

# A Mooring for Ethical Life: Assessing the Basic Structure of Society

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# Introduction

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Even once we accept that morality has a universal foundation, we should still recognize that the particular values, virtues, relationships and obligations that guide our decisions are often contingent. We should respect one another, advance happiness, live flourishing lives and advance justice, but the *way* in which we should do this will always be specific to our social context. In recognizing that much of our form of ethical life is relative to our social world, we do not need to think that all of ethics is relative. The ultimate moral ends or principles that ground our pursuits and restrict our actions will only have meaning and substance through the particularities of the form of life we live. To ignore these particularities will only obscure what the ultimate ground for ethics and morality truly is.

The particular way in which we live together determines much of our particular form of ethical life. In living together, we organize, coordinate and understand our actions in accordance with social practices. These practices set our expectations of others and give meaning to our activities. When our interactions are complex and when we live with large groups, we organize our interaction more and more, and our practices become more and more structured. What we identify as our *social institutions* are particularly ordered practices that structure our life together. In ordering our lives, these institutions have profound and pervasive effects on the content of ethical life. These institutions not only determine the material conditions in our society and the distribution of advantages, they also influence the shape of ethical life. Our social practices establish new obligations, define our rights, shape our values, and set the terms of our relationships.

These social institutions are a concern of ethics and morality because the institutions that structure our conduct could have been otherwise and we can change them now. Since these institutions have profound effects on our form of ethical life, which institutions we choose to have

can have a broad impact on the values, virtues, relationships and obligations that define our particular ethical life. This makes the question of which institutions we should have a distinct and weighty ethical concern.

Of course, there is the view that our real obligations, values, and virtues are everywhere and always the same. To some extent, this must be true if we recognize a universal foundation for our moral and ethical claims. Yet, we should not take this view too far. We live particular lives with particular concerns and particular ways of interacting. If ethics is to properly treat us as particular persons, it needs to be sensitive to the differences in our ways of living. What ends we set, what makes us happy, and what we rely on others to do will also be specific to our social context, and a complete identification of our values, virtues, relationships and obligations should be sensitive to these particular features of our lives.

This dissertation is about how moral and political philosophy should proceed after recognizing the profound influence of our social institutions on the content of ethical life. I argue that there is a distinct and unified set of institutions that have a kind of moral primacy. The institutions establish moral rights, obligations and powers for individuals as members of society. They establish a background for living our life together. The central role that these institutions play in determining that which is particular to our form of ethical life makes this institutions of primary moral importance. These institutions are those that constitute the basic structure of society, and I will argue that they have primacy in a proper order of evaluation amongst those moral issues that we need address.

## **1. The Basic Structure and Justice**

In *A Theory of Justice*, John Rawls made the claim that “the primary subject of justice is the basic structure of society.”<sup>1</sup> By the “basic structure,” Rawls meant the way our basic social institutions--

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<sup>1</sup> Rawls, *Theory of Justice* (Revised), 6.

which include a property scheme, economic system and political constitution--come together as a single system of social cooperation.<sup>2</sup> I take this choice of subject to be one of the many contributions that Rawls made to the fields of moral and political philosophy, and I take it to be a contribution that is separable from his others. A reader could agree with Rawls in taking the basic structure as subject even when they do not accept his two principles of justice, contractualism, constructivism, or his conception of the person. In this dissertation, I mean to show, not only that a reader *could*, but that a reader *should* appreciate the Rawlsian choice of subject even when they disagree with Rawls on these other core issues.

What turns many recent theorists away from the Rawlsian focus on the basic structure is linked to what turned theorist towards *Theory of Justice* when it was first published. As the title states, the book was offered as a theory of justice and the importance of justice immediately grabs us.<sup>3</sup> The fact that Rawls seemed to offer a renewed account of justice made it more attractive as a major work in philosophy. The fact that this renewed account was appealing, rigorous and deep made it one of the most significant works in 20th century philosophy. However, if we think of *Theory of Justice* as a theory of justice, we are tempted to read the phrase “the primary subject of justice is the basic structure of society” as a claim about the nature of justice. We think of it as a thesis about justice; that justice has some unique relationship to the Rawlsian artifice that is the basic structure. At this point, many come to doubt the Rawlsian choice of subject. Should we think that justice is really about the basic structure in some primary way? Isn't justice something broader than *that*? Our pre-theoretic understanding of justice seems to cut against the claim that justice is somehow uniquely related to the specific subject of the basic structure. So, being about

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<sup>2</sup> Rawls, *Justice as Fairness*, 10.

<sup>3</sup> G.A. Cohen motivate his criticism with this claim, “It was because it was thought to offer a new and comprehensive theory of *justice* that the book *A Theory of Justice* was welcomed with such excitement: the excitement was not that Rawls had proved a theory of something, well, *sort of* like justice.” *Rescuing Justice and Equality*, 304.

justice makes *Theory of Justice* appealing, but being about justice makes the Rawlsian choice of subject seem unappealing.

G.A. Cohen, Liam Murphy and Aresh Abizadeh have used this intuition against the Rawlsian choice of subject in each of their more focused arguments. First, Cohen argued that justice is a unified moral demand whether we are assessing institutions, states of the world or individual actions.<sup>4</sup> If we are to identify the basic structure--or anything--as “just,” then we must be claiming that the unified and fully general demand of justice is instantiated in the basic structure. Given that justice is general in this way, Cohen argues that we cannot rightly identify justice with a principle that applies only to the basic structure. A principle of justice is general across subjects by its very nature, so it cannot apply only to the basic structure. Second, Murphy argued that if we think of justice as primarily a concern of our basic institutions, then this only frustrates our ability to promote justice in an unjust world. For Murphy, identifying justice as an institutional virtue means that we can only advance justice through institutions, but this would mean we cannot always do that which would directly advance justice. Here again, Murphy uses a common intuition about the nature of justice to challenge the Rawlsian focus on the basic structure. Third, Abizadeh has focused on distributive justice specifically and challenged the idea that the basic structure of society would limit the scope of distributive justice. Once we recognize that distributive justice has demands beyond the basic structure, it seems to pull us away from its importance as a primary subject. In these arguments again, Abizadeh uses a pre-theoretical idea of distributive justice to challenge the Rawlsian choice of subject.

My response to these arguments is to distance the claim that “we should take the basic structure as subject” from any claim about the nature of justice. Accordingly, I do not claim that “the primary subject of justice is the basic structure of society,” but instead claim that “the basic structure has primacy as a distinct moral subject.” I will claim that the basic structure of society is

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<sup>4</sup> Cohen, *Rescuing Justice and Equality*, Ch. 7 (especially p. 291).

a kind of *mooring for ethical life*. Regardless of what we think about justice as an ideal, we should treat the evaluation of the basic structure as amongst the most important ethical concerns.

Before explaining why the basic structure is such an important subject, I first want to make clear how my approach differs from typical responses to Cohen, Murphy and Abizadeh. Their arguments appeal to a pre-theoretical understanding of justice and show the problems with taking the basic structure as primary subject given that understanding of justice. The obvious response to their arguments would be to develop or defend an alternative understanding of justice, and then to show why we should take the basic structure as primary subject given that understanding of justice. Thomas Nagel and Samuel Scheffler seem to make such an argument with their appeal to the division of moral labor, each offering an understanding of justice that uniquely bears on institutions.<sup>5</sup> Andrew Williams argues for an understanding of justice that is uniquely related to publicity.<sup>6</sup> Kok-Chor Tan shows that core social institutions are the site of a suitably defined idea of distributive justice.<sup>7</sup> In each case, theorists defend the Rawlsian view by articulating a view of justice that institutions would be uniquely related to it.

By contrast, my argument does not appeal to any understanding of justice. I do not claim that the basic structure is the primary subject of justice but that the basic structure is a centrally important subject for ethics. I claim that the reasons for taking the basic structure as subject are independent of the nature of justice. Instead, the reasons come from the ways in which the basic structure affects the content of ethical life.

There is an important difference between what I believe about justice and what I need to claim for my argument. I have a certain belief about how we should understand justice, but my arguments do not require that belief. Specifically, I believe that the demands of justice are not

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<sup>5</sup> Nagel, "The Moral Division of Labor," *Equality and Partiality*; Scheffler, "The Moral Division of Labor: Egalitarian Liberalism as Moral Pluralism," *Equality and Tradition*.

<sup>6</sup> Williams, "Incentives, Inequality and Publicity" *Philosophy and Public Affairs*, Vol. 27, No. 3 (1998).

<sup>7</sup> Tan, "Justice and Personal Pursuits" *The Journal of Philosophy*, Vol. 101, No. 7 (2004); *Justice, Institutions and Luck*, Ch. 3.



general across all subjects. What makes for a just society, just relations between societies, just agreements, and a just character is not a single and unified moral demand instantiated in all these things. Such a view towards justice is well-suited to those concerned with a single moral good, like equality or happiness, but it not well-suited for those who focus on the complexities and conflicts of ethics. Instead, I treat justice in the way that deontologists treat rightness. For deontologists, what is “right” is determined by a principle that applies in that circumstance and not by a single principle that applies across all circumstances. Likewise, I believe that what is “just” is determined by a principle that applies to that subject and not by a single principle that applies across all subjects. When it comes to justice, I am a “non-generalist”. With this understanding of justice, I can explain why the principles that apply to the basic structure are principles “of justice” even when they are not derived from any more fundamental principles of justice. I will return to this issue in Chapter 5 in order to highlight responses to Cohen’s argument.

For now, the key is to recognize that I do not need this understanding of justice to make my point. I do not need to make any argument about the nature of justice in order to show the ethical importance of the basic structure. We can appreciate the Rawlsian choice of subject most easily when we distinguish the argument for this choice of subject from any claim about the nature of justice.

## **2. Profound and Pervasive Effects**

So, why is the basic structure such a centrally important ethical subject? In short, because the basic structure determines the rights, obligations and powers that we have as members of society, and these moral demands and claims form a background for our social interaction and thereby for the various practice-dependent aspects of ethical life. The whole complex of values, virtues, relationships and obligations that specify our ethical life is not explained solely by the

particularities of the basic structure, but the basic structure has both profound direct effects and wide indirect effects. It directly establishes core obligations, has far-ranging effects on our material conditions, and determines much of the distribution of social advantages. It also indirectly affects what associations and relationships persons build and the ways we think of ourselves. It is this kind of profound and pervasive effect on ethical life that makes the basic structure so centrally important for ethics. Think of all the ways in which a feudal society differs from a democratic market society. Think of both the direct effects that has in individual rights and obligations, and think of the indirect effects in has on our relationships and ends. That is the kind of deep significance the basic structure has.

In making this claim, I am bound to perk the ears of those familiar with recent criticisms of Rawls. Rawls claimed that the basic structure was the primary subject of justice because its effects are so “profound and pervasive” from the start of life.<sup>8</sup> Yet, G.A. Cohen’s argued against such a justification for the focus on the basic structure in his popular essay “Where the Action is: On the Site of Distributive Justice.”<sup>9</sup> The criterion, “having profound and pervasive effects,” cannot justify a unique concern for the basic structure of society because things beyond the basic structure also have profound and pervasive effects. For example, suppose we live in a society in which a majority of persons greatly value poetry. Perhaps a majority see poetry as the highest form of human accomplishment. It is likely that this appreciation would have profound and pervasive effects on education, leisure time, career choices, and much else. We would not, however, think that this appreciation for poetry is part of the basic structure. Accordingly, we could not justify an exclusive concern for the basic structure by appeal to profound and pervasive effects because it would not rule out our concern for the appreciation of poetry. It is because of such an argument--and his subsequent support for this argument--that Cohen will be the

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<sup>8</sup> Rawls, *Theory of Justice* (Original Edition), 96.

<sup>9</sup> Cohen, “Where the Action is: On the Site of Distributive Justice,” *Philosophy and Public Affairs*, Vol. 26, No. 1 (1997), 3-30.

primary interlocutor for much of my argument. I need to explain why my appeal to the profound effects of the basic structure does not make me liable to Cohen's objection.

In response to Cohen's argument, I want to make two points. The first point does not address his objection, but is nonetheless important. I sense that persons read the phrase "profound and pervasive effects" as if it refers solely to material effects. At least, this is how Cohen uses the ideas when the effect he is concerned with is material equality. He makes the point that an egalitarian ethos could have profound and pervasive effects on equality in the same way that economic institutions can.<sup>10</sup> It is important for my response however, that profound and pervasive effects are not only material effects but also effects on the content of ethical life. The profound and pervasive effects are on our values, virtues, relationships, obligations and self-conception. My concern is with the effects on our relationships with one another, our pursuits in life and what our responsibilities are.

Even once we are concerned with profound and pervasive effects on ethical life, however, Cohen's objection still stands. The above poetry case is an example of how. I move then to a second point, which directly addresses Cohen's objection. The profound and pervasive effects criterion is not meant to distinguish the basic structure from other moral concerns. It is, instead, meant to show why the basic structure--otherwise distinguished as an ethical concern--is so important. In short, the appeal to profound and pervasive effects is not meant to answer the question "what distinguishes the basic structure from other ethical concerns?" but instead to answer "why is the concern with the basic structure primary amongst ethical concerns?" The organization of the basic structure has profound effects, so it is ethically important that we address it. It is also true that the informal structure of society has profound effects, so it is ethically important that we address it as well. Yet, the fact that both the informal structure and the basic structure are ethically important is no problem for taking one as subject over another.

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<sup>10</sup> *ibid*, 13-14.

In short, I want to claim that the basic structure is so important because it has profound and pervasive effects on ethical life, Cohen objects that other aspects of social life also have such effects. I agree. Those other aspects of social life are also important to assess. This fact takes nothing away from the importance of the basic structure.

The question inevitably raised at this point is “if other aspects of social life are also important, then why direct our attention to the basic structure specifically?” I still need to explain why the basic structure, specifically, deserves attention. I recognize that an appeal to profound and pervasive effects on ethical life will not do that by itself.

### **3. Three Issues**

At this point, I have said what I will *not* do. I will neither argue for a focus on the basic structure by arguing for a particular conception of justice nor claim that the basic structure is unique in having profound and pervasive effects. To explain what I will do, I need to distinguish three issues. In his criticism of Rawls, Cohen mixes these three different issues together, and I mean to separate them again.

The first issue is the need to offer an adequate account of *what the basic structure of society is*. What differentiates the basic structure from the entire system of law or from all norms of conduct? What unifies the major social institutions into the basic structure? Rawls does not give any such full articulation of what the basic structure is, and he does not do so purposively.<sup>11</sup> However, given recent challenges, we need a more precise account of what the basic structure is. Call this issue a concern with the *identity* of the basic structure.

The second issue is explaining *why we would need to assess the basic structure specifically*, once it is identified. Why is the basic structure--given what it is--an object of moral concern?

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<sup>11</sup> Rawls, *Justice as Fairness*, 12, 57. The way that Rawls purposively uses an intuitive understanding of the basic structure is brought out in Samuel Freeman, “The Basic Structure as First Subject of Justice,” in Jon Mandle and David A. Reidy (eds.), *A Companion to Rawls* (Hoboken: Wiley-Blackwell, forthcoming).

Why wouldn't our concerns with it be addressed by other moral principles? Even if we recognize that certain problems of political philosophy need to be addressed, it is not clear why we should address them with principles that apply to the basic structure rather than, say, justifying the use of coercion or justifying our social institutions individually. What would require that arguments in political philosophy be about the basic structure specifically? Call this issue a concern with the *moral indispensability* of the basic structure.

The third issue is offering a justification of why we would treat the principles that applies to the basic structure as distinct from other moral principles. Even if we should morally assess the basic structure, why would we think that the moral demand on it would be any different from the moral demands on other subjects? Why wouldn't we merely apply a more general principle to the basic structure as we do other subjects? After all, Rawls starts out developing principles for this subject rather than developing first principles to be applied to it. What could warrant detaching the basic structure from broader moral commitments in this way? Call this issue a concern with the *moral distinctiveness* of the basic structure.

Cohen wrongly supposes that the identity, moral indispensability and moral distinctiveness of the basic structure are all addressed by a single account. He offers two options that would explain the *identity* of the basic structure, and then shows either option to be inadequate as an explanation for its *moral distinctiveness*. In the 2009 version of his argument,<sup>12</sup> Cohen claims that we cannot identify the basic structure as the coercive structure because it does not explain why we are concerned with the coercive structure rather than the other features of social life that have profound and pervasive effects. Likewise, he argues that we cannot identify the basic structure as certain norms of conduct because it does not explain why we are not likewise concerned with other norms that have profound and pervasive effects. In this way, he

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<sup>12</sup> In §5.1.1, I will point out that Cohen slightly changes his argument from the 1997 article to the 2009 book.

claims that no explanation of the identity of the basic structure is adequate because it does not explain its moral distinctiveness.

A single explanation does not need to resolve these three issues. Why would we think that a single account would explain the identity, moral indispensability and moral distinctiveness of the basic structure? The three issues are fundamentally different. First, identity is a descriptive problem. It addresses what part of the world is picked out by the idea of the basic structure. One could articulate a view about what the basic structure is and think it has no moral significance whatsoever.<sup>13</sup> Second, the moral indispensability issue turns on claims about the aims of moral theory. It depends on a view about what our moral principles need to do such that we would need principles that apply to the basic structure. Third, the moral distinctiveness depends on broader views about how our moral commitments hang together--or don't. Whether we can detach the basic structure as an ethical subject and develop principles for it depends on views about what makes appropriate principles. For example, are all appropriate principles derived from first principles or can they be generated by a constructive procedure?

I suspect that the reason why Cohen mixes these three issues together, despite their apparent differences, is because of the role that "justice" plays in our moral reasoning. Justice seems to be both morally indispensable and morally distinctive. First, we intuitively think that the demands of justice are a centrally important aspect of morality and ethics. Second, the ideal of justice seems distinct from other moral ideals, like rightness or goodness. If "the primary subject of justice is the basic structure of society" our views about the indispensability and distinctiveness of justice would seemingly make the basic structure both morally indispensable and morally distinct. Those who argue for a conception of justice that is uniquely tied to the basic structure, thereby get the moral indispensability and moral distinctiveness of the basic structure for free through its ties to justice. For Cohen, justice is indispensable and distinct, but it is broader and

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<sup>13</sup> I have no idea *why* one would do this, but that is not the point.

more fundamental than our judgements about the basic structure. It is for this reason that the focus on the basic structure seems misplaced to him.

In my core arguments, I do not make any claim about the nature of justice. Instead, I claim that the basic structure is a centrally important subject for ethics. To make this claim, I need to explain the identity, moral indispensability and moral distinctiveness of the basic structure. If I am right that its association with the ideal of justice previously made the basic structure seem indispensable and distinct, then my challenge will be to explain these two features of the basic structure without appeal to the nature of justice.

#### **4. Addressing the Three Issues**

The first three chapters of this dissertation address the identity, moral indispensability and moral distinctiveness of the basic structure respectively. In the fourth chapter, I review the significance of these arguments for moral theory more broadly. The final two chapters, address objections to my arguments.

The first chapter identifies the basic structure as a specific set of social practices. It begins by defining the general idea of a social practice and then progressively defines subclasses of social practices until we reach the idea of “major social institution.” I then claim that the basic structure is the way these major social institutions come together to form a single system.

There are two important ideas that are introduced in the first chapter that form the core of its argument; the first is the idea of an “ostensibly binding practice” and the second is the connected idea of a “major social institution.” Ostensibly binding social practices are those practices that persons understand as requiring that they act in ways specified by the practice. As an example, the practice of line-waiting is understood by participants as requiring that they wait in line in order to get service. There are two important features of this kind of practice. First, we can understand these practices as requiring action without committing ourselves to the judgement

that we should act in the required ways. In this way the practices are only “ostensibly” binding. For example, one could describe the practice of line waiting as included the rule that “one ought to wait in line” without themselves thinking that persons really ought to wait in line. Whether we should act in the ways required by an ostensibly binding social practice is a moral question that is not answered by detailing our understanding of practice alone.

Second, I identify the “major social institutions” as those practice that meet two conditions; (1) the rules are specific enough so that persons can form definite claims on their basis and (2) the rules apply to us *as members of society*. For example, a property system is a major social institution because it requires that persons respect property specific claims that persons have due to their membership in society. As members of society, we know that persons are required by the rules to act in that way, and we plan our lives against the expectation that they will do so. The fact that the major social institutions are specific enough to establish claims gives members of society a kind of “background security.” As they live and plan their lives, they can rely on people to generally act according to the institutional rules. I then argue that we can best understand the basic structure as constituted by the major social institutions for a single society. Hence, the basic structure is *the way in which the major social institutions together establish background security for persons as members of society*. This is the key idea that unites the basic structure as a single subject rather than a mere heap of institutions.

With the identity of the basic structure thereby established, I move on to the moral indispensability of the basic structure in the second chapter. It might seem natural to show any particular subject is morally indispensable on the basis of a substantive moral view. For instance, one might argue that we need to assess the basic structure because of the moral importance of either autonomy or happiness and claim that the basic structure uniquely bears on autonomy or happiness. Instead, I give a more ecumenical argument that is not based on a commitment to any substantive moral claim. Instead, the argument is made on the basis of a view about the



normativity of social practices. Most simply, I claim that to assess certain actions we need to assess the practices that those actions are a part of. Analogously, I claim that to assess the major social institutions, we need to assess the basic structure of which they are a part.

To see the motivating commitment of my argument, we should look to Hume. In his *Treatise on Human Nature*, Hume gives an example that highlights the kind of argument I mean to make. In §3.2.2, he writes

“A single act of justice is frequently contrary to the public interest; and were it to stand alone, without being followed by many other acts, may, of itself, be very prejudicial to society. When a man of merit, of a benevolent disposition, restores a great fortune to a miser, a seditious bigot, he has acted justly and laudably, but the public is the real sufferer. Nor is every single act of justice, considered apart, more conducive to private interest, than to public; and ‘tis easily conceived how a man may impoverish himself by a single instance of integrity.”

In these two cases, Hume gives examples of actions that would be quite wrongful if judged in isolation. If one had the choice between giving money to a bigoted miser or to a charity, then to give the money to the miser would be uncaring. Yet, if we see the action as an instance of returning a loan, our assessment of the action changes. Here, the man of merit ought to give the miser the money because the action is part of a practice of contract-keeping. Whether the action is part of a social practice is thereby relevant for properly assessing the action. Hume here assumes that the practice of contract-keeping is a good one, because we would hardly approve of the action of the man of merit if it were not. For this reason, we can recognize the importance of assessing the practice of which the action is a part in order to assess that action.

The moral indispensability of the basic structure is explained by carrying this analysis to a second level. To properly assess an action that is part of a practice, we need to assess that practice. To properly assess an institution that is part of the basic structure, we need to assess the basic structure itself. We need to treat institutions as we treat the action of the man of merit; just as we

see his action as part of the practice of contract-keeping we should see contract-keeping as part of the basic structure. The basic structure is morally indispensable as a subject because we can only properly assess our major social institutions by assessing the basic structure as a whole.

In the third chapter, I move on to explain why the basic structure is morally distinctive. To do this, I argue for a fundamental distinction between moral judgments that apply within a social practice and judgments that apply to that practice. The reason for this distinction is because social practices affect the moral context of individuals within that practice. Judgments made within a moral context should be sensitive to the context established by the practice, but the judgments made of that practice should not be. For example, suppose that a property system establishes trespass as a wrong. Our evaluation of an action within a property system should be sensitive to the wrong of trespass, but our assessment of the property system should not be. The fact that a property system makes trespass wrong is not a reason to support a property system. I claim that it is this distinction between judgments that apply within a social practice and those principles that apply to a practice that distinguishes the basic structure as a moral subject.

In making this argument, I contrast my account of the moral distinctiveness of the basic structure with the primary alternative, the “division of moral labor” arguments offered by Thomas Nagel and Samuel Scheffler. Both arguments justify distinguishing principles for institutions from principles for individuals based on the efficacy of such a separation in satisfying our diverse moral aims. Instead of this, I argue that what justifies assessing the basic structure according to distinct principles is a division between principles that apply within a moral context and those that apply to practices that establish that moral context. Within an ethical life, the particularities of our social practices establish certain values, virtues, relationships and obligations that are relevant to determining how we should act. The principles that apply to these practices should not be sensitive to the particularities that they establish, but principles that apply within these practices should be. The principles that apply to the basic structure are principles that should not be

sensitive to any moral context whereas the principles that apply to a variety of other subject should be. While the basic structure is not the sole determinant of the particularities of ethical life, it has a kind of independence that justifies treating it differently.

With these three chapters complete, I will have explained the identity, moral indispensability and moral distinctiveness of the basic structure. First, the basic structure is the way in which the major social institutions together establish background security for persons as members of society. Second, we need to assess the basic structure as subject in order to properly assess the major social institutions that together form it. Finally, the moral demands on this structure are distinct because of the difference between principles that apply within a social context and the principles that apply to those practices that determine that context. What explains why the basic structure is a centrally important subject for ethics is not the nature of justice, but the normativity of social practices and the kind of social practices the basic structure consists of. It is because the basic structure is a system of practices that we need to assess it, and it because it is a system of practices that it is morally distinct from the principle that apply within it.

## **5. Significance and Two Objections**

Together, the first three chapters show why the basic structure is a centrally important ethical subject. Depending on the reader, this conclusions might seem either humdrum or extreme. In Chapter 4, I mean to counter both of these objections. I seek to show that the general approach I support meets a reasonable middle between those who insist that morality is independent of our social context, and those who believe it is fully determined by our social context. In this way, the approach has the possibly of appealing to both Kantians and Hegelians, communitarians and liberals, as well as sociologists and moral philosophers. However, I do not think that I am only creating friendships through my argument. I also claim that my argument is inconsistent with any moral theory that cannot accept “limited conventionalism.” I define limited conventionalism as

the view that some--but not all--of our moral demands and claims are practice-dependent. If a moral theory cannot recognize either (a) that some demands or claims are practice-dependent or (b) that some demands or claims are practice-independent, then they will not accept my arguments.

This fourth chapters does not complete my argument. I still want to respond to two objections in Chapter 5 and 6 respectively. Both objections are inspired by recent criticism of Rawls, but I identify them with much deeper tendencies in moral and political theory. In the final two chapters, I want to show why the approach I argue for is preferable to the approaches that are consistent with those deeper tendencies.

The first objection is developed from Liam Murphy's argument in "Institutions and the Demands of Justice." There, Murphy makes an both a direct argument and an intuitive argument against separating principles that apply to institutions from those that apply to individual actions. His direct argument seeks to show that separating the principles that apply to institutions frustrates our attempts to advance justice in our imperfect world. This argument can be easily addressed, but there is a deeper intuitive argument that presents a more persistent difficulty. Specifically, Murphy appeals to the intuitive idea that all our moral principles are united at some fundamental level. Those principles that are at this fundamental level must then be general across all subjects; they apply to institutions as much as they apply to individuals. This intuitive view directly conflicts with the moral distinctiveness of the basic structure, because it limits the extent to which practices can affect our moral context. Murphy's view is an intuitive view of moral theory, and since this view conflicts with the moral distinctiveness I defend, I need to address it.

In response, I first want to show exactly why Murphy's argument would be problematic for the view I argue for. Our social context can affect the assessment of individual action in two ways. First, our social context might change the causal processes by which we satisfy moral principles. For example, one might think that the convention of driving on the right changes the ways by

which I satisfy my obligation not to harm others. One could argue that no new moral standards arise from this convention but only a new way by which to satisfy an older moral standard. Second, our social context might establish new standards by which to assess individual action. For example, one might think that if the institutions of property are justified, then I should respect property claims. Someone with this view might think that our social context establishes new standards by which to judge actions. My argument relies on the possibility of the second way that social context affects our moral assessment of individuals. Murphy's argument is only an objection against my view insofar as it shows why the second possibility is impossible. It is not clear that Murphy seeks to make this point, but some might interpret his argument in this way. They might claim that "if all valid moral judgments are entailed directly by first principles, then social context cannot create new standards by which to judge individual actions." The act-consequentialist, for example, is committed to only one principle as grounding any judgments of individual action. If such a view is necessarily correct, then social context is not as important for assessing individual action as my argument requires. Such a moral theory might seem to be entailed by Murphy's claim that all moral principles are united at a fundamental level.

I identify this challenge as a commitment to "Generalism," which holds that all valid moral judgments must be entailed directly by a fully general first principle (or fully general first principles). Now, I recognize that a commitment to generalism would block my argument for the moral distinctiveness of the basic structure because it would block the importance of social context, so Chapter 4 is focused on defending against arguments for generalism. Overall, I mean to show that arguments from generalism are not problematic because *we have no reason to be committed to the generalism*. Any argument that assumes it to argue against a focus on the basic structure is therefore question-begging. I look at four major kinds of argument offered in defense of generalism and show why each of them is lacking. Finally, I end by giving one brief argument against a commitment to generalism.

In Chapter 6, I am concerned with a second objection that is used by G.A. Cohen in his 2009 book, *Rescuing Justice and Equality*. In this book, Cohen goes beyond the argument from his 1997 article and appeals more directly to the concept of justice to ground his criticism of Rawls. As I made clear in §0.2, my argument consciously avoids making any claims about the nature of justice. I see the biggest impediment towards accepting the central importance of the basic structure to be the fact that persons see such a focus as only motivated by views about the nature of justice. Yet, while I avoid arguing from claims about justice, someone might still object to my view from *their* own view about justice. Shouldn't we be concerned with justice, especially when we are assessing something like the basic structure? As Cohen points out, if we think that the basic structure ought to be just, then shouldn't we first identify what justice requires and then apply it to determine how the basic structure ought to be? While I have been avoiding making claims about the nature of justice, I have ignored how justice bears on the issue. Since justice seems to be a central moral concern, shouldn't we be concerned with what justice requires?

I meet this objection by focusing on what the concept of justice is and how it bears on the basic structure. I draw a contrast between unified and disunified conceptions of justice. A unified conception of justice consists of a single moral demand that unifies all objects that we can rightly consider just or unjust. A disunified conception of justice views the demands of justice as different for different subjects. A disunified conception of justice is like the deontological conception of rightness. For the deontologist, what is right is determined by a principle that applies in that circumstance (rather than a single overarching principle for all circumstances), and a disunified conception of justice maintains that what is just is determined by a principle that applies to that subject (rather than a single principle of justice that applies to all subjects). Cohen's argument relies on a unified conception of justice, and I argued against such a view in Chapter 5. Specifically, I show that such an understanding of justice does not fit well with the role that concept plays in our practical reasoning. I then show how a disunified conception of justice can

better explain why the basic structure of society would be the primary subject of justice, thereby returning to the original Rawlsian claim.

## **6. A Mooring**

The arguments in the chapters to come will show why the basic structure is an indispensable and distinct ethical subject, but I here want to briefly preview the argument of Chapter 4 and say what is so important about the basic structure for ethical theory. Recognizing that it is not profound and pervasive effects that either identifies or distinguishes the basic structure as subject, I want to return to explain why its profound and pervasive effects make the basic structure--otherwise distinguished--such a centrally important subject.

To see this, we need to recognize the effects that social practices have on ethical life. Our most important decisions are often made between options determined by the social structure, the relationships that mean the most to us are understood on conventional terms, and many of our moral obligations arise from customary norms. The influence of these various social practices on ethical life is apparent whenever one gains a deeper understanding of some distant culture. In comparing their ideals, virtues, relationships and obligations with our own, we can see how different life in one society can be from life in another.

Given the apparent influence of social practices, it makes sense that some come to explain *all* of ethical life as dependent on contingent practices. One can easily go from recognizing that social practices substantially shape ethical life to supposing that these practices *fully* shape ethical life. However, when we take this perspective, we give up on the possibility of any ultimate assessment of those practices. While one might criticize a society according to the values that the society itself inculcates, we would still give up on any perspective that is external to these practices from which to judge them.

Yet, when we then look to find some practice-independent ethical perspective from which to judge our own society, we risk a different problem. If so much of our ethical life is influenced by contingent social practices, then any practice-independent foundation for ethical life risks being too thin. The danger is that if we treat the practice-independent perspective as though it were the only perspective, we then ignore the rich aspects of ethical life that come from being embedded in a specific culture. In looking for some way to assess our own practices, we risk looking past them; we risk losing sight of the significant practice-dependent aspects of ethical life.

Given these two difficulties, our ethical theories are pulled in two directions, one local and one universal. We are pulled towards a more local perspective in being concerned with the particular ideals, virtues, relationships and obligations that are specific to our society. We often care deeply about these aspects of ethical life even when we recognize that our concern with them is explained by our being embedded in a particular culture. Alternatively, we are also pulled towards a more universal perspective in seeking out a suitable principle or perspective from which to judge our own society. We can be concerned with this perspective even when we do not see how it can explain the richness of ethical life.

The conflict between these two contrary pulls has manifested itself historically in arguments between figures allied more with either local or universal concerns. For instance, Kant was explicit in trying to identify a transcendental perspective from which to judge all moral questions. He tried to identify a valid standard that was not only independent of the contingencies of a culture but also independent of the contingencies of our inclinations. In response, Hegel was pulled in the opposite direction. He was concerned that Kant's ultimate standard was too thin to validate the full experience of ethical life.<sup>14</sup> To do so, we need to recognize the richness of a particular culture at a particular time and we need to appreciate our place within it. Whether or not Hegel offered an adequate standard for assessing particular

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<sup>14</sup> Likewise, while Henry Sidgwick sought the standard that could decide all moral disputes, F.H. Bradley looked towards the particularity of our lives to identify the self that ethics sought to realize.



cultures, many readers stop with his criticism of Kant. For them, it is more important to recognize the significance of a society for ethical life than to determine how one should assess that society.

Given the conflicting pulls of our local and universal concerns, perhaps the appropriate role of moral theory is to discredit one or the other. One could try and show that all the richness of ethical life can be validated by a practice-independent ethical perspective, or one could show that there is no practice-independent perspective that could provide such validation. Neither of these seem the right approach because each would miss something important. We should instead recognize that our contingent social practices have an important role in vindicating many of the ideals, virtues, relationships and obligations that we care most deeply about, and a practice-independent perspective has an important role in both grounding certain duties and providing a perspective from which to assess those practices. With this view, the real difficulty is not to discredit one aspect of ethical experience but to show how they complement one another. Some of the most important aspects of ethical life are practice-dependent and some are practice-independent, and we can hardly expect to progress far in ethical theory until we determine which are which. This project is all the more difficult because it must be done always from within a particular culture, but that is the project I am concerned with.

What I have found most valuable in Rawls's political philosophy is his contribution to this project. Too often, theorists will read Rawls as carrying through on the Kantian project as conceived above; he is thought of as identifying the perspective from which we can assess all aspects of ethical life. Yet, that is not the Rawlsian view. He does not try to identify a single perspective from which *all* ethical questions are addressed. Instead, he sought to identify a perspective from which to address a *specific* question; how should the basic structure of society be organized? It is Rawls's identification of this question that contributes to the project I am concerned with. Identifying the basic structure as ethical subject can properly respect both the universalizing and localizing aspects of ethical experience.

There are practice-dependent aspects of ethical life, and the particularities of a basic structure have profound and pervasive influence on those aspects of life. There are also practice-independent aspects of ethical life, and the particularities of the basic structure have no effect on these. In assessing the basic structure, we need to treat it as having this profound effect on ethical life and differentiate it from the choices that happen within ethical life. We respect the practice-independent aspects of ethical life by ensuring that our assessment of the basic structure is sensitive to them. We respect the practice-dependent aspects of ethical life in recognizing that the basic structure has a profound influence on the content of ethical life. It is because the basic structure has this profound influence on the content of ethical life that its assessment can properly respect both the universalizing and localizing perspectives in ethical philosophy.

According to this analysis, we can recognize that the particularities of our social context are relevant for much of moral and ethical philosophy. Our culture, shared meanings, institutional roles, and social ideals are important for understanding how we should live; their importance is not merely a socially determined illusion. Moreover, we can recognize particularities of ethical life without embracing a kind of moral relativism. How our society is organized will influence much of the content of ethical life, but how our society is organized should be justified by practice-independent values. In this way, our assessment of the basic structure acts as a kind of *mooring for ethical life*. The particularities of culture, history and chance will swash our culture in different directions and with it carry the particularities of our values, virtues, relationships and obligations. Nonetheless, so long as we hold that the basic structure of society should be a certain way, these particularities will not sweep our ethical life too far afield. We will stay tethered to the solid ground that our practice-independent values provide.

## Chapter 1: Social Practices, the Basic Structure, and Social Cooperation

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“Let us unite,’ he says to them, “to protect the weak from oppression, restrain the ambitious, and secure for everyone the possession of what belongs to him. Let us institute regulations of justice and peace to which all are obliged to conform, which make an exception of no one, and which compensate in some way for the caprices of fortune by equally subjecting the powerful and the weak to mutual duties. In a word, instead of turning our forces against ourselves, let us gather them into one supreme power which governs us according to wise laws, protects and defends all the members of the association, repulses common enemies, and maintains us in an eternal concord.” ...All ran to meet their chains thinking they had secured their freedom, for although they had enough reason to feel the advantages of a political establishment, they did not have enough experience to foresee its dangers.”

- J.J. Rousseau, *Discourse on Inequality*

When we plan our lives, we do so against a background of expectations. Some of these expectations are about the natural world, as when the sailor plans her voyage in accordance with the tides or a biker plans his cross-country trek for when his knees are sturdier. Other expectations are social. We plan a career on the basis of how professional fields are organized; going into marketing rather than sales or teaching mathematics rather than physics. We put work into a house based on the expectation that we will have an exclusive claim to use and sale of the property. We build a family with the expectation that we bear responsibility for our children. In these cases and so many others, we are able to plan our lives because we have reliable expectations about the social world.

The expectations we have about our social world are expectations about other persons, but they are not like those expectations we have of those we know personally. For instance, we might save up for a beachside cottage because we expect that it would make our partner happy. Or, we might choose to live closer to home on the expectation that our closest friends will also stay near. These expectations are based on personal information in a way that our expectations about the social world are not. Instead, our expectations of the social world are based on an understanding of how persons--even strangers--will *generally* act. We expect that persons will generally continue

to treat sales and marketing as fields and that strangers will abide by the rules of property. Because these expectations are general, they can seem quite similar to our expectations of the natural world. The fact that our economy is organized as it is and that occupations are categorized as they are can seem determined by scientific laws. However, these generalized expectations are nonetheless expectations of other persons; they are expectations of how persons will generally act.<sup>1</sup>

Oftentimes, our expectations about how persons will generally act are backed by a kind of normativity. It is not merely our observation that persons generally follow a certain pattern of behavior but that persons “ought” to follow this pattern.<sup>2</sup> If a person doesn’t act in the expected way, they act *wrongly* (rather than merely acting strangely). I say that these expectations are based on a “kind” of normativity because it does not need to be the case that (a) one judges that persons really should act a certain way or (b) that persons objectively should act that way. Instead, these expectations are backed by our recognition that persons in a relevant group make claims on one another to act according to these patterns. For example, I expect others to wait in line behind me when they come to get coffee, but I do not expect this merely because I have observed a pattern of people doing this. I also recognize that those who wait in line make *claims* on others to do so. Whether I judge these to be valid claims is quite different from my recognition that persons make these claims.

Oftentimes, the phrase “normative expectations” is used exclusively to refer to those expectations that I hold others to. It refers to those expectations for which I think certain reactive attitudes are appropriate if those expectations are not met. Yet, I can recognize that persons will

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<sup>1</sup> In *The Company of Strangers* (Princeton University Press, 2004), Paul Seabright advances the view that what makes society possible between creatures with our biology is a kind of trust in strangers to act according to expectations.

<sup>2</sup> In *Grammar of Society* (Cambridge University Press, 2006, 11), Cristina Bicchieri analyzes social norms as having a similar structure. She argues that a social norm exists when a person prefers to act in a way because (a) they recognize a social rule that requires that action (b) they believe others in their social group will act in that way, and (c) they believe others expect them to act in that way.

generally hold others to certain normative expectations even when I do not hold them to those expectations. I might think that one should not wait in line but still recognize generally held normative expectations that persons “ought” to wait in line.

There is a sense in which mere patterns of behavior can be described in terms of “rules,” but it is when patterns are backed by claims and normative expectations that they seem most “rule-like.” It is because there is a rule that persons should act a certain way that we can identify behavior that violates that rule as “wrong” in some sense. Since my recognition of such a rule involves my belief that the members of a relevant group make claims on others to act in certain ways that these rules are “social rules.” When I recognize a social rule, I recognize that the rule requires that I should act in a certain way.<sup>3</sup> I may or may not ultimately decide that I should act in the way that the rule dictates, so we can identify these rules as “ostensibly binding.” They claim to bind in virtue of their form, but do not necessarily do so.

In outlining ways in which persons should act, these rules can create certain obligations, rights, and powers. They create an obligation when the rules specify that a person must act a certain way, they create a right when the rules specify claims that a person has on the actions of others, and they create a power when the rules specify ways in which one might change the obligations and rights of others. Yet, these rules are merely ostensibly binding, so they can merely create ostensible obligations, ostensible rights, and ostensible powers.

As I will continue to emphasize, our social world is incredibly complex. I might recognize social rules that apply to members of a religious organization, an ethnic group, a company, or a group of friends. In each case, the social rules are relative to a particular social position. In this chapter, my concern is the social rules that apply to individuals *as members of society*. There are certain social rules that apply to persons due to membership in a society, and the mutual

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<sup>3</sup> It might be more appropriate to say that “when I recognize a social rule, I interpret the members of a particular community as generally holding normative expectations that I should act in a certain way.” However, I think that we tend to skip this step and merely understand social interaction in accordance with rules rather than as normative expectations.

recognition of these rules establishes obligations, rights, and powers for individuals as members of society.

From this idea, I argue that we can understand *the basic structure of society* as consisting of those and only those practices that *establish ostensible obligations, rights, and powers for individuals as members of society*. Accordingly, the basic structure is a basis for those expectations that we can rely on as members of society in planning our lives. These expectations are not merely based on observed patterns of behavior but on our recognition of social rules. Understanding the basic structure in this way gives us a clear standard by which to distinguish it from other aspects of the social world. A “social ethos,” for example, might be important in shaping the values and relationships in a society, but it does not specify clear claims. It does not consist of “rules” in the strict sense. By contrast, a property scheme, economic system, political constitution and legal system are constituted by strict rules that specify individual claims. Accordingly, these institutions create determinate obligations, rights and powers. Moreover, the fact that the basic structure institutions establish our claims *as members of society* differentiates it from a myriad of other practices that might also ground specific claims.

### **1.1 The Basic Idea of the Basic Structure**

The idea of the basic structure is most familiar from *Theory of Justice*, where it is identified as consisting of “the political constitution and the principle economic and social arrangements.”<sup>4</sup> Examples of these arrangements include, “the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family.”<sup>5</sup> While this characterization of the basic structure provides some guidance in thinking about what it is, Rawls never provided a clear criterion by which one could identify whether some aspect of our social world is or is not part of the basic structure. He supposes that

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<sup>4</sup> Rawls, *Theory of Justice*, 6.

<sup>5</sup> *ibid.*

we should understand the basic structure as “the main political and social institutions and the way they fit together as one scheme of cooperation,”<sup>6</sup> but this notion leaves it unclear exactly *what* the main political and social institutions are and *how* they fit together.

Rawls himself did not see any problem with his looser characterization of the basic structure. He writes, “Note that our characterization of the basic structure does not provide a sharp definition, or criterion, from which we can tell what social arrangement, or aspects thereof, belong to it. Rather, we start with a loose characterization of what is initially a rough idea.”<sup>7</sup> Likewise, he says, “A sharp definition of that [basic] structure might have gotten in the way of fitting it into these other ideas, just as a sharp definition of them would have gotten into the way of fitting them to it.”<sup>8</sup> For Rawls, a more precise articulation of what the basic structure is was not necessary for his project and may have made issues unnecessarily difficult. Yet, while a clear criterion for identifying the basic structure was not necessary for Rawls’s primary purposes, recent objections show why such a criterion might be helpful for us.

Specifically, there are three recent objections that a more precise articulation of the basic structure might address. First, recent cosmopolitan challenges demand a principled differentiation between the basic structure and the global structure. Such a differentiation seems important for understanding why distributive justice would or would not be a concern for domestic society alone. Specifically, Aresh Abizadeh has argued that none of the criteria typically used to ground a concern with the basic structure can actually justify restricting the difference principle to domestic society.<sup>9</sup> Second, some political theorists have identified the basic structure

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<sup>6</sup> Rawls, *Theory of Justice*, 4.

<sup>7</sup> *Justice as Fairness*, ed. Erin Kelley (Harvard University Press; Cambridge, MA. 1999), 12.

<sup>8</sup> *Justice as Fairness*, 57. The way that Rawls purposively uses an intuitive understanding of the basic structure is brought out in Samuel Freeman “The Basic Structure as First Subject of Justice,” *Blackwell Companion to Rawls* [forthcoming].

<sup>9</sup> Abizadeh, “Cooperation, Pervasive Impact, and Coercion: On the Scope (not Site) of Distributive Justice” *Philosophy and Public Affairs*. Vol. 35, No. 4 (2007)

of society as the coercive structure. Most prominently, Michael Blake has argued that we are concerned with the basic structure because of the kind of coercion it uses against us, which differentiates it from the global structure and justifies the limited scope of distributive justice.<sup>10</sup> Since the justification of coercion has been one of the most historically significant concerns in political philosophy, it is important to identify exactly what the connection between the basic structure and coercive power is. Finally, arguments like G.A. Cohen's and Iris Marion Young's put pressure on Rawlsians to include more informal aspects of society within the basic structure.<sup>11</sup> For Cohen, the personal is political and an exclusive focus on the basic structure obscures this. Insofar as certain norms in society have important effects on us, why not assess them by the same standard we assess political and economic institutions by? To better address these three challenges, the contemporary Rawlsian needs a more developed conception of the basic structure than Rawls himself used.

Below, I develop a characterization of the basic structure that can address these challenges. Specifically, I argue that we can understand the basic structure as those social practices that *establish obligations, rights, and powers for individuals as members of society*. To do so, I will first explain the Rawlsian use of "institution" as referring to--what I call--*ostensibly binding practices* in §1.3. Then, in §1.4, I will better explain what I mean by saying that we are concerned with those practices that establish obligation, rights, and powers "for individuals as members of society." In many ways, this idea allows us to see what unifies the major social institutions as all forming *the basic structure*.

My central concern in this chapter is to show how we can conceive of the basic structure, and it is not to address the three criticisms above; an adequate answer to each would require its

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<sup>10</sup> Michael Blake "Distributive Justice, State Coercion, and Autonomy," *Philosophy and Public Affairs*, Vol. 30, No. 3 (2001)

<sup>11</sup> Young, *Responsibility for Justice*, Ch. 2; Cohen, *Rescuing Justice and Equality*, Ch. 3



own focus. However, to see the general contours of the account I offer, I want to give a broad-brush response to each of these three challenges.

First, my response to Abizadeh's cosmopolitan argument comes in two parts. We should distinguish the claim that (a) there is no principled way to distinguish the basic structure from the global structure from the claim that (b) there is no moral reason to be concerned with the basic structure and not the global structure. The argument of this chapter is concerned with addressing the first claim, and I address the second in Chapter 2. I want to give a characterization of the basic structure that distinguishes it from the global structure, but I do not here say why the distinction is morally significant. I will return to that issue in §2.3.2. I do not claim that the basic structure is the exclusive site of distributive justice (nor do I claim that it is not). Abizadeh is ultimately concerned with whether there is a morally significant difference between the basic structure and global structure that could justify restricting the scope of distributive justice.

While I am not concerned with identifying the site of distributive justice, I am concerned with giving a principled distinction between the basic structure and the global structure. While I do not deny that there are global institutions, these institutions do not establish obligations, rights, and powers for individuals as members of society in the way that domestic institutions do. The primary difference is that the basic structure institutions bind *individuals* as members of society whereas the global structure binds international bodies (such as states). Ultimately this difference will be morally significant, but it is left to Chapter 2 to say why.

To address the second challenge, I argue that some coercive institutions are part of the basic structure, but the basic structure is not identified *as* the coercive structure. For us, the basic structure of society is likely to be coercively enforced, but that is not what makes it the basic structure. We could have a system of social practices that establishes obligations without those practices being coercively enforced, but coercive enforcement will always be an important part of ensuring that are institutions are reliable. Given the creatures that we are, the basic structure

institutions should be coercively enforced, but that does not mean that they are *necessarily* coercively enforced. We should not confuse the justification of coercive force within a basic structure with the justification of the basic structure.

Finally, to address the third challenge, I argue that the basic structure consists only of ostensibly binding practices. While there are many other important aspects of society that form the “informal structure,” the basic structure consists only of ostensibly binding practices because those are the practices that provide the relevant kind of security. In requiring specific actions at specific times, these practices establish claims for individuals as members of society. The informal structure does not provide this same level of security and specificity in our claims.

In short, I argue that we should understand the basic structure as consisting of those institutions that establish obligations, rights, and powers for individuals as members of society. This provides us with not only an intuitive sense of the basic structure, but a criterion. The basic structure is differentiated from the global structure by the moral demands it establishes, differentiated from the coercive structure because it is not necessarily coercive, and differentiated from the informal structure because it consists of specific rules capable of establishing claims. To better explain the various aspects of the account, I will start with the idea of “ostensibly binding social practices” in §1.2, explain social institutions as an instance of these practices in §1.3 and and then show which institutions form the basic structure in §1.4.

