



Where the Action is: On the Site of Distributive Justice

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I

In this paper I defend a claim which can be expressed in the words of a now familiar slogan: the personal is political. That slogan, as it stands, is vague, but I shall mean something reasonably precise by it here, to wit, that principles of distributive justice, principles, that is, about the just distribution of benefits and burdens in society, apply, wherever else they do, to people's legally unconstrained choices. Those principles, so I claim, apply to the choices that people make *within* the legally coercive structures to which, so everyone would agree, principles of justice (also) apply. In speaking of the choices that people make *within* coercive structures, I do not include the choice whether or not to comply with the rules of such structures (to which choice, once again, so everyone would agree, principles of justice [also] apply), but the choices left open by those rules because neither enjoined nor forbidden by them.

The slogan that I have appropriated here is widely used by feminists.¹ More importantly, however, the idea itself, which I have here used the slogan to formulate, and which I have tried to explicate above, is a feminist idea. Notice, however, that, in briefly explaining the idea that I shall defend, I have not mentioned relations between men and women in particular, or the issue of sexism. We can distinguish between the substance and the form of the feminist critique of standard ideas about

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1. But it was, apparently, used by Christian liberation theologians before it was used by feminists: see Denys Turner, "Religion: Illusions and Liberation," in Terrel Carver, ed., *The Cambridge Companion to Marx* (Cambridge: Cambridge University Press, 1991), p. 334.

justice, and it is the form of it which is of prime concern to me here,² even though I also endorse its substance.

The substance of the feminist critique is that standard liberal theory of justice, and the theory of Rawls in particular, unjustifiably ignore an unjust division of labor, and unjust power relations, within families (whose legal structure *may* show no sexism at all). That is the key point of the feminist critique, from a political point of view. But the (often merely implicit) form of the feminist critique, which we get when we abstract from its gender-centered content, is that choices not regulated by the law fall within the primary purview of justice, and that is the key lesson of the critique, from a theoretical point of view.

In defending the claim that the personal is political, the view that I oppose is the Rawlsian one that principles of justice apply only to what Rawls calls the “basic structure” of society. Feminists have noticed that Rawls wobbles, across the course of his writings, on the matter of whether or not the family belongs to the basic structure and is therefore, in his view, a site at which principles of justice apply. I shall argue that Rawls’s wobble on this matter is not a case of mere indecision, which could readily be resolved in favor of inclusion of the family within the basic structure: that is the view of Susan Okin,³ and, in my opinion, she is wrong about that. I shall show (in Section V below) that Rawls cannot admit the family into the basic structure of society without abandoning his insistence that it is to the basic structure only that principles of distributive justice apply. In supposing that he could include family relations, Okin shows failure to grasp the *form* of the feminist critique of Rawls.

II

I reach the conclusion announced above at the end of a trail of argument that runs as follows. Here, in Section II, I restate a criticism that

2. Or, more precisely, that which *distinguishes* its form. (Insofar as the feminist critique targets government legislation and policy, there is nothing distinctive about its form.)

3. Okin is singularly alive to Rawls’s ambivalence about admitting or excluding the family from the basic structure: see, e.g. her “*Political Liberalism, Justice and Gender*,” *Ethics* 105, no. 1 (Oct. 1994): 23–24, and, more generally, her *Justice, Gender and the Family* (New York: Basic Books, 1989), Chapter 5. But, so far as I can tell, she is unaware of the wider consequences, for Rawls’s view of justice in general, of the set of ambiguities of which this one is an instance.

I have made elsewhere of John Rawls's application of his difference principle,⁴ to wit, that he does not apply it in censure of the self-seeking choices of high-flying marketeers, which induce an inequality that, so I claim, is harmful to the badly off. In Section III, I present an objection to my criticism of Rawls. The objection says that the difference principle is, by stipulation and design, a principle that applies only to social institutions (to those, in particular, which compose the basic structure of society), and, therefore, not one that applies to the choices, such as those of self-seeking high fliers, that people make *within* such institutions. Sections IV and V offer independent replies to that *basic structure objection*. I show, in Section IV, that the objection is inconsistent with many statements by Rawls about the role of principles of justice in a just society. I then allow that the discordant statements may be dropped from the Rawlsian canon, and, in Section V, I reply afresh to the basic structure objection, by showing that no defensible account of what the basic structure *is* allows Rawls to insist that the principles which apply to it do not apply to choices within it. I conclude that my original criticism of Rawls rests vindicated, against the particular objection in issue here. (Section VI comments on the implications of my position for the moral blamability of individuals whose choices violate principles of justice. The Endnote explores the distinction between coercive and noncoercive institutions, which plays a key role in the argument of Section V).

My criticism of Rawls is of his application of the difference principle. That principle says, in one of its formulations,⁵ that inequalities are just if and only if they are necessary to make the worst off people in society better off than they would otherwise be. I have no quarrel here with the difference principle itself,⁶ but I disagree sharply with Rawls on the matter of *which* inequalities pass the test for justifying inequality that it sets

4. See "Incentives, Inequality, and Community," in Grethe Peterson, ed., *The Tanner Lectures on Human Values*, Vol. 13 (Salt Lake City: University of Utah Press, 1992), and "The Pareto Argument for Inequality," *Social Philosophy and Policy*, 12 (Winter 1995). These articles are henceforth referred to as "Incentives" and "Pareto," respectively.

5. See "Incentives," p. 266, n. 6, for four possible formulations of the difference principle, all of which, arguably, find support in *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971). The argument of the present paper is, I believe, robust across those variant formulations of the principle.

6. I do have some reservations about the principle, but they are irrelevant to this paper. I agree, for example, with Ronald Dworkin's criticism of the "ambition-insensitivity" of the difference principle: see his "What Is Equality? Part 2: Equality of Resources," *Philosophy & Public Affairs*, 10, no. 4 (Fall 1981): 343.

and, therefore, about how *much* inequality passes that test. In my view, there is hardly any serious inequality that satisfies the requirement set by the difference principle, when it is conceived, as Rawls himself proposes to conceive it,⁷ as regulating the affairs of a society whose members themselves accept that principle. If I am right, affirmation of the difference principle implies that justice requires (virtually) unqualified equality itself, as opposed to the “deep inequalities” in initial life chances with which Rawls thinks justice to be consistent.⁸

It is commonly thought, for example by Rawls, that the difference principle licenses an argument for inequality which centers on the device of material incentives. The idea is that talented people will produce more than they otherwise would if, and only if, they are paid more than an ordinary wage, and some of the extra which they will then produce can be recruited on behalf of the worst off.⁹ The inequality consequent on differential material incentives is said to be justified within the terms of the difference principle, for, so it is said, that inequality benefits the worst off people: the inequality is necessary for them to be positioned as well as they are, however paltry their position may nevertheless be.

