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Subjects of Justice: Social Institutions and the Basic Structure

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I explore how justice can be said to apply to different subjects through an examination of the work of John Rawls. I first offer an interpretation of Rawls's idea of a social institution, and explain how Rawls is able to avoid a well-known objection put forward by Hayek. I then raise a puzzle about how the justice of institutions is supposed to fit with the justice of the basic structure of society. Rawls asserts that justice is the first virtue of social institutions, but it is not clear whether this means that institutions must be just in isolation or in terms of the role they play in the basic structure. I examine two possible solutions to the puzzle, derived from the work of David Miller and Jon Elster, but find that neither is compatible with Rawls's theory. I illustrate the ambiguity by reference to the family, drawing a distinction between the family as a social institution and families as associations. I conclude from this example that institutions must be just in terms of the basic structure, but argue that Rawls's hierarchical account of domestic and local justice – applying to the basic structure and to families within it respectively – is underdeveloped and unconvincing. Turning to the basic structure itself, I argue that the language of 'subjects' of justice is insufficiently precise, and we should distinguish between a *site* and an *agent* of justice. I illustrate this distinction with reference to recent work by Miriam Ronzoni. Rawls originally saw the basic structure of society as the site of social justice, but moved in his later work towards a more agent-orientated conception. This difference, I suggest, has significant implications for the meaning of the highly influential thesis that the basic structure of society is the primary subject of justice.

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I. The first virtue thesis: Justice and social institutions

1. Introduction

In this thesis I explore several questions about the subjects of justice in the context of the work of John Rawls. In doing so I hope to bring new insight to some interpretative questions that arise in Rawls's philosophy, but my main concern is to understand better what the attribute of justice, and in particular social justice, can be properly applied to. More specifically, I ask the following. First, is justice essentially agential? That is: is justice at the most basic level always predicated of agents, such that ascription of justice to other subjects, such as states of affairs, is purely derivative of its ascription to the agents who bring them about? I will not reach any definitive conclusion on this question, but in this chapter I will explore one way in which the suggestion might arise, and a possible Rawlsian response to it. In doing so I prepare the ground for the following chapters by setting out Rawls's approach to social institutions. I return to the question of agency in Chapter IV.

Second, what does Rawls mean when he says that the basic structure is the *primary* subject of justice (the basic structure thesis), and how does this fit with the idea that justice is the first virtue of social institutions (the first virtue thesis)? Rawls appears to allow that social institutions can be assessed either qua social institution or qua aspect of the basic structure. He apparently thinks that there are principles of justice that are appropriate to social institutions as subjects in isolation, as well as principles that are appropriate to the basic structure. This means that the first virtue thesis can be interpreted in two ways. On the first interpretation (FV1) Rawls is saying that a social institution must be *just in its own terms* (i.e. the terms that apply to it in isolation) or be reformed or

abolished. On the second (FV2) he is saying that it must be *just in terms of the basic structure*. In Chapter II I explore how the first interpretation might be sustained consistently with the basic structure thesis.

In Chapter III I examine these questions in the context of one particular social institution of equivocal status: the family. Rawls includes the family as an institution of the basic structure, but his treatment of this subject is ambiguous as between FV1 and FV2. I illustrate the same ambiguity in Okin's critique of Rawls, and note that her argument does not damage Rawls, owing to its systematic equivocation on the sense in which the family is required to be just. I argue that Rawls's position on the 'local' justice of the family can be best understood if we distinguish between the family as an institution – a system of rules – of the basic structure, and families as associations – groups of individuals – within it, and I explain how associations fit into Rawls's socio-political ontology.

Finally, what does it mean to say that something is a 'subject' of justice, other than simply that the predication of justice is linguistically proper in this case? Is this label philosophically helpful, or might refining our terminology help us with the conceptual and normative problems that justice throws up? In Chapter IV I look at one interpretation and defence of the basic structure thesis which I believe illustrates an ambiguity in the notion of a 'subject of justice' as between *agent* and *site*. In doing so I uncover a development in Rawls's own thought and contrast the answer to the 'agency' question implied in *A Theory of Justice* with the answer the Rawls of *Political Liberalism* might have given.

2. Rawls and Hayek on social justice and institutions

Justice, according to Rawls's influential but elusive aphorism, is the first virtue of social institutions. This remark is part of Rawls's impressionistic rendering of 'our intuitive conviction of the primacy of justice';[1] in practice he takes it to mean that 'laws and institutions no matter how efficient or well-arranged must be reformed or abolished if they are unjust'.[2] I call this the 'first virtue thesis'. Now Rawls apparently does not mean that it is simply in the nature of justice as a virtue that it takes primacy over other virtues, or that its claims always take priority over others. If this were the case then justice would be the first virtue of anything of which it was a virtue. In some subjects it might be proper that justice is balanced against other virtues; but as far as social institutions are concerned reasons of justice have a special weight.[3] And indeed, beyond social institutions there are no other candidates on Rawls's list – 'actions…, including decisions, judgments, and imputations'; 'attitudes and dispositions of persons, and persons themselves' – of which it would seem plausible to say that justice was their first virtue.[4] The justice of a judgment or imputation, for example, is no more than a function of its accuracy. Persons ought to be just, but they ought also to be charitable and benevolent. There is no hierarchy involved. On the traditional Aristotelian view justice is a virtue alongside many others.

Rawls believes that his conception of social justice 'tall[ies] with tradition'[5] but his attempted reconciliation with Aristotle's account is curious. He admits that Aristotle frames his account to apply to actions and, derivatively, to agents. (I leave aside which of

[1] John Rawls, *A Theory of Justice* (Harvard University Press 1971) (hereafter *TJ*) 4.
[2] *TJ* 3.
[3] John Rawls, *Collected Papers* (Samuel Freeman ed, Harvard University Press 1999) 220.
[4] *TJ* 7. For the sake of simplicity I take Rawls's phrase 'laws, institutions, and social systems' to be in effect equivalent to 'social institutions'. Laws may be social institutions on Rawls's view if we take them to include composites such as 'the legal protection of freedom of thought and liberty of conscience' (see below p9) or they may be akin to individual rules (see below p19) that comprise such institutions. I also recognize concerns about the individuation of institutions (see below p53 n42).
[5] *TJ* 10.

these, if either, ought to be considered basic.[6]) But he claims that an account of a disposition to give each person her due presupposes an account of what each person's due is. What might follow from this? Clearly we need a theory of what is due to each person; that is, a theory of the content of justice. Rawls's next thought is that 'such entitlements are… very often derived from social institutions and the legitimate expectations to which they give rise.'[7] From this observation Rawls seems to believe that he can conclude that justice is a virtue *of* these social institutions. But the reasoning here is obscure. Aristotle thought that the disposition to render each her due was a virtue of persons. It is hard to understand how the result of an investigation into the content of each person's due is supposed to rebound on us, as it were, and force us to revise this prior conclusion as to the proper predication of justice. If social institutions were proposed as the answer to the question where to look to discover what the just person renders to each, then the conclusion ought simply to be that the just person renders to each the entitlements derived from social institutions.

This interpretation makes 'derived from' mean something like 'located in'. Perhaps Rawls has something stronger in mind. Perhaps the thought is that very often it is actually social institutions, rather than individuals, that are in a position to render to each her due. I shall consider the relationship between institutional and individual responsibility in Chapter IV. But I think we should understand the analogy between Aristotelian just persons and just social institutions differently. The parallel is not supposed to be that they are each at different times dispensers of justice. In fact there is no single category of 'what is due to each', which happens sometimes to be derived from one source and sometimes from another, but at any rate 'very often' from social institutions. Rather, what

[6] For discussion see David Wiggins, 'Neo-Aristotelian Considerations on Justice' in his *Ethics: Twelve Lectures on the Philosophy of Morality* (Penguin 2006).
[7] *TJ* 10.

is due varies according to context, and very often when we are discussing such 'entitlements' what we are talking about is what is due to us in the context of social interaction, i.e. social justice. What is due to us in the context of individual transactions is a matter of the justice of individual agents. But it would be a mistake to push the analogy any further, and say that social justice concerns the justice of institutional agents. The 'justice of the basic structure' is a different case and must be recognized as such. I will shortly provide an account of social institutions that I hope supports this interpretation, and illustrates that Rawls underestimates the extent to which his view requires a revision of the 'traditional' notion of justice as a virtue.

F R Hayek's take on this debate is well-known. Justice, he claimed, 'is an attribute of human conduct', which 'may thus be predicated about the intended results of human action but not about circumstances which have not deliberately been brought about by men'.[8] A requirement of our coherent use of the concept of justice is that, when we describe a situation as unjust, we must be able to identify the *agent* of the injustice. It must make sense to ask, 'Who is supposed to have been unjust?'[9] States of affairs, including distributions, can be just or unjust only derivatively, insofar as they have been brought about by a just or unjust agent. On this purely conceptual argument Hayek's assertion that justice is inapplicable to 'the result of a spontaneous process' follows quite simply. Since a spontaneous process is not an agent, no state of affairs brought about by a spontaneous process can be thought of as just or unjust.

To the extent that the argument is designed to appeal exclusively to what is supposed to be the correct understanding of the concept of justice, without providing any further explanation as to why this understanding is the correct one, it is likely to remain

[8] F R Hayek, *Law, Legislation and Liberty, Volume 2: The Mirage of Social Justice* (Routledge & Kegan Paul 1976) (hereafter *LLL2*) 70.
[9] *LLL2* 93.

unsatisfying. Sometimes Hayek does appear to intend the argument to be purely conceptual. 'To apply the term "just" to circumstances other than human actions or the rules governing them,' he says, 'is a category mistake',[10] and the term 'social justice' is 'meaningless'[11] or 'nonsense'.[12] But Hayek's case in fact seems to comprise three closely linked lines of argument, which are not often easy to distinguish.[13] On closer investigation his dismissals of the very idea of social justice turn out to be underpinned by more substantial considerations. The first is about responsibility. It is 'meaningless to describe a factual situation as just or unjust' '*unless* somebody could and should have arranged things differently'.[14] It is responsibility for the outcome that makes the difference. But, Hayek observes, there is 'no human agency' responsible for 'differences in human fates';[15] there is 'no distributing agent whose will or choice determines the relative position of the different persons or groups.[16] It is not enough, Hayek thinks, to say that society at large is responsible, for this is too nebulous to be a proper subject to which to attach responsibility for justice. If we are to make claims of justice – and justice, unlike generosity, say, concerns what we can *claim*, or what is *due* to us – there must be someone to whom we can make these claims. It is 'meaningless to describe them as claims on "society" because "society" cannot think, act, value, or "treat" anybody in a particular way'.[17]

The second line of argument supports the first. Justice must be achievable by way of rules that individuals can follow in their everyday conduct, but 'there are no principles of

[10] *LLL2* 31.
[11] *LLL 2* 33, 68.
[12] *LLL2* 78.
[13] Steven Lukes takes Hayek to be offering distinct arguments in 'Social Justice – The Hayekian Challenge' (1997) 11(1) *Critical Review* 65.
[14] *LLL2* 32 (emphasis added).
[15] *LLL2* 68.
[16] *LLL2* 72.
[17] *LLL2* 103.

individual conduct which would produce a pattern of distribution which as such could be called just, and therefore also no possibility for the individual to know what he would have to do to secure a just remuneration of his fellows.'[18] Individuals in society, in other words, have a severe epistemic deficit. We are not in a position to know what we can do to bring about any favoured distribution. Responsibility implies control; and in a market society or 'spontaneous order', no one will have sufficient control over outcomes to be able to take responsibility for them. The market itself will not spontaneously give rise to any particular favoured distribution; nor, more importantly, can a group of individuals interacting continuously but unsystematically and without centralized direction bring about such a distribution. Justice can be properly predicated only of individual just agents because it is only individual just agents that could bring about any favoured distribution. The idea is that in order for any subject S to be held responsible for a distribution, S must have been able to bring about a different distribution. In holding society (or the individuals severally constituting society) responsible for the outcome of market processes we are saying that society ought to have ensured a different outcome. But ought implies can, and in fact it was not possible for society to have ensured a different outcome. Therefore, society is not responsible; therefore the market distribution cannot be just or unjust.

The final part of Hayek's case is a concession – somewhat underplayed – that these points apply only to a society based (perhaps even exclusively based[19]) on the free

[18] *LLL2* 70.

[19] The 'prevalent demand for material equality is probably often based on the belief that the existing inequalities are the effect of somebody's decision – a belief which would be wholly mistaken in a genuine market order and has still only *very limited validity* in the highly interventionist "mixed" economy existing in most countries today' (*LLL2* 81, emphasis added). Many of Hayek's arguments depend on this kind of failure to entertain the possibility of quite feasible 'middle' positions, for example between a command economy and an unfettered free market, or between the attainment of perfectly 'patterned' distributive justice and the failure of 'social justice' in principle.

market. For an agent to be responsible for justice, an agent has to take control of the factors that constitute or contribute towards it. That agent will inevitably be the state: the only way to solve the collective action problem of justice would be by adopting a totalitarian form of government that directed our every move in pursuit of its chosen end. So although society cannot play the requisite role as agent of justice, a highly authoritarian state at the helm of a command economy might yet do so.

Rawls, let us remind ourselves, thought that justice was the first virtue of social institutions, not of society, so apparently he did not make what Hayek thought was the cardinal error. But what exactly are social institutions? Rawls never makes this particularly clear in his writing. He provides an abstract account in Chapter II of *A Theory of Justice* but for the most part adverts to a series of unsystematic and sometimes contentious examples. The nature of social institutions on the Rawlsian picture has been obscured rather than clarified by its role in debates about global justice, in which thinkers have tended to cite what are more naturally termed political institutions, or even political organizations, such as the World Bank or the International Monetary Fund as indicators of the existence (or not) of a 'global basic structure'.[20] These examples may be compatible with Rawls's definition of an institution, but the latter is a broader and more abstract category than they suggest. It will be important for my argument to have a reasonably firm grasp of the Rawlsian notion of a social institution, particularly as his view appears to have changed somewhat, so I now explore the nature of social institutions and their relation to social justice.

[20] See, for instance, Thomas Nagel, 'The Problem of Global Justice' (2005) 33 *Philosophy and Public Affairs* 113. For an interpretation along the lines suggested here, see Thomas Pogge, *John Rawls: His Life and Theory of Justice* (OUP USA 2007) 28.

An institution is, Rawls says, 'a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like'.[21] It can be thought of either 'as an abstract object, that is, as a possible form of conduct expressed by a system of rules' or 'as the realization in the thought and conduct of certain persons at a certain time and place of the actions specified by these rules'.[22] But, notes Rawls, any sense in which we regard the abstract object as just or unjust is merely parasitic on the sense in which justice is more properly predicated of the real world realization. Rawls is principally concerned with the 'major social institutions'; it is the way in which these 'distribute fundamental rights and duties and determine the division of advantages from social cooperation'[23] that constitutes the basic structure of society, which is the primary subject of social justice. These are 'the political constitution and the principal economic arrangements. Thus the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family are examples of major social institutions'.[24]

An account of justice on which it is predicated at the most basic level only of agents or actions, where any application of the concept to states of affairs is derivative of this basic usage, should be congenial to Rawls, since it offers a way of unifying the application of justice to all the possible subjects he canvasses, and also of escaping the Hayekian challenge. Even if the very notion of social justice is meaningless unless there is an identifiable agent who is responsible for bringing it about, Rawls can point to social institutions to fill this role, without needing to worry about any atavistic personification of society itself. Rawls clearly thinks, *pace* Hayek, that there *is* a sense to social justice –

[21] *TJ* 55.
[22] *TJ* 55.
[23] *TJ* 7.
[24] *TJ* 7.

but is the sense of this notion dependent on Rawlsian institutions being thought of as agents?[25] And did Rawls think of them in this way?

The examples Rawls cites should make us suspicious of any suggestion that when Rawls talks of institutions he has agents in mind. Further passages support this reading. '[G]ames and rituals, trials and parliaments, markets and systems of property' are social institutions,[26] as are slavery and serfdom.[27] In *Political Liberalism* the examples have become still more abstract, including 'the political constitution, the legally recognized forms of property, and the organization of the economy, and the nature of the family'.[28] In some contexts 'institutions' might be synonymous with 'organizations', and that is the way in which Rawlsian social institutions have often been understood.[29] But in general the agential picture of institutions is not compatible with Rawls's view of them in *A Theory of Justice*. On Rawls's view, social justice is not done by a single agent, but inheres in the activities of a group of agents according to rules. Nor should we think of institutions as constituting collective agents; rather, the participating individuals' actions constitute the institution insofar as they are performed in accordance with the system of

[25] As John Gardner seems to suggest: 'Finnis on Justice' (2012) Oxford Legal Studies Research Paper 29/2012, 4 < http://ssrn.com/abstract=2081900> accessed 1 September 2013. See also Hugo Adam Bedau, 'Social Justice and Social Institutions' (1978) 3 *Midwest Studies in Philosophy* 159, 166.

