How should we justify moral principles?
A constructivist defense of fact-sensitivity

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ABSTRACT: Constructivism is the metaethical position stating that although we cannot have direct access to moral facts, we can still come up with a set of principles that can be justified and that ought to be respected by individuals. The strength of these moral principles derives from the fact that they are the result of a procedure respecting certain desirable conditions. Constructivism concerns the methodology of political philosophy, being preoccupied with the process of generating and justifying moral principles. In this review article I present the main contentions of constructivism (focusing especially on the Kantian constructivism advanced by Rawls and Scanlon), describe its positioning on the realist–antirealist axis, and compare it with its main competitor in the field of metaethical views, intuitionism. I dedicate a separate section to the method of reflective equilibrium, which represents an important part of several metaethical accounts, be they constructivist, realist, or intuitionist. I show how reflective equilibrium represents the main instrument constructivists can employ in order to capture the appeal of relying on intuitions in moral theorizing, without leaning toward intuitionism. Toward the end of the article I present G. A. Cohen's (2003, 2008) criticism of constructivism. I focus on the replies Ronzoni and Valentini (2008), Hall (2013), de Maagt (2014, 2016) and Rossi (2016) give to Cohen, ending with a criticism of my own.

KEY WORDS: Constructivism, fact-sensitivity, intuitionism, realism and antirealism, reflective equilibrium

Introduction

The main purpose of this article is to defend a constructivist method of generating and justifying principles of justice, by presenting its main contentions and its positioning on the realist–antirealist axis, the way

constructivists employ the instrument of reflective equilibrium in order to account for the role of intuitions without facing the problems encountered by intuitionist approaches, and how it can respond to a series of objections.

Before I properly introduce constructivism, I would like to point out an interesting relation that contemporary political philosophy has with facts. Faced with countless examples of highly idealized societies, such as Dworkin's (2002) society whose economy focuses on plovers' eggs and pre-phylloxera claret, or Kasper Lippert-Rasmussen's (2008) world inhabited by either persons born with two pairs of eyes or persons born with no eyes, one may find it difficult to ascertain the relevance for our real world of such far-fetched examples. Nevertheless, many philosophers resort to such thought experiments. As Elster (2011) emphasizes, these counterfactual examples usually belong to one of the following "paradigmatic positions": conceivabilism or realism. Conceivabilists consider that if you can imagine it, then you can use it. Thus, we are faced with making a choice between allowing billions of people to suffer extreme agony for only a minute, or subjecting fifteen people to decades of agony (Parfit 2012); we encounter societies in which the fate of individuals' well-being is dependent on manna from heaven or manna from hell (Nielsen 2017). Alternatively, we are led to reach the super-repugnant conclusion of considering that

> a world populated by individuals every one of whom has a life barely worth living would be better than a world populated by ten billion individuals all of whom have very worthwhile lives, if only the former population has an appropriate size. (Holtug 2007: 8)

Realists, on the other hand, consider that "only cases which could plausibly occur given the world as it is should be used to elicit intuitions" (Elster 2011: 242). Indeed, it is highly plausible that, if an unfortunate soul got trapped under a TV station transmitter during a World Cup football game, a decision maker could face the choice between (a) rescuing him immediately by turning off the transmission for fifteen minutes and (b) rescuing him only after the game is over (Scanlon 1998, Fleuerbaey and Tungodden 2010). It is not too far-fetched to think of a Health Impact Fund that would encourage pharmaceutical companies to trade monopoly pricing for immediate rewards based on the estimated global effect of the newly developed medicine (Pogge 2008). Although the realist position is well represented in philosophy, especially in debates concerning global justice, many papers aiming at refining a

certain distributive principle or defending or criticizing a distributive pattern or currency make use of counterfactual examples. Therefore, we see that facts are heavily featured in contemporary philosophy in the choice of examples designed as part of the case-implication strategy of argumentation for or against a principle or theory (Sen 1979).

A second venue in which facts appear is in the evaluation of normative models. According to Volacu (2017), facts are featured either in the outputs of a theory, when you subject the implications of said theory to a feasibility test, or in the inputs of a theory, when you have to choose whether to introduce in the theory "descriptive assumptions, which make some form of empirical claims about the state of the world" (Volacu 2017: 3). According to Volacu, considerable confusion has been caused by conflating the two distinct ideas of fact-sensitivity and feasibility. Whereas fact-sensitivity affects the inputs of a theory, the feasibility constraint concerns the outputs of a theory. Fact-sensitivity is related to the investigation of what Korsgaard (1996) calls "the sources of normativity". By the end of this article, I hope to have vindicated a constructivist perspective on generating and justifying principles of justice, with the constructivist procedure acting as the source of normativity. Constructivism can vindicate the role played by facts in contemporary political philosophy. Thus, while much of the paper is dedicated to constructivism in metaethics, the discussion is also relevant to political philosophy. While the justifiability of constructivism has to start from metaethical foundations, the implications are also of relevance for political philosophy, and for how we use a constructivist procedure in order to defend normative principles.