## **1.2 Ostensibly Binding Practices**

Social practices take a variety of forms and and diverse roles in social life. Some practices allow for coordination, others create new forms of behavior, and some require that we act in specified ways. In this section, I narrow our focus to “ostensibly binding practices.” I use this phrase because these practices *present themselves as requiring action*, but the mere fact that social practices present themselves in this way does not mean that we are morally or prudentially bound

to follow its rules. As paradigm examples, I take the practices of line-waiting, property, and a legal system. An appropriate description of these practice's rules requires a "should," "ought," "must," or similar term, but that does not mean that we actually should, ought or must follow the rules. The practices are not necessarily binding; they are only *ostensibly* binding.

Ostensibly binding practices have three key features; they are (a) conventional (b) systems of rules that (c) have an authoritative character. First, by being "conventional" I mean that these practices could have been otherwise.<sup>12</sup> The specific rules that constitute the practice are not morally required or naturally required.<sup>13</sup> Second, each practice can be understood by certain rules that guide behavior and specify valid claims that participants can make on one another. The feature that most distinguishes authoritative practices, however, is the third; we understand these practices as *requiring* certain actions or *validating* certain claims. Rather than merely providing opportunities or structuring our choices, these practices make a claim on what we ought to do. For example, it is not only that we think we should wait in line, but that line-waiting consists in rules that persons should wait in line. Accordingly, we understand the rules of authoritative practices as ostensibly binding; whether or not we actually have reason to follow the rules, we understand the rules as having a binding character.

It can be potentially misleading to refer to a social practice as constituted by "rules" because we often think of rules as explicit or promulgated while the rules of social practices do not need to be either. Instead, in referring to social practices as a "system of rules," I mean that we can articulate our implicit understanding of a social practices in the form of rules. If we want to

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<sup>12</sup> I recognize that the phrase "conventional" is used in many different senses, some more vague and others more precise. While I see much value in exclusively using the phrase to refer to social practices that solve coordination problems--as the way in which David Lewis (*Convention: A Philosophical Study*) and Cristina Bicchieri (*The Grammar of Society*) use the phrase--I here use only the vaguer popular use of "could have been otherwise." In this, I follow Andrei Marmor (*Social Conventions: From Language to Law*)

<sup>13</sup> It is possible that it is morally required that there be some rules to accomplish a particular aim, but that does not morally require a specific set of rules. For instance, we might have a natural right to property, but the rules of property are underspecified.

individuate or discuss the structure of a particular social practice, we do so by articulating the features of this practice in terms of rules. Importantly, our implicit understanding of any social practice might very well outrun our ability to articulate rules for the practice. Just as we can accurately use a word in conversation without having an explicit definition in mind, so can we follow a social practice without having any explicit rules in mind. We should not think that an individual understands a social practice by consciously applying explicit rules; an implicit understanding often comes before any rules can be articulated.

Yet, while the rules of a social practice do not need to be explicit or promulgated, they *can* be. When there are differences in interpretation of practices, it will aid cooperation when there is an “official statement” of the rules.<sup>14</sup> This official statement might come from either a trusted or conventionally-recognized authority. For instance, a system of law acts as such an authority and makes many of the rules of social practices explicit that might be disputed. In these cases, there will be an explicit and promulgated set of rules that outline the social practice because it will be codified in legislation or in court decisions. Yet, even if there are such cases in which social practices have definitive and explicit rules, we do not need to think that all social practices must.

In *The Myth of Ownership*, Thomas Nagel and Liam Murphy seem to mistakenly suppose that the rules of a property system must be explicit legal rules. It is surely the case that most rules of property are explicit and legally enforced, but this does not mean that a property scheme *needs*

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<sup>14</sup> When the rules of a social practice do not have any explicit articulation, any description of the rules must be an interpretation of that practice. Any particular set of rules will merely be what is *generally* understood about the practice rather than a uniform understanding across all participants. A description of the rules of the practice is meant to give explicit content to our shared implicit understanding, but that understanding is more likely to be an overlapping sense of the rules than any clear agreement. For instance, persons generally understand when a promise has been made, but there will surely be disagreements. Does it count as a promise when someone says, “I swear to you that I will do X” without uttering “I promise” and without further remark? Is there a mutual understanding that a promise does not need to be fulfilled when the personal costs exceed a certain amount, or is a wrong always done in such cases that needs be repaired? Different persons are likely to have different understandings on how the conventions of promising bear on these particular situations. When one offers an interpretation of promise-keeping, they seek to find the overlapping consensus that is implicit in our shared understanding. For this reason, I will refer to the rules of a practice as they are *generally* understood without any claim that there is a single authoritative standard in all cases.

to have explicit rules or to be legally enforced. Perhaps Nagel and Murphy did not mean to suggest that property *is necessarily* a legal practice but merely meant to say that it is a legally specified practice *for us*.<sup>15</sup> In either case, it is important to recognize that a system of property can exist without explicit rules. This is easiest to imagine in small societies where the conflicts related to property claims are limited, but such an implicit understanding would not be efficient in contemporary society. However, we should not confuse efficiency with possibility. There is nothing about a scheme of property or any normative practice that requires that rules be explicit.

What is most distinct of ostensibly binding practices is that our implicit understanding of the rules involves some implicit “ought,” even when we do not think it is morally or prudentially required of us. Other practices might be articulable in terms of interpreted patterns of behavior, but ostensibly binding practices *require* that we act a certain way. When I choose to make a promise, I recognize a role that I “ought” to keep that promise. How we should understand our recognition of this ought is open to interpretation, but I will take its recognition as basic for my account.

In this same way that we can articulate the structure of social practices in terms of rules, we can articulate the authoritative character of social practices in terms of *ostensibly-binding* rules. The rules are not just that when persons utter “I promise to X” they typically do X but instead the rules have the form that “a promise made *ought* to be kept.” We recognize a rule that we should wait in line even if we could sneak into the front. We recognize a rule that we should not steal even if we could get away with it. These demands are implicit in our understanding of

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<sup>15</sup> They emphasize that property is a “legal convention” in order to support their larger argument that taxation schemes do not violate anyone’s rights or claims to desert. They argue that a taxation scheme and a property scheme must be assessed together as part of a legal scheme, thus it is wrongful to suppose that a taxation scheme could conflict with moral claims to property. Their conclusion is correct, but it has nothing to do with whether a property scheme is necessarily legal. It is not their joint membership in a legal scheme that makes it wrongful to treat the property and taxation schemes as conflicting, it is because of their joint membership in the basic structure of society. I argue this in Ch. 2.

the practice that is represented in the form of rules. When represented, these rules take the form of ought claims, “persons P *ought to* X in circumstances C.”

In referring to the rules of a practice as ostensibly binding, I purposively mean that their authoritative character is not reducible to either moral oughts or prudential oughts. We represent the rules as requiring that “person P ought to do X in context C,” but we can recognize this rule without thinking that either “P morally ought to do X in C” or that “P prudentially ought to X in C.” In regards to the prudential ought, there is a tradition in rational choice theory that has explained conventions as arising from the coordination of individuals around a salient choice.<sup>16</sup> Given this perspective, it would seem sensible to understand “recognizing a social rule” as either (a) a prediction about coordination or (b) coming to see a particular strategy of interaction to be most rational. Yet, the first does not explain the ostensibly binding representation of the rules and the latter fails to explain how we can recognize a social rule that applies to us even when following that rule would not be an optimal strategy. For instance, I might recognize a social rule that requires me to keep a promise, even without being sure whether keeping that promise would be most rational for me. Perhaps I should keep promises only when I might be found out instead. For similar reasons, we cannot explain “recognizing a social rule” as consisting in the judgment that a particular action would be morally best. As above, we can recognize a social rule without thinking that there is moral reason to follow that rule. For instance, an individual might recognize the social rules that they ought to follow (what is mutually recognized as) the law, without thinking that they really have a moral obligation to obey the law.

Since we cannot reduce the notion of recognizing an ostensibly binding social rule to either of these notions, we can distinguish three judgments from each other; (a) the judgment that an action would be prudential, (b) the judgment that an action would be morally best, and

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<sup>16</sup> Most recognized in this tradition is David Lewis, *Convention* (Harvard University Press; Cambridge, MA. 1969), but also included is Cristina Bicchieri, *The Grammar of Society* (Cambridge University Press; Cambridge, UK. 2006) and Brian Skyrms, *Signals: Evolution, Learning, and Information* (Oxford University Press; Oxford, UK. 2010).

(c) the judgment that an action is required by a social rule. Oftentimes the fact that there is a generally recognized convention that requires one to take some action will make taking that action prudential (as when the rules are backed by coercive power) or moral (as when the practice serves a justified purpose), but neither of these need to be the case for us to recognize a social rule.

In explaining ostensibly binding practices, I am most concerned with the fact that we can recognize a rule as part of a practice and still be uncommitted as to whether we ought to follow the rule. If a person were explaining the practice of line-waiting, they would say that the practice consists in the rule that “persons ought to wait in line who are waiting for service” even if they do not think that persons morally ought to wait in line. A devout Nietzschean who thought line-waiting was the most pure form of herd-mentality might think that persons *ought not to* wait in line, yet still describe the social practice as consisting of the rule “persons ought to wait in line.” We can recognize the social rule without judging that we ought to follow it. This opens up the space for a person to ask “I know that the social practice of line-waiting requires that I wait in line, but should I wait in line?”

### **1.3 Institutions**

The next step in this analysis of the basic structure is to show why “institutions”--in the Rawlsian use of the term--should be understood as a kind of ostensibly binding practice. To show this, I need to answer two questions. First, why would we think that the Rawlsian understanding of “institutions” aligns with this model of ostensibly binding practices? Second, what distinguishes the class of social institutions from the larger class of ostensibly binding practices? To answer the first question, we can look to *Theory of Justice*, where Rawls writes,

“by an institution, I shall understand a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like. These rules specify certain forms of action as permissible, others as forbidden; and

they provide for certain penalties and defenses, and so on, when violations occur.

As examples of institutions, or more generally social practices, we may think of games and rituals, trials and parliaments, markets and systems of property”

In this characterization of institutions, Rawls identifies institutions with social practices, but he does not mean “social practices” in the broadest sense of “regularities in conduct.” He specifically has in mind those practices that are a “public system of rules.” It might be possible that there are some practices that could not be easily specified by a system of rules, let alone a public system of rules. For instance, many symbols in pop culture or artistic expression have a conventional significance that could not be easily specified by rules. In American music, the use of a banjo tends to suggest southern backcountry living, but this convention might not be aptly describable in terms of rules. If we would identify this use of the banjo as part of a social practice, then that is not the kind of social practice Rawls has in mind. Instead, Rawls is speaking specifically of those practices that can be specified by rules, and ostensibly binding practices are of this type.<sup>17</sup>

The more important feature of Rawls’s characterization of institutions is the way in which the rules are authoritative. As Rawls puts it, these rules “specify certain forms of action as permissible, others as forbidden.” Rawls never explains the authority of these rules, but he cannot do so either in terms of moral or prudential authority. First, these rules cannot explain certain forms of activity as “morally” permissible or forbidden because it is not a social practice that determines the morality of those actions. Whether it is morally permissible to follow the rules is different from what the rules make permissible. The property norms might make it permissible for me to bequest my entire wealth to the Ku Klux Klan, but it is not morally permissible for me

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<sup>17</sup> An alternative interpretation of the above Rawlsian definition is to think of “a public system of rules” as a legal code rather than a system of generally recognized social rules. Here the normativity of the rights, duties, powers, etc. would be explained by appeal to the requirements of the explicit laws rather than by appeal to more implicit social rules. The first problem with this alternative is the fact that the law is one such institution that itself needs to be justified. If institutions are necessarily defined by laws, then it is difficult to see how law itself could be an institution. Second, it seems odd that Rawls would not say “laws” if that is what he meant, given that it would be easier to explain. Third, he compares the rules of institutions to the rules of rituals and games, which do not need to be codified in law.



to do so. Likewise, we would not think of the rules of “games and rituals” as making certain action morally permissible, but only permissible as part of the game or ritual. Second, these rules cannot explain certain forms of activity as “prudentially” permissible for similar reasons. Whether it is prudentially right to follow a social rule is different from what the rules make permissible, as we can notice that the rules forbid breaking a promise even when doing so might be in our interest.<sup>18</sup>

The model of ostensibly binding practices is able to explain the authority of institutional social rules without recourse to either moral or prudential authority. The social rules specify certain actions are permissible and other as forbidden because they are ostensibly binding. We understand the rules as requiring certain actions, but that does not mean that we have judged that it would be moral or prudential to follow those rules. Insofar as Rawlsian institutions are systems of ostensibly binding social rules, then institutions are authoritative social practices.

Yet, what about the second question? Even if institutions are a kind of ostensibly binding practice, we might not think that all ostensibly binding practices are institutions. While someone is free to define institutions in any way they like, we typically use the phrase “institutions” to apply to a subclass of ostensibly binding practices. However, there does not seem any necessary and sufficient conditions that a social practice might meet for it to be an institution. Rather, we are more likely to call a social practice an “institution” to the extent that it meets three conditions. First, the rules of institutions are more clearly understood and *less open to interpretation*; there is a general understanding about what the core rules are that structure institutions. Oftentimes this feature is explained by the fact that there is some body that has the authority to determine those rules, but not always. Second, institutions are often more *complex and structured* than other social practices. This complexity is not just in the nuances of particular rules, but in the different roles

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<sup>18</sup> Rawls is quite explicit that social rules are not prudential strategies: “It is necessary to note the distinction between the constitutive rules of an institution, which establish its various rights and duties and so on, and strategies and maxims for how best to take advantage of the institution for a particular purpose. Rational strategies and maxims are based upon an analysis of which permissible actions individuals and groups will decide upon in view of their interests, beliefs and conjectures about one another’s plans. These strategies are maxims are not themselves part of the institution” Rawls, *Theory of Justice*, 49.

that system of rules may establish. Institutions often include different positions, powers and privileges that fit together into one system. Third, institutions are particularly important or *socially significant*. There is no single definitive standard for determining when a social practice is an institution, but these are three features that “institutions” seem to have to a greater degree than social practices generally.

This link between institutions and ostensibly binding practices is significant because it shows why we do not need to think of institutions as anything more than a particular kind of practice. They do not need to have a legal or material basis. There is a natural tendency to see aspects of our social world as if they were part of the natural world. In short, we tend to *reify* our social institutions. This is quite obvious when one hears conservative activists claim that we should not allow same-sex marriage because that is not what marriage *is*, but reification of the social structure goes far beyond this.<sup>19</sup>

The fact of reification should be no surprise because our institutions form a background for our plans, and we thereby take their presence and stability for granted. Thinking in these terms can even be quite helpful because it allows us to abstract away from the complicated structure of interaction that forms an institution, and just focus on the institution itself. It is because of our commonsense reliance on these institutions that persons look for something beyond social practices to ground social institutions, and they ultimately look towards the law or patterns of sanction as something more solid than mere social practice. Ultimately, however, our social structure is composed on nothing more than social practices, certain shared patterns of activity and expectation. The above analysis shows how we can understand institutions in these terms and do not need to make recourse to anything else.

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<sup>19</sup> We might be charitable and suppose the argument underneath these claims is that the values that the institution of marriage promotes are undermined by allowing same-sex marriage, but that does not seem to be the argument offered.

So, the social world is structured by a thick array of social practices, some of these social practices are authoritative, and some of these authoritative practices are social institutions. The next step of the analysis is to show that some of these institutions form the basic structure of society. The difficulty is explaining which social institutions do so.

#### **1.4 The Major Social Institutions and the Basic Structure**

The basic structure is constituted by the “major social institutions,” but it is not immediately clear what qualifies a social institution as “major.” So, in order to explain what the basic structure is we need a standard by which to distinguish the major social institutions from the broader class of institutions. The goal of this section is to explain this standard. I argue that the major social institutions are differentiated by their unique role in structuring our lives as members of a society. By better explaining the unique role of these institutions, I will identify the standard by which we can distinguish the basic structure.

The unique role of the major social institutions is that they *establish obligations, rights, and powers for individuals as members of society*. Accordingly, those institutions that do this are those that belong to the basic structure and we can understand the basic structure as the system of institutions that together establish these demands and claims for individuals as members of society. To better substantiate this idea, I want to break my exposition into two parts. First, I will better explain how the basic structure “establishes obligations, rights, and powers.” Second, I will explain the significance of the clause “for individuals as members of society.” With these notions explained, I then identify the basic structure as the way in which the major social institutions come together to form a single system.

##### 1.4.1 “establishing obligations, rights and powers...”

In understanding how a class of practices can establish obligation, rights, and powers, it is crucial that we distinguish the ostensible from the actual. The mere fact that a social practice is practiced

does not mean that we should act in the ways required by the rules or that we have legitimate claims based on the rules. The practice itself is merely a pattern of behaviors, expectations and understandings. To accurately explain these practices, we need to represent them as consisting of rules, but we need only represent these rules as “ostensibly binding.” The rules are understood as involving the claim to bind but might not actually bind.

In representing rules as “ostensibly binding,” I mean to offer an analysis of practices that is consistent with social theory. Yet, I would need to draw on resources from a moral theory in order to explain when these rules are “actually binding.” Such a moral theory would need to explain both when persons should follow the rules of contingent practices and when they have claims on others to do likewise. Typical explanations appeal to the principle of fair-play, the power of consent, our identification with the social roles,<sup>20</sup> and indirect utilitarianism. Any such explanation will need to explain (a) why an individual is obligated to follow the rules of a morally justified practice (rather than merely showing how the rules are often efficacious ways to advance some end), and (b) when a practice is morally justified. The fair-play theorist, for example, supposes that (a) we are obligated to practices because we owe a fair-share for receipt of the benefits and (b) we are so obligated when the practice is fair to each participant.<sup>21</sup>

For my argument to succeed, I do not need to argue for any one of these theories over the others. Instead, I merely need to suppose that there is *some* explanation for why contingent practices can establish actual obligations, rights, and powers. I identify any moral theory that meets this requirement as a form of “limited conventionalism.” It is a form of conventionalism because conventional practices can establish new requirements and claims, but it is a limited form of conventionalism because it does not suppose that *all* more requirements and claims are established by practices. Limited conventionalism is fully consistent with commitments to

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<sup>20</sup> Hardimon, Michael O. "Role obligations." *The Journal of Philosophy* (1994): 333-363.

<sup>21</sup> The conditions that consent theorists and Hegelians would put on obligating practices are more difficult to articulate, but I nonetheless believe that both views need to satisfy both conditions.

practice-independent obligations, rights and values. It merely needs to be the case that the major social institutions can establish requirements and claims. I better explain the commitments and importance of limited conventionalism in §4.1.

Importantly, practices can establish requirements and claims in two different ways. A practice can either (a) better specify pre-existing obligations/rights/powers that are too vague, or (b) create new obligations/rights/powers *ab nihilo*. For example, we might think that we have a practice-independent right to personal property, but that this practice-independent right does not entitle us to any specific property. According to this view, it is only when we live within a society with definitive property norms that our pre-institutional right entitles us to the specific property that the norms identify as ours. Or, we might think that there is no practice-independent rights to personal property. Instead, we might think that persons have come to coordinate around norms of property and that these norms bind us because the Principle of Fair-Play requires that we follow the rules that benefit us. In the first case, a practice of property specifies a pre-existing right while the practice creates a right to property in the latter case. Either case is consistent with “limited conventionalism.” In each, our practices establish specific requirements or claims that we would not have if the practice did not exist.

A moral theory that accepts limited conventionalism will recognize that the major social institutions can establish *actual* obligations, rights, and powers. However, we do not need to appeal to any such moral theory to identify a basic structure. The moral theory explains when an ostensibly binding practice is actually binding, but we can still identify ostensibly binding institutions when they are not actually binding.

The major social institutions are those practices that establish ostensible obligations, ostensible rights, and ostensible powers. For this reason, society can have major social institutions that are so unjust that persons should not follow the rules of those institutions. For example, the institution of slavery is typically so unjust that no person has a moral reason to follow its rules.

However, it is still likely that persons would understand that institution as consisting of ostensibly binding rules. The rules create ostensible obligations to obedience, ostensible rights of ownership, and ostensible powers of authority. The fact that these rules are morally heinous does not change the analysis of these rules as ostensibly binding, and an institution of slavery can accordingly be amongst a society's major institutions.

#### 1.4.2 “...for individuals as members of society”

The basic structure institutions are not all the institutions that establish (ostensible) obligations, rights, and powers, but are specifically those that establish these demands and claims by virtue of membership in society. In this way, the basic structure institutions are closely tied with belonging to a particular society. To see the importance of this point, we can see that there will be free associations that establish obligations, rights, and powers. For instance, the employees of IBM could mutually comply with social rules that establish obligations amongst coworkers, rights to vacation, and powers of authority. In this case, these demands and claims are established for individuals *as employees of IBM*. Likewise, the members of a church could mutually comply with social rules that establish obligations, rights, and powers in the religious community.

What is unique about the basic structure institutions is not that they establish demands and claims--since IBM and a church might do that--but that they establish these obligations and claims *for individuals as members of a society*. It is because I am a member of the United States that I have certain obligations and rights. In a society that cooperates through norms of property, members can know that each has obligations and rights to property. In a society that cooperates through certain norms of family life, members can know that there are certain demands and claims in a marriage. Even if a person chooses to be an ascetic and live without property or to be single and live without a family they are aware that they could be entitled to security in those things as a member of society. They know that if they acquired property, then others would

generally refrain from seizing it. They know that their authority over and responsibility for children would generally be respected if they choose to have children. These demands and claims are part of being a member of society because all members of a society live under the same social rules.

At this stage, an objection from circularity might seem obvious. I have said that the basic structure institutions establish security for individuals as members of society, yet how can we understand who is a “member of society” in this sense? If one defines membership in a society as being an individual to whom the rules of the basic structure institutions apply, then we define “member of society” in relation to the idea of the “major social institutions” and define the “major social institutions” in relation to the idea of being a “member of society.” If that is correct, my account seems circular. I rely on a notion of members of society to explain who is a member of society.

Yet, there are two ways of getting away from this circularity objection. First, I can deny that the idea “member of society” is best defined as a participant in the basic structure institutions. While this first way of avoiding circularity might be open to me, I do not currently know of any other satisfying way to explain who is a member of society. Accordingly, I will assume that a “member of society” is best understood as “a person identified as participant in the basic structure institutions,”<sup>22</sup> and I will appeal to a second way to avoid the circularity objection. Even if “member of society” is explained in terms of participation in the major social institutions and the “major social institutions” are explained by relying on a notion of member of society, this is not actually a problem. Remember that the various basic institutions are social practices. In explaining these practices and their relations to one another, we give an explanation of how

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<sup>22</sup> They are “identified” as a participant by an interpretation of the institutions. As we interpret the rules of a practice, we interpret to whom the rules are meant to apply. There is no prior fact outside of this interpretation that sets who is a participant in the practice. John Simmons goes wrong in pressing the question of “to whom does a practice apply” in his arguments against the Natural Duty of Justice (See *Moral Principles and Political Obligations*; Princeton University Press, 1981, pp 147-152)

persons act and reconstruct their implicit understanding of the social world. Doing this does not require an ontology whereby we appeal to some fundamental notion from which all other notions are built. Rather, it only needs to depict how persons act and understand the world. Such a depiction can be circular without problem. We start from within an ongoing social practice, and we only need to characterize that practice. At this stage, we might understand Americans as those bound by American institutions and understand American institutions as those that bind Americans. While this might be circular, it is not problematic if it accurately describes our implicit understanding of these practices.

#### 1.4.3 the basic structure

At this stage, we have narrowed our concern from social rules to ostensibly binding practices to institutions and, finally, to the major social institutions. From this final notion, we can now understand the basic structure of society as constituted by the major social institutions. The basic structure is how these institutions come together and complement one another. Accordingly, we can now understand the basic structure of society as those ostensibly binding practices that together establish our obligations, rights, and powers as members of society.

In establishing obligations, rights, and powers for individuals as members of society, the basic structure creates a kind of social “background.” In deciding how to live our lives, we do so on the basis of various expectations about our social world. This includes the various opportunities we have, the powers and rights of individuals, and the limits on what we can rightfully do. As we plan our lives, we hold things about our society constant as we think about the different lives we might lead within that society. In such choices, the obligations, rights, and power that we have as members of society form a kind of background for the choices about which particular life we will lead. Our various expectations of others give us a security with regard to the actions of others. Since we hold this security constant across the lives we might lead, the basic



structure institutions establish a kind of “background security.” As we make the choices that make our lives our own, we come to have security in particular things; in our property, our family, our occupation, and our worship. The basic structure institutions do not establish the security we have in these particular things, but they establish the security we have as a member of society; it establishes *background security*.

To better emphasize the significance of this point, it might be helpful to see the way in which a basic structure establishes background security through a comparison between anarchy and society. We do not need to suppose that anarchy would be a war of all against all, even if we recognize that it might be. Perhaps persons would not be likely to attack one another or even to make claims on them. In the absence of society, persons might live as in Rousseau’s “most-happy” age.<sup>23</sup> There, persons are independent of one another and do not consider their needs to be satisfied by the actions of others. Now, regardless of whether persons are peaceful or at war in anarchy, persons will not have *security* with regard to the actions of others. Without a social structure that specifies how each must act, no one can have rightful expectations of strangers. Even if moral rules or natural rights are binding, we only have security when we believe that persons will follow those rules. Even peaceful and safe anarchies do not have the obligations, rights, and powers we have as members of society.

As soon as there are mutually recognized social rules, there is a social structure, and there is no longer anarchy. We move away from anarchy as soon as we “institute regulations of Justice and peace to which all are obliged to conform, which make exception of no one, and which compensate in some way for the caprices of fortune by equally subjecting the powerful and the

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<sup>23</sup> “This period in the development of human faculties, occupying a just mean between the indolence of the primitive state and the petulant activity of the our *amour propre*, must have been the happiest and most lasting epoch...The example of the Savages, almost all of whom have been found at this point, seems to confirm that Mankind was made always to remain in it...that all subsequent progress has been so many steps in the appearance toward the perfection of the individual, and in effect towards the decrepitude of the species.” (Cambridge Tran. 167). As Rousseau would argue, even if conflict is necessary with interdependency, we do not need to suppose interdependency in an anarchic state.

weak to mutual duties.”<sup>24</sup> These are rules that establish obligations, rights, and powers amongst the members of a society. In establishing these clear and reliable rules, our social rules establish a kind of background security. In §1.6, I will argue that we can understand “social cooperation” as the unique form of cooperation between members of society that establishes these rights, obligations, and powers. First, however, I want to survey a few objections to this understanding of the basic structure.

### **1.5 Objections**

On first look, this characterization of the basic structure might seem problematic for a number of reasons. I want to address three of the most pressing objections here. By addressing these objections, I should also be able to explain the central idea behind my account.

First, one might be tempted to think that my characterization of the basic structure would be too expansive. For example, does it include the obligations and rights we have against deception? After all, if we are lost on a street corner and ask a random passerby for directions, we can have a right to the truth and the passerby has an obligation to tell the truth. Since I characterized the basic structure as establishing such rights, it would seem like my characterization of the basic structure would include truth-telling. Since we do not typically recognize truth-telling as part of the basic structure, this would be problematic for my characterization.

In response, I only need to stress the importance of the clause that the basic structure establishes obligations, rights, and powers “for individuals as members of society.” When we have a right to the truth, it has nothing to do with our position as member of society. Instead, if we do trust persons, it is either on the basis of a judgment of their individual character or on the basis of our position *as persons*. Regardless of whether that street corner is in one’s own society or in a

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<sup>24</sup> Rousseau, Jean-Jacques “The First and Second Discourses,” trans. Roger D. and Judith R. Masters, (Boston, MA: St. Martin’s Press, 1964), 159

distant society, we likely will still trust a random passerby to tell the truth. Accordingly, norms of non-deception are not part of the basic structure because they do not establish rights for individuals as members of society.

A second, and similar, objection would charge that my account would include obligations like promise-keeping as part of the basic structure. If one thinks that it is a moral obligation of all persons to keep their promises, then my response to this objection will be the same as that above. Our promissory obligations are established by being persons rather than being members of society. If one thinks that promise-keeping is a moral obligation only because it is a social convention, then it seems more difficult to claim that our promissory obligation is established by our role as persons.

Nonetheless, this obligation is still unproblematic. First, insofar as a person utters “I promise” it is clear that they identify themselves as a participant in the promise-keeping convention, regardless of whether they are a member of society or not. So, if promise-keeping is conventional, it can still establish security for persons *as persons* because our security is explained by their recognition of the convention rather than our membership in society. To see the difference, compare the rights and obligations involved in a signed contract between strangers and the rights and obligations involved in a promise. The conditions that identify a contract as valid are specified by legal norms specific to a society whereas the conditions that identify a promise as valid are more important to interpretation and may vary from one social group to the next. In this way, we can recognize security in contracts as arising from our role as members of society while we explain security in promises as arising from our role as persons.

Finally, as a third objection, one could point out that foreigners and tourists have obligations, rights, and powers specified by the major social institutions even though they are not members of society. This objection might seem to show problems with the clause that the basic structure establishes security *for individuals as members of society*.

Yet, if everything else about the account is not problematic, then this last objection should be no worry. This is because when foreigners and tourists are treated as members of a society that is not their own, they merely assume the role of member of society.<sup>25</sup> Now, this does not mean that they assume the role of *citizen*. To be a citizen--in the way, I distinguish the phrase--is to have a particular role in a political and legal structure. Being a citizen entitles one to certain privileges and responsibilities, but being a citizen and being a member of society are not synonymous. It is fair to say that illegal immigrants are members of society even if they are not citizens in the proper sense. Likewise, we might not consider tourists to ultimately be members of society, though we do treat them accordingly. When we travel to other societies, we likewise should act according to the norms that members of that society act in accordance with.

In this way, the identification of basic structure institutions does not include moral rules because we do not have security in these rules as members of society, it does not include aspects of the informal structure because the rules of the informal structure are not sufficiently particular, and it does not rule out the possibility that those in a foreign society assume the role as member of society.

### **1.6 The Basic Structure, Social Cooperation and the “Fundamental Problem of Justice”**

In this chapter, I have developed the idea of the basic structure in ways that Rawls does not. While I have not said anything that I believe Rawls would reject, I want to go beyond Rawls’s intuitive understanding of the basic structure and develop the idea in ways that withstand recent challenges. In this section, I want to explain one additional advantage of this account; it can better justifying Rawls’s own method by connecting the idea of “social cooperation” with the idea of the basic structure.

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<sup>25</sup> I discuss the idea of our “role as member of society” more extensively in 2.2.3.

In *Political Liberalism*, the idea of social cooperation is central for unfolding the various aspects of Rawls's theory. He writes, "the fundamental organizing idea of justice as fairness, within which the other basic ideas are systematically connected, is that of society as a fair system of cooperation over time."<sup>26</sup> In assessing a society, we should not be concerned with whether it advances some particular moral end or makes human perfection possible. Instead, we should be concerned with whether the terms of social cooperation are fair. In society, we work together to advance what we each think is important in life, but we need to ensure that we work together on fair terms. For Rawlsians, the central problem of political justice is then identifying the fair terms of social cooperation. Rawls makes this point explicit when he identifies "the fundamental question of political justice" as determining "what is the most appropriate conception of justice for specifying the terms of social cooperation between citizens regarded as free and equal, and as normal and fully cooperating members of society over a complete life?"<sup>27</sup>

Now, it is not immediately obvious from Rawls's own remarks why this concern with the terms of social cooperation justifies his focus on the basic structure of society. Rawls uses an intuitive extension of the basic structure as including "the political constitution,...the legally recognized forms of property, and the structure of the economy... as well as the family in some form."<sup>28</sup> Yet, why would these institutions be the ones most relevant for setting the terms of social cooperation? Rawls starts from a concern with the terms of social cooperation, but then only stipulates that we address this concern by focusing on the basic structure. How is a concern with identifying the fair terms of social cooperation related to a focus on the basic structure?

While the connection between these ideas is not obvious from Rawls's explicit remarks, it can be explained by the account provided here. The key is a particular understanding of social

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<sup>26</sup> Rawls, *Political Liberalism*, 15.

<sup>27</sup> Rawls, *Political Liberalism*, 20.

<sup>28</sup> Rawls, *Justice as Fairness*, 10.

cooperation. Cooperation is distinct from coordination in that cooperation is done with deference to the others with whom one cooperates. One can selfishly coordinate, but one cannot selfishly cooperate. The best way to interpret Rawls's use of "social cooperation" (in contrast to "cooperation" more generally) is as referring to the unique form of cooperation that exists between members of a society.<sup>29</sup> Social cooperation is the distinct kind of cooperation engaged in by members of society, it is neither mere coordination nor cooperation in all its forms.

Yet, what *is* the unique kind of cooperation between members of society? What is referred to by "social cooperation"? I maintain that we can best understand this unique form of cooperation as the cooperation between members of society *in following the social rules that establish obligations, rights, and powers for individuals as members of society*. This is a form of cooperation when persons (a) coordinate in following the same social rules (b) with deference to those with whom they coordinate. This is a unique cooperative relationship between members of society because it specifically establishes our obligations, rights, and powers as members of society.

Given this understanding of social cooperation, the terms of social cooperation in a particular society will be specified by the rules of the major social institutions. In this way, the terms of social cooperation are given form *as* the basic structure of society. Thus, by determining how the basic structure ought to be organized, we determine what the terms of social cooperation are. In short, by focusing on "the first subject of justice," we address "the fundamental problem of political justice."

In the section, I have made important connections between a number ideas quite quickly, so it will be helpful to provide a more formal summary of the main points. The core ideas that got us to the above conclusion can be expressed as follows:

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<sup>29</sup> Since all cooperation is social in one sense, this idea might have been better expressed with the phrase, "societal cooperation," but that phrase is much more cumbersome.

- 1) *Social cooperation* is the unique form of cooperation that establishes the obligations, rights and powers of individuals as members of society.
- 2) In any society, these obligations, rights and powers are established by mutual compliance with certain social rules, R.
- 3) The *major social institutions* are those institutions defined by those social rules R.
- 4) Thus, in any society, these obligations, rights, and powers are established by mutual compliance with the rules of the major social institutions. [2, 3]
- 5) The *basic structure* of a society is the way in which all the major social institutions together form a single system.
- 6) Thus, these obligations, rights, and power are established in any society by mutual compliance with the rules of the basic structure [4, 5]
- 7) Thus, in any society, social cooperation proceeds through the rules of the basic structure. [1,6]
- 8) Thus, by evaluating the organization of the basic structure, we evaluate the terms of social cooperation.

All together, this explanation should make better sense of why the basic structure is “the arrangement of the major social institutions into one scheme of cooperation.”<sup>30</sup> Social cooperation is the unique cooperation between members of society in establishing background security, and the basic structure is the entirety of those institutions that social cooperation proceeds through. In this way, the basic structure forms a single scheme of cooperation.

Rawlsians do not ultimately judge society by whether it accomplishes some moral end, such as the promotion of happiness, individual perfection or equality. Instead, society is a system of social cooperation and we ought to assess it by determining whether the terms of cooperation are fair. Since the terms of social cooperation are given form in the basic structure of society, we should take the basic structure as the primary subject for assessing society.

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<sup>30</sup> Rawls, *Theory of Justice*, 47.

### **1.7 The Identity of the Basic Structure**

The primary task of this dissertation is to show why the basic structure has primacy as a distinct moral subject. As I discussed in the introduction, I will do this by explaining three features of the basic structure; its identity, its moral indispensability, and its moral distinctiveness. The account of this chapter addresses the identity of the basic structure specifically. It explains that the basic structure consists of those institutions that establish background security for individuals as members of society.

Starting from the idea of ostensibly binding practices and building up to the notion of the basic structure, we have the tools to overcome many of the traditional problems with the idea of the basic structure. According to this theory, the basic structure consists of ostensibly binding social rules. It does not necessarily consist of rules that are legally or coercively backed. Instead, it consists of rules that we understand as ostensibly binding. Likewise, the rules are specific enough that they differ from the informal structure. While our entire social structure consists in many ostensibly binding practices, the basic structure does not include all of them. Rather, the basic structure consists of only those ostensibly binding practices that establish obligations, rights, and powers for individuals as members of society. This differentiates the basic structure from moral practices that bind all persons, from social practices that persons choose to be part of, and from the global structure that provides security for international actors. The basic structure remains a distinct and unified aspect of the social structure.

Moreover, this articulation distinguishes the basic structure from the broader set of practices that establish our social context. There is wide diversity of practices in social life, and only some of them are part of the basic structure of society. In his objections to Rawls, Cohen appeals to the example of a society with an “egalitarian ethos.”<sup>31</sup> Even if our major social

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<sup>31</sup> *Rescuing Justice and Equality*, 134-150. While never defined explicitly, Cohen uses the idea to refer to the various social norms and attitudes that are prevalent and pervasive in society. An egalitarian ethos would be part of, but not the whole of, the informal structure of society.



institutions maximally promote equality, we promote equality even further if persons generally acted for the sake of equality in their personal decisions. In his arguments from “On the Site of Distributive Justice,” G.A. Cohen argues that there is no non-arbitrary way by which Rawls can distinguish the norms that form the basic structure from the norms that would form an egalitarian ethos.<sup>32</sup> Now, I have little doubt that such an ethos would be a significant part of social life. It might impact what individuals in that society value, the shape of their life plan, and their relationships. Moreover, I do recognize that both the basic structure and an egalitarian ethos are formed by norms. However, neither of these points mean that there is no non-arbitrary way by which to distinguish an egalitarian ethos from the basic structure.

While the norms of an egalitarian ethos outline patterns of behavior, the norms of the basic structure *require* action or *specify* claims. The rules are particular in identifying specific actions as required and as rights-violations. Once one has security in property or security in religious freedom, then there are certain actions that individuals cannot take. With an egalitarian ethos, there is no such specificity. The fact that we live in a society where members of the military are particularly esteemed does not require any particular actions from individuals or give any persons claims. I do not act wrongly if I do not buy a soldier a beer at the bar even if there is an ethos of appreciate for the military. Such informal norms--whether esteem for military personnel or appreciation for equality--do not establish particular obligations, rights, or powers in the way that basic structure institutions do.

In his 2009 book, Cohen slightly changes his objection. He does not claim that there is not way by which to distinguish the basic structure from informal norms like an egalitarian ethos. Instead, he argues that any such distinction would be morally arbitrary. Ultimately, we only care about identifying the basic structure as distinct from informal norms because we think that there is something morally significant about the basic structure and not about the informal structure.

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<sup>32</sup> In *Rescuing Justice and Society*, he amends this argument too suppose that even if there was *some* way to distinguish to two, the difference would not be morally significance

Instead of focusing on the *possibility* of a distinction between the basic structure and the informal structure, Cohen focuses on the *moral significance* of the distinction.

So far, I have only tried to show what the distinction is and not what the moral significance of this distinction is. In Chapter 2, I will show why the basic structure is an indispensable moral subject, and I show why the principles that apply to it will be distinct from the principles that apply to individual action in Chapter 3. Here, I have identified the basic structure as those institutions that establish our obligations, rights, and powers as members of society. An egalitarian ethos does not establish specific rights or obligations upon persons. In being concerned with the basic structure, Rawlsians are concerned with these specific institutions. Next I argue for why they *should* be so concerned.

## Chapter 2

# Levels of Moral Evaluation

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“The social virtues of humanity and benevolence exert their influence immediately, by a direct tendency or instinct, which chiefly keeps in view the simple object, moving the affections, and comprehends not any scheme or system, or consequences resulting from the concurrence, imitation, or example of others...The case is not the same with the social virtues of justice and fidelity. They are highly useful, or indeed absolutely necessary to the well-being of mankind: but the benefit, resulting from them, is not the consequence of every individual act; but arises from the whole scheme or system, concurred in by the whole, or greater part of society. General peace and order are the attendants of justice or a general abstinence from the possessions of others: But a particular regard to the particular right of one individual citizen may frequently, considered in itself, be productive of pernicious consequences.”

- Hume, *An Enquiry Concerning the Principles of Morals*, Appendix 3

Few doubt that we need some guiding principles for individual action. We are faced with the difficulties of ethics because we need to act, so we seek principles that help guide our choices. Being members of political communities, we are also accustomed to arguing about principles to guide the choices of the state, so few doubt that we need some guiding principles for government decisions. We know that we need principles for these issues, but why would we need principles that apply to the basic structure of society?

The question is not why we *could* develop principles for such a subject. After all, we might invent any number of subjects to develop principles for; we could develop principles to regulate which street fairs a city ought to have or what beers bars should serve. We are not concerned with all the subjects for which we could develop principles, so why be concerned with the basic structure? Why wouldn't the various issues surrounding the basic structure be otherwise addressed? Why couldn't a broader principle be applied to the specifics of the basic structure? Since there are so many ways to think about the moral questions involved in society, the questions that needs to be answered is why we would be particularly concerned with any particular subject. Why treat the basic structure as a morally indispensable subject?

Many of the most intuitive answers do not explain why the basic structure, rather than some similar subject, deserves our attention. For example, my concern with the basic structure is not explained by a concern for its profound and pervasive effects on individual life because other aspects of the social world also have similar effects.<sup>1</sup> Undoubtedly, one of the reasons why the basic structure is so important is because of its profound and pervasive effects, but that cannot be the reason why *the basic structure* (rather than all influential norms) is an indispensable moral subject in itself. Second, I cannot claim that a concern with justifying coercion explains why we need to evaluate the basic structure because I have not identified the basic structure as coercive. Third, I cannot claim that a concern for social cooperation explains why we need to evaluate the basic structure because I have identified “social cooperation” as the unique form of cooperation between members of society. Since the basic structure is constituted by the institutions that persons cooperate with one another through as members of society, justifying a concern for the basic structure on a concern for social cooperation would be like justifying a concern for the basic structure on a concern for the basic structure. Moreover, arguing from profound effects, coercion, or social cooperation would require that I support a moral theory that identifies coercion or social cooperation as particularly morally significant. I want to construct an argument that fits with a broader range of moral views.

In “The Basic Structure as Subject,” Rawls did give one clear reason why the basic structure is morally indispensable.<sup>2</sup> He argued that principles for the basic structure were needed in order to regulate “background fairness.” This argument starts from the intuitive idea that both the economy and society generally should progress “in accordance with free agreements fairly arrived at and fully honored.”<sup>3</sup> Such an ideal ensures that persons’ free decisions are respected.

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<sup>1</sup> As G.A. Cohen has argued, *Rescuing Justice and Equality*, Ch. 3

<sup>2</sup> Rawls, *Political Liberalism*, Ch. 7.

<sup>3</sup> Rawls, *Political Liberalism*, 265.

However, free agreements can only be fairly arrived at against a background of fair relationships between persons. If inequalities are too great, then we could not expect the agreements made to truly be fair to all participants. Thus, we need to evaluate the basic structure of society in order to ensure background fairness, which would make the ideal of a society progressing according to free and fair agreements possible. Thus, the basic structure is morally indispensable because of our concern for background fairness.

The force of Rawls's argument, however, is limited. It was meant primarily as a response to libertarians and classical liberals who hold the ideal that "society should progress according to free agreements fairly made." In this way, the Rawlsian argument shows why *libertarian* ideals require a concern with background fairness and, therefore, a concern with the basic structure. While many others (besides libertarians and classical liberals) share this ideal, it is not universally held. If this was the sole argument for treating the basic structure as subject, a Hegelian who saw this ideal as inappropriately applying the ideals of civil society to the state would not have reason to treat the basic structure as subject.<sup>4</sup> A second challenge that Rawls's argument faces is to show why we need principles that apply specifically to the basic structure *rather* than principles that regulate background fairness. After all, the basic structure is not obviously those and only those institutions that regulate background fairness. For these reasons, we should see Rawls's argument in "The Basic Structure as Subject" as a response to the *laissez-faire* capitalists who see no reason to be concerned with the basic structure. It is not a complete argument in favor of taking the basic structure as subject.

With the identity of the basic structure established in the last chapter, I can now give a more complete argument for the moral indispensability of the basic structure in this chapter. The argument does not rely on profound effects, coercion, social cooperation or background fairness.

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<sup>4</sup> Rawls does address a Hegelian criticism in "The Basic Structure as Subject," but that addresses a different point. There, he is concerned with the argument that *the social contract mechanism* misidentifies the ideal of civil society with the ideal of the state (rather than the argument that *the ideal of society progressing in accordance with free decisions* misidentifies the ideal of civil society with the ideal of the state). See *Political Liberalism*, 285-288.

Instead, it relies on *the normative structure of social practices*. Oftentimes, individual actions are part of social practices. For example, if I walk through your land uninvited, I am trespassing. Yet, this action is understood as trespass only because it occurs within a generally recognized practice of property. In order for me to fully evaluate the actions that are part of a practice, I often need to evaluate the practice of which it is a part. Whether an act of trespass is rightful or wrongful, for example, depends on whether the practice of property is rightful or wrongful. In such cases, the proper evaluation of an action requires that we evaluate the practice that the action is part of. This requires that we have some way of evaluating the practice; we need principles that apply to the practice that action is part of. In the example, we need some way of determining whether the property system is rightful.

Likewise, I argue that to properly evaluate certain social practices, we need some way of evaluating the systems of which those practices are a part. In the same way that we need to evaluate a practice to determine whether the actions that are part of that practice are justified, we need to evaluate a system of practices to determine whether the practices that are part of that system are justified. Since the major social institutions together form a system--the basic structure--we need to evaluate the basic structure in order to properly evaluate the institutions that are part of the basic structure. All the basic structure institutions together specify our role as member of society, so we need to evaluate these institutions as part of that system. For example, in order to evaluate a property scheme, political constitution or economic system, we need to see each as part of the basic structure; we need to see each as contributing to the specification of our role as members of society.

To establish this argument, the chapter will proceed in three parts. In §2.1, I explain why the evaluation of individual actions often requires that we evaluate the practices that the action is part of. Then, §2.2 explains why the evaluation of certain practices requires that we evaluate the systems of that those practices are part of. I then apply this argument to show how it justifies

evaluating the basic structure as subject. In the final part, §2.3, I answer some important objections and highlight what needs to be established in the next chapter.

In making this argument, this chapter seeks to show one way in which ethical life is complex. Whether moral principles aid or determine our moral evaluations, we cannot think that moral principles apply only to individual actions. We must see actions as part of practices, which also need to be evaluated. Moral principle either aid or determine our evaluation of these practices. This makes for a complex moral landscape, especially since our actions are part of so many different practices. This complexity extends even further when practices together form systems. We then evaluate not only actions and practices but systems of practices. The basic structure is an indispensable moral subject because it is the system that specifies one's role as member of society. As complex as the social and moral landscape is, we need to evaluate the basic structure in order to properly evaluate those institutions that establish our obligations, rights, and powers as members of society.

## **2.1 Actions as Part of Practices**

In many cases, we can properly evaluate an action by looking at it and its effects in isolation. If one saves a child from drowning, for instance, we can generally assume that the person acted rightly. In other cases, we can only properly evaluate an action when we look at it as part of a practice. Famously, Hume made this argument in *A Treatise of Human Nature*. In §3.2.2, he writes

“A single act of justice is frequently contrary to the public interest; and were it to stand alone, without being followed by many other acts, may, of itself, be very prejudicial to society. When a man of merit, of a benevolent disposition, restores a great fortune to a miser, a seditious bigot, he has acted justly and laudably, but the public is the real sufferer. Nor is every single act of justice, considered apart, more

conducive to private interest, than to public; and 'tis easily conceived how a man may impoverish himself by a single instance of integrity.”<sup>5</sup>

In this passage, Hume emphasizes that we cannot merely look at all actions as though they “stand alone.” If we look at the act of giving money to a seditious bigot, it would not call for our approval. A more laudatory action would be to give that money to those who need it and not leave it in the hands of the bigoted miser. Yet, we might approve of the action when we see it as an instance of *keeping contracts* if we learn that the man of merit had agreed to repay a loan. In this case, we see the action as part of a social practice of contract-keeping. For Hume, this demonstrates that we cannot explain our judgment of actions merely by appeal to the action in isolation. He ends the passage by pointing out that doing so is no less problematic if we focus only on personal advantage. One might uphold a contract and thereby bring herself into poverty, and we would still approve of this action as appropriate. Looking at the effects of action alone--either the moral or prudential effects--cannot explain why the action is laudable.

In Hume’s view, our approval of the man of merit’s action is explained by our recognition that the practice, as a whole, benefits ourselves and others. Our approval is transferred from the practice as a whole to the individual actions that contribute to it. Even if upholding a contract does not seem to have any merit on its own, we recognize that the practice of keeping contracts has merit, and so we approve of actions that are part of the practice. According to Hume, to understand our response to such actions, we recognize how we see such action as part of a beneficial social practice.

Now, others might offer a different explanation of Hume’s particular example. They might say that what explains our approval of the man of merit is our recognition of a practice-independent moral obligation to keep contracts. So long as we recognize that keeping contracts is morally laudable in isolation, we do not need to recognize the action as part of a practice of

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<sup>5</sup> Hume, *Treatise of Human Nature* (Oxford University Press, 2000), 319.



contract keeping. Yet, even if this response shows a problem with this particular case, it will not be a problem for all cases. Some actions will be praiseworthy as part of a practice that will not be praiseworthy in isolation. For example, a citizen who researches the candidates and votes in an election does a praiseworthy action, but the fact that it is praiseworthy only makes sense within a representative democracy.

Hume's example works particularly well because it is a clear instance of an action that would be judged differently if it were not viewed as part of a practice. In our everyday life, however, the issue is much more complex. We live amongst overlapping practices, and even those actions that are praiseworthy or condemnable because they fit within a social practice are not as clearly linked to any specific practice. I harm a student's interests when I give a student a bad grade on a paper, but I am justified in doing so within the complex practices of education. Grades should be given on the basis of merit and the harm caused is irrelevant according to the practice. Beyond grading, if we praise a teacher as particularly dedicated to students and clear in his explanations, such praise makes sense within the role that is established for teachers. To properly evaluate the various actions one takes as teacher, we need to recognize the particular practices that a teacher acts within.