[26] *TJ* 55.

[27] *TJ* 158.

[28] John Rawls, *Political Liberalism* (Columbia University Press 1993) (hereafter *PL*) 258. Note that some of the examples cited here are the abstract types corresponding to more specific versions mentioned in *TJ*. So the label 'the legally recognized forms of property' indicates that whatever legally recognized form property takes in a given society, the system of rules specifying that form (or, more precisely, the realization in persons' thought and conduct of the actions specified by those rules) will be a major institution in that society. Similarly 'the nature of the family' is a functional placeholder for whatever system of rules plays the role in a given society that is played in Western liberal democracies (at least according to Rawls) by 'the monogamous family'.

[29] See, for instance, Kenneth Ehrenberg, 'Procedural Justice and Information in Conflict-Resolving Institutions' (2003) 67 *Albany Law Review* 167, 171: 'Institutions are artificial social structures *or organizations* framed to deal with certain kinds of problems or to accomplish or pursue certain goals.' Ehrenberg cites *TJ* 55 but Rawls doesn't use the word 'organization' on this page, and in my opinion it offers no support to this gloss.

public rules that makes it the institution that it is. What we are concerned with is 'the form of [people's] common practices';[30] 'it is a matter of the justice of practices themselves in which participants stand in various relations to be appraised in accordance with standards which they may be expected to acknowledge before one another'.[31]

Why would justice be the first virtue of such institutions? What is it about social institutions that makes justice first of all relevant, and also prior to all other virtues? In short, it is that social institutions demarcate the sphere of necessary social cooperation. In 'Justice as Reciprocity' Rawls uses 'practice' as a synonym for 'institution'. It is 'any form of activity specified by a system of rules which defines offices and roles, rights and duties, penalties and defences, and so on, and which gives the activity its structure'.[32] (He gives the same examples as in *A Theory of Justice*.[33]) Society is a cooperative venture for mutual advantage,[34] or alternatively a system of social cooperation over time, between free and equal persons,[35] and justice 'is the virtue of practices where there are assumed to be competing interests and conflicting claims, and where it is supposed that persons will press their rights against one another.'[36] Justice as a virtue of social institutions inheres not in their conduct, nor even in the conduct of their participants, but in the rules that describe individuals' activities qua participants in the institution: 'social cooperation is guided by publicly recognized rules and procedures which those cooperating accept as

[30] *CP* 221.
[31] *CP* 223.
[32] *CP* 190.
[33] The synonymity of 'institutions' and 'social practices' is less clear (but, I think, intended) at *TJ* 7.
[34] *TJ* 4.
[35] *PL* 15-22.
[36] *CP* 205.

appropriate to regulate their conduct.'[37] Injustice lies in the inadequate system of rules governing a field of interaction.

Rawls, then, does not need to say that institutions are agents in order to defend the coherence of his theory of social justice. If individual justice inheres in individual action (e.g. in individual transactions) then social justice inheres in social action, that is, in interaction. The major social institutions, or practices, are the site of this interaction. These practices are constituted by the many actions of individuals, but as systems of rules within which individual actions are performed, they are susceptible to assessment in terms of justice as much as individual actions are. Of course this assessment cannot be exactly the same kind of assessment, but that is precisely the point of introducing the notion of social justice.[38] If (as Hayek rightly observes) we each act justly in our individual action, this does not add up to justice in society at large. At this point Hayek throws up his hands and pronounces social justice meaningless. He fails to observe the solution: we can design the structure of our interactions – our social practices or institutions – such as to ensure that they are just.

If this is to be an adequate response to Hayek's critique it must have an answer to the question about responsibility. That answer is as follows. The fact that the results of social interaction have not been deliberately brought about – that they are not 'spontaneous' in that sense – does not mean that they could not be otherwise. We may not direct individuals' interactions towards those results, but we put in place, or at least allow to remain in place, a system of rules which makes results of that sort inevitable. Hayek himself concedes this: the shares apportioned by the market 'are the outcome of a process

[37] John Rawls, *Justice as Fairness: A Restatement* (Erin Kelly ed, Harvard University Press 2001) (hereafter *JFR*) 6.

[38] Compare Pogge, *John Rawls* (n20) 28-9: 'The moral assessment of… practices and rules is the domain of social justice. The moral assessment of individual and collective agents and of their conduct within some existing institutional scheme is the domain of ethics.'

the effect of which on particular people was neither intended nor foreseen by anyone when the institutions first appeared – institutions which were then permitted to continue because it was found that they improve for all or most the prospects of having their needs satisfied.'[39] Hayek recognizes that institutions, including the market mechanism, exist, if not through the original design of any agents, at least because of the joint action of all members of society in allowing them to. The clear implication is that they could be reformed if this was thought necessary – and Hayek does not have the resources left to argue that such a reform, if carried out, could not be in pursuit of social justice. This is because he also concedes that the market's distributions (or some of them) would be unjust *if* they were the outcome of a deliberate allocation.[40] On his admission they are in fact the outcome of an act of 'permission' (either by all or, more likely, by some members of society – namely, those with political power), and as long as he admits that we could choose not to permit such distributions, it is not clear on what principle he would propose to distinguish such an act of permission from an original deliberate act.

Rawls thinks in terms not of an act of permission, but an act of design. In order to consider the question of social justice, Rawls proposes that rather than thinking of the members of society as continuing to permit current patterns of distribution, we think of society as the result of our collective design. If we permit social institutions to persist in a certain state, it is if we had designed them to be that way. We can therefore speak in terms of a hypothetical act of design. It is in this moment of collective design that Hayek ought to locate the claims of justice that he thinks are incoherent as addressed to the fictional entity called 'society': 'questions of justice are involved when *conflicting claims* are made *upon the design of a practice*…'[41] It is not the agent in charge to whom

[39] *LLL2* 64.
[40] *LLL2* 64.
[41] *CP* 201 (emphasis added).

complaints should be directed – there is no such agent – but to each other as co-designers of the rules according to which we live together in society. It might be objected that there is no plausible sense in which the society in which we live has been designed by us. There is, urges Hayek, 'no individual and no co-operating group of people against which the sufferer would have a just complaint'.[42] I think Rawls has two replies to this. The first is that there is such a cooperating group of people, the existence and moral responsibility (in the sense of answerability to each other's claims) of which he takes for granted. 'In justice as fairness men agree to share one another's fate. In designing institutions they undertake to avail themselves of the accidents of nature and social circumstances only when doing so is for the common benefit.'[43] He conceives of society as a fair system of cooperation, and Hayek is simply starting from the wrong place.

The second response,[44] which also serves to reinforce the first, is more interesting. Rawls's constructivism about justice allows it to be primarily a property of social institutions because any prior 'act' of justice is purely hypothetical. For Rawls it is by working out which set of principles would be agreed to behind the veil of ignorance that we discover what the virtue of justice consists in for the case of social institutions. Justice is a virtue of our social practices rather than of us who design them because the content of justice – what each of us is due in the context of social interaction – is determined by what we *would* design given certain epistemic constraints intended to model universally agreed requirements of morality, that is, in the original position. Rawls's innovation is to 'backdate' the complaints mechanism, by asking how individuals could justify their position to each other before entering into society. The constructivist method invites us to see claims of justice arising not when distributions have been made and some have come

[42] *LLL2* 69.
[43] *TJ* 102.
[44] I discuss a further Rawlsian response to Hayek, based on the idea of pure procedural justice, in section 3 of Chapter IV.

out badly through no fault of their own, but before any process of interaction, market-based or otherwise, has even been run. The device of the original position, instead of asking what we should each *do* to secure a preferred distribution of goods, asks what principles we would each *choose* to govern our interaction. The answer to this question is the content of social justice, which is a virtue of the social institutions that embody those principles.

II. The basic structure thesis and the subjects of justice

1. Institutions and the basic structure

It is foundational to Rawls's approach to formulating a theory of social justice that justice applies in the first instance to the basic structure of society. 'It is natural to conjecture,' he suggests, 'that once we have a sound theory for this case, the remaining problems of justice will prove more tractable in the light of it. With suitable modifications such a theory should provide the key for some of these other questions.'[1] There are two principal concerns about this approach. First, Rawls gives us no particular reason to consider this conjecture a natural one. He is aware that his institutional approach may not seem to tally with tradition, but his argument that Aristotle would find his account agreeable underplays the extent of his innovation. There is no obvious reason to think that social institutions are where a theory of justice should start, assuming that there are other subjects of justice that need to be treated differently. Perhaps we will find that we need to build from the bottom up, rather than from the top down; for example, illuminating social justice through a theory of the justice of persons. Secondly, and relatedly, Rawls does not consider the possibility that the nature of justice may be so heterogeneous that an account of the justice of the basic structure provides no guidance at all as to the best account in other areas. Worse, it may be that justice is such that a proper understanding cannot be achieved if isolated cases are examined piecemeal – that justice is susceptible of analysis only at a global level, so that the justice of any individual subject can only be understood once we have identified what constitutes justice *simpliciter*.[2] In this chapter I explore the

[1] *TJ* 8.
[2] Rawls later recognized the need to give a more reasoned justification of the focus on the basic structure. See *PL* 258.

question whether Rawls's belief that the basic structure of society is the primary subject of justice is compatible with his belief that justice is also properly applied to other subjects, in particular to individual social institutions for which it is the first virtue. Over this chapter and the next I will suggest that Rawls does little to make good on his conjecture.

Across *A Theory of Justice* and *Political Liberalism* Rawls gives an account of justice in which it can intelligibly be predicated of a variety of subjects. Some of these subjects constitute a part[3] of another, so that it can also be said that assessments of justice can be made at different levels. (I will explain this point in detail presently.) Justice is the first virtue of social institutions in general. A subset of these social institutions collectively constitutes the basic structure of society, which is the *primary subject* of justice.[4] Social institutions that constitute part of the basic structure I call 'basic structure institutions'. Non-basic structure social institutions can also be assessed for justice, even though, Rawls tells us, '[t]here are… institutions[5] in regard to which the concept of justice does not ordinarily apply', such as (in some circumstances) rituals.[6] As we have seen, there are also other possible subjects of justice, including moral agents and individual transactions.

Rawls produces various formulations to explain the notion of the basic structure. It is described as: 'the way in which the major social institutions distribute fundamental rights

[3] I will shortly refine this way of speaking.
[4] *TJ* 7.
[5] Rawls does not seem to consider whether institutions other than social institutions can be assessed for justice. His definition of an institution ('a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like' (*TJ* 55)) and his examples ('games and rituals, trials and parliaments, markets and systems of property') all suggest that he has social institutions exclusively in mind. This is no less the case for the comment quoted in the text.
[6] *TJ* 58.

and duties and determine the division of advantages from social cooperation';[7] 'the way in which the major social institutions fit together into one system, and how they assign fundamental rights and duties and shape the division of advantages that arises through social cooperation';[8] and '[society's] main political, constitutional, social, and economic institutions, and how they fit together to form a unified system of social cooperation over time'.[9] These quotations illustrate that the basic structure is not simply the sum total of the major social institutions of society; rather it is the way in which they fit together or combine. This conception of the basic structure will be important in trying to understand how justice can be predicated of both the individual social institutions within the basic structure, and of the basic structure itself. 'The principles of justice,' Rawls says, 'apply to the basic structure and regulate how its major institutions are combined into one scheme'.[10] It seems that what it means for the principles of justice to apply to the basic structure is that they regulate this schematization. In contrast, Rawls notes, the principles 'do not apply directly to or regulate internally institutions and associations within society'.[11]

Rawls's proposed principles are principles of social justice, and as such their primary subject is the basic structure of society. But we have seen that Rawls thinks justice can be predicated of a wide range of subjects. There must be some principles of justice that regulate these other subjects. And indeed, Rawls makes it clear that we can assess the justice of these subjects, and understand the way in which they relate to the justice of the basic structure:

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[7] *TJ* 7.
[8] *PL* 258.
[9] *PL* xliii. The last formulation provides Rawls's most ecumenical statement of the type of institutions comprehended by the basic structure. There are many similar passages: see also, e.g., *PL* 201, *PL* 376.
[10] *PL* 274.
[11] *JFR* 10 (emphasis added).

> We may also distinguish between a single rule (or group of rules), an institution (or a major part thereof), and the basic structure of the social system as a whole. The reason for doing this is that one or several rules of an arrangement may be unjust without the institution itself being so. Similarly, an institution may be unjust although the social system as a whole is not. There is the possibility not only that single rules and institutions are not by themselves sufficiently important but that within the structure of an institution or social system one apparent injustice compensates for another. The whole is less unjust than it would be if it contained but one of the unjust parts. Further, it is conceivable that a social system may be unjust even though none of its institutions are unjust taken separately: the injustice is a consequence of *how they are combined together* into a single system. One institution may encourage and appear to justify expectations which are denied or ignored by another. These distinctions are obvious enough. They simply reflect the fact that *in appraising institutions we may view them in a wider or a narrower context*.[12]

Shortly I will ask what the implications of these wider and narrower contexts of appraisal are for our ability to assess the various subjects of justice that Rawls puts on the table, but for now I want to establish that this passage introduces a distinction between two ways of assessing a basic structure institution for justice. First, such institutions can be assessed simply *qua social institution*, or in a *narrow context*. It is on this assessment that we may find that an institution is unjust even though it constitutes part of a just social system. Conversely, it may in itself be just, and yet constitute part of an unjust system because of the way it interacts with the system's other constituent parts (which may all also be just in themselves). Note that on Rawls's account it follows from the fact that there are two different kinds of justice assessment, both of which we can coherently perform but which may return contradictory results, that a different set of criteria applies to each assessment. I will sometimes call an institution that is just (or unjust) in the narrow context just (or

[12] *TJ* 57, emphases added.

unjust) *in its own terms*.[13] What Rawls supposes those terms to be and how they relate to the terms on which the basic structure is assessed is what I want to explore.

Assessment of a basic structure institution *qua* social institution is to be contrasted with assessment of the institution *qua aspect of the basic structure*. This is an assessment of justice *in the wider context* or, as I shall sometimes say, justice *in terms of the basic structure*. When appraising an institution in the wider context we have to keep an eye on its position in the basic structure, since this may be finely balanced by the compensatory or complementary[14] effects of other basic structure institutions. In this way we can see that what we considered unjust on its own terms was in fact only an 'apparent injustice' when looked at from the point of view of the basic structure.[15] Now, until this point I have said that basic structure social institutions constitute a part of the basic structure. This is not quite accurate. Recall that the basic structure of society is not all the major social institutions taken together as an aggregated monolith, but rather '*the way in which* the major social institutions fit together into one system'. This is why I say that in the wider context we assess institutions *qua aspect* of the basic structure, rather than *qua*

[13] By which I mean simply the terms which apply to it in itself, regardless of its role in the basic structure. The phrase is not meant to imply that institutions are in any sense 'free' to set their own terms of appraisal, in the manner that we might say of a man with a wayward view of morality, 'Judged on his (own) terms, he's a good person.'

[14] The terminology of 'compensation' is itself odd. Rawls also speaks of 'compensating injustices' (*PL* 279) as if two institutions each unjust on its own terms can be mutually compensating such that they constitute an aspect of a just basic structure. The idea of one injustice *compensating* for another is obscure. What Rawls seems to be gesturing towards is the idea that while one of these institutions would be unjust in the absence of the other, taken together they manifest no such injustice. Or, to put it in the terms that reflect the point being made here, the activities of these two institutions are *complementary*, such that there is justice in *the way they fit together*.

[15] Rawls's choice of adjective here suggests the priority of the assessment in terms of the basic structure. If the injustice really was ('merely') apparent, then the assessment in the narrow context was less an assessment of the institution in its own terms than a *provisional* assessment in terms of the basic structure. Similarly the idea that one institution 'may… appear to justify expectations' suggests that viewing institutions in the narrow context yields mistaken assessments of justice, corrected once one adopts the wider view. But I think the overall tenor of Rawls's remarks in this passage is against this interpretation, and his discussion of the 'appropriate sequence of theories' in *PL* 259-262 seems decisive. Hence I say the injustice is apparent *from the point of view of the basic structure*.

component or constituent part. Sometimes I will use the terminology of part and whole for ease of exposition, but this qualification must always be understood.

2. *The basic structure thesis*

The basic structure of society is the primary subject of justice. The basic structure thesis is about regulative primacy: 'the conception of justice [for the basic structure]… has a certain regulative primacy with respect to the principles and standards appropriate for other cases'.[16] Rawls explains this notion of regulative primacy in his account in *Political Liberalism* of the 'appropriate sequence of theories' that he believes apply to the various subjects of justice:

> The first principles of justice as fairness are plainly not suitable for a general theory. These principles require… that the basic structure establish certain equal basic liberties for all and make sure that social and economic inequalities work for the greatest benefit of the least advantaged against a background of fair opportunity.