Constructivism and intuitionism

In his *Theory of Justice*, John Rawls points time and again to the connection between justice and fairness and various elements of Immanuel Kant's philosophy. For instance, in his criticism of utilitarianism, Rawls introduces the idea of the priority of the right over the good, which he notes "is a central feature of Kant's ethics" (1971: 31, n16). Discussing the condition of publicity, Rawls mentions that it "is clearly implicit in Kant's doctrine of the categorical imperative insofar as it requires us to act in accordance with principles that one would be willing as a rational being to enact as law for a kingdom of ends" (1971: 133). The thought experiment from which different parties have to assess the menu of political principles, the original position, is considered "a procedural interpretation

of Kant's conception of autonomy and the categorical imperative" (1971: 256). It is, however, in one of his later works that Rawls clarifies how much his project is indebted to Kant. In *Theory of Justice*, rational and reasonable parties under a veil of ignorance had selected the principles of justice as fairness. Rawls claims that "one should not be misled by the somewhat unusual conditions which characterize the original position", as we could arrive at a similar configuration of principles if we resorted to reflective equilibrium" (1971: 20–21). Reflective equilibrium constitutes the main topic of a subsequent section, but for the moment it is sufficient to say that it serves the purpose of showing that "the conditions embodied in the description of the original position are ones that we do in fact accept. Or, if we do not, then perhaps we can be persuaded to do so by philosophical reflection" (1971: 21). In "Kantian constructivism in moral theory", Rawls takes a step further and presents an argument for how a conception of justice (such as, but not limited to, justice as fairness) could be justified, even if we had reasonable doubt about its truth. For Rawls, Kantian constructivism "holds that moral objectivity is to be understood in terms of a suitably constructed social point of view that all can accept" (1980: 519). In order to decide upon a set of principles, argues Rawls, we need not presume the existence of moral facts:

> […] whether certain acts are to be recognized as reasons of right and justice can be ascertained only from within the constructive procedure, from the undertakings of rational agents of construction when suitably represented as free and equal moral persons. (Rawls 1980: 519).

More generally, what Kantian constructivism does is "set up a procedure of construction which answers to certain reasonable requirements, and within this procedure persons characterized as rational agents of construction specify, through their agreements, the first principles of justice" (1980: 516).

Rawls advances a proceduralist characterization of constructivism (Street 2010: 364). According to this interpretation, constructivism's unique character is that it derives the rightness of a moral principle from the procedure that led to its adoption (Stret 2010: 365), amounting to a view in which "what comes out of a certain kind of situation is to count as just" (Barry 1991: 266). In all of its forms, constructivism aims to answer what Scanlon calls the "question of practical significance": why are moral demands authoritative? Closely intertwined with this is what we could call the question of epistemic significance: "how is it possible for us to come to know truths about morality?" (Scanlon 2012: 227).

For Ronzoni and Valentini (2008: 404), constructivism originates in an attempt to "reconcile agnosticism about moral facts with optimism about moral justification." As Lenman and Shemmer (2012) underline, constructivism has been deliberately or accidentally adopted by many theorists due to its capacity to explain the force moral precepts exert, without delving into strong metaphysical assumptions about moral facts.

One must be careful when discussing truth in constructivism. At most, we can talk about truth in a coherentist way (Young 2018), which states that a belief or set of beliefs are justified to the extent that they cohere with another set of beliefs, and the set forms a coherent system (Olsson 2017). One of the key methods employed by constructivists, reflective equilibrium, is coherentist, with some even calling it "the most popular version of moral coherentism" (Timmons 1990: 97, see also Daniels 1980). Therefore, when constructivists say that there are *true moral facts*, they use a weaker interpretation than in strong versions of foundationalism such as rational intuitionism (Ebertz 1993: 198, n9).

Unlike other metaethical approaches, constructivism is supposed to be applicable. For Korsgaard (2008a: 321–322), "constructivism is the use of reason to solve practical problems […] normative concepts are not the names of objects or of facts that we encounter in the world [but] solutions of problems." Compare this to intuitionism, according to which moral properties are "objective and irreducible", and, at an epistemological level, "at least some moral truths are known intuitively" (Huemer 2005: 6). Before I proceed with presenting intuitionism and the constructivist challenge to it, I must clarify the fact that modern intuitionists do not consider intuitions "infallible or indefeasible" (Huemer 2005: 105). Rather, intuitions may be regarded more as "starting points for philosophical theories, providing ideas for exploration, evidence for judgment, and guidance to action" (Audi 2015: 76). However, intuitionism also brings with it an additional layer of metaphysical and epistemological assumptions which are missing from the constructivist scaffolding. Evidence for this is the fact that different variants of ethical intuitionism go hand in hand with foundationalism, which states that "the set of a person's justified empirical beliefs has the following structure: some of its members depend for their justification on other members whose justification in turn is not so dependent" (Timmons 1987: 596). Irrespective of whether we can put an equals sign between foundationalism and intuitionism, what both approaches do is single out a set of moral beliefs that are "privileged or directly justifiable" (Daniels 2016).

No such strategy is available to the constructivist, who must *prove* the justifiability of all moral beliefs. In what follows I focus on highlighting the inherent issues of intuitionism, while simultaneously trying to salvage intuitions as legitimate instruments in the process of moral justification.

Intuitionism's history is interwoven with the development of the metaethical position of foundationalism. What foundationalists argue is that a moral belief is justified to the extent that it is either foundational, i.e. non-inferentially justified, or based on the appropriate kind of inferences from such foundational beliefs (Brink 1987: 74). Intuitionism, as a variant of moral foundationalism, "requires of every justified moral belief that it be foundational or that the termini of its justification include foundational moral beliefs" (Brink 1987: 74). For Price, "many instances of truths [are] discernible no other way than intuitively", although "learned men have strangely confounded and obscured by supposing them subjects of reasoning and deduction" (1974 [1757]: 159–160). For Sidgwick, intuitionism refers to "immediate judgment as to what ought to be done or aimed at" (1962: 97). The minimal core that all intuitionist theories share is the "irreducible plurality of moral principles that are non-inferentially and intuitively knowable" (Audi 2004: 197). At first glance, intuitionism seems appealing due to several reasons: it relies on moral intuitions, which are widely used in applied ethics, political philosophy, and political theory in general; and the principles intuitionists put forward are ones to which we relate, are present in several moral systems, and are a vital part of what we might call *folk ethics.*