In broader society, the ways in which our actions are part of practices proliferate. We make choices as parents, citizens, and friends. All of these roles carry particular ways of acting, and proper evaluation of action should be sensitive to these actions. We should not think that Hume's point is limited to simple cases where the rules are explicit and clear; we have much more complex practices that individual actions need to be seen as part of.

### 2.1.1 Why we should see actions as part of practices

What examples like Hume's show is the intuitive way in which we see actions as part of social practices, but it is less clear why we *should* do so. Hume offers it as a brute psychological fact

that our approval of the practice transfers to a our approval of the action, but we can ask whether we really *ought* to transfer our approval in this way. Why should we evaluate actions as part of practices? Answering this question is particularly important for the larger argument of this chapter. Since I want to show that we should evaluate practices as parts of systems, I will need to show that the same reasons that explain why we should evaluate actions as part of practices can be extended to show why we should evaluate practices as part of systems.

Put simply, the reason why we need to see actions as part of practices is because the moral significance of a practice is not reducible to the significance of the actions that are part of the practice. When an individual action is part of a practice, that action is significant as *contributing* to whatever is significant about the practice that is not reducible to the actions in isolation. If we did not see the action as part of the practice, our evaluation of that action would not capture the way in which the action contributes to that practice. We would capture the moral significance of the action in isolation, but we would not capture the significance of the action related to the irreducible significance of the practice.

In Hume's example, there is a particular good involved in being able to rely on others with whom one has made a contract. This is a good in having a practice of contract-keeping that is not reducible to individual acts of keeping contracts. In isolation, acts of contract-keeping are good because they promote the interests of the contracted with, but bad insofar as they could advance greater interests of others. As a part of the practice of contract-keeping, particular acts contribute to a system of reliance. Such a practice allows persons to coordinate and trust one another in ways that might not be possible in the absence of the practice. We can say that a practice of contracts facilitates trust and cooperation in ways that would not otherwise be possible. Accordingly, there is some value in having the practice that is not reducible to the value of persons generally doing that which they said they would. It is relevant to the evaluation of the man of merit's action that it contributes to the well-functioning of the

practice and thus contributes to this irreducible benefit. To properly evaluate the man of merit's action, we need to see it as contributing to the practice of contract. If we looked at the action in isolation, we would lose sight of this morally significant aspect.

What is true in the case of Hume's example is true of practices generally. To show this, §2.1.2 will look more carefully at the benefits (and costs) of practices that are not reducible to the benefits (and costs) of individual actions. Then §2.1.3 will focus more on how we need to see individual actions as contributing to these practices. Finally, §2.1.4 will show how this all requires that there is (at least) two levels of moral evaluation. We need to be able to evaluate actions, and we need to be able to evaluate the practices that actions are a part of.

### 2.1.2 The irreducibility of practices

While practices manifest themselves through patterns of individual action, the effects of practices are not fully reducible to the actions that are part of the practice. This is not because there is some ontologically important entity over and above individuals, but because the recognition of a practice changes how persons understand their social world. In recognizing social rules, persons think about their own action in different ways and expect different actions from others. The existence of a practice changes the social context within which our choices are made. Our concern with social practices is not merely a concern with a convergence of individual actions, we are concerned with the ways that practices structure our actions.

In his article, "Two Concepts of Rules," John Rawls is focused on the difference between justifying a practice and justifying an action that is part of a practice.<sup>6</sup> To show the importance of this distinction, he uses the practices of punishment and promise-keeping as examples. From the utilitarian perspective, we cannot make sense of why keeping promises *per se* is justified. After all, we always ought to do that action that best promotes happiness and this will not

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<sup>6</sup> Rawls, "Two Concepts of Rules," *Collected Papers*.

always involve keeping a promise. Likewise, if harming another could count as happiness-promoting deterrence, the utilitarian perspective requires that we harm regardless of whether the harmed is innocent of a crime or guilty. Yet, we can justify both punishment and promise-keeping as actions required by the rules of a practice, and we can see that practice as justified by the utilitarian principle. Accordingly, when the utilitarian principle is used directly to justify acts of promise-keeping or punishment, it seems inadequate. Yet, when the principle is used to justify practices, and actions are justified as part of the practice, then utilitarianism seems like a more appealing moral position.

Now this distinction would not be helpful if practices did not have effects that were not reducible to individuals' actions. The reason why both punishment and promise-keeping can serve as Rawls's examples is because they both have effects that could not be captured merely by individuals action. Punishment works as a deterrence only because it sets up a certain context in which persons who contemplate crimes can expect to be harmed. Moreover, it works as a good system of deterrence because there are certain expectations about who does the punishment and under what situations, so that harm cannot be perpetrated on a mere pretense of punishment. Likewise, the practice of promise-keeping establishes a way of assuring others of your action due to the mutually recognized wrong of breaking promises. In both cases, it is not merely individual actions that are important, but the establishment of mutually recognized rules. These rules structure behavior in new ways, and the effects of this structuring go beyond the effects of individual actions. These practices establish a social context for our actions.

Generalizing beyond these examples, we can recognize three ways that social practices structure behavior and thereby have unique effects. First, a practice structures behavior when it constitutes a new activity. As with punishment and promises, practices can have important effects by making a new activity possible. For instance, persons can only play chess when there are generally recognized rules that constitute the game of chess. Likewise, persons can only

have property when there is a generally recognized practice of property claims. Persons can only pass, enforce or obey laws when a system of law is in place. In any of these examples, by establishing the new activity, the practice changes our social context. We now have an option to play chess that we would not otherwise have. We are bound by claims of property that we would not otherwise be bound by. We can make laws and be compelled to obey them. The effects of these practices go beyond the effects that persons have in playing chess, making property claims or making law. We need to also consider the effects that having the option to play chess, make property claims or make law have. Oftentimes, the existence of these practices will have an effect even when persons choose not to follow their rules.

A second way in which practices structure behavior is by facilitating cooperation. For instance, the practice of waiting in line provides a way of cooperating for those who wait for service. Through a mutually recognized system of rules, persons coordinate who gets service next--whether at the DMV, at a coffee shop, or at Disneyland. While we can identify line-waiting as its own activity in one sense, people only engage in this activity as a way of waiting for service.<sup>7</sup> It coordinates our behavior rather than creating a new activity. Such coordination structures our behavior by establishing specific ways of working with others. As we make decisions, we hold these ways of coordinating with others as fixed. For instance, I might not go to the coffee shop if I am running late because I know there will be a long line. Moreover, such ways of coordinating can have broader effects than merely coordinating. Right now, line-waiting is a particularly egalitarian activity. However, in airports, a growing norm has been that those with a willingness to pay a higher price can bypass the line--either at security or at the terminal--because they have bought a special pass to do so. If this were to become pervasive

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<sup>7</sup> Whereas we do not say that persons engage in chess as a way of playing a game or respect property as a way of living together.

across situations of line-waiting, then line-waiting would have a different social significance.<sup>8</sup> It would be an indication of social class. In this way, practices structure behavior by coordinating our behavior and by coordinating it *in a certain way*. The particular way of coordinating might have expansive effects beyond just coordination.

The third way that practices structure behavior is merely by creating expectations of behavior. Even when individuals do not try to coordinate with others, the fact that persons act in ways specified by a practice will have effects on how they understand the social world. For instance, it might have an epistemic impact as persons take the fact that others act a certain way as evidence that it is a good way to act. For example, in a society where women primarily work in the home, members of that society might be more likely to think that there is something inherently right in women working at home. In planning their lives, they will tend to think that this is the better way to live--even when they are not concerned with coordinating with others. Even beyond this, we cannot ignore the myriad ways in which expectations of the social world influence our linguistic practices, and with that the ways we understand the world. To be any more specific on this would require a theory of learning and development that I cannot offer, but few can doubt the ways in which our social practices impact our habits, heuristic rules, modes of understanding and aims.

Regardless of which of these three ways practices structure behavior, each has a moral significance that is not reducible to the significance of those actions that compose it. The fact that persons see that practice as part of the social world has a deeper significance. These practices organize our behavior with one another and provide us with a social context within which to act. For this reason, we need to be concerned with these practices as having these effects. We need to be concerned with the irreducible significance of practices.

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<sup>8</sup> as remarked in a recent New York Times article; "Want to Save Civilization? Get in Line" *New York Times*, May 31st, 2013. <[http://www.nytimes.com/2013/06/02/magazine/want-to-save-civilization-get-in-line.html?\\_r=0](http://www.nytimes.com/2013/06/02/magazine/want-to-save-civilization-get-in-line.html?_r=0)>

### 2.1.3 Evaluating contribution

While the benefits and costs for any of these practices is not fully reducible to the effects of those actions that are part of the practice in isolation, it is nonetheless true that there would be no practice if persons did not follow the rules of the practice. Accordingly, those actions that correspond to the rules of the practice *contribute* to the functioning of that practice, and those actions thus contribute to the benefits and costs of the practice. When we evaluate those actions that are part of a practice, we need to evaluate them *as* parts of a practice in order to capture this morally significant aspect of the action. The fact that the action contributes to the benefits or costs of the practice is relevant for evaluating that act.

To see the point here, imagine a case in which a city will suffer from a drought unless persons generally cut down on their water usage. Suppose that the city is large enough such that no one person's usage will either cause or avert the drought, but a general change by all would solve the problem. If we look at an individual situation in isolation, there is little reason for any individual to cut back. After all, their own choice will not either cause or solve the problem. Yet, we can praise an individual who *contributes* to the solution by cutting back--even if the drought is not ultimately avoided. In this case, it is the effects of general behavior rather than any particular action that matters. We can then evaluate the action as contributing to this general behavior. Similarly, when we are concerned about the effects of a practice that are not reducible to effects of isolated actions, we should still evaluate actions as contributing to the practice.

Intuitively, we often jump from approving the general behavior to approving the individual action. We jump from thinking that a general reduction in water usage makes the particular choice of an individual to reduce their water usage good. Yet, this *is* a jump. It does not directly follow and different moral theories will justify it on different grounds. For instance, some appeal to the "Principle of Fair Play," which requires that persons contribute to a practice

that they accept the benefits of. Alternatively, utilitarians might appeal to an indirect utilitarian principle such that persons ought to act in the way that, when persons generally act that way, would best promote utility.<sup>9</sup> My present concern is not to argue for any particular way of justifying individual contribution to practices, but merely to point out that there must be some ground that aligns with our intuitive approval of such actions.

In speaking of our evaluation of individual actions as “contributing” to a practice, it may seem as though such actions would not be strictly obligatory. The phrase makes it seem as though the practice accomplishes an end, and our action is praiseworthy insofar as it contributes to that end. However, sometimes a practice strictly requires compliance and then our evaluation of the action does not seem to depend on any contribution. For instance, a practice of contract-keeping does not explain praise of those actions that contribute to the reliability of contracts; it requires that persons keep their contracts. A practice of property does not explain praise of actions that secure property claims; it requires that persons respect property. How can we explain such requirements while being concerned only with the ways the actions contribute to the practice?

Oftentimes, the efficacy of a practice requires that persons can fully rely on individuals acting a certain way. For instance, a practice of promising only works because persons are *always required* to keep their promises. It would not work the same way if the practice only requires that persons do enough to maintain trust in promises. A practice of property only works when persons have trust that others will respect their property claims. When such practices exist, then one contributes to the practice *by strictly following its rules*. The praiseworthy action is not to contribute however one sees fit--it is to follow the required rules. In these situations the rules of a practice will be obligatory.

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<sup>9</sup> For a developed view of rule-utilitarianism, see Hooker, *Ideal Code, Real World*.



What goes for good practices, equally goes for bad practices. If we praise actions that contribute to good practices, then we condemn actions that contribute to bad practices. For example, in areas of Africa and the Middle East, there is a practice of female genital cutting. According to this practice, young girls undergo procedures of varying severity from limited circumcision to complete infibulation. Given the harm caused to these girls, we can condemn such a practice and with it condemn the actions that contribute to it. Just as we evaluate actions that contribute to a justified practice as good, we can evaluate actions that contribute to an unjustified practice as bad. Accordingly, our evaluation of individual actions will often depend upon our evaluation of the practice of which it is a part. To fully evaluate individual actions, we need to evaluate the practices of which they are part.

#### *2.1.4 Two levels of evaluation*

So, individual actions will have moral significance as isolated acts, and they will have significance as part of social practices. In order to fully evaluate an action we need to appreciate both perspectives towards the action. In order to evaluate the action as part of the practice, however, we need to evaluate the practice itself. If the practice is justified, then individuals have reason to contribute to the practice. If the practice is unjustified, then individuals have reason against contributing to the practice. A full evaluation of action needs to take this into account, so a full evaluation of action requires a judgment of the practice of which the action is part.

What all this shows is that we cannot suppose that moral evaluation happens only at the level of individual actions. At times, what an individual ought to do depends upon whether a practice is justified, and this shows that moral evaluation cannot be directed only at individual actions. We need to be concerned with the evaluation of practices. In developing moral principles, we should have moral principles for individual action and we should have principles for practices.

So, this argument shows why we should be concerned with social practices, but it does not do so on the basis of any substantive moral theory. Instead, the argument relies merely on the role of social practices and the way in which actions contribute to them. This argument applies whether one ultimately thinks that social practices should be evaluated by self-interest, utility, rational agreement, reasonable agreement, pluralist values or god's will. Since practices have effects that are not reducible to effects of isolated actions, we need to be able to evaluate those practices in order to evaluate the actions that contribute to them.

In section §2.2, I will extend this argument to systems of practices and the basic structure. I will argue that we have reason to view moral theory as having three levels. I argue that we should be concerned with actions, practices and systems of practices. Since the basic structure of society is a system of practices, we should be concerned with the basic structure of society. In this way, I will have argued for the moral indispensability of the basic structure without relying on any particular moral theory.

#### 2.1.5 Applbaum's objection

In his 1999 book, *Ethics for Adversaries*, Arthur Applbaum examines the morality of actions that are part of adversarial practices such as the law, business, and political campaigning.<sup>10</sup> His primary concern is with behavior that would not be permissible were it not part of a social practice that licenses it. He asks how deceptive, coercive and violent actions can be justified merely because they are part of a practice. As a particularly stark example, he offers the case of an executioner. Such a person kills, but we think he kills in virtue of a certain institutional capacity. If the executioner did not have a particular role in a legal system, we would not think such killings could be justified. Applbaum's challenge is whether such killing is even justified within the institution. He asks how being part of such an institution could really justify this

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<sup>10</sup> Arthur Applbaum, *Ethics for Adversaries* (Princeton, NJ; Princeton University Press, 1999).

violent behavior. In what way does being part of a practice really change our evaluation of the action?

Appelbaum's real object of concern is not executioners, but the more mundane institutions of law and market competition. In these cases, we pit persons against one another and believe that a system in which they compete is beneficial in the long run. Yet, when lawyers manipulate or hide facts in the courtroom, they do not cease to lie merely because they are lawyers. When persons focus solely on profit in market exchanges, they are not less guilty of greed. While persons might cite their role as a justification for their conduct, it is not obvious how their role could justify such *prima facie* immoral conduct.

Much of Appelbaum's argument presses against the view that I have argued for in this chapter. While I argue that we should see actions as part of practices, he convincingly argues that we should see actions in isolation. We ought to see lawyers as lying, businessmen as greedy, and executioners as killing. Being part of a practice does not justify a fundamentally different evaluation of the action. In fact, we might wrongly judge an action by viewing it as part of a practice rather than by viewing it as an isolated act. Appelbaum's arguments are significant because they push against the fundamental move of this chapter. They show why actions that are part of a practice should not always be evaluated as part of a practice.

Yet, Appelbaum's views and my own do not conflict in any way. Both can recognize that we should evaluate actions as part of practices and that we should evaluate actions in isolation. Both perspectives are relevant to the ultimate evaluation of that action. My claim is not that being part of a practice fully determines whether an act is right or wrong. My claim is only that a proper evaluation of that action requires that we evaluate it as part of a practice. In fact, there could be four ways in which our evaluation of the act in isolation and our evaluation of the act as part of a practice interact in an ultimate evaluation of that action.

First, it might be the case that persons should generally follow the rules of a practice, but that situations arise when the rules should not be followed. Here, the particularities of the action in isolation require that we do not follow the rules that would typically justify the action. Perhaps it is wrong for an executioner to kill political criminals even if an executioner can generally kill criminals.<sup>11</sup> There might be cases when a lawyer should not lie, even if the adversarial legal system is generally good. There might be cases when one should not keep their contract, even if contracts should generally be kept. In such situations the fact that persons should generally follow the rules of a practice does not mean that they should always do so.

Second, it might be that a practice is unjustified because it requires that persons act in ways that are immoral in isolation. It might very well be an objection against capital punishment that it causes persons to kill outside of self-defense. It might be an objection against adversarial legal conventions that they require lawyers to lie. In such cases, the fact that practices encourage (if not require) such immoral acts would be a reason against the practice being practiced. When this occurs the reasons for the practices would be compared to the reasons against, and we could determine whether or not the practice is, ultimately, justified.

Third, Applbaum does not deny that a practice can make an otherwise immoral action moral, only that we cannot assume it does so.<sup>12</sup> It is also consistent with both of our positions that a practice might be important enough to justify persons acting in immoral ways as part of it. Perhaps the advantages of the adversarial legal system are great enough to justify the lies that it encourages. Perhaps a market system in which advertisers deceive could be sufficiently justified in a way that excuses individual actions of deception.

Fourth, these two perspectives towards our action might very well be irreconcilable. If the practice is justified, but the act it requires is immoral, then a person who acts according to

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<sup>11</sup> Of course, I do not offer any positive view of when, if ever, executioners are permitted to kill.

<sup>12</sup> He offers a contractualist account of when practices can make prima facie immoral actions moral in Chapter 8 of *Ethics for Adversaries*.

the practice might act both rightly and wrongly. We do not need to suppose this conflict can be resolved. This, after all, is how Michael Walzer treats the problem of dirty hands.<sup>13</sup> The political leader is put in a place whereby they ought to do that which benefits their public. When this requires that they act in immoral ways, their political role pulls them towards one action and the immorality of the isolated action takes them in another. For Walzer, the politician who acts in accordance with their role does right, but they do right by doing wrong. We should not suppose that the wrong is wiped away by the right. The politician should appreciate both aspects of his act. This might be a fact of moral life far beyond politics. Our institutional obligations and social roles might require that we do wrong to do right--and we should not think that the wrong we do is wiped away.

Applbaum's argument importantly shows that the view of our actions as part of practices is not the only morally relevant view of our actions. Even when they are part of practices, our actions are still isolated actions. For a full evaluation of them, we need to recognize both aspects. We need to see our actions in their particularity, and we need to see them as contributing to practices. How these two perspectives towards the action are resolved needs to be determined by a particular moral theory, so I cannot offer a general solution here. What matters is that his emphasis on evaluating actions in isolation does not itself conflict with my emphasis on evaluating actions as part of practices.

## **2.2 Practices as Parts of Systems**

The reason why we need to evaluate certain practices as part of systems is the same as the reason why we need to evaluate actions as part of practices. Systems of practices can have certain effects that practices alone do not have. When practices contribute to such a system, this contribution is an important aspect of that practice. A contribution to a beneficial system is

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<sup>13</sup> Walzer, "The Problem of Dirty Hands,"

laudable, and a contribution to a harmful practice is condemnable. For instance, the coercive enforcement of good laws can be a great good whereas the coercive enforcement of bad laws can be a great bad. While being part of a system is not the only salient feature of such practices, it will be relevant for determining whether that action is rightful. For this reason, it will often be the case that to properly evaluate an individual's action, we need to evaluate the practice of which that action is a part.

To extend this argument from the last section, §2.2.1 will argue that systems of practices have the same kinds of unique effects as practices do. Oftentimes, systems of practices can be justified by the effects they have beyond the effects of the practices they are made of. Following this, §2.2.2 argues that we need to evaluate practices by their contribution to such systems. The fact that a practice contributes to a justified system counts in favor of that practice and it would count against it if it contributed to an unjustified system. Finally, in §2.2.4, I better explain how we can understand the basic structure, specifically, as a system that the major social institutions need to be justified as part of.

### *2.2.1 The effects of systems*

Just as practices have unique effects in creating a social context for individual actions, so do systems of practices create a context for practices. Accordingly, the effects of a system of practices are not reducible to the effects of practices in isolation. Once we see the unique effects that systems of practices have, we can see why we need to see individual practices as contributing to systems.

As an example, we can focus on the educational system in the United States. In this system, there is no one over-arching institution that has authority or influence over the other institutions. Pre-schools operate under a different framework than primary schools, public schools operate under a different framework than public schools, and colleges operate under a

different framework than high schools. Moreover, there are plenty of secondary institutions that are well integrated within these. For instance, the companies that administer Advanced Placement tests, the companies that organize the SAT, ACT, GRE, and MCAT tests, and the various financing organizations that offer student loans are all integrated within the educational system. While these various institutions are not unified as part of any formal system, they do work together as part of “the educational system” in the United States. Each institution is organized in ways that presume the idiosyncrasies of other institutions, and members of society have certain expectations on the system as a whole.

Because our educational institutions are part of the educational system, they are all part of a particular social context. If we wanted to evaluate any one kind of institution, we would need to do so within the context set by the system as a whole. If we were evaluating high school education, we would need to think of it as situated within the system of primary schools, colleges and placement tests. We could not properly evaluate high school as an institution if we viewed it in isolation; we would need to see it as part of the educational system.

In this way, the evaluation of educational institutions is quite similar to individual actions. If we are to evaluate the choice of the man of merit, we would need to see his action as within the context of a practice of contracts. To see the action in isolation would be to treat it wrongly. In fact, the same three ways in which practices structure individual action also apply for how systems structure individual practices. First, systems of practices could constitute new kinds of systems. When this occurs, then the practices will only make sense within the system that it partly constitutes. For example, we might understand “the state” as constituted by various institutions--perhaps a political constitution, legal system, and police force. These institutions will only make sense as part of the state, as a whole, in the way that moves of chess only make sense as part of the game of chess. Second, systems of practices will often coordinate the actions of other practices. For example, the educational system coordinates the activities of

the various educational institutions. In this case, the way the system is organized has influence on how its parts are organized. Third, systems of practices will also have a structuring role by setting expectations and a context for understanding. For example, persons might see themselves and their own maturity in the context of the educational system. As the normal course of education extends past high school into college, persons come to see themselves as adults after college and not after high school.

Just as practices structure behavior in these three ways, so do systems of practices structure practices in these three ways. Accordingly, we need to evaluate systems of practices as having this unique structuring effect; just as practices provide a social context for actions, systems provide a social context for practices.

### *2.2.2 The contribution of practices*

So, systems of practices have irreducible effects by establishing a social context for practices, but it is still practices that together form a system. Accordingly, the role that a practice plays in the system is important for evaluating that practice. Just as we need to evaluate individual actions as contributing to practices, we need to evaluate individual practices as contributing to systems. A practice will have morally significant aspects as an isolated practice, but it will also have morally significant aspects as part of a system. Thus, a full evaluation of practices requires that we see them as part of these systems.

Just as evaluating an action as part of a practice requires that we evaluate the practice as a whole, so does evaluating a practice as part of a system require that we evaluate the system as a whole. A practice could be part of a justified system, and fulfilling a role within that system would count in favor of that practice. A practice could contribute to an unjustified system, and fulfilling a role in that system would count against the practice. A full evaluation of practices requires that we see them as part of systems.



Continuing our example, while the educational system in the United States is far from ideal, we can imagine an educational system that--as a whole--works well and fairly. Now, whether this system works well will depend on the individual institutions that comprise it and how they work together. So, suppose that we focused on any one institution--such as pre-school. Now, there are certainly parts of a pre-school that we can evaluate as an isolated institution. For instance, pre-schools should be healthy environments where children feel safe. However, we could not focus only on making pre-school the best it could be without considering what role it plays in the larger system. If we evaluate pre-school in isolation, we would not be adequately evaluating pre-school. Part of our evaluation of the institution also depends upon what we think of the system as a whole. The fact that a pre-school fulfills a necessary role in a justified system counts in favor of that institution. Yet, if a pre-school fulfills its role within an unjustified system, that does not count in its favor. In this way, the individual institutions that comprise the education system need to be viewed as part of that system, and this will often require that we be able to judge that system as a whole.

So, what all this shows is that we should be concerned with the moral evaluation of systems of practices. Just as our concern for adequate evaluation of individual action will require that we evaluate the practices that actions are part of, so does our concern with practices require that we evaluate the systems of which practices are a part. Again, it is not due to any substantive moral theory that we should be concerned with the system as a whole, but because of the structure of practices and of systems. Regardless of what moral theory one holds, we should be concerned with evaluating systems of practices.

Accordingly, moral evaluation cannot be confined to one level or two, but must occur at (at least) three levels. We need to be concerned with individual actions, with the practices that actions are part of, and with the systems that practices are part of. Oftentimes the evaluation of individual action requires that we view that action as part of a practice and that requires that

we evaluate that practice. To evaluate that practice, we may need to see it as part of a system of practices, and that requires that we evaluate that system as a whole. Accordingly, a full moral theory needs to have principles that apply at these three different levels.

The final step of the argument will be to show that the basic structure of society is one such system of practices that we should be concerned with. Yet, before I do that, I want to clear up one difficulty.

### 2.2.3 What makes a system a system?

The argument thus far relies on the claim that those practices that are part of systems should be evaluated as part of those systems. But, what exactly counts as a “system” of practices? Whether or not we should evaluate any particular practice as part of a system depends on how we answer this question. That will determine when a practice should be evaluated only in isolation and when it should not be.

In accordance with the core analogy of this argument, I want to answer the question of what counts as a system by asking what counts as a practice. When do we know when actions are parts of practices? The same answer could potentially be applied to determine when practices are a part of systems. There are, however, two problems with this approach. First, we have an intuitive notion of practices that is not easy to articulate. As Wittgenstein claimed of games, it is quite difficult to offer a clear standard by which to identify a practice.<sup>14</sup> Second, we might be able to refer to the participants’ attitudes towards a practice to identify it as a practice, but we cannot refer to the attitudes towards systems to identify a system. It is not nearly as common for persons to think of systems as it is to think of practices. Accordingly, it is not obvious how the analogy between practices and systems can be carried through.

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<sup>14</sup> Wittgenstein, *Philosophical Investigations*, §65.

What we can say of both practices and systems is that they organize their parts as a single activity. Oftentimes that activity is constituted by the rules of the practice, but other times it merely provides a way of pursuing a prior activity. This is the key aspect of practices that can be extended to identify systems. A practice organizes individual actions around a single activity, and a system of practices organizes practices around a single activity. In our repeated example, the educational system organizes the various institutions around the activity of educating members of society. Each institution has a role in education.

So, what makes a heap of practices into a system is that the practices jointly contribute to some activity or goal. This raises the question: what activity do the major social institutions jointly contribute to such that they form a system?

In the last chapter, I explained the basic structure as consisting of those institutions that establish our obligations, rights, and powers as members of society. While this gives some unity to the major social institutions, it is not clear whether it really counts as a single activity. Isn't it actually a mere heap of distinct activities; establishing property rights, voting powers, and the like?

My response to this worry is to emphasize the ways in which the requirements and claims we have as members of society define our *role* as members of society. The obligations, rights, and powers that the major social institutions establish jointly specify our *role as member of society*. The unity of the basic structure as single system can be explained as joint contribution to the single activity of specifying our role.

To talk in terms of a "role" might seem odd in this context. Often, we might associate a role with specifying a particular goal that one has in virtue of occupying some office. For example, one's role as parent is to raise a healthy and autonomous individual. In being a member of society, there is no single goal that one has. It therefore seems odd to suppose that the

major social institutions thereby specify our “role.” Being a member of society hardly seems to give content to a role in the same way that various offices do.

However, this objection comes from a skewed way of viewing a role. Oftentimes our roles in an institution will be tied to the goal of that institution. Our role as parent is tied together with the broader role that the family institution has. Yet, a liberal society does not have a single goal. Instead, it is organized in ways that facilitate the accomplishment of its members goals. The rules that we follow are those that mutually advantage members of society generally. Their justification is this mutual advantage and not a contribution to some goal. Accordingly, our role as member of society is not understood as goal-oriented. Instead, our role is specified by the obligations, rights, and powers we have as members of society. Our role comes in the forms of claims and obligations rather than as ends. In a liberal basic structure, our goals will be our own and our role as member of society will be specified by the rules of the major social institutions.

#### 2.2.4 Why evaluate the basic structure

At this stage, all the parts of the argument have been assembled to show why we have reason to be concerned with the basic structure of society. A full moral appraisal of certain actions requires that we see them not only in isolation, but as part of a social practice. If a practice is justified, then persons have moral reason to follow the rules of the practice. If a practice is a morally bad practice, then persons have a moral reason to not follow the rules of the practice. Accordingly our evaluation of the practice itself is relevant to our evaluation of individual action. We need to be able to evaluate actions and practices. However, to evaluate certain practices, we likewise cannot view them as isolated. Certain practices should be evaluated as parts of systems of practices. When the system is good, then the practice can be justified as contributing to the practice. When the practice is bad, then the fact that the practice

contributes to it might make the practice unjustified. Accordingly, we need to be able to evaluate not only actions and practices; we must also be able to evaluate systems of practices. Our moral evaluation must reach to three levels.

As argued in the last chapter, the basic structure of society is a system of social practices. Specifically, it is the system of social practices that specify our role as member of society. Accordingly, it makes sense that we view the basic structure *as* a system. The various institutions that form the basic structure together specify the requirements and demands that I have as member of society.

More intuitively, we can see this point by noticing that we live in a society, and that society establishes a range of claims, obligations, and expectations. These various claims, obligations, and expectations are established by the major social institutions, like an economic system, property scheme, legal system and political constitution. We do not have a choice to participate in any one of these institutions and not any of the others. Instead, they come as a mutually supporting group. These institutions together establish the requirements on and claims of persons as members of society. Since we cannot choose to be a participant in one or the other, we should evaluate each of them as contributing to the whole. The most important moral concern then is whether these institutions as a whole are justified. Whether the society we find ourselves in is justified. To try and evaluate one of these institutions in isolation from the others, like the legal system or property system, would ignore the way in which they are part of the society that establishes our claims, obligations and expectations as a whole. It would be like evaluating preschool without understanding how preschool fits into the education system; it would be like evaluating returning money to the bigoted miser without seeing it as part of contract-keeping.

Once we conceive of the basic structure as a system of practices, we can see why we need to focus on the basic structure as an object of ethical concern. To fully evaluate any basic

structure institution, we need to see it as part of the basic structure. Whether the institution is itself justified then depends upon its role within the basic structure and whether the basic structure--as a whole--is justified. Accordingly, we need to have some way of evaluating the basic structure as subject.

The argument can be seen if we focus on particular actions. So, imagine we are concerned with whether an individual ought to follow the law. If we conceive of a legal system as a social practice that consists partly of the rule “citizens ought to follow what is identified as the law,” then persons ought to follow the law if they ought to follow the rules of the legal system. Whether they ought to follow the rules of this social practice depends upon whether the social practice is justified, so we need to determine whether the legal system is a good one. To do this, we need to see the legal system as part of a system of practices. Since the legal system is one institution that establishes security for persons as members of society, we should evaluate the legal system as part of the basic structure of society. Whether the legal system is good partly depends upon whether the basic structure of which it is part is good, and to determine this we must be able to evaluate the basic structure of society. So, in order to properly evaluate certain actions--like following the law--we need to be able to evaluate the basic structure of society. Regardless of what moral theory someone holds, we need to be morally concerned with the basic structure of society.

In this way, the argument for being concerned with the basic structure as subject extends the original argument offered by John Rawls in “Two Concepts of Rules.” As explained above, Rawls was there concerned with the distinction between justifying an action and justifying a practice. Some actions are parts of a practice, and the justification of those actions requires that we see them as part of a justified practice. Likewise, I maintain a distinction between justifying a practice and justifying a system of practices. Some practices are parts of systems, and the justification of these systems requires that we see them as part of a justified

system. A concern with the basic structure recognizes the logical distinction between actions and practices and extends it to another level. The concern with the basic structure is justified by this distinction between justifying practices and justifying systems of practices.

### **3.3 Addressing Objections**

At this stage, the core argument for focusing on the basic structure is established, but a number of objections might still be raised. In this section, I seek to anticipate two major objections and offer responses. Doing this should do more than seal potential gaps with the view, it should also help to better explain the core argument.

The first objection I address is one that questions the restricted focus of the basic structure. Why not instead focus on the entirety of our social life and see our basic institutions as part of *that social system*. While we should judge our social institutions as part of a larger social context, why restrict ourselves to seeing the institutions as only part of the basic structure? The second objection argues for extending the argument beyond its intended purview. Why wouldn't we see the basic structure as itself part of an even larger system, the global structure?

#### **3.3.1 First objection: focusing on society as a whole**

Why do we need to see the basic structure institutions *as part of the basic structure* specifically? One might recognize that we should evaluate the major social institutions as part of a larger system, but does that larger system need to be the basic structure? Why not see them *as part of society as a whole*? Why not evaluate them as part of the full social structure, and determine how the entire social structure ought to be? In all likelihood, this would seemingly require that we evaluate both the basic structure and informal structure as working together as part of the same social system.

In “Remarks on Bentham’s philosophy,” J.S. Mill argues against Bentham that he is too focused on individual actions and not the larger social context in which decisions are made. His own objection to Bentham might support this first objection to my view. Mill writes,

“A theory, therefore, which considers little in an action beside that actions’s *own* consequences...will be most apt to fail in the consideration of greater social questions--the theory of organic institutions and general forms of polity; for those (unlike the details of legislation) to be duly estimated, must be viewed as the great instrument of forming the national character; of carrying forward the members of the community towards perfection, or preserving them from degeneracy.”<sup>15</sup>

In this quotation, Mill recognizes the major driving intuition behind the argument of this chapter. We cannot merely evaluate individual actions in isolation, but must see them as part of the larger social context. For Mill, this meant using the principle of utility to apply to the entirety of the social context.<sup>16</sup> He was concerned with using the principle to evaluate “national character” and sees our actions are part of these larger social questions. Mill does not make any such restriction in saying that we should see actions as only part of practices and practices as only parts of systems. Rather, he seems to suggest that they are all part of the whole of a national character.

Extending this idea, we only need to ask why we do not start from the largest possible unit of evaluation. Why not be concerned with evaluating society as a whole, and see the various aspects of society as part of it. This would mean that we evaluate the basic structure

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<sup>15</sup> J.S. Mill, *Collected Works*, Vol. 10 (Liberty Fund Press), 9

<sup>16</sup> “The recognition of happiness as the only thing desirable in itself, and of the production of the state of things most favourable to happiness as the only rational end both of morals and policy, by no means necessarily leads to the doctrine of expedience...the ethical canon which judges of the morality of an act or class of actions, solely by the probable consequences of that particular kind of act, supposing it to be generally practiced. This is a very small part indeed of what a more enlarged understanding of the “greatest-happiness principle” would require us to take into account...All acts suppose certain dispositions, habits of mind and heart, which may be in themselves states of enjoyment or wretchedness, and which must be fruitful in *other* consequences, besides those particular acts.” Mill, *Collected Works*, Vol. 10 (Liberty Fund Press), 7.



institutions, the informal structure, and even particular acts as all part of the national character. The perspective agrees with my claims that we need to take a larger perspective towards our actions than seeing them in isolation, but why wouldn't this larger perspective see all aspects of social life as part of society as a whole and start from an evaluation of society?

Most simply, we do not evaluate practices as part of the society as a whole because society is not a system. There is no single activity that all parts of society are contributing to. We evaluate the major social institutions as part of the basic structure because they all contribute to the specification of our role as member of society. While I urge us to take a broader perspective in evaluating actions and practices, this does not require that I take a maximally broad perspective. It is because actions contribute to practices that we need to evaluate them as part of the practice and it is because practices contribute to systems that we evaluate them as part of the system. Since society is not understood as any single activity, we do not need to evaluate particulars as part of society.

In response, a teleological moral theory might object that we can see all of society as contributing to a single activity; the furtherance of the moral end. The utilitarian, for example, will see all of society as contributing to the activity of promoting the greatest happiness. Accordingly, we could evaluate any practice as part of a single system; the system that promotes happiness. Yet, even those who accept such a view need not reject my conclusion. That we should be concerned with all of society does not mean that we should not be concerned with the basic structure. If anything, it would only mean that we should see the basic structure as part of the social structure. If we have a comprehensive social view, then surely our evaluation of the basic structure should be consistent with that larger view, but it does not show that you should not focus on the basic structure as a particular system. Hence the argument does not seem like an objection against a concern with the basic structure. It merely shows that this concern is insufficient for moral theory, and I've never held that it would be.

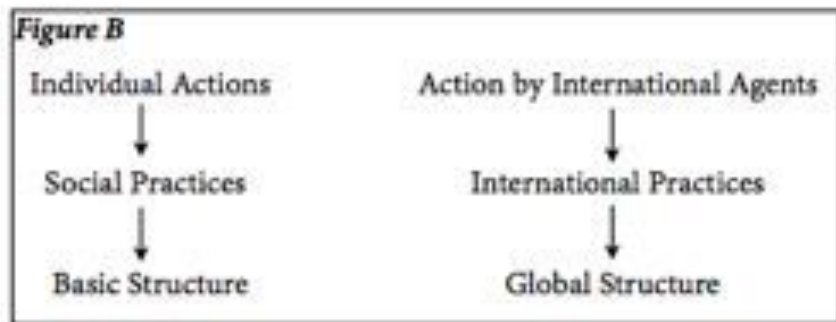
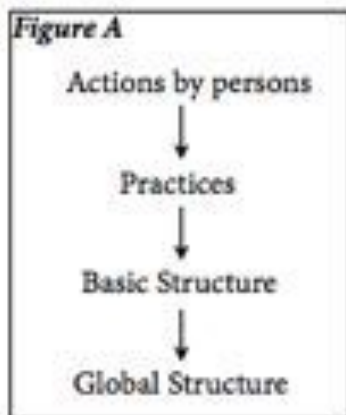
As a final point, I want to make a more general point about ethical theory. From the perspective of any moral goal, anything might be evaluated as instrumental towards that goal. It is unsurprising that someone who has an ethical goal would then see little reason to distinguish a concern for the basic structure from a concern with any other part of the social structure; all of the social structure is viewed as instrument to that goal. If equality is a moral aim, then the basic structure, like any other part of the social structure, can contribute to equality. If autonomy is a goal, then both the basic structure and the informal structure are important for promoting autonomy. Yet, this does not really change the underlying point of my argument. I mean to emphasize the distinct role that the basic structure has in establishing our obligations, rights, and powers as members of society. Even if we ultimately assess the basic structure by some single moral end, the way in which it implicates that moral end will be unique. The basic structure forms a background against which each person lives their lives; obligations, rights, duties and opportunities are all explained by the idiosyncrasies of the basic structure. In so doing, the basic structure will have unique effects on whatever moral ends we take to be important. Even if we are concerned with how all of society affects autonomy, equality or happiness, we have reason to distinguish our concern with the basic structure because of the unique ways in which the obligations, rights, and powers we recognize will effect autonomy, equality and happiness.

### 3.3.2 Second objection: focusing on the global structure

A second objection extends my argument and argues that just as we should evaluate the major institutions as part of the basic structure of society, so should we evaluate the basic structure as part of the global structure. We could not then properly evaluate the basic structure without evaluating the global structure.

My first response is to point out that this is not, strictly speaking, an objection to my argument. Even if we should see the basic structure as part of the global structure, that still does not count against evaluating the basic structure as a moral concern. It merely suggests that we need to take a broader view to properly do so.

Nonetheless, we also should not see the basic structure of society as part of the global structure. Actions are part of social practices because practices only exist when persons act in accordance with the rules, and institutions are part of the basic structure because the basic structure only exists when the practices that compose it exist. Yet, it is not the case that the global structure is made up of basic structures. Rather, the global structure consists of international practices, and those practices consist in actions by international agents--such as states, corporations and various NGOs. In this way, the global structure is *similar* to the basic structures rather than *constituted* by basic structures. The difference between the two is that the basic structure is a structure of practices between persons whereas the global structure is a structure of practices between international agents. Whereas the objection supposes a relationship like that in figure A below, the real situation is like that of figure B



So, while the objection supposes that my argument should be extended to see the basic structure as part of the global structure, the conclusion we should draw is quite different. Just as we need to evaluate the basic structure to properly evaluate individual actions, so we should evaluate the global structure to properly evaluate international actions.

Of course, this argument relies on a certain empirical fact about the global structure, that international practices and the global structure are constituted by actions of international agents rather than by individual agents. This point might seem contentious, but my argument still stands even if I am wrong. Suppose it is the case that international practices are constituted by the actions of individual agents. This *still* would not imply that the basic structure should be evaluated as part of the global structure. Instead, it would imply either (a) that the global structure is a system of practices alongside the basic structure as system or (b) that the global structure counts as a basic structure. If (a), the global structure might establish claims that individuals make on one another as members of the globe--rather than as members of society. In the case of (b), the global structure would establish obligations, rights, and powers for persons as members of society, in which case there would be a global basic structure. In either case, it would not mean that we should see the basic structure as part of the global structure.

#### **2.4 The Moral Indispensability of the Basic Structure**

So, the core argument for being concerned with the basic structure does not arise from any particular moral value. I do not claim that happiness is important and the basic structure has a unique role in promoting happiness. I do not claim that autonomy is important and claim that the basic structure has a unique role in protecting autonomy. Instead, the argument arises from the way in which our social structure is organized and how moral theory needs to treat that social structure. We live amidst social practices and those social practices are part of systems of practices. In order for our moral evaluations to be complete, we need to see actions as part of

practices and practices as parts of systems. As the basic structure institutions are practices that are part of an important system, we need to see these institutions as part of the basic structure. Accordingly, complete moral evaluation requires that we have a concern with the basic structure, regardless of what is substantively valuable. It is for this reason that the basic structure is a morally indispensable ethical subject.

## Chapter 3

# Within and Without an Institutional Context

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“In accord with the interests and occupations of the group, certain things become objects of high esteem; others of aversion. Association does not create impulses of affection and dislike, but it furnishes the objects to which they attach themselves. The way our group or class does things tends to determine the proper objects of attention, and thus to prescribe the directions and limits of observation and memory...Just as the sense requires sensible objects to stimulate them, so our powers of observation, recollection, and imagination do not work simultaneously, but are set in motion by the demands set up by current social occupations”

- Dewey, *Democracy and Education*

Having shown *that* we should evaluate the basic structure as a moral subject, I now turn to *how* we should do this. One intuitive approach holds that we should identify first principles that can be applied across all moral problems, and then apply these principles to the basic structure. Yet, this approach hardly warrants giving any more attention to the basic structure as a moral problem than we would give to any other problem. In each case, we would merely apply first principles to the issue.

To overcome this challenge, there must be something morally *distinct* about the basic structure. What is morally different about the basic structure such that we would evaluate it with distinct principles? Why not merely identify the correct ideals for individual actions and recognize those as the same ideals for the basic structure? To claim that the we should focus on the basic structure seems to require that there is something that makes the basic structure worthy of distinctive principles.

If one argues for a conception of justice that is uniquely related to the basic structure, then one can easily explain what is distinct about the basic structure. Justice strikes us as a distinct normative ideal. If justice uniquely bears on the basic structure, then the basic structure is distinct by its relation to justice. However, I do not argue for a focus on the basic structure from any

particular conception of justice. Instead, I mean to show why the arguments for a focus on the basic structure transcend any particular conception of justice.

There is already an expansive literature on the ways in which the basic structure is morally distinct, though it is not typically understood in these terms. Beginning with his 1992 Tanner Lectures, G.A. Cohen has argued that being committed to the principles of justice should require certain norms of conduct.<sup>1</sup> In these arguments, Cohen challenges the Rawlsian approach of identifying principles that apply only to the basic structure. In 1997, Cohen explicitly argued that any distinction between principles that apply to the basic structure and those that apply to individual actions is morally arbitrary; whatever concerns us about the basic structure should concern us about individual action.<sup>2</sup> In this way, Cohen denies the moral distinctiveness of the basic structure as subject. Similarly, Liam Murphy's 1998 article, "Institutions and the Demands of Justice," argues that our principles must be unified at a fundamental level. Any separation between two principles, he argues, would only frustrate our attempts to promote our fundamental values or satisfy our first principles. Most recently, Seanna Shiffrin has offered a more nuanced argument on behalf of a similar conclusion, claiming that our acceptance of the two principles of justice indirectly commits us to certain norms for individual action because of our commitment to *the justification* of the two principles.<sup>3</sup> Each of these arguments challenges the moral distinctiveness of the basic structure in claiming that the fundamental principles that apply to the basic structure should also be applied to individual choices.

The predominant response on behalf of the moral distinctiveness of the basic structure has been an argument from the "moral division of labor." According to this view, we have a plurality of fundamental values, and we can best respect all these values by dividing the labor

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<sup>1</sup> Cohen, G.A. "Incentives, Inequality and Community" *Tanner Lectures on Human Values*, 1992. Also in *Rescuing Justice and Equality* (Harvard University Press; Cambridge, UK. 2009), Ch. 1.

<sup>2</sup> Cohen, G.A. "Where the Action is: On the Site of Distributive Justice" *Philosophy and Public Affairs*, Vol. 26, Iss. 1, 3-30 (1997). Also *Rescuing Justice and Equality*, Ch. 3.

<sup>3</sup> Shiffrin, Seanna. "Incentives, Motives and Talents," *Philosophy & Public Affairs*, Vol. 38, Iss. 2 (2010), 111-142.

between principles that apply to institutions and principles that apply to individuals. We do best in respecting all our values if our institutions are primarily assessed by some values and our individual actions assessed by others. Thus, we should divide institutional principles from individual principles. Both Thomas Nagel and Samuel Scheffler advance versions of this basic argument, but they differ on why the separation between principles would best respect our values.<sup>4</sup>

In this chapter, I will offer an argument that addresses Cohen's, Shiffrin's, and Murphy's criticisms, but I will not appeal to any moral division of labor. Instead, my argument relies on claims about how practices affect the content of moral and ethical life. Like the last chapter, I rely on claims about the normative structure of social practices. Our social practices often establish an "institutional context," and principles that apply within this context should be sensitive to its particularities. For example, a justified practice of property might identify certain acts as wrongful trespassing. For those who act within that practice, the wrong of trespass is relevant for evaluating their action in a way that the wrong of trespass is not relevant for evaluating the practice itself. As particular persons in a determinate social structure, there are certain considerations relevant for assessing our actions only because of the particular institutions we act within, and our individual principles need to be sensitive to these considerations. I will claim that it is these considerations that make the basic structure morally distinctive.

My argument for this conclusion will proceed in two sections. In §3.1, I argue that those committed to conventionalism will recognize certain considerations that are only relevant for evaluation within an institutional context. This allows me to provide a direct answer to Seanna Shiffrin's recent argument. In §3.2, I apply the argument of §3.1 to justify the general distinction between principles that apply to the basic structure from those that apply to individual action. This allows me to answer Cohen and Murphy's recent arguments. With my positive argument

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<sup>4</sup> See, Nagel, Thomas. *Equality and Partiality* (Oxford, UK; Oxford University Press, 1991), 53-63; Scheffler, Samuel. *Equality and Tradition* (Oxford, UK; Oxford University Press, 2010), 107-128.



complete, I then contrast my own argument with the moral division of labor argument offered by Nagel and Scheffler.

All together, the three sections of this chapter show the importance of our moral context for the evaluation of actions and practices. In this way, it contributes to a view of political and moral theory that respects both the importance of a universal foundation for our moral claims as well as the ethical significance of our particular social context. We are, after all, determinate persons living within a form of social life, and this shapes who we are, what we care about, and how we relate to others. Our individual principles should not be distant and detached from our way of life but embedded within it.

### **3.1 Our Institutional Context**

For my argument to succeed, I will need to show why there are certain considerations that are relevant for moral evaluation within an institutional context that are not relevant outside that context. To do this, I first need to explain what I mean by “institutional context.” Suppose we recognize that trespassing is wrongful only because it violates the rules of a specific system of property rights. In this case, the fact that an act counts as trespassing is a consideration against the act for those to whom the practice’s rules apply. It is only a wrong within the “institutional context” set by the property system. As we recognized in the last chapter, institutions can establish obligations, rights and powers. Because the institution so establishes these demands and claims, we say that a persons only has such an obligation, right, or power in an institutional context.

The influence of such practices is pervasive across ethical life. Our practices establish specific obligations that bind us and they set the terms of our most important relationships. These practices can shape our particular values and they can define our virtues. In a variety of ways, our institutions establish a moral context within which our choices are made. If individual principles are to guide our conduct, then we cannot rely solely on our foundational and universal values to

determine how we ought to act. Instead, our individual principles need to be sensitive to the particular values, virtues, relationships and obligations within our institutional context.

By contrast, the principles that apply to our basic social institutions should not be sensitive to the particular values, virtues, relationships and obligations that arise within the institutional context that those institutions create. For example, it would be wrong to justify our system of property on the basis that it limited trespassing. For this reason, principles that apply to the basic structure should *not* be sensitive to our moral context in the way that principles that apply to actions within an institutional context should. I maintain that this distinction explains the distinctiveness of the basic structure as moral subject.

To build this broader argument, I will first need to show how practices can establish considerations that are only relevant within an institutional context. In §3.1.1, I give a general argument for how this occurs that draws on resources from Chapter 2. Then, in §3.1.2, I show how this argument is relevant for addressing Seanna Shiffrin's recent arguments that those who accept Rawls's two principles of justice shouldn't accept inegalitarian incentives. I then answer some objections in §3.1.3 and summarize the significance of these arguments in §3.1.4.