Now, before I mount my criticism of this argument, a *caveat* is necessary with respect to the terms in which it is expressed. The argument focuses on a *choice* enjoyed by well-placed people who command a high salary in a market economy: they can choose to work more or less hard, and also to work at this occupation rather than that one, and for this employer rather than that one, in accordance with how well they are remunerated. These well-placed people, in the foregoing standard presentation of the argument, are designated as “the talented,” and, for reasons to be given presently, I shall so designate them throughout my criticism of the argument. Even so, these fortunate people need not be thought to be talented, in any sense of that word which implies something more than a capacity for high market earnings, for the argument to possess whatever force it has. All that need be true of them is that *they are so positioned that, happily, for them, they do command a high salary*

7. “Proposes to conceive it”: I use that somewhat precious phrase because part of the present criticism of Rawls is that he does not succeed in so conceiving it—he does not, that is, recognize the implications of so conceiving it.

8. *A Theory of Justice*, p. 7.

9. This is just the crudest causal story connecting superior payment to the better off with benefit to the worst off. I adopt it here for simplicity of exposition.

and they can vary their productivity according to exactly how high it is. But, as far as the incentives argument is concerned, their happy position could be due to circumstances that are entirely accidental, relative to whatever kind of natural or even socially induced endowment they possess. One need not think that the average dishwasher's endowment of strength, flair, ingenuity, and so forth falls below that of the average chief executive to accept the argument's message. One no doubt does need to think some such thing to agree with the different argument which justifies rewards to well-placed people in whole or in part as a fair return to exercise of unusual ability, but Rawls's theory is built around his rejection of such desert considerations. Nor are the enhanced rewards justified because extra contribution warrants extra reward on grounds of proper reciprocity. They are justified purely because they elicit more productive performance.

I nevertheless persist in designating the relevant individuals as "the talented," because to object that they are not actually especially talented *anyway* is to enter an empirical claim which is both contentious and, in context, misleading, since it would give the impression that it should matter to our assessment of the incentives argument whether or not well-placed people merit the contestable designation. The particular criticism of the incentives argument that I shall develop is best understood in its specificity when the apparently concessive word "talented" is used: it does not indicate a concession on the factual question of how top people in a market society get to be where they are. My use of the argument's own terms shows the strength of my critique of it: that critique stands even if we make generous assumptions about how well-placed people secured their powerful market positions. It is, moreover, especially appropriate to make such assumptions here, since the Rawlsian difference principle is lexically secondary to his principle that fair equality of opportunity has been enforced with respect to the attainment of desired positions: if anything ensures that those who occupy them possess superior creative endowment, that does. (Which is not to say that it indeed ensures that: it is consistent with fair equality of opportunity that what principally distinguishes top people is superior cunning and/or prodigious aggressivity, and nothing more admirable.)

Now, for the following reasons, I believe that the incentives argument for inequality represents a distorted application of the difference principle, even though it is its most familiar and perhaps even its most persua-

sive application. Either the relevant talented people themselves affirm the difference principle or they do not. That is: either they themselves believe that inequalities are unjust if they are not necessary to make the badly off better off, or they do not believe that to be a dictate of justice. If they do not believe it, then their society is not just in the appropriate Rawlsian sense, for a society is just, according to Rawls, only if its members themselves affirm and uphold the correct principles of justice. The difference principle might be appealed to in justification of a government's toleration, or promotion, of inequality in a society in which the talented do not themselves accept it, but it then justifies a public policy of inequality in a society some members of which—the talented—do not share community with the rest:¹⁰ their behavior is then taken as fixed or parametric, a datum vis-à-vis a principle applied to it from without, rather than as itself answerable to that principle. That is not how principles of justice operate in a just society, as Rawls specifies that concept: within his terms, one may distinguish between a just society and a just government, one, that is, which applies just principles to a society whose members may not themselves accept those principles.

So we turn to the second and only remaining possibility, which is that the talented people do affirm the difference principle, that, as Rawls says, they apply the principles of justice *in their daily life* and achieve a sense of their own justice in doing so.¹¹ But they can then be asked why, in the light of their own belief in the principle, they require more pay than the untalented get, for work that may indeed demand special talent, but which is not specially unpleasant (for no such consideration enters the Rawlsian justification of incentives-derived inequality). The talented can be asked whether the extra they get is *necessary* to enhance the position of the worst off, which is the only thing, according to the difference principle, that could justify it. Is it necessary *tout court*, that is, independently of human will, so that, with all the will in the world, removal of inequality would make everyone worse off? Or is it necessary only insofar as the talented would *decide* to produce less than they now

10. They do not, more precisely, share *justificatory community* with the rest, in the sense of the italicized phrase that I specified at p. 282 of "Incentives."

11. "Citizens in everyday life affirm and act from the first principles of justice." They act "from these principles as their sense of justice dictates" and thereby "their nature as moral persons is most fully realized." (Quotations drawn from, respectively, "Kantian Constructivism in Moral Theory," *The Journal of Philosophy*, 77, no. 9 (Sept. 1980): 521, 528, and *A Theory of Justice*, p. 528.)

do, or not to take up posts where they are in special demand, if inequality were removed (by, for example, income taxation which redistributes to fully egalitarian effect¹²)?

Talented people who affirm the difference principle would find those questions hard to handle. For they could not claim, *in self-justification*, at the bar of the difference principle, that their high rewards are necessary to enhance the position of the worst off, since, in the standard case,¹³ it is they themselves who *make* those rewards necessary, through their own unwillingness to work for ordinary rewards as productively as they do for exceptionally high ones, an unwillingness which ensures that the untalented get less than they otherwise would. Those rewards are, therefore, necessary only because the choices of talented people are not appropriately informed by the difference principle.

Apart, then, from the very special cases in which the talented literally *could* not, as opposed to the normal case where they (merely) would not, perform as productively as they do without superior remuneration, the difference principle can justify inequality only in a society where not everyone accepts that very principle. It therefore cannot justify inequality in the appropriate Rawlsian way.

Now, this conclusion about what it means to accept and implement the difference principle implies that the justice of a society is not exclusively a function of its legislative structure, of its legally imperative rules, but also of the choices people make within those rules. The standard (and, in my view, misguided) Rawlsian application of the difference principle can be modeled as follows. There is a market economy all agents in which seek to maximize their own gains, and there is a Rawlsian state that selects a tax function on income that maximizes the income return to the worst off people, within the constraint that, because of the self-seeking motivation of the talented, a fully equalizing taxation system would make everyone worse off than one which is less than fully equalizing. But this double-minded modeling of the implementation of the difference principle, with citizens inspired by justice endorsing a state policy which plays a tax game against (some of) them in their manifestation as self-seeking economic agents, is wholly out of

12. That way of achieving equality preserves the information function of the market while extinguishing its motivational function: see Joseph Carens, *Equality, Moral Incentives, and the Market* (Chicago: University of Chicago Press, 1981).