Nonetheless, intuitionism brings to the table additional requirements for morality. Assuming that parsimony is a theoretical quality, a view stipulating the existence of a "faculty of intuition" (Audi 2015: 59) seems to rely too much on metaphysical assumptions. Another objection regularly raised against intuitionism is that it "must be embarrassed by the existence of conflicting moral beliefs" (Brink 1989: 108). Warnock (1967: 15–17) argues that intuitionism cannot lead to convincing one to adopt a specific course of action rather than another. This is a consequence of the fact that intuitionism posits the existence of a "vast corpus of moral facts about the world", without giving us a way to know them. Even if these arguments are not decisive against intuitionism, they do cast a shadow on its appeal. Furthermore, as most variants of intuitionism are based on a foundationalist theory of justification, the problems that plague foundationalism also damage intuitionism. According to Brink (1989: 122), "foundationalism cannot incorporate the epistemological

requirement that justifying beliefs themselves be justified." This failure is caused by the foundationalist requirement that the justification of some beliefs be non-inferential.

The main allurement of intuitionism is given by the *intuitions* themselves. If we can incorporate intuitions into an alternate metaethical view, free from the metaphysically charged luggage of intuitionism, then we have a *prima facie* reason for preferring this alternative metaethical view. Are intuitions compatible with constructivism? In what follows, I argue that they are.

Constructivism between realism and antirealism

In one of the most influential contemporary contractualist writings, Scanlon (1998) focuses on what moral principles we can advance that others cannot reasonably reject. In doing so, he resorts to a constructivist strategy of argumentation. According to him, it is doubtful that we can deny intuitions' role in moral theorizing. He draws attention to the fact that "in Rawls' overall theory […] the original position itself is justified by appeal to its ability to account for our considered judgments of justice in reflective equilibrium" (Scanlon 1998: 246). What must be clarified now is the role played by reflective equilibrium in constructivism. Sometimes, it seems that moral philosophers are unsure in which camp to place reflective equilibrium. Brun (2013: 248) mentions that we can see reflective equilibrium as a "minimally intuitionist method". Hare (1989) also calls reflective equilibrium a kind of "subjective intuitionism", a label to which he suggests Rawls may not be privy (1989: 83). On the other hand, Dworkin (1989) mentions that we should distinguish between two ways of employing intuitions in our moral thinking: a natural one and a constructivist one. Reflective equilibrium, including Rawls' overall use of "intuitions", is of the second kind. While the natural model is about the discovery of a moral reality, the constructive model deals with institutions as "stipulated features of a general theory to be constructed, as if a sculptor set himself to carve the animal that best fit a pile of bones he happened to find together" (Dworkin 1989: 28). Whereas the first model seems to be connected to moral realism, the second is more in line with the kind of ethical constructivism depicted in the previous section. Moral realism is "a thesis about the metaphysical status of moral claims, which not only purport to but often do state facts and refer to real properties, and that we can and do have at least some true moral beliefs and moral

knowledge" (Brink 1989: 7). By contrast, constructivists try to justify the action-guiding function of ethical guidelines by giving up on that thesis (O'Neill 2003: 348).

The debate concerning moral realism centers on metaethical matters, trying to ascertain whether there are moral truths and how it is possible to attain knowledge in regard to morality (Copp 2006). As all other metaethical views, realism tries to give an answer to the question of what is objectivity. The realist position is that moral facts and truths are objective in some way (Brink 1989: 14). The constructivist position is that "the correctness of moral beliefs is to be determined by reference to the practical point of view an individual has to accept independent of her specific desires, aims, or beliefs" (De Maagt 2016: 8). In one of the most plausible versions of moral realism, this approach is also considered capable of explaining the action-guiding character of morality, which is supposedly one of the strengths of constructivism. According to Brink, this is so because "we typically invite others to share our attitudes and prescribe courses of action because we hold the defeasible belief that these attitudes and courses of action are correct or valuable" (Brink 1989: 78). His realism (a metaphysical conception about the existence of facts) is accompanied by a coherentist moral epistemology

According to Brink, coherentism is compatible with realism as long as we do not assume objectivism about justification to be true. Brink makes a distinction between objectivism of moral facts (which moral realists embrace) and objectivism about justification (which moral realists ought to reject). Objectivism about justification holds that justification in holding a belief represents justification in arguing that belief to be true. However, this is a mistake of "overstating the connection between justification and truth" (Brink 1989: 126). Brink considers that adopting coherentism is a step ahead from traditional moral realists who relied on problematic foundationalist epistemological views (1989: 143). Brink even considers that Rawls could be interpreted as having construed a theory compatible with realism in some of his works (1989: 303). For instance, Brink reiterates what Rawls said about his political constructivism, that "we try to avoid the problem of truth and the controversy between realism and subjectivism about the status of moral and political values" (Rawls 1985: 230). This, contends Brink, means that Rawls does not position himself on antirealist grounds (1989: 308). However, in his main study on constructivism, Rawls places himself on solid antirealist ground (Brink 1989: 315–320). What Brink finds problematic is the fact that Rawls employs a moral epistemology "that is incompatible with

the sort of coherence theory of justification in ethics that he has long advocated" (Brink 1989: 321). This stems from Rawls' rejection of the idea that there exist evidence-independent moral facts, which in turn prompts him to assume that moral theory is underdetermined (Brink 1989: 319). On the other hand, Brink considers that a coherentist theory of justification doubled by a moral realist metaphysical approach can explain why moral theory is not underdetermined, to a degree that Rawls' constructivism is unable to emulate. The underdetermination charge is in fact one that is usually raised against reflective equilibrium (Raz 1982), so Brink attempts to salvage the method of reflective equilibrium by pulling it away from constructivism and toward moral realism. Nonetheless, I want to show that reflective equilibrium is not underdetermined, and can in fact lead to some agreement in regard to substantial matters. If that is the case, then there is no need to try to rescue it by resorting to a metaphysically charged approach such as moral realism. It also means that a definite positioning of constructivism on the realist–antirealist axis is less important than some other authors have made it out to be, which may also explain why Rawls himself sometimes seems to present an inconsistent stance in this regard.