### 3.1.1 Conventionalism

Consider the different ways in which property systems could treat trespassing. In one system, the rules might *absolutely* forbid setting foot on someone's land without their consent. In another, the rules might forbid such action *unless* someone is in dire circumstances. In a third, the rules might *only* forbid setting foot on the land of another when doing so would harm the owner's property. In a fourth, the rules might *not* forbid setting foot on another's property at all, though it might forbid actions associated with trespass such as violating certain privacy rights. We might immediately think that one of these property systems would be better than another, but we nonetheless recognize them as possible specifications of a property system.

Now, suppose we ask the moral question, “should an individual avoid setting foot on another’s land?” According to some moral theories, we can only answer this question if we know which of the above property systems the individual lives within. These theories suppose that if the rules of property forbid setting foot on another’s land, then one should avoid doing so. If the rules do not forbid it, then one does not need to avoid doing so. Whether a person should avoid setting foot on another’s land would then depend on the conventional rules of property. Of course, not every moral theory would answer the question in this way. For some, trespass might be morally forbidden in every possible social structure--perhaps because of a natural right to property. Or, one might never act wrongly in setting foot on the land of another--perhaps because we all have an inalienable right to the use of land.

To simplify the issue, we can say that one is either a conventionalist or absolutist with respect to the morality of trespass. One is a conventionalist in this respect when one must reference the conventions of the property system to settle whether one should not set foot on the land of another. One is an absolutist when the particularities of a property system are irrelevant for answering the moral question. A typically under-appreciated point is that one can be a conventionalist about any particular moral obligation without being a conventionalist about all moral obligations. I might be a conventionalist with regard to trespass but an absolutist with regard to promise-keeping.

In fact, it makes little sense to be a conventionalist about everything. One needs to be able to explain *why* a practice can create new obligations, rights, or powers. To supply this explanation, we need some non-conventional moral principle. For example, Rawls was a conventionalist with respect to property rights. In this commitment, he followed Hume, who analyzed promise-keeping, property, allegiance to government and even fidelity in marriage as conventional obligations.<sup>5</sup> However, Rawls grounded his own conventionalism in two natural duties. First, the

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<sup>5</sup> Hume, David. *A Treatise of Human Nature*, Book 3, Part 2.

Natural Duty of Justice requires that individuals (a) follow the rules of just institutions when they exist and apply to that individual, and (b) build just institutions when they are needed.<sup>6</sup> Second, the Principle of Fair Play requires that we follow the rules of a cooperative scheme when we have accepted the benefits of that scheme.<sup>7</sup> Together, these two principles explain why we would be obligated by the rules of conventional practices. We are obligated by the Principle of Fair Play to follow the rules when we have voluntarily accepted the benefits of a practice, and we are obligated by a duty of justice to follow the rules when the practice is sufficiently just and applies to us.<sup>8</sup>

Rawls was a conventionalist not only about obligations, but also about rights and powers. This point is often lost because he emphasized the Principle of Fair Play and the Natural Duty of Justice, which both explicitly specify obligations. However, his conventionalism goes beyond this. As he writes in *Theory of Justice*,

“In a well-ordered society individuals acquire claims to a share of the social product by doing certain things encouraged by the existing arrangements. The legitimate expectations that arise are the other side, so to speak, of the Principle of Fairness and the natural duty of justice. For in the way that one has a duty to uphold just arrangements, and an obligation to do one’s part when one has accepted a position in them, so a person who has complied with the scheme and

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<sup>6</sup> Rawls, *Theory of Justice*; 98-99, 293-296. This principle has come under scrutiny for a number of different reasons. The most significant argument against this principle comes from John Simmons, who argues that the account does not adequately identify the “us” to whom institutions binds (see Simmons, A. John. *Moral Principles and Political Obligations*. Princeton University Press, 1981; 147-152). Jeremy Waldron has given a defense of the principle, but I do not think that is the right way to address the problem. Rather, the institutional rules apply to a group of people in virtue of our *interpretation* of the institution. There is nothing beyond the conventional institution itself that determines who the rules apply to (For Waldron’s view, see “Special Ties and Natural Duties.” *Philosophy & Public Affairs* 22.1 (1993), 3-30.)

<sup>7</sup> Rawls, *Theory of Justice*; 96-98, 301-308. While this principle has come under scrutiny as well, there is more willingness to accept it if it is not applied to political obligation. For Rawls, this principle only applies when one has voluntarily accepted the benefits of a cooperative scheme, and few have voluntarily accepted the benefits of a government. There are not many objections to this form of the principle, though I do not think it is the best way to reconstruct Hart’s original use of the idea. See Hart, HLA. “Are There Any Natural Rights?” *The Philosophical Review* 64.2 (1955): 185..

<sup>8</sup> Rawls does not explicitly say, “sufficiently just” though I believe it is implied by his text, which he is clear about in *Political Liberalism*, 428, 393. This has also been noted by G.A. Cohen (*Rescuing Justice and Equality*, 339), Andrew Sable (“Looking Forward to Justice” *Journal of Philosophy*, 9.3 (2001), 314) and Jon Mandel (“Tolerating Justice” in *The Political Philosophy of Cosmopolitanism* (2005), 227)

done his share *has a right to be treated accordingly by others*...what we can say is that, in the traditional phrase, a just scheme gives each person his due: that is, it allots to each what he is entitled to as defined by the scheme itself.”<sup>9</sup>

Rawls does not ever develop this idea extensively, but a full treatment of his conventionalism would need to recognize how claims arise and are linked to the natural duties. I take the basic idea here to be quite intuitive; if persons are morally obligated to stay off my land, then I also *have a right* that they do not set foot on my land. If the natural duty of justice explains why persons are so obligated, then a corresponding story should be able to say why persons have a right. While a complete account would need to be defended, the Rawlsian view accords with the general approach of this dissertation is identifying institutions as establishing obligations, rights, and powers.

As with the commitments of the last chapters, my argument only requires that persons recognize some way in which social practices can establish obligations, rights, or powers. Regardless of what moral principle one appeals to to explain this, the point remains the same; there are new considerations that arise within an institutional context. The Natural Duty of Justice and Principles of Fair Play are popular ways in which to ground such obligations, but they are not the only principles that can do so.

### 3.1.2 Labor markets, conventionalism, and incentives

In “Incentives, Motives, and Talents,” Shiffrin argues that those who accept the difference principle are committed to treating talents as arbitrary from a moral point of view; the fact that someone possesses a certain talent makes that person no more deserving of social goods than someone without that talent. She then argues that if someone believes that talents are morally arbitrary, then that person cannot justifiably seek out inegalitarian incentives on the basis of their talents. They do not have a claim to higher wages on the basis of their talents.

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<sup>9</sup> Rawls, *Theory of Justice*, 313, my emphasis

In this section, I will use the importance of an institutional context to address Shiffrin's claim that those who accept the difference principle should not pursue or accept inegalitarian incentives.<sup>10</sup> I will argue that an institutional context can change the way in which talents are relevant in determining what persons deserve. An institution that treats those with different talents differently can be justified on the basis of a commitment that talents are morally arbitrary. Within that institution, however, talents will no longer be fully arbitrary. An institution might specify what persons deserve, and treat those with talents as having different claims than those without. In this way, talents are not morally arbitrary within a practice even when they are morally arbitrary for justifying that practice. In this way, my argument will demonstrate the difference between moral considerations within a social practice from the moral considerations outside a social practice.

If we recognize, as Rawls does, that our institutions establish new rights, obligations, and powers, then individual actions need to be assessed within the moral context established by those institutions. For example, we can only say that a person acts rightly or wrongly in setting foot on the property of another when we know whether trespass is proscribed by the rules of a sufficiently just property scheme. For ease of reference, I will say that we need to assess an agent's actions within an "institutional context" when the institutions they act within affect the agent's rights, obligations and powers.

Within a Rawlsian view, it is correct to say that talents are arbitrary from a moral point of view when determining *how our institutions should be organized*. However, talents are not always arbitrary from a moral point of view *within an institutional context*. If the rules of an institution identify those with a particular talent as the bearer of a right, obligation, or power, then talents are no longer morally arbitrary within that institution. In this case, the fact that a legitimate

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<sup>10</sup> I often say "pursue or accept" to differentiate between the wrongfulness of actively seeking inegalitarian incentives and the wrongfulness of merely accepting incentives that are offered. In her arguments, Shiffrin makes this distinction, and I believe it is an important one, but my argument need not discriminate between the two. See Shiffrin, "Incentives, Motives, and Talents" 135-140.

institution differentiates a person's rights, obligations, or powers on the basis of their talents makes talents morally relevant.

If we accept the moral arbitrariness of talents for assessing institutions, as Rawls does, then it would be wrong to justify any institution on the basis that either (a) it treats those with a particular talent well or badly or that (b) it gives them what they deserve. However, if the institution can be justified while treating talents as morally arbitrary and that institution treats talents differently, then talents are not morally arbitrary within the context set by the institution.

Two examples might help to bring out this core point. First, we can return to the property case. Suppose I am committed to the view that, outside of social institutions, trespassing is not a moral wrong. In this case, I could not argue against some property system because it did not proscribe trespass. Whether a property system proscribes trespassing has no direct bearing on whether it is a good or bad property system. However, I can recognize that trespassing might be wrongful when a property system is established. While I do not think trespassing is wrongful when assessing the institution of property, I can think it is wrongful within an institutional context.

Second, we can imagine a simple case where talents are not morally arbitrary. Suppose the members of our society agree that high-quality music is a public good worth investing in. In this case, we might think that it is worth funding public education in music and we might recognize the value of getting students started early in this education. Suppose we then establish a system of schools where those who seem to have exceptional musical talent are awarded a free and high-quality education in music. If such a system were justified, then those identified as having exceptional musical talents *deserve* the free education. If any particular child with sufficient talent were purposively denied the education--perhaps by a sinister administrator with nepotistic motives--we would recognize that the child was wronged. Yet, this wrong is not explained by a natural right to free musical education. The child was wronged because they were denied a right

established by their particular institutions. If the musical education institution was sufficiently just, then musically talented children have a right to that education.

Similarly, a labor market is a kind of institution, the rules of which put labor-buyers and labor-sellers at odds with one another. Sellers expect that buyers will want a low price and buyers expect that sellers want a high price. The labor price is thus established by the prices that buyers and sellers are willing to agree upon. Such an institution tends towards an efficient allocation of labor because an individual's labor is then used in the place where it is most demanded. A labor market is efficient, in part, because labor sellers aim to get a high price for their labor. The market would not be as efficient if they did not do so.

While there are many good criticisms of a labor market as a way to distribute wages and labor, let us suppose--for the sake of argument--that a labor market can be sufficiently just under some conditions. Suppose the gains are greater than the costs, and the costs can be offset by additional institutions like high quality and free education. If a labor market can be sufficiently just, then the rights, obligations, and powers that are associated with that institution are legitimized according to Rawlsian conventionalism. If labor-buyers put a higher price on certain talents, then those with such talents act within the rules of the institution in seeking out or accepting that higher price. Their doing so contributes to an efficient allocation of labor. In the institutional context of a labor market, talents would no longer be morally arbitrary. If the labor market is justified, then persons have a right to the wage they can get on the market and their talents might explain their being offered that wage.

Importantly, this argument does not support the libertarian view that an individual has a right to that which they can earn on a free market. A person's claims are determined by their institutional context, and this context might be established by more than one institution. If a tax system taxes those with higher wages at higher amounts, then individuals only have a claim to



their post-tax income.<sup>11</sup> Since the labor market is justified within a broader context that includes the tax system, individual claims are established by both the labor market and tax systems.

From Rawls's perspective, a labor market is justified if it is part of a basic structure that satisfies the two principles of justice. He believes that a labor market can be sufficiently just because of the gains to efficiency, but his principles place strong restrictions on when a labor market would be just. First, the society would be one with fair equality of opportunity. This requires that we do not assess a labor market in isolation but see how it relates to an education system and the broader patterns of inequality. Second, the society would be one in which the worst off are better off than the worst off would be under any other system.<sup>12</sup> Third, Rawls suggests that a society that meets the two principles of justice will have a state that acts as employer of last resort.<sup>13</sup> This possibility would insulate individuals from the more rapacious aspects of a labor market. When these conditions are met, it seems far less strange to think that a labor market could be a sufficiently just economic institution. If it is sufficiently just, then the rights, obligations, and powers associated with the institution are legitimate. Persons have a valid claim to that which they can earn on the labor market.

When persons have a valid claim to what they can earn on the labor market, and the market rewards those with certain talents, then persons have a right to the wage they earn on the basis of their talents. Within the institutional context of a labor market, talents are not morally arbitrary. Instead, persons *deserve* the wage they earn on a labor market and that wage is partly explained by the talents one possesses.

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<sup>11</sup> A point emphasized by Thomas Nagel and Liam Murphy in *The Myth of Ownership*, Oxford University Press, (2002)

<sup>12</sup> That is, better off than in any other system that also protected equal rights and secure equality of opportunity.

<sup>13</sup> Rawls, John. *The Law of Peoples*, Harvard University Press (1999), 50. ("The lack of a sense of long-term security and of the opportunity for meaningful work and occupation is destructive not only of citizen's self-respect, but of their sense that they are members of society and not simply caught in it")

For this reason a person can simultaneously (a) accept the justification for the difference principle and (b) claim a right to higher wages on the basis of their talents, so long as they believe that (c) the principles of justice justify a labor market that gives persons a right to a market wage partly determined by talents. Such a person recognizes that talents are morally arbitrary outside of an institutional context, but are not morally arbitrary within the context established by a labor market. In this way, it is Rawls's commitment to conventionalism that can explain why it is possible that one can accept or pursue inegalitarian wages on the basis of their talents.

### 3.1.3 Three objections

I want to briefly address three possible objections to this argument. First, one might object that my argument does not really show that talents are not morally arbitrary. Instead, it only shows that persons have a right to what they earn on a labor market. In this case, talents would only be morally relevant insofar as those talents explain the wage one can earn on a labor market. The talent *itself* is not morally relevant, but merely the wage one is able to get. After all, having adequate talent does not entitle anyone to a wage or a job---as many a professional philosopher can attest to. According to this objection, talents are still morally arbitrary in a sufficiently just labor market because talents do not actually determine any claim. I only have a claim to what I can earn, it just so happens that talents might explain why I am offered some wage.

I think this objection is broadly correct. I recognize that my argument does not directly explain why talents are not morally arbitrary in an institutional context. However, I do not think this changes the broader argument in any way. A person might cite their talent as the reason they were offered a wage, and it is the fact that they were offered the wage in a sufficiently just market that gives them a claim to this wage. I have chosen to talk about the arbitrariness of talents because that is the language that Shiffrin and Cohen use, but I do not think that refining our language would substantially change their argument or my response. In either case, Shiffrin

would find the pursuit of inegalitarian incentives wrongful whereas I argue that persons have a conventional right to such incentives by the rules of a justified institution.

The second objection would claim that, “if this argument shows that talents are morally relevant for wages, can it equally show that race, gender or sexuality are morally relevant?” If my argument seemed to justify such discrimination, it would be a severe problem. Yet, unless one thinks that a labor market could never be sufficiently just or that a bigoted market could be just, the two cases will not be similar.<sup>14</sup> My argument presupposes that a labor market can be sufficiently just, but I doubt that a labor market that established claims on the basis of race, gender, or sexuality could be sufficiently just.<sup>15</sup> While a labor market might be part of a society that satisfied the two principles of justice, markets that discriminate on the basis of race, gender and sexuality would not be. Accordingly, a labor market that discriminated on the basis of race, gender or sexuality would not establish legitimate claims in the same way that a market that discriminated on the basis of talents could.

The third objection points out a deeper problem of Rawlsian conventionalism. The two principles of justice specify what a *fully just* society would be like. They express an ideal for a society. Yet, an institution only needs to be *sufficiently just* for that institution to establish rights, obligations and powers. We would not think that only the very best property system would establish property rights. Instead, the property system only needs to be sufficiently just. Likewise, we have a right to market wage even when the labor market is not part of an ideally just society. Instead, it only needs to be part of a sufficiently just society.

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<sup>14</sup> Shiffrin makes this analogy in her article (“Incentives, Motives, and Talents,” 126-128) and demonstrates her point about the moral arbitrariness of talents through our intuitions about the moral arbitrariness of race. For many, there is a deep difference between these issues. As KC Tan expresses the point in *Justice, Institutions, and Luck*, “To put the point schematically, racism is morally objectionable, and hence we create institutions that reflect this moral stance; inequalities due to talents need not be morally objectionable, and we create institutions in order to determine conditions under which they are acceptable and under which they are objectionable” (Oxford University Press, 2012, 66).

<sup>15</sup> My point is not lessened if one can think of extreme cases in which such bigoted markets do seem justified. That, then, is merely an extreme case that is not our situation now.

Rawls does not give any general principles about when a basic structure would be “sufficiently” just. So, we could not use Rawls’s theory to determine whether we--in our imperfect institutions--have a right to what we earn on a labor market. We would first need to argue about when institutions are sufficiently just before we could settle that argument, and that is a complex problem far from the current point.

While Rawlsian conventionalism is limited in this way, it does not limit its effectiveness against Shiffrin’s argument. This is because Shiffrin focuses on the specific case of the well-ordered society in which all members accept the two principles of justice and their justification. Accordingly, whether the institutions they live under are sufficiently just is not an issue. After all, the institutions are fully just. So, the difficulties that arise when we try to specify when institutions are sufficiently just do not arise. This difference is relevant for us to decide how we ought to act in the here and now, but it does not represent a problem for Rawls’s ideal theory.

#### 3.1.4. How extensive is an institutional context?

The significance of this argument goes beyond providing a Rawlsian response to Shiffrin’s argument. It serves as an example of the way in which considerations within an institutional context are distinct from those outside that institutional context. In this case, the fact that the labor market establishes certain claims to wage shows why talents are not morally arbitrary within an institutional context. The fact that persons have such claims, however, has nothing to do with whether a labor market is justified. We do not justify a labor market because the talented have certain claims, but the talented might have those claims within an institutional context. In the example of property, trespass becomes a moral consideration within an institutional context but it is irrelevant for evaluating the property system itself.

The arguments of Chapter 1 and Chapter 2 appealed to the ways in which practices can establish new obligations, rights, and powers. That is all my argument relies on, but these same

ideas might be extended further to recognize other effects that practices might have on the particularities of ethical life. The fact that a particular practice is practiced might not only ground demands and claims but also explain the emergence of certain values, virtues, and relationships. While I have focused on more rule-based features of moral life, the influence of social practices likely carries over to features of ethical life that are much less ordered. In this section, I want to suggest how my argument might be extended in this direction.

To show how this might be the case, I want to offer some possible examples for how the choice of particular basic structure institutions might affect the relationships, ideals and self-conception of members of society. I do not suppose that any evidence favors these stories, but I mean to show how our institutional context *might* effect ethical life beyond the obligations, rights, and powers directly specified by the basic structure institutions.

First, we might suppose that differences in the economic structure will create differences in how we view our relationships with others. For instance, one might stipulate that a capitalist economic structure relies on competition in the labor market. In a competitive labor market, individuals are situated towards others as rivals. In order to achieve one's goal of securing an occupation, one must out perform other members of society who vie for that job. While this mentality has its primary manifestation in the adult search for jobs, it could easily spread to earlier stages of education; a competition for spots at universities gives rise to a competition for top-level classes and gives rise to a competition in high school, middle-school, elementary school, and pre-school. Children would then be raised against a background of competition against one another and parents would be aware that this is the relationship with which their children stand. Of course, this is not to suggest that all children or parents will necessarily be competitive, but only that the capitalist economic structure tends to make persons more competitive than alternative economic structures. The relationship between persons is partly a relationship of competition. This differs substantially from the way in which G.A. Cohen envisions the relations

of socialist society in which persons view one another through the spirit of fraternity.<sup>16</sup> If such a socialist economic structure were able to counter competitive tendencies, then persons might view their relationships with one another as part of a larger “siblinghood.” While this might seem far more appealing than a society of individuals in competition, it might also have different unfortunate results beyond a reduction in production. For instance, if each individual understood him or herself as related to the social family, this attitude might encourage social homogeneity. Persons would be hesitant to explore new ways of life and pursuits, and there would not be the diversity of pursuits available in a capitalist society.

Likewise, we could see why an individual’s conception of themselves might be influenced by the contingencies of the social structure. For instance, in a capitalist economy with a free labor market, an individual might conceive of themselves partly in terms of what their assets in such a labor market are. In a sense, the individual comes to see himself or herself as having “human capital”. The person with experience in the field of retail sales might come to identify themselves partly as a retail salesperson (as others might as well). More troubling, the person who cannot find a job might come to see themselves as being less valuable of a person merely because they see themselves as less valuable on the job market. Here, the individual identifies his personal value with the market value of his skills. One might suppose that in a socialist economy, individuals would be less likely to view themselves in terms of their human capital. Instead of being individualized atoms competing in a chaotic and alien labor market, they see themselves as having a place in democratically planned production scheme. In this economic system, persons may be more likely to see themselves in terms of their contribution to society’s projects. However, persons might also come to see themselves *merely* as parts of these projects and not as self-standing and full individuals. In understanding themselves in terms of their role in society’s

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<sup>16</sup> See *Why Not Socialism?* (Princeton University Press, 2009).

projects, they may be less likely to identify themselves with their human capital, but also less likely to identify themselves with their own goals and aspirations--atomistic as those might be.

With these differences in mind, we can likewise see why different ideals might be emphasized in a society with a capitalist economic structure than an socialist structure. In the competitive and labor-differentiated markets of capitalism, it would be unsurprising if the public culture emphasized the ideals of individual achievement and self-perfection. Likewise, insofar as capitalism tends to engender commercialism across its culture, the ideals of personal happiness would be emphasized and associated with the accumulation of goods. Alternatively, in a more socialist structure, the social ideals of solidarity might be emphasized while the ideals of achievement and individuality are degraded.

What holds for the way in which the choice of economic structure impacts relationships, self-conception, values and obligations also holds for our choice over other aspects of the basic structure. While it is much more difficult to imagine alternative family structures than economic or political structure, it is much easier to recognize how differences in family structure might change a society's public understandings. Likewise, choice between government forms would be fundamental in how persons conceive of the relation between themselves and those with political authority. We can imagine that the members of a democracy would have different public understandings from the members of an Aristocracy, Plutocracy, Military dictatorship, Theocracy or Hereditary Monarchy. Still we can imagine different schemes of property whereby the class of things that can be owed is different or who can own what is different. If the maternal head of a family were recognized as the primary owner of all property, then public understandings would be quite than if all members of a family were recognized as co-owners.

When a basic structure protects a certain freedom, the existence of such an institutionalized freedom has its own effects. The role the free religious institutions play within a basic structure might have a quite profound influence on ethical life. For instance, protecting

freedom of religion will likely lead persons view their religious denomination as a choice. The lesser role that religious institutions have on public life, the more likely it is that persons will see these institutions as only part of their social life. Rather than seeing themselves as liable for their behavior to the religious official or as educating their children through church resources, they may see the religion as a resource for personal, social and spiritual fulfillment. This will tend to impact the ways in which religious officials interact with members as religious institutions seek ways to better address the expectations and needs that members come to them with. More noticeably, a plurality of religious organizations will likely create an environment of pluralism. Optimistically, this might lead persons to better come to appreciate a diversity of views as well as better know their own beliefs in all the ways that J.S. Mill suggests. Pessimistically, it might lead to a kind of society that Marx warns about as public life becomes a the space of satisfying wants, and persons treat other members of society as means to their ends. In either case, the religious organizations themselves are not part of the basic structure, but the freedom that allows free worship is. This freedom itself has profound ethical effects.

In each case, the choice of basic structure institutions has a much broader effect on ethical life than what is immediately obvious. The choice of an economic structure has a broader effect than merely efficiencies in production or employment rates, the choice of family has broader effects than health and education of children, the choice of a government has a broader effect than control over coercive power, and the choice of a property scheme has a broader effect than the control over material objects. In each case, the choice of a basic structure institutions exercises direct impact on our public understandings and thereby on our relationships, self-conception values and (especially) obligations.

There are difficult questions about the extent to which an economic structure affects the content of ethical life as opposed to merely affecting our *perception* of that content. If a socialist economy has the tendency to stifle individuality, that does not make individuality any less morally



significant. If a capitalist economy tends to stifle social solidarity, that does not make solidarity any less significant. In this case, the economy merely influences our perception of what is significant. However, the influence of social institutions is still worth our attention if the major social institutions merely change our perception of ethical life. The fact that our relationships and values are affected by particular institutions is reason to evaluate the institutions differently from our individual choices within those institutions. Beyond this, we should not diminish the extent to which our perception of our values, virtues, and relationships affects what is actually ethical. How we should live our lives is often partly dependent on how those around us are living their lives. The fact that persons hold certain ends or think about their relationships in specific ways gives us some reason to value those ends and act within those relationships. Otherwise, we risk acting as Prince Myshkin amongst St. Petersburg's Yepanchins. Living with others in a social world affects what ends we should hold and the terms within which we should affect others. While the extent to which our institutions affect the actualities of ethical life versus our perspective of ethical life is a difficult question on which much more should be written, but I think the arguments of this section emphasize the great influence of social institutions regardless of how you answer that question.

This all suggests that our institutional context is quite extensive. Which values, virtues, relationships, obligations, rights, and self-conceptions are specific to our institutional context and which are independent of that context? For my argument to succeed, I only need it to be the case that the obligations, rights, and power established by our major social institutions contribute to an institutional context. While much more of moral and ethical life might be specific to such a context in the ways discussed above, I do not require that it is. The more impact the basic structure has on ethical life, the more important and distinctive the basic structure is. I now return to my more limited argument, and explain how the establishment of obligations, rights, and powers justifies distinct principles for the basic structure.

### **3.2 Moral Principles Within and Without an Institutional Context**

The aim of this chapter is to show why the basic structure is a morally distinct subject. In §3.1.1 - §3.1.3, I showed why the considerations relevant for evaluating actions within an institutional context are different from the considerations relevant for evaluating the institutions that determine that context. What I have not yet shown is why this justifies developing distinct principles for the basic structure of society. Cohen and Murphy argue that, at a fundamental level, the principles that apply to institutions must be the same as the principles that apply to individuals. In §3.2.1, I will show how the difference between relevant considerations differentiates the principles that apply within an institutional context from those that apply to the institutions that establish that context. Then in §3.2.2, I will show why the principles that apply to the basic structure are distinct from the principles that apply to other institutions/systems. Finally, in §3.2.3, I will explain why the principles that apply to the basic structure are distinct from those that apply to the informal norms in a society.

#### *3.2.1 Deliberative and decisive principles*

To make the transition from talking about “considerations” to talking about “principle, I need to make a distinction between two kinds of moral principles; deliberative principles and decisive principles. I understand “deliberative principles” as guiding us towards the recognition of considerations that are relevant for moral and ethical evaluation. I call them deliberative principle because they guide us in our deliberation about moral and ethical problems. By contrast, “decisive principles” guide us in reconciling various considerations and coming to a final evaluation or decision. They are decisive in the sense that they provide the decisive evaluation of that to which they apply.

Some moral theories, like forms of intuitionism or pluralism, will only recognize deliberative principles as valid. Such theories suppose that we cannot articulate any final

principles that can reconcile relevant considerations. Perhaps autonomy and well-being are both irreducible moral considerations, but there are no principles that determine how tradeoffs between the two should be made. Other moral theories will only recognize decisive principles as valid. According to such views, the only relevant considerations are those that decisive principles identify as decisive. Since other considerations do not ultimately determine how we should act, they are not really considerations because they should not be considered. A third group of theories might recognize both kinds of principles, supposing that we need to understand what considerations are relevant before we can make any decisive judgments. If we think that decisive judgments are explained by a relation between considerations, then we will think both kinds of principles will be relevant.

In §3.1, I argued that the considerations relevant for evaluating actions within an institutional context will be distinct from those that are relevant for evaluating the institutions that determine that context. Why does this mean that the principles that apply to institutions will be distinct from the principles that apply to individual actions? Well, that depends on what kind of principles you have in mind.

First, if one is concerned with deliberative principles, then such principle will need to present the considerations that arise within an institutional context in some way. If one is deliberating about whether they should accept inegalitarian wages, a deliberative principle should present the claims that arise within a labor market as a relevant concern. In this case, the (deliberative) principles that apply to an action within an institutional context will not be the same as those (deliberative) principles that apply to the institutions that determine that context; the principles that apply to actions should represent the claims within a labor market whereas the principles that apply to the labor market itself should not.

My claim is *not* that all the principles or considerations that apply within an institutional context will be different from those that apply to the institutions. Helping persons satisfy their

basic needs might be a consideration that is relevant for evaluating both individual and institutions. Though some considerations might be relevant for each, not all are. The crucial point is that the *set* of considerations relevant for assessing institutions is distinct from the *set* of considerations relevant for assessing individual action, so we should distinguish institutional principles from individual principles.

Second, if one is concerned with decisive principles, then we need recognize how a institutional context ultimately affects what an individual should do. Suppose that two different property schemes, A and B, would identify two different people, Y and Z, as the owner of a particular object. If we live under property system A and that system grants the property right to Y, then we think that Z should not claim that property as her own. A decisive principle should recognize this, so decisive principles need to be sensitive to the particularities of the institutional context in which they are applied. Y's ownership of the object is only a consideration against Z's seizing it within a particular institutional context, and our decisive principle should track the relevance of such considerations.

So, regardless of whether we are concerned with deliberative or decisive principles, the principles that apply to individual actions within an institution's context should be distinct from those that apply to that institution. It should then be no surprise that moral theories that recognize both the validity of both deliberative and decisive principles will recognize that principles should be distinct in these two cases. To present and track the significance of considerations relevant in an institutional context, the principles for the two should be distinct.

How does all this bear on the arguments of Cohen and Murphy. Well, Cohen's overall view is concerned with considerations that are represented by fundamental principles. Suppose we recognize that equality, autonomy, and well-being are always significant for any moral problem. Cohen wants to argue that we address moral problems by seeing how they relate to these fundamental values, regardless of whether we are evaluating institutions or individual conduct. I

can agree with this. I only maintain that we do not *only* evaluate individual actions by these fundamental moral values. The considerations that are particular to an institutional context are also relevant. The fact that our institutions specify obligations, rights, and powers is also relevant to evaluating action. Our moral principles must also present the particularities within an institutional context as relevant, and these considerations can oftentimes change our overall evaluation of an action. It might be permissible for a person to enhance inequality within a justified labor market if that labor market grants her a claim to such incentives. I do not need to deny that equality, autonomy, and well-being are fundamental values to recognize that the set of considerations relevant for evaluating actions within an institution's context are distinct from those relevant for evaluating that institution.

A similar point applies to Murphy's argument. Murphy emphasizes that the same fundamental principles should apply to individuals and institutions. I will have more to say on Murphy's complete argument in §5.1, but let me give a preliminary reply here. So long as we recognize that our institutions can establish obligations, rights, and powers, then the considerations relevant for evaluating actions will be distinct in an institutional context. Fundamental principles will still apply to both individuals and institutions, but there will be additional (and often decisive) considerations that apply to individual action.

At this stage, I have shown (a) that the considerations relevant for evaluating individual action within an institutional context are distinct from those relevant for evaluating the institutions that establish that context, and (b) that the principles that apply to individual actions in that context are distinct from the principles that apply to the institutions. This does not yet get me to the claim that the basic structure is a distinct moral subject. After all, the basic structure is not constituted by all institutions, but only those that establish our obligations, rights, and powers as members of society. First, I need to explain why it would be that principles for the basic structure would be morally distinct from the principles for other institutions or practices. I do so

in §3.2.2. Second, I need to explain why the principles for the basic structure would be morally distinct from the principles for the network of informal norms that also have a role in shaping ethical life. I do this in §3.2.3.

### *3.2.2 Institutions and the Basic Structure*

What would justify treating the basic structure differently from other institutions? So far, I've only discussed the difference between principles that apply to actions in an institutional context and the principles that apply to the institutions that establish that context. However, it would be wrong to think that individual actions are the only subject evaluated within an institutional context. Our social practices and institutions shape the moral context relevant for assessing individual actions, but they also shape the moral context relevant for assessing other practices. Sometimes an institution will be justified only because of the role it plays within a particular institutional context. What differentiates the basic structure from other institutions is that our assessment of the basic structure should not be sensitive to any institutional context whereas our assessment of other institutions often should be. In this way, my strategy to distinguish principles for the basic structure from institutional principles more generally is merely an extension of my argument for distinguishing principles that apply to institutions from those that apply to actions within an institutional context.

To see why the assessment of the basic structure should be insensitive to moral context in a way that other institutions do not need to be, we need to look again towards what the basic structure is and why it is morally indispensable. The basic structure is that system of social institutions that establish our obligations, rights, and powers as members of society. In so doing, it forms a social background against which the various other practices and institutions in society are formed. Accordingly, these other practices and institutions will often need to take into consideration the institutional context established by the basic structure institutions. It is because

various practices and institutions are situated within a basic structure that we should treat the basic structure differently from these other institutions. The basic structure is not situated within any other institutions that its assessment should be sensitive to.

As an example, consider our assessment of a particular educational practice--such as the admission tests like the SAT and ACT. This practice is not itself part of the basic structure because there is nothing about the practice that establishes obligations, rights or powers as members of society. Instead, the practice is a general understanding amongst students and admission officials about what one needs to do to get into a college. If we want to assess the practice, we need to look at how it fits within the various practices around it. We should look at the role that college plays in the job market, at the ways in which high school prepares students for the test, and so on. Our assessment of the educational practices as a whole requires that we see how education fits within the larger society. How does education prepare students for the life they will live? Does it prepare them for the economy? Does it prepare them to contribute to a democracy? In this way, we assess our educational practices as within the basic structure institutions of the political constitution and economic system, and we assess the admission tests within this education system. Now, if we assess the individual actions of students, teachers, and administrators that are related to admission tests, we need to see their actions as within these practices. So, the actions of individuals are within an institutional context, but the practices are also within such a context. The basic structure, however, sets the fundamental rules in society around which various other practices are formed. This distinguishes the basic structure as uniquely removed from the moral context established by institutions.

Now, the explanation that I give here should not be confused for a mistaken historical theory. I recognize that the particularities of the basic structure that one lives within were not created first and followed by the creation of other institutions. I recognize that the institutions that constitute the basic structure were themselves developed against a moral context composed

of particular practices and norms that were themselves within another basic structure. The point is not to say that the assessment of other institutions should be sensitive to the moral context established by the basic structure because the basic structure institutions are temporally prior. Instead, the idea is that the rules of the basic structure institutions apply to all persons in a society, and so they apply to persons engaged in other institutions within society. Accordingly, the background that the basic structure sets is a background for these other institutions. It is not because the basic institutions came first, but because their rules set a background for the activities of other practices that we need to assess these other practices within the moral context set by the basic structure.

For example, we can recognize the activities that religious organizations engage in will be limited by the basic structure institutions. If our society establishes certain basic rights, then the activities of religious organizations need to respect these rights. Whatever property system is recognized designates what property rights these groups have. What economic system we live within determines how the group can fund itself. In these cases, it is within the broader systems of the basic structure that religious activities proceed and religious groups are sustained. Even if we carve out exemptions for religious groups, for example by allowing gender to be a factor in hiring, it is a feature of our legal institutions that grants that exception. It might be the case that the basic structure of society is explained because of the structure and influence of these religious groups, but that does not change the fact that their activities are now bound by their rules. Even if the historical story is one in which the religious traditions explain the basic structure, the normative story is that the religious traditions are now within a moral context set against the rules of the basic structure.

One might object that the basic structure is situated within another institutional context, the global structure. It might seem like the particularities of the global structure should influence our evaluation of the basic structure, thus reducing the centrality of the basic structure as subject.



In response to this objection, I want to return to the response made in §2.3.2. There, I argued that the global structure is constituted by norms that bind governments whereas the basic structure is constituted by norms that bind individuals. Because of this, I think it is wholly appropriate that we evaluate the decisions of governments as occurring within a global context. However, that does not mean that we should evaluate the basic structure as within a global context.<sup>17</sup>

So, the core argument of §3.1 distinguishes institutions generally from the basic structure in the same way that it distinguishes actions from the institutions those actions occur within. Principles within a context should be sensitive to the particularities within that context, but principles that apply to whatever establishes that context (whether an institution or system of institutions) should not be so sensitive. Our assessment of college entrance exams, for example, needs to be sensitive to the larger context set by the education system. The basic structure is distinct as a moral subject because it establishes a context within which our various other institutions and practices are situated. For this reason, the principles that apply to the basic structure will be distinct from those that apply to other institutions. Principles for other institutions need to be sensitive to the moral context established by the basic structure within which they fit, but principles for the basic structure do not need to be.

### 3.2.3 The basic structure and the informal structure

Now, it is of course true that institutions are not the sole determinate of the content of ethical life, and this might seem to warrant an objection to the view. Recall that any conception of the basic structure will need to distinguish the basic structure from the various informal norms and generalized expectations within a society. These norms and expectations might not rise to the level of “institutions,” but they still have profound and pervasive effects on social life. Call these various features of social life, the “informal structure” of society.

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<sup>17</sup> We should also bear in mind that the idea that a state represents the interests of its citizens in international relations is itself part of the basic structure of society. In this way, the features of the global structure are, in part, best understood as within a context of basic structures (rather than the other way around).

Now doesn't the informal structure of society have as much affect on the content of ethical life as the more formal institutions of the basic structure? Couldn't we also say that institutions occur within a context set by the informal norms of a society? It seems just as important that a good society have the right mores as that it have the right institutions. Since these norms establish a moral context as well, their assessment seems formally similar to the assessment of institutions-- if we need to distinguish principles for the basic structure because they establish a moral context for other institutions why wouldn't we distinguish principles for our basic mores on the same basis? If these are so similar, then why wouldn't the principles that apply to one also apply to the other?

The appropriate response to this criticism is to focus our attention on the difference between systems of rules and patterns of behavior. As discussed in Chapter 1, we should understand social rules as ostensibly binding. There are behaviors that are identified as right or wrong by appeal to these rules. By contrast, the informal norms of society do not have this bindingness. They undoubtedly have influence as persons aim to either adhere to flout those norms, but they are not rule-like. If persons in society generally celebrate the military, care about equality, or see poetry as the highest form of achievement, then that society will have certain informal norms. It is not until persons recognize rules that specify how they ought to act that such norms becomes rules.

Because of this difference between rules and informal norms, we can ask what rules we should have without directly asking how persons ought to choose. By contrast, our concern with the informal structure is fully captured by our concern with how individuals should choose. Now, deciding how individuals should choose will always be dependent upon their own social context and the complexities of their situation. In deciding how the basic structure ought to be, we develop principles that apply to the institutions that determine and institutional context whereas principles for the informal structure must apply within an institutional context.

For example, if a basic structure gives parents the prerogative to choose private schools or public schools, certain patterns will emerge wherein certain groups--the rich, the religious, the artistic--might tend to enroll their children in private schools more often. If these patterns become sufficiently embedded, they could be considered part of the informal structure. In this case, one might say that persons ought to choose to send their children to public school. This would then seem to be a principle that applies to the informal structure. However, it is quite difficult to make this claim independent of the social context. It will depend on the quality of education as well as its fit with philosophical and religious views. It will depend on the structure of society--with democracies perhaps giving stronger reason--and the norms within family life. It will also depend upon how that choice is viewed amongst persons, whether it will be seen as elitist and selfish or as selfless and encouraging excellence. The particularities of a social context seem highly relevant to determining how particular individuals should choose.

So, the objection is addressed by carrying through the original distinction that this argument is based upon. While individual choices and the informal structure do affect the structure of ethical life, the principles that apply to individual choice and the informal structure will need to be principles that apply within ethical life because individual choices always occur within a social context and the informal structure is constituted only by individual choices. The basic structure, as a system of rules, can be assessed outside of a particular social context.

Of course, none of this is to say that individual choices should not take into consideration their effects on the structure of ethical life. In a society where women are viewed as having a particular role in the family and in the workforce, then women and men ought to recognize that their own choices have an effect on either reinforcing or overriding those traditional ideas. Individuals need to recognize that their personal choices have influence on the structure of ethical life. However, recognizing this does not mean that no women ought to pursue traditional roles if that is their life-plan. To make such a broad claim would be insensitive to the complexities

of ethical life. Such a principle might be appropriate in some societies, but it will not be in many others. Each person should take their effect on ethical life into consideration, but other concerns also need to be considered. The point is only that the principles that apply to individual choices will, in the end, need to be principles that apply within the particular context of an ethical life. The principles that apply to the basic structure should not be.

### **3.3. Contrast with the Moral Division of Labor**

In *Equality and Partiality*, Thomas Nagel gave an influential justification for developing distinct principles for the basic structure that centered on the distinction between principles for individuals and principles for institutions. Specifically, he argued that it is appropriate to distinguish the two because of a fundamental difference between two moral perspectives--one personal and one impersonal. When institutions were assessed by appeal to the values of a impersonal perspective, it allows individuals to pursue those values that are particular to the personal perspective. By dividing institutional and individual principles in this way, we create a “moral division of labor” under which we are better able to pursue our personal concerns secure in the knowledge that our impersonal concerns are secured by our shared institutions. The choice to develop principles specifically for the basic structure was justified by this kind of moral division of labor.

While it was meant as a defense of the Rawlsian focus, Nagel’s interpretation set the terms of the debate in ways that were quite favorable to Rawls’s opponents. To many, Nagel seemed to say that institutions were to take care of the requirements of justice so that individuals did not have to. Famously, G.A. Cohen argued that the focus on the basic structure licensed capitalistic avarice in personal decisions because institutions and not individuals were charged with promoting equality. Liam Murphy tried to show that such a distinction was ultimately unsustainable due to the challenges it faced in non-ideal theory. Even Nagel was not fully

enthusiastic about the approach he argued for because it did not fully avoid conflicts between our values, leaving the possibility of a dissociated self.

Recognizing these difficulties, Samuel Scheffler offered a new argument on behalf of a moral division of labor. This time, he was sure to emphasize that the division between institutional principles and individual principles was not justified on the basis of the pursuit of self-interest. Instead, he argued from a kind of value pluralism. He started from the recognition that we have many important values, some are more “small-scale” and some are more “large-scale.” The small-scale values are typically related to interpersonal interaction and individual responsibility. The large-scale values are more typically related to impartial concerns like equality, justice and fairness. *Prima facie*, there seem to be conflicts between these kinds of values because acting for the sake of one might frustrate acting for the sake of another. This conflict can be represented in two kinds of cases. First, persons might live their lives in accordance with the small-scale moral values, but feel that they are failing to adequately respect the large-scale values. For instance, a strong dedication to family success might draw resources away that could be used to benefit the world’s worst off. Second, one might focus on respecting large-scale values and thereby neglect small-scale values. For instance, a dedication to global justice might take one away from one’s family or community in ways that seem not to respect small-scale values.

One solution to these possible conflicts is to try and explain one set of values as arising from the other. If this were possible, then one could grant deference to the more basic set of values in any possible conflict. This deference might go in two possible ways. First, if the rules of interpersonal interaction are explained in terms of the large-scale values, then we know that ultimately we ought to act on behalf of the large-scale values in any ostensible conflict. Scheffler identifies consequentialism as taking this approach by explaining small-scale values in terms of the large-scale value of universal happiness. Second, if the large-scale values can be addressed by proper adherence to small-scale values, then the conflict is likewise resolved. Scheffler similarly

identifies libertarianism as taking this approach and being unconcerned with any large-scale values, such as equality or social welfare, that are not addressed by proper respect for small-scale values.

Scheffler seeks to avoid both of these approaches and to avoid explaining one kind of value in terms of the others. To do so, he recommends a division of moral labor, which he identifies with egalitarian liberalism. Such a theory properly respects small-scale values in interpersonal relations and large-scale values in the design of institutions. Accordingly, we assess individual action predominantly by small-scale values and institutions by large-scale values. Whereas Nagel explained the division of labor as grounded in two aspects of the self, Scheffler explains the division of labor as grounded in a single capacity to recognize diverse values. It is our responsiveness to both small-scale and large-scale values that explains why we would distinguish principles for institutions from principles for individuals. This allows us to respect both kinds of value.

The reason why Scheffler's view counts as a "division of labor" is because he recognizes a guiding aim that we ought to jointly accommodate our values, both large and small-scale. What justifies the division of labor is that it is the best way of accomplishing this guiding aim. By dividing labor amongst individuals and institutions, we best accommodate this guiding aim similarly to how we most efficiently produce pins by dividing labor according to the different aspects of the pin-making process. Scheffler does not suppose that there is some one measure by which our accommodation of values can be maximized, so this guiding aim is not like the typical consequentialist aim. However, it is nonetheless the effectiveness in accommodating value that justifies Scheffler's division of moral labor.

Upon first look, it might not be immediately obvious what kind of distinction Scheffler means to draw in dividing "small-scale" from "large-scale" value. If we interpreted small-scale values as those that are particular to a local community and large scale values as those that are

general across communities, then his arguments would be much closer to my own. Under such an interpretation, the small/large distinction would be similar to the practice-dependent/practice-independent distinction that I draw. However, this is not how Scheffler wants to divide these values. Instead, he identifies small-scale values as those that apply to micro-phenomena like interpersonal interactions. By contrast, large-scale values are those that apply to macro-phenomena like patterns of distribution. For example, he identifies small-scale values with libertarian concerns over interpersonal transactions and identifies large-scale values with utilitarian concerns for total welfare. While Scheffler does not give an exact specification for which values are small or large, he seems to have something like the micro-phenomena/macro-phenomena distinction in mind. Instead of being focuses on micro/macro-phenomena, I rely on a distinction between ethical considerations that are relevant within an institutional context contrasted with those considerations relevant for evaluating the institutions that establish that context.

What makes my distinction possible is the way in which institutions establish obligations, rights, and powers. What makes Scheffler's distinction possible, is a commitment to value pluralism. His distinction matters because we have a plurality of irreducible fundamental values, some of which more directly apply to micro-phenomena and others which apply to macro-phenomena. Now, it is important to identify the specific *kind* of pluralism that Scheffler here appeals to because there are at least three ways in which we tend to use the phrase. First, we might recognize "principle pluralism," which holds that there are distinct principles that legitimately apply to different subjects. Both my argument and Scheffler's support "principle pluralism." After all, we both seek to explain why the evaluation of the basic structure is distinct from the evaluation of individual conduct. Neither of us, however, argue *from* principles pluralism because that would be begging the question. Principle pluralism is the conclusion and not a premise. Second, another kind of pluralism is "pluralism of the good," which holds that (a) different

people can hold different conceptions of what matters in life and (b) these different conceptions can be equally worthy of respect. Scheffler, myself and Rawls all accept pluralism of the good. However, our acceptance of this pluralism is unrelated to current arguments. This variety of pluralism has much more to do with an argument for liberalism than with an argument for the division of labor. Third, the last kind of pluralism is “meta-normative pluralism,” which holds that our moral and ethical justifications are ultimately grounded in a plurality of fundamental values. According to this view, our justification ultimately bottom out in a plurality of irreducible value. Now, neither myself nor Rawls argues from meta-normative pluralism, but Scheffler does. It is his commitment to meta-normative pluralism that grounds his moral division of labor. He supposes that there are a plurality of principles and the moral division of labor is justified because it best allows us to respect our different values without reducing them to one another. This justificatory strategy requires a commitment to pluralism that neither mine nor Rawls’s own strategy require.

For this reason, Scheffler’s approach requires more substantive presuppositions than my own argument requires. I only need claim that our institutions establish obligations, rights, and powers whereas Scheffler needs meta-normative pluralism to be the best account of ethics. Even if this is not a significant advantage for my argument--as I think it is--it is nonetheless a clear contrast between our approaches.

To better understand this contrast, we should recognize the ways in which meta-normative pluralism relies on a set conception of our values whereas I argue that many of our values are dependent on our social context. The fact that we live in a specific social world will tend to bring out certain values that would not be the same in another social world. How we ought to act will be sensitive to those context-dependent values, and not merely the set conception of values with which we began. I suspect that any fundamental values that Scheffler might appeal to would be too abstract and amorphous to adequately function in our deliberation and justifications. To take a Hegelian point, our abstract values always need to be made real, and



they are only made real to us within a particular social structure. We need a linguistic community to differentiate values, to identify them with concrete particulars, and to discuss their nuances with. We need shared practices and activities through which to mutually understand one another. Only within a social world does it make sense to identify some abstract and amorphous value without the boundaries of a particular word or practice. For that value to function as part of a justification, it needs to be given a content that can only exist in a social world. In different social worlds, the particular and real values that are the shared objects of deliberation will be different--even if those real values are ultimately explained as valuable due to their connection with a set catalogue of abstract values. By contrast, Scheffler's argument presupposes that our values are sufficiently specified prior to a social context such that they could themselves justify a moral division of labor. It seems to me that such a justification requires a much more concrete conception of values than would be available independent of a social context.

To see the present point in a specific example. It seems that Scheffler would like to include the values we associate with specific relationships within the range of small-scale values. In this regard, he might include the relationship between parent and child, between husband and wife, between sisters or between old friends. When we use these relationships as justifications, we appeal to the value of these specific relationships. We appeal to parent-child relationships or the nature of friendship. Yet, in many ways, these relationships are based on conventional terms. The fact that the family or friendship takes the form that it does is not a necessary aspect of human life, but exists within the particular form of life that we occupy. Accordingly, there is a clear way in which the contours of our social structure shape those values we think relevant for individual choices. It is not that there was a value of family prior to and always independent of social structure such that it can be used to justify the shape of our social and normative life. Instead, the shape of the social world makes the family values we care about particularly understandable and valuable. It is true that the value of such relationships is crucially important for personal choices

in a way that it is not important for the assessment of institutions, but we cannot say that is because there is some determinant value of friendship that is always important such that we should structure social life to make it part of personal choices.