13. See "Incentives," p. 298 *et circa*, for precisely what I mean by "the standard case."

accord with the (sound) Rawlsian requirement on a just society that its citizens themselves willingly submit to the standard of justice embodied in the difference principle. A society that is just within the terms of the difference principle, so we may conclude, requires not simply just coercive *rules*, but also an *ethos* of justice that informs individual choices. In the absence of such an ethos, inequalities will obtain that are not necessary to enhance the condition of the worst off: the required ethos promotes a distribution more just than what the rules of the economic game by themselves can secure.

To be sure, one might imagine, in the abstract, a set of coercive rules so finely tuned that universally self-interested choices within them would raise the worst off to as high a position as any other pattern of choices would produce. Where coercive rules had and were known to have such a character, agents could choose self-interestedly in confidence that the results of their choices would satisfy an appropriately uncompromising interpretation of the difference principle. In that (imaginary) case, the only ethos necessary for difference principle justice would be willing obedience to the relevant rules, an ethos which Rawls expressly requires. But the vast economics literature on incentive-compatibility teaches that rules of the contemplated perfect kind cannot be designed. Accordingly, as things actually are, the required ethos must, as I have argued, guide choice within the rules, and not merely direct agents to obey them. (I should emphasize that this is not so because it is *in general* true that the point of the rules governing an activity must be aimed at when agents pursue that activity in good faith: every competitive sport represents a counterexample to that generalization. But my argument for the conclusion stated above did not rest on that false generalization.)

III

There is an objection which friends of Rawls's *Theory of Justice* would press against my argument in criticism of his application of the difference principle. The objection is that my focus on the posture of talented producers in daily economic life is inappropriate, since their behavior occurs within, and does not determine, *the basic structure* of society, and it is only to the latter that the difference principle applies.¹⁴ What-

14. For a typical statement of this restriction, see, John Rawls, *Political Liberalism* (New York: Columbia University Press 1993) pp. 282-83

ever people's choices within it may be, the basic structure is just provided that it satisfies the two principles of justice. To be sure, so Rawls acknowledges, people's choices can themselves be assessed as just or unjust, from a number of points of view. Thus, for example, appointment to a given job of candidate A rather than candidate B might be judged unjust, even though it occurs within the rules of a just basic structure.¹⁵ But injustice in such a choice is not the sort of injustice that the Rawlsian principles are designed to condemn. For, *ex hypothesi*, that choice occurs within an established basic structure: it therefore cannot affect the justice of the basic structure itself, which is what, according to Rawls, the two principles govern. Nor, similarly, should the choices with respect to work and remuneration that talented people make be submitted for judgment at the bar of the difference principle. So to judge those choices is to apply that principle at the wrong point. The difference principle is a "principle of justice for institutions."¹⁶ It governs the choice of institutions, not the choices made within them. The development of the second horn of the dilemma argument at pp. 8–9 above misconstrues the Rawlsian requirement that citizens in a just society uphold the principles that make it just: by virtue of the stipulated scope of the difference principle, talented people do count as faithfully upholding it, as long as they conform to the prevailing economic rules *because* that principle requires those rules.

Call that "the basic structure objection." Now, before I develop it further, and then reply to it, I want to point out that there is an important ambiguity in the concept of the basic structure, as that is wielded by Rawlsians. The ambiguity turns on whether the Rawlsian basic structure includes only coercive aspects of the social order or, also, conventions and usages that are deeply entrenched but not legally or literally coercive. I shall return to that ambiguity in Section V below, and I shall show that it shipwrecks not only the basic structure objection but also the whole approach to justice that Rawls has taught so many to pursue. But, for the time being, I shall ignore the fatal ambiguity, and I shall take the phrase "basic structure," as it appears in the basic structure objection,

15. See the first sentence of Sec. 2 of *A Theory of Justice* ("The Subject of Justice"): "Many different kinds of things are said to be just and unjust: not only laws, institutions, and social systems, but also particular actions of many kinds, including decisions, judgments, and imputations" (*ibid.*, p. 7). But Rawls excludes examples such as the one given in the text above from his purview, because "our topic . . . is that of social justice. For us the primary subject of justice is the basic structure of society" (*ibid.*).

16. *A Theory of Justice*. D. 303.

as denoting *some* sort of structure, be it legally coercive or not, but whose key feature, for the purposes of the objection, is that it is indeed a structure, that is, a framework of rules within which choices are made, as opposed to a set of choices and/or actions.¹⁷ Accordingly, my Rawlsian critic would say, whatever structure, precisely, the basic structure is, the objection stands that my criticism of the incentives argument misapplies principles devised for a structure to individual choices and actions.

In further clarification of the polemical position, let me make a background point about the difference between Rawls and me with respect to the site or sites at which principles of justice apply. My own fundamental concern is neither the basic structure of society, in any sense, nor people's individual choices, but the pattern of benefits and burdens in society: that is neither a structure in which choice occurs nor a set of choices, but the upshot of structure and choices alike. My concern is *distributive justice*, by which I uneccentrically mean justice (and its lack) in the distribution of benefits and burdens to individuals. My root belief is that there is injustice in distribution when inequality of goods reflects not such things as differences in the arduousness of different people's labors, or people's different preferences and choices with respect to income and leisure, but myriad forms of lucky and unlucky circumstance. Such differences of advantage are a function of the structure *and* of people's choices within it, so I am concerned, secondarily, with *both* of those.

Now Rawls could say that his concern, too, is distributive justice, in the specified sense, but that, for him, distributive justice obtains just in case the allocation of benefits and burdens in society results from actions which display full conformity with the rules of a just basic structure.¹⁸ When full compliance with the rules of a just basic structure obtains, it follows, on Rawls's view, that there is no scope for (further) personal justice and injustice which affects *distributive* justice, whether it be by enhancing it or by reducing it. There is, Rawls would, of course,

17. The contrast between structure and action is further explained, though also, as it were, put in its place, in the Endnote to this article.

18. *A Theory of Justice*, pp. 274–75: "The principles of justice apply to the basic structure. . . . The social system is to be designed so that the resulting distribution is just however things turn out." Cf. *ibid.*, p. 545: ". . . the distribution of material means is left to take care of itself in accordance with the idea of pure procedural justice."

readily agree, scope, within a just structure, for distribution-affecting meanness and generosity,¹⁹ but generosity, though it would alter the distribution, and might make it more equal than it would otherwise be, could not make it more *just* than it would otherwise be, for it would then be doing the impossible, to wit, enhancing the justice of what is already established as a (perfectly) just distribution by virtue merely of the just structure in conformity with which it is produced. But, as I have indicated, I believe that there is scope for relevant (relevant, that is, because it affects justice in distribution) personal justice and injustice *within* a just structure, and, indeed, that it is not possible to achieve distributive justice by purely structural means.