Reflective equilibrium, intuition, and normative agreement

Constructivism's main appeal is its practical character: the possibility to provide an objective account of morality without assuming too much about metaphysical matters. No one is singled out as having access to moral truth, and constructivists do not assume that there exists an external foundation for morality. Instead, "we are answerable to criteria of correctness that are internal to and constitutive of the very exercise of rationality" (Korsgaard 2008b: 13–15, 110–126, 207–229). How does this work exactly? As mentioned above, relying on intuitions alone does not suffice. Constructivism requires a more precise manner in which to generate moral principles. Rawls (1971) proposes the original position as a way to generate a conception of justice that respects certain criteria: the fact that arbitrary characteristics of a person such as race, class, gender and abilities are morally irrelevant, and the fact that parties should be free and equal. Scanlon (1998) proposes a contractual situation in which we have to come up with terms of cooperation that no one could reasonably reject. Reflective equilibrium serves as a more grounded method for justifying normative principles. It is a metaethical device, i.e. it does

not stipulate the content of morality, but instead provides the means through which we can ascertain the content of morality. Although it is a coherentist method, for proponents of reflective equilibrium what matters is not just attaining consistency between our judgments, but also how the equilibrium was reached (Scanlon 2014: 79). As Buckley (n.d.) puts it, "if political principles are to be justified as obligatory and morally authoritative, it is insufficient to derive them without also explaining why the point of view is also authoritative."

Reflective equilibrium constitutes a project of attaining coherence between three types of beliefs held by a person: a set of considered moral judgments, a set of moral principles, and a set of relevant background theories (Daniels 1979: 258). It starts from the premise that our considered judgments hold "a certain reasonableness". We start by giving up on judgments "which are likely to be erroneous or influenced by an excessive attention to our own interests. Considered judgments are those rendered under conditions favorable to the exercise of the sense of justice" (Rawls 1971: 47–48). However,

> since we are of divided mind and our judgments conflict with those of other people, some of these judgments must eventually be revised, suspended, or withdrawn, if the practical aim of reaching reasonable agreement on matters of political justice is to be achieved. (Rawls 2001: 30)

Rawls writes of two types of equilibria, one narrow and the other one wide. A narrow reflective equilibrium is obtained when one "finds the conception of justice that makes the fewest revisions in that person's initial judgments and proves to be acceptable when the conception is presented and explained" (Rawls 2001: 30). It does not take into account alternative conceptions of justice. By contrast, a wide reflective equilibrium takes those alternative conceptions into account and compels us to much more intensely work back and forth our considered judgments, principles and background theories (Daniels 2016). In such wide reflective equilibria, we have to include

> an account of the conditions under which it would be fair for reasonable people to choose among competing principles, as well as evidence that the resulting principles constitute a feasible or stable conception of justice, that is, that people could sustain their commitment to such principles. (Daniels 2016)

According to Bonevac (2004: 366–369), the process through which we finally arrive at reflective equilibrium looks as follows. We start with the aforementioned considered judgments. Suppose that we try to achieve reflective equilibrium regarding intergenerational justice. We renounce

those intuitions that do not satisfy the criterion of "considered". Believing that only our offspring deserve resources in the future does not seem a very good starting point, rendering it exactly the kind of judgment that would be thrown away at this early stage. Afterwards we investigate a series of alternative sets of moral principles "which have varying degrees of fit with our moral judgments" (Daniels 1979: 258). We investigate, for instance, egalitarian, sufficientarian or prioritarian principles. We decide among these by analyzing the strengths and weaknesses of each and by resorting to a relevant set of background theories (Daniels 1979: 258). For instance, suppose we find out that people despise egalitarian distributions. If that were the case, we might have to drop egalitarian principles. Assuming we end up with a set x of moral principles, the equilibrium does not end there. "No one type of considered moral judgment is held immune to revision. We may have provisional fixed points among our considered moral judgments, but all considered judgments are revisable" (Daniels 1979: 267). At every stage we seek to determine whether there are discrepancies between our considered judgments, the principles that have the best fit with them, and the background theories we hold to be relevant here. Bonevac (2004) describes several ways in which such reconciliation could take place:

> We either revise the considered judgement, adopting its negation instead, or revise our principles to drop or weaken one or more. We add or strengthen a principle to make the considered judgment derivable. We drop or weaken one or more principles to remove the inconsistency. We examine the judgment derivable from the considered judgments or our principles to see whether we are willing to include it or its negation among our considered judgment. We reconsider our background theories, asking whether it is advisable to reformulate them in light of the outcome of the adjustments made in our judgments and principles. (Bonevac 2004: 367–369)