So, the core problem with the division of labor argument provided by Scheffler is that it appeals to meta-normative pluralism with a static conception of fundamental values. He justifies the division of moral labor--and a normative/institutional scheme more generally--by the joint accommodation of a determinate and static set of values. Yet, the values that serve as justifications for us are much more dynamic. They change with the social structure, with culture and with the existing normative structure. The argument that I appeal to is much more fitted to recognize such dynamic values.

We live in a particular social world, and in the particular social world there are certain specific things that matter to us and the people around us. Accordingly, the justification of actions within that social structure will need to take the specifics of our social world into consideration. If it does not do so, it ignores the thick and nuanced ways in which we live ethical life. This will differentiate the ethical assessment of actions within our social structure from the ethical assessment of actions outside of that structure. Within the structure, we need to pay attention to the particular form that our values take, but outside of that structure it would not be as appropriate to do so. Insofar as Scheffler's account relies on a conception of values that are fully independent of our social structure, his account seems problematic.

### **3.4 Moral Distinctiveness**

In the introduction, I set three tasks for my account. First, it needed to explain what the basic structure is. Second, it needed to explain why the assessment of the basic structure is morally indispensable. Third, it needed to explain why the assessment of the basic structure is morally distinct. Accomplishing these three tasks will show why the basic structure is a centrally

important ethical subject without relying on any claims about the nature of justice. The first two chapters accomplished the first two tasks, and this chapter accomplishes the third. In summary, the assessment of the basic structure is morally distinct because we need to differentiate the assessment of actions (and institutions that are within a moral context established by systems) from the assessment of the practices those actions happen within. Since the particularities of the basic structure institutions establish much of the moral context for assessing individual action and the non-basic institutions, we need to differentiate the assessment of the basic structure.

These arguments should be widely acceptable across any moral theory that recognizes how practices can establish an institutional context. Most simply, we need to recognize that our ethical life is best understood as embedded within a complex of practices. The assessment of actions needs to be sensitive to the particularities of the practices they occur within, and the assessment of practices needs to be sensitive to the particularities of the practices that those systems are formed within.

## Chapter 4

# Limited Conventionalism, Primacy, and the Local

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“That principles for institutions are chosen first shows the social nature of the virtue of justice, its intimate connection with social practices so often noted by idealists. When Bradley says that the individual is a bare abstraction, he can be interpreted to say, without too much distortion, that a persons’ obligations and duties presuppose a moral conception of institutions and therefore that the content of justice institutions must be defined before the requirements for individuals can be set out.”

- John Rawls, *Theory of Justice*, 95

The three preceding chapters have sought to show (1) what the basic structure of society is, (2) why it is indispensable as a moral subject, and (3) why its evaluation is distinct from the evaluation of other subjects. I argued that the basic structure is the set of institutions that establishes our obligations, rights, and powers as members of society. In order to evaluate our actions, we often need to evaluate the practices that those actions contribute to. Likewise, in order to evaluate our practices, we often need to evaluate the systems that those practices contribute to. The institutions that belong to the basic structure constitute the system that specifies our role as member of society, so we will need to evaluate the basic structure as a whole in order to properly evaluate the institutions that belong to it. How we evaluate these institutions should be quite different from how we evaluate individual action because individual actions occur within the social context established by these institutions. Our evaluation of individual action should be sensitive to this social context whereas our evaluation of institutions should not be.

Recently, the focus on the basic structure seems to have fallen out of favor amongst political theorists, many of whom have been convinced by G.A. Cohen’s criticisms of Rawls. Now, Cohen offers a number of arguments and there is no single response that shows all of them to be mistaken. However, the arguments of the last three chapters both provide responses to many of Cohen’s arguments and present a perspective from which to respond to others. First, Cohen

challenges the possibility of distinguishing the basic structure from aspects of the informal structure such as an egalitarian ethos. In response, Chapter 1 showed the way in which to distinguish them. Second, Cohen seems to think that there is no reason to focus exclusively on the basic structure if justice--as an ideal--does not uniquely adhere to the basic structure. In response, Chapter 2 shows why an evaluation of the basic structure is morally indispensable regardless of one's conception of justice. Third, Cohen often claims that we cannot distinguish the fundamental principles that evaluate the basic structure from those that evaluate individual action, but Chapter 3 shows a deep difference between the evaluation of institutions and the evaluation of individuals.

The value of these arguments, however, does not lie exclusively in their reply to Cohen. The arguments also give a broader perspective for the importance of the basic structure of society in moral and political philosophy. Even when we recognize a universal or absolute foundation for our moral claims and obligations, we should still appreciate how our contingent practices affect the particularities of ethical life. In order to appreciate our particular place---with its specific obligations, claims, powers, virtues, relationships and values--we need to appreciate the significance of our participation in social practices. In order to properly evaluate our choices within these practices, we also need to evaluate these practices. This perspective shows why it is important to focus on the basic structure as subject. To evaluate some of the most influential practices--those that establish our claims as members of society--we need to evaluate the basic structure that they are part of.

The goal of this chapter is to better motivate this broader perspective in moral theory and thereby further support my claim that we should focus on the basic structure. In §4.1, I want to better specify (a) what my core argument relies on, (b) its core conclusion, and (c) how it differs from similar arguments. Then, in §4.2, I will emphasize the range of moral theories for which my arguments are relevant. There are undoubtedly some moral theories, like Act Consequentialism,

that deny the premises upon which my arguments rely. However, my argument fits with a broader range of moral theories than it might at first seem. Following this, I give a broader motivation for the perspective that I advocate. In §4.3, I argue that treating the basic structure as moral subject can contribute to a reconciliation between two seemingly opposed impulses in moral and ethical theory. The arguments of this dissertation provide a way to respect both the universal and local features of moral and ethical life. In recognizing the way in which our practices specify the particularities of our ethical life, I respect the local features of morality. However, I also respect the universalizing features in requiring that these practices stand in need of justification outside of an institutional context.

#### **§4.1. What do I claim?**

To summarize my core argument in a sentence, we can say “those who accept a limited form of moral conventionalism should recognize the primacy of the basic structure as a distinct moral subject.” In §4.1.1, I explain what I mean by “a limited form of moral conventionalism.” One accepts “conventionalism” if they recognize that moral demands or claims can be established by contingent practices. Conventionalism has a bad name in moral theory because people think that it either (a) seeks to explain *all* our obligations and claims as part of social practices, or (b) is some form of relativism. Yet, the form of conventionalism that I argue from accepts (a<sub>1</sub>) only *some* of our obligations and claims are explained as part of social practices, and (b<sub>1</sub>) that those practices be morally justified by appeal to practice-independent values. In this way, I argue from a *limited* form of conventionalism.

In §4.1.2, I argue from limited conventionalism to the “primacy of the basic structure as a distinct moral subject.” As I use the phrase, a moral problem has “primacy” when we must first address that moral problem in order to fully address other moral problems. I argue that the basic structure has primacy because we need to evaluate it before we can fully evaluate certain

individual choices and institutions. The basic structure is a “distinct” subject because we cannot evaluate the basic structure with the same principles used to evaluate all others subjects.

Finally, in §4.1.3, I will show how the argument from limited conventionalism to the primacy of the basic structure differs from similar arguments for the Rawlsian focus on the basic structure. First, I return to a claim made in the introduction that my argument does not rely on any conception of justice. Second, I explain how my argument differs from the “moral division of labor” argument offered by Scheffler and Nagel. Third, I differentiate my view from one which identifies the basic structure as instrumentally necessary for social cooperation. While I do not make any claim that these arguments are wrong, I think they require more contentious commitments than my own arguments.

#### *4.1.1. What does the arguments rely on?*

My arguments rely on a commitment to, what I call, “limited conventionalism.” Here, I characterize conventionalism as the view that social practices can determine the particularities of moral and ethical life. While there is a tradition that exclusively uses the phrase “convention” to refer to strict coordination games, I use it in the broader sense to refer to any practice structured by rules. So understood, there can be a wide range of conventionalist theories. Some are fully relativist in that there is no part of ethical or moral life beyond our contingent way of life. My argument relies on a very different form of conventionalism. In this section, I want to better explain what this limited form of conventionalism requires

First, I do not claim all obligations, rights, and powers are practice-dependent. For example, the argument is consistent with practice-independent obligations to tell the truth<sup>1</sup> or to

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<sup>1</sup> Of course, we could recognize assertion as a social practice and then asserting what you take to be true or what you take to be false would be practice-dependent in some sense. Yet, even if assertion is practice-dependent, this does not mean that every form of indicating beliefs is practice-dependent, so lying (or indicating that you have beliefs that you do not have) could perhaps exist without assertion or other social practices.

help others.<sup>2</sup> Whether any particular aspect of ethical life is practice-dependent will always be open to debate. For example, the demands of promise-keeping and the family may or may not be practice-dependent. The demands involved in line-waiting seem to be conventional but there is always the possibility of an argument that they are not.

My argument need not show exactly which features of moral and ethical life are or are not practice-dependent. However, I do suppose that a property system, legal system, political constitution and economic structure are examples of practices that establish obligations, rights, and powers. Whether our practices create these demands and claims *ab nihilo* or whether they specify our vague pre-existing rights does not need to be settled by my current claim. I do not need to claim that all obligations, rights and powers are established by social practices in order to claim that these institutions establish new obligations, rights, and powers.

Second, I do not claim that “if a practice gives rise to new claims, then it is part of the basic structure.” I recognize the possibility of practices, like line-waiting, that are morally significant and are not assessed as part of the basic structure. Whether line-waiting is a good practice does not depend on how it contributes to the system of claims we have as members of society in the way that the major social institutions do.

Third, I have not claimed that there is one and only one moral theory that can ground practice-dependent claims. I have not exclusively appealed to the principle of fair-play, a consent theory, or a conception of our roles<sup>3</sup> in order to ground practice-dependent claims. Instead, my arguments are consistent with any of these ways to ground practice-dependent claims and many others. So long as a theory can explain why practices change our moral demands, that is sufficient for the view I hold.

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<sup>2</sup> For more on this perspective, see Herman, Barbara. "The Scope of Moral Requirement." *Philosophy & Public Affairs* 30.3 (2001): 227-256.

<sup>3</sup> For an example of the last type, see Michael Hardimon's "Role Obligations." *The Journal of Philosophy* (1994): 333-363.



All together, a moral theory is “conventionalist” insofar as it recognizes that social practices can give rise to new moral demands, and it is “limited” insofar as it recognizes that there are features of moral and ethical life that are not explained by social practices. My argument relies only on limited conventionalism as a feature of complete moral theories and it does not itself require a particular moral theory. Kantians, Intuitionists, Hegelians and even some varieties of consequentialism might accept limited conventionalism, and my argument will apply to those theories.

#### 4.1.2 What is the core conclusion?

From a commitment to limited conventionalism, I argue that the basic structure has primacy as a distinct ethical subject. The “primacy” of the basic structure refers to the way in which we must evaluate the basic structure in order to evaluate the actions and practices that are part of the basic structure. In this section, I will better explain how the arguments of Chapters 2 and 3 support the primacy of the basic structure as a moral subject.

In Chapter 2, I argued that in order to fully evaluate individual action, we often need to evaluate the practices of which that action is a part. If this is the case, then the evaluation of the practice has *primacy* over the evaluation of the individual action that is part of the practice. In this sense, primacy identifies an “order of evaluation;” in order to fully evaluate individual action, we first need to evaluate practices. Likewise, in order to fully evaluate certain practices, we first need to evaluate the systems of which they are a part. The major social institutions are part of the system that is the basic structure, so the basic structure has primacy in the order of evaluation. First, we evaluate the basic structure, which allows us to fully evaluate the major social practices, which in turn allows us to fully evaluate the actions that are part of these institutions. The basic structure has this kind of primacy, and it is because it has this primacy that it is an indispensable subject.

Importantly, this order of evaluation is only needed for a “full evaluation” of individual action. We can surely assess action in some way without assessing the practice of which it is a part, but any such evaluation would be incomplete. For a full evaluation of the individual action we need to see how it contributes to the social practices it is part of. Since these practices will have moral effects that are not reducible to the moral effects of individual action, we need be concerned with how individual actions contribute to these practices. Likewise, an evaluation of practices will be incomplete if we do not consider how that practice fits with others in a system. In order to properly evaluate actions and practices, we need see them as contributing to broader practices and systems.

To see the significance of the primacy of the basic structure, I want to return to an issue discussed in Chapter 3. G.A. Cohen has recently argued that those who hold equality to be an important aspect of social justice should be concerned with how individual actions (and not only institutions) impact equality . Many egalitarians have jobs that provide them with incomes that far exceed a society’s median income. In accepting these wages, we seem to be contributing to inequality in some way. If persons were willing to forgo these inegalitarian incentives, wouldn’t we have a more equal world? Doesn’t our concern for equality give us reason to reject higher wages when our receiving those wages does not promote equality?

According to my argument, we cannot merely look at the individual choice to accept inegalitarian incentives and then evaluate it outside of its social context. Our decision to accept higher wages is situated within a set of institutions, the most prevalent of which is a labor market. In theory, A labor market promotes efficiencies by (generally) distributing labor to the places where it can produce the greatest monetary value. If persons generally refused inegalitarian

wages, it is not clear that a labor market could do this as well.<sup>4</sup> This raises questions about the role of a labor market in society. Is it a justified institution? Do its advantages in efficiency justify its inequalitarian effects? Is the individuality that it encourages an advantage or disadvantage? When our action, as part of a well-functioning labor market, is ultimately justified depends--in part--on our moral assessment of the labor market. Moreover, we cannot adequately assess the labor market in isolation. Instead, we need to see how it works alongside our educational system, unemployment system, tax system, and much else. A labor market in one society might be morally heinous whereas its bad effects might be offset by other institutions in another society. Accordingly, our moral assessment of the labor market depends on our evaluation of the basic structure of which it is part. It is in this sense that the basic structure has evaluative primacy. In order to fully evaluate our actions in the labor market, we need to first evaluate the labor market of which it is a part. In order to fully evaluate that labor market, we need to first evaluate the basic structure of which it is part.

With this example, we can also return to the distinctiveness of the basic structure as subject. Our evaluation of individual action should be sensitive to the social context determined by institutions like the labor market. Whether a person acts rightly depends on the obligations, rights, and powers established by institutions. Our evaluation of certain practices should be sensitive to the social context in which those institutions are situated. Our evaluation of the labor market, for example, needs to be sensitive to other features of the basic structure. By contrast, our evaluation of the basic structure should not be sensitive to such social context. Since it influences so much of our social context, it needs to be justified separately from this context. In this sense, it

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<sup>4</sup> Even if we assume--as Joseph Carens does in *Equality, Moral Incentives, and the Market: An Essay in Utopian Politico-Economic Theory* (Chicago: University of Chicago Press, 1981)---that persons were fully motivated by a concern for equality, then we would still need competition amongst workers to secure the greatest income. There are informational advantages involved in a well-functioning labor market, and those who want to work where their work best promotes the position of the worst off might not know how they can do so. That is why Carens supposes that our obligation to help meet social needs manifests itself as an obligation to maximize pre-tax income, which is then redistributed as equal shares of income. Our question would then be whether a Carens-system would be morally better than a system in which persons received an income more associated with the price of their labor.

should be distinct from our assessment of individual actions and practices that are part of systems.

This argument only puts a minimal bar on the ways in which the basic structure is distinct as a moral subject. Given the normative structure of social practices, we should distinguish the assessment of the basic structure from the assessment of particulars that are part of practices or systems. There will be other reasons to distinguish the basic structure even further as a moral subject. These further reasons, however, will be specific to particular moral theories. Depending on what one thinks is important, the basic structure might be importantly distinct in other ways. If, for example, one thinks that coercion is a distinct moral problem, we should recognize that that use of coercion is part of (not a defining characteristic of) the basic structure. Our coercive institutions would be justified as part of the basic structure, and the basic structure would be distinct for that reason as well.<sup>5</sup> If one is concerned with, say, society progressing according free and fair agreements between persons, then one will be concerned with background fairness.<sup>6</sup> Insofar as the basic structure uniquely effects background fairness, the basic structure will be a distinct moral subject for that reason as well. If one has a particular conception of justice that identifies the basic structure as a particularly important site of distributive justice, then that is *another* reason for the basic structure to be distinct. My argument does not exclude these additional reasons to distinguish the basic structure. They are merely more specific to particular moral theories than my argument is.

If one is committed to limited conventionalism, then one should accept the primacy of the basic structure as a distinct moral subject. In order to fully evaluate individual actions and major social institutions, we need to first evaluate the basic structure of society. This makes the basic

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<sup>5</sup> In this way, I suggest that those who see the primary problem of political philosophy as the justification of coercion should see the evaluation of the basic structure as even more primary. In order to justify state coercion, we need to evaluate it as part of the larger social system that it coerces the rules of.

<sup>6</sup> For more on this, see the introduction to Chapter 2.

structure a crucially important moral subject for addressing a broader range of moral problems. Moreover, how we should evaluate this subject is distinct from how we should address these other moral problems in at least one respect; the basic structure should not be assessed as within a particular social context.

#### *4.1.3 How Does this Argument Relate to Similar Arguments*

There have been a range of recent arguments made on behalf of the Rawlsian focus on the basic structure, but the above approach is unique in relying on claims about the normative structure of social practices. I do not need to show that these other arguments are wrong to show why mine is correct, but I nonetheless want to draw a contrast with three recent alternatives. For each, I want to highlight the additional assumptions that the alternative approach needs to succeed.

The most typical argument for the Rawlsian focus on the basic structure relies on claims about the nature of justice. These arguments develop a conception of justice that is explicitly institutional. Arguments claim, for example, that justice is an institutional virtue or that publicity is a condition on justice.<sup>7</sup> Implicit in these views, as I understand them, is an understanding that (a) the basic structure is morally indispensable because justice is morally indispensable and (b) the basic structure is morally distinct because justice is morally distinct. Accordingly, the basic structure has primacy as a distinct moral subject because justice has primacy as a distinct moral concern.

I offer this as the most “typical” argument because it is the one that I think is most often ascribed to Rawls as the basis of arguments.<sup>8</sup> It is also the interpretation of Rawls that I take Cohen to be primarily concerned with. Accordingly, it seems to form a sort of “starting point” for

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<sup>7</sup> Williams, Andrew. "Incentives, Inequality, and Publicity." *Philosophy & Public Affairs* 27.3 (1998): 225-247.

<sup>8</sup> Persons take the claim “Justice is the first virtue of social institutions” to be a claim about the identity of justice rather than a claim about what ideal we should use to evaluate institutions. Given the context, this can be a strange claim. After all, Rawls immediately compare justice to truth in saying “as truth is [the first virtue] to systems of thought.” We do not take this later claim to be a definition of what truth is, yet persons are willing to take Rawls’s remark at a definition of justice.

both criticisms and defenses of the focus on the basic structure. Defenders might try to show why an institutional conception of justice is appropriate while critics show it to be inappropriate.

My argument does not rely on any conception of justice. In this way, it tries to go beyond the more typical argument. It is possible that someone will object to my view from a particular conception of justice, but I leave that issue until Chapter 6. My argument transcends a particular conception of justice because it shows the importance of the basic structure as a moral subject regardless of what one's conception of justice is. Whether justice is a concern relevant for or the regulative ideal for the basic structure does not change the fact that the basic structure has primacy as a moral subject. The importance of the basic structure does not depend on whether justice is specifically an institutional virtue.

I have avoided making an argument from a conception of justice because I doubt that those with substantively different moral views will agree on a such a conception. What determines whether one thinks that a particular conception of justice is the correct conception will depend on how that conception fits with their broader views on moral methodology, on the nature of justification, and on their substantive convictions. It is undoubtedly an important part of moral and political theory that we argue about what justice requires. At the least, it facilitates discussion between persons with wholly different approaches. However, I doubt that I will be able to convince the reader about the primacy of the basic structure on the basis of a conception of justice. Instead, I think it is better to show how the primacy of the basic structure fits with more widely acceptable views. I think I am more likely to get agreement on limited conventionalism than I am about a particular conception of justice.

A second approach that has been used to defend the Rawlsian focus on the basic structure is an argument from a "moral division of labor." Both Thomas Nagel and Samuel Scheffler have developed versions of such an argument, each relying on remarks that Rawls makes in "The Basic Structure as Subject." According to both versions of this argument, not all of our values are best

applied to all moral problems. Rather, some values are best understood as applying to institutions whereas other values apply to individuals.

For Nagel, the difference is between personal values, which are recognized from our first-personal perspective, and impersonal values, which are recognized from a third-personal perspective. We best reconcile these two moral perspective when we assess institutions in terms of impersonal values and assess individual choice in terms of personal value. For Scheffler, the difference is between small-scale and large-scale values. He sees the failure of utilitarianism as trying to explain small-scale values in terms of large-scale values, and he sees the failure of libertarianism as trying to explain large-scale values in terms of small scale values. By contrast, he recommends the liberal-egalitarian perspective that can respect both kinds of value without reducing on to the other.

The moral division of labor argument works particularly well to explain why the principles that apply to the basic structure of society would be *distinct* from those that apply to individual action. That is why I drew an extensive contrast with these views in Chapter 3. The division of labor argument claims that principles should be distinct because the values that apply to these subjects are fundamentally distinct. On its own, however, the argument is incomplete in two ways. First, it does not identify what the basic structure is in a way that distinguishes it from other institutions. After all, even if we recognize a distinction between institutional and individual principles, why should we distinguish institutional principles that apply to the basic structure from principles that apply to other institutions (including global institutions)? Second, the moral division of labor argument does not show why the basic structure is indispensable as a moral subject. It shows why the principles that apply to it would be distinct from principles for individual action, but it does not show why we need principles for the basic structure as a moral subject.

However, one interpretation of the moral division of labor argument does address this second gap. If we understand the moral division of labor argument as showing us (a) that *justice* is an institutional value, and (b) that the basic structure is uniquely related to justice, then this argument would show that the basic structure is indispensable as a moral subject. The moral division of labor argument would then be a type of the “conception of justice” argument. It would be an argument for why justice is specifically an institutional value. Insofar as one wants to interpret the moral division of labor argument as an argument for the primacy of the basic structure as moral subject, this is the way in which I think it should be interpreted. It gives us clear reasons to think of justice as uniquely tied to the assessment of institutions, and it is because the basic structure is uniquely tied to justice that we should focus on the basic structure.

Yet, I do not advocate the “moral division of labor argument for a conception of justice” approach. Such an argument might add additional support to my argument through an accompanying conception of justice, but I do not need such an argument. Specifically, I do not need to claim anything about a fundamental distinction in our values. Instead, I merely claim that social context is important for the evaluation of actions and practices. I claim that a proper evaluation of individual action will oftentimes require seeing that action as part of a social practice and evaluation of such practices will oftentimes require seeing those practices as parts of a system. It might *also* be the case that the proper evaluation of individual action is sensitive to individual values and the proper evaluation of institutions should be sensitive to institutional values. That seems completely feasible to me, but it goes beyond the requirements of my argument. Instead, I only need to claim that our practices/systems make certain considerations relevant for evaluating actions or practices that would not be relevant outside of that practice/system.

A third approach for defending the Rawlsian focus on the basic structure is the idea that the basic structure is understood as the set of institutions that are *instrumentally necessary* for



social cooperation. The importance of social cooperation as an end then explains the importance of the basic structure as necessary for bringing that end about. As an example of this argument, one might read Samuel Freeman as offering an interpretation of Rawls that appeals to this “instrumental-necessity” reading. Freeman writes that,

“it’s not the coercive enforcement of social rules themselves that distinguishes basic institutions from other institutions. After all, if everyone freely accepted the application of the rules all the time, coercion might never be needed. Rather it’s the reason for coercion, namely that basic institutions are essential to social life. The distinctive feature of the basic social institutions that constitute the basic structure is that they are, in some form or another, *necessary for productive social cooperation*, and hence for the continued existence of any society, particularly any relatively modern one.”<sup>9</sup>

In this passage, Freeman distinguishes a concern with the basic structure from a concern with coercion, and he does so on the basis of the relationship between productive cooperation and the basic structure. Arash Abizadeh explicitly reads Freeman as offering this “instrumental necessity” interpretation in “Cooperation, Pervasive Impact, and Coercion.” There, Abizadeh argues that such a justification cannot justifiably limit a concern with distributive justice to a domestic basic structure.<sup>10</sup>

However, I do not think that this “instrumental necessity” interpretation is the only way to understand the relationship between the basic structure and social cooperation. The phrase “necessary” in Freeman’s remarks might be read in two different ways. First, it might be that the basic structure is instrumentally necessary for social cooperation; it is because the basic structure creates certain conditions that people can engage in social cooperation. Second, it might be that the basic structure is conceptually necessary for social cooperation; we understand “social

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<sup>9</sup> Freeman, *Rawls*, 102 (my emphasis). Also see, “The basic structure of society consists of the arrangement of the political, social, and economic institutions that make social cooperation possible and productive” (*Rawls*, 101).

<sup>10</sup> Abizadeh, Arash. “Cooperation, Pervasive impact, and Coercion: on the Scope (not Site) of Distributive Justice.” *Philosophy & Public Affairs* 35.4 (2007): 318-358.

cooperation” as the kind of cooperation that persons who live in a society engage in with one another. In this way, whether Freeman understands the basic structure as instrumentally necessary for social cooperation depends on how we understand “necessary.”

In §1.6, I argued for the view that the basic structure is *conceptually* necessary for social cooperation. Social cooperation consists in the cooperation between members of a society in following the rules of the major social institutions. It is because we understand “social cooperation” as this specific kind of cooperation that we recognize a basic structure as conceptually necessary for social cooperation. One cannot have social cooperation without a basic structure to cooperate in following the rules of.

The challenge in thinking that the basic structure is instrumentally necessary is that one must articulate a conception of social cooperation that requires there to be a basic structure. How should we think of social cooperation? If social cooperation is coordination on fair terms, then we do not need the basic structure to cooperate on fair terms. If social cooperation is coordination between strangers, then social norms alone may be sufficient for that. Moreover, does this view identify the basic structure as *only* those institutions that are necessary for social cooperation? After all, there could be seemingly justified institutions--such as universal health care--that are not necessary for social cooperation but might nonetheless be part of the basic structure.

Importantly, I recognize that these challenges to the instrumentally-necessary approach could be overcome, but they do highlight a contrast with the conceptually-necessary approach that I advocate. I have tried to present a view that sees social cooperation as the kind of cooperation that results in society. This cooperation creates obligations, rights, and powers for persons as members of society. The complex social world in which we live takes these obligation, rights and powers as setting the background for free interaction. Our following these rules allows us to live and plan more stable lives. We define the basic structure as the institutions that persons

follow the rules of as members of society. In this way, the basic structure is conceptually necessary for social cooperation.

Altogether, I claim that it is limited conventionalism that explains the primacy of the basic structure as an ethical subject. It is not a particular conception of justice, a division of moral labor, or the independent importance of social cooperation. It is because the major social institutions establish new obligations, rights, and powers for individuals as members of society. In order to fully evaluate these institutions and the actions that occur within them, we need to first evaluate the basic structure of society.

#### **§4.2. The Scope of the Argument across Moral Theory**

My argument relies on limited conventionalism, which not all moral theorists will accept. However, a much broader range of moral theorists can (and should) accept limited conventionalism than one might think. In §4.2.1, I explain the conditions under which a foundationalist moral theory is consistent with my arguments. In §4.2.2, I focus on the deeper significance that my arguments have for constructivist moral theories. All this will set the stage for the broader arguments offered in §4.3, which seeks to better motivate the approach that this section claims is widely accessible across moral theories.

##### *§4.2.1 First principles and limited conventionalism*

As I understand “foundationalism,” it is the view that all justifications must ultimately appeal to some first principle or set of first principles. With such a view, the primary task of moral theory is to identify the first principles and then determine how they relate to particulars. There is not anything about foundationalism, *per se*, that necessarily supports or undermines the argument I offer. Whether foundationalism is consistent with limited conventionalism will depend on the specific foundational principles that one advocates. Certain foundational principles will allow

institutions to establish obligations, rights and powers. Other foundational principles will not. In this section, I want to better explain the difference.

To begin, let me give two toy examples of foundationalist theories that are consistent with limited conventionalism. First, imagine a moral theory that identifies self-realization as the end of all ethics, however, the self that is realized is a socially-determined self in a specific social world. This moral theory resembles the view that Bradley sketches in the “My Station and Its Duties” chapter of *Ethical Studies*. Here, there is a single foundational moral principle: realize your self. Yet, the institutional context created by our institutions is centrally important in specifying the self that needs to be realized. At least part of ourselves is determined by our role in social life, so the specifics of our role are significant for morality and ethics. Second, imagine a theory that consists of a number of foundational principles, one of which is the Principle of Fair Play. This principle requires individuals to follow the rules of those social practices that are (a) fair to each participant, and (b) advance their interests. According to this moral theory, what particular obligations we have will be partly determined by which social practices exist in our society. In this way, the particular institutions that exist will affect what obligations we have. In either of these two examples, we have moral theories that ultimately justify any judgment on the basis of foundational principles and are consistent with limited conventionalism.

What allows these theories to support limited conventionalism is that some particular judgments are justified indirectly (rather than directly) by the foundational principles. For example, if my particular social role includes being a participant in a democracy, then either example theory could (potentially) explain why I have an obligation to vote. According to the first, we could explain my role as citizen as part of my identity. Realizing my self would then require that I fulfill the part of my identity that is consistent with being a citizen, and I should then take up the duties of citizenship. If I were to live in a different form of government, however, I would not have these same duties. According to the second view, we can understand a

democratic form of government as a particular social practice that advantages the citizenry. In order to support this practice, I owe a contribution that is specified by the rules of the practice. If the political system requires citizens to vote, then I should vote in order to support the system. Again, if there were a different political system, I would not have these same obligations. In both cases, I have obligations that are particular to my social context, and these obligations are grounded indirectly by fundamental principles of self-realization and Fair Play that are applied to my particular political structure.

By contrast, there are also versions of foundationalism that are inconsistent with limited conventionalism. For example, Act-Consequentialism (AC) does not explain how social practices could establish obligations, rights, or powers. For the sake of argument, let us define AC as the view that an action is right if that action promotes the best consequences. Undoubtedly, AC can recognize that a practice can change which actions are those that promote the best consequences. In this way, the fact that an action takes place within an institutional context can change our evaluation of that action. However, our evaluation is not changed because the action is part of a practice but because the prevalence of a practice has changed the causal path by which we can promote the best consequences.

To see this point more clearly, recall that AC does not really recognize an obligation to follow the rules of property. It can say that we should often follow the rules of property, but it is not because we have an obligation to follow the rules. Rather, we should only do that which a property system requires when we promote the best consequences by doing so. When we do not promote the best consequences, we do not have moral reason to follow the rules of property. According to AC, it might be good that persons *think* they have such an obligation, and it might also be good that persons have a disposition to follow the rules. AC can even claim that it is good that property rules are coercively enforced *and* good when coercion is used against someone who

acts rightly in breaking the rules of property. All these claims are consistent with AC, but it is not consistent with AC to claim that we have an obligation to follow the rules of property.

AC would reject limited conventionalism because, according to AC, practices do not change our obligations, rights, and powers. Practices can change the causal paths by which to satisfy our single obligation, but it does not change our obligations. According to AC, thinking that our obligations change is a fundamental mistake. Perhaps we take our laudable dispositions too seriously or have bought into a noble lie. The feature of AC that explains why it is inconsistent with limited conventionalism is its view that whether any particular action is right is determined by directly appealing to the foundational principle.

Act-Consequentialism is not the only version of foundationalism that is inconsistent with limited conventionalism. We can imagine any number of foundational principles that do not make a social context morally relevant. If all particular judgements are justified by direct appeal to foundational principles, then social context will be irrelevant in the way that it is irrelevant for Act-Consequentialism. Suppose I recognize four foundational principles; (1) promote autonomy, (2) promote well-being, (3) promote equality, and (4) promote knowledge. Suppose that any particular judgement is justified by directly applying these four principles. Whether a person is good or bad will depend on whether they promote autonomy, well-being, equality, and knowledge. Whether an action, institution, practice, or disposition is appropriate will likewise depend on promoting these four values. This form of pluralist foundationalism will also be inconsistent with limited conventionalism unless promoting one of these values explains how social practices establish obligations, rights, and powers.

If a version of foundationalism conflicts with limited conventionalism, then whether we should accept foundationalism or my argument will be determined by much more holistic considerations. I doubt that any single argument can show such a version of foundationalism to be wrong, and I do not attempt to give one here. After all, a fully committed foundationalist could

even give up their commitment to the truths of logic if they needed to. Instead, the best argument for or against any moral theory will be holistic. How does the theory really fare as a whole? My arguments only show a moral theory to be wrong insofar as the approach seems to better provide what we want from a moral and political theory.

Yet, even if some forms of foundationalism can accept the primacy of the basic structure, this might seem like a trifling conclusion for the foundationalist. What matters for the foundationalist is ultimately first principles, which are then applied to all moral problems--including the evaluation of the basic structure. For any moral problem, we look to see how the fundamental principles bear on that problem. What, then, is the significance of saying that we should “focus” on the basic structure?

For versions of foundationalism that accepted limited conventionalism, the focus on the basic structure is quite significant. It identifies a particular moral problem to which only foundational principles are applied. The evaluations of practices and actions within the basic structure will need to be sensitive to those non-foundationalist considerations that are determined by an institutional context. By contrast, there are no non-foundationalist considerations that are relevant for evaluating the basic structure. This makes the distinctiveness of the basic structure as moral subject significant even for the foundationalist. It is a subject to which foundational principles are not applied indirectly, but only directly.

Of course, the distinction between the basic structure and other moral problems might be significant for other reasons beyond this. Versions of foundationalism might recognize some foundational values as relevant for evaluating the basic structure that are not relevant for evaluating individual practices or actions. As I understand it, the Division of Moral Labor argument advocates for such a version of foundationalism. The argument understands justifications as appealing to foundational values, but it also supposes that some foundational values are appropriate for evaluating institutions whereas others are appropriate for evaluating

individual conduct. According to this form of argument, the distinctiveness of the basic structure will be significant for two reasons. First, only certain foundational values apply to the basic structure. Second, the foundational values that apply to the basic structure apply to it directly rather than indirectly.

I suspect that both Nagel and Scheffler would want their views to be consistent with limited conventionalism, but they do not argue from such a commitment. The argument of this dissertation differs from theirs in arguing *from* limited conventionalism rather than a particular form of foundationalism. I do not need to claim that a particular form of foundationalism is the true moral theory but only that the true moral theory, whatever it is, needs to accept limited conventionalism. I think this is especially important for understanding Rawls's own argument for focusing on the basic structure because he is not a foundationalist. Instead, he is a constructivist. In the next section, I want to emphasize the deeper significance of my argument for constructivist theories.

#### §4.2.2 Constructivism and limited conventionalism

Foundationalism may be the most intuitive form of moral theory, but it is not the only form. Rawlsian Constructivism is one example of a non-foundationalist moral theory, and the conclusions of my argument are much more significant for such non-foundationalist theories. To draw this out, I want to first highlight a feature of Rawlsian constructivism; the procedure that warrants principles is "problem-dependent." By this, I mean that constructed principles are always constructed to address a particular moral problem (rather than providing general first principles). Insofar as constructivism's procedures are problem-dependent, the primacy of the basic structure will be even more significant.

To see this point, we should notice that some versions of constructivism will be foundationalist. By this, I mean that the relevant procedure (or perspective) will be constructed to



warrant a foundational principle or set of principles.<sup>11</sup> For example, there are attempts to justify act-utilitarianism<sup>12</sup> and rule-utilitarianism<sup>13</sup> by appeal to constructivist reasoning. Likewise, a constructivist reading of Kant would identify him as using a constructed procedure to warrant the categorical imperative, which some might read as being a fundamental principle. In these cases, constructivism is used to warrant foundationalism. Whether they are consistent or inconsistent with limited conventionalism will then depend on the specific foundational principles as I discussed above. In this section, I am concerned with forms of constructivism that are *not* foundationalist.

Rawls's considered view is the most prominent example of non-foundationalist constructivism. Persons in the original position do not agree to a set of principles that settles all moral questions. Rather the original position is designed to settle a particular moral problem; "what are the fair-terms of social cooperation?" The arguments of *Theory of Justice* and *Political Liberalism* are directed towards this particular problem, and Rawls says relatively little about how the constructivist approach would be applied to different problems. However, Rawls does develop a different constructive procedure in *Law of Peoples*, and that procedure is specified for a very different problem than determining the fair terms of social cooperation. Likewise, Rawls also suggests that different procedures would be necessary to settle questions about justice in associations.<sup>14</sup>

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<sup>11</sup> Sharon Street argues that constructivism is better understood as warranting conclusions that follow from a practical perspective rather than a constructed procedure. Street, Sharon. "What is Constructivism in Ethics and Metaethics?." *Philosophy Compass* 5.5 (2010): 363-384.

<sup>12</sup> See Gibbard, Allan. *Reconciling our Aims: In Search of Bases for Ethics*. (Oxford University Press, 2008).

<sup>13</sup> See Hooker, Brad. *Ideal Code, Real world: A Rule-Consequentialist Theory of Morality*. (Oxford University Press, 2000).

<sup>14</sup> i.e. "To illustrate: for churches and universities different principles are plainly more suitable. Their 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." (Rawls, *Political Liberalism*, 261)

The few remarks we get about Rawlsian constructivism suggest that any legitimate procedure will need to generate principles that (a) respect persons as free and equal and (b) satisfy a practical need. In a slogan, Rawls suggests that, according to his view, “free and equal moral persons are to construct reasonable and helpful guidelines for moral reflection in view of their need for such organizing principles and the role in social life that these principles and their corresponding subjects are presumed to have.”<sup>15</sup> In this articulation, principles are always constructed with the “need for such principles” and their “social role” in mind. This is what I meant to refer to in saying that the procedure that warrants principles is “problem-dependent.” The specifics of the procedure are determined by the particular problem that principle is developed to address. The construction that warrants the two principles of justice, for instance, was constructed specifically for the problem of identifying the fair terms of social cooperation.

When a form of constructivism is problem-dependent in the way that Rawlsian Constructivism is, the primacy of the basic structure as a distinct subject has a greater significance for two reasons. The rest of this section will be spent explaining the two ways in which my conclusions are especially significant for such views.

First, the nature of the basic structure as subject influences the content of the principles that apply to it. When a form of constructivism is problem-dependent, the principles that evaluate the basic structure are developed specifically to apply to the basic structure. Accordingly, the particularities of the basic structure are crucially important for the development of the principles. We do not merely apply first principles to the identified subject. Instead, the nature of the subject determines the principles.

This feature of Rawlsian constructivism is well-represented in the phrase, “the correct regulative principle for anything depends on the nature of that thing.” Rather than merely applying a fundamental principle to a particular subject, Rawls means to develop principles in

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<sup>15</sup> See *Political Liberalism* (Columbia Classics in Philosophy), 261-262.

ways that make them suited to that subject. This phrase appears in *Theory of Justice* when Rawls offers a quick rejoinder against the utilitarian conception of justice;

“whereas the utilitarian extends to society the principle of choice for one man, justice as fairness, being a contract view, assumes the principles of social choice, and so the principles of justice, are themselves the object of an original agreement. There is no reason to suppose that the principles which should regulate an association of men is simply an extension of the principle of choice for one man. On the contrary: if we assume that the correct regulative principle for anything depends on the nature of that thing, and that the plurality of distinct persons with separate ends is an essential feature of human society, we should not expect the principle of social choice to be utilitarian”

In *Theory*, this is only a brief and relatively unexplored contrast between justice as fairness and utilitarianism, but I think that it is an important one. It argues that, given a certain methodological perspective, we can see a central problem for the utilitarian. Utilitarianism is modeled on the rationality of a single individual in maximizing their own utility, which is extended to model the rationality of a social choice to maximize total utility. Yet, the choice over how society is structured is distinct from how a single individual ought lead their life, so it seems odd to suppose that one can be addressed by merely extending the other. A utilitarian conception of justice seems to violate the methodological perspective that any regulative principle should depend on the nature of that which it regulates. For Rawls, our recognition of the basic structure as a distinct moral subject is significant because our conception of the subject influences the principles that appeal to that subject. In moral theory, our principles should fit with our understanding of a moral problem. We should not try to make our understanding of the problem fit our principles.

The second reason why the primacy of the basic structure has a greater significance for problem-dependent forms of constructivism is due to a way in which such theories can explain moral unity. One might think that a problem-dependent form of constructivism is condemned to

disunity amongst its principles. If we accept foundationalism in some form, then it is easy to see how our various judgements form a unity; they all express our commitment to foundational principles. Yet, there is no such unity for a problem-dependent form of constructivism; each principle is developed for the specific problem it addresses. This might seem to result in a hodgepodge of principles, each principle merely meeting the conditions for its own use and failing to express any deeper moral vision.

In “The Basic Structure as Subject,” Rawls recognizes this problem in a section titled “Unity by Appropriate Sequence” and offers a solution. He writes,

At first sight the contract doctrine may appear hopelessly unsystematic: for how are the principles that apply to different subjects to be tied together? But there are other forms of theoretical unity than that defined by completely general first principles. It may be possible to find an appropriate sequence of kinds of subjects and to suppose that the parties to a social contract are to proceed through this sequence with the understanding that the principles of each later agreement are to be subordinate to those of all earlier agreements, or else adjusted to them by certain priority rules. The underlying unity is provided by the idea that free and equal moral persons are to construct reasonable and helpful guidelines for moral reflection in view of their need for such organizing principles and the role in social life that these principles and their corresponding subjects are presumed to have.<sup>16</sup>

In this passage, Rawls supposes that contractualist theory can still be unified through an “appropriate sequence.” This is a methodological sequence as principles are agreed to by appeal to principles that have been previously developed. For each principle in the sequence, the principles

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<sup>16</sup> *Political Liberalism*, 261

are those that free and equal moral persons would agree to. If such a process were completed, a problem-dependent form of constructivism would express a kind of unity.<sup>17</sup>

Rawls does not say much more about how this sequence would proceed beyond this passing remark. However, there are two features of Rawls's theory that seem to fit well with this perspective towards unity. First, he orients questions about global justice and justice between generations as being addressed *after* developing an account of domestic justice. In "Law of Peoples," he writes

Typically, a constructivist doctrine proceeds by taking up a series of subjects, starting, say, with principles of political justice for the basic structure of a closed and self-contained democratic society. That done, it *works forward* to principles for the claims of future generations, *outward* to principles for the law of peoples, and *inward* to principles for special social questions. Each time the constructivist procedure is modified to fit the subject in question. In due course all the main principles are on hand, including those needed for the various political duties and obligations of individuals and associations."<sup>18</sup>

In this passage, Rawls appeals to his methodology of approaching a range of subjects in an appropriate sequences; first, principles of justice for a closed society, then global justice and justice between generations, and eventually explicating personal obligations as members of political organizations or associations. Likewise, in *Theory of Justice*, Rawls appeals to a four-stage sequence in addressing questions of justice for a closed society. A conception of justice does not itself determine the answers to all the relevant political questions. We not only need first principles of justice, but must also appeal to those principle that (a) evaluate constitutional

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<sup>17</sup> In unpublished lecture notes, Rawls identifies Scanlon's form of contractualism as a "general moral conception" like utilitarianism, perfectionism, and intuitionism. By contrast, he identifies a possible contractualism that applies the notion of agreement to different areas of morals. He writes,

"Contractualism might be a general conception of the following kind: while a notion of agreement is always applicable, the notion of agreement is specified differently from one part of morals to another; and also, the principles and precepts that result are not universally applicable. So while contractualism would leave a certain unity, it would not have the unity given by general principles universally applicable"

<sup>18</sup> Rawls, *Collected Papers*, 532.

arrangements, (b) evaluate legislation and policies, and (c) evaluate particular instances. For each question, Rawls constructs an appropriate perspective from which to reason about the relevant issue, but each perspective is constrained by acknowledgment of the principles decided in earlier stages. For instance, he writes, “In framing a just constitution, I assume that the two principles of justice already chosen define an independent standard of the desired outcome. If there is no standard, the problem of constitutional design is not well-posed.”<sup>19</sup> Likewise, one cannot judge the justice of law without knowledge of the constitutional procedures within which they are developed and one cannot judge particular acts without knowledge of the laws from which they follow. As such, the four-stage sequence models the way in which principles are developed for specified contexts in a way that relies upon prior principles, but does not suppose that the prior principles can be easily applied to new contexts. Instead of an appeal to an overarching general principle that addresses each of these diverse concerns directly, Rawls appeals to developing these principles in an appropriate sequence, each relying on the preceding development of principles.

Yet, what is it that makes an appropriate sequence *appropriate*? With the four-stage sequence, it makes sense why this sequence would be as it is. At each level, the relevant contractors have more and more information about the society in which they live, so there is a natural order to the progression. Yet, what would make any particular sequence more appropriate than another beyond this? What makes certain subjects the ones that should be addressed before others? We cannot appeal to moral principles to settle this issue because the order of the sequence will likely influence our moral principles. We cannot appeal to moral facts because the constructivist denies such moral facts. How should the appropriate sequence proceed? The answer to this question is far from apparent in Rawls’s own writings. What would be an appropriate argument to show that one starting place is more appropriate than another?

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<sup>19</sup> *Theory of Justice (OE)*, 198

I take the argument of this dissertation to show why we would think that the basic structure has primacy in such an appropriate sequence. I do not think it shows that the basic structure is the first subject in such a sequence, but it does show why it should precede other subjects. Perhaps it only shows why the basic structure is the primary subject *of justice*.<sup>20</sup> To appropriately evaluate particulars, we often need to evaluate them within a particular social context. This requires that we have some prior way to evaluate the social context. This gives a reason for the primacy of the basic structure that does not appeal to moral principles or to moral facts. Instead, it appeals to intuitions about the normative structure of social practices. Those who accept limited conventionalism have reason to accept the primacy of the basic structure in an appropriate sequence.

#### **§4.3 A Mooring for Ethical Life**

So, those who accept forms of foundationalism and constructivism can accept the primacy of the basic structure as subject. In this section, I want to better motivate both limited conventionalism and the deeper moral importance of the basic structure. Instead of showing the relationship between limited conventionalism and the basic structure, I want to show how a central concern with the basic structure provides a way to reconcile the localizing and universalizing impulses in moral theory.

There is a consistent conflict between those who see ethical life as grounded in universal principles that apply to all and those who see ethical life as particular to social context. We can see this conflict between universal and local in arguments from Plato and Aristotle, Kant and Hegel, Sidgwick and Bradley, and Rawls and Walzer. While I would not claim a focus on the basic structure settles this conflict, I do believe it can contribute to a moral theory that respects both

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<sup>20</sup> More on this in §6.2

the universal and local in moral and ethical life. I want to motivate my approach by showing how it combines the best features of both perspectives.

Limited conventionalism recognizes that our moral obligations, rights, and powers are often grounded by contingent social practices. In §3.2.3, I argued that such practices likely influence our values, virtues, relationships and self-conceptions. The view does not, however, require that all values, virtues, relationships, self-conceptions, rights and obligations are grounded by such practices. In fact, limited conventionalism needs to appeal to some universal principles in order to explain *why* practices have this influence on moral and ethical life. Accordingly, there is already some balance between the local and universal in the theory. Some moral demands and claims will be particular to our social context whereas others will be universal across social contexts. Which are which is an issue that needs to be settled by a moral theory.

Limited conventionalism also recognizes that, in order to change our moral demands, social practices must be morally justified. Not every practice can establish new obligations; only morally justified practices can. At times, whether a practice is justified will be determined by universal principles. At other times, a practice will be justified by its social context. According to the view here, when a practice is part of a system, we will need to evaluate the system in order to evaluate the practice that it is part of. This adds another way in which our evaluation is particular to a social context. Whether a practice is justified will often depend on the social context that practice occurs within.

With this view, the basic structure of society is a moral subject at the nexus between the local and the universal. Many of our particular claims will be explained by the practices that they belong to. For many practices, whether they are justified and give rise to genuine claims will be determined by how they fit within a basic structure. So, the basic structure is quite central for our local evaluations--we often need to evaluate practices by how they fit within a basic structure. However, the evaluation of the basic structure itself does not appeal to our social context. There is



no larger practice or system that the basic structure is part of. Instead, it is evaluated by appeal to more universal principles.

To show how this approach can reconcile the localizing and universalizing features of ethical life, I will rehearse one of the most appreciated Hegelian objections to Kantian moral theory. This will allow me to contrast a concern with the practice-dependent aspects of ethical life with a concern for the practice-independent aspects. Then, I will suggest a middle ground that recognizes the importance of both these aspects of ethical life. Since a focus on the basic structure is part of this middle ground, such a focus respects both the practice-dependent and practice-independent features of ethical life.

#### 4.3.1 The Hegelian criticism

Hegel's most (in)famous criticism of Kant has been the claim that his argument for the categorical imperative amounts to nothing but an empty formalism. In §135 of *Philosophy of Right*, Hegel writes,

“However essential it is to give prominence to the pure unconditioned self-determination of the will as the root of duty, and to the way in which knowledge of the will, thanks to Kant's philosophy, has won its firm foundation and starting-point for the first time owing to the thought of its infinite autonomy, still to adhere to the exclusively moral position, without making the transition to the conception of ethics, is to reduce this gain to an empty formalism, and the science of morals to the preaching of duty for duty's sake. From this point of view, no immanent doctrine of duties is possible; of course, material may be brought in from outside and particular duties may be arrived at accordingly, but...no transition is possible to the specification of particular duties.”