In discussion of my claim (see p. 10 above) that social justice requires a social *ethos* that inspires uncoerced equality-supporting choice, Ronald Dworkin suggested²⁰ that a Rawlsian government might be thought to be charged with a duty, under the difference principle, of promoting such an *ethos*. Dworkin's suggestion was intended to support Rawls, against me, by diminishing the difference between Rawls's position and my own, and thereby reducing the reach of my criticism of him. I do not know what Rawls's response to Dworkin's proposal would be, but one thing is clear: Rawls could not say that, to the extent that the indicated policy failed, society would, as a result, be less just than if the policy had been more successful. Accordingly, if Dworkin is right that Rawlsian justice requires government to promote an *ethos* friendly to equality, it could not be for the sake of making society more distributively just that it was doing so, *even* though it would be for the sake of making its distribution more *equal*. The following threefold conjunction, which is an inescapable consequence of Rawls's position, on Dworkin's not unnatural interpretation of it, is strikingly incongruous: (1) the difference principle is an egalitarian principle of distributive justice; (2) it imposes on government a duty to promote an egalitarian *ethos*; (3) it is not for the sake of enhancing distributive justice in society that it is required to promote that *ethos*. Dworkin's attempt to reduce the distance between Rawls's position and my own threatens to render the former incoherent.

19. This is a different point from the one made at p. 11 above, to wit, that there is scope within a just structure for justice and injustice in choice in a "nonprimary" sense of "justice."

20. At a seminar in Oxford, in Hilary Term of 1994.

Now, before I mount my two replies to the basic structure objection, a brief conceptual digression is required, in clarification of the relationship between a just *society*, in Rawls's (and my own) understanding of that idea (see p. 8 above) and a just *distribution*, in my (non-Rawlsian) understanding of that different idea (see pp. 12–13). A just society, here, is one whose citizens affirm and act upon the correct principles of justice, but justice in distribution, as here defined, consists in a certain egalitarian profile of rewards. It follows that, as a matter of logical possibility, a just distribution might obtain in a society that is not itself just.

To illustrate this possibility, imagine a society whose ethos, though not inspired by a belief in equality, nevertheless induces an equal distribution. An example of such an ethos would be an intense Protestant ethic, which is indifferent to equality (on earth) as such, but whose stress on self-denial, hard work, and investment of assets surplus to needs somehow (despite the asceticism in it) makes the worst off as well off as is possible. Such an ethos achieves difference principle justice in distribution, but agents informed by it would not be motivated by the difference principle, and they could not, therefore, themselves be accounted just, within the terms of that principle. Under the specifications that were introduced here, this Protestant society would not be just, despite the fact that it displays a just distribution. We might say of the society that it is accidentally, but not constitutively, just. But, whatever phrasings we may prefer, the important thing is to distinguish "society" and "distribution" as candidate subjects of the predicate "just." (And it bears mentioning that, in contemporary practice, an ethos that achieves difference principle equality would almost certainly have to be equality-inspired: the accident of a non-equality-inspired ethos producing the right result is, at least in modern times, highly unlikely. The Protestantism described here is utterly fantastic, at least for our day.)

Less arresting is the opposite case, in which people strive to govern their behavior by (what are in fact) just principles, but ignorance, or the obduracy of wholly external circumstance, or collective action problems, or self-defeatingness of the kinds studied by Derek Parfit,²¹ or something else which I have not thought of, frustrates their intention, so that the distribution remains unjust. It would perhaps be peculiar to

21. See his *Reasons and Persons* (Oxford: Oxford University Press, 1984), Chapter 4.

call such a society *just*, and neither Rawls nor I need do so: justice in citizens was put, above, as a *necessary* condition of a just society.

However we resolve the secondary, and largely verbal, complications raised in this digression, the point will stand²² that an ethos informing choice within just rules is necessary in a society that is committed to the difference principle. My argument for that conclusion did not rely on aspects of my conception of justice which distinguish it from Rawls's, but on our shared conception of what a just society is. The fact that distributive justice, as I conceive it, causally requires an ethos (be it merely equality-promoting, such as our imaginary Protestantism, or also equality-inspired) that goes beyond conformity to just rules, was not a premise in my argument against Rawls. The argument of Section II turned essentially on my understanding of Rawls's well-considered requirement that the citizens of a just society are themselves just. The basic structure objection challenges that understanding.

IV

I now present a preliminary reply to the basic structure objection. It is preliminary in that it precedes my interrogation, in Section V, of what the phrase "basic structure" denotes, and also in that, by contrast with the fundamental reply that will follow that interrogation, there is a certain way out for Rawls, in face of the preliminary reply. That way out is not costless for him, but it does exist.

Although Rawls says often enough that the two principles of justice govern only justice in basic structure, he also says three things that tell against that restriction. This means that, in each case, he must either uphold the restriction and repudiate the comment in question, or maintain the comment and drop the restriction.²³

22. If, that is, my argument survives the basic structure objection, to which I reply in Secs. IV and V.

23. Because of these tensions in Rawls, people have resisted my incentives critique of him in two opposite ways. Those convinced that his primary concern is the basic structure object in the fashion set out in Sec. III. But others do not realize how important that commitment is to him: they accept my (as I see it, anti-Rawlsian) view that the difference principle should condemn incentives, but they believe that Rawls would also accept it, since they think his commitment to that principle is relevantly uncompromising. They therefore do not regard what I say about incentives as a *criticism* of Rawls.

Those who respond in that second fashion seem not to realize that Rawls's liberalism is jeopardized if he takes the route that they think open to him. He then becomes a radical

First, Rawls says that, when the difference principle is satisfied, society displays *fraternity*, in a particularly strong sense: its citizens do not want to have greater advantages unless this is to the benefit of others who are less well off. . . . Members of a family commonly do not wish to gain unless they can do so in ways that further the interests of the rest. Now wanting to act on the difference principle has precisely this consequence.²⁴

But fraternity of that strong kind is not realized when all the justice delivered by that principle comes from the basic structure, and, therefore, whatever people's motivations may be. Wanting not "to gain unless they can do so in ways that further the interests of the rest" is incompatible with the self-interested motivation of market maximizers, which the difference principle, in its purely structural interpretation, does not condemn.²⁵

Second, Rawls says that the worst off in a society governed by the difference principle can bear their inferior position with dignity, since they know that no improvement of it is possible, that they would lose under any less unequal dispensation. Yet that is false, if justice relates to structure alone, since it might then be necessary for the worst off to occupy their relatively low place only because the choices of the better off tend strongly against equality. Why should the fact that no purely structurally induced improvement in their position is possible suffice to guarantee the dignity of the worst off, when their position might be very inferior indeed, because of unlimited self-seekingness in the economic choices of well-placed people?²⁶ Suppose, for example, that, as many politicians claim, raising rates of income taxation with a view to enhancing benefits for the badly off would be counterproductive, since the higher rates would induce severe disincentive effects on the productivity of the better off. Would awareness of that truth contribute to a sense of dignity on the part of the badly off?