Thus far, achieving reflective equilibrium has been described as an individualistic process. In his later works, Rawls (1993) focuses more on the idea of an overlapping consensus between different equilibria. "Complexity, uncertainty, variation in experience, lead human reason, when exercised under conditions of freedom, to an unavoidable pluralism of comprehensive moral and philosophical views" (Daniels 2016). Reflective equilibrium does not do all the work for constructivism. It simply represents an instrument that can be employed by individuals in order to see that the principles they propose are justifiable. In fact, this is the appeal of the reflective equilibrium emphasized by Raz (1982), although Raz himself does not consider it sufficient to validate the method of

reflective equilibrium: it "implies the proposition that the less likely one is to abandon a moral belief because one has acquired more information, the more trustworthy that belief is" (1982: 329). However, how can diverse individuals, each equipped with a different reflective equilibrium, converge in their moral considerations? Does reflective equilibrium have the instruments to rule out unreasonable equilibria? As De Maagt asks, "should we believe that coherent homophobia is better justified than incoherent homophobia" (2016: 10)? The standard response of the proponents of reflective equilibrium is to say that such moral beliefs would ideally be ruled out by critical reflection in early stages of the equilibrium, or upon confrontation with other moral theories (DePaul 2006: 613–614). Even if one cannot think on one's own of counterarguments, the alternatives suggested by others have been mentioned as needing to be taken into account (Ebertz 1993: 213).

The process of reflective equilibrium is not complete until public confrontation with the ideas of others. While "wide reflective equilibrium remains at the center of Rawls' account of individual moral deliberation about justice" (Daniels 2016), it is the engagement in public methods of justification of the ideas resulting from reflective equilibrium that puts a provisory stop to the process (Daniels 2016). This, however, seems an invitation to the underdetermination charge mentioned in the previous section. Bonevac (2004: 364) argues that there are no grounds for assuming that *some* equilibrium would emerge after the whole process. Or, if it does, it would be just a provisory one, as mentioned. What kind of equilibrium would this be? The best answer that a defender of reflective equilibrium would be able to give is that this is no problem at all. The dynamism of this method is part of its appeal: the fact that even when we think the process has ended we can still revise our judgments, seems to be a feature, not a bug. Public justifiability of principles of justice is not guaranteed unless we resort to the method of reflective equilibrium. Even if people were to disagree on the existence of the moral truth of the principles we propose, the fact that they are publicly justifiable means that they would at least be held as objective (Daniels 1979: 276). At the same time, reflective equilibrium solves the paradox identified before: the fact that while intuitions are appealing in moral philosophy, intuitionism faces insurmountable problems that have led many to consider it unacceptable as an epistemological method. It does so by allowing the moral inquirer to use intuitions in a way that does not involve relying on non-inferentially justified beliefs. What the moral inquirer does is

"continually reflect on what she already believes", while remaining open to the possibility of revising those beliefs (DePaul 2006: 604).

In the following section I present two more objections to constructivism, focusing on what could be considered the most powerful one raised so far, Cohen's (2003) "fact-sensitivity" charge.

Constructivism and its critics

In this section I discuss two objections that have been raised against constructivism. One targets constructivism in general, whereas the second has been tailored as a charge against Rawls' Kantian constructivism. The problem moral realists see with constructivism is that, even if constructivism can justify moral beliefs, it fails to guarantee that they are *true* beliefs (Brink 1989: 34). However, whether there are moral facts or not is irrelevant from the standpoint of constructivism. Justification is all that matters; truth is superfluous. In Rawls' words

> what justifies a conception of justice is not its being true to an order antecedent to and given to us […] moral objectivity is to be understood in terms of a suitably constructed social point of view that all can accept. (Rawls 1980: 519)

However, this answer begs the following question: is it valid to make inferences from false moral facts? In reply, the constructivist may say that this is still an interpretation of truth that comes from a realist worldview. Constructivist views "understand normative truth as not merely uncovered by or coinciding with the outcome of a certain procedure, but as constituted by emergence from that procedure" (Street 2010: 365). We would then reach another problem, for this would "make it hard to see how constructivism could be a metaethical position at all", as everyone would regard his or her procedure as the correct one, leading to a plethora of distinct metaethical interpretations (Street 2010: 365). In order to prevent this outcome, Street recommends that we give up on a strictly proceduralist interpretation of constructivism, and regard the Rawlsian original position as a heuristic device "whose function is to capture, organize and help us investigate what follows from a certain evaluative standpoint on the world" (Street 2010: 366). Thus, normativity is objective to the extent that valuing individuals confer value to those facts that they agree make up the fabric of morality (Street 2010: 371). In order to not let "anything go", the constructivist has to explain what an individual must do in order to be qualified as a valuing agent and to "explain how standards of correctness in the normative domain get

generated by this attitude" (Street 2010: 369). Although procedure may not be everything, we cannot have constructivism without a procedure that respects certain criteria. What those criteria are will be seen in the response constructivists give to Cohen's (2003, 2008) charge against Kantian constructivism. Among other things, the qualifier of seeing agents as reasonable free and equal agents is one of those constraints; for instance, an individual would not qualify as a valuing agent if she did not accept the "burdens of judgment", the sources of reasonable disagreement in a political community (Rawls 1993: 54).

The second charge against constructivism stems from Cohen's (2003) argument that constructivists mistake rules of regulation with principles of justice. Even in *Theory of Justice,* Rawls emphasizes the necessity of grounding a conception of justice in empirical condition:

> [H]uman freedom is to be regulated by principles chosen in the light of moderate scarcity […] justice as fairness is a theory of human justice and among its premises are the elementary facts about persons and their place in nature. (Rawls 1971: 257)

Rawls includes a plethora of factual information in the construction of the original position.[1] In general, these amount to what Rawls calls "the circumstances of justice". Here are included objective circumstances (the most important being the postulated condition of moderate scarcity) and subjective circumstances. Among the subjective circumstances Rawls mentions the fact that

> men suffer from various shortcomings of knowledge, thought, and judgment. Their knowledge is necessarily incomplete, their powers of reasoning, memory and attention are always limited, and their judgment is likely to be distorted by anxiety, bias, and a preoccupation with their own affairs. (Rawls 1871: 127)

Parties in the original position are endowed with such information concerning the circumstances of justice (Rawls 1971: 128). The parties know general aspects concerning the way modern societies function. Furthermore, they hold quite extensive knowledge regarding biological evolution, economic processes, psychological phenomena, and the general tendencies of human behavior. In fact, in the absence of these factual claims, the parties would simply be unable to reach a conclusion regarding the content of justice. For instance, factual claims are behind the paramount importance conferred by Rawls to primary goods as all-purpose means (2001: 58). Given that the task of the principles of

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[1] I thank Adrian Miroiu for this observation.

justice as fairness is to distribute those primary goods, facts seem to be front and center of Rawls' enterprise.