These principles are not suitable to (for example) churches and universities, Rawls thinks, because

> [t]heir members usually affirm certain shared aims and purposes as essential guidelines to the most appropriate form of organization. The most we can say is this: because churches and universities are associations within the basic structure, they must adjust to the requirements that this structure imposes in order to establish background justice.[17]

We 'should not assume in advance,' Rawls says, 'that principles that are reasonable and just for the basic structure are also reasonable and just for institutions, associations, and social practices generally.'[18]

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[16] *PL* 257-8.
[17] *PL* 261.
[18] *JFR* 11. Rawls sometimes calls the two principles of justice 'principles for institutions' (e.g. *TJ* 195), but if we are to take this 'appropriate sequence of theories' account seriously, he must mean institutions considered collectively as constituting the basic structure rather than considered

Now it seems to follow from the conjunction of the claims that (i) the basic structure is the primary subject of justice, and that (ii) the basic structure is the way in which the major social institutions fit together, that institutions *within* the basic structure must each be such as to partly constitute the justice of the basic structure. If justice is primarily predicated of the way elements *a, b, c,… n* fit together, then the justice of the combination must be some function of the characters of those elements. Rawls seems to think that this conclusion is equivalent to the observation that there are distinct principles *of justice* for each institution. He says that it is 'the distinct purposes and roles of the parts of the social structure, and how they fit together, that *explains* there being principles for distinct kinds of subjects'.[19] But this is not at all obvious. I have suggested that on Rawls's view the justice of the combination of elements *a, b, c,…n* must be a function of the *characters* of those elements. It does not also follow that it must be a function of the *justice* of those elements. Indeed, if justice is to be judged in the first instance of the basic structure, one might think instead that individual institutions should each be arranged according to principles of efficiency, that is, principles tailored to their role in the social structure, such as to ensure that the result of all institutions being arranged in accordance with their individualized rules is that the basic structure – the way in which all these activities fits together – turns out to be just. Or, to pay better respect to the precision I have advocated on the nature of the basic structure, such as to ensure that the combination of appropriate principle-following social institutions *constitutes* a just basic structure. On

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severally. What might be the appropriate principles for institutions considered *qua institution* is precisely the question to which Rawls does not venture an answer. It is notable that in the quotation in the text Rawls refers to 'institutions' alongside 'associations' (which presumably are not institutions), suggesting that the principles for the basic structure apply to neither, whereas we might have expected him to say that the basic structure principles applied to institutions (since they fall within the basic structure) but not associations (since they – apparently – do not). This further reinforces the distinction between justice in the basic structure and justice in institutions.

[19] *PL* 262 (emphasis added). Compare David Miller's 'modes of human relationship', each with distinctive principles of justice – *Principles of Social Justice* (Harvard University Press 1999) (hereafter *PSJ*). I explain below how Miller's account differs.

this picture, in accordance with Rawls's suggestion, social institutions falling within the basic structure would each have principles applying exclusively to them.[20] But rather than the principles of justice being applied directly to institutions, each institution would play its unique part by satisfying principles specifically designed to add up to a basic structure in which the principles of justice were fulfilled. Institutions would observe *justice-targeted* principles (targeted, that is, at justice in terms of the basic structure); but it does not follow – indeed, on this picture it would seem wrong to say – that they would be observing their *own* principles *of justice*.

But that, it seems, is not Rawls's position. The various parts of the social structure, he claims, exhibit justice in their own way, each being assessed in its own terms, but also comprising an aspect of the justice of the basic structure. Basic structure social institutions can be assessed for justice either *qua* social institution or *qua* aspect of the basic structure of society. Recall at this point the first virtue thesis: in the case of each institution, it is its satisfaction or not of principles of justice that leads us to decide whether or not it needs to be 'reformed or abolished'. It is now clear that this thesis is ambiguous. We need to know whether the principles of justice in terms of which the first virtue thesis is expressed are those that apply to the institution *qua* social institution (as yet unidentified), or those that apply to it *qua* aspect of the basic structure (i.e. Rawls's two principles of justice). In other words, we need to know whether the first virtue of a social institution is justice in its own terms, or justice in terms of the basic structure.[21]

[20] Or, if the same set of principles applied to more than one institution, this would only be contingently so – a matter not quite of coincidence, but of the fact that their roles in the basic structure happened to be relevantly similar.

[21] Compare Jeremy Waldron, 'The Primacy of Justice' (2003) 9 *Legal Theory* 269, 272: 'The claim that justice is the first virtue of social institutions might be read as a generalization that, for every single social institution, justice is the first virtue of that institution. This would be a very ambitious claim. More modestly, it might be read as the claim that justice is the first virtue of the array of institutions that together constitute the basic structure of society.' Waldron takes Rawls

On the second interpretation of the first virtue thesis (FV2), Rawls is saying that social institutions must be just in terms of the basic structure or else be reformed or abolished. If the first virtue thesis is understood as referring to justice in terms of the basic structure then Rawls should say not that the *institution* must be reformed or abolished, but that the *basic structure* must be reformed – which, crucially, may *not* include reforming or abolishing the institution because, as Rawls says, an 'apparent' injustice in this institution can be compensated elsewhere in the basic structure. In Chapter IV I take up this problem by looking at justice in terms of the basic structure, and examining the concept of the basic structure as a 'subject' of justice in more detail. On the first interpretation of the first virtue thesis (FV1), Rawls is saying that a social institution must be just in its own terms or be reformed or abolished. In this chapter and the next I look at the possibility that the first virtue thesis should be understood to refer to justice in the narrow context.

I established above that Rawls believes there are distinct principles of justice for different kinds of subjects, on which they are assessed for justice in a narrow context. The verdict reached by this assessment can be different from that arrived at when the same subjects are assessed in a wider context, in terms of the basic structure. But if this is the case, how should we understand the relationship between the assessment of justice in the narrower context and the assessment in the wider context?[22] Put another way: how does the justice in its own terms of a basic structure institution relate to justice in the basic structure? And if the answer to this question is that there is no relationship between them – there are simply two different, and sometimes opposing, assessments of justice to be

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to intend the second reading, but the burden of my argument so far is that this reading is at least not obviously correct. I hope the quoted passages from *PL* go some way to demonstrating the viability of the interpretation Waldron rejects.

[22] Contrast Wiggins' account of Jouvenel's view, on which justice in the wider context can 'take care of itself' precisely because justice applies differently to different subjects in the narrower context, *without* a basic structure as overarching subject: Wiggins, 'Neo-Aristotelian Considerations on Justice' (p4 n6).

made, then we need an explanation of how this can be. Can there really be two distinct notions of justice for each basic structure institution, one which is measured against criteria that apply to the institution in isolation, *qua* social institution, and one which is measured against criteria that apply to it *qua* aspect of the basic structure? Most importantly, what does the first virtue thesis instruct us to do if these two verdicts conflict?

Suppose I assess an institution at the narrower level and conclude that it is unjust. It is then drawn to my attention that when the institution is viewed in its wider context we recognize how in fact it contributes to the justice of the basic structure. We may go further and say that if that institution were just at the narrower level, this would in fact disturb the justice of the basic structure.[23] How should we now make sense of my claim that the institution is unjust? Has it not been pointed out to me that the view I was taking was *too* narrow? I simply failed to understand how the institution fitted into the bigger picture; I was mistaken about its contribution to justice. But the first virtue thesis, on its first interpretation, will not allow us to draw this conclusion. It tells us that justice is the first virtue of social institutions, considered in their own right – not just of the basic structure. If they are not just they need to be reformed or abolished. Now, *ex hypothesi* at the narrower level (the level of the individual institution) the institution in question is unjust. And yet Rawls does not want to say that it needs to be reformed, because when it

[23] Miriam Ronzoni uses the example of affirmative action or quotas for women, which are in themselves '"unjust", i.e. they violate the principle of fair equality of opportunity; however, their role in the basic structure as a whole may make the whole system more just, i.e. more capable to realize fair equality of opportunity overall' ('What Makes a Basic Structure Just?' (2008) 14 *Res Publica* 213-214). This example, however, is not of an *institution* that is unjust *in its own terms*. Whether affirmative action counts as a social institution is doubtful, but in any case Ronzoni's point is that if the principles that apply to the basic structure are applied directly to the subject in question – here, affirmative action – the verdict is that that subject is unjust. But this does not present a problem. On Rawls's account it is a mistake to apply the principles for the basic structure directly to individual subjects. The problem only arises when we consider the possibility that the injustice of an institution *in its own terms* may nevertheless contribute to the justice of the basic structure. I return to Ronzoni's account of justice in the basic structure in Chapter IV.

is combined with other ('compensating') institutions, it constitutes part of a just basic structure. So in what sense is justice the first virtue of this institution considered in its own terms? In the next section I look at two possible accounts of the relationship between just institutions and a just basic structure, one of which claims to follow Rawls's model, and one of which Rawls himself claimed to be following. Neither of these claims, I will suggest, should be conceded.

3. *How do (just) institutions make for a just basic structure? Two non-Rawlsian accounts*

David Miller's account is in terms of procedures and outcomes. He proposes that we understand the justice that applies to basic structure social institutions as essentially different from the justice that applies to the basic structure itself. There is an instrumental relationship between institutional justice and basic structural justice. The justice exhibited by individual institutions is a means to the end of justice in the basic structure. To put it in Miller's terms, institutional justice is a form of *procedural* justice, because it is focused on the appropriate procedures for achieving the desired *outcome* of social justice. Miller writes: 'In our day-to-day activities in these [professional] roles [within basic social institutions] we are properly guided mainly by considerations of procedural justice; were we to try to promote social justice more directly by bending the procedures, we would very likely end up creating more injustice than we avoided, because our decisions would be inconsistent with those made in institutions parallel to ours.'[24] Justice for individual social institutions therefore consists in the following of procedures that are collectively geared towards achieving social justice. As much as social justice is the overall aim, we cannot aim at it directly within institutions because this would be counterproductive;

[24] *PSJ* 106-7.

instead 'our aim would be to identify what a just distribution of the good in question would look like, and then discover the procedure that is likely to get us closest to that outcome.'[25] The accordance of an institution's activities with its appropriate procedure (e.g. universities admitting students according to merit) constitutes justice for that institution, even if justice at the level of the basic structure is more complex (e.g. fair equality of opportunity, involving further institutions compensating for differences in social background and so on). Individual procedural justices thus add up to social justice through the structure of institutions.

Miller contends that his position coincides with that taken by Rawls,[26] but he seems to be mistaken in this.[27] His proposal is inconsistent with Rawls's pronouncements about appraising institutions in a wider or a narrower context. Rawls is clear that on his interpretation of what it means for an institution to be just, 'an institution may be unjust although the social system as a whole is not'.[28] If principles of justice for institutions were procedural principles targeted at justice in the basic structure, then a collection of just institutions would *necessarily* add up to a just basic structure. All it could mean for an institution to be unjust would be that it was failing to follow the procedures calculated to produce a just basic structure. If the institutional procedures had been correctly arranged, an unjust institution would, by failing to follow the procedures, render the basic structure unjust. Or, at least, if the basic structure remained just this could only be because the minor procedural failings on the part of individual institutions were insufficient to produce injustice on the scale of the basic structure. But it is clear from the substantial passage quoted above (viz. *TJ* 57) that the basic structure might be just not

[25] *PSJ* 107.
[26] 107 n31. It is not clear for just how much of his account he makes this claim.
[27] At least, if we assume that Rawls's position does not change from *TJ* to *PL*, which we shall have reason to doubt in Chapter IV.
[28] *TJ* 57.

simply despite containing unjust institutions, but precisely *because* it contains institutions that are unjust in their own terms whose complementarities add up to justice in the basic structure. One 'unjust part' of the basic structure can combine with another unjust part to render the basic structure as a whole more just. This could hardly be the case if the appropriate standard by which to judge the justice of social institutions was determined by its role in contributing to a just basic structure.

The difficulty with Miller's account is that it seems to make the basic structure not the primary subject of justice, but the only (true) subject of justice – because what counts as justice for institutions is ultimately determined by the outcome (social justice) that they are designed to achieve. What Miller has in mind for institutions are the principles of efficiency rejected above. But he does think that there is 'a justice of procedures that can be identified independent of the outcomes to which these procedures lead'.[29] He suggests several principles (equality, accuracy, publicity and dignity) that ought to be observed by allocative procedures out of respect for the individuals who are subject to it. A procedural injustice of this kind would occur when, regardless of outcome, the procedure failed in one way or another to accord individuals the respect they are due.[30] And there may be a conflict when 'the pursuit of outcome justice would require us to violate one of the norms of procedural fairness.'[31] But there is a puzzle here. It looked as if when Miller said that we were 'guided by procedural justice', what we were being guided towards was outcome justice. Each institution being guided by procedural justice was presented as an indirect, but ultimately more effective, means of achieving outcome justice. Now it appears that procedural justice, far from being a means towards outcome justice, may work against it in some circumstances.

[29] *PSJ* 94.
[30] *PSJ* 99-101.
[31] *PSJ* 106.

The explanation is that Miller's notion of being 'guided by procedural justice' is ambiguous between (i) being guided by the rules of the procedure, which are themselves aimed at securing social justice, even though we in following them do not make it our direct aim, and (ii) being guided by the independent norms of what we might call 'procedural justice proper' (equality, dignity, and so on). It is by running these together under the label of 'procedural justice' that Miller appears to give us a notion of institutional justice that can come to Rawls's aid. But this appearance is deceiving. In the first sense, institutions are still being assessed in terms of the basic structure, whereas we were looking for them to be just in their own terms. In the second sense, institutions are being assessed in their own terms,[32] but these terms bear no particular relation to the justice of the basic structure. Rather, there may have to be a trade-off between procedural justice in the institution and social (or outcome) justice in the basic structure. Neither sense gives us what we want: an explanation of how institutions can exhibit justice in their own way, but also combine to constitute justice of a different kind at the level of the basic structure.

On Miller's instrumental account, the justice of institutions in isolation – procedural as opposed to outcome justice – is ultimately determined by the principles for the basic structure. This relationship of procedure to outcome is not what Rawls has in mind. He thinks, rather, that the principles for the basic structure *constrain* the principles for institutions and associations. In adopting this position Rawls claims in *Justice as*

[32] In fact this is not quite accurate. They are being assessed in terms that apply to procedures *in general*. This gets us no closer to understanding how the 'distinct purposes and roles of the parts of the social structure, and how they fit together' '*explains* there being principles for distinct kinds of subjects'. It is in any case clear that Rawls does not think that the justice of an institution *qua* institution is procedural justice proper. He deals separately with what he calls 'formal justice', or 'justice as regularity', which is 'the regular and impartial administration of public rules', (*TJ* 235) or the 'impartial and consistent administration of laws and institutions, *whatever their substantive principles*' (*TJ* 58, emphasis added). It is these 'substantive' principles of justice for institutions that we have still to identify.

Fairness: A Restatement that he is following the work of Jon Elster on 'local justice'. And indeed, in saying that the 'principles for the basic structure constrain (or limit), but do not determine uniquely, the suitable principles of local justice'[33] Rawls echoes Elster's account of local justice principles, which 'may be constrained by guidelines laid down by the center'.[34] The problem under examination – how to understand the relationship between justice of institutions considered *qua* institution and *qua* aspect of the basic structure – looks like a problem of how to understand 'local justice'. Refining Elster's terminology, Rawls in *Justice as Fairness* states that there are three levels of justice – local, domestic, and global.[35] 'Justice as fairness starts with domestic justice – the justice of the basic structure. From there it works outward to the law of peoples and inward to local justice.'[36] It is interesting that whereas Rawls's proposals extending justice as fairness outward to the law of peoples have engendered a lively debate,[37] very little has been said about his gestures in the other direction. When they are mentioned they are often either misunderstood,[38] or accepted uncritically.[39] In fact local justice presents just as much of a problem as global justice, philosophically if not politically.

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[33] *JFR* 11-12.
[34] Jon Elster, *Local Justice: How Institutions Allocation Scarce Goods* (Russell Sage Foundation 1993) (hereafter *LJ*) 4.
[35] Elster talks of 'local' and 'global', but his 'global' corresponds to Rawls's 'domestic'. I adopt Rawls's usage here.
[36] *JFR* 11.
[37] See, e.g., Rex Martin and David E. Reidy (eds), *Rawls's Law of Peoples: A Realistic Utopia?* (Blackwell, 2006).
[38] See, e.g., James Gledhill, 'Political Theory and Social Practices' (PhD thesis, London School of Economics 2010): 'Local justice focuses on the mechanisms through which principles of justice are realized in particular institutional situations' (30). If the 'principles' here are understood as the principles for the basic structure (as seems most natural), this sounds more like Miller's account in terms of procedure and outcome than Rawls's. Nor is it consonant with the meaning Elster ascribes to the notion of local justice. Finally, in Rawls's usage 'local justice' applies to 'associations within the basic structure' as well as institutions that are part of it. Rawls is keen to distance himself from the idea that it is any part of the role of such associations to 'realize' the principles for the basic structure. Local justice is about the principles that apply to them *rather than* to the basic structure.
[39] Samuel Freeman, 'The Law of Peoples, Social Cooperation, Human Rights, and Distributive Justice' (2006) 23 *Social Philosophy and Policy* 29, 40-41.