Third, Rawls says that people in a just society act with a sense of justice *from* the principles of justice in their daily lives: they strive to apply

egalitarian socialist, whose outlook is very different from that of a liberal who holds that "deep inequalities" are "inevitable in the basic structure of any society" (*A Theory of Justice*, p. 7).

24. *A Theory of Justice*, p. 105.

25. See, further, "Incentives," pp. 321–22, "Pareto," pp. 178–79.

26. See, further, "Incentives," pp. 320–21.

those principles in their own choices. And they do so because they

have a desire to express their nature as free and equal moral persons, and this they do most adequately by acting *from* the principles that they would acknowledge in the original position. When all strive to comply with these principles and each succeeds, then individually and collectively their nature as moral persons is most fully realized, and with it their individual and collective good.²⁷

But why do they have to act *from* the principles of justice, and “apply” them “as their circumstances require”²⁸ if just behavior consists in choosing as one pleases within, and without disturbing, a structure designed to effect an implementation of those principles? And how can they, without a redolence of hypocrisy, celebrate the full realization of their natures as moral persons, when they know that they are out for the most that they can get in the market?

Now, as I said, these inconsistencies are not decisive against Rawls. For, in each case, he could stand pat on his restriction of justice to basic structure, and give up, or weaken, the remark that produces the inconsistency. And that is indeed what he is disposed to do at least with respect to the third inconsistency that I have noted. He said²⁹ that *A Theory of Justice* erred by in some respects treating the two principles as defining a *comprehensive* conception of justice:³⁰ he would, accordingly, now drop the high-pitched homily which constitutes the text to footnote 27. But this accommodation carries a cost: it means that the ideals of dignity, fraternity, and full realization of people’s moral natures can no longer be said to be delivered by Rawlsian justice.³¹

V

I now provide a more fundamental reply to the basic structure objection. It is more fundamental in that it shows, decisively, that justice re-

27. *A Theory of Justice*, p. 528, my emphasis. See, further, footnote 11 above, and “Incentives,” pp. 316–20.

28. John Rawls, “Justice as Fairness: A Briefer Restatement,” Harvard University, 1989, typescript, p. 154.

29. In reply to a lecture that I gave at Harvard in March of 1993.

30. That is, as (part of) a complete moral theory, as opposed to a purely political one: see, for explication of that distinction, *Political Liberalism*, *passim*, and, in particular, pp. xv–xvii.

31. See “Incentives,” p. 322.

quires an ethos governing daily choice that goes beyond one of obedience to just rules,³² on grounds which do not, as the preliminary reply did, exploit things that Rawls says in apparent contradiction of his stipulation that justice applies to the basic structure of society alone. The fundamental reply interrogates, and refutes, that stipulation itself.

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 subject³³ of justice from which I can imagine no way out. The fault line exposes itself when we ask the apparently simple question: what (exactly) *is* the basic structure? For there is a fatal ambiguity in Rawls's specification of the basic structure, and an associated discrepancy between his criterion for what justice judges and his desire to exclude the effects of structure-consistent personal choice from the purview of its judgment.

The basic structure, the primary subject of justice, is always said by Rawls to be a set of institutions, and, so he infers, the principles of justice do not judge the actions of people within (just) institutions whose rules they observe. But it is seriously unclear *which* institutions are supposed to qualify as part of the basic structure. Sometimes it appears that coercive (in the legal sense) institutions exhaust it, or, better, that institutions belong to it only insofar as they are (legally) coercive.³⁴ In this widespread interpretation of what Rawls intends by the "basic structure" of a society, that structure is legible in the provisions of its constitution, in such specific legislation as may be required to implement those provisions, and in further legislation and policy which are of central importance but which resist formulation in the constitution itself.³⁵

32. Though not necessarily an ethos embodying the very principles that the rules formulate: see the last four paragraphs of Sec. III above. Justice will be shown to require an ethos, and the basic structure objection will thereby be refuted, but it will be a contingent question whether the ethos required by justice can be read off the content of the just rules themselves. Still, as I suggested at p. 14, the answer to that question is almost certainly "Yes."

33. That is, the subject matter that principles of justice judge. I follow Rawls's usage here (e.g. in the title of Lecture VII of *Political Liberalism*: "The Basic Structure as Subject"; and cf. n. 15 above).

34. Henceforth, unless I indicate otherwise, I shall use "coercive," "coercion," etc. to mean "legally coercive," etc.

35. Thus, the difference principle, though pursued through (coercively sustained) state policy, cannot, so Rawls thinks, be aptly inscribed in a society's constitution: see *Political Liberalism*, pp. 227–30.

The basic structure, in this first understanding of it, is, so one might say, the *broad coercive outline* of society, which determines in a relatively fixed and general way what people may and must do, in advance of legislation that is optional, relative to the principles of justice, and irrespective of the constraints and opportunities created and destroyed by the choices that people make within the given basic structure, so understood.

Yet it is quite unclear that the basic structure is *always* thus defined, in exclusively coercive terms, within the Rawlsian texts. For Rawls often says that the basic structure consists of the *major* social institutions, and he does not put a particular accent on coercion when he announces *that* specification of the basic structure.³⁶ In this second reading of what it is, institutions belong to the basic structure whose structuring can depend far less on law than on convention, usage, and expectation: a signal example is the family, which Rawls sometimes includes in the

36. Consider, for example, the passage at pp. 7–8 of *A Theory of Justice* in which the concept of the basic structure is introduced:

Our topic . . . is that of social justice. For us the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. By major institutions I understand the political constitution and the principal economic and social arrangements. Thus the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family are examples of major social institutions. . . . I shall not consider the justice of institutions and social practices generally. . . . [The two principles of justice] may not work for the rules and practices of private associations or for those of less comprehensive social groups. They may be irrelevant for the various informal conventions and customs of everyday life; they may not elucidate the justice, or perhaps better, the fairness of voluntary cooperative arrangements or procedures for making contractual agreements.

I cannot tell, from those statements, what is to be included in, and what excluded from, the basic structure, nor, more particularly, whether coercion is the touchstone of inclusion. Take, for example, the case of the monogamous family. Is it simply its “legal protection” that is a major social institution, in line with a coercive definition of the basic structure (if not, perhaps, with the syntax of the relevant sentence)? Or is the monogamous family itself part of that structure? And, in that case, are its typical usages part of it? They certainly constitute a “principal social arrangement,” yet they may also count as “practices of private associations or . . . of less comprehensive social groups,” and they are heavily informed by the “conventions and customs of everyday life.”