Cohen's position is that there exist true normative principles, although he mentions that the fact-sensitivity thesis he upholds is neutral with respect to the "realism-anti-realism-quasi-realism-a-little-bit-of-realism-here-not-so-much-realism-there" controversy (2003: 211). For Cohen, constructivism entails the acceptance of the fact-sensitive thesis, according to which at least some of the principles we propose include facts in the grounds for affirming them (2003: 213). In opposition, Cohen is the adept of the fact-insensitive thesis, which states that ultimate principles of justice ought not reflect factual claims (2003: 214). In order to illustrate this distinction, Cohen proceeds as follows. Suppose there is a principle P1 holding that individuals should be encouraged in their efforts to pursue life plans. Among the reasons we may have for P1 is the factual claim F1, which stipulates that people's happiness is dependent on their ability to pursue life plans. In turn, F1 can support P1 in light of a more fundamental principle, P2, which could be a utilitarian principle, thus making the maximization of happiness a worthwhile goal. We could then further complicate the justificatory chain and introduce F2, which grounds P2 in the fact that promoting individuals' happiness is a good way to show that we respect them. This could also entail principle P3, that expressing respect to individuals is a moral precept. P3 could then be based on F3, which posits some characteristics that are respect-meriting, and holds that people somehow satisfy those characteristics. Cohen mentions that now we could end the justification process by introducing P4 as a fact-free principle requiring that we respect beings with those characteristics that are respect-meriting. Cohen concludes by saying that either that principle is itself fact-insensitive, "or, if it is fact-sensitive, I would press beyond it to a fact-insensitive one" (2003: 216–217). In order to counteract the potential objection that this justificatory chain resembles a regress *ad infinitum*, Cohen provides an argument meant to show that this process is bound to have an end term.

> P1: Whenever a fact F supports a principle P, there must be an explanation of why F supports P.
> P2: This explanation implies the existence of a more ultimate principle, to which we could commit even if F were to be denied. This more ultimate principle would provide an account of why F supports P.
> P3: The sequence will reach an end "because our resources of conviction are finite".
> ───────────────────────────────
> Every fact-sensitive principle reflects a fact-insensitive principle. (Cohen 2003: 218)

Leaving aside for the moment the fact that P3 itself is based on a factual claim (that resources of conviction are finite), I concede this premise for the time being. The more egregious problem, nonetheless, is one tangentially touched by Cohen, that P3 "presupposes a controversially foundationalist view of justification" (2003: 222). Cohen thinks that it represents a small price to pay if it rescues justice from constructivism, perceived as inherently flawed given its conflation of fundamental principles and rules of regulation (2008: 279). Not only do the parties in the original position need to take into account considerations "that do not reflect the content of justice itself", but Rawls endows them with "cognitive resources that are redundant from the point of view of specifying what justice is" (2008: 283–284). Although facts would be required in selecting principles of regulation, which govern real societies, "[they] make no difference to the very nature of justice itself" (2008: 285). Thus, Rawls' efforts to define circumstances of justice reflect the wrong concern. Whereas rules of regulation do respond to the questions "Under what circumstances is the achievement of justice possible?" and "Under what circumstances do questions of justice arise?", they should not be confused with the more fundamental question of "What is justice?" For Cohen, only a fact-insensitive, fundamental principle can respond to the latter question (2008: 331–335). Given that rules of regulation have to be balanced with other considerations – stability, efficiency, publicity – they "lack ultimacy […] they cannot tell us how to evaluate the effects by reference to which they themselves are to be evaluated" (Cohen 2003: 241). Mistaking rules of regulation for fundamental principles means that Rawls sacrifices the content of justice for the sake of external considerations, as in his compromise with the "incentives policy formed by capitalism" (Cohen 2008: 27–86). For Cohen, the added effects of giving the legislators in the original position the wrong tools, plus letting them pursue a different task from the one they would be capable of undertaking, leads to a contentment "with an expedient compromise", which is in fact a betrayal of justice (Cohen 2008: 86). Cohen does admit that there could be some fact-free principle grounding the principles that make up the justice as fairness conception, "but they are also hidden within the unstated content of the conception of human beings as free and equal that justifies the original position itself" (2008: 292–293).

In what follows I present several objections raised against Cohen's fact-insensitive thesis. The first of these, belonging to Ronzoni and Valentini (2008), holds that Cohen ignores the ontological agnosticism at the heart of constructivism. Hall (2014) and Rossi (2016) criticize Cohen

from a political realist² approach to justice. De Maagt (2016) defends fact-sensitivity by introducing a further distinction between a fact-free supreme principle of morality (such as the categorical imperative for Kant or the stipulation that the parties in the original position are free and equal) and the content of morality, which includes fact-sensitive principles. Lastly, I sketch a novel objection to Cohen's criticism. I advance the idea that Cohen's thesis is affected by a conflation of fact-dependency with fact-sensitivity.