Evidently Rawls thinks that he can co-opt Elster's work to round out his picture of the relationship between local and domestic justice, but this is far from being the case. Elster's approach does not fit neatly into Rawls's theory. Elster does recognize that there is a problem of local justice: 'the overall effect of many locally just decisions may be the production of global [in Rawls's terms, domestic] injustice.'[40] He calls this 'a lacuna in the theory of distributive justice'[41] but focuses his efforts on analysing the methods of local and domestic justice separately rather than on solving the problem of how they might be made to accommodate each other. '[S]ometimes,' he notes, 'the total effect of local decisions is to create a pattern of burdens and benefits that seems unfair, inefficient, or both. The importance of such effects may be more than marginal, but certainly less than pervasive.'[42] But this is an unfortunate empirical difficulty rather than a conceptual puzzle about the way in which the justice of institutions *qua* institution makes for justice at the domestic level. And it is a difficulty that is explained by Elster's different conceptions of justice at local and domestic level. Local justice is about relatively simple and isolated problems of allocation – who is to get a kidney transplant, who is to be selected to fight in wartime, and so on. Local justice principles are 'designed by relatively autonomous institutions' and concern 'allocation in kind' of goods and burdens. Domestic principles, by contrast, are 'globally redistributive', are 'intended to compensate for bad luck' and 'take the form of cash transfers'.[43] Elster's notion of domestic justice is therefore significantly different from Rawls's. It is an essentially luck-egalitarian conception, seeing justice as a cancelling-out of undeserved bad luck rather than a Rawlsian sharing of the benefits and burdens of cooperation. And it principally

[40] *LJ* 114.
[41] *LJ* 132.
[42] *LJ* 132.
[43] *LJ* 4.

concerns redistributive taxation, which is only one aspect of Rawls's account of social justice.

What then are the 'constraints' that led Rawls to see Elster's work as congruent with his own? Elster's account makes these seem more psychological than operational. That is, it is not that the system we have in place for domestic justice rules out certain allocative moves within institutions. This kind of constraint is what we would expect if the basic structure were the primary subject of justice. It is also the approach that Rawls apparently wants to endorse. Elster's discussion of the interaction of local and domestic justice focuses instead on the way in which our ideas about what is just at the domestic level might influence how far we are willing to endorse the kind of allocative principles that are commonly used at local level. For example, a theory of justice that subscribed to ethical individualism might be inconsistent with the allocation of burdens common in insurance systems, where (to take one instance) 'young male drivers pay higher rates than drivers in other categories'.[44] Elster is interested in cataloguing the kind of local justice principles that are actually used in the world, and wants to see how our understanding of domestic justice, as informed by theories such as Rawls's, might lead us to revise or reject them as principles of justice. Even if there is a stronger sense in which principles of local justice are constrained by principles of domestic justice, on Elster's account the relationship is all in one direction. There does not seem to be any way in which the justice or injustice of institutions at local level combine to constitute a just basic structure. While decision makers in local institutions may have to bear in mind the constraints they are placed under by the principles applicable at domestic level, neither they nor the architects of their institutions have at any point to consider how the decisions might contribute towards the satisfaction of those principles at the domestic level.

[44] *LJ* 196.

This is hardly surprising, given how different Elster's theoretical framework is from Rawls's. Elster need not even entertain the possibility of the justice or injustice of individual institutions combining to constitute a just basic structure, because he thinks of local and domestic justice as taking fundamentally different forms and serving essentially different purposes. When he does discuss Rawls directly, Elster notes that Rawls's theory 'is not directly relevant for local justice. Its proposals are too broad to have clear implications for small-scale problems.'[45] But he goes on to ask how the 'general spirit of the theory' could 'illuminate issues of micro-allocation.' For instance: 'The concern for the worst-off certainly suggests specific policies in many arenas. Employment offices might give priority to those with the longest periods of unemployment; doctors to those with the shortest life expectancy; admissions officers to the educationally disadvantaged; and so on.'[46] But this suggestion misses the point of the idea that the basic structure is the primary subject of justice: it is only to the basic structure that the difference principle applies. Nor does it cohere with the role that Rawls gives to the concept that he labels 'local justice' in the discussion in *Justice as Fairness*. Rawls thinks that the principles for the basic structure *constrain* the possible principles at local level, not that the latter should be *inspired* by the same general concerns (e.g. that the worst-off be made as well-off as possible). It may turn out that employment offices' giving priority to those with the longest periods of unemployment (rather than, say, to those who are easiest to help into work) will actually lead to a worse position overall in terms of primary goods for those who turn out to be the worst-off group in society (who, plainly, are not the same group as those who have been out of work for longest). This may be, for instance, for reasons having to do with the positive effects on the economy of maximizing the number of people in work, regardless of the time spent without a job by those who remain

[45] *LJ* 229.
[46] *LJ* 229.

unemployed. If that is the case then giving priority to those who are easiest to help into work must be the policy recommended by the principles for the basic structure. To apply the difference principle to local problems in the way Elster suggests is to fail to understand the basic structure thesis. Ironically, it appears to be precisely the kind of mistake that Rawls counsels against in his invocation of the concept of local justice.[47]

Miller's and Elster's accounts stand on opposite sides of the position Rawls wishes to occupy. For Miller, institutions are to be designed with a view to social justice; their own justice consists in being conducive to this outcome.[48] For Elster, institutions' allocative functions are independent of social justice concerns, because local justice is 'noncompensatory', even if this may ultimately lead to practical difficulties in achieving through centralized redistribution the luck-compensatory aims of domestic justice. On Miller's view social institutions are assessed for justice in terms of the basic structure (subject to concerns about 'procedural justice proper'). On Elster's view they are assessed in their own terms, subject to a process of reflective equilibrium in which the principles applying to them *qua* institution are harmonized with our general theories about justice. Rawls, I have argued, tries to hold both of these views; it remains to be seen whether this is a tenable position.

Two matters in this discussion remain to be cleared up. First, Miller's and Elster's conceptions of an institution differ significantly from the one I have attributed to Rawls. For Miller, the justice of institutions consists in participants *in* institutions (or even

[47] Elster recognizes that 'In most cases… it would clearly be a mistake to defend specific allocative policies by claiming that they are supported by Rawlsian reasoning' (*LJ* 229) but he does not refer to this programmatic reason why.

[48] It should be admitted, however, that Miller's conception of justice in the basic structure is itself importantly pluralistic, taking in separate principles of need, desert and equality. Therefore, insofar as the goods distributed by a certain institution are associated exclusively with one of these principles, that institution will need to concern itself with this principle alone, even though the satisfaction of that principle, for those goods for which it is appropriate, will nevertheless constitute part of the achievement of justice in the basic structure.

professionals in organizations) following the rules, and the rules are in turn set up so that the result of everyone following the rules – rather than each trying directly to achieve social justice from within their necessarily restricted domains – is justice in the basic structure. But for Rawls, as we have seen, institutions *are* sets of rules. They are practices, as embodied in the actual activities of those who engage in them, so there is no conceptual room on Rawls's analysis for institutions to *follow* rules. Miller explicitly opposes his account to Hayek's argument that justice consists only in agents following rules. He therefore attempts to fight him on his own ground, by showing how justice can be viewed as such while still accommodating the notion of outcome justice that Hayek rejects.[49] In his version the relevant agents are professional ones, and the relevant rules the rules of their institutions. It is implicit in my reconstructed response to Hayek in the previous chapter that Rawls's response is more radical than this, attributing social justice directly to our social practices rather than either to the outcomes that result from them or to the agents whose interactions constitute them.

Secondly, Rawls invokes Elster's idea of local justice to deal not only with institutions that are part of the basic structure, but also with what he calls 'associations'. These are sometimes said to be 'within the basic structure'.[50] This presents a further complication and, I think, highlights the distance between Rawls's and Elster's conceptions of local justice. For Elster local justice is about institutions as agents. For Rawls it is about associations, as opposed to institutions. Elster thinks that public institutions in society have their own principles of just allocation, which may conflict with the (luck-egalitarian) justice of society as a whole. Rawls thinks that associations

[49] What Rawls made of the notion of 'outcome justice' is not clear. The difference principle specifies an outcome, but its precise manner of operation in social institutions is bound up with the complex idea of pure procedural justice. I discuss pure procedural justice in Chapter IV, but do not address this aspect of it.
[50] E.g. *JFR* 11, 163.

have their own principles of justice, which are constrained by the requirements of justice of the basic structure. That is Rawls's problem of local justice. I deal with these issues, and set out the distinction between institutions and associations, in the next chapter, in which I explore the first virtue thesis further through the example of the family.

III. The first virtue thesis: the case of the family

1. Justice and the family

Much of the work on justice and the family in the decades since *A Theory of Justice* was published has been done within the framework of Rawls's theory. Some have argued that Rawls's inattention to the problem of the justice of the family is a defect that could be remedied within the theoretical apparatus he has assembled;[1] others that Rawls's theory, properly interpreted, is already able to accommodate family justice.[2] Still others have seen Rawls's cursory treatment of the family, or even his unwillingness to recognize its specific difficulties, as fatal to his project.[3] The family presents an especially useful example for investigating Rawls's understanding of the subjects of justice, because the prominent accounts so far have failed to make the important distinction between the family *qua* institution and *qua* aspect of the basic structure.

In this section I illustrate the ambiguity of the first virtue thesis in Rawls's work by reference to the example of the family. I will show that the debate about the institution of the family in the philosophical literature has been hampered by a lack of clarity about the sense in which the family should be just. I hope this will also go some way to rendering the ambiguity more compelling as a point of interpretative interest in Rawls's work. I will suggest that the case of the family strongly suggests that the best way to interpret the first virtue thesis is on the second interpretation, that is, that social institutions must be just in

[1] S Okin, *Justice, Gender, and the Family* (Basic Books 1989) (hereafter *JGF*); to some extent Martha Nussbaum, 'Rawls and Feminism', in Samuel Freeman (ed), *The Cambridge Companion to Rawls* (Cambridge University Press 2003).
[2] Will Kymlicka, 'Rethinking the Family' (1991) 20 *Philosophy and Public Affairs* 77; Joshua Cohen, 'Okin on Justice, Gender, and Family' (1992) 22 *Canadian Journal of Philosophy* 263.
[3] Deborah Kearns, 'A Theory of Justice – and Love: Rawls on the Family' (1983) 18 *Politics* 36.

terms of the basic structure. However, in order to understand fully Rawls's remarks about family justice, and in particular to make sense of the notion of 'local justice', I distinguish between the family considered as an institution and families considered as associations. This distinction is crucial to understanding the family's equivocal status within the basic structure.

Philosophers have asked, both as a matter of interpretation and as a matter of substantive theory, whether the family is part of the basic structure to be 'regulated by' the principles of justice. But often this has been without settling the prior question what it would actually mean for the family to be so regulated. Clearly the family is not supposed to be some kind of microcosm of interaction which satisfies the two principles of justice in isolation from any other social institutions. This would be absurd: after all, the basic liberties encompassed by the first principle are political liberties such as the right to vote and to be eligible for public office;[4] it would make no sense to say that such rights must be guaranteed within the family. But this observation can be broadened to the whole range of social institutions. The political constitution is one of the major social institutions, but Rawls is clear that the difference principle should not be constitutionally embedded.[5] The principles of justice are not satisfied within the constitution alone any more than they are within the family alone. Indeed, if what it means for an institution to be 'directly' regulated by the principles of justice is that the principles are fully satisfied 'within' the institution, then no individual institution is 'directly' regulated by the principles.

These observations are relevant because they indicate an important line of response to concerns about the very idea of justice in the family. For some, justice is an

[4] *TJ* 61.
[5] *PL* 229ff.

inappropriate standard by which to measure certain institutions. In the ideal family, for example, 'relations are governed in large part by spontaneous affection and… in consequence, the circumstances of justice prevail to a relatively small degree.'[6] If we were to exchange the 'spirit of generosity' for a 'judicious temper of unexceptionable integrity', we would be diminishing rather than enhancing the moral value of the family.[7] But perhaps these criticisms of the notion of justice in the family are the result of a false picture of what it means for an institution to be regulated by the principles of justice. Rawls doesn't help because he says that the family is not *directly* regulated by the principles, as if some institutions are – but it is not clear that any institution is directly regulated by them.[8]

2. *The family as an institution*

Rawls's comments on the status of the family in the basic structure are not entirely consistent, but it is possible to discern in his scattered remarks a progression towards a view that coheres with his account of social institutions in general. In *A Theory of Justice* Rawls cites 'the monogamous family' among 'examples of major social institutions', alongside 'the legal protection of freedom of thought and liberty of conscience, competitive markets [and] private property in the means of production'.[9] In *Political Liberalism*, by contrast, Rawls no longer refers to a specific form that the family might take, but cites instead 'the nature of the family' as the relevant institution.[10] The rationale that Rawls gives in *Justice as Fairness* for including the family in the basic structure explains this refinement: 'the family is part of the basic structure [because] one of its essential roles is to establish the orderly production and reproduction of society and of its

[6] M Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press 1982) 33.
[7] Sandel, *Liberalism and the Limits of Justice* (n6) 33.
[8] Sometimes he says instead that they are not 'internally' regulated by them. See n34 below.
[9] *TJ* 7.
[10] *PL* 258. See p10 n28 above.

culture from one generation to the next.'[11] He goes on specifically to repudiate the narrow view taken in *Theory*: 'no particular form of the family (monogamous, heterosexual, or otherwise) is so far required by a political conception of justice so long as it is arranged to fulfil these tasks [scil. raising and caring for children, ensuring their moral development and education into the wider culture] effectively and does not run afoul of other political virtues.'[12] In other words, the institution of the family is whatever institution in society as a matter of fact fulfils this 'essential role'; since Rawls entertains no serious doubt that this will turn out to be something like the family as we know it, he can afford to refer to it as 'the nature of the family' rather than, for example, 'the means of reproduction of society'.[13]

In *Political Liberalism* Rawls, in discussing the strategy of *A Theory of Justice*, says: 'Other major matters are omitted, for example, the justice of and in the family, though I do assume that in some form the family is just. The underlying assumption is that a conception of justice worked up by focusing on a few long-standing classical problems should be correct, or at least provide guidelines for addressing further questions.'[14] The ambiguity between two senses in which the family could be just is evident here: does Rawls mean that he takes for granted, in formulating principles of justice for the basic structure, that the family is just in its own terms? On this view, the assumption of the justice of the family is part of the general strategy adverted to in the previous section, of developing a theory of justice for a certain subject – the basic structure – and trusting that

[11] *JFR* 162. Note that Rawls's reason for locating the family in the basic structure is not an instance of any of the general reasons he gives across *TJ*, *PL* and *JFR*. Those, identified by Samuel Scheffler (*Equality and Tradition*: *Questions of Value in Moral and Political Theory* (OUP 2010) 131-2), are: (i) its profound and pervasive effects, (ii) its shaping of citizens' wants and aspirations, and (iii) its role in enabling a system of pure procedural background justice.
[12] *JFR* 163.
[13] It is a similar attempt to repair his 'Western liberal democracy' bias that leads Rawls to amend 'private property in the means of production' (*TJ* 7) to 'the legally recognized forms of property' (*PL* 258). See p10 n28 above.
[14] *PL* xxxi.

the justice of other subjects will become clearer in the light of the theory for this subject. Critics might argue that this is an unhelpful assumption to make, but Rawls makes clear that he is focusing on a particular subject of justice, and the justice of the family might have to be granted in the context of formulating a theory for the basic structure.[15] Or does Rawls mean that he takes it for granted (perhaps because the abolition of the family is practically unthinkable) that the family 'in some form' recognizable to us as such will turn out to be an institution that forms part of the basic structure, and will therefore be just in terms of the basic structure? This is a much more philosophically significant assumption. Instead of being a stipulation to simplify the task at hand, or a bracketing out of a tangential issue, it gives Rawls's critics a hostage to fortune: if it can be shown that a just basic structure as Rawls understands it could not conceivably contain the family as we understand it, then there is a problem. Either the 'monogamous family' has to go, or Rawls's construction of a just basic structure must be amended somehow.