For Hegel, true freedom occurs only when we recognize that our freedom is not a freedom of indeterminacy but a freedom as a particular individual, an individual who is understood as occupying a particular social position. We are raised within a particular social atmosphere and our own identity and interests are reliant upon the particularities of that social atmosphere.

Accordingly, the material through which we determine our duties and goals is drawn from that atmosphere. To abstract away from this material is to abstract away from all material that could establish our duties. An ethical theory that arises from the idea of the will as pure indeterminacy will be empty and formal, but an ethical theory that arises from the idea of a will as embedded in a social position will have the material through which to recognize the fullness of ethical life.<sup>21</sup>

Now, there are many related and overlapping aspects to Hegel's criticism, and I do not mean to address them here in full. Much of the literature hangs on Hegel's *internal* criticism of Kant that the Formula of Universal Law (FUL) cannot warrant any moral judgment on its own. Much has been written about whether this criticism shows a mistake in Kant's reasoning, but my concern is with Hegel's point as an *external* criticism. Is Hegel right to think that any account of ethics is inadequate if it ignores the particularities of our social atmosphere? The FUL might not be empty, but Hegelians will still argue that Kantian theory is flawed because it ignores the importance of our being socially embedded. Most specifically, Hegelians can argue that no Kantian view adequately represents individual freedom. The individual will is not a pure abstraction of indeterminacy but a particular will embedded in a social environment. For a particular will to truly be free, it needs not will any arbitrary ends but will the ends that are identified as its own particular ends.

A similar external criticism is used by many of the contemporary Communitarian thinkers, but they need not be tied to Hegel's own metaphysical and methodological commitments. These thinkers have focused specifically on the ways in which the self is socially embedded without taking the detour through the conditions for freedom or the claim that the FUL is empty.

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<sup>21</sup> Whether Kant is guilty of abstracting from the particularities of ethical life in a problematic way is a contentious issue in Kant interpretation. Barbara Herman, for example, argues that Kant did not suppose that the FUL and FH were sufficient for determining moral and ethical context. Instead, they express a form of morality through which we should reason in coming to conclusions about morality. In this way, she understands Kant as only developing a metaphysics of morals rather than a complete procedure for determining moral conclusions. See *The Practice of Moral Judgment*, (Harvard University Press, 1993).

For Hegel and Kant, the contrast between them is well-represented in their differing conceptions of freedom, but the contrast between communitarians and liberals is not as clear. As Will Kymlicka points out,<sup>22</sup> the contemporary Liberal does not deny that the self is socially embedded. Instead, liberals only deny that there is no *single* socially determined feature of ourselves that is not open to possible revision. The woman raised in a misogynistic society might see herself as lesser than the men around her, but she has the capacity to critically engage with that view and change her self-conception overtime. Alternatively, a religious person might fundamentally identify himself with his religion and remain orientated around it throughout his life, but he *could* revise his commitments. His commitment is made more significant by the fact that he could change it and does not.

So, all sides in the contemporary dispute can recognize that selves are socially embedded, so that cannot be where the dispute really lies. Even Kantians can recognize that the self is socially-embedded and merely maintain the freedom consists in rational willing rather than self realization. What, then, grounds the conflict between communitarian and liberal views?

I want to suggest that these two perspectives differ in their identification of the source of ethical ends and principles. Both sides might recognize that the self is socially embedded but they significantly differ in interpreting how this matters for morality and ethics. For the Communitarian, what determines the content of ethics and morality are the particularities of our social structure and culture. Rather than distinguishing themselves by appeal to the claim that the self is socially embedded, I suggest that they distinguish themselves by the claim that the content of ethical life is dependent upon the particular practices of a society. In short, Communitarians claim that ethical life is substantially practice-dependent.

The Hegelian agrees with this Communitarian commitment, though Hegel understands there to be a rational development of ethical life through time. For him, the content of ethical life

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<sup>22</sup> Kymlicka, Will. *Contemporary Political Philosophy: An Introduction* (Oxford University Press, 2002), 208-282.

is practice-dependent, but the practices of our society can be explained by the rational development of human freedom. Despite this difference, the Hegelian and Communitarian are in agreement that the content of ethical life and morality is predominantly practice-dependent and local.

#### *4.3.2 The Reconciliatory Response*

To say that the two sides are divided by the extent to which they identify the content of ethical life as practice-dependent or practice-independent undoubtedly seems too rough; it ignores the nuance on the two sides. However, a rough contrast can nonetheless be helpful and track a real difference. The contrast can help highlight a better view by seeing the inadequacies of these two contrary positions. We should not think that the sole source of our ethical ends and principles is our local particularity, and we should not think that the sole source is an independent ethical perspective. The former would ignore any objective grounding for the importance of socially determined concerns, and the later would ignore the richness of ethical life provided within a community.

To transcend the inadequacies of either view, we need only combine them. We can recognize that the source of *some* ethical ends and principles is the social structure, and the source of *other* ethical ends and principles is an independent ethical perspective. In short, we should recognize that there are practice-dependent values and practice-independent values. We can accept a kind of limited conventionalism. Any adequate ethical theory need recognize both. I think that most Hegelians, Communitarians, Kantians and Liberals recognize this. Limited conventionalism provides a form for this reconciliation.

The way in which to recognize both aspects of ethical life is to recognize that the contingencies of our social practices have a profound effect on ethical life, but the non-contingent aspects of ethics and morality do as well. While many of our values, virtues, relationships and

obligations will be explained by particular features of our social context, others will not be. For instance, it is due to conventional aspects of our professional structure that we have the kind of relationships with co-workers that we have. It is because of our particular form of government that we have the political obligations we have. Yet, one might think that we should not deceive others regardless of the particularities of society. Or, one might think that knowledge is always valuable. Which aspects are explained by which is not easily decided, and different theories will explain different aspects. What matters is that we can recognize contingent features of our social context as determining some aspects of ethical life just as we can recognize non-contingent aspects as well.

Most importantly for my concern, practice-independent principles or values will have a central role in evaluating our social context itself. Even if the content of ethical life was predominantly determined by contingent social practices, practice-independent values would have a role in assessing those practices. To support the communitarian aspect of his view, F.H. Bradley appeals to a quotation from Hegel that is actually more aligned with my conclusions than Bradley there recognizes. The full quotation comes from §153 of *The Philosophy of Right*;

“to be moral is to live in accordance with the moral tradition of one’s country; and in respect to education, the one true answer is that which a Pythagorean gave to him who asked what was the best education for his son, If you make him *the citizen of a people with good institutions*”

In this we can recognize that living a good life means living the life of a member of particular society, and the particularities of a people determine the specifics of how one should live. Even when Hegel recognizes that our ethical life is partly determined by our social context, he recognizes that it is important to have *good institutions*. To determine which institutions are good, I maintain that we need some practice-independent perspective. So, practice-independent values are important not only as part of the content of ethical life, but in assessing those practices that determine the content of ethical life.

Hegel is likely referring to an actual Pythagorean in the above passage, but his additional comments show that he also had Rousseau in mind. Rousseau did not dispute the ways in which a social context had a profound and pervasive influence on a people's aims, relationships and values but he was not fully communitarian in his outlook. Instead, he reached towards features of human nature that were independent of any particular social context as part of a social critique. Likewise, even while Bradley argues that ethical life consists partly in fulfilling one's "stations and its duties," he can recognize that it is only the stations and duties of a *good* society that we should honor. Here, the good society is one that is justified by appeal to values that are independent of that society. For Rousseau, that was human nature. For Hegel, it was human freedom. In this way, the quotation that Bradley used to support his view comes closer to that which I argue for. I merely emphasize that we need a way of determining what counts as a "good" institution, and that is done by appeal to practice-independent values.

From this perspective, we can agree with Hegelians that an account of ethics that is fully reliant on a formal conception of the self would be inadequate for ethical life. We can recognize that much of the substance of our values, virtues, relationships, self-conception and obligations come from the particularities of our social context. Yet, this recognition does not lead us to think that there is no practice-independent ethical values, instead those practice-independent values are merely insufficient. Hegel was right to suppose that a practice-independent perspective would be insufficient but a practice-independent perspective is still necessary for a full grounding of ethical life. In particular, practice-independent principles are appropriate for evaluating our social structure, which grounds the particularities of our form of ethical life.

It is with this view in mind that we can see how a concern with the basic structure of society can respect both the practice-dependent and practice-independent aspects of ethical life. First, it respects the practice-dependent parts of ethical life by recognizing the profound and pervasive influence of the basic structure. We recognize that our values, virtues, self-conception,

relationships and obligations change. Second, it respects the practice-independent parts of ethical life by both holding the basic structure up to appraisal by practice-independent values and by recognizing that not all of our values, virtues, self-conception, relationships and obligations are practice-dependent.

It is in this way that a morally justified basic structure acts as a mooring for ethical life. In living with others, our particular form of life will be influenced by the contingencies of our culture and history. Like a boat atop the water, we will be moved in one direction or the other by the winds and tides. A form of ethical life that is evaluated only by its local and practice-dependent values is adrift, but a society with a justified basic structure is bound to solid ground. We will still move with the winds and tides of culture and history, but our drift will have limits. Ethical life will always be sensitive to the particular practices we live within, but living within a justified basic structure keeps us tethered to the solid ground that our practice-independent values provide.

#### **4.4 What is Still to come**

In the remaining two chapters, I want to address two potential criticisms of my argument. I have chosen to address these two objections specifically because each draws on deeper convictions that might lead to a philosophical impasse. By discussing these objections, I hope to bring these deeper convictions to the surface and explicitly address them. The objection of Chapter 5 appeals foundational commitments regarding the role of moral principles, and the objection of Chapter 6 appeals to convictions about justice as an ideal.

As I argued in 4.1, it is no problem if a moral theory rejects limited conventionalism. While there will then be a conflict between that moral theory and my conclusions, we then need to settle whether that moral theory or one that accepts limited conventionalism is the best moral theory. What is a problem is an argument that shows a fundamental problem with limited

conventionalism. In Chapter 4, I introduce an argument that tries to show this. This argument seeks to show that all justifications must appeal directly to first principles that are fully general across moral subjects. I call such a view a commitment to “generalism.” If generalism is right, then limited conventionalism is wrong. Limited conventionalism requires that some justifications appeal to an institutional context and thus *indirectly* to first principles. Insofar as generalism supposes that all valid justifications appeal *directly* to first principles, those who are committed to limited conventionalism are mistaken. Accordingly, I argue against a commitment to generalism in Chapter 5.

From the introduction, I have contrasted my argument for a focus on the basic structure with an argument that appeals to a particular conception of justice. One might try to show the identity, moral indispensability, and moral distinctiveness of the basic structure by arguing that justice is uniquely related to the basic structure. Such an argument uses the indispensability and distinctiveness of justice to ground the indispensability and distinctiveness of the basic structure. I did not argue against this approach except to suggest that we are unlikely to settle our disagreement by appeal to a conception of justice alone. We need to argue to--and not from--a conception of justice.

By contrast, the objections that I am concerned with in Chapter 6 *start* from a particular conception of justice. First, one might claim that my approach necessarily misrepresents the nature of justice. Insofar as we take the principles that apply to the basic structure as principles of justice, we then represent justice as consisting of that principle. If the demands of justice are wider than this, we misrepresent justice by taking its total demands to be those that are specific to the basic structure. Second, one might claim that we can only determine how the basic structure should be if we first determine what justice requires. Accordingly, this objection supposes that I have confused the order of evaluation. In Chapter 6, I will respond to these two objections.



**Excursus: Rawls, Hegel and the basic structure as subject**

As a final note, I want to better support the argument of §4.3.2 through an interpretation of Rawls's own reason for taking the basic structure as subject. There is good reason to suppose that Rawls saw his focus on the basic structure as providing a response to Hegel's criticism of liberalism much as I suggest such a focus can reconcile the local and universalizing impulses in moral theory. In discussing Hegel in his *Lectures on the History of Moral Philosophy*, Rawls writes,

A second criticism of liberalism is that it fails to see, what Hegel certainly saw, the deep social rootedness of people within an established framework of their political and social institutions. In this we do learn from him, as it is one of his great contributions. But I don't think that a liberalism of freedom is at fault here. A Theory of Justice follows Hegel in this respect when it takes the basic structure of society as the first subject of justice. People start as rooted in society and the first principles of justice they select are to apply to the basic structure.

In this passage, Rawls recognizes that Hegel is correct to focus on the social-rootedness of persons, and argues that his own theory does this as well. Specifically, it does so by developing principles for the basic structure of society.

What is clear from this passage is *that* Rawls thinks treating the basic structure as subject properly recognizes the social rootedness of persons, but what is less clear is *why* he thinks this. His additional remarks in the lecture do not help, but he does spend more time on this issue in an unpublished lecture titled, "The Contingencies of Social Dependence."<sup>23</sup> In a revealing passage, Rawls starts with the fact of social rootedness. He argues that our conception of ourselves, our aims, our relationships and our values are all influenced by our social context. Following this, Rawls concedes the typical communitarian point that these aspects of our personality are not chosen, but he then explains why this does not undermine liberalism. For

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<sup>23</sup> Papers of John Rawls; Harvard Archives, HUM 48, Box 28, Folder 9

Rawls, our freedom is a capacity to survey and revise our ends, which does not require radical self-determination. He goes on to argue that--given the fact of social rootedness--any adequate conception of social justice must establish the social conditions within which that conception of justice is acceptable to citizens. It is for this reason, he argues, that we should take the basic structure as the first subject. In advocating principles for the basic structure, we recognize the importance that our social context plays in shaping our character and self-conception. Insofar as a conception of justice is feasible only when the basic structure supports a social milieu in which persons accept that conception, we ought be primarily concerned with developing principles for the basic structure to support that social milieu.<sup>24</sup>

What Rawls does not make explicit--but follows from this argument--is that the fact of social rootedness makes it *appropriate* to use the abstract (Kantian) conception of the person to develop principles for the basic structure. Yes, the Kantian conception of the person is abstract and does not represent determinate individuals in all their particularity. However, given that the contingencies of the basic structure profoundly effect the particularity of persons, it would be inappropriate to determine how the basic structure ought to be on the basis of the particular interests and values of persons within a determinate social context. As Rawls writes in 1977, to allow the determinate interests of individuals to effect the principles of justice would be “to allow the disparate and deep contingent effects of the social system to influence the principles adopted.”<sup>25</sup> In order to develop principles that are free of an ideological justification, their determination ought reach beyond the particularities of the social structure they are to be applied within. For this to occur, we must represent persons in the original position abstractly.

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<sup>24</sup> From this point, Rawls also elaborates a second point that the particularities of a basic structure “limits citizen’s ambitions and hopes.” Given the opportunities afforded to those in our particular social position, we are likely to choose to develop certain talents or pursue certain paths. In this way, the basic structure affects our lives in ways beyond setting up our conception of the good; it also sets the possibility of our achievements. In this way, the contingencies of the basic structure are influential in two deep ways. All this is on pages 12-14 of the manuscript.

<sup>25</sup> Rawls, John. “The Basic Structure as Subject” *American Philosophical Quarterly*, Vol. 14, No. 2 (April 1977), 161.

Insofar as we recognize persons as free and equal persons with the two moral powers, then we model them only as free and equal persons with the two moral powers. While the moral construction does not recognize persons as determinate individuals, the profound and pervasive effects of the basic structure so affect the content of our identities that it would be inappropriate to use a less abstract conception of the self.

The final step of the analysis is to point out that what is inappropriate for determining principles for the basic structure is *not* inappropriate for determining principles for other subjects. The fact that Rawls appeals to a Kantian conception of the person for assessing the basic structure does not commit him to appealing to this abstract conception for all ethical questions. In determining principles that apply within a particular social structure, it will be more appropriate to appeal to the particularities within that social structure. The principles for interpersonal interaction, for example, will need to be sensitive to the particular ideals, virtues, relationships and conventional obligations in that society. In specifying his “four-stage sequence” for applying the principles of justice, Rawls makes this clear. While we start from principles in an original position under a thick veil of ignorance, the following stages include more and more information about the particular society that the principles apply to. In this way, the particularity of a social context bears more and more importance as the stages of the sequence proceed.

This all gives Rawls the tools to address the Hegelian criticism because he can cede the Hegelian’s point without effecting his own theory. It might very well be the case that the Kantian conception of the person would not be adequate for addressing *all* the concerns of ethical life. In our personal life, we would need a moral theory that respects our particularity; it needs recognize our social place and individual character. Since Rawls does not claim that his version of Kantian Constructivism appeals to the Kantian conception of the person for addressing all these concerns, he need not show that the Kantian conception of the person is

fully sufficient. For Rawls, the principles we ought follow are determined by a construction that treats persons as free and equal. If we integrate his comments from “The Contingencies of Social Dependence,” we see that the construction treats persons as free, equal and *determinate*.<sup>26</sup> We are not noumenal beings but social creatures within a particular social world. In developing principles for the basic structure, what it means to develop principles that express our nature as free, equal and determinate persons is that the construction abstract from our particularities. In other cases, principles can only express our nature as free, equal and determinate persons by representing us in our particularity. When our particular ideals, virtues, relationships and obligations bear on the choice, then ignoring our particularity would not treat us as determinate persons.

If this is all correct, then we ought treat the principles that apply to the basic structure of society differently from other moral subjects. The principles that apply to the basic structure ought not be specific to the particularities within a social context, whereas many other principles ought be. The difference between these principles is not explained by a difference between individual and institutional principles, but between principles that influence the

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<sup>26</sup> This is explicit in notes that Rawls wrote in “The Contingencies of Social Dependence,” (an earlier version located in Papers of John Rawls; Harvard Archives, HUM 48, Box 26, Folder 1). There, Rawls handwrites a number of themes of the article. For the second such theme, he writes:

“2. The attempt to adjust a K[ant]ian view so that it takes account of the fact that people originate at some definite social place in their society and with certain endowments. K[ant] is moved by the idea that people must each make themselves whatever they are from the n[oumenal] P[oint of] V[iew], whether for good or evil, and themselves effect what they are or become (cf. General Observation to Religion Book I). This is one (but only one) way to see perhaps why he thinks of us as noumenal beings etc. But any such view seems likely to Fall into Fantasy. So what to do? Hence adopt notion of the P[ersons in the ]O[riginal ]P[osition]’s as representing determinate persons and trying to work this notion into a K[ant]ian view while at the same time avoid K[ant]’s difficulties. cf. contra Williams: “Persons, Character and Morality” in ed. A. Rorty: Identities of Persons (1976)

While the Williams article that Rawls mentions does not identify itself as arguing a Hegelian point, it fits well with the empty formalism objection. Moreover, Rawls seems content to suppose that Hegel’s internal criticism of Kant is on the mark insofar as he supposes the the FUL requires that Rawls introduce the notion of “true human needs” into the Kantian theory in order for the procedure to result in appropriate content. See *Lectures in the History of Moral Philosophy*, ed. Barbara Herman (Harvard University Press, Cambridge, MA. 2000), 173-176.

particularities of a social context and principles that apply within those particularities. As Rawls writes in *Theory of Justice*,

“That principles for institutions are chosen first shows the social nature of the virtue of justice, its intimate connection with social practices so often noted by idealists. When Bradley says that the individual is a bare abstraction, he can be interpreted to say, without too much distortion, that a persons’ obligations and duties presuppose a moral conception of institutions and therefore that the content of just institutions must be defined before the requirements for individuals can be set out.”

In this passage, we see Rawls emphasizing the relationship between the primacy of the basic structure, the Hegelian criticism of a Kantian conception of the person, and the way in which social institutions shape our obligations and duties. Rawls recognizes the “social nature of the virtue of justice” by first developing principles that apply to the basic structure.

Now, one need not be a Rawlsian to appreciate the distinction that Rawls is making between principles that apply to the basic structure and principles that apply to other subjects. This is a distinction that any moral theory can recognize the importance of, and it is the distinction that I think is important to take away from Rawls’s argument. Any moral theory has reason to recognize the difference between moral judgments within the structure of ethical life and judgments of the structure of ethical life, so any moral theory has reason to treat the basic structure differently. We can hardly imagine making personal moral decisions without thinking about our social context. The particular values, virtues, relations and obligations that characterize our social context as central for understanding morality and ethics. In distinguishing the basic structure from other moral subjects, we respect this aspect of morality. The basic structure of society has profound and pervasive effects on the structure of ethical life, so it ought be treated differently than those moral subjects that are relevant within ethical life. Both within and without Rawlsian theory, this gives us reason to distinguish principles that

apply to the basic structure from principles that apply to other subjects--and this justification relies neither on creating space for self interest nor a pluralist division of moral labor.

## Chapter 5

# Against Generalism

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The fallacy in these versions of the same idea is perhaps the most pervasive of all fallacies in philosophy. So common is it that one questions whether it might not be called *the* philosophical fallacy. It consists in the supposition that whatever is found true under certain circumstances may forthwith be asserted universally or without limits and conditions. Because a thirsty man gets satisfaction in drinking water, bliss consists in being drowned”

-John Dewey, *Human Nature and Social Action*, p. 175

As mentioned in the last chapter, my argument relies on a commitment to limited conventionalism, and not all moral theories will accept this commitment. So, not all moral theories will accept my arguments. That, in itself, is not problem. What would be a problem is an argument that showed that limited conventionalism must be false. If someone could disprove limited conventionalism, then much of my argument would be disproved along with it.

In this chapter, I want to focus on a possible argument that claims to disprove limited conventionalism. The argument seeks to show that a particular perspective towards justification must be correct, and then to show that limited conventionalism conflicts with that perspective towards justification. I identify this perspective as a commitment to “generalism.” According to generalism, any adequate justification appeals directly to first principles that are applied generally across all moral problems. The arguments that I am concerned with in this chapter seek to show that generalism must be true. They seek to show that any justification must appeal directly to fully general first principles.

Generalism conflicts with limited conventionalism because it leaves no room for institutional context. Limited conventionalism claims that we should often look towards the particular practices and systems we act within to justify a particular judgement. It is because our practices affect the content of ethical life that we need to differentiate the principles that apply within a moral context from those that do not. First principles might aid our understanding of

ethical life, they might direct our reforms of the social world, and they might settle some particular conflicts, but they do not settle all moral and ethical conflicts on their own. In this way, limited conventionalism and generalism are opposed. If an argument shows that we should be committed to generalism, then we should not be committed to limited conventionalism.

The name, “generalism” refers to a family of foundationalist moral theories, but it does not refer to all foundationalist theories. Act-utilitarianism is one view that is committed to generalism; it explains legitimate justifications as appealing only and directly to the fundamental principle that we should promote happiness. There are also non-consequentialist versions of generalism. Such theories explain all legitimate justifications as appealing to fundamental values like autonomy, equality, and happiness.<sup>1</sup> Not all versions of foundationalism, however, are committed to generalism. As mentioned in §4.2.1, a moral theory might recognize the Principle of Fair Play as a fundamental principle and thereby recognize legitimate justifications as those that appeal to the particular rules of social institutions (and only indirectly appeal to the foundational Principle of Fair Play). Or, one might understand respect for autonomy as requiring that we respect the particularities of persons as determined by their social environment. We might even recognize a consequentialist form of conventionalism if it meets the right conditions. Any of these views might be foundationalist but they would not be committed to generalism.

In being concerned with arguments for generalism, I am specifically concerned with those who are committed to the view that “institutional context cannot matter for individual principles because all judgments are justified directly by first principles.” In addressing generalism, I both address the consequentialist and non-consequentialists versions. I mean to combat the view that all legitimate justifications must appeal directly to fully general principles--whatever form those principles take.

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<sup>1</sup> Oftentimes, G.A. Cohen seems to adopt such a pluralist foundationalism, but it is not clear whether he would allow for indirect appeals to foundational values like those required by limited conventionalism.



My argument will proceed in four sections. In the first, I want to emphasize the significance of a commitment to generalism by showing how it motivates Liam Murphy's objections to Rawlsian theory. I will first reconstruct Murphy's argument from "Institutions and the Demands of Justice" to show how it ultimately relies on a commitment to generalism.<sup>2</sup> With this set-up complete, §4.2 is concerned with a historically significant argument used by J.S. Mill and Henry Sidgwick in favor of there being one fully general principle that can directly settle all moral conflicts. §4.3 then introduces three other arguments, each of which seeks to show that there must be a plurality of fully general first principles. I argue that each of these four arguments fails to show that legitimate justifications must appeal directly to first principles. With this defensive portion of my argument complete, I will transition to offense in §4.4. There, I argue that the particularities of the social world are centrally important to who we are and our relationships with others. Generalism fails as a moral theory because it fails to recognize the moral significance of our social particularity.

Overall, this chapter should show why there is no reason to be committed to generalism, and it will thereby show why any argument that assumes generalism is question-begging. While few recognize it explicitly, a commitment to generalism is predominant in ethical theory. In many ways, it mimics the model of physics; we seek to find general ethical laws that justify the whole of our diverse ethical convictions. Given the aims of ethical theory, it makes sense to look for such general principles because they provide a clear way to simplify our ethical understanding. Given our sociology, this model makes sense because of the close ties between philosophy, logic and science. Yet, the goal of this chapter is to show why we should not be committed to generalism. We do not need to treat ethics like physics.

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<sup>2</sup> *Philosophy and Public Affairs*, Vol. 27, Iss. 4, 1998.

## **5.1 Liam Murphy and Generalism**

In “Institutions and the Demands of Justice,” Liam Murphy criticizes the Rawlsian method of political philosophy for separating individual and institutional principles.<sup>3</sup> Murphy’s concern is not that Rawlsians advocate guiding principles that apply to institutions and not individual conduct but that they advocate *fundamental* principles that apply to institutions and not to individual conduct. He claims that his view,

“is of course compatible with the existence of specifically political principles of a non-fundamental kind, such as the principle that taxation should be levied according to taxpayers’ “ability to pay.” What [I reject] is any defense of such a principle by appeal to a fundamental one that does not also apply directly to people’s conduct. It should therefore be clear that monism does not have the absurd implication that all morally defensible legal principles are ipso facto valid moral principles.”<sup>4</sup>

Murphy does not explain exactly what a “fundamental” principle is, but it seems that he means a principle that has a foundational role in our moral, political and ethical justifications. While it is an interpretive jump, I will assume that a “fundamental principle” is a principle that is not justified by any further principles. In this way, Murphy argues that our foundational principles--those from which all justifications proceed--must apply generally across both institutions and individuals. For him “any plausible fundamental normative principles for the evaluation of legal and other institutions” must also apply to “the realm of personal conduct.”<sup>5</sup>

For ease of exposition Murphy distinguishes two views. “Dualism” is the belief that “the two practical problems of institutional design and personal conduct require, at the fundamental

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<sup>3</sup> Murphy, “Institutions and the Demands of Justice,” 251.

<sup>4</sup> Murphy, “Institutions and the Demands of Justice,” 254. While I will take Murphy at his word that his view does not have this “absurd implication,” he does not explain *why* it does not. I would be curious about how such an argument can be made that does not imply a difference between individual and institutional principles at the fundamental level. Are they different principles only as guiding principles?

<sup>5</sup> More specifically, he identifies monism as the rejection “that there could be a plausible fundamental normative principle for the evaluation of legal and other institutions that does not apply in the realm of personal conduct.” While this is not the same as the commitment I articulate above, I believe that Murphy is committed to such a view of monism.

level, two different kinds of practical principles.”<sup>6</sup> Alternatively, “Monism” is defined as the denial of dualism. Using these terms, he wants to argue against dualism and thereby on behalf of monism.<sup>7</sup> However, there are two problems with this argument, which I address in §4.1.1 and §4.1.2 respectively. First, Murphy implicitly uses a foundationalist model of justification that Rawlsians should reject. Second, Murphy wrongly imputes a position to Rawlsians about what our individual obligations are.

### 5.1.1. Fundamental principles?

One of the deeper challenges facing Murphy’s argument is that he appeals only to an intuitive sense of what “fundamental” normative principles are. The ways in which he uses the phrase seem to suggest that fundamental principles are of foremost moral importance and that they have some methodological primacy. While one needs to make an interpretive leap to understand Murphy here, it seems that fundamental principles are moral principles that are not justified by any other--more fundamental--principles.

The problem with this view is that it cannot be squared with the Rawlsian view of justification that Murphy argues against. Rawls does not justify principles by appealing to more fundamental principles, instead he appeals to a broader sense of reflective equilibrium. Whereas fundamental principles make sense within a foundationalist model of justification, it is not clear what role they play in a more holist model. One might think that the two principles of justice are fundamental principles that are applied to determine what institutions we ought to have, yet

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<sup>6</sup> *ibid.*, 254.

<sup>7</sup> These names can be misleading for two reasons, so it important to first clear up what he means. First, Murphy does not mean to associate his monism with the more typical use of the phrase that is committed to only one ultimate value or principle. For Murphy’s version of “monism,” there might be many different principles or values so long as they each apply to both institutional design and individual conduct. In this way, pluralism is consistent with Murphy’s monism, though a pluralism of scope-restricted values is not. Second, there is nothing about “dualism” that commits it to *only* two practical problems with different kinds of practical principles. In this way, dualism might distinguish fundamental practical principles in more ways than merely individual conduct and institutional design.

Rawls does not even accept that. Instead, the two principles are applied through a “four-stage sequence” in which the principles that are developed in the original position are then interpreted by representative citizens who know more about their society than do those behind a veil of ignorance.<sup>8</sup> Subsequently, the particular laws that we should have are determined by representative citizens that interpret both the two principles of justice and the constitution developed. There is no strait-forward application of more fundamental principles in this broader story.

Given this complication, it is unclear exactly how one should interpret Murphy’s arguments. If we take Murphy’s definition of dualism on its face, Rawls is not a dualist. Murphy defines dualism as the view that “the two practical problems of institutional design and personal conduct require, at the fundamental level, two different kinds of practical principles.” Yet, since Rawls does not think that these problems require fundamental principles at all, he would not be a dualist.<sup>9</sup> Of course, it is clear that Murphy is trying to argue against Rawls, so this might seem like a nitpicky issue. However, it is unclear how Murphy could make his point *at all* without appealing to the idea of “fundamental principles.” If Murphy dropped the phrase “fundamental” from the definition, then dualism would immediately be recognized as innocuous. After all, Murphy does explicitly recognize “the existence of specifically political principles of a nonfundamental kind.”<sup>10</sup>

### 5.1.2. Non-Ideal Circumstances

Suppose that Murphy can overcome this difficulty, and he can articulate a view of fundamental principles that is consistent with Rawls’s project and does not rely on a foundationalist model of justification. Nonetheless, his argument against the Rawlsian method is still problematic. He seeks to show that any fundamental institutional principle must also apply to individual conduct. This

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<sup>8</sup> Rawls, *Theory of Justice*, §31.

<sup>9</sup> Taking Murphy strictly, he defines monism as the negation of dualism, and Rawls would then be a monist.

<sup>10</sup> Murphy, “Institutions and the Demands of Justice,” 254.

argument relies on a supposed problem that Rawlsians face in dealing with injustice in our actual world. As Murphy writes,

“It seems to me that any political theory that accepts Rawls's bifurcation of the normative realm into one set of principles for institutions and another for people will yield an implausible account of what people should do in non-ideal circumstances. Thus there is a general reason to reject dualism.”<sup>11</sup>

The problem with Murphy's argument, however, is that a mere commitment to dualism does not itself lead to an implausible account for non-ideal circumstances. In order to claim that dualism leads to an implausible account, Murphy wrongly attributes an additional commitment to dualists. This additional commitment does not follow from dualism alone, so Murphy's argument relies on a non-sequitur. To see why, we can formalize Murphy's argument into three simple steps.

- 1) A moral theory should not have implausible implications for non-ideal theory
- 2) Dualism has implausible implications for non-ideal theory
- 3) Thus, we ought to reject dualism

In this argument, I completely agree with (1) but disagree with (2), so I reject Murphy's conclusion, (3). It is surely true that some versions of Dualism might have implausible implications, but it is not the case that a commitment to Dualism itself has such implausible implications.

The support that Murphy gives for (2) is that dualism would mandate that individuals in non-ideal circumstances can only promote justice by revising institutions rather than addressing social problems directly. This, he argues, leads to implausible implications;

“The case to focus on is of course a nonideal situation where it is not true that the best way for people to alleviate inequality or promote well-being is to promote just institutions. For here monism tells people to do what they can to bring about an improvement directly. If injustice is about inequality, people should do what they can to reduce it. If they can have a great impact on inequality by aiming directly at

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<sup>11</sup> Murphy, “Institutions and the Demands of Justice,” 279.

its reduction than they would if they directed their energies to institutional reform, this is what they should do. Dualism tells a different story: even if the individual could do more to reduce inequality, alleviate suffering, or whatever, by direct action, this is not what justice requires her to do. Justice requires her to promote just institutions even if she is sure that the aim of the just institutions she is promoting would be better served if she herself pursued that aim directly. How could this be right?”<sup>12</sup>

To again formalize Murphy’s argument, we can identify the following steps;

- a) Dualism requires persons to advance justice by promoting just institutions
- b) Just institutions are justified (at least in part) by accomplishing certain aims
- c) In non-ideal theory, those certain aims will sometimes be better advanced by direct action than through institutions
- d) Thus, in non-ideal theory, dualism would be self-frustrating
- e) A theory that is self-frustrating is implausible
- f) Thus, dualism has implausible implications for non-ideal theory.

The most important problem with this argument is that (a) is either false or does not lead to the conclusion. To see what I mean, there are two ways of reading (a). First, we might read it as:

- (a1) Dualism *strictly requires* persons to advance justice *only* by promoting just institutions

This reading would imply that there is no other appropriate way by which to advance justice than by promoting just institutions. Second, we might read (a) as:

- (a2) Dualism *loosely requires* persons to advance justice by promoting just institutions along with other means ,

In this case, there are other permissible ways of advancing justice beyond promoting just institutions, though promoting just institutions is one permissible way. While (a1) would require that persons advance justice only by promoting just institutions, (a2) would not. Instead (a2) makes the promotion of just institutions a part of the requirement of justice.

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<sup>12</sup> *ibid.*, 280-281.

Now, while Murphy seems to have (a1) in mind, it is false. A person might very well be a dualist and that person might be committed to only advancing justice through institutions, but that does not mean that a commitment to dualism requires that justice can be advanced only by institutional means. It is false because it supposes that a commitment to dualism implies some specific principle for individuals. Yet, the commitment to dualism is silent on such issues. Dualism itself is merely the distinction between principles for institutions and principles for individuals, it does not say anything about the content of the principles for individuals. Since (a) is a principle of individual conduct, whether or not promoting just institutions is strictly required is determined by the principles of individual conduct and *not* by a commitment to Dualism alone. Thus, (a1) is false.

On the other hand, (a2) might be true just in case dualism would be implausible without it.<sup>13</sup> Yet, even if one must accept (a2), it does not warrant (d) because it might allow people to advance justice by also promoting certain aims directly. Since Dualism allows us to distinguish principles for individual conduct from principles for institutions, it might be that individuals should not promote just institutions whenever they could promote other more worthy moral ends. Thus, the argument to show that a commitment to dualism leads to implausible implications does not succeed because (a1) is false and the conclusion would not follow from (a2). Since Murphy cannot show that dualism leads to implausible implications, he cannot show that we ought to reject dualism. Murphy mistakes a commitment to dualism with a commitment

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<sup>13</sup> Earlier in the article, Murphy gives an argument that might be interpreted as an argument for (a1), but it only warrants (a2) if it succeeds at all. Murphy argues that it is a necessary commitment of dualism that individuals have responsibility to advance just institutions. He writes,

“Justice may be a virtue of institutions, and we may thus be able to say that particular institutions are in themselves just or unjust, but people must be subject to some kind of requirement to support those institutions, for they cannot become virtuous and remain so all on their accord.” (Murphy, 270).

Yet, even if people must be subject to “some kind of requirement to support these institutions” this does not mean that they are subject to the strong requirement of (a1), which requires that people promote just institutions even to the exclusion of other morally worthy goals. Even if persons have an obligation to promote just institutions--as Rawls does require--this says nothing about them having to do so even when they might rather promote other morally worthy ends. Thus, Murphy needs (a1) for his argument to succeed, but only can possibly get (a2).

about what individuals ought to do in non-ideal theory. Yet, since dualism involves no commitment to the content of individual duties in ideal or non-ideal theory, his arguments fail.

Overall, Murphy's argument fails because he confuses a commitment to dualism with a substantive view about the content of individual obligations. He supposes that what distinguishes principles for institutions from principles for individuals implies something about what our individual obligations are. There is no doubt that someone who is committed to dualism might have implausible commitments about individual duties, but a commitment to dualism does not entail such commitments.

### 5.1.3 Murphy's Defensive Arguments

Perhaps the most impressive aspect of Murphy's essay is the arguments he uses against the various theorists who, up to that point, had argued on behalf of separating individual principles from institutional principles. Against Nagel's division of moral labor, he claims that such a perspective might aid us in building institutions that best promote justice, but it does not give us a reason to distinguish principles for institutions from principles for individuals at any fundamental level.<sup>14</sup> Against Thomas Pogge, he claims that the idea of causing harm to those involved in our institutions is insufficient for distinguishing our concern with institutions.<sup>15</sup> Against Dworkin, he argues that a division between the claims on a political community and the claims on individuals is too stark.<sup>16</sup> Even if Murphy errs in the ways expressed in §4.1.1 and §4.1.2, these arguments against Nagel, Pogge, and Dworkin might seem to maintain their force.

Yet, Murphy's arguments themselves suffer from two mistakes that limit their effect. First, the argument against Dworkin supposes that dualism implies views about how individuals should act, which §4.1.2 has shown would not be implied by dualism alone. Second, his arguments

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<sup>14</sup> Murphy, "Institutions and the Demands of Justice," 263-264

<sup>15</sup> *ibid.*, 274-275

<sup>16</sup> *ibid.*, 277-278.



against Nagel and Pogge rely merely on shifting the burden of proof. He claims that these views are not sufficient to justify a fundamental distinction between institutional and individual principles. Yet, given the failures of his own argument outlined above, he does not offer any adequate argument to show that all fundamental principles must apply to both institutions and individuals. It is only if we suppose that Murphy has the default view that the claim that any argument is insufficient proves the conclusion of that argument wrong. Without an argument for his default position, Murphy does not give us any reason to deny that institutional principles and individual principles are morally distinct.

The arguments of the previous chapters remain untouched by Murphy's arguments. My claim is that the principles that apply to the basic structure should be morally distinct because the principles that apply to it should be insensitive to moral context, whereas principles for individual action and many other institutions should be sensitive. This claim does not rely on any claims about differences in demands on moral agents, as (Murphy's reconstruction of) Nagel's argument does. It does not rely on any views about the unique ways in which we cause harm to persons through institutions, as Pogge's argument does. Likewise, it does not rely on views about the unique moral relationship between members of a political community, as Dworkin's does. In this way, the arguments I give are resistant to all of Murphy's defensive arguments.

#### 5.1.4 The Underlying Motivation

There remains one larger point behind Murphy's argument even after we recognize the problematic presupposition involved in appealing to fundamental principles, after we show that Murphy's argument against dualism fails, and even after we see the problems in his arguments against Nagel, Pogge, and Dworkin. Murphy also makes an intuitive claim that motivated his argument against separating individual and institutional principles. Put simply, whatever we are concerned about with institutions, we should also be concerned about for individual action. For

instance, the fact that equality seems relevant for both assessing institutions and individual conduct seems to give us reason to treat both institutions and individual conduct as applications of a more general principle that expresses the importance of equality. Whatever the faults of his explicit argument, this core motivation might still stand. Does the fact that we care about some of the same things for institutions and for individual conduct rightly dissolve the distinction between individual principles and institutional principles?

This motivating point only reveals Murphy's implicit commitment to, what I have called, generalism. For his arguments to succeed, Murphy needs it to be the case that the concerns we have about our institutions are the same as those about our individual action. This would only be a challenge to my argument if fully general first principles directly settled all moral and ethical conflicts. In appealing to "fundamental principles," Murphy is implicitly referring to a generalist model of morality in which conflicts are settled by first principles. Murphy's arguments would only bear out if he had a view like that of the act-utilitarians wherein our first principles directly applied to all moral concerns.

Without an argument for generalism, Murphy's claims amount to mere burden-shifting. He means to show that previous arguments for the separation between institutional and individual principles fail. It is no surprise that those who are committed to a form of generalism will not find those previous arguments adequate. Murphy gives no more reason to accept generalism than to reject generalism. In this chapter, I mean to highlight the importance of this commitment to generalism and to directly address it.

Given the predominance of a commitment to generalism, it is no surprise that many have seen Murphy's argument as important, but I mean to undercut the convictions that ground generalism. To do so, I now want to look at the major arguments in favor of Generalism and then show why each is inadequate. Doing this will show why an argument from generalism against those who do not accept it can only be question-begging.

## **5.2. Sidgwick's argument for Generalism**

Through this chapter, I aim to combat that view that fully general first principles are the ground for all legitimate justifications. By blocking this view, I defend limited conventionalism and thereby defend the primacy of the the basic structure as a distinct subject. In §4.2, I will be concerned specifically with an argument that seeks to show that there must be *one* fully general first principle that settles all moral conflict.

This argument is most famous from Chapter 5 of J.S. Mill's *Utilitarianism*<sup>17</sup> but is most developed in Henry Sidgwick's *Methods of Ethics*.<sup>18</sup> There, Sidgwick argued for utilitarianism from the intuitive idea that any moral conflict can be definitively settled. He argued that this intuition could only be correct if there were a single overarching moral principle capable of settling all conflicts. How else could any moral conflict be definitively decidable if there were not an overarching principle that had authority over any conflict? If there were such a principle, then its requirements would always determine how one ought to act in all instances. This reasoning establishes an agenda for moral philosophy that many still accept: to identify the single fundamental principle that settles all possible conflicts. For both Sidgwick and many today, the argument for utilitarianism is that promoting the greatest happiness seems to be the most appropriate principle that could play this role. Even those who deny utilitarianism, however, might still be tempted to identify such a fundamental principle. One might, for example, advocate the Kantian principle to preserve and promote autonomy in all instances.<sup>19</sup>

To be more precise, the argument goes as follows. If all moral conflicts are able to be definitively settled, then there must be one choice that it is right to make for any two mutually

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<sup>17</sup> Mill, J.S. *Utilitarianism*, 2nd Edition (Indianapolis, IN; Hackett Publishing Company), 55-59. There, Mill argues that the Principle of Utility is the only sensible way to order our divergent judgements about the justice of actions.

<sup>18</sup> Sidgwick, Henry. *Methods of Ethics* (Indianapolis; IN; Hackett Publishing Company), 418-422.

<sup>19</sup> While Sidgwick argues against such a Kantian view as the fundamental principles, contemporary Kantians can offer responses that overcome his arguments.

exclusive choices. The next step is to suppose that for one choice to be right, there must be some *principle* that can articulate what it is right to choose explicitly. Now, suppose that principle X determines what is right in the choice between  $\alpha$  and  $\beta$ , and principle Y determines what is ethical between  $\gamma$  and  $\delta$ . Now, imagine that there is some possible conflict where principle X justifies doing  $\epsilon$  while principle Y justifies doing  $\theta$ , where  $\epsilon$  and  $\theta$  are mutually exclusive choices. For our choice amongst  $\epsilon$  and  $\theta$  to be right, we must now appeal to some principle Z to ethically choose between what is warranted by X and what is warranted by Y. This same process continues as there might now be conflicts between principles Z and some principle W, and it continues until there is a single fully general principle. Once we determine that single fully general principle, we can appeal to that principle to definitively settle all moral conflicts. If that principle settles all conflicts, then we need only ever appeal to that principle to determine what to do.

### 5.2.1 Response from irreconcilable pluralism

One way to respond to Sidgwick would be to claim that not all moral conflicts can be definitively settled. One might suppose that we live amongst competing values and that we can do no better than to strike a balance between them in our judgments. Such a view might recognize that the considerations relevant within our particular moral contexts are amongst these competing values. With this view, there is no reason to suppose that there must be some final principle that settles all moral conflicts. We might develop principles that balance values relevant for our institutions and we might develop principles that balance values relevant for individual actions, but we do not need to suppose that there is anything beyond our competing values that unifies them.

I take it that whether one believes in irresolvable value conflicts is one of the major dividing lines between contemporary ethical theorists. For some, the project of ethics is to determine the structure of ethics that resolves these conflicts, and for others the project is to start from the fact of irresolvable conflict. For figures such as Isaiah Berlin, Michael Walzer and

Bernard Williams, to start an argument from the assumption that there must always be a rational way to resolve a moral conflict is to construct a bad argument. As Williams writes,

“It is my view, as it is Berlin’s, that value-conflict is not necessarily pathological at all, but something necessarily involved in human values, and to be taken as central by an adequate understanding of them. I also think, though Berlin may not, that where conflict needs to be overcome, this ‘need’ is not of a purely logical character, *nor a requirement of pure rationality*, but rather a kind of social or personal need, the pressure of which will be felt in some historical circumstances rather than others.”<sup>20</sup>

Here, Williams emphasizes value conflict is an inherent part of our lives, one that should not be explained away or avoided. Importantly, the fact that not all conflicts in value are rationally reconcilable does not mean that no conflicts of value are rationally reconcilable.<sup>21</sup> Reflection, understanding and revision of our values might go some way towards resolving these conflicts, and ethical philosophy might have an important role in doing this.<sup>22</sup> Yet, one makes a mistake if one assumes that all conflicts *must* be resolvable. For those who follow a perspective like Williams, the argument from the demands of practical reason to generalism does not even get off the ground.

### 5.2.2 Response from Constructivism

While this kind of intuitionism is one plausible response to Sidgwick, those on the other side of the dividing line than Williams will find it inadequate. If one believes that our moral conflicts can be definitively settled, then we need to appeal to something beyond a balance of intuition. John Rawls recognized this, and he drew a response to Sidgwick’s arguments from a constructivist interpretation of Kant’s moral philosophy. In his lectures on Kantian Constructivism, Rawls writes,

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<sup>20</sup> *Moral Luck* (Cambridge University Press; Cambridge, UK. 1981), 72. my emphasis.

<sup>21</sup> *ibid.*, 77.

<sup>22</sup> For a view that develops this idea, see Susan Wolf “Two Level of Pluralism” in *Ethics*, Vol. 102, No. 4, 1992

“Sidgwick overlooked [the possibility of constructivism] because of a second limitation: he failed to recognize that Kant’s doctrine...is a distinctive method of ethics...Since Kant’s view is the leading historical example of a constructivist doctrine, the result once again is that constructivism finds no place in *Methods [of Ethics]*.”<sup>23</sup>

The fact that constructivism finds no place in Sidgwick’s argument is significant because the method of constructivism provides a way to definitively settle moral conflicts, and this method does not rely on a single fundamental principle. Instead, the principles that settle moral conflict are determined by an appropriate constructive procedure.<sup>24</sup> It is not a more fundamental principle that justifies our institutional and individual principles but the pedigree of their constructive procedure.

It is by appeal to a constructivist method that one can address Sidgwick’s argument and justify the possibility that principles can be distinct at a deep level. According to Sidgwick’s argument, our various principles are all justified by a substantive first principle. Once we recognize this, we see the variety of principles we might use merely as a variety of principles that guide us in satisfying the first principle. The picture is quite different according to constructivist reasoning. According to this view, our principles are justified by whether an appropriate procedure would result in those principles.<sup>25</sup> If a principle is so justified, it maintains its own authority as a principle. It’s authority is not merely that it guides us towards satisfying a more fundamental principle. After all, the procedure is constructed to result in principles that have such authority. These principles are constructed *as* fundamental principles, and we should not look past them towards anything more fundamental. After all, they are not justified as satisfying some deeper principle but from the pedigree of their procedure. In this way, a commitment to constructivism can justify a *plurality of fundamental principles*, so long as each would result from an appropriate procedure.

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<sup>23</sup> Rawls, “Kantian Constructivism in Moral Theory,” in *Collected Papers* (Cambridge, MA; Harvard University Press, 1999), 342.

<sup>24</sup> A helpful, but abstract, way of distinguishing the constructivist model of justification is by differentiating the material ground of justification from the formal grounds. An appeal to first principles appeals to them as material grounds for the later principles while constructivism uses a formal ground to justify principles.

<sup>25</sup> Of course, much argument goes into whether any particular procedure is appropriate. If it were appropriate only because it resulted in principles that could be justified from a fundamental first principle, then the argument would be problematic. However, there are various other ways in which one might argue that a constructivist procedure is appropriate.

This point might be better seen by comparing three different constructivist views. First, in Rawls's version of Kantian Constructivism, fundamental principles are justified as those that express our nature as free and equal moral persons. In determining the principles of justice, we accept the principles that persons would agree to under specified conditions because those principles respect our nature as free and equal. The principles resulting from such procedures are not merely applications of a first principle to a particular context but are themselves constructed as first principles. Second, T.M. Scanlon's contractualism warrants those principles that no one could reasonably reject. If we come to recognize that a moral principle could not be reasonably rejected, then we accept it as one of many fundamental principles. We do accept these principles as applications of a first principle or as guides for how to act in ways that no one could reasonably reject. Third, those who read Kant as a constructivist can explain our principles as those that can be willed as universal law. Only those maxims that align with these principles will be free of empirical determination, so only those actions in accordance with such principles are truly autonomous. In each of these three cases, the constructivist procedure results in a plurality of fundamental principles rather than applications of a first principle or mere guiding principles.

Once we appreciate this aspect of constructivism, we can see why Sidgwick's argument is mistaken. We can recognize that moral conflicts can be definitively settled without an appeal to a single first principle. Rather than any one fundamental value--such as the greatest happiness or maximal coextensive autonomy--constructivists recognize a plurality of principles that fit with one another and settle any moral conflict.