Puzzlement with respect to the bounds of the basic structure is not relieved by examination of the relevant pages of *Political Liberalism*, to wit, 11, 68, 201–202, 229, 258, 268, 271–72, 282–83, and 301. Some formulations on those pages lean toward a coercive specification of the basic structure. Others do not.

basic structure and sometimes does not.³⁷ But once the line is crossed, from coercive ordering to the non-coercive ordering of society by rules and conventions of accepted practice, then the ambit of justice can no longer exclude chosen behavior, since the usages which constitute informal structure (think, again, of the family) are bound up with the customary actions of people.

"Bound up with" is vague, so let me explain how I mean it, here. One can certainly speak of the structure of the family, and it is not identical with the choices that people customarily make within it; but it is nevertheless impossible to claim that the principles of justice which apply to family structure do not apply to day-to-day choices within it. For consider the following contrast. The *coercive* structure arises independently of people's quotidian choices: it is formed by those specialized choices which legislate the law of the land. By contrast, the non-coercive structure of the family has the character it does only because of the choices that its members routinely make. The constraints and pressures that sustain the non-coercive structure reside in the dispositions of agents which are actualized as and when those agents choose to act in a constraining or pressuring way. With respect to coercive structure, one may fairly readily distinguish the choices which institute and sustain a structure from the choices that occur within it.³⁸ But with respect to informal structure, that distinction, though conceptually intelligible, collapses extensionally: when A chooses to conform to the prevailing usages, the pressure on B to do so is reinforced, and no such pressure exists, the very usages themselves do not exist, in the absence of conformity to them.

Now, since that is so, since behavior is *constitutive* of *non-coercive* structure, it follows that the only way of protecting the basic structure objection against my claim that the difference principle condemns maximizing economic behavior (and, more generally, of protecting the restriction of justice to the basic structure against the insistence that the personal, too, is political) is by holding fast to a purely coercive specification of the basic structure. But that way out is not open to Rawls,

37. See the final paragraph of Sec. I of this paper.

38. For more on structure and choice, see the Endnote to this article. Among other things, I there entertain a doubt about the strength of the distinction drawn in the above sentence, but, as I indicate, if that doubt is sound, then my case against Rawls is not weakened.

because of a further characterization that he offers of the basic structure: this is where the discrepancy adverted to in the second paragraph of this section appears. For Rawls says that “the basic structure is the primary subject of justice because its effects are so profound and present from the start.”³⁹ Nor is that further characterization of the basic structure optional: it is needed to explain why it *is* primary, as far as justice is concerned. Yet it is false that only the *coercive* structure causes profound effects, as the example of the family once again reminds us.⁴⁰ Accordingly, if Rawls retreats to coercive structure, he contradicts his own criterion for what justice judges, and he lands himself with an arbitrarily narrow definition of his subject matter. So he must let other structure in, and that means, as we have seen, letting chosen behavior in. What is more, even if behavior were not, as I claim it is, constitutive of non-coercive structure, it will come in by direct appeal to the profundity-of-effect criterion for what justice governs. So, for example, we need not decide whether or not a regular practice of favoring sons over daughters in the matter of providing higher education forms part of the *structure* of the family to condemn it as unjust, under that criterion.⁴¹

Given, then, his stated rationale⁴² for exclusive focus on the basic structure—and what *other* rationale could there be for calling it the *primary* subject of justice?—Rawls is in a dilemma. For he must either

39. *A Theory of Justice*, p. 7.

40. Or consider access to that primary good which Rawls calls “the social basis of self-respect.” While the law may play a large role in securing that good to people vulnerable to racism, legally unregulable racist attitudes also have an enormous negative impact on how much of that primary good they get.

But are the profound effects of the family, or of racism, “present from the start” (see the text to n. 39)? I am not sure how to answer that question, because I am unclear about the intended import, here, of the quoted phrase. Rawls probably means “present from the start of each person’s life”: the surrounding text at *Theory*, p. 7 supports this interpretation. If so, the family, and racial attitudes, certainly qualify. If not, then I do not know how to construe the phrase. But what matters, surely, is the asserted profundity of effect, not whether it is “present from the start,” whatever may be the sense which attaches, here, to that phrase.

41. Note that one can condemn the said practice without condemning those who engage in it. For there might be a collective action problem here, which weighs heavily on poor families in particular. If, in addition to discrimination in education, there is discrimination in employment, then a poor family might sacrifice a great deal through choosing evenhandedly across the sexes with whatever resources it can devote to its children’s education. This illustrates the important distinction between condemning injustice and condemning the people whose actions perpetuate it: see, further, Sec. VI below.

42. See the text to n. 39 above.

admit application of the principles of justice to (legally optional) social practices, and, indeed, to patterns of personal choice that are not legally prescribed, *both* because they are the substance of those practices, *and* because they are similarly profound in effect, in which case the restriction of justice to structure, in any sense, collapses; or, if he restricts his concern to the coercive structure only, then he saddles himself with a purely arbitrary delineation of his subject matter. I now illustrate this dilemma by reference to the two contexts that have figured most in this paper: the family, and the market economy.

Family structure is fateful for the benefits and burdens that redound to different people, and, in particular, to people of different sexes, where “family structure” includes the socially constructed expectations which lie on husband and wife. And such expectations are sexist and unjust if, for example, they direct the woman in a family where both spouses work outside the home to carry a greater burden of domestic tasks. Yet such expectations need not be supported by the law for them to possess informal coercive force: sexist family structure is consistent with sex-neutral family law. Here, then, is a circumstance, outwith the basic structure, as that would be coercively defined, which profoundly affects people’s life-chances, *through the choices people make in response to the stated expectations, which are, in turn, sustained by those choices*.⁴³ Yet Rawls must say, on pain of giving up the basic structure objection, that (legally uncoerced) family structure and behavior have no implications for justice in the sense of “justice” in which the basic structure has implications for justice, since they are not a consequence of the formal coercive order. But that implication of the stated position is perfectly incredible: no such differentiating sense is available.

John Stuart Mill taught us to recognize that informal social pressure can restrict liberty as much as formal coercive law does. And the family example shows that informal pressure is as relevant to distributive justice as it is to liberty. One reason why the rules of the basic structure, when it is coercively defined, do not by themselves determine the justice of the distributive upshot is that, by virtue of circumstances that are

43. Hugo Adam Bedau noticed that the family falls outside the basic structure, under the coercive specification of it often favored by Rawls, though he did not notice the connection between non-coercive structure and choice that I emphasize in the above sentence: see his “Social Justice and Social Institutions,” *Midwest Studies in Philosophy*, 3 (1978): 171.

relevantly independent of coercive rules, some people have much more power than others to determine what happens *within* those rules.