The fact-insensitivity thesis fails to consider constructivism's ontological agnosticism (Ronzoni and Valentini 2008)

In their reply to Cohen, Ronzoni and Valentini draw attention to one important element in all constructivist accounts: that they try to combine ontological agnosticism about the ability to track moral facts with optimism about the possibility of moral justification (2008: 404). Cohen's main charge against constructivism is reconstructed in the form of the following dilemma: if the fact-insensitivity thesis is correct, constructivists cannot claim that principles generated by procedures reliant on factual aspects represent fundamental principles of justice. Then, constructivists would either have to give up on the pretense that they formulate principles of justice and concede that their methods can only generate rules of regulation, or show that the end term of the justificatory chain may be something other than a factual claim. A potential defense of the constructivist position, briefly mentioned by Cohen, is to argue that the justificatory sequence ends with a methodological principle. For Cohen, methodological principles are not preoccupied with the content of morality, but rather with "how to generate normative principles" (2003: 219). Ronzoni and Valentini mention two ways in which these methodological principles can be seen: either as imperatives (follow procedure *x!*) or, more plausibly, as "thinking of them as principles that explain how to generate normative principles and indicate which criteria one ought to adopt when one engages in substantive normative theorizing" (2008: 408–409). In this second understanding of methodological principles, they are normatively charged, but they are not substantive normative principles (2008: 409).

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² Political realism here is different from the previous two understandings of the term. According to this conception, "political philosophy should [issue] theories about the distinctive forces that shape real politics" (Rossi and Sleat 2014: 689).

Ronzoni and Valentini provide the following justificatory sequence. We can start from principle P1, which refers to the legitimacy of those principles generated by following procedure X. P1 rests on the factual claim F1, according to which X represents the constructive procedure best suited for the task of justifying normative principles in a world in which we cannot track moral facts. P2 says that one ought not to advance principles whose validity is grounded in the existence of independent moral facts, given the agnosticism encouraged by constructivists. However, this agnosticism is itself based on F2, according to which we find ourselves in the impossibility of having decisive arguments in favor of, or against, the existence of independent moral facts. The end term in the sequence is P3, which holds that moral theorizing should not start from assumptions "whose validity or truth is beyond the limits of what we can plausibly claim to know" (2008: 409). P3 is not grounded in facts, but neither does it represent a substantive moral principle, as it simply specifies a condition that ought to be respected in the process of generating substantive principles.

Applying this argumentation to Rawls, Ronzoni and Valentini hold that the assumptions that the parties in the original position are free and equal need not be interpreted as a substantive conviction (2008: 410). Far from being a substantive commitment, modeling the parties as free and equal represents a rational strategy to pursue in settings in which there is no pre-established authority. Imposing our views on others when anyone has the opportunity to be right "is beyond the limits of what we can plausibly claim to know", which would amount to our actions not being "rationally justified" (2008: 411-412). Thus, "it is not intrinsically wrong to claim the moral entitlement to impose our views on others because they are worthy of respect; rather, it is irrational" (2008: 411). Intersubjective justification would be impossible in the absence of accepting this minimal premise. The same argument may apply to Rawls' later works. For instance, unreasonable individuals would be excluded from the legitimation pool (borrowing a term used by Friedman 2004) because they do not show the epistemic modesty characteristic to constructivist models. By refusing to accept the burdens of judgment, i.e. "the many hazards involved in the correct and conscientious exercise of our powers of reason and judgment in the ordinary course of political life" (Rawls 1993: 56), they also refute the very possibility of intersubjective justification. This interpretation is in line with Ronzoni and Valentini's argument that

> rather than indicating exactly what justice positively requires, constructivism helps us identify what justice must exclude. There are rules of interaction which agents who are vulnerable, interconnected, and concerned with leading their lives in accordance with their conception of the good could never unanimously consent to. (Ronzoni and Valentini 2008: 413)

This ties back neatly with the underdetermination objection mentioned in the previous sections. Even if no determinate result is achieved, constructivism may still be salvaged by excluding certain kinds of perspectives from the legitimation pool. Thus, it can incorporate our intuition about the badness of some perspectives, such as racist or sexist ones, while also modeling their exclusion as a formal constraint on justice, and not as substantively charged. Cohen, on the other hand, fails to "properly engage with the ontological agnosticism which is the animating concern of constructivism" (2008: 419). Thus, Cohen's charge poses no danger to a constructivist who is willing to accept the existence of methodological principles as grounding substantive principles.

Political realist replies to Cohen (Hall 2013; Rossi 2016)

Hall (2013) and Rossi (2016) tackle the fact-insensitivity challenge from another angle. While Ronzoni and Valentini choose to assume that Cohen is right in saying that fundamental/ultimate principles of justice cannot be grounded in facts, political realists argue for the relevance of facts in political and moral theorizing. Hall indicates that the fact that an important part of political philosophy focuses on how to get from ideal theory to non-ideal theory "undermines the sharp distinction Cohen draws between principles and rules of regulation, as it shows that the justification of political principles is sensitive to how to regulate politics" (2013: 177). Furthermore, Cohen simply misplaces the motivation that drives agents in politics. Whereas in highly idealized, fact-insensitive situations, such as on a camping trip, agents may be motivated by an egalitarian ethos, the same would not be true in a real society. We cannot separate the realm of politics from "large-scale collective action problems" or from the lack of "unity of purpose". These do not represent feasibility concerns, "but rather the more fundamental requirement that we actually address the practice with which we claim to be concerned" (Hall 3013: 180).