The discussion of this point in *Theory* seems to indicate the second, more significant, interpretation. Rawls says: 'Now I shall assume that the basic structure of a well-ordered society includes the family in some form, and therefore that children are at first subject to the legitimate authority of their parents. Of course, in a broader inquiry the institution of the family might be questioned, and other arrangements might indeed prove to be preferable.'[16] The idea is that any viable basic structure (within the terms of a manageably conservative inquiry) will include the institution of the family, so there must be a just version of this institution to be found. And of course there is one well-known passage in which Rawls's language recalls his expression of the first virtue thesis. That thesis holds, as we have seen, that a social institution that is unjust must be reformed or

[15] That is not to say that Rawls can necessarily assure us that he has the theoretical resources to provide a convincing account of the 'local' justice of the family: we have seen in the previous section that this may not be the case.
[16] *TJ* 462-3.

abolished. The only case of Rawls explicitly considering the 'abolition' of a central social institution is that of the family, on the grounds that it conflicts with the principle of fair equality of opportunity. 'Even in a well-ordered society that satisfies the two principles of justice,' he notes, 'the family may be a barrier to equal chances between individuals.'[17] Then later he asks:

> Is the family to be abolished then? Taken by itself and given a certain primacy, the idea of equal opportunity inclines in this direction. But within the context of the theory of justice as a whole, there is much less urgency to take this course. The acknowledgement of the difference principle redefines the grounds for social inequalities as conceived in the system of liberal equality; and when the principles of fraternity and redress are allowed their appropriate weight, the natural distribution of assets and the contingencies of social circumstances can more easily be accepted.[18]

Whatever the actual argument against abolition being made here, it is at least clear that the justice of the family is being understood in terms of the basic structure, and that is what is important for our purposes. For the concern could have been that the family has its own principles of justice and if these are satisfied – if the family is just in its own terms – then the justice of the basic structure could be compromised. This would be an instance of Elster's worry that there might be irremediable conflicts between local and domestic justice owing to the fact that they serve different values. But this does not seem to be Rawls's concern. The thought is instead that the justice of the basic structure is threatened by the *fact of* the family, that is, by the very existence of an institution of its kind in society; it is not threatened specifically by the *justice of* the family. It is threatened by the fact that parents will inevitably pass on certain advantages and privileges to their offspring, and will systematically – and often justifiably, given the acknowledged value of the family – favour the interests of their children, thus further entrenching inequality of opportunity in society.

[17] *TJ* 301.
[18] *TJ* 511-2.

The case of the family, then, gives us provisional support for the idea that the first virtue thesis should be understood on its second interpretation – that social institutions must be just in terms of the basic structure. This interpretation also offers a bulwark against criticism that justice cannot be the first virtue of the family because the family is not justice-apt. It may be true of some social institutions considered in isolation from the basic structure that justice is an unlikely candidate for their first virtue, or even that justice seems an inappropriate dimension of assessment altogether. As regards the family, we can easily agree with Sandel and others that, for instance, generosity and affection are more fitting virtues than justice. But this is not incompatible with saying that when looked at from the point of view of the basic structure, justice is the first virtue of the family, as it is of all the social institutions whose combination constitutes that structure. That is to say: if, owing to the nature of the family, the basic structure of society is not just, then the family must be reformed or – more radically – abolished in order to make it just. We can also see that to assess the plausibility of the first virtue thesis in respect of the family by imagining families governed by a 'judicious temper of unexceptionable integrity' in its members is to miss its point. If justice in institutions is interpreted in terms of the basic structure, it should not be measured by the attitudes of the individuals participating in them,[19] but rather in the effect of its combination with other institutions on the justice of the basic structure. This is in contrast to virtues such as generosity and affection, which can only be understood as virtues of individuals participating in institutions.

At other times, however, Rawls does indicate that he takes for granted that there are principles of 'local justice' that apply specifically to the family. The first 'psychological law' that Rawls invokes in his explanation of the development of the sense of justice is

[19] In the case of the family, individual conduct is presumably assessed in terms of local justice, as well as against other non-justice standards. See p48 below on 'The family as an association'.

that '*given that family institutions are just*, and that the parents love the child and manifestly express their love by caring for his good, then the child, recognizing their evident love of him, comes to love them.'[20] It is fairly obvious in the context that this is not the 'facile assumption' of the justice of the family that Susan Moller Okin thinks it is.[21] Rawls means '*provided that* family institutions are just', not '*since it is true that* family institutions are just'. The interesting question is what he thinks counts as justice for these family institutions. Here apparently it must be justice in their own terms, not justice in terms of the basic structure, because he is talking about the conditions that have to obtain in order to sustain justice in the basic structure. It couldn't be that one of those conditions was justice in the basic structure itself. In fact, I will argue, this should not disturb our provisional conclusion. Despite Rawls's reference to 'family institutions', this passage should not be interpreted as adverting to the possibility that the family as an institution could be just in its own terms. I come to this argument after briefly illustrating the same ambiguity in Okin's critique of Rawls on the family.

It has been observed before that Okin sometimes seems to take for granted the mistaken view that all basic structure institutions must be made just by ensuring that the principles of justice apply directly to them. She notes 'Rawls's failure to subject the structure of the family to his principles of justice' and argues that Rawls should 'require that the family, as a major social institution affecting the life chances of individuals, be

[20] *TJ* 490 (emphasis added).
[21] S Okin, 'Justice and Gender: An Unfinished Debate' (2004) 72 *Fordham Law Review* 1537, 1542. Rawls's law is about what naturally follows provided favourable conditions obtain: 'given that family institutions are just, and that the parents love the child and manifestly express their love by caring for his good, then the child, recognizing their evident love of him, comes to love them' (*TJ* 490).

constructed in accordance with the two principles of justice.'[22] This interpretation of Rawls is in keeping with her view that

> [w]henever the basic institutions have *within them* differences in authority, in responsibility, or in the distribution of resources such as wealth or leisure, the second principle requires that these differences must be to the greatest benefit of the least advantaged and must be attached to positions accessible to all under conditions of fair equality of opportunity.[23]

Okin apparently intends the italicized 'within them' distributively rather than aggregatively, so that the difference principle imposes requirements on each institution considered separately, rather than the basic structure as constituted by the way these institutions fit together.[24] But Okin's more cogent criticism is that Rawls's apparent assumption that a viable just basic structure will include the institution of the family is unwarranted. In 'Justice and Gender', for instance, she offers examples to show that a society whose basic structure satisfied the principles of justice could not include the family as a gendered institution on contemporary lines. Among the basic political liberties, for example, free choice of occupation is compromised by the culturally entrenched inequality in the burden of housework and childcare.[25] In these passages Okin takes the line that the family ought to be just from the point of view of the basic structure. Her complaint is that in fact it is not, and Rawls is culpably complacent in assuming it to be so. (Indeed, some of her argument is targeted at affirming that the family should be considered *part of* the basic structure, in the face of Rawls's apparent indecision on this point.[26])

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[22] *JGF* 97.
[23] *JGF* 93 (emphasis added).
[24] Véronique Munoz-Dardé has pointed out this error in the case of the family: 'Rawls, Justice in the Family and Justice of the Family' (1998) 48 *Philosophical Quarterly* 335, 347.
[25] Susan Moller Okin, 'Justice and Gender' (1987) 16 *Philosophy and Public Affairs* 42, 67.
[26] 'Surely Rawls is right in initially naming it as one of those basic social institutions that most affect the life chances of individuals and should therefore be part of the primary subject of justice' (*JGF* 96).

At other times Okin seems to think that the family should be just in its own terms. On some occasions multiple ascriptions of 'justice' are apparently conflated without any indication that some differentiation should be understood. The following passage is especially illustrative of the kind of confusion about justice assessments that I have been examining:

> … in the real world, justice is a virtue of fundamental importance for families, as for other basic social institutions. An important sphere of distribution of many social goods, from the material to the intangible, the family has a history of distributing these goods in *far from just ways*. It is also, as some who have overlooked its *internal justice* have acknowledged, a sphere of life that is absolutely crucial to moral development. If *justice* cannot at least begin to be learned from our day-to-day experience within the family, it seems futile to expect that it can be developed anywhere else. Without *just families*, how can we expect to have a *just society*? In particular, if the relationship between a child's parents does not conform to *basic standards of justice*, how can we expect that child to grow up with a *sense of justice*?[27]

Are the family's methods of distribution 'far from just' from the point of view of the basic structure? This would imply that the presence of the institution of the family as it has been manifested historically should be regarded with suspicion in today's society; that the family presents an obstacle to a fair distribution of the benefits and burdens of social cooperation, and that we should consider its reform, presumably at state level. In other words, the justice of the *basic structure* requires the reform or abolition of the family. Or has the family failed in its own terms; that is, has it failed to live up to the standards of distribution that apply peculiarly to the family? This would imply that family members – presumably husbands for the most part – need to reassess and correct their flawed conception of their role and bring their conduct into line with the principles of family justice (whatever they might be).

[27] *JGF* 135 (emphases added).

Most significant is Okin's assertion that we cannot expect to have a just society without just families. If this is a theoretical rather than an empirical matter then it is an articulation of the very question at issue. If justice is always to be assessed from the point of view of the basic structure, and if Rawls is right that what may appear to be unjust when considered in isolation can on a wider view be understood as part of a mutually compensatory network of institutions collectively comprising a just basic structure, then there is no conceptual difficulty in accepting that a just basic structure can contain an (apparently) unjust family institution. If it is an empirical question it amounts to this: how can we expect to have a just society – that is, a society with a just basic structure, but also in which people generally act from a sense of justice, as Rawls would have it, and are committed to just institutions – unless children are imbued with that sense of justice through their upbringing?[28] But if the idea is that children are to learn about the concept of justice, and to come to appreciate its importance, from their understanding of what justice means within a family, and that is a form of justice that is peculiar to the family, then it is not clear that Rawls commits any error at all in omitting the justice of the family from a theory of justice as it applies to the basic structure of society. He has set out his agenda as the construction of a theory for the basic structure, acknowledging that this does not constitute a general theory for all subjects. He can accept Okin's conclusion, but point out that it was never part of his project to provide a theory of the local justice of families. Only if assessments of family justice were to be made in terms of the principles for the basic structure would Rawls be guilty of a damaging omission.

To recap: Rawls's consideration of the abolition of the family speaks in favour of a picture of social institutions being assessed for justice in terms of the basic structure. This interpretation makes best sense of the worry that the family's very existence poses a

[28] See *JGF* 97-101.

threat to one of the central pillars of a just basic structure, that is, fair equality of opportunity. Nevertheless Rawls does think that there is a significant question to be asked about the 'local justice' of the family, even if he does not see it as his task to attempt to answer it. But the local justice of the family, I now argue, does not concern the family as an institution being just in its own terms; the assumption of family justice made in Rawls's first 'psychological law' is in fact best understood as not concerning the family as an institution at all.

3. *The family as an association*

There is an important distinction that promises to illuminate both Rawls's and Okin's comments on the justice of the family, and in particular the sense in which the family can be said to be 'regulated by' the principles of justice. That is the distinction between the family as an institution and as an association – or rather, between *the family* as an institution and *families* as associations.[29]

Recall Okin's remarks quoted above:

> An important sphere of distribution of many social goods, from the material to the intangible, the family has a history of distributing these goods in *far from just ways*… Without *just families*, how can we expect to have a *just society*?

The idea that 'the family' has historically distributed goods unjustly is ambiguous. It could mean that actual historical families have distributed goods in unjust ways. Or it could mean that the existence of a gendered family institution in society has caused goods to be distributed in unjust ways in that society. I think Okin means the second of these. It is the family as an institution that has 'a history'; the actual behaviour of individual

[29] Munoz-Darde makes a distinction between institutions and associations, but it is not clear to me what she means by either. At any rate, her distinction does not seem to be the same as the one drawn here. See 'Rawls, Justice in the Family and Justice of the Family' (n24) 347.

families is constitutive of this historical pattern, but the history incorporates a great many of them over decades and centuries. The entity that continues throughout this time is the family as an institution. But when she asks whether we can expect to have a just society without just *families*, Okin switches to talking about families as associations. Associations are not simply 'private' institutions, as they seem sometimes to have been understood. Institutions are abstract systems of rules ('the monogamous family' is one example);[30] associations are groups of individuals (sometimes conceived as collective agents[31]). We should conclude that when Rawls refers to 'family institutions'[32] this is a careless locution; he is talking about associations. We can also now see that Rawls in fact makes both the assumptions suggested above. He assumes (that it will turn out to be the case that) the *institution* of the family will appear in a just basic structure. This is a genuine assumption that is barely argued for, although it will probably seem plausible to most readers. He also assumes (for the sake of argument) that family *associations* exhibit the local justice that is peculiar to families. This local justice is one of the necessary causal conditions for children's proper moral development.

[30] To be more accurate, they can be thought of 'as an abstract object, that is, as a possible form of conduct expressed by a system of rules' or 'as the realization in the thought and conduct of certain persons at a certain time and place of the actions specified by these rules' (*TJ* 55). It is the realizations that we generally consider just or unjust. This subtlety in the meaning of 'institution' as used by Rawls perhaps explains the difficulty interpreters have had understanding how they differ from associations. After all, an actual family – mother, father and three children, say – can be considered either as a realization in the thought and conduct of five persons of the rules specified by an institution, or simply as a collection of five people living and interacting together. But I think by 'in the thought and conduct of certain persons at a certain time' Rawls has something broader in mind, viz. the thought and conduct of *most or all of those persons in a given society* whose conduct instantiates the rules specified by the institution. So in a Rawlsian closed society there are not several, or several thousand, institutions correctly labelled 'the family' simply because the rules of the abstract object can be realized in the thought and conduct of many different collections of actual persons, but one institution of the family. When Rawls refers in *PL* to 'the *nature of* the family' instead of the family, he is referring to the abstract object reading rather than the realization reading.

[31] The basic structure, says Rawls, is 'the background social framework within which the *activities of associations* and individuals take place' (*JFR* 10, emphasis added). For further references to the family as an association see *TJ* 467 and *CP* 199.

[32] See p44 above.

Stephen de Wijze articulates the ambiguity that I propose to resolve by means of this distinction when he says that 'The family, it seems, is both part of the basic structure but also exempt from the principles of justice because it is concerned with affectional relationships "in a way the political is not."'[33] What we should say instead is that the family as an institution is part of the basic structure, but families as associations are not. (Indeed, they could not be, because they are not the right kind of thing – i.e., an institution – to be part of the basic structure.) There is nothing that is 'exempt' from the principles of justice. The principles apply to the institution of the family in the same way that they apply to any other major social institution (although, as we have seen, this is not a case of 'direct application' in respect of any institution); but they do not apply to individual families as associations.[34]

But for his failure to make the institution/association distinction explicit, Rawls's account in *Justice as Fairness* is relatively clear. Rawls poses a question he has inherited from Okin's criticism: 'how, if [the] principles [of justice] do not apply directly to the

[33] Stephen de Wijze, 'The Family and Political Justice: The Case for Political Liberalisms' (2000) 4 *Journal of Ethics* 257, 263, quoting *PL* 137.

[34] Rawls's inconsistent use of the labels 'institution' and 'association' in connection with the family has greatly hindered the critical examination of family justice within his theory. For instance, Samuel Freeman notes that the family is an association, and aligns it with others 'such as churches, universities, military units, or sports teams in support of the contention that 'the principles of justice [do not] apply internally within' it (Samuel Freeman, *Rawls* (Routledge 2007) 236). But without the distinction between institutions and associations this is unhelpful, because sports teams are clearly not part of the basic structure, whereas the family apparently is. Freeman, at any rate, thinks that Rawls is right to place the family in the basic structure (*Rawls* 237). But if that is the case, there must be some way in which the principles apply to it. That he is keen to stress that they do not apply internally within the family suggests that he thinks they do apply internally within institutions such as the constitution or the system of private property in the means of production. But we have seen that this idea is of dubious intelligibility. Okin takes the opposite view, doubting whether the family should be considered an association at all: 'The family is not a private association like a church or a university, which vary considerably in type, and which one can join and leave voluntarily. For although one has some choice (albeit highly constrained) about marrying into a gender-structured family, one has no choice at all about being born into one' ('Justice and Gender' (n25) 51). Given that Rawls emphasizes the lack of voluntariness involved in participation in basic structure institutions, and – by implication at least – the contrary in the case of associations such as firms, universities and churches, this strikes me as an important criticism.

internal life of families, can they ensure equal justice for wives along with husbands'?[35] He starts by noting that 'much the same question arises in regard to all associations, whether they be churches or universities, professional and scientific associations, business firms and labor unions. The family is not peculiar in this respect.'[36] The equal liberties and just distributions that are characteristic of a just basic structure are enjoyed by citizens in all aspects of their lives. It is not a question of the principles applying to the internal life of families, but of the principles applying to the basic structure which regulates the lives of all citizens. If it is then said that, after all, the family *is* peculiar in that it, unlike churches, universities, business firms and so on, is also a basic structure social institution, then Rawls can appeal to the distinction between institutions and associations. The institution of the family – the system of rules that defines the practice of married or partnered life and child-rearing – is part of the basic structure, and must be such as to partly constitute justice in the basic structure when combined with the other major social institutions. And the restrictions in the name of social justice on the form the institution can take will of course have implications for every group of persons that constitutes a family. 'Even if the basic structure alone is the primary subject of justice, principles of justice still put essential restrictions on the family and all other associations'.[37]

The clearest statement of how the principles are supposed to apply to associations is the following:

> While the political conception as a whole does apply to the family as an institution belonging to the basic structure, its several principles are not

[35] *JFR* 164.
[36] *JFR* 164.
[37] *JFR* 166. This remark is clearer in 'The Idea of Public Reason Revisited', which has '*the* principles' (i.e. the principles of justice for the basic structure) rather than simply 'principles' (which could also mean the *local* principles of justice applying to the family as an institution). See *CP* 598.