The second illustration of discrepancy between what coercive structure commands and what profoundly affects the distribution of benefits and burdens is my own point about incentives. Maximizing legislation,⁴⁴ and, hence, a coercive basic structure that is just as far as the difference principle is concerned, are consistent with a maximizing ethos across society which, under many conditions, will produce severe inequalities and a meager level of provision for the worst off, yet both have to be declared just by Rawls, if he stays with a coercive conception of what justice judges. And that implication is, surely, perfectly incredible.

Rawls cannot deny the difference between the coercively defined basic structure and that which produces major distributive consequences: the coercively defined basic structure is only an instance of the latter. Yet he must, to retain his position on justice and personal choice, restrict the ambit of justice to what a coercive basic structure produces. But, so I have (by implication) asked: why should we *care* so disproportionately about the coercive basic structure, when the major reason for caring about it, its impact on people's lives, is *also* a reason for caring about informal structure and patterns of personal choice? To the extent that we care about coercive structure because it is fateful with regard to benefits and burdens, we must care equally about the ethi that sustain gender inequality, and inegalitarian incentives. And the similarity of our reasons for caring about these matters will make it lame to say: ah, but only the caring about coercive structure is a caring about *justice*, in a certain distinguishable sense. That thought is, I submit, incapable of coherent elaboration.

My response to the basic structure objection is now fully laid out, but before proceeding, in the sections that remain, to matters arising, it will be useful to rehearse, in compressed form, the arguments that were presented in Sections II through V.

My original criticism of the incentives argument ran, in brief, as follows:

- (1) Citizens in a just society adhere to its principles of justice.

44. That is, legislation which maximizes the size of the primary goods bundle held by the worst off people, given whatever is correctly expected to be the pattern in the choices made by economic agents.

But

- (2) They do not adhere to the difference principle if they are acquisitive maximizers in daily life.
- ∴ (3) In a society that is governed by the difference principle, citizens lack the acquisitiveness that the incentives argument attributes to them.

The basic structure objection to that criticism is of this form:

- (4) The principles of justice govern only the basic structure of a just society.
- ∴ (5) Citizens in a just society may adhere to the difference principle whatever their choices may be within the structure it determines, and, in particular, even if their economic choices are entirely acquisitive.
- ∴ (6) Proposition (2) lacks justification.

My preliminary reply to the basic structure objection says:

- (7) Proposition (5) is inconsistent with many Rawlsian statements about the relationship between citizens and principles of justice in a just society.

And my fundamental reply to the basic structure objection says:

- (8) Proposition (4) is unsustainable.

VI

So the personal is indeed political: personal choices to which the writ of the law is indifferent are fateful for social justice.

But that raises a huge question, with respect to *blame*. The injustice in distribution that reflects personal choices within a just coercive structure can plainly not be blamed on that structure itself, nor, therefore, on whoever legislated that structure. Must it, then, be blamed, in our two examples, on men⁴⁵ and on acquisitive people, respectively?

I shall presently address, and answer, that question about blame, but, before I do so, I wish to explain why I could remain silent in the face of it, why, that is, my argument in criticism of Rawls's restricted applica-

45. We can here set aside the fact that women often subscribe to, and inculcate, male-dominant practices.

tion of the principles of justice requires no judgment about blaming individual choosers. The conclusion of my argument is that the principles of justice apply not only to coercive rules but also to the pattern in people's (legally) uncoerced choices. Now, if we judge a certain set of rules to be just or unjust, we need not add, as pendant to that judgment, that those who legislated the rules in question should be praised or blamed for what they did.⁴⁶ And something analogous applies when we come to see that the ambit of justice covers the pattern of choices in a society. We can believe whatever we are inclined to do about how responsible and/or culpable people are for their choices, and that includes believing that they are not responsible and/or culpable for them at all, while holding that on which I insist: that the pattern in such choices is relevant to how just or unjust a society is.

That said, I return to the question of how blamable individuals are. It would be inappropriate to answer it, here, by first declaring my position, if, indeed, I have one, on the philosophical problem of the freedom of the will. Instead, I shall answer the question about blame on the prephilosophical assumptions which inform our ordinary judgments about when, and how much, blame is appropriate. On such assumptions, we should avoid two opposite mistakes about how culpable chauvinistic men and self-seeking high fliers are. One is the mistake of saying: there is no ground for blaming these people *as individuals*, for they simply participate in an accepted social practice, however tawdry or awful that practice may be. That is a mistake, since people do have choices: it is, indeed, *only* their choices that reproduce social practices; and some, moreover, choose *against* the grain of nurture, habit, and self-interest. But one also must not say: look how each of these people shamefully decides to behave so badly. That, too, is unbalanced, since, although

46. We can distinguish between how unjust past practices (e.g. slavery) were and how unjust those who protected and benefited from those unjust practices were. Most of us (rightly) do not condemn Lincoln for his (conditional) willingness to tolerate slavery as strongly as we would a statesman who did the same in 1997, but the institution of slavery itself was as unjust in Lincoln's time as it would be today.

What made slavery unjust in, say, Greece, is exactly what would make slavery (with, of course, the very same rules of subordination) unjust today, to wit, the content of its rules. But sound judgments about the justice and injustice of people are much more contextual: they must take into account the institutions under which they live, the prevailing level of intellectual and moral development, collective action problems such as the one delineated in n. 41 above, and so forth. The morally best slaveholder might deserve admiration. The morally best form of slavery would not.

there exists personal choice, there is heavy social conditioning behind it and there can be heavy costs in deviating from the prescribed and/or permitted ways. If we care about social justice, we have to look at four things: the coercive structure, other structures, the social ethos, and the choices of individuals, and judgment on the last of those must be informed by awareness of the power of the others. So, for example, a properly sensitive appreciation of these matters allows one to hold that an acquisitive ethos is profoundly unjust in its effects, without holding that those who are gripped by it are commensurately unjust. It is essential to apply principles of justice to dominant patterns in social behavior—that, as it were, is where the action is—but it doesn't follow that we should have a persecuting attitude to the people who emit that behavior. We might have good reason to exonerate the perpetrators of injustice, but we should not deny, or apologize for, the injustice itself.⁴⁷

On an extreme view, which I do not accept but need not reject, a typical husband in a thoroughly sexist society, one, that is, in which families in their overwhelming majority display an unjust division of domestic labor, is literally incapable of revising his behavior, or capable of revising it only at the cost of cracking up, to nobody's benefit. But even if that is true of typical husbands, we know it to be false of husbands in general. It is a plain empirical fact that some husbands are capable of revising their behavior, since some husbands have done so, in response to feminist criticism. These husbands, we could say, were moral pioneers. They made a path which becomes easier and easier to follow as more and more people follow it, until social pressures are so altered that it becomes harder to stick to sexist ways than to abandon them. That is a central way in which a social ethos changes. Or, for another example, consider the recent rise in ecological consciousness. At first, only people that appear to be freaky because they do so bother to save and recycle their paper, plastic, and so forth. Then, more do that, and, finally, it becomes not only difficult not to do it but easy to do it. It is pretty easy to discharge burdens that have become part of the normal round of everybody's life. Expectations determine behavior, behavior determines expectations, which determine behavior, and so on.

