why should we accept the claim that our principles of justice must be ultimate in order to count as principles of justice?\(^{21}\) The appropriate response to Cohen is, I think, to accept that rights are not ultimate, but to insist that they are nonetheless fundamental. This last point is counterintuitive. How can rights be fundamental if they are derivative?

Rights are fundamental, I think, in two ways: (1) they are an integral part of a complete conception of justice and (2) no distribution is appropriately characterised as just if it does not satisfy rights. The first conceptual point is that we have more reason to be attached to the claim that rights are principles of justice than the claim that principles of justice must have the required Cohenian ultimacy. Moreover, and this is the second point, it is more important that a conception of justice incorporate rights than it is that they embody fact-insensitive principles of the ‘one ought not to do what causes bad things to happen’ or ‘individuals ought not to be disadvantaged through no fault of their own’ variety. Rights are more integral to justice than fairness is.

The second argument is familiar from the work of Elizabeth Anderson.\(^{22}\) I take the ‘luck egalitarian’ family that she criticises to be characterised by two principles: (1) individuals ought not to be disadvantaged through no fault of their own, but (2) they ought nonetheless to be held responsible for the choices they make from positions of initial equality.\(^{23}\) It follows from these principles that if a person makes a choice from a position of initial equality which results in her disadvantage, we are justified in leaving her to bear the costs of that disadvantage.\(^{24}\) If we don’t assume that rights (or claims of need) are satisfied, then it would seem to be just to fail to perform certain duties that would otherwise be owed towards persons if they were responsible for the duty’s invocation in the first place. To take a familiar example from Anderson: if A fails to purchase health insurance and is seriously injured in an accident which she herself negligently causes, we owe her no duty of justice to provide medical assistance.\(^{25}\)

The example is intended to make vivid the potential for harshness in luck egalitarian outcomes, but for most luck egalitarians the example is untroubling. This is so because, for the most part, they don’t think that luck egalitarianism would require abandoning negligent

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\(^{21}\) I’m not sure that Cohen explicitly makes this claim; but I think that it is implicit in - and necessary to make sense of - his critique of Rawls.


\(^{23}\) For a similar characterisation see Samuel Scheffler ‘What is Egalitarianism?’ *Philosophy and Public Affairs*, vol. 31, no. 1 (2003), p. 32.


\(^{25}\) Anderson, ‘What is the Point of Equality?’ pp. 296-7.
victims. In the ideal case, it is highly unlikely that A would fail to purchase health insurance. Most instances of dangerous or imprudent risk-taking are associated or attributable to prior disadvantage or lack of information. Assuming A was fully informed and rational (which she would have to be in order to be considered responsible), she would purchase insurance.

And yet, we can imagine cases – perhaps not driving, but extreme sports - where the agent is aware of the risks she undertaking, and declines to purchase insurance because doing so for such an extreme and risky sport is prohibitively expensive. If she goes ahead and is seriously injured as a result of losing out on her gamble, then it would seem inconsistent for the luck egalitarian to insist that we nonetheless have a duty of justice to come to her aid. More importantly, if we deny the extreme sports fanatic’s responsibility for her disadvantage, then we are denying that, in failing to insure and taking the risk anyway, she is treating those who must pay for her treatment unfairly. Luck egalitarians willing to concede that we have no reason of justice to assist the sports fanatic are for this reason more consistently luck egalitarian. This doesn’t mean that luck egalitarians think we ought to leave risk-lovers to bleed to death on the side of the road or the foot of the ski-slope; we may nonetheless have reasons of charity, or pity, or compassion to rescue them.

Suppose that we accept the luck egalitarian’s characterisation of the risk-lover’s claim as itself unfair. If you agree that agents have rights to, say, basic medical care, then the unfairness of the negligent or risk-loving victim’s conduct would not be sufficient reason to undermine the right’s moral and binding force. She has that in virtue of her humanity, not the fairness of her conduct. There is, then, a clash between a rights-based view and the prescriptions of a consistently luck egalitarian position; the luck egalitarian position entails that there is an injustice in fulfilling the risk-lover’s rights.

To further illustrate the tension, consider another example which lies outside the field of distributive justice. Consider the case of B, who is called up to jury duty at T₁ but who willingly shirks his duty, and fails to serve. Now imagine that at T₂ B is charged with a capital offence; we might want to say that it is unfair of B to benefit from a trial by jury at T₂, when he failed to contribute to the service upon which his right relies at T₁, but would we really be justified in withholding the service from him on the basis of that failed contribution? I think not; we still have a duty to provide B with a trial by jury when he is charged with a crime, regardless of his own failure to comply with the duties incumbent on him in virtue of others’ rights.

Luck egalitarians can, of course, concede that we have reasons of justice to give B a trial by jury, and provide medical care to A, despite the unfairness associated with doing so on the grounds that there is more to justice than egalitarian justice. They might accept, then, that it is just to offer B a trial by jury, but that the situation is still characterised by injustice due to

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26 For defences of luck egalitarianism of the face of the harshness objection, see, for example, Carl Knight Res Publica, vol. 11 (2005), pp. 55-73.
27 See Nicholas Barry, ‘Defending Luck Egalitarianism’ Journal of Applied Philosophy, vol. 23, no. 1 2006 ‘…because real-world inequalities rarely reflect option luck, the harsh treatment problem will not be widespread.’
29 See Adam Swift and Harry Brighouse ‘Some responses to some objections to luck egalitarianism’.
30 See, for example, Zofia Stemplowska [ref]
the unfairness. The unfairness is, as Cohen has recently put it, *pro tanto* unjust. Distinguishing between egalitarian justice and justice all-things-considered saves the luck egalitarian who shares my intuitions about these examples from any inconsistency. The claim that we should reserve the term ‘principles of justice’ for fairness principles rather than rights principles seems all the more implausible, however.

Without rights luck egalitarian principles could lead to unjust outcomes; and, as we have seen, outcomes that are characterised by unfairness can nonetheless be just if the unfairness is required to respect rights. The purpose of this discussion has not been to provide a critique of luck egalitarianism, but rather to provide support for the idea that rights are fundamental – in the sense of integral – to a complete theory of justice. The argument offered here is incomplete; at most it shows that some luck egalitarian outcomes would be unjust if not supplemented by rights. In so far as luck egalitarianism is the most plausible candidate for a theory of justice that aims to arrive at an account of the principles of justice independent of any considerations about feasibility or political possibility, then the argument is potentially more far-reaching.

**Conclusion**

The paper began by setting up a distinction between two kinds of rights: real rights and ideal rights. The argument that followed was, in short, that ideal rights lacked the distinctive conceptual features of rights: their urgency, moral priority and their peremptory force. Part II of the paper was devoted to an analysis of the potential clash between non-idealised conceptions of rights – real rights – and some ideal theories of justice. We would not, I argued, arrive at an accurate account of our most basic rights if we assumed full compliance, disregarded history, or failed to take into account the availability of resources required to fulfil certain rights under normal circumstances.

A committed ideal theorist could accept the argument about the nature of rights, but deny the conclusion I sought to draw from it: that idealised conceptions of justice are therefore somehow impoverished because they cannot accommodate real, non-ideal, rights. Ideal theorists could argue that our most fundamental principles of justice can only be arrived at under appropriately idealised conditions and that rights are, in turn, derived from a combination of facts and more ultimate principles of justice. To this the response was two-fold: first, to challenge the thought that our most fundamental principles of justice must be our most ultimate ones; second, to argue that rights are more fundamental – in the sense of graver affronts to justice – than those principles of justice that are capable of being derived from idealised conditions.