### 5.2.3 Responses from Conceptions of Rationality

Finally, we could recognize the possibility of other moral theories that accept neither constructivism nor that moral conflicts cannot be definitively settled. Implicit in Sidgwick's argument is a typical claim that a decision between two options can be rational only if there is a single scale on which they can be compared. Another response to Sidgwick's argument can deny that this is a condition of rational choice.

Once example of such a theory is offered by Elizabeth Anderson in *Value in Ethics and Economics*. There, Anderson argues against the view that there is a single overarching standard of value. She identifies the appeal of this view in that it can satisfy two demands of practical reason, that “reason can settle all question about what to choose” and “that reason requires the global maximization of value.”<sup>26</sup> If there is only one standard of value, then these two demands can be settled by reference to that one value; Reason settles all questions by appeal to maximizing that single value. In this way, she recognizes the appeal of a single standard of value as similar to the intuition behind Sidgwick’s argument, it allows us to settle any possible value conflict.

Anderson argues against this view by rejecting the notion that the values of states-of-affairs can be globally compared, opting for more contextual guidance in decision-making. Practical reason can still settle all questions about what to choose (as it needs to), but we do not need to suppose that it does so by reference to some global value. Instead, it only needs to settle specific questions within determinate contexts, which it can do by being responsive to relevant contextual features. In this way, Anderson gives an example of a third way in which all moral conflicts can be settled that does not appeal to constructivism. Specifically, she relies on the determinate values that are relevant within a context to settle what to do.

Similarly, Henry Richardson offers another example of how practical reason can settle value conflicts. In *Practical Reasoning about Final Ends*, he argues for a kind of reflective equilibrium that supports our principles.<sup>27</sup> When we recognize that any two principles conflict, we should revise one or both principles. We might revise them in any number of ways, but we see the conflict as reason why our principles are in need of revision. We do not search for a single

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<sup>26</sup> Anderson originally suggests that there are three demands, but admits that contemporary monists have backed away from the third and that the first two nonetheless give reason to favor monism. *Value in Ethics and Economics* (Harvard University Press; Cambridge, MA. 1995), 45.

<sup>27</sup> Richardson, *Practical Reasoning about Final Ends*, Ch. 7-8 especially.



foundational principle that resolves all conflict but instead revise our principles for coherence amongst themselves.

So, the most daunting argument against the claims of Chapter 3 is Sidgwick's view that, if all moral conflicts can be definitively settled, then there must be a first principle that is capable of settling any conflict. In response, I have first shown that many will deny Sidgwick's starting premise that all conflicts can be settled. Second, I have shown that even those who do not deny this starting premise can explain how conflicts are definitively settled without appeal to first principles. Constructivism provides a way of settling conflict by appeal to the principles that are licensed by an appropriate procedure. Also, nothing blocks more alternative conceptions of rationality like those of Anderson's and Richardson's, both of which show the problems with Sidgwick's assumption about rationality. Together, these arguments show why we do not need to accept a single fully general first principle.

### **5.3 Other Arguments for Generalism**

Even those who do not think that all moral conflicts can be definitively settled might still think that any judgement must be justified by appeal to fully general first principles. For some, this does not mean that there is a single first principle; there are many. In this section, I treat three arguments that seem to support the idea that there must be first principles from which all judgments are justified. The first argues from simplicity, the second from unity and the third from our attempts to explain our various moral judgments. In each case, I show that the arguments are inadequate to ground generalism.

#### **5.3.1 Scientific Simplicity**

First, one important advantage to broad explanations in science is that they allow us to easily understand and apply those explanations. As Quine wrote, "Simplicity also engenders good working conditions for the continued activity of the creative imagination; for, the simpler a

theory, the more easily we can keep relevant considerations in mind.”<sup>28</sup> This might be one reason why both laws of nature and ethical principles should be sufficiently broad. By articulating fully broad principles that relate to all domain-specific principles, we have “good working conditions” for solving our ethical problems.

Yet, this is only a point about the advantageousness of simple theories, and does not give reason for us to suppose that the simple theory is more correct or reasonable. If Newtonian mechanics is simpler or easier to understand than Quantum Mechanics, that is no reason to believe that Newtonian Mechanics is true. While we surely have reason to prefer simple and broad explanations, there is little reason to suppose that all explanations *must be* simple and broad. Rather, the most important question is whether our explanations adequately explain, regardless of whether they are complex and narrow or simple and broad. We might think that the simplicity of Kepler’s models defeated Copernicus’s use of epicycles, but the simplicity would not count in Kepler’s favor unless its predictions were also more accurate.

The tendency to suppose fully general ethical principles probably developed from the general appreciation of the scientist’s ability to provide simple and broad explanations for our observations of the world. Yet, on what basis can one defend this tendency in ethics? Why would we suppose that ethical questions are best answered by broad and simple principles rather than restricted or complicated principles? Since the values in life are so diverse and multifaceted, why would our ethical principles be any less complex than ethical life itself? Surely, if one asks the question, “what is the foundation for all ethics,” one invites an answer that is maximally broad, but the tendency to ask that question assumes a view under which it can be answered. While it is possible that the best way to treat all these ethical subjects is to find some maximally broad principle, it does not need to be the only way. Without some other argument for their similarity, we should not assume that the model for physics is appropriate for ethics.

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<sup>28</sup> *Word and Object* (MIT Press, Cambridge, MA. 1960), 20.

Overall, we should recognize that a simple explanation of any complex phenomenon is bound to be wrong. Human life is complex, so ethical theory should be hesitant about simplicity. Think of all the different pursuits that persons engage in and all the different relationships we have. Think of all the different tradeoffs we might face and all the persons we might become. Think of all the different responsibilities that might direct us, opportunities that might open to us, and understandings that might close to us when we pick one path in life over another. Now think of all the lives we could have led had our social world or material conditions been different. Human life is astoundingly complex in its subtleties and possibilities. With so many ways of engaging with the world and only a single life within which to do so, we should recognize the complexities of ethics.

In science, a simple theory can be elegant but fail to explain the evidence. It would be nice if all matter were composed of four elements but, when we use such a theory in the world, the world pushes back. When we use our elegant and simple theories for ethics however, the world does not push back. Instead, we just see the world in terms of that simpler theory; we see our actions as means to happiness or choices as instances of autonomy. What tells against simplicity in science does not do so in ethics, so we need to be extra careful of our own theoretical preference for simplicity in the case of ethical theory.

### 5.3.2 The Unity of Ethics

Second, one might argue in favor a broad principles on the basis that they would explain the unity of our practical judgments. Typically, we think that our ethical judgements should form a coherent whole and an appeal to fully broad principles or values would explain that unity. Regardless of the role that such unity plays in resolving conflict, we might take it to be a basic condition of ethics that all values form some kind of unity. It is because general principles express

a unity amongst our various commitments, that our commitment to ethical unity would lead us to think that broad principles have a greater authority.

Yet, a commitment to broad first principles is not the only way to explain a unity amongst our ethical commitments. Even if we recognize the importance of some unity in ethical judgements--which many might not recognize--we do not need to suppose that general principles are part of that unity. For example, Elizabeth Anderson explains the unity of judgments as arising from the active constitution of our identities and ideals. She says, "When a person's psychological states are rationally justified, or come tolerably close, they bear expressive relations to one another that give them an internal coherence and unity."<sup>29</sup> Alternatively, as we saw in 4.2.2, Rawls understand the unity of constructivism as consisting in an appropriate sequence of subject. For him, "The underlying unity is provided by the idea that free and equal moral persons are to construct reasonable and helpful guidelines for moral reflection in view of their need for such organizing principles and their corresponding subjects are presumed to have."<sup>30</sup> The important thing to notice is that both Rawls and Anderson provide alternative ideas of what makes unity possible in ethics without general first principles. Both appeal to more contextual judgments but Anderson unifies these judgments by appeal to the unity of self while Rawls does so by a practical procedure. While fully general principles may provide one way of unifying our ethical commitments, general principles are not necessary for such unity.

An argument from unity has recently been used by Ronald Dworkin in *Justice for Hedgehogs*, and it might seem like his argument could be used on behalf of fully general first principles. After all, Dworkin appeals to an ideal of dignity--the constituent parts of which are respect towards others and responsibility for oneself--as defining the unity of all value.<sup>31</sup> Yet, we

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<sup>29</sup> Anderson, 1995, 39.

<sup>30</sup> Rawls, 2005, 261-262.

<sup>31</sup> His clearest elaboration of this view is in the conclusion. Dworkin, *Justice for Hedgehogs*, 419-423.

need to be careful to separate the whole of Dworkin's positive proposal from his specific argument for unity.<sup>32</sup> This specific argument arises from Dworkin's understanding of morality and ethics as independent of the scientific world of brute facts. As he says in the introduction, "Value judgments are true, when they are true, not in virtue of any matching but in view of the substantive case that can be made for them."<sup>33</sup> Since our values depend upon the cases that will be made for them, our justification will depend on other values. It is from this that Dworkin now supposes that an ideal--fully responsible--agent's values would be fully complementary and mutually supporting. The core idea is that our arguments for our values depend on our other values, so a fully worked out conception of value must bring our values into a broader unity.<sup>34</sup> Since there is no realm of value independent of our argument for our values, we cannot say that the fully harmonized conception of value gets anything wrong. It can only fail to make the case for itself.

While I find Dworkin's argument about the independence of morality and ethics quite appealing and tend to agree that the vindication of a value judgment depends only how it is supported by other values, I do not see how this argument could be used in favor of fully general first principles--or even in favor of the unity of value. The reason why it could not favor fully general first principles is because that would prejudge the final interpretation of how our values hang together. Why would we think that our values must ultimately support one another through fully general first principles? Whether we ought to accept such principles depends on whether our

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<sup>32</sup> Dworkin's holism, however, might resist doing this. Perhaps it would be wrong to distinguish his argument for unity from his larger proposal of unity. Nonetheless, it seems important to isolate and examine the parts of Dworkin's argument that lead to this conclusion. We can better appreciate their significance by seeing how they fit with the hole, but these arguments should be able to withstand scrutiny from those who agree with some parts of the larger argument but not others.

<sup>33</sup> Dworkin, *Justice for Hedgehogs*, 11.

<sup>34</sup> "The moral realm is the realm of argument, not brute, raw fact. Then it is not implausible--on the contrary--to suppose that there are no conflicts but only mutual support in that realm. Or, what comes to the same thing, that any conflicts we find intractable show not disunity but a more fundamental unity of value that produces these conflicts as substantive results." Dworkin, *Justice for Hedgehogs*, 11.

acceptance of them is supported by our other values. Even if his arguments show that value judgments cannot conflict, there are other ways of resolving conflicts than by appeal to fully general first principles--as the arguments against Sidgwick show. Even if Dworkin's argument gets us unity, it does not get us unity through first principles. That comes only through the more arduous task of showing what understanding of morality and ethics is best.

A second problem goes closer to the core of Dworkin's project. He argues from (a) the idea that value judgments depend on their supportability by other value judgements, to (b) the mutual supportability of value judgments for a fully responsible moral agent,<sup>35</sup> to (c) the fact that values do not conflict, to (d) the unity of value. For the sake of argument, I will assume that (c) and (d) are mutually interchangeable; I assume that the unity of value is nothing more than the fact that values do not conflict. If they do differ, then I see no argument that would get from (c) to (d). This is worth pointing out because it emphasizes the way in which "unity," for Dworkin, is nothing more than a lack of conflict. With this point aside, my bigger concern is with the move from (b) to (c); I see little reason to suppose that the mutual supportability of values supposes the lack of conflict between values. We can--and Dworkin does--imagine a scheme of values whereby there is no principled way to settle conflicts. There is nothing that rules out this possibility, and Dworkin even acknowledges this when he writes,

"There is another possibility. It might be that for some reason the best interpretation of our values *requires* that they conflict: they serve our underlying moral responsibilities best if we conceive of them in such a way that from time to time we must compromise one to serve another. Values don't conflict just because they do, but because they work best for us when we conceptualize them so that they do. That is a conceivable view, and perhaps someone might make it seem

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<sup>35</sup> The fully responsible moral agent is defined as that agent that acts from a conception of values that are morally supportable. See Dworkin, *Justice for Hedgehogs*, 104-117.

plausible...It would provide an interpretation that reconciles values in a different way: by showing conflict as deeper collaboration.”<sup>36</sup>

In this passage, Dworkin recognizes a possible view that would block the move from (b) to (c). If we see conflict between values as the best way to show the mutual supportability of our values, then we do not get to the fact that values do not conflict. This is an odd passage because Dworkin does not explain *why* this view would be implausible and he does not say why this interpretation of values would be a “deeper collaboration.” To what end would our values then be collaborating? We can only suppose that they are working together *if we* assume the unity of value, but that is the very thing that this view blocks the argument towards.

My suggestion is that our commitment to the mutual supportability of values does not license a commitment to the lack of conflict in values. Accordingly, Dworkin lacks an argument for value unity. It is of course true that his full view presents a picture of ethics that is unified, and his picture might end up being the very best. However, his arguments do not show that we should accept the unity of value *unless* we accept his whole view.

As a final point in favor of my argument, I want to point out the incongruity between the unity that Dworkin supposes is in ethics and the disunity that he supposes in interpretation. In order to make sense of interpretation in all its guises, Dworkin gives a disunified conception of interpretation. What makes for a good interpretation depends on the particular genre within which the interpretation is given. What makes for an interpretation of the law substantially differs from an interpretation of *Hamlet*. In each case, what makes for interpretation depends on the values implicit in the practices of that genre.<sup>37</sup> In this story, Dworkin gives a disunified conception of interpretation in order to best interpret it. What would block the same kind of disunified conception from being the best interpretation of our values?

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<sup>36</sup> Dworkin, *Justice for Hedgehogs*, 120.

<sup>37</sup> Dworkin, *Justice for Hedgehogs*, 130-144.

#### 4.3.3 The “Why?” question

While broad first principles are not necessary for unity across ethics, these principles do seem to satisfy a different need for explanation. Suppose we could show a consistent set of range-limited principles that adequately captured our moral convictions and gave us guidance in our decisions. Still we would wonder *why* these principles were adequate, and why they were adequate for their particular ranges. This would seemingly require some general principle that could explain why a principle is fit for a particular range. Henry Sidgwick presses this intuition in *Methods of Ethics* when he writes,

Even granting that these rules can be so defined as perfectly to fit together and cover the whole field of human conduct, without coming into conflict and without leaving any practical questions unanswered,—still the resulting code seems an accidental aggregate of precepts, which stands in need of rational synthesis. In short, without being disposed to deny that conduct commonly judged to be right is so, we may yet require some deeper explanation of *why* it is so. From this demands springs the third species or phase of Intuitionism, which...to get one or more principles more absolutely and undeniably true and evident, from which the current rules may be deduced.”<sup>38</sup>

In this quotation, Sidgwick emphasizes that it is not the need to avoid practical conflict alone that leads us towards first principles from which judgments can be deduced, but also the need to answer why the principles we accept are the right principles. It might seem like fully general first principles can adequately answer this why question.

In his book, *Practical Reasoning about Final Ends*, Henry Richardson focuses on Sidgwick’s claim, trying to understand exactly why Sidgwick aims to find fully general first principles in order to put ethics on a rational basis. To be more particular, Richardson imagines two principles of limited scope that do not conflict and asks why Sidgwick would demand that these two principles be explained by a broader first principle. As an example, he uses the two

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<sup>38</sup> Sidgwick, *Methods of Ethics*, 102



principles “benevolence towards one’s friends, implacable justice to strangers” because there is no conflict in what the principles require. Richardson points out that Sidgwick seems to suppose that an adequate answer to the “why?” question must provide a reason that “(a) is of wider scope than the two subordinated principles because it concerns itself with what should happen on both sides of the scope restriction (in our example, with both friends and strangers), and (b) can soundly or appropriately override each of these two subordinated principles.”<sup>39</sup> In this way, Richardson views the Sidgwick model as proposing a kind of “judicial” model of practical reasoning wherein “Principles of superior validity thus sit in judgment over lesser principles, overruling them when necessary and settling their boundaries.”<sup>40</sup>

Richardson’s arguments against Sidgwick are primarily challenges to this judicial model of practical reasoning. After all, his ultimate concern is to understand the structure of practical reason, so Sidgwick’s claims about practical reason are his primary concern. He makes two separate points against this model, both of which are important to see for us to reject broad first principles as answering the why question. First, Richardson points out that we are rarely as confident with our general and broad principles as we are about our beliefs about particulars.<sup>41</sup> So, why would we think that we would get an more authoritative verdict by appealing to the broader principle we are less confident in? Second, Richardson argues that it involves a problematic dissociation to the self. If one set of our values pulls in one way, and a different set of our values pulls in another way, then in settling the issue by appeal to a superior authority, we distance ourselves from the values that pull us. As Richardson puts it,

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<sup>39</sup> Richardson, *Practical Reasoning about Final Ends*, 127

<sup>40</sup> *ibid.*, 128

<sup>41</sup> “Among normative judgments that stand most firm are some quite concrete, even particular ones--about the evil of the Holocaust or the My Lai massacre, about the admirable character of Mother Theresa’s work with the poor and sick of Calcutta....Similarly, an author may be more firmly attached to the project of writing a particular books that to any description of his or her ends in so doing...In both the moral and practical arenas, then, the most concrete propositions are among the firmest.” (*ibid.*, 138)

“It would be an oddly dissociated person who generally felt a distance from his competing desires and commitments as a judge is supposed to be from parties who come before her...How can you decide a case fairly when you are sleeping with both the plaintiff and the defendant?”<sup>42</sup>

The basic idea in this criticism is that thinking of fully general principles as fully authoritative in practical conflicts would not adequately recognize the particular cares we have that give rise to the conflict.<sup>43</sup> Deliberation, for Richardson, is more about finding a way to adequately respect both sides of the conflict, to “meet in the middle,”<sup>44</sup> than it is to look towards principles outside of the concerns themselves. Both these reasons seem to suggest that the judicial model is not an appropriate understanding of our practical reasoning.

If the judicial understanding is not a proper understanding of practical reasoning, then what reason do we have to think that a fully general principle would answer the why question of ethics any better than principles that are not fully general. If we had some proof of a moral theory that consisted of first principles, which grounded all other principles, then we would have reason to think that such first principles justified all others. Yet, it would be the proof of this moral theory that answered our why question and not that fact that they are general principles. Any such proof of this moral theory could not rely on the claim that first principles better explain all our other principles--as Sidgwick’s argument does. Yet, barring such proof, we cannot suppose that the best answer to our why question would necessarily involve general first principles. One might appeal to simplicity or unity to make that argument, but I have already shown why we have

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<sup>42</sup> *ibid.*, 139.

<sup>43</sup> In this way, Richardson’s argument bears a similarity to the conviction of Michael Walzer in his famous article “the problem of dirty hands”. There Walzer argues that the politician ought to get his hands dirty, but that he ought to suffer the punishment for doing so. This is the proper way of valuing both the reasons for getting his hands dirty and the reasons against it. To suppose that the dirty hands politician is right to dirty his hands and therefore free of rightful guilt is to not properly condemn that unfortunate aspect of his action.

<sup>44</sup> Richardson, *Practical Reasoning about Final Ends*, 140.

no reason to suppose that ethical life is simple or that general principles are the only way to get ethical unity.

So, without an appeal to simplicity, unity, the structure of practical reason or a proof of valid first principles, the argument that first principles explain our moral principles best is ungrounded. We have no reason to think that first principles would better answer the why question than would an account that did not rely on any such principles.

#### 5.3.4 Defending Against Generalism

Without an argument from simplicity, unity, or explanation, it is not clear how one can ground the claim that broader principles have greater authority. So, it is not clear why someone who is not committed to the greater authority of broad principles can be convinced of it. We are left with a distinction between those committed to a theoretical intuition, and those not committed to it.

I know of no ways by which this difference can be settled than by showing that one moral theory does better for what we want a moral theory to do than another. Until I am shown a reason why a moral theory that involves broad first principles does better than any that do not, then I see no reason to be committed to such a view. However, I do think there are *prima facie* reasons why a moral theory that relies on general first principles to directly settle all moral conflicts would do worse than moral theories that do not. Explaining these *prima facie* reasons is the goal of the next section.

#### **5.4 Objection to Generalism**

I've defined generalism as the view that fully general first principles directly settle all moral and ethical conflicts. The most common form of generalism is act-utilitarianism, but we can likewise identify certain forms of Kantianism or value pluralism as also committed to generalism. My remarks in §4.2 and §4.3 are meant to block various arguments that might seem to show that one must be committed to generalism, but I have not given any reason to reject a commitment to

generalism. The goal of this section is to give one brief reason why I think such a commitment is morally problematic.

One alternative to generalism--and the alternative that I am concerned with defending in this dissertation--is the view that our social context affects the moral principles that appropriately regulate our actions. If persons generally recognize a practice of property that can be sufficiently justified, then persons have an obligation to follow the rules of property. If persons generally recognize a legal system, then persons have an obligation to follow the law. If flaunting certain norms would express disrespect, then persons ought to follow those norms. It is true that a generalist can often explain why we should respect property, obey a law, or follow etiquette in any particular instance by arguing that some fully general principle applied to the circumstances would show that we should do that which respects property, obeys a law, or follows etiquette. They might even say that, given the facts, it will generally be the case that we should do these things, so “respect property,” “follow the law,” and “follow etiquette” will be good heuristics for guiding our action. However, the generalist cannot make sense of our having an obligation to respect property, follow the law, or follow etiquette. Doing so would mean that not all legitimate justifications appeal directly to first principles. In such a case, we would need to appeal to the rules of our social practices as legitimately determining how we should act. Our moral conflicts would be settled by the particularities of our social context. Such a view would no longer be generalist.

To focus on one example, one could either explain the obligation to respect property as either (a) a natural obligation, (b) not really an obligation, or (c) a practice-dependent obligation. If (a), then one must claim that property, in all its specificity, is a natural obligation. Even if one is willing to bite this bullet for property, there is a wider range of obligations that seem conventional, which one would also need to explain as a natural duty. For example, if one recognizes a citizen’s obligation to vote, this would need to be justified as a natural duty as well. If

(b), then one claims that it is only the case that we often should respect property claims, and not that we truly have an obligation to do so. This is the act-utilitarian route. I have claimed that the best option was (c), which requires that we recognize our obligation to respect property as contingent; they rely on the general recognition of norms of property. When such a system is adequately justified, we have reason to respect property.

Here, I want to expand on this argument and better explain why I think option (c) is the best way to think about obligations like property. As I also indicated in the last two chapters, there are many more aspects of social life beyond obligation that I think are dependent on the particularities of a social structure. The virtues that we aspire to, the values that direct our activities, and relationships that we care about are also given their particular form within a social context. So, my argument is meant not only to defend practice-dependent obligations, like property, but practice-dependent values, virtues, and relationships.

The first step of my argument is to point out the ways in which contingent features of our social world are important to us. Many of our goals only make sense as goals within a particular society; for example, the goal to get tenure or to write a particular book. How we think of our selves is also tied to the social roles we occupy or our particular hobbies; to see oneself as American, or as an academic, or as someone who likes to sail or paint. Moreover, many of the norms that we have internalized are conventional. We can recognize that a morally seamless life, in which our aims are integrated with appropriate moral constraints, is an ideal. Yet, this ideal only occurs when we have internalized moral constraints into our daily behavior, and this will often mean integrating conventional constraints--such as our respect for property. Once internalized in this way, these norms are important to who we are and how we live. In all the various ways that we plan our life, we plan it against a background of social expectations. We rely on the fact that there are authorities, such as judges, that decide conflicts. That we feel obligated to such an authority may be contingent, but it is nonetheless an important part of how we plan our

lives. In many more ways than I can go into here, the contingencies of our social life specify what matters to us.

The second step of the argument is to insist that the right view of morality must respect what is important to us and--more importantly--what is important to others. Beginning in the 1980s, there was a swath of philosophical articles and books that stressed the ways in which morality should not be over-demanding.<sup>45</sup> Samuel Scheffler expressed this point as arguing that morality should be human; it should fit with the kinds of creatures that we are.<sup>46</sup> A morality that did not respect what was important to us and important to others would be burdensome to us, but it would also be inhuman in other ways. We are social creatures, who build our lives with others according to conventional rules and contingent norms, and morality ought to be sensitive to the ways in which our lives are socially embedded. How we understand ourselves, our lives and our relationships with others are influenced by the contingencies of society. A morality that was not sensitive to these contingencies would not be a human morality. This is apparent from a first person perspective because we would not want to be bound by a morality that did not fit with the lives we lead, but it is even more apparent in how we should live with others. We do not want to treat others according to moral norms that do not respect what is important to them.<sup>47</sup>

With these two points established, the problem with the generalist view is that it does not respect what is important to us and others because it does not respect the contingent features of our moral context. According to this view, how we ought to choose is directly determined by fundamental principles that hold across all social contexts. The generalist might recognize particularities of our society as social facts that bear on the application of general principles, but it

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<sup>45</sup> i.e. Bernard Williams, "Persons, Character and Morality;" Susan Wolf, "Moral Saints;" Shelley Kagan, *The Limits of Morality*.

<sup>46</sup> Scheffler, *Human Morality* (Oxford, UK; Oxford University Press, 1992)

<sup>47</sup> All this is even more true if we recognize that any moral argument we make must, ultimately, link up to what persons would choose. No moral argument, no matter how rooted in natural or metaphysical fact, would do the job of convincing one how to act if it did not seem to fit with an agents core concerns.

does not treat the practices of society as having any significance for us. Once we see who we are and what we care about as crucially linked to the particularities of our social structure, this makes generalist morality quite alienating. The fundamental principle of the generalist are imposed upon us and our society rather than being a manifestation of who we are.

By contrast, a theory that recognizes contingency in ethical life can properly respect the way that particularities of the social structure are important to us. If our claims to property and to other conventional rights are important to us, a conception of morality that puts our property claims and conventional rights on a firm foundation respects what is important to us. I have throughout argued for a view of morality that is sensitive to our social context, partly because such a view of morality better expresses who we are.

The obvious objection to this view is that it seems too relativistic. To admit this kind of contingency in ethical life might seem to say that all of ethics and morality is contingent. To say that are social structure establishes certain values, virtues, relationships and obligations might seem to say that all there is to ethics is a particular social structure.

If the only way to develop such a view were to accept relativism, then I would recognize that this would be an objection to the view. I recognize that relativism is inadequate as a moral theory. Yet, saying that ethical life is sensitive to the particularities of our society is not to say that it is fully determined by the particularities of our society. A view of ethical and moral life that is sensitive to our moral context does not deny that there are many obligations, values, virtues are relationships that are directly justified by absolute principles. For example, it might be immoral in any society to deceive or murder. It also does not deny that there are certain obligations, values, virtues and relationships that are justified by absolute principles but need to be specified within a particular social context. For example, Barbara Herman has argued that the imperfect duty of beneficence is specified into particular moral requirements only in a society.<sup>48</sup> Others might think

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<sup>48</sup> Herman, "The Scope of the Moral Requirement"

that there is a natural right to property, but that right is specified within particular social communities. In either case, the absolute principles that surpass any particular community are still an important element of ethical life.

The broader point of this dissertation is to show why the view developed here is not relativist in yet another sense. The particular practices that explain much of the contingency in ethical life are themselves open to assessment. The fact that they establish certain obligations, values, virtues or relationships does not make those practices any more *prima facie* justified. It remains the case that our assessment of these institutions will often be sensitive to the moral context those institutions are set within--as argued in §3.2.2. Yet, our assessment of the basic structure institutions does not occur within any moral context. They are the institutions that the vast majority of our practices occur within, so they establish a moral context rather than being situated within one. Accordingly, the proper way to assess the basic structure institutions is by values that are outside of moral context. We ought to assess these institutions by appeal to absolute moral principles that are independent of social particularity. From there, we can assess the various institutions within a moral context that is justified by absolute moral principles. It is in this way that the basic structure acts as a mooring for ethical life. As argued in Chapter 4, the particularities of our society and culture will swash the content of ethical life one way or another, but our ethical life stays tethered to non-relativist moral ground so long as our basic structure is justified by absolute principles,



## Chapter 6

# The Concept of Justice

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“Plainly we cannot grapple adequately with the issue if we see it as one concerning the proprieties of linguistic usage. For what really is at stake is the comparative merit of a wider or narrower concept...If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquires, or advance and clarify our moral deliberations, or both.”

-H.L.A. Hart, *The Concept of Law*, 209

With the work of the past four chapters complete, we can now return to the topic of justice. I have defended the claim that “the basic structure has primacy as a distinct moral subject,” but the more typical Rawlsian claim is that “the basic structure is the primary subject of justice.”<sup>1</sup> I choose to make the former claim because the value of taking the basic structure as subject transcends any particular view about justice. Our political and moral theory should recognize the primacy of the basic structure regardless of our particular understanding of justice as an ideal.

Most objections to the Rawlsian focus on the basic structure come from alternative articulations of justice that show why the basic structure is not the primary subject of justice. Unfortunately, these arguments are unlikely to resolve any conflicts. More often than not, one’s views about justice are fitted to our broader moral and theoretical commitments. We do not share significant agreement over what justice is such that appeals to justice could settle our disagreements. Arguments about the nature of justice might provide helpful contrasts between moral views, but they are unlikely to settle the deep disagreements that typically divide philosophers. So, I have sought to construct an argument that appeals to notions that are less contentious than a conception of justice. In particular, I have tried to show that those who accept a limited form of moral conventionalism should recognize the primacy of the basic structure as a distinct moral subject.

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<sup>1</sup> Inverted the word order from Rawls, *Theory of Justice* [OE], 7.

Yet, I cannot merely ignore those arguments that start from a conception of justice. While I do not think that arguments about the nature of justice are the best way to *vindicate* the primacy of the basic structure, others think that arguments about the nature of justice are the best way to *defeat* the primacy of the basic structure. I need to address claims about the nature of justice insofar as they are an objection to the view I defend. That is the central task of this chapter.

In particular, I am concerned with two objections that begin with a claim about justice. According to the first, we misrepresent justice by focusing on the basic structure of society. Suppose we recognize that the basic structure should be just, and we set out to determine moral principles that apply to the basic structure. We are then likely to conceive of the principles we come to accept as principles *of justice*. This, in turn, is likely to skew our perspective towards justice more generally. We will think that the moral demands on the basic structure indicate the moral demands of justice *tout court*. Thereby we run the risk of misrepresenting justice by associating the broader ideal with its limited application to the basic structure. As an example, suppose that justice requires equality of treatment, and we determine that a just basic structure equalizes each person's opportunities for securing social goods. It would misrepresent justice if we took it to require equality of opportunities for social goods. We would be representing the demands of justice as more limited than they really are. More generally, if justice requires X and this requires that a basic structure meet condition Y, it would be wrong to understand justice as Y. We would misunderstand an application of justice as justice itself. In this way, one's focus on the basic structure might be objectionable because it misrepresents justice.

The second objection claims that we must determine what justice requires in order to determine the correct principles for the basic structure. While I have argued that the basic structure has primacy as a moral subject, one might claim that articulating an ideal of justice has greater primacy. After all, such an ideal is necessary to properly understand how the basic

structure could be just. Accordingly, we should primarily be focused on articulating what justice requires and not on how the basic structure should be organized.

If these objections relied on a particular conception of justice, then they would not be that problematic. The objections would then only be offering a contrast between conceptions of justice. What makes these objections more forceful is that they seek to identify standards that *any conceptions of justice* must meet. They do not start from such premises as “justice consists in equality” or “justice consists in respect for natural rights.” Instead, they appeal to the way that justice figures into our practical reasoning and moral debate. The first objection supposes that any adequate conception of justice is broader than the demands it places on the basic structure. The second objection supposes that any adequate conception of justice has justificatory primacy. In this way, the arguments start from conditions on the *concept* of justice. These two objections start from premises about how the idea of justice fits within our moral deliberation and debate.

Since the objections start from claims about the concept of justice, my response offers a perspective towards how we should think about the concept of justice. I do not argue against any conception but against the concept of justice that these objections appeal to. To do so, I will contrast two ways that the ideal of justice figures in our deliberation and debate. A concept of justice might be “unified” or “disunified.”

If one conceives of the concept of justice as “unified,” then one supposes that the demands of justice can be articulated as a single moral demand across the various objects that might be considered just or unjust. We could, in theory, identify a single property that all just institutions, persons, actions, dispositions and societies have. In this way, a unified concept of justice is Platonic in that it identifies justice as having a particular essence instantiated in each just thing. By contrast, a “disunified” concept of justice holds that the demands of justice differ from one subject to the next. What makes for a just law is different than what makes for a just person, and what makes for a just basic structure can be different from what makes for a just action. In this

way, a disunified concept of justice is like a deontologist's concept of rightness; what is "right" is determined by a principle that applies in that circumstance rather than by a single principle that applies across all circumstances. Likewise, what is "just" is determined by a principle that applies to that subject and not by a single principle that applies across all subjects.

In response to the two objections, I argue for a disunified concept of justice over a unified concept. Instead of thinking that "a particular is just if it instantiates a unified and general ideal" we should think that "a particular is just if it satisfies a principle of justice that applies to it." Beyond the formal property of satisfying a principle of justice, I argue that there does not need to be a single property that makes all just things just.<sup>2</sup> To determine whether something is just, we need not look for a single, unified and fully general principle of justice. Instead, we look to see whether that object satisfies a principle of justice.

If one accepts a disunified concept of justice, then neither of the two above objections is a problem. First, focusing on the basic structure would not misrepresent justice. Determining how the basic structure should be does not influence how we should think about justice more generally because we can recognize that the principles of justice for the basic structure might be distinct from a principle of justice for other subjects. In determining how the basic structure should be, we could be seen as determining an appropriate principle of justice for the basic structure without making claims about justice as a whole. Second, we would not need to first articulate the demands of justice in order to determine how the basic structure should be because there is no single demand of justice for all subjects. We do not obviously reason from a prior and broad ideal to the instances of that ideal.

My primary concern is in responding to these two objection, but a disunified conception of justice also allows me to better explain why the basic structure could be "the primary subject of

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<sup>2</sup> This does not rule out the fact that the various principles of justice actually do share a property. It merely does not require it. All the principles of justice might, for example, be those that free and equal moral persons could agree to. Or all principles of justice could be those that optimally promote equality. A disunified conception of justice does not require a single property of justice, but it does not rule it out either.

justice.” It might seem odd to make this claim once we accept a disunified concept. After all, if something is just when it satisfies a principle of justice, then why would one subject of justice be more primary than another? However, I argue that it is the primacy of the basic structure as a moral subject that makes the basic structure the primary subject of justice. The particularities of our basic structure have profound and pervasive effect on our moral context, and this makes it a primary concern. In this way, the arguments of the past four chapters combine with a disunified conception of justice to show why the basic structure might be properly understood as the primary subject of justice.

The argument of this chapter proceeds in three parts. First, I motivate the importance of the argument in §6.1 by showing the ways in which G.A. Cohen’s most developed criticism of Rawls relies on a unified concept of justice. Over the years, Cohen has made a lineage of arguments against Rawls, and they end with an argument that the Rawlsian focus on the basic structure is arbitrary from the perspective of justice. Those who are not interested in seeing how Cohen’s argument developed between 1992 and 2009 can skip ahead to §6.1.3. There, I show how Cohen’s most developed arguments rely on a unified concept of justice. By arguing on behalf of a disunified concept, this chapter addresses the most developed form of Cohen’s argument.

In §6.2, I give two arguments against a unified concept of justice. My first argument seeks to show how a disunified concept can better capture the argument between those who offer alternative conceptions of justice because it allows for both unified and disunified conceptions of justice. My second argument seeks to show that a disunified concept is more aligned with the way in which we treat justice as having a kind of “preeminence.” The fact that something is often means that it is as it should be, and a disunified concept can more easily fit with this feature of justice. I end my argument in §6.3 by responding to an important objection. My response to this objection allows me to explain how the basic structure might be rightfully identified as the primary subject of justice.

I do not doubt that there is a strong intuitive pull towards thinking about justice as a single unified ethical demand. Much about our use of the idea pulls us to articulate a single sense of justice that explains why all things are just. What I mean to show here is the problem with thinking that justice *must* be a single moral demand. There is nothing conceptually necessary about treating justice as a unified and general moral demand, and I think we can give a better conception of justice that is not unified and general.

### **6.1 The Development and Force of Cohen's Critique of Rawls: A Review**

The lineage of arguments represented in Cohen's 2009 book began with his 1992 Tanner Lectures titled "Incentives, Equality and Community."<sup>3</sup> In these Tanner Lectures, Cohen took issue with an intuitive motivation for Rawls's difference principle. The difference principle justifies inequalities when they are to the advantage of the worst off, and such justified inequalities are typically thought possible only because persons work harder when incentivized to do so, thereby yielding benefits for all. Yet, Cohen points out, this only occurs when the incentivized hold their hard work hostage for the incentive; the worst off could be even better off if the incentivized were willing to work hard without the incentive. Cohen emphasizes that if persons really accepted the difference principle, then they would not demand such incentives. In this way, Cohen argued that mutual acceptance of Rawls's difference principle requires a much more egalitarian society than most recognize; it requires a society of persons who work to the advantage of the worst off without requiring incentives to do so.

This line of argument was sharpened in a 1995 article where Cohen argues against Brian Barry's argument for the difference principle.<sup>4</sup> Barry's argument comes in two steps; we start from a *prima facie* commitment to the justice of equality, and then recognize that each is made better off in a society structured by the difference principle. Accordingly, even the worst off

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<sup>3</sup> Tanner Lectures on Human Values, 1992 ( <http://tannerlectures.utah.edu/lectures/documents/cohen92.pdf> )

<sup>4</sup> "The Pareto Argument for Inequality" *Social Philosophy and Policy*, Vol. 12, Iss. 1, 1995, 160-185.

prefer a society structured according to the difference principle rather than equality. Yet, echoing his earlier argument, Cohen replies that a society organized in accordance with the difference principle is preferable only because the well-situated choose to act unjustly. If equality is *prima facie* just, then those who demand incentives to work towards the improvement of the worst off are working against equality, and thus against justice. Accordingly, Barry's argument "accedes to injustice in its account of what justice is." Yet, even if Cohen's argument stands against Barry's view, it does not stand against Rawls's. Rawls does not recognize equality as a *prima facie* just starting point, and Rawlsians should not do so. Accordingly, this 1995 article plays a minor role in Cohen's substantive argument against Rawls.

Cohen's more important argument was published in 1997 and titled "Where the Action is: On the Site of Distributive Justice." There, Cohen is centrally concerned with responding to a Rawlsian objection to his original 1992 argument. The conclusion of the original argument was that acceptance of the difference principle should lead members of society to refuse those incentives offered to make the worse off better off. Yet, the Rawlsian can respond that the difference principle applies *only to the basic structure of society*, and so its acceptance would not have any impact on personal decisions. To extend the difference principle to individual choices would be like supposing that if one accepts that (a) governments should not favor a particular religion, they should accept that (b) *individuals* should not favor any particular religion. In this way, the Rawlsian appeals to the distinction between principles for individuals and principles for institutions.

What has made Cohen the primary interlocutor in the arguments of this dissertation is how he responds to this distinction between individual and institutional principles. He offers a number of different responses that I have addressed at various points in my arguments.

*6.1.1 The first argument: profound and pervasive effects*

In “Where the Action is: On the Site of Distributive Justice,”<sup>5</sup> Cohen argues that any principle that applies only to the basic structure is problematic because there was no way in which the Rawlsian could adequately distinguish the basic structure from individual choices. He writes, “a major fault line in the Rawlsian architectonic not only wrecks the basic structure objection but also produces a dilemma for Rawls’s view of the subject of justice....The fault line exposes itself when we ask the apparently simple question: what (exactly) is the basic structure?” Cohen recognizes two ways of answering this question; the basic structure is understood as the coercive structure or it is not. If defined as the coercive structure, it conflicts with the Rawlsian aim of assessing those aspects of society that have profound effects because more than the coercive structure has such effects. If it is not defined as the coercive structure, then it must necessarily involve personal choices, which would make the difference principle apply to personal choices. Given this dilemma, the basic structure cannot be distinguished as subject. Since it cannot be distinguished as subject, the Rawlsian cannot reply that the difference principle applies only to the basic structure. Thus, if the difference principle is an appropriate principle of justice, it must be applied to individual choices.

After the publication of Cohen’s 1997 article, the Rawlsian responses to Cohen’s criticism proliferate and Cohen’s arguments against these responses proliferate in return. The three above-mentioned articles form the first three chapters of Cohen’s 2009 book, and the remaining chapters of the book develop the argument further. We do wrong, however, to think that *Rescuing Justice and Equality* is merely a clarification and extension of the views expressed in “Where the Action is.” In fact, there is a significant alteration of his argument stated in an 2008 appendix to the 1997 article and corroborated by an important change in the text. In 1997, the second horn of the dilemma is based on the claim that there is *no way* to distinguish the basic structure from

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<sup>5</sup> *Philosophy and Public Affairs*, Vol. 26, Iss. 1, 1997, 3-30.



individual choices, but the 2008 appendix admits that there is a way to distinguish structure from individual choice. He writes,

“Actions are, in general, no part of the basic structure, because a structure, in the present sense of the term, is a set of rules, and actions are not members of sets of rules. So the relevant customary actions...are nevertheless not themselves a set of rules. My point is not that daily behavior, including ‘individual market behavior,’ is part of the basic structure but that it is so closely related to what must on pain of arbitrariness be included in the basic structure, to wit, the informal structure demanded by justice, that it too, that is, daily behavior, comes under the same principles of justice that judge structure properties of justice.”<sup>6</sup>

Read alongside the 1997 article, this is an odd passage. In 1997, the second horn of Cohen’s dilemma relies on the claim that there is no adequate way of distinguishing the basic structure from personal choice. Yet, in the above passage, Cohen admits that there is a way of doing this because “a structure...is a set of rules and actions are not members of sets of rules.” In this way, he seems to undermine his argument from 1997.

However, this is no issue for Cohen because he has a new argument. In 2008, the claim is that the informal structure of society must “on pain of arbitrariness” be included in the basic structure. Yet, if the distinction between the basic structure and personal choices is a real one--as he admits in the passage--then why would distinguishing the two be arbitrary? Cohen here relies on another implicit argument to show that the distinction between the basic structure and personal choice might be possible but is nonetheless *ethically* arbitrary. The distinction could be made, but it could not be *justified*.

Why would this distinction be ethically arbitrary? Cohen gives two different answers in *Rescuing Justice and Equality*. The first answer is contained in a 2008 change to the text of “Where the Action is.” There, Cohen argues the distinction is ethically arbitrary because any reason to be

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<sup>6</sup> Cohen, *Rescuing Justice and Equality*, 149-150

concerned with the basic structure is likewise a reason to be concerned with personal choices. In a passage added in 2008, he writes,

“Structure and choice remain distinguishable, but not from the point of view of the applicability to them of principles of justice (at any rate when, as it is *ex hypothesi* the case here, they are thought to apply because of the fateful consequences of that to which they apply: you cannot bring the informal norm into the compass of justice for that reason without also bringing within its compass the action that gives the norm substance and that account for much, if not most, of the effect).”<sup>7</sup>

For Cohen, if our reason to be concerned with the basic structure is the profound effects they have on our life, we must also be concerned with personal choices because they have similar effects. The distinction would be ethically arbitrary because our grounds for concern with one also grounds a concern with the other. Readers will notice that in making this argument in 2008, his treatment of the second horn of his dilemma is now the same as his treatment of the first horn. Whether the basic structure is defined coercively or not, distinguishing the basic structure from personal choice is ethically arbitrary because both have profound effects. Accordingly, Cohen’s 2008 argument is that Rawls cannot justify a focus on the basic structure from an appeal to profound effects. There is no longer any dilemma for Rawls, but this single argument.

Yet, this argument relies on a mistaken reading of Rawls, and Cohen’s concern with profound effects is only a distraction. Appeal to profound effects was not meant to explain why Rawls focuses on the basic structure *rather than* other aspects of society. It was instead meant to explain why the organization of the basic structure is of such ethical *importance*. In comparing this concern with the basic structure to other ethical concerns, the basic structure is of such high importance because it has profound and pervasive effects. In short, the appeal to profound and pervasive effects is not meant to answer the question “what *distinguishes* the basic structure from other ethical concerns?” but to instead answer “why is the concern with a basic structure *primary*

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<sup>7</sup> Cohen, *Rescuing Justice and Equality*, 135

amongst ethical concerns otherwise distinguished.”<sup>8</sup> The organization of the basic structure has profound and pervasive effects, so it is ethically important that we address it. The informal structure of society also has profound and pervasive effects, so it is ethically important that we address it as well. Yet, the fact that both the informal structure and basic structure are ethically important is no reason to address them together as a single subject.

### 6.1.2 Cohen’s second argument: the scope of justice

Since Rawls does not appeal to the “profundity of effects” criterion<sup>9</sup> to distinguish his concern with the basic structure, Cohen’s first argument to show that this distinction is ethical arbitrary does not succeed. However, Cohen has a second argument. This second argument is contained neither in the 1997 article nor in the 2008 edits, but it runs through the remaining chapters of *Rescuing Justice and Equality*. According to this second argument, the reason why we should not distinguish the basic structure is because doing so is *arbitrary from the perspective of justice*. To make this point, Cohen turns his attention to clarifying the nature of justice. Once we see what kind of requirement justice must be, we can see why it is arbitrary to distinguish structure and choice from the perspective of justice.

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<sup>8</sup> In short, the often cited sentence, “the basic structure is the primary subject of justice because its effects are so profound and present from the start,” should be read with the emphasis on “primary.” Rawls, *Theory of Justice*, 7. The appeal to “profound” effects is made five times in the Rawls corpus, at *Theory of Justice*, 7, 96; *Collected Papers*, 258, 265; and *Justice as Fairness*, 55. In each of these instances, the notion is mentioned in motivating the importance of the basic structure as an ethical concern, and not as a reason to distinguish it from other subjects. In *Political Liberalism*, at 278-281, a similar idea is mentioned, but only to show why an agreement about the organization of the basic structure is fundamentally different from agreements made within a basic structure

<sup>9</sup> Cohen, *Rescuing Justice and Equality*, 136.

To show what kind of requirement justice must be, Cohen appeals to a theory of justification.<sup>10</sup> He argues that all justification proceeds by appeal to more fundamental ethical principles. While the justification of any particular act, judgment or principle might go in many stages--appealing to still more fundamental principles at each stage--this process bottoms out at *fundamental normative principles*. These fundamental normative principles express our core ethical commitments, which are often implicit and cannot themselves be justified.

Cohen uses this model of justification in two related arguments. First, in Chapter 6, “The Facts,” Cohen argues against those theorists who ground a conception of justice on certain facts. The basic argument is that any principle that is based on certain facts can only be justified if a more fundamental principle shows those facts to be morally relevant. For example, the utilitarian might support a moral principle that we ought to protect religious freedom, and she might argue for this moral principle based on the *fact* that doing so would promote happiness. Yet, this fact is only relevant because of her acceptance of the more fundamental *principle* that we ought to do that which promotes happiness. Since facts are only relevant because more fundamental principles make them so, the most fundamental principles cannot be based on facts. In short, fundamental ethical principles must be fact-free.

The second argument where Cohen uses his model of justification is against constructivism about justice in Chapter 7. In this chapter, Cohen argues that constructivism mistakes “rules of regulation” for fundamental normative principles. He defines rules of regulation as rules we adopt to order our choices, and this distinguishes them from fundamental principles because rules of regulation are *chosen* whereas fundamental normative principles are

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<sup>10</sup> Before arguing about the *concept* of justice, however, he first sharpens his view about the *content* of justice. In Chapter 4, he tries to show that the appropriate standard for distributive justice is not the difference principle, but equality. In Chapter 5, he answers an objection that requiring persons to be concerned with equality would unfairly restrict either freedom of occupation or the value of self-realization. These two chapters together fill in Cohen’s substantive view; Justice does not require that the basic structure be organized in accordance with the two principle of justice, it requires equality. It requires equality in structuring an economy and in person’s individual choices.

*unchosen*. Cohen argues one determines “how the basic structure ought to be organized” by choosing a rule of regulation that addresses this question. Since we choose such a rule of regulation, we will need to justify that choice. To do this, we need to (eventually) appeal to a fundamental normative principle. Moreover, if we think that rule that applies to the basic structure is a principle “of justice,” then we must appeal to a fundamental normative principle “of justice.”

Accordingly, Cohen concludes that even Rawlsian constructivists must be committed to fundamental principles of justice. In order to justify a rule of regulation for the basic structure, the Rawlsian needs to implicitly use a fundamental principle of justice. Bringing Chapter 6 and Chapter 7 together, Cohen claims that all Rawlsian constructivists must ultimately be committed to a fundamental and fact-free principle of justice. Rawls’s two principles of justice are merely rules of regulation, which need to be ultimately justified by such a fundamental principle of justice.

This argument allows Cohen to identify why the Rawlsian focus on the basic structure is arbitrary from the perspective of justice. Justice is the expression of a fundamental normative commitment, and as such, it is general across all things that might be just. If we justify a global norm, constitution, economic scheme, law, social norm or individual action as being just, we make ultimate appeal to the same fundamental principle of justice. Yet, given that this fundamental principle is fully general across all these subjects, it is arbitrary to focus merely on the basic structure. Accordingly, the Rawlsian focus on the basic structure is ethically arbitrary. Even if the basic structure *can* be distinguished from daily behavior, it should not be.