Rossi says that although there could very well exist "non-trivial fact-insensitive normative principles", these lack normative power in

the realm of politics, i.e. "they are unable to adequately determine how we should judge particular political states of affairs" (Rossi 2016: 506). Furthermore, Cohen's concern that relying on facts will lead to status quo bias is not vindicated by his reliance on moral intuitions only, which may engender an even more damaging status quo bias (Rossi 2016: 518). In order to account for the transition from "general principles to particular political judgment" while eschewing this potential risk, Rossi mentions that we should resort to an approach like Rawlsian constructivism, practice-dependence or political realism (2016: 516). While I agree with his assessment of constructivism as capable of avoiding this problem, I do not believe that practice-dependent accounts are able to eschew status quo bias. To make matters worse, Cohen's objections gain traction especially when directed against practice-dependent accounts. In order to see why this is the case, we need to distinguish between *fact-sensitive* and *fact-dependent* theories and principles, a task that I will postpone until the end of this section.

Constructivism is grounded on a supreme principle of morality (De Maagt 2016)

De Maagt (2016) argues that Cohen does not represent correctly the constructivist *structure of justification*. De Maagt accepts Cohen's thesis that the foundation of morality has to be non-empirical, but believes that constructivism can account for such a foundation (2016: 449). What constructivists can do is resort to "the moral conception of the person which functions as the basic material of construction" (2016: 450). This entails introducing a new distinction, between what can be called fundamental principles of justice and the supreme principle of morality. Unlike Cohen, De Maagt (following Rawls) believes that fundamental principles of justice can be fact-sensitive. Nonetheless, they do not represent the *ultimate foundation* of morality. What grounds these fundamental principles, be they fact-sensitive or fact-insensitive, is the "supreme principle of morality", i.e. the respect for persons as free and equals, which is not grounded in facts (2016: 450). De Maagt is inspired here by Kant, in whose theory the foundation of morality – the categorical imperative – is grounded just in reason. On the other hand, "what Cohen overlooks is that Kant's arguments for the content of morality do include references to facts about human interdependence and vulnerabilities" (2016: 451).

Conflation of fact–sensitivity and fact–dependency

How much should we rely on facts in our moral theorizing? What weight should facts have? At one point in his case against constructivism, Cohen makes an analogy between reasoning from fact-sensitive premises and "the lovers of sights and sounds in Book V of Plato's Republic, who think it suffices for saying what justice is to say what counts as just within the world of sights and sounds" (Cohen 2008: 291). Cohen then argues that justice should transcend the facts of the world, and not commit the mistake of the prisoners of the cave. Is this the same way the main constructivist projects, such as O'Neill's, Scanlon's, Korsgaard's or Rawls', proceed? It is my contention that Cohen conflates here fact-sensitivity with fact-dependency.

In order to understand this distinction, we must turn to Dworkin's discussion on parameters and limits. Although some circumstances that individuals encounter are limitations on what they are able to do, others are parameters. Parameters "state essential conditions of a specified performance" (Dworkin 2002: 261). Many ethical parameters, for Dworkin, are normative, by "helping define the challenge that people should face" (2002: 262). Dworkin introduces the discussion on parameters and limits in the context of how we should define a good life. Nonetheless, I believe that we can apply the concepts in metaethical debates as well. In Rawls' works focusing on societal justice (1971, 2001), stability, publicity, or the necessity to incentivize individuals represent parameters. Falling short of them would hurt the normative enterprise. Consequently, these considerations ought to be included when evaluating the desirability of a normative project. In Rawls' *The Law of Peoples* (1999), however, stability is seen as a limitation on what principles we can generate. The necessity to accommodate what Rawls calls decent hierarchical societies, which are merely "decent" and not "reasonable", leads Rawls to a weaker conception of global justice than many of his proponents would have expected (Beitz 1979; Pogge 1994).

Relying so much on facts that you make concessions to unjust practices is closer to what Estlund (2014) calls "utopophobia" than merely taking facts into consideration so that the output of your theory is simultaneously desirable and feasible. Practice-dependent accounts (James 2005) make this mistake, and lean dangerously close to ethical positivism, "the belief that we must try to reduce norms to facts [...]

that the existing laws are the only possible standards of goodness" (Popper 1947: 59–60). On the other hand, constructivism's incorporation of factual claims into its procedure is not a subjugation of norms to facts, but simply a way to ensure that the principles that emerge from the constructivist procedure will be feasible. While feasibility does not constitute the topic of this article, it is an important constraint on what justice should look like. We do not have access to a Platonic Form of justice that is immutable and unchanging. In our real world, we have to face the prospect that principles made for a far too perfect world are going to amount to nothing. Furthermore, the public justifiability of principles will be hindered if we do not resort to a certain fact-sensitivity. What must be avoided at all costs is fact-dependency. Cohen's mistake is that he fails to separate the two concepts.

Conclusions

In this article I have reviewed some defenses of constructivism, the view according to which moral principles "are not merely given to us, but rather the products of thought […] not created from nothing, but rather constructed from various resources appropriate to political judgment" (Buckley, n.d.). I have compared the metaethical claims of constructivism with its main rival, intuitionism, placing constructivism toward antirealism in the realist–antirealist positioning debate. As a coherentist theory of justification, constructivism's claims can be defended by resorting to a method such as reflective equilibrium, which I have argued best captures the appeal of intuition in moral thinking without assuming too much from an ontological standpoint, as intuitionism does owing to its foundationalist roots. Toward the end of the paper I have presented several arguments extant in the literature against Cohen's criticism of constructivism, ending with a novel objection, that Cohen conflates fact-sensitivity (which is not problematic for constructivism) with fact-dependency (which constructivism does not entail and which should indeed be rejected). As the paper has been intended as a review article, I have not discussed the latter objection at length. However, it can represent a new avenue for research, further contributing to the reasons why constructivism is uniquely situated among the metaethical views investigated here in generating principles that can be widely accepted.

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