> intended to apply directly to the relations between members of the family, or to personal relationships between individuals, nor again to relations between members of small groups, or associations.[38]

'This is not to deny,' Rawls adds, 'that in general the principles of justice restrict the form these arrangements can take.'[39] This 'constraints view' is Rawls's answer to the question posed above: how, if the principles do not apply to the internal life of families, can we ensure equal justice for wives along with husbands? When Rawls and his interpreters point out that the principles do not apply 'directly' to families, churches and universities, this is confusing because it implies that there are some institutions to each of which the principles do apply directly. The point should instead be put more strongly: the principles do not apply to families, churches or universities at all. Rather, they apply to the basic structure, and as a result the activities of associations, and the relationships between individuals within them, are subject to certain restrictions: 'the principles do not apply directly to its internal life but they do impose essential constraints on the family as an institution[40] and guarantee the basic rights and liberties and fair opportunities of all its members.'[41]

But once we recognize the distinction between institution and associations we can see that there are two senses, insufficiently distinguished in Rawls's account owing to his

[38] *JFR* 73.
[39] *JFR* 73 n41.
[40] This must be wrong. Does Rawls want to say that the principles impose constraints on the institution of the basic structure, or that they impose constraints on associations *through* (their application to) the basic structure? The second is the view he expresses most consistently, so if my distinction between institutions and associations is sound, 'institution' here should be read as 'association'. Rawls must be similarly confused when he goes on to say that '[t]he family *as part of the basic structure* cannot violate' the basic claims of equal citizens. He has just noted that the principles protect the rights and liberties of the members of churches, which are not part of the basic structure, 'by the constraints to which all churches and associations are subject'. So (as we would expect) churches cannot violate the basic freedoms either. It must therefore be incorrect for Rawls to link the fact that the family cannot do so with its place in the basic structure. Compare Munoz-Dardé (n24): 'Because rights apply to all family members in the very same manner as they apply to members of churches, of universities and of any other association, work within the family is submitted to no more and no fewer legal constraints than in any other free association' (349).
[41] *JFR* 164.

inconsistent use of 'institution' and 'association', in which the principles of justice may be said to impose constraints. First, the requirement that the basic structure satisfy the principles of justice itself constrains the form that the institutions constituting it can take.[42] For example, in *Justice as Fairness* Rawls leans towards what he calls 'property-owning democracy' over welfare state capitalism. He thinks it likely that a basic structure on the former but not the latter economic model will be able to satisfy the principles of justice.[43] The institution at stake here is 'private property in the means of production'. The requirement that the basic structure satisfy the principles imposes a constraint on the form this institution may take; one acceptable form is that of a property-owning democracy.[44] The analogue for the case at hand is the 'nature of the family', about which we can at least say that the 'monogamous family' is not the only acceptable form.

Second, the basic structure that satisfies the principles, constituted by institutions so constrained, in turn imposes constraints *on associations*. That is, the actions of individuals within associations, and the actions of associations, are constrained by the existence of institutions of a certain type. For example, the actions of charitable trusts – in particular, say, their investment decisions – are constrained by the form taken by the institution of private property, because this institution will dictate which holdings are and are not acceptable. In the case of the family, the actions of families (associations) are constrained by the form taken by *the family* (a social institution, namely the system of

[42] There is a concern here (and throughout Rawls's discussions) about the individuation of institutions. What is the difference between (i) a basic structure including institutions a, b & c instead of institutions d, e & f, and (ii) institutions a, b, c in a basic structure taking form x rather than form y? I cannot address this here, but presumably the answer will have to do with the level of abstraction at which institutions are specified. The difficulty is in finding non-arbitrary reasons for choosing a certain level of abstraction.

[43] *JFR* 139-40.

[44] Or, to be more precise, the form taken by private property in the means of production *in* a property-owning democracy.

legal and social rules in a given society that governs the 'orderly production and reproduction of society and of its culture from one generation to the next'.[45]

What is confusing is that both of these might be said to be a way in which the principles 'apply indirectly' to 'the family'.[46] Furthermore, Rawls actually has little to say about either of them. His comment on the way in which the institution of the family is constrained by the requirement that the basic structure fulfil the principles of justice extends only to the point of noting that this does *not* include its restriction to the monogamous or any other specific type of family. As for the constraints on associations, Rawls notes simply that associations cannot violate the rights of their members as citizens.[47]

What help does the constraints view give us in understanding how justice is to be assessed in different subjects? Rawls's conjecture was that 'once we have found a sound theory for [the] case [of the basic structure], the remaining problems of justice will prove more tractable in the light of it': has this been borne out? The first point is that the 'constraints to which all churches and associations are subject' include constraints on the possible principles of justice for churches and other associations:

> Justice as fairness starts with domestic justice – the justice of the basic structure. From there it works outward to the law of peoples and inward to local justice…. No attempt will be made here to deal systematically with local justice. In general, principles for the basic structure constrain (or limit), but do not determine uniquely, the suitable principles of local justice.[48]

[45] *JFR* 168.
[46] More confusingly still, Rawls also uses the language of 'constraints' to express the idea that the existence of the family limits the possible arrangements of the basic structure, thus threatening the principle of fair equality of opportunity: 'The family imposes constraints on ways in which this goal can be achieved, and the principles of justice are stated to try to take these constraints into account' (*CP* 596).
[47] *JFR* 166.
[48] *JFR* 11.

That the principles for the basic structure constrain the possible local principles for associations is a logical consequence of the fact that the principles constrain the actions of associations and the relationships between their members. There could be no set of principles of local justice for an association that required that its members be treated so as to deny the rights assigned to them by the principles for the basic structure. This is a demonstration of the basic structure thesis. The justice of the basic structure is prior to the justice of other subjects, so local justice cannot impinge on domestic justice.[49]

But this is progress of a very limited sort. The primacy of the basic structure has left us with constraints on possible theories of justice for other subjects, but no particular direction for an investigation. Nor do these constraints appear to be particularly strong. In the case of families, for instance, favouring male children over female would be inadmissible insofar as the differential treatment extended to basic liberties, or to the extent that it made the difference principle impossible to realize in the basic structure – but it could not be ruled out as a principle of local justice if its observance in individual families had no such significant effects at the level of the basic structure. It might be said that such conduct would inevitably exert a 'profound and pervasive influence' from the start of citizens' lives and therefore would necessarily form part of the institution of the family, and thus of the basic structure. It would therefore be assessable by reference to the domestic principles of justice. But such an objection could not be sustained for just any conduct that we might be inclined to rule out on grounds of justice. If it were said that any unjustified preferential behaviour would be bound to have far-reaching effects in society, the 'essential restrictions on the family'[50] exerted by the principles of justice for

[49] Which means that Rawls denies one of the central theses of the account (Elster's) he claims to be following.
[50] *JFR* 166.

the basic structure would come into play, and principles of local justice would then be rendered inert.

What if there was a society in which the basic structure was just but innumerable associations within it were locally unjust? It would seem odd to be able to say that firms, universities, churches, families and so on, were all roundly failing to live up to the standards of justice appropriate to them, and yet, since none of these injustices amounted to, say, a denial of citizens' basic liberties, or a hindrance to the satisfaction of the difference principle, therefore they were just in terms of the basic structure, and we could still say our society was just. But this possibility is entailed by Rawls's mature view on the relationship between local and domestic justice: questions of local justice are to be considered on their own merits, and instances of local injustice in associations do not necessarily add up to injustice in the basic structure, provided that those injustices really are restricted to the 'local' scale of associations.[51]

It is unfortunate that Rawls gives no indication at all of the kind of principles he envisages being appropriate for associations. In the absence of any details, it is hard to imagine any systematic injustices within associations of the kind Rawls mentions which we would not consider either to raise an issue of concern at a level higher than the association itself, or to be simply a matter of principles of justice that apply *in general*.[52] The first would not be principles of local justice because they would have an impact on justice in terms of the basic structure. The second would not be principles of local justice because they would be common to all associations rather than depending on 'the nature

[51] Rawls does appear to think that principles of local justice apply to institutions as well as to associations but it may be that in such passages he is thinking of institutions that do not belong to the basic structure. It is in one such passage (*JFR* 11) that Rawls purports to be following Elster's work, a claim which I hope I have showed to be unsustainable.

[52] Recall the similar problem observed in trying to use the idea of procedural justice to give a sense to institutions' being just in their own terms: p29 n32.

and role of the association, group, or relation at hand'.[53] The example of the family is a particularly problematic one in this regard. Insofar as parents' treatment of their children has an impact on their enjoyment of the right to fair equality of opportunity it appears to be a problem of justice in the basic structure: 'the prohibition of abuses and the neglect of children… will… be a vital part of family law.'[54] But insofar as there are issues of justice in the family that do not reflect on the basic structure – perhaps inclusivity in family decision making or equal punishment for siblings' misbehaviour – there appears to be nothing about them that is distinctive to the family. They might just as well arise in firms, universities or churches – for instance, as corporate decision making and equal sanction for employee absenteeism. And what *is* (or might be) distinctive about the family is not about justice, as Rawls seems to concede in observing that 'at some point society has to trust to the natural affection and goodwill' – not to the sense of justice – of parents.[55]

[53] *JFR* 164.
[54] *JFR* 165.
[55] *JFR* 165.

IV. The basic structure thesis: subject, site and agent

1. Ronzoni on the basic structure

In this chapter I turn my attention to the basic structure thesis and the second interpretation of the first virtue thesis. If, as I have suggested, we should understand Rawls as holding that the first virtue of social institutions is justice in terms of the basic structure, what exactly does it mean for institutions to be assessed from this point of view? How should we understand the basic structure as the primary subject of justice? In this section I examine and criticize one proposed answer to these questions. I argue that it is helpful to distinguish between a *site* and an *agent* of justice, and that a development from one to the other interpretation of the 'subject' of justice can be discerned in Rawls's own work.

Across several papers Miriam Ronzoni has articulated an interpretation of the notion of the basic structure with a view to defending both its viability and its usefulness in helping to understand problems of global justice.[1] In 'What Makes a Basic Structure Just?' her aims are particularly relevant to the current discussion. They are to 'properly [understand] in what sense principles can actually apply to a basic structure'[2] and 'what it means for principles to apply to institutions'.[3]

She also claims to make sense of Rawls's distinction between appraising institutions in a wider and narrower context by situating it within a sophisticated account of the

[1] Miriam Ronzoni, 'Two Concepts Of The Basic Structure, And Their Relevance To Global Justice' (2007) 1 *Global Justice: Theory Practice Rhetoric* 68; 'What Makes a Basic Structure Just?' (2008) 14 *Res Publica* 203 (hereafter 'What Makes'); 'The Global Order: A Case of Background Injustice? A Practice-Dependent Account' (2009) 37 *Philosophy and Public Affairs* 229.
[2] 'What Makes' 205.
[3] 'What Makes' 208.

relationship between social justice and the basic structure.[4] I will argue that the account fails in this ambition, and that its picture of the application of principles of justice to institutions fails to make a compelling case for the utility of the concept of the basic structure. However, the attempt offers the opportunity to highlight some important but neglected distinctions, and allows us to see more clearly the connections between the basic structure thesis and the notions of agency and responsibility canvassed in Chapter I.

Ronzoni's interpretation seeks to make sense of the idea that social institutions must always be assessed in the light of the role they play in the basic structure. This is how she purports to save Rawls's account from G.A. Cohen's charge that the (coercive) basic structure can be just, even though society is not, because of the (non-coercive) social practices within it.[5] Since Cohen's critique is her main target, she assumes a purely coercive understanding of the basic structure, and attempts to show that the non-coercive social practices that Cohen sees as being integral to our assessment of justice in society are indeed so, but that this need not imply the rejection of the basic structure thesis. What I will question is whether in the final analysis Ronzoni's account manages to maintain the view that the basic structure is the primary subject of justice, except as a dogmatic assumption about institutional responsibility *for* justice.[6] So my interest is not primarily in contributing to the debate on Cohen's critique of Rawls, but in illustrating the weaknesses in what is superficially an attractive way of drawing the relationship between the justice of social institutions and the justice of the basic structure.

[4] 'What Makes' 214.
[5] GA Cohen, 'Where the Action Is: On the Site of Distributive Justice' (1997) 26 *Philosophy and Public Affairs* 3. I do not explain Cohen's critique of the basic structure thesis here.
[6] Ronzoni appears to understand the basic structure thesis somewhat differently from Rawls: see n24 and text thereto. I am interested in the cogency of the arguments based on her interpretation.

On Ronzoni's preferred interpretation of Rawls, the thesis that 'The basic structure of society should be regulated by the principles of justice delivered [in the original position]' should be understood as implying the following steps:[7]

1Y. First we should understand which social conditions have to be in place for us to be able to say that in a given society the relevant principles of justice are satisfied;

2Y. Then, we should build the institutions needed in order to bring about those social conditions.

And we can conclude:

3Y. Once the institutional setting is arranged in the way 2Y prescribes, the basic structure of our society is just, and our society is therefore also just.[8]

This model Y is in contrast to model X on which we first (1X) 'determine which legally coercive institutions are to be considered as part of the basic structure' and then (2X) 'make sure that these institutions are constrained by the appropriate principles of justice in their actions and conduct', concluding (3X) that '[o]nce [2X] has been performed, the basic structure of our given society is just, and hence our society itself is just.'[9] Although Ronzoni is careful to emphasize that her argument is not intended as an exegesis of Rawls, it should be noted that her understanding of the nature of institutions reflects the interpretation I have offered here. There are two specific parallels. First, Ronzoni recognizes that institutions are practices rather than organizations, as I did in Chapter I; she repudiates the notion of principles of justice being a constraint on institutional

[7] I have changed the numbering for ease of exposition.
[8] 'What Makes' 209.
[9] 'What Makes' 209.

conduct.[10] Secondly, it is only on model Y that institutions are understood as abstract types rather than their specific instances of those types. This is in keeping with Rawls's more careful articulations of basic structure institutions such as the '*nature of* the family', or (whatever might turn out to be) 'the *legally recognized* forms of property'. Institutions are not given once and for all for a society, and then constrained by the principles of justice; rather – on model Y – the form taken in a given society of any basic structure institution is itself within the scope of application of the principles of justice.

Ronzoni's point against Cohen is that 'informal rules and norms do play a significant role in the *assessment of* our basic structure, even if we do not conceive of them as *direct part* [sic] of the basic structure.'[11] By 'informal rules and norms' Ronzoni has in mind the kind of social expectations that might tend to force women, for example, into certain social roles and positions of disadvantage. On a coercive understanding of the basic structure, such informal norms are, she argues, not constitutive of institutions of the basic structure – such as, for example, marriage. (On the purely coercive view, the complete specification of this institution would be given by the content of the law relating to marriage explicitly and perhaps to other relevant areas.) But they do nevertheless serve to structure such institutions, in the sense that institutions must be built against this background of informal rules and norms. The idea of a 'direct part' of the basic structure is a slightly odd one: how could something be an *indirect* part of another thing? But the reason for this form of words is Ronzoni's subtle position on the question of informal norms' role in constituting the basic structure. They may not be a 'direct part' of it, but their role in our assessment of it – its success or failure is judged on how it 'deals with' them – might be said to be a 'constitutive' role in a somewhat attenuated sense.

[10] Although my argument will be that the function she ends up envisaging for the basic structure does not maintain this picture.
[11] 'What Makes' 210 (emphasis in original).

Assessment of institutions, we might say, always has an eye on the bigger picture – in deciding whether an institution is just, we must always take into account, in addition to the way it fits together with other institutions, the (non-coercive) social context in which it operates. For this reason I refer to it as the 'contextual view'. What I want to pursue is the conception of the basic structure implied by Ronzoni's account, and the implications of her argument for our understanding of the possible subjects of justice.