Yet, the Rawlsian should not be any more worried by this second argument for ethical arbitrariness than she should be worried by the first. In this second argument, Cohen tries to show that the Rawlsian focus on the basic structure is arbitrary on the basis of his model of justification, but every Rawlsian should deny Cohen’s model of justification. Put simply, Cohen is

a foundationalist but Rawls is a holist. Cohen supposes that all justification must ultimately appeal to fundamental normative principles, but Rawls argues that all justification ultimately appeals to a reflective equilibrium. Accordingly, moral principles are not justified by more fundamental normative principles for Rawls, they are justified by their fit with our considered convictions. Thus, Rawlsians do not need to ultimately appeal to fact-free principles (though, they can) and they do not need to appeal to any fundamental principle of justice. Instead, they appeal to a broad range of considered convictions, both about generalities and particulars. For Cohen's argument against Rawls to succeed, he would thus need to invalidate reflective equilibrium as a model of justification and show the necessity of his own foundationalism. Without doing so, his criticism gets no grip against Rawlsians.

Just as Rawls's model of justification shows that Cohen's arguments are insufficient against the Rawlsian view, so does Cohen's model of justification show certain Rawlsian arguments to be insufficient against his own view. In explaining justice as a particular fundamental principle, Cohen is not committed to the priority of justice. For him, being just is merely one consideration that counts in favor of some option, and other considerations will often be more significant. If justice requires one choice over another, it is not necessarily the case that we ought to choose what justice requires. Likewise, the fact that one institution would be more just than another does not necessarily mean that we ought to establish the more just institution. Instead, Cohen views justice as one competing fundamental value amongst others. We might sometimes rightly act in accordance with justice, and sometimes rightly act against it. As he says in Chapter 6, "Justice is not the only value that calls for (appropriately balanced) implementation: other principles, sometimes competing with justice, must also be variously pursued and honored."<sup>11</sup>

This commitment protects Cohen from any argument that claims that his view of justice does not take some important value into consideration. After all, he can merely distinguish that

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<sup>11</sup> Cohen, *Rescuing Justice and Equality*, 272.

other important value as expressed by a different fundamental principles than justice. For instance, some might respond that Cohen's conception of justice is odd because it would lead to "leveling-down." According to Cohen, the society in which each has equal welfare is more just than a society in which all have higher welfare but some have much more than others. Yet, Cohen can respond and say that the more unequal society is indeed less just but might still be preferable. In that case, we are merely sacrificing justice for welfare, and that might be okay.<sup>12</sup> A second example of this response occurs in Chapter 8, "The Publicity Argument." There, he treats an objection from Andrew Williams that requiring individuals to promote equality does not satisfy the demands of publicity. To this Cohen can merely deny that publicity is a requirement on justice, though it might be a concern grounded by a different fundamental principle. In a third instance, others might argue that Cohen's conception of justice is problematic because it ignores the importance of personal projects.<sup>13</sup> If justice requires each individual to pursue equality in their personal choices, then persons would not have the opportunity to pursue those projects important to themselves. Yet, Cohen can again respond that persons can pursue personal projects, but they are merely sacrificing justice to do so. While doing so might be unjust, it might not be wrongful. Sometimes, we should sacrifice justice for personal pursuits. Since Cohen does not suppose that we should always do the most just course of action or that we ought to live in the most just society, these kinds of arguments would not force Cohen to give up his view. For some, this commitment might cut against Cohen's view, but it is not argument against Cohen, given the role he assigns justice in his model of justification. It seems that we have reached a stalemate.

### 6.1.3 The broader argument

However, even if Cohen's arguments in Chapter 6-7 of *Rescuing Justice and Equality* do not succeed in invalidating the Rawlsian focus on the basic structure, they still make an important

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<sup>12</sup> *ibid.*, 319-320

<sup>13</sup> For such arguments, Tan, "Justice and Personal Pursuits" *The Journal of Philosophy* (2004): 331-362.

point. To see why, we can deconstruct the form of Cohen's argument, which goes in two basic steps. The first step is establishing that justice *must* be a unified ethical requirement that is general across all contexts. By referring to justice as a *unified* ethical requirement, I mean that something can rightly be considered just only when it is related to a single conception of justice, which is the same across all contexts. For contrast, justice would be "non-unified" if there were some object for which the properties that warranted calling that object "just" were wholly different from the properties that warranted calling some different object "just."<sup>14</sup> By referring to justice as *general* across all contexts, I mean that this unified requirement is relevant across a broad range of subjects; institutions, laws, choices, dispositions, etc. Cohen's theory of justification is meant to show why justice *must* be unified and general; it must be so in order to be a fundamental normative principle.

The second step of the argument is to show that, since justice is a unified and general ethical requirement, the Rawlsian focus on the basic structure is arbitrarily restrictive. Rawls's two principles of justice are not unified and general, so they cannot be principles of justice. Accordingly, the basic argument can be expressed as follows:

- 1) Justice is a unified ethical requirement that is general across all contexts
- 2) The Rawlsian focus is restricted to the justice of the basic structure
- 3) Thus, the Rawlsian focus ignores the requirements of justice in all other contexts
- 4) Thus, the Rawlsian focus is ethically arbitrary from the perspective of justice.

In short, the Rawlsian goes wrong because she mistakes the nature of justice. Since justice is, by its nature, unified and general, any principle that artificially restricts the authority of justice is arbitrary from the perspective of justice.

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<sup>14</sup> In more formal terms, justice is "disunified" if there is an X such that X is just if and only if it has property P, and there is Y such that Y is just if and only if it has properties Q, and property P is not identical with property Q. Justice is "unified" if for every X and every Y, if X and Y are just, then there is a property P such that both X and Y have property P.



Now, I have claimed that this argument is unsuccessful because Cohen has not adequately argued for (1); he has not shown that justice *must* be a unified ethical requirement general across all contexts. To prove (1), Cohen appeals to a theory of justification, but Rawlsians should reject this theory. Accordingly, Rawlsians can and ought to reject (1), and thus they ought to reject Cohen's conclusion.

However, even if Cohen has not proved (1), persons might otherwise be committed to it; they might think that justice must consist in a unified and general moral requirement. In this way, they might treat the concept of justice as unified; for a conception to be a conception of justice it must offer a unified and general requirement. Someone so committed will accept (1), and someone who is not so committed will reject (1). Even though Cohen does not prove that we should have a unified concept of justice, his argument still shows why those who are committed to a unified concept should view the Rawlsian perspective as problematic.

In short, while Cohen does not show the Rawlsian position to be incoherent, he does show an inconsistency between the commitment to a unified concept of justice and the Rawlsian focus on the basic structure. Rawlsians do not need to be committed to thinking of justice as a fundamental, general and unified ethical value, but those who are committed to such a conception of justice might find the Rawlsian view problematic.

One of the reasons why Plato's dialogues are so intriguing is that they record the views of an interlocutor as they are sharpened over the course of conversation. As various issues are cleared away, we are often left with the core commitments of the interlocutor laid bare. The most invaluable aspect of *Rescuing Justice and Equality* is that we can likewise see how Cohen's own views are sharpened over the course of a 17 year conversation. While the Rawlsian interlocutor is always offstage, his presence is felt as Cohen responds to objection after objection. I here mean to suggest that as years have cleared away various issues, we are now left with Cohen's own core commitment laid bare. What began as an extension of the difference principle to individual

choices, eventually became an argument about the nature of justice. Cohen's core commitment is a view of justice as a unified and general ethical requirement. For Cohen, Rawls's theory goes wrong because it does not treat justice as it is. Accordingly, the next topic that would continue the conversation is whether we ought to treat justice as a fundamental, general and unified ethical value.

I argue that we cannot assume that the concept of justice is unified. Even if we ultimately accept a unified *conception* of justice, we cannot argue that any adequate conception of justice must present a unified and general ideal. Accordingly, Cohen's argument that just must consist in an unified ideal goes wrong. Whether we should accept a unified conception of justice depends on whether it is the best conception of justice, and not on any conceptual necessity.

## **6.2 The Argument against a Unified Concept of Justice**

It is difficult to know what could settle a dispute between whether the concept of justice is unified or disunified. If we argue about a natural fact, we look for evidence in the world to settle the debate. We cannot, however, look towards evidence in the world to determine the nature of justice. One might say that we look to the patterns of how persons use the phrase, "justice," and then look towards what their implicit beliefs about what its content is. Yet, such an analysis would (at most) tell us what people think about justice, and we recognize that persons can be wrong about this. If most in a country use justice in such a way that implies that the death penalty is just, we would not take that to mean that the death penalty was just. Instead, in appealing to the idea of justice we appeal to an idea that could correct what people believe. In the same way that persons might be wrong about what is or is not just, persons could also be wrong about whether the concept of justice is or is not unified.

As I understand the issue, the best way to settle a debate about whether justice is unified or disunified is by determining which way of thinking about justice better explains the role that

justice plays in our practical reasoning. Justice has a particular role in our deliberation and moral debate, and the right concept of justice should fit that role. In other words, the terms of the argument should be practical. We vindicate one way of thinking about justice by showing that it fits best with the role the idea plays in practical reasoning and debate.

One clear feature of how justice is used in debate is that people disagree about what justice requires. Even a single individual might be “of two minds” on what justice requires. In order to accurately represent the concept of justice, then, we need to recognize that the idea is not used to refer to any particular requirement(s). Luck Egalitarians, Civic Republicans, Libertarians, Contractualists, and Marxists all employ the same concept of justice--lest we see them as merely talking past one another--but they differ in what they think the requirements of justice are.

For this reason, it is always helpful to distinguish the concept of justice from a conception of justice. We can think of a conception as an articulation of what justice requires. Egalitarians, Republicans, Libertarians, Contractualists, and Marxists all employ different conceptions of justice. By contrast, a concept of justice is that which these groups disagree about when they offer different conceptions of justice. The difficulty is giving a characterization of the concept of justice that (a) does not dissolve into a conception of justice and (b) still respects the ways in which justice is distinct from rightness, goodness, merit, and other normative concepts.

In the introduction, I introduced two objections to the argument of this dissertation. First, one might object that developing principle for the basic structure leads us to misrepresent justice. Insofar as we think of the principles for the basic structure as principles *of justice*, we risk understanding justice as consisting in the requirements on the basic structure if we first develop principles for the basic structure. Second, one might suppose that articulating a conception of justice has primacy over developing principles for the basic structure. Only if we

apply a conception of justice to the basic structure could the principles that apply to it be principles of justice. In §6.1, I argued that Cohen's most developed criticism seeks to show that Rawls's focus on the basic structure is arbitrary *from the perspective of justice*. We should notice that none of these arguments seems to come from a particular conception of justice. Instead, they come from claims about what justice must necessarily be like. Yet, these claims of necessity are not claims of physical or logical necessity, they are claims of conceptual necessity. They are about what justice is for all those who advocate different conceptions of justice.

The specific claim about justice that these arguments advance is that justice consists in a single unified and general requirement across context. In this way, they advance a "unified concept of justice." If justice is not unified, then developing principles of justice for the basic structure would not have definitive implications for justice more broadly. If justice is not unified, then developing a general conception of justice would not tell us what would make a basic structure just. If justice is not unified, then developing principles for a particular subject would not be arbitrary from the perspective of justice. So, in order to respond to these three arguments, I want to argue against a unified conception of justice. I want to argue conceptual necessity does not require that all conceptions of justice be unified.

As an alternative to a unified concept, I offer a disunified concept. A unified concept of justice maintains that "a particular is just if and only if it relates to a single unified and general requirement." By contrast, a disunified concept maintains that "a particular is just if and only if it satisfies a principle of justice." Given this definition, it is important to ask what makes a principle of justice a principle *of justice*, and I return to that issue in §6.3. Before that, I want to argue on behalf of a disunified concept of justice over a unified concept. This will allow me to address the two objections and Cohen's criticism.

My argument on behalf of a disunified concept of justice moves in two stages. In §6.2.1, I argue that a disunified concept of justice can better explain the field of disagreement about

justice. Even those who favor a unified conception of justice can recognize disunified conceptions as rival conceptions of justice. However, a unified concept of justice fails to recognize disunified conceptions of justice as conceptions *of justice*. By contrast, a disunified concept of justice can recognize unified conceptions as conceptions *of justice*. Therefore, a disunified concept can better account for disagreement between rival conceptions. In §6.2.2, I argue on behalf of a disunified conception of justice. This bolsters the important of the first argument by better indicating why we should recognize a disunified concept, but is also favors a disunified conception more generally. After making these arguments, I briefly survey one possible objection from the recent work of Ronald Dworkin.

### 6.2.1 A disunified concept better sets the space of disagreement

My first argument points out that it is meaningful for someone to wonder whether the requirements of justice are unified and general across context. If we accept a unified concept of justice, however, we cannot make sense of this as meaningful. If we suppose that justice consists of a unified and general requirement, then someone who wonders whether justice consists of a unified and general requirement must be making some kind of mistake. We would say that they are not wondering about *justice*. By contrast, a disunified concept of justice does not impose such a requirement. Instead, it supposes that a particular is just whenever it satisfies a principle of justice. Given the vagueness of what “a principle of justice” might consist in, someone could not wonder whether justice consists in satisfying some principle of justice in the same way. For this reason, a disunified concept of justice better captures the space of possible disagreements about justice.

To some, this argument might seem reminiscent of Moore’s “Open Question Argument,” which has been thoroughly scrutinized. This argument was used to better emphasize the way in which we cannot define goodness by identifying it with a property that

all good things have. Even if something is good whenever (and only whenever) it is pleasurable, we cannot define goodness with the pleasurable. This is shown in how, whenever goodness is defined in terms of some property P, we can always meaningfully ask, “are P things really good?” In this way, it is always an open question whether something is good. It cannot be settled by definitions alone.

The typical challenge to the Open Question Argument is that it only expresses the paradox of analysis. However, those who criticize the argument in this way interpret it as meant to do more than the arguments aims to do. We can recognize that the question, “is water really H<sub>2</sub>O?” is a meaningful question, but this does not mean that we cannot define water as H<sub>2</sub>O. The difference between the water case and the goodness case is that the person who claims that water is H<sub>2</sub>O does not *merely* offer it as a definition; they can also show *why* what we are looking for when we identify something as water is the same as that which we identify by H<sub>2</sub>O. The meaningfulness of the question does not show that water and H<sub>2</sub>O are not the same, it merely shows that more beyond mere definition needs to be said. The chemist who defines water as H<sub>2</sub>O can say more in defense of this claim, but the hedonist who defines goodness as pleasure cannot. Moore’s open question argument merely points out that whoever defines goodness as “the pleasurable,” “the natural,” or “the unified” must do more than stipulate a definition. The open question argument helps us to recognize that a definition is not enough, but it does not show that an analysis is impossible.

A much better way to express the point that Moore gestures towards is through the distinction between concepts and conceptions. We can understand Moore’s target as offering a particular conception of goodness. For example, the hedonist offers a conception goodness as the pleasurable, but this hedonist goes wrong whenever they mistake their conception of goodness for the concept of goodness. A hedonist cannot say, “goodness consists in the pleasurable, that is merely a fact of definition,” because the voluntarist does not think that

goodness consists in pleasure. The voluntarist responds, “goodness consists in fulfilling god’s will, *that* is a fact of definition.” If both stick to their words, then they would merely be talking past one another. In order to make sense of their debate, we differentiate the concept of goodness from the conception. The hedonist might define their conception of goodness as “goodness consists in the pleasurable” and the voluntarist might define their conception of goodness as “goodness consists in fulfilling god’s will.” Yet, they should recognize that either would be inadequate as the concept of the goodness. Instead, the concept need be defined in such a way that does not predetermine a particular conception. In order to make sense of how the word is used, one cannot define goodness in terms of a conception. That is why we find the question, “are P things really good?” to always be an open question. Our concept of goodness is distinct from any articulation of good things provided by a conception.

Returning now to my argument, I want to point out that--what I have called--a unified concept of justice comes closer to being a conception of justice than a concept of justice. Of course, the unified concept is not itself a conception because it is consistent with different conceptions. Someone who thinks “justice always consists in promoting equality” and someone who thinks “justice always consists in promoting autonomy” both identify justice with a unified and general requirement, but they offer different requirements. So, it would be wrong to suppose that a unified concept of justice is really a concept. It is better to see the unified “concept” of justice as picking out *a class of conceptions* rather than the *concept* of justice. Conceptual necessity does not require that justice consist in a unified and general demand. Instead, it is merely the case that there is a class of conceptions that posit a unified and general demand.

The fact that we can meaningfully ask, “does justice really consist in a single unified and general moral requirement?” shows that someone cannot merely stipulate that the concept of justice is unified. Someone can reasonably think that justice consists of a unified requirement

just as they can think that goodness is the pleasurable. They cannot, however, stipulate the meaning of justice so as to exclude conceptions of justice that are not unified.

When we have fully accepted the concept/conception distinction, we can recognize that one not only accepts either a unified or disunified concept of justice, they might also accept either unified or disunified conceptions. Oddly enough, one could simultaneously recognize the concept of justice as disunified while accepting a unified conception. Recall that a disunified concept of justice identifies any particular as just if it satisfies a principle of justice. If someone were to argue that the only relevant principle of justice is that “any particular should promote autonomy” then they can accept a disunified concept of justice while arguing for a unified conception. The unified conception recognizes a unified and general ethical demand--to promote autonomy--as the best understanding of justice. However, someone who holds this conception might also think that when disputants disagree about conceptions of justice, they disagree about what the appropriate principles of justice are. They can recognize that someone who offers a disunified conception of justice is still offering a conception *of justice*.

By contrast, I see no way in which someone can accept a unified concept of justice while accepting a disunified conception. If someone understands disputes about justice as disputes about which unified and general demand represents the demands of justice, then they will not recognize someone who advocates a disunified conception as offering a conception *of justice*. Since their conception of justice does not consist in a unified and general demand, it is not consistent with the concept of justice. Thus, there are only three positions one might hold; (a) recognizing a disunified concept and disunified conception, (b) recognizing a disunified concept and unified conception, and (c) recognizing a unified concept and a unified conception.

For this reason, the argument I use against a unified conception of justice does not extend to an argument against a disunified conception. Let us imagine that someone asks, “does



justice really consist in satisfying a principle of justice?” If this is a meaningful question then it shows a problem for the disunified concept as much as my argument shows a problem for the unified concept. Yet, is this question meaningful? The idea of a “principle of justice” is so open and vague that I doubt it rules out any conception of justice.

For these reasons, the disunified concept of justice is better able to make sense of the space of disagreement about justice. If one accepts a unified concept of justice, then they cannot make sense of a disunified conception as a conception *of justice*. By contrast, someone who accepts a disunified concept of justice can make sense of both unified and disunified conceptions. In this way, a disunified concept of justice better represents the role that justice plays in our reasoning and debate.

### 6.2.2 One reason for a disunified conception

The second stage of my argument aims to give one reason why we should accept a disunified conception of justice. This argument plays two roles. First, it supports the first argument by showing why it is important that the field of disagreements about justice be able to include disunified conceptions of justice. Second, it gives us reason to think that any conception of justice that posits a unified and general moral requirement goes wrong. I don't think this argument *proves* that a disunified conception of justice is the best one, but it meant to counterbalance the intuitive pull that unified conceptions might have.

The core claim of the second argument is that how a particular ought to be is often settled when we identify what would make it “just.” Likewise, if a particular is “unjust” then we recognize that it should not be that way. In these cases, we do not treat justice merely as a consideration that is balanced amongst others in making final judgements. Instead, justice determines how particulars should be. In this way, justice has a kind of “preeminence,” it authoritatively settles how something should be. Typically, we think that “if a law is unjust, it

should be overturned,” “if an institution is just, it should be respected” “if an action is just, it should be performed,” and “if a society is unjust, we must act to change it.” If these statements are typical of how justice figures into our deliberation and debate, then justice has a kind of preeminence.

Now, a disunified conception is better able to explain the preeminence of justice than a unified conception is. This is because a disunified conception has greater flexibility to pick out how different particulars should be. It can identify one standard for how institutions should be and another standard for how actions should be. In order to simultaneously maintain (a) a unified conception of justice, and (b) the preeminence of justice, we would need to be committed to (c) a single moral demand that determines how a broad range of things should be. My point is not that someone cannot be committed to (c), but that it is a very contentious commitment with high costs.<sup>15</sup> By contrast, a disunified conception of justice identifies a particular as just when it satisfies a principle of justice. Since different principles of justice can be sensitive to different considerations in different contexts, a disunified concept has a kind of moral flexibility. It can identify different considerations as settling how different particulars should be. If justice is disunified, it does not rigidly identify some single demand as settling how all particulars should be. Instead, it is sensitive to differences between cases.

To see this point, let's start from a toy example of a disunified conception of justice. According to this conception, (a) a basic structure is just when its institutions protect basic rights, which includes equal political rights, (b) laws are just when they are the result of a democratic process within a just basic structure, (c) actions are just when are in accordance with just laws or promote just laws, and (d) dispositions are just when they lead persons to act justly. Now someone who supports a unified concept of justice would deny that these four principles, (a)-(d), express a conception of justice. Since they do not offer a unified and general

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<sup>15</sup> For example, utilitarians might being committed to (c) but they then have difficulties distinguishing justice from rightness.

demand that all just particulars instantiate, this disunified conception is not a conception of *justice*. Someone who maintains a disunified concept of justice, however, can recognize this toy conception as a conception of justice.

With this toy example in hand, we can see the way in which a disunified concept of justice has greater flexibility. With such a view, we can see why the fact that a basic structure, law, action, or disposition is just can imply that it is as it should be.<sup>16</sup> In each case, the principle of justice that applies to that particular is suited to the kind of thing--basic structure, law, act, or disposition--that it is. Compare this to a more unified conception of justice. If justice consists in promoting equality, for example, we might see why a social structure that is just is as it should be. However, we might doubt that actions that promote equality are always the actions we should take.<sup>17</sup> Likewise, if justice consists in respecting certain natural rights, then we might see why actions should always be just. However, it is less clear that this conception would be adequate for determining how a social structure should be. After all, there are institutional questions that are not settled by respect for rights alone. In each of these cases, a unified conception does not provide the flexibility that allows for justice to be preeminent.

In summary, a unified concept of justice faces two problems. First, a unified concept is less able to make sense of all our disagreement about justice because persons might disagree about whether justice is unified. Second, a unified concept is less able to respect the preeminence of justice. A disunified conception, however, has the flexibility to make sense of how any particular that is identified as just is as it should be. This second arguments gives us

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<sup>16</sup> It is an important point to recognize that my argument does not require that justice is preeminent for all moral questions. It might be the case that there are some issues for which we do not think that whether something is just settles the issue. All that matters is that there are some issues for which justice is preeminent, and even those who do not think it always settles the issue can recognize that it sometimes does.

<sup>17</sup> The force of this objection can be well represented in the development of Cohen's own argument. In arguing for justice as a unified and general ideal, Cohen abandons the primacy of justice (as discussed in §6.1.2)

one reason to resist the intuitive pull of a unified conception of justice, and thereby shows the advantage of a concept of justice that allows for both unified and disunified conceptions.

### *6.2.3 Justice as an interpretive concept*

In this section, I want to treat one possible defense of a unified concept of justice. This argument does not come from Cohen's own views, but from the recent argument of Ronald Dworkin. While I do not think that Cohen would be entitled to use these arguments, they might be available to someone else who would want to defend the unified concept of justice and then use it to object to the views I defend.

The defense that I have in mind argues that justice is an *interpretive concept*. Dworkin distinguishes "interpretive concepts" from both "natural-kind concepts" and "criterial concepts," and shows how moral concepts like justice are best understood as interpretive concepts rather than natural-kind or criterial concepts.<sup>18</sup> A natural-kind concept is something that has a fixed identity in nature. If one thought that justice was a natural property instantiated in just things that we must come to identify and articulate, then justice would be a natural kind concept. Since we do not think that any natural discovery will settle what justice requires, justice is not a natural kind concept. Criterial concepts are those defined by criteria used to identify something. If one thought that justice was a criterial concept, then we would share a concept of justice only if we agreed about which things in the world are just. Since both socialists and libertarians seem to share the concept of justice, justice cannot be criterial. Instead, justice is an interpretive concept. Interpretive concepts are identified by the practices we use them in--often because of the overlapping paradigms to which we apply them--and we interpret what is the best way to understand that concept as it figures in these practices. We, as

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<sup>18</sup> Dworkin, *Justice for Hedgehogs*, 157-170.

a linguistic community, use the concept of justice in various ways, and we differ on how best to interpret the idea as it figures in these practices.

Applied to the current argument, one might make two claims from this understanding of the concept of justice. First, one might claim that treating justice as an interpretive concept can make sense of the role that justice plays in practical reasoning. Second, one might claim that recognizing justice an interpretive concepts shows why it must be unified. I agree with--or, at least, will grant--the first argument, but I disagree with the second. Even if justice is an interpretive concept, that gives us no reason to see it as necessarily unified.

In regards to the first argument, I recognize treating justice as an interpretive concept does not face the objections to a unified concept in §6.2.1 and §6.2.2. In fact, many of the same reasons that I deny a unified concept of justice are the same as Dworkin's reasons for denying that justice is either a criterial or natural-kind concept. If justice is a natural-kind concept, we cannot make sense of the Open Question Argument. Once we have identified what justice is in the world, we would not be able to ask whether what we identified as just was really just. If justice were a criterial concept, then persons would be talking past one another in arguing about justice. If justice is an interpretive concept, however, we can recognize that we treat justice as preeminent for some concerns. Any interpretation of justice would then have to explain why it is preeminent for those concerns, and also why it is not preeminent for others. Likewise, since our practices often treat judgments of justice as the terminus of practical reasoning, the interpretation of justice must do the same. Dworkin's articulation of interpretive concepts resolves much of the problems I have articulated above.

Nonetheless, accepting that justice is an interpretive concept does not give us any reason to suppose that justice is unified. Once we recognize it as an interpretive concept, the question is what the best interpretation of it is. Whether justice is unified or disunified then depends on which interpretation is best. The mere fact that justice is interpretive does not mean that it is

unified because there is nothing that compels us to interpret justice as unified.<sup>19</sup> Given the range of objects that we consider just and unjust, and the range of moral concerns that are relevant for these judgements, it seems to me that the best interpretation would need to be disunified, but a complete argument would be needed to show this definitively.

I will grant that a person who both (a) sees justice as an interpretive concept, and (b) interprets justice as unified is able to overcome the objections offered in §6.2.1. Yet, this is only because they offer a unified *conception* of justice rather than a unified *concept*. So long as they recognize the possibility that a conception of justice might be disunified, they do not support a unified concept. Instead, they support a unified conception as the best interpretation of the concept. Such a view does not misrepresent how justice figures in practical reasoning.

Once someone grants that justice is an interpretive concept, they cannot block the possibility of a disunified conception of justice. Whether justice is unified or disunified then depends on the best arguments we can give in favor of one conception or the other. We need to show that a unified conception better interprets the practices in which we use justice or that a disunified conception does so. What is important for my argument is that one can no longer appeal to a unified concept of justice to block a disunified conception. Neither conception has *prima facie* authority but are instead rival interpretations of justice.

#### 6.2.4 How a disunified concept addresses the two objections

At the beginning of this chapter, I introduced two objections that one might make against focusing on the basic structure from a concern with justice. First, one might argue that focusing on the basic structure would misrepresent the nature of justice. Second, one might argue that we can only determine how the basic structure ought to be by determining what

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<sup>19</sup> For Dworkin, all of ethics and morality is unified, and that might seem at first to lend some argument to why justice must be unified. However, his unity of value comes at a high-level. This unity only needs to show that our values do not conflict when all our values are fully supported by one another. This does not mean that we need to articulate justice as unified but only that however we articulate justice must ultimately support how we articulate our other values. Moreover, it is unclear why Dworkin thinks all values must be unified--as I point out in §5.3.2

justice requires. Both these objections are defeated once we accept a disunified concept of justice.

The overall reason why these objections are defeated is because we recognize that whether the basic structure is just is the same as whether it is as it ought to be. In arguing that the basic structure ought to be organized in one way rather than another, we are arguing about what would make it just. In arguing about the justice of the basic structure, we are arguing about how the basic structure ought to be. In arguing about the injustice of actions, we are arguing about what actions ought not to be done. So, to focus on the question of how the basic structure ought to be or which actions are unjust, we are neither misrepresenting the nature of justice nor ignoring a proper order of explanation.

First, we do not misrepresent the nature of justice by focusing on a principle for the basic structure of society because we do not claim to be offering any general conception of justice at all in doing so. If one determines what makes a basic structure just, that does not itself determine anything about what makes something else just. To figure out whether a particular law, action or disposition of character is just, we need to determine what the appropriate principle of justice for that law, action, or disposition of character is. We do not suppose that the same thing that makes the basic structure just makes all things just, so we do not misrepresent justice generally by focusing solely on the basic structure.

Second, we do not need to first determine what justice generally requires to determine how the basic structure ought to be. Instead, we determine whether a basic structure is just by determining the appropriate principle of justice for the basic structure; we determine how the basic structure ought to be. This will require that we look at the particularities of the basic structure and how it fits within ethical life. It is not a requirement of practical rationality or the order of value that we first determine a unified concept of justice and then apply it to the basic structure.

### 6.2.5 Where the argument stands

With my major arguments in favor a disunified concept of justice complete, I want to summarize where I think my broader arguments stands. I have *not* shown that the correct conception of justice *must* be disunified. Instead, I have merely argued against the view that the correct conception of justice *must* be unified. In so doing, I have argued against a unified concept of justice and for a disunified concept. However, one might still argue that the best conception of justice--understood as a disunified concept--is unified. That is fine. I only mean to argue against those arguments that presume a unified concept of justice. The two objections surveyed in the introduction and Cohen's fully developed criticism only get their force if we assume a unified concept of justice, and I mean to show why these arguments are wrong to do this. A conception of justice might be disunified.

All this leaves open the question, "what is the best conception of justice?" I think that it should leave this question open. I do not doubt that persons with a particular conception of justice might disagree with my view on the basis of that conception of justice. In such cases, we have a contrast between views. Whether the view I advocate or a rival is best will depend on a more holistic comparison between the advantages of both views and how they fit with ethical and theoretical commitments.

I only mean to block those arguments that show my argument *must* be wrong regardless of which conception of justice one accepts. I think that the argument should be about what conception of justice we should accept, and I hope that this dissertation contributes to that argument. I believe that my arguments show why the basic structure has primacy as a moral subject even when we do not presume a particular conception of justice, and I believe that this favors those conceptions of justice that are consistent with treating the basic structure as a primary moral subject.



### **6.3 A New Objection and the Primary Subject of Justice**

I have explained a disunified concept of justice as committed to the idea that an object is appropriately identified as just when it satisfies a principle of justice. Yet, this only opens the question, “what makes a principle of justice a principle *of justice*.” In order for a principle to be identified as a principle of justice, there needs to be something that ties together all the principles of justice as *principles of justice*.<sup>20</sup> The defender of a unified concept of justice will say that this issue shows why my articulation of a disunified concept only pushes the problem back another level. We will need some substantive unity to explain what distinguishes certain principles as principles of justice.<sup>21</sup>

Now, I recognize that I need some way of bringing the various principles of justice together, but I deny that we need a unified concept of justice to do this. Instead, we only need to explain what makes principles of justice distinct and unified as principles. This does not require us to represent justice as a single unified demand. So long as the various principles of justice have some feature in common, they can be identified as principles of justice.

In this section, I want to offer one candidate for a way to tie the principles of justice together without appeal to a unified moral demand. A full argument in defense of my suggestion would require a different project, so I leave it only as a suggestion for now. If my suggestion is plausible, then it shows how we can make sense of the basic structure as the primary subject of justice. If my suggestion is not plausible, then my argument serves merely as an example for how another account might work. To overcome the objection, it only needs to

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<sup>20</sup> This need is most apparent in distinguishing what is just from what is right. Both might be understood as that which satisfies a moral principle, but what differentiates what is just is that it satisfies a principle of justice.

<sup>21</sup> I suspect that Cohen would object in this way because it resembles his own argument against the Rawlsian view. As mentioned above, Cohen appeals to the idea that a unified concept of justice is needed to explain why all the just things are just (Cohen, *Rescuing Justice and Equality*, 291). Similarly, one might argue that the various principles of justice associated with a disunified concept of justice are only principles of justice if they apply a fundamental principle of justice, and that will need to be unified.

be the case that there is *some way* to bring the principles of justice together that does not rely on a unified moral demand.

### 6.3.1 A proposal: principles of justice as specifying claims

While a complete argument would need to better support any judgment of this type, I suggest that principles of justice are moral principles that deal specifically with valid claims we on our broader community. What makes a principle of justice a principle *of justice*, is that it relates to these claims.

According to this view, principles of justice might specify the claims members of society have or they might specify what claims persons should have. We might call the violation of rights unjust because it violates claims that persons have, and we might call a society that does not secure healthcare for all as unjust because it should do so. It is in this sense that justice can both be a requirement and an ideal. It is a requirement in identifying what persons have claims on, and it is an ideal in establishing the best systems of claims that persons could have. It is in this sense that justice can have both a natural component, as when we believe that persons have natural rights, and an artificial component, as when we think rights arise from conventional practices. It also differentiates the demands of justice from the morally supervenient because persons do not have claims on you to act in morally supervenient ways.<sup>22</sup>

In offering this unifying feature of justice, I follow Mill's articulation of justice in Book V of Utilitarianism. There he sketches a social history of the idea and its development through the modern period. At the conclusion of this history he writes,

“Whether the injustice consists in depriving a person of a possession, or in breaking faith with him, or in treating him worse than he deserves, or worse than other people who have no greater claims--in each case the supposition

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<sup>22</sup> Likewise, what makes a principle of justice within this view differentiates justice from the promotion of the good because the promotion of good is a first-personal moral ideal whereas valid claims deal with a more second-personal stance.

implies two things: a wrong done, and some assignable person who is wronged. Injustice may also be done by treating a person better than others; but the wrong in this case is to his competitors, who are also assignable persons. It seems to be that this feature in the case--a right in some person, correlative to the moral obligation--constitutes the specific difference between justice and generosity of beneficence. Justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right. No one has a right to our generosity or beneficence because we are not morally bound to practice those virtues toward any given individual.”<sup>23</sup>

In this passage, Mill specifically identifies justice as distinct from utility, and explains it by the idea of a valid claim that one has on another. Of course, Mill soon uses this notion of justice in order to show that we need the principle of utility because the claims that persons have often conflict and we need some principle by which to settle these conflicts. Yet, nothing compels us to accept Mill’s idea that our disputed claims need to be resolved by some fully general first principle such as the principle of utility. I addressed that argument in Chapter 5. Rawls also conceives of the problem of justice in a similar way in his early writing. In “A Decision Procedure for Ethics,” Rawls writes;

“the problem of justice arises whenever it is the reasonably foreseeable consequence of the satisfaction of two or more claims of two or more persons that those claims, if given title, will interfere and conflict with one another.”<sup>24</sup>

In this passage, the particular problem of justice is understood in ways that are similar to Mill’s understanding. In the later article, “Justice as Fairness,” Rawls specifically recognizes that his two principles of justice are not principles that settle all questions of justice, but are only “typical of a family of principles normally associated with the concept of justice.”<sup>25</sup> Later in the essay, he gives an articulation of how the members of this family are related to one another, “It

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<sup>23</sup> Mill, *Utilitarianism* (Indianapolis, IN; Hackett Publishing, 2001), 50.

<sup>24</sup> Rawls, “A Decision Procedure for Ethics,” *Collected Papers*, 13.

<sup>25</sup> Rawls, “Justice as Fairness,” *Collected Papers*, 48.

is typical of cases of justice to involve persons who are pressing on one another their claim, between which a fair balance or equilibrium must be found.”<sup>26</sup> In these passages, the idea of a claim is crucial for justice. A particular conception of justice will settle persons’ claims in some specific way. My suggestion follows Mill and Rawls’s early work in understanding the various principles of justice as those moral principles that specify claims and settle disputes.

One objection to this articulation is that we have all sorts of claims that are not related to justice in any way. I have a valid claim that you bring me to the store if you promised to, but you do not commit an injustice if you do not fulfill your promise. In cases like this, not every valid claim relates to justice, so this articulation of what makes a principle a principle of justice is inadequate.

To answer this objection, we only need to specify that the principles of justice are not related to all claims that we have, but claims we have on our broader community. When we have a right, for example, it is a claim we have on persons generally. When someone commits an injustice, it is a wrong done to the larger community rather than to a particular person. So, the suggestion is that principles of justice relate to those claims we have on persons in our community generally. This overcomes the promising objection, because that is a claim against a particular person rather than on the members of a community generally.

Of course, this is only a first approximation of what unites the principles of justice, and it will undoubtedly need to be tweaked. Since my present goal is not to defend a complete account of what differentiates justice, I only offer this suggestion as a plausible idea to show how such an articulation may be possible and how it can aid in answering the present objection. I should stress that this understanding of the unifying idea of justice answers no substantive questions about justice. Specifically, it does not determine what valid claims we

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<sup>26</sup> Rawls, “Justice as Fairness,” *Collected Papers*, 54.

have or what institutions we ought to have. To answer those questions we require a complete conception of justice.

The challenge that I mean to address in this section is to show what ties the various principles of justice together as principles of justice. Someone who advocates a unified concept of justice might suppose that the only way to identify a principle as a principle of justice is to suppose that it relates to a single unified moral demand. By identifying the principles of justice as those related to valid claims, I have instead tied together the various principles of justice in a more formal way. By explaining the link between principles of justice with such a formal feature, I show why we do not need to rely on any unified concept of justice. What is most important for answering the objection is to show how a formal link between the principles of justice would be possible. Other formal links--that justice deals with distributions of advantages or with laws, for example--might also answer this objection.

### 6.3.2 The primary subject of justice

Beyond answering the objection, the idea that principles of justice are related to valid claims can show us why the basic structure of society would be the “primary subject of justice,” as Rawls famously labeled it. To see why it would be a subject “of justice,” we only need to look back at how the basic structure was identified in Ch. 1. Recall that the basic structure is the system of social institutions that together establish our rights, obligations, and powers as members of society. In this way, these institutions establish the basic claims we have on one another as members of society. Since the institutions of the basic structure establish claims we have as members of society, the principles that apply to the basic structure can rightly be identified as principles of justice. It is not because the principles themselves represent a single unified conception of justice, but because they relate to our claims on the broader community that they can be considered principles of justice.

To see why the basic structure would be the “primary” subject of justice, we only need to recall the argument of Chapter 3. Recall all the ways in which both institutions and individual actions need to be understood within the moral context established by the basic structure. When we articulate principles of justice that do not apply to the basic structure, we need to recognize that the principles should be sensitive to the moral context established by the basic structure. Some claims that we have will be due to institutions that are not part of the basic structure, but which institutions we ought to have need to be sensitive to the moral context established by the basic structure. When claims are not specified by institutions, those claims still need to be sensitive to the moral context established by the basic structure. In this way, the various principles of justice can only be fully specified within a particular basic structure.

It is for this reason that the basic structure would be the “primary subject of justice.” In order to adequately develop other principles of justice, we need to have a sense of the moral context those principles will apply in. The basic structure forms the moral context within which these principles of justice can be rightly determined, but the principles for the basic structure should not be specific to a moral context. Thus, they have a kind of primacy amongst the principles of justice. The basic structure would be the primary subject of justice for the same reason why it has primacy as a moral subject.

#### **6.4 The Priority of the Practical**

The full argument of this dissertation, beginning with the introduction and ending here, might seem to involve a subtle trick. I began by saying that my arguments would not come from any claims about the nature of justice. In the introduction, I said that I did not defend the claim that “the basic structure is the primary subject of justice” but instead that “the basic structure is a centrally important ethical subject.” Yet, even if I have not appealed to any claims about the

nature of justice, my arguments do bear on our views about the nature of justice. What seems like a trick is that I have an argument for why the basic structure is “the first subject of justice,” but the argument is a pragmatic one. Rather than arising from a conception of justice, it shows the primacy of the basic structure as a moral subject, and then claims that this gives reason for us to regard it as the primary subject of justice.

I do not claim that the basic structure is a centrally important ethical subject because justice is uniquely related to it. Instead, I claim that we should understand justice as uniquely related to the basic structure because it is a centrally important ethical subject. My argument for the primacy of the basic structure was made in the first four chapters, and it did not appeal to any broader conception of justice. Instead, it relied on a view of social institutions, their assessment, and the assessment of actions within those institutions. Instead of arguing from justice, I argued from a conception of the normative structure of social practices. This all shows the importance of determining how the basic structure ought to be organized, and I believe it is appropriate to understand this as the primary subject of justice because of its importance.

The core question at hand is an odd one; how should we understand our moral concepts like justice? Those who argue that the basic structure is not the primary subject of justice, take a stance not only on what is just and unjust but on how we should use the idea of justice. Yet, how should we settle a debate between persons who disagree about how we use the idea? I suggest that we should understand justice by the role it plays in our practical reasoning. Of course, there is no settled agreement on what role this is, but I have suggested it often plays the role of identifying a terminus of practical judgement. When we judge something just, we often seem to judge that it is as it should be rather than judging that it is good in only one respect. This is what, in part, blocks the claims that justice is--by necessity--a unified ethical demand.

Yet, even if I am wrong and there is not this, or any, pattern of use, then we can still ask the question of how we should use the concept of justice. Here, I believe that the central

importance of the basic structure is key. If we agree that the basic structure is a centrally important subject for ethics, then we have reason to think that the basic structure is a central concern of justice. Insofar as we use the idea to discuss one of the most important aspects of ethical life, it would be appropriate to use the idea of justice to discuss one of the most important questions. In this way, it is the argument for the importance of the basic structure that shows why it would be a primary subject of justice and not any claim about the nature of justice *per se*. In this way, it is more of a pragmatic argument about justice. How we use the idea should be tied to what moral problems we need to solve.



## Afterword: Social and Moral Complexity

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Rarely is good philosophy merely about proving a conclusion. More often, it is about a broader perspective to take towards a range of issues. For the best understanding of the world, we need more than truths. We need to know the best ways to articulate truths, how to connect them, and which are most significant. More than any particular conclusion, I want this dissertation to show a particular perspective towards the social structure and ethical life. I have tried to construct this perspective by addressing a number of different issues, arguing for particular conclusions and contrasting my view with alternatives. I hope that the broader perspective I want to get across has already been revealed across the various arguments, but I want to make this broader perspective more apparent in this final note.

There are a few motivating ideas that underlie much of this argument. One of the most important is an appreciation for social complexity. We act within a network of intertwined practices. When practices are stable, they get built upon with additional practices, adding to the complexity and making any change more difficult and disruptive. One of the most amazing features of human life is how we navigate and manipulate these practices with ease. Yet, the fact that we live within this web of practices without much difficulty can also blind us to them.<sup>1</sup> When theory tries to make an understanding of our actions explicit, however, it goes wrong if it fails to recognize the complex of practices that we implicitly act within. Any accurate

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<sup>1</sup> In a commencement speech to Kenyon College, David Foster Wallace told the simple parable of two young fish swimming along one day and are passed by an older fish going the other direction. In passing, the older fish says, "Morning, boys. How's the water?" Long after the older fish has passed, one younger fish turns to the other and asks, "what the hell is water?" My point is that social practices are our water; no adequate account of our ethical life can neglect the role that practices play even if it is so easy for us to ignore them. This point has been much insisted by figures from Hume to Wittgenstein and beyond, but "the most obvious, important realities are often the ones that are hardest to see and talk about." (David Foster Wallace, Convocation to Kenyon College, <<http://moreintelligentlife.com/story/david-foster-wallace-in-his-own-words>>)

understanding of our actions and values needs to see them as within a moral context established by our practices.

It is in the theorist's search for a simple way of understanding morality and ethics that we come to ignore the complexities that our practices give rise to. We try to look past and through these practices to identify a moral foundation. Doing this is not problematic in itself, but becomes problematic if we do not recognize the ways in which any such foundation only matters to us within the practices of our social world. First, any such foundation would be too abstract; it would need to be made real to us through our ways of living. Second, any such foundation would be alienating if it were not tied into our social life. If morality and ethics is to be important to us, it must be important to the people we are as members of our particular social world with our particular characters. Our practices are bound to skew the correct moral understanding in some ways, but the correct understanding must still be shown to us through our ways of living together. The account of ethics that matters for us must be tied to our practices.

If we appreciate the importance of contingent practices in specifying the content of our ethical life and we appreciate social complexity, we can also appreciate both (a) why it is so difficult to argue that we should be concerned with the basic structure and (b) why the basic structure is so important. The argument is difficult because the basic structure is just one particular set of social practices in our complex social world. What would make it any more deserving of our attention than other practices or the whole of society? One cannot merely distinguish the assessment of practices or institutions from the assessment of individual action and then claim that they have vindicated the focus on the basic structure. One must give an argument for what makes the basic structure a particularly important ethical subject.

What I have tried to argue throughout is that what makes the basic structure a particularly important more subject is the way in which it establishes our obligations, rights,

and powers as members of society. We can understand what the basic structure is--it's identity--as the set of institutions that together specify our role as member of society. It is because these institutions together form a system that we need to assess the basic structure as a single subject; to properly assess any major social institution we need to assess it as part of the basic structure and this means that we need evaluate the basic structure as a whole. Finally, it is the way in which the basic structure establishes an institutional context for both practices and individual actions that explains the moral distinctiveness of the basic structure. The particularities of the major social institutions are relevant for assessing the actions and practices within a society, but these particularities are not relevant for assessing the major social institutions themselves.

Recall that I understand social cooperation in a particular way. Rather than being focused on production or a lack of conflict, I understand it as the unique cooperative relationship between members of society. I have argued that this cooperative relationship consists in following the rules of our major social institutions. We coordinate with one another in mutually following these rules, and this coordination counts as cooperation when it is done with deference (rather than exploitation) towards those we coordinate with. This provides a tight link between the terms of social cooperation and the major social institutions because it is by following the rules of the major institutions that persons in society cooperate in the way specific to members of society.

When members of society cooperate in this way--that is, when they follow the rules of the major social institutions--they establish obligations, rights, and powers for individuals background as members of society. Persons have a level of surety that others will act in accordance with the rules of the major social institutions, so they can plan on the basis of what these rules are. They can rely on their property claims, on an authority to settle conflicts, on protection from threats, on an economic system, on certain relationships, and on a form of

political power. At a fundamental level, this surety only comes from persons mutually following the rules of social practices. The basic structure consists of the ways in which these major institutions together establish background security. Accordingly, social cooperation consists in following the rules of the basic structure institutions, and we assess the terms of social cooperation by assessing the basic structure.

What should be obvious at this stage is that these ideas together form a kind of conceptual circle. I have defined major social institutions, social cooperation, and member of society in inter-reliant ways. This is no problem because these ideas are meant to make explicit an implicit understanding of social practices. Since these practices are already up and running, and we find ourselves in the midst of them, it is no problem that their explication does not build up from primary ideas with the theoretical beauty of *Leviathan's* Part I. There is no problem with circularity in this reconstruction, so long as it accurately reconstructs our practices.

This is the core argument that takes us from the complexity of social life to the central importance of the basic structure as an ethical subject. Our social practices influence much of the content of ethical life; they establish new obligations, shape our values, determine our virtues and set the terms of our relationships. Not only our basic structure, but also our social practices generally, have profound and pervasive effects on ethical life. However, what makes the basic structure such a centrally important ethical subject is the particular role it has in social and ethical life. In establishing obligations, rights, and powers for individuals as members of society, it is distinct from the rest of the social structure. It sets the moral context for the assessment of individual actions and many of our other social practices. Accordingly, if our moral theory is to appropriately appreciate the complexity of the social world, moral theory should treat the basic structure as a distinct and centrally important subject.

From the perspective of a moral theory that has tried to look past our particular practices, I have little doubt that this method will seem odd. If we think that morality is fundamentally about first principles directly applied to solve our problems, we will think it odd that our practices can generate moral and ethical considerations. If we think of justice as a single, unified ethical demand, we will think it odd to be less concerned with articulating that demand. That is why I used the fourth and fifth chapters to argue against these views. Not only do they motivate some of the most discussed objections to a Rawlsian focus on the basic structure, they also represent two of the deeper convictions that can lead to a philosophical impasse.

In both responses, I want to advocate a view of moral theory that appreciates the complexity of our social world. First, to rely on fully general first principles to settle all our moral conflicts ignores the ways in which we are social creatures, living lives bound up in our particular practices. The fact that we live together with others according to these practices generates new and specific moral and ethical considerations that first principles alone cannot adequately respect. Since the major arguments that advocate such principle all fail, one cannot assume such a view of moral theory against the view I defend. Second, one should not assume that justice must be a single unified ethical idea. To do so necessarily limits its importance in our complex world. Any single articulated moral demand is unlikely to be sensitive to all the nuances of ethical life, so a view of justice that takes that role is bound to be limited. It relegates justice to one concern among many, and an argument about justice would not settle the difficult questions of what we ought to do. Instead, we should recognize that in arguing about justice, we argue about how things should be. If there is no easy answer to determining how all things ought to be, then we should not represent justice as a single unified ethical demand.

Undoubtedly, some of the claims I make in this dissertation will raise new questions and concerns. I know, for instance, that much more needs to be said about exactly how our

practices influence the content of ethical life. How exactly can we make sense of values, virtues, relationships and obligations being influenced by social practices while denying strong forms of ethical relativism? I hope to better address these questions in time, but even if I have muddied the waters, I hope they are clear enough to see my core point. The focus on the basic structure of society is not justified merely by a particular view of the nature of justice. Those who doubt some view of justice do not adequately show that we should not be concerned with the basic structure. The basic structure is a distinct moral subject that figures centrally in ethical life. Once we recognize that we act within a particular moral context that is partly established by our social practices, we should see the basic structure as a centrally important and distinct moral subject.