One problem that the contextual view promises to solve is how to understand Rawls's comments in *A Theory of Justice* regarding the assessment of institutions in wider and narrower contexts. Ronzoni's central insight is that our assessment of institutions is always contextual. Even though it is the basic structure which is the primary subject of justice, nevertheless we need to know the full (or as close as possible to the full) social context in which the basic structure operates in order to be able to judge in any given society whether it is just. Ronzoni thinks – as perhaps Rawls did – that this contextual approach gives a sense to an institution's being unjust in itself, even while it may be just from the point of view of the basic structure. She uses the example of affirmative action or quotas for women, which are in themselves '"unjust", i.e. they violate the principle of fair equality of opportunity; however, their role in the basic structure as a whole may make the whole system more just, i.e. more capable to realize fair equality of opportunity overall.'[12] But the scare quotes around 'unjust' are welcome: for what is the motivation for saying that quotas are unjust in themselves? On the contextual view, the very fact that we cannot assess the justice of institutions in the basic structure until all the facts are in about the social conditions with which they have to contend militates against any intelligible notion of assessing institutions for justice in their own terms. They can be just or unjust, on the contextual view, depending on

[12] 'What Makes' 213-214.

whether they deal appropriately with prevailing social conditions. The assessment of their justice is entirely beholden to their efficacy in addressing the relevant facts so as to bring about a society in which the principles of justice are satisfied. In other words, they are following principles targeted at social justice, not principles of justice of their own.

Consider Ronzoni's response to Cohen's claim that 'sexist family structure is consistent with sex neutral family law.'[13] Cohen's critique, argues Ronzoni, leaves no room for the claim that 'Family law on its own may be just, but considered from the point of view of the basic structure as a whole it might produce unjust results'.[14] Does Ronzoni's argument offer a solution? I do not think it does. Her idea of an institution being just 'on its own' seems to be that of an institution being just, *if the principles of justice are applied to it in isolation*.[15] But Rawls would not – and we should not – see any point in this, precisely because of the basic structure thesis. It is the basic structure that is the subject of the principles, and it is wrong to try to apply them at any other level. In any case, it is not clear that *any* sense can be given to the notion of an institution's being just on its own in a thoroughgoing contextual account such as Ronzoni's. If we always need to consult the facts about the particular society in which an institution is situated in order to assess its justice, then all 'on its own' can mean is something like 'in some other context' or 'prima facie' (the first impression of injustice perhaps being a result of the fact that in *most* social contexts the institution would turn out to be unjust). But this is not a sufficiently robust sense of 'on its own' to make the contrast between assessment of

[13] Cohen 'Where the Action Is' (n5) 22.
[14] 'What Makes' 216.
[15] I am assuming, of course, that Ronzoni does not mean to invoke the kind of conception of justice I considered in Chapter II, according to which the principles relevant to (say) family law might be completely different from those that apply to the basic structure. But I see no evidence in her arguments that she intends such an interpretation. Her interpretation of affirmative action quotas being unjust in themselves (see above) as meaning that they violate the principle of fair equality of opportunity demonstrates that she is applying the same principles at both 'narrow' and 'wide' levels.

institutions in themselves and from the point of view of the basic structure intelligible. To say that an institution will be just given one set of circumstances but unjust given another is just to repeat the primary claim that the social context must be taken into account. There is no sense in which assessment is being made in a 'wider' or a 'narrower' context: every assessment is from the point of the basic structure, but relative to a different social context.

In fact we can go further. '[A] basic structure is just,' we are told, 'not when each of its institutions (whatever they are) respects certain principles, but when, taken as a whole, it brings about certain social conditions.'[16] But if that is right, then assessment of individual institutions must give way to assessment of the basic structure. Justice may be the first virtue of the basic structure, but it is not clear that there is any sense to predicating justice of each institution at all, even as an aspect of the basic structure – because in any given case there might be many different and incompatible, but equally effective, adjustments in the basic structure that could be made to bring about social conditions in which the principles are satisfied. On Rawls's stated view in *A Theory of Justice* the reason to choose one of these adjustments rather than another would be either that *that institution* is unjust (in its own terms) or it is *that institution's* contribution to the way things fit together that renders the latter – the basic structure – unjust (and so the institution is unjust in terms of the basic structure). But on Ronzoni's view it is not that the basic structure – the way things fit together – is unjust; it is that society is unjust, and must be fixed by the basic structure. There might be any number of ways of achieving

[16] 'What Makes' 205.

this, and none of them would be motivated by a need to render just any institution of the basic structure.[17]

2. Subject, site and agent

I have said that on Ronzoni's view society is unjust. This, it seems to me, is a fundamental point of departure from the Rawlsian view. For Ronzoni, the basic structure is the (exclusive) *instrument* of social justice. When in the first instance we criticize a social injustice, we make a criticism of society as unjust (for example, that fair equality of opportunity does not obtain). It is the responsibility of the basic structure to fix it. An unjust basic structure is one that fails to ensure that the principles of justice are satisfied in society. For Rawls – in *A Theory of Justice* at least[18] – the basic structure is the *site* of social justice. Injustice is attributed directly to the basic structure.

I now introduce some terms that I will use to explain this ambiguity in the notion of the 'subject' of justice. 'Subject' is in the first instance a linguistic category, and when Rawls introduces the question of the possible subjects of justice, his list is constrained only by the semantics of the word 'justice' (laws, institutions, actions, judgments, persons and their attitudes and dispositions), undifferentiated by any further thematization. Such a list does not help us to understand the structure of justice as a moral or political concept. More specifically, it does not help us to understand what *types* of things can be (or, in any give case of justice or injustice, must be) subjects of justice.

1. The locus at which justice must be done I call the *site* of justice. Roughly speaking, where principles of justice are satisfied *in* a subject, that subject is a site of justice. Even on Hayek's view there must be a site of justice. Justice being

[17] An account where each institution has its distinctive role to play – e.g. Miller's: see p34 n48 above – seems necessary to sustain a sense of the justice of each.
[18] I qualify my reading of Rawls shortly.

done might consist in a single transaction between two individuals being performed in accordance with the appropriate rule. In this case the site of justice is the transaction.[19] On a radically different view where a complex set of principles are satisfied on a global scale, the site of justice would be the global order.[20]

2. The person(s) by whom justice must be done I call the *agent* of justice. Roughly speaking, where principles of justice are satisfied *by* a subject, that subject is an agent of justice. This can in turn be split into two further ideas:
    a. The person on whom moral responsibility for justice or injustice lies I call the *ultimate agent* of justice. For Hayek this is the basic, and perhaps the only 'true', category.
    b. The person or instrument by which justice is to be brought about I call the *instrument* (or *proximate agent*) of justice. This may or may not be conceived as an agent in the sense of a designing intelligence. A proximate agent may be said to have a moral responsibility for justice or injustice, and one that is no less real or important than that of the ultimate agent, but it is a responsibility derived from that of the ultimate agent.

These distinctions can be used to disambiguate questions about the application of principles of justice of the sort that have caused so much confusion. What is meant by the 'application' of principles to a subject depends on the kind of subject being talked about. For an agent of justice, principles of justice are those principles that govern its conduct so

[19] Obviously this is not 'social' or distributive justice, however, since Hayek repudiates the very idea.
[20] The global order is treated as such a site in Ronzoni, 'The Global Order' (n1). Arash Abizadeh distinguishes the site of justice from its scope in 'Cooperation, Pervasive Impact, and Coercion: On the Scope (not Site) of Distributive Justice' (2007) 35 *Philosophy and Public Affairs* 318.

far as justice is concerned; as regards a site of justice, principles of (social) justice are those which order the distribution of goods in the given field of relevance.

Now what is it on Ronzoni's view to which the principles of justice actually apply? Remember that Ronzoni sees her account as an interpretation of how principles apply to a basic structure. But in model Y what exactly is satisfying the principles when 'in a given society [they] are satisfied'? Rawls says it is the basic structure that must satisfy the principles. But Ronzoni appears to say instead that it is society that does so. At least, the institutions of the basic structure on her account appear to be the means by which we ensure that the principles are satisfied 'in society'. While ostensibly explaining what it means for principles to apply to institutions, Ronzoni has given an account in which principles apply directly to society; the institutions – in the form of the basic structure – are responsible for ensuring that society satisfies them.

Rather than taking the basic structure as the primary subject of which justice is predicated, Ronzoni's account in fact presupposes a concept of a just society, that is, one in which the principles of distributive justice are satisfied (see her step 1Y). The idea of a just basic structure appears to be derivative from this, meaning something like 'a basic structure that is so constituted as to achieve a just society'. And since the justice of the basic structure is being judged by its efficacy in ensuring that the principles are satisfied in society, it makes no sense for Ronzoni to conclude that 'Once the institutional setting is arranged in the way [2Y] prescribes, the basic structure of our society is just, and our society is *therefore* also just'.[21] The order of explanation is surely the other way around, because the instrumental role of the basic structure has been specified such that the justice of the basic structure can only be understood by reference to its efficacy in bringing about the required social conditions. In other words: for Rawls the basic structure is set up *such*

[21] 'What Makes' 209 (emphasis added).

as to satisfy principles of justice. It is a site of justice. For Ronzoni, it is set up *such as to ensure that society satisfy* those principles. It is an instrument of justice.

Ronzoni's interpretation of the basic structure thesis illustrates the ambiguity of the notion of a 'subject' of justice. Although she defends the thesis that the basic structure is the primary subject, her account of the basic structure leads to a picture that instead features distinct conceptions of the site and agent of social justice, and it is not clear that the basic structure is a useful concept in either case. Ronzoni imagines that 'Society T is committed to Rawls's principle of fair equality of opportunity… and therefore sets up two institutional mechanisms to promote it: (1) a constitutional protection of fair equality of opportunity; (2) an education system which gives women *privileged* chances to be trained and become qualified for positions of advantage in public life.[22] But the expectations on women in T are not conducive to their subsequently achieving the positions that their abilities and training equip them for. Despite having the educational resources to achieve such positions, women are expected to use their intellect only for social and family purposes. The problem here, as Ronzoni sees it, is that 'such a society might *not have the right institutions*.'[23] The basic structure needs to be reformed in order that it performs its function in ensuring that justice is realized. The right institutions are those that are fit to realize a standard of justice in society. The assessment of injustice is made on the basis that the principles of justice are not satisfied in the society in question. But we do not need the concept of the basic structure to make this assessment. The basic structure only comes onto the scene when we decide what to do about the injustice (i.e. about the principles' not being satisfied), namely, design and bring into being the appropriate institutions (or reform the current ones) to address the deficiency. The thought seems to be this: since society affirms fair equality of opportunity, and yet

[22] 'What Makes' 211 (emphasis in original).
[23] 'What Makes' 211 (emphasis in original).

despite the attitudes of its members, fair equality of opportunity is not available, there is a political problem – one that needs collective action to rectify. The solution is an institutional one.[24] Ronzoni therefore combines two theses. First, the idea that the site of social justice is in fact society: it is society in which the principles of justice are to be satisfied. Second, that the proper agent (or at least the proximate agent) of justice is institutional; in short, it is the basic structure. (This step, I shall go on to suggest, is entirely unargued for.)

Ronzoni's position is reflected in her gloss on the basic structure thesis, which, I think, Rawls himself would not have endorsed: 'in order to determine whether a society is just, we mainly need to assess whether its basic structure is just.'[25] For Rawls it is not society *simpliciter* in the first instance that is to be assessed for social justice; it is its basic structure.[26] Ronzoni, on the other hand, takes it for granted that society is the first subject of assessment for justice, and then asks what is the principal determinant of justice in society. This she takes to be the basic structure, and it is for this reason that she takes the basic structure to be the primary subject of justice. Let me try to clarify this distinction between the 'first subject of assessment for justice' and the 'primary subject of justice'. I have already explored Rawls's notion of 'regulative primacy'; this is the idea that the principles for the basic structure constrain the principles for the other subjects.

[24] Compare Rawls's description of the utilitarian view from which he distinguishes his own: 'For the utilitarian has, in principle anyway, an independent standard for judging all distributions, namely, whether they produce the greatest net balance of satisfaction. In his theory, institutions are more or less imperfect arrangements for bringing about this end. Thus given existing desires and preferences, and the natural continuations into the future which they allow, the statesman's aim is to set up those social schemes that will best approximate an already specified goal' (*TJ* 89). See also Bedau, 'Social Justice and Social Institutions' (p10 n25) 166-167.

[25] 'What Makes' 204. This 'mainly' leaves it unclear what conditions there might be for a just society other than a just basic structure. The thrust of the argument seems to me to be that a just society is just precisely *in virtue of* having a just basic structure.

[26] Rawls usually refers to a *well-ordered* society rather than a just one; this includes both a just basic structure, and individuals who subscribe to a shared conception of justice as fairness. The well-ordered society (unlike Ronzoni's just society) is not presupposed by, but constructed in part from, the notion of a just basic structure. See *TJ* 4-5, *CP* 308-310, *JFR* 8-9 on the idea of a well-ordered society.

There will be principles of local justice for associations such as churches, universities and families that are different from the principles for the basic structure, but they cannot be such as to disturb the justice of the basic structure. But does the basic structure's being the primary subject of justice also mean that the property of social justice is inherited from the basic structure? Is the basic structure the first thing that we need to look at when making assessments of social justice? This seems to be the burden of Ronzoni's gloss on the basic structure thesis. If the basic structure of our society is just, she argues, then our society is therefore also just. And yet – as I have tried to show – her account does not actually bear this out. In fact the original bearer of the predicate is a site, namely society – just as it is for Cohen, in fact, whose account she is opposing.[27]

3. The basic structure as agent: collective action and pure procedural justice

I have argued that in *A Theory of Justice* Rawls regarded the basic structure as the site of social justice. But it is not clear that this assumption remains sound for Rawls' later work, or for those liberal thinkers inspired by it. Rawls often writes as if he thinks of the basic structure as an agent, a tendency that goes against the grain of his general account of institutions as practices. In *Political Liberalism* the 'basic structure as agent' theme is often strongly associated with the basic structure thesis. The 'primary subject of justice,' Rawls reiterates, 'is the basic structure of society, which has the fundamental *task* of establishing background justice.'[28] In his explanation of the basic structure thesis in this work, as well as in *Justice as Fairness*, the idea of the basic structure as the *site* of social cooperation (and therefore the site of justice) is less prominent, and its function as the agent of the system of 'pure background procedural justice' is to the fore. 'A conception

[27] 'My own fundamental concern is neither the basic structure of society, in any sense, nor people's individual choices, but the *pattern of benefits and burdens in society*: that is neither a structure in which choice occurs nor a set of choices, but the upshot of structure and choices alike' (Cohen, 'Where the Action Is' (n5) 12, emphasis added).
[28] *PL* 286 (emphasis added).

of justice,' Rawls now thinks, 'must specify the requisite structural principles and point to the overall direction of *political action*.'[29]

On the 'basic structure as agent of justice' picture, asking to what the principles of justice apply directly (we may recall that Rawls uses this terminology in various unsuccessful attempts to clarify their application to the family) amounts to asking whose conduct they are supposed to guide. This strand of justification of the basic structure thesis, however, sits uneasily with the 'practice' account of institutions and with the view of the basic structure as how these institutions fit together, and tends to lead perilously back towards the agential picture of justice that I rejected on Rawls' behalf in Chapter I.

Rawls thinks that the operation of the two principles of justice, as applied to their proper subject, the basic structure of society, involves pure procedural justice:

> …the two principles of justice as they work in tandem incorporate an important element of pure procedural justice in the actual determination of distributive shares. They apply to the basic structure and its system for acquiring entitlements; within appropriate limits, whatever distributive shares result are just. A fair distribution can be arrived at only by the actual working of a fair social process over time in the course of which, in accordance with publicly announced rules, entitlements are earned and honoured. These features define pure procedural justice.[30]

There is, Rawls argues, no independent criterion by which it can be asked whether a distribution to specific individuals is just – this is characteristic of a system of pure procedural justice – but the playing out of the ongoing process of social interaction is necessary for us to be able to say that any distribution that does result is just. This social architecture, Rawls thinks, is sufficient to rebut claims that social justice (or 'patterned'

[29] *PL* 285 (emphasis added).
[30] *PL* 282. Compare *TJ* 88. Of course Rawls discusses pure procedural justice in *TJ* as well, but the emphases are different.

principles thereof[31]) makes unrealistic epistemic demands or requires an unacceptable level of interference with individuals' lives:

> Entitlements are earned and honored as the public system of rules declares. Taxes and restrictions are all in principle foreseeable, and holdings are acquired on the known condition that certain transfers and redistributions will be made. The objection that the difference principle enjoins continuous corrections of particular distributions and capricious interference with private transactions is based on a misunderstanding.[32]

The idea of pure procedural justice – that social outcomes can be just as part of an ongoing and manageable system of entitlements and redistribution – goes together with the idea of 'background' justice, that is, the obtaining of fair conditions against which individuals and associations may interact. These fair conditions will 'be gradually undermined even though no one acts unfairly when their conduct is judged by the rules that apply to transactions within the appropriately circumscribed local situation.'[33] It is up to the basic structure to counteract this inevitable erosion of background fairness: 'The role of the institutions that belong to the basic structure is to secure just background conditions against which the actions of individuals and associations take place.'[34] Even if Hayek is right to claim that the market is 'an economic game in which only the conduct of the players but not the result can be just',[35] on Rawls's view, as long as the conduct of the players *and the rules of the game* are just, then the result will be so automatically. This requirement of background justice is no more than is reflected in Hayek's own stipulation 'that [the game] be fair and that nobody cheat'.[36]

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[31] I leave aside the debate whether Rawls's theory does in fact involve what Nozick labels 'patterned principles' – see A Kaufman, 'The Myth of the Patterned Principle – Rawls, Nozick and Entitlement' (2004) 36 *Polity* 559.
[32] *PL* 283.
[33] *PL* 267.
[34] *PL* 266.
[35] *LLL2* 70.
[36] *LLL2* 71.

Rawls's argument for the basic structure thesis in terms of pure procedural justice presents a strong rejoinder to the Hayekian challenge but at the cost of re-embracing the agency conception of justice. The institutions of the basic structure are the relevant just or unjust agents. This story is in addition to the response I envisaged Rawls making to Hayek in Chapter I, and its emphasis is very different. On the *Theory of Justice* account the responsible agents are the denizens of the original position, engaged in the collective design of their social practices, and the basic structure that they devise is thus the site of social justice. On the *Political Liberalism* account the basic structure has itself become the responsible agent. Nevertheless other writers have been strongly attracted to this part of Rawls's account. Samuel Scheffler, for instance, endorses this reading of the basic structure thesis, and apparently embraces the agential picture of justice that it implies, going further than Rawls in rendering this aspect explicit. Elaborating Rawls's idea of 'an institutional division of labour between the basic structure and the rules applying directly to individuals and associations',[37] Scheffler sees principles for institutions as serving 'to guide [them] in securing the background justice and fairness of the social system, a task that individual agents cannot feasibly accomplish by themselves.'[38]

(It is worth noting that there appears to be a tension between the two reasons Rawls presents in *Justice as Fairness: A Restatement* for making the basic structure the primary subject of justice. The tension concerns the means of identifying the basic structure. The first kind of reason is that 'Taking the basic structure as the primary subject enables us to regard distributive justice as a case of pure background procedural justice';[39] the basic structure is whatever it is necessary to regulate in order to preserve background justice. But the second kind of reason – in terms of the pervasive and profound influence of the

[37] *PL* 268-269.
[38] Scheffler, *Equality and Tradition* (p40 n11) 138.
[39] *JFR* 54 (emphasis added).

basic structure – depends on the concept of the basic structure having an extension that can be stated independently of the reason. That is, we can only agree that the basic structure has a pervasive influence if we know what it consists of. It is an empirical question. But if for the purposes of the first kind of reason the extension of the basic structure is given as that which it is necessary to regulate to preserve background justice, then it is trivially true that it has a profound and pervasive impact, that impact being precisely its erosion over time (if unregulated) of background justice.[40])

Scheffler's conception of principles of justice as guiding the conduct of institutions conflicts with Rawls's original idea that the basic structure is the way that the relevant institutions fit together into one scheme of cooperation and also with the practice conception of institutions themselves. If institutions are conceived as being themselves abstract sets of rules, then rules cannot apply to them in the same way that they apply to individuals and associations. But on occasion Rawls drops the description of the basic structure as the way that institutions combine, and instead identifies it directly with the institutions themselves and their relevant activities: 'The basic structure comprises first the institutions that define the social background and includes as well those operations that continually adjust and compensate for the inevitable tendencies away from background fairness, for example, such operations as income and inheritance tax designed to even out the ownership of property.[41] How should we explain these

[40] Scheffler's account appears to suffer from this problem too. He thinks that *because* 'social institutions inevitably play a special role in determining people's economic expectations, shaping their characters, and structuring the background against which they enter into agreement with one another', they 'are subject to special normative principles' (*Equality and Tradition* 123). But the special kind of principles applicable to a device *designed* for solving a collective action problem by creating an institutional division of labour is not obviously the same special kind of principle applicable to a *pre-given* structure of institutions which (as a matter of empirical fact) shapes individuals' characters and aspirations.

[41] Note that on this reading the family can't be included, since the family is an institution that contributes to the tendency away from background fairness, as Rawls admits in his discussion in *TJ* of fair equality of opportunity.

inconsistencies? I suggest the following as a speculative reconstruction of the progression of Rawls's thinking. In his earlier work Rawls was operating with a conception of the basic structure as the site of justice because it is the site of (coerced) social cooperation.[42]. (The agency problem was sidestepped by the device of the original position – the crucial act of designing institutions was reduced to a hypothetical one.) When he focused on the argument for the basic structure as subject (later refined for *Political Liberalism*) he was drawn to emphasize the concept of 'background justice' and the way in which the notion of 'pure background procedural justice' (as he came to label it in *Justice as Fairness*) overcomes the epistemic challenge to social justice. So in 'The Basic Structure as Subject' the notion of the basic structure as comprising the institutions themselves, and their having a task to perform, comes out more strongly, and that task is seen to permeate to all areas of society (churches, universities etc.). This is what seals the division into site and agent – and one reason among others for Rawls's greater concern with the notion of the legitimacy of the state in political liberalism.

4. Agency and responsibility

Earlier on I questioned the direction of causation involved in Ronzoni's argument that if a society is unjust that is because it has an unjust basic structure. This view is central to her affirmation of the basic structure thesis but, I argued, the direction of explanation actually appeared to be the other way round: we were required to identify an injustice in society before concluding that there must be something wrong with our institutions, and that therefore the basic structure must be unjust. We can now push this criticism further and observe that there is actually no warrant for the move from 1Y to the specific content of 2Y. Given the 1Y aim of bringing about the social conditions for a society in which the

[42] For his early distinction between justice and fairness in terms of coercion see, for instance, 'Justice as Reciprocity': the 'element of necessity in justice… make[s] it more urgent to change unjust than unfair institutions.' (*CP* 209).

principles of justice are satisfied, there is no obvious reason why the next step should be to '*build the institutions needed* in order to bring about those social conditions', rather than simply to 'do *whatever is needed* in order to bring about those social conditions.' This may include inculcating in members of society an egalitarian ethos, the measure proposed by Cohen in the critique to which Ronzoni is responding. Now Ronzoni may of course reply that carrying out such a proposal may well be one of the tasks of the basic structure, that her case against Cohen is precisely that if inegalitarian attitudes prevail in society so as to prevent the principles of justice being satisfied, this fact is within the scope of the task of the basic structure – it is one of the things that the design of social institutions must take into account, and which the basic structure, once designed, must counteract. But this reply still leaves us asking: Why is this the task of the basic structure? Why does dealing with such attitudes, fostering the appropriate cultural conditions and so on – in short, bringing about a society in which the principles are satisfied – fall to the basic structure rather than to individuals in their everyday lives? This was Cohen's challenge,[43] and it has not yet received a satisfactory answer, because step 2Y simply assumes that justice-targeted action belongs to institutions.[44]

It is because Ronzoni thinks that the basic structure is the primary agent of justice that she can say, as against Cohen, that an unjust society is so because it has an unjust basic structure. But the argument is a sleight of hand. Her step 2Y includes an assumption that it is the responsibility of the basic structure to bring about social justice. If that is the case, inevitably any society that is unjust will be so because it has an unjust basic

[43] '[W]hy should we *care* so disproportionately about the coercive basic structure, when the major reason for caring about it, its impact on people's lives, is *also* a reason for caring about informal structure and patterns of personal choice?' (Cohen, 'Where the Action Is' (n5) 23, emphasis in original). See also Liam Murphy, 'Institutions and the Demands of Justice' (1998) 27 *Philosophy and Public Affairs* 251.

[44] Joshua Cohen appears to make a similar assumption in his 'Taking People As They Are' (2000) 30 *Philosophy and Public Affairs* 363, 377.

structure. Let me explain. If we find an agent that is responsible for justice, then it will always be in a certain sense *because of* the unjust agent that the relevant site (in this case society) is unjust. But that 'because' is a normatively loaded one: it is because of the failure of the basic structure to fulfil its responsibility that society is unjust, in the same way that it is in law because of the action of the tortfeasor that the claimant suffers damage. Precisely because the tortfeasor had an *ex ante* responsibility *not* to act in a certain way, it is her acting in that way that we pick out as the relevant cause. The triviality in the notion of causation at work here undermines Ronzoni's claim to have provided an account on which it is the basic structure that causes a society to be unjust even if we take a purely coercive view of the basic structure. Recall the conclusion reached by working through the example, viz. that society might not have the right institutions to realize fair equality of opportunity. Ronzoni admits that unjust social norms can be part of the explanation of why a society is unjust – but, she claims, it is nevertheless because of the basic structure's failure to realize the principles (i.e. because the basic structure does not comprise the right institutions) that society is unjust. That is, we should pick out the failure of the basic structure as being the *relevant* cause.[45] But why prefer to put it that way? We could say instead that society is unjust because of its unjust social norms (focusing on the site rather than the agent), and *one of* the things we should do to rectify the injustice is to reform or abolish institutions. Equally we could say that society is unjust precisely because we have failed to create the appropriate institutions. If the absence of the appropriate institutions is proximately responsible for social injustice, our failure to build those institutions is ultimately indictable. Only if we

[45] I take Ronzoni to intend 'because of' here not only in a causal sense, but in a constitutive sense. That is: since the failure of the basic structure is the *relevant* cause, it is *in virtue of* that failure (= in virtue of the injustice of the basic structure) that society is unjust.

assume that the basic structure is *the agent* (that is, solely responsible) can we say that it is because of the basic structure's failure that society is unjust.

A similar preference for explaining injustice in terms of agent rather than site occurs in Ronzoni's discussion of global justice. '[I]nternational "agreements" which obviously benefit one of the parties at the expense of the other… might reveal an injustice precisely in the absence of effective mechanisms to declare these agreements void and not binding, or in the absence of measures meant at [sic] changing the underlying structure of incentives and rewards which make such agreements attractive to global actors in the first place.'[46] Again, unless we simply assume that it is the responsible agent of whom injustice must be non-derivatively predicated, there is no reason not to regard the interaction *simpliciter* as unjust, and the (global) basic structure as invoked in order to fix it. An injustice in the absence of *x* means no more than a (prima facie) injustice that stands to be rectified *by x*. In all Ronzoni's arguments injustices have to be identified as being eradicable by other institutions than those currently in place before any injustice can be attributed to the basic structure.

Ronzoni is in effect defending the view that the property of injustice flows from the responsible agent. But this view is simply too easy to defend if one is prepared to say that any injustice is such because of some agent's *omission* in failing to respond to 'background injustice', or – what in a society of ongoing social interaction amounts to the same thing – failing to act such as to prevent such injustice arising in the first place. This strategy saves the agential view at the expense of making it trivial. We can agree with Hayek that only an agent who brought about an injustice can have a duty to bring about justice – i.e. to put it right – but if we think that there can be omissions of injustice as well

[46] Ronzoni, 'Two Concepts of the Basic Structure' 80.

as acts, then this does not help to rule anything out. We could all be responsible for the injustice by our failure to prevent it in the first place.

In fact something like this conclusion does seem to be implicit in Ronzoni's argument. Even if the basic structure is the proximate agent, or instrument, of justice, there is still an ultimate agent implied in the notion that 'we should build the institutions needed in order to bring about' the right social conditions. Who is 'we'? Presumably it is the citizens of the society that is the site of justice. The proper way to understand Rawls's principles, according to Ronzoni, is 'as a criterion of justice that we ought to *realize* by creating the appropriate institutions'.[47] The ultimate duties of justice are held, after all, by individuals. But why should we realize the criterion by creating institutions? Scheffler gives us the answer in his own defence of the basic structure thesis: 'Given the scale of a modern economy, the establishment and preservation of background justice requires far too much information and is far too complex a task to be accomplished by any set of rules that might plausibly guide individual conduct. Instead, it is the function of the basic structure to secure and preserve background justice.'[48] Even if individuals have basic responsibility for social justice, Hayek was right in observing that the epistemic challenge involved in achieving it is far too great for individuals to meet as individual actors. It makes sense for the immediate responsibility to fall on the institutions of the basic structure. But even if the epistemic problem means that the basic structure (or indeed the state) should be considered the primary – or proximate – agent of justice, it does not follow from this that there is nothing individuals can do in direct pursuit of social

[47] 'What Makes' 215 (emphasis in original).
[48] Scheffler, *Equality and Tradition* (p40 n11) 115, citing *PL* 266.

justice,[49] or that their duties of justice are necessarily discharged by their creation of the appropriate institutions.

The dilemma for Ronzoni's defence of the basic structure thesis against Cohen's critique is as follows. She can maintain either that the basic structure is the agent of justice or that it is the site. If it is the agent of justice it is only so proximately; we can still pursue the line of responsibility down to the actions of individuals (the ultimate agents) in building institutions. But then why should they only build institutions? Other direct individual action cannot be non-arbitrarily ruled out. Since this is precisely Cohen's point, his critique is vindicated. Ronzoni's position differs from his only in the assumption that the content of the justice-directed duties of individuals is to build social institutions. Perhaps she would agree with Scheffler that '[d]espite the primary role of the basic structure, justice is not exclusively an institutional value. Individuals too have duties of justice, and just institutions will shape people's motives so as to discourage individual conduct that is incompatible with justice. But, on the one hand, the primary subject of justice remains the basic structure of society and, on the other hand, there are many other values and norms that should appropriately regulate individual conduct within the basic structure.'[50] But when put like this the basic structure thesis looks much less significant than it has often been taken to be. It is less an interpretation of the nature of social justice, and more an empirical observation about the way that justice-directed action is best coordinated under modern social conditions.[51] Indeed, Hayek's error seems to have been in conflating the two. If, on the other hand, the basic structure is the site of justice then we can still ask how we are supposed to draw the boundaries of the basic

[49] The indirect pursuit of justice would be by way of support for just institutions, which Rawls clearly enjoins (*TJ* 334). Indirect action is logically dependent on the existence of institutional action; direct action is not.
[50] Scheffler, *Equality and Tradition* (p40 n11) 123.
[51] Cohen criticizes Pogge's defence of the basic structure thesis along similar lines in his *Rescuing Justice and Equality* (Harvard University Press 2008) 377-378.

structure. Ronzoni's argument was designed to counter Cohen's contention that there is no non-arbitrary way of doing this. If I am right in thinking that her strategy in fact turns the basic structure into an instrument (or proximate agent) of justice, then we are simply returned to the first horn of the dilemma, and Cohen's challenge remains.

The instrumental view of the basic structure also loses something that is distinctive to Rawls's theory, namely, that the idea of the basic structure of society is conceptually necessary for social justice. The basic structure is simply the most appropriate tool for us to use in achieving collectively what justice requires of us individually. Social justice in *A Theory of Justice*, on the other hand, is intrinsically collective, a property primarily of the site of cooperation, that is, of the basic structure of society. On this site-orientated rather than agent-orientated view, the basic structure is a constitutive, rather than an instrumental, part of social justice.[52] Cohen picks on only one of Rawls's stated rationales for the basic structure thesis – that of profound and pervasive impact – in arguing that the basic structure is fatally indeterminate.[53] In my exposition of Rawls's *TJ* account of the basic structure as site I focused instead on the argument that social justice is a virtue of cooperation. Perhaps this offers a more robust position from which the basic structure thesis could be defended. The defence would be along the following lines. If the basic structure was an agent pursuing the aim of achieving justice in society, there would be no reason why individual agents should not also do so. But, Rawls might argue, principles of justice do not prescribe aims, but rather set fair terms for cooperation. Since the basic structure of society is the way in which social practices fit together in one system of cooperation, it is thereby the primary site of social justice.[54] If the same outcomes as

[52] Abizadeh draws this distinction in 'Cooperation, Pervasive Impact, and Coercion' (n20).
[53] As Scheffler notes: *Equality and Tradition* (p40 n11) 150.
[54] Presumably the subjects of local justice – churches, universities, families and so on – are also sites of cooperation, and therefore (subsidiary) sites of social justice. Local justice is a species of social justice.

result from a just basic structure were achieved through some entirely different process (e.g. individual action, semi-miraculously coordinated) there would be no reason to call this a just society because justice is a virtue of cooperation. If the result is not arrived at through the operation of common practices, then the question of social justice simply does not arise.

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