Are there circumstances in which a similar incremental process could

47. See the preceding note.

occur with respect to economic behavior? I do not know. But I do know that universal maximizing is by no means a necessary feature of a market economy. For all that much of its industry was state-owned, the United Kingdom from 1945 to 1951 had a market economy. But salary differentials were nothing like as great as they were to become, or as they were then in the United States. Yet, so I hazard, when British executives making five times what their workers did met American counterparts making fifteen times what their (anyhow better paid) workers did, many of the British executives would *not* have felt: *we* should press for more. For there was a social ethos of reconstruction after war, an ethos of common project, that restrained desire for personal gain. It is not for a philosopher to delimit the conditions under which such, and even more egalitarian ethi, can prevail. But a philosopher can say that a maximizing ethos is not a necessary feature of society, even of market society, and that, to the extent that such an ethos prevails, satisfaction of the difference principle is prejudiced.

In 1988, the ratio of top executive salaries to production worker wages was 6.5 to 1 in West Germany and 17.5 to 1 in the United States.⁴⁸ Since it is not plausible to think that Germany's lesser inequality was a disincentive to productivity, since it is plausible to think that an ethos that was relatively friendly to equality⁴⁹ protected German productivity in the face of relatively modest material incentives, we can conclude that the said ethos caused the worst paid to be better paid than they would have been under a different culture of reward. It follows, on my view of things, that the difference principle was better realized in Germany in 1988 than it would have been if its culture of reward had been more similar to that of the United States. But Rawls cannot say that, since the smaller inequality that benefited the less well off in Germany was not a matter of law but of ethos. I think that Rawls's inability to regard Germany as having done comparatively well with respect to the difference principle is a grave defect in his conception of the site of distributive justice.

48. See Lawrence Mishel and David M. Frankel, *The State of Working America, 1990-1991* (Armonk, N.Y.: M. E. Sharpe, 1991), p. 122.

49. That ethos need not have been an egalitarian one. For present purposes, it could have been an ethos which disendorses acquisitiveness as such (see n. 32, and the digression at the end of Sec. III), other than on *behalf* of the worst off.

ENDNOTE ON COERCIVE AND OTHER STRUCTURE

The legally coercive structure of society functions in two ways. It *prevents* people from doing things by erecting insurmountable barriers (fences, police lines, prison walls, etc.), and it *deters* people from doing things by ensuring that certain forms of unprevented behavior carry an (appreciable risk of) penalty.⁵⁰ The second (deterrent) aspect of coercive structure may be described counterfactually, in terms of what would or might happen to someone who elects the forbidden behavior: knowledge of the relevant counterfactual truths motivates the complying citizen's choices.

Not much pure prevention goes on within the informal structure of society: not none, but not much. (Locking an errant teenager in her room would represent an instance of pure prevention, which, if predictable for determinate behavior, would count as part of a society's informal structure: it would be a rule in accordance with which that society operates.) That being set aside, informal structure manifests itself in predictable sanctions such as criticism, disapproval, anger, refusal of future cooperation, ostracism, beating (of, for example, wives who refuse sexual service) and so on.

Finally, to complete this conceptual review, the ethos of a society is the set of sentiments and attitudes in virtue of which its normal practices, and informal pressures, are what they are.

Now, the pressures that sustain the informal structure lack force save insofar as there is a normal practice of compliance with the rules they enforce. That is especially true of that great majority of those pressures (beating does not belong to that majority) which carry a moral coloring: criticism and disapproval are ineffective when they come from the mouths of those who ask others not to do what they do themselves. To be sure, that is not a conceptual truth, but a social-psychological one. Even so, it enables us to say that what people ordinarily do supports and partly constitutes (again, not conceptually, but in effect) the informal structure of society, in such a way that it makes no sense to pass judgments of justice on that structure while withholding such judgment from the behavior that supports and constitutes it: that point is crucial

50. The distinction given above corresponds to that between the difficulty and the cost of actions: see my *Karl Marx's Theory of History* (Oxford: Oxford University Press, and Princeton: Princeton University Press, 1978), pp. 238–39.

to the anti-Rawlsian inference at p. 20 above.⁵¹ Informal structure is not a behavioral pattern, but a set of rules, yet the two are so closely related that, so one might say, they are *merely* categorially different. Accordingly, so I argued, to include (as one must) informal structure within the basic structure is to countenance behavior, too, as a primary subject of judgments of justice.

Now, two truths about legally coercive structure might be thought to cast doubt on the contrast I drew between it and informal structure in Section V above. First, although the legally coercive structure of society is indeed discernible in the ordinances of its constitution and law, those ordinances count as delineating it only on condition that they enjoy a broad measure of compliance.⁵² And, second, legally coercive structure achieves its intended social effect only in and through the actions which constitute compliance with its rules. To be more accurate, those propositions are true provided that we exclude from consideration “1984” states in which centralized brute force prevails against nonconformity even, if necessary, at the cost of half the population being in jail. But it is appropriate to ignore 1984 scenarios here.⁵³

In light of those truths, it might be objected that the dilemma that I posed for Rawls (see pp. 21–22 above), and by means of which I sought to defeat his claim that justice judges structure *as opposed to* the actions of agents, was critically misframed. For I said, against that claim, that the required opposition between structure and actions works for coercive structure only, with respect to which a relevantly strong distinction can be drawn between structure-sustaining and structure-conforming action, but that coercive structure could not reasonably be thought to

51. See the sentence beginning “But once” on the top of that page.

52. It does not follow that they are not *laws* unless they enjoy such compliance: perhaps they are nevertheless laws, if they “satisfy a test set out in a Hartian rule of recognition, even if they are themselves neither complied with nor accepted” (Joshua Cohen, in comment on an earlier draft of this paper). But such laws (or “laws”) are not plausibly represented as part of the basic structure of society, so the statement in the text can stand as it is.

53. That is because of Rawls’s reasonable stipulation that, in a just society, the threat of coercion is necessary for assurance game reasons only: each is disposed to comply provided that others do, and coercion is needed not because, in the absence of its threat *to me*, I might not comply, but because in the absence of its threat to others I cannot be sure that *they* will comply (see *A Theory of Justice*, p. 315). This stipulation makes formal law less *essentially* coercive than one might otherwise suppose and therefore less contrastable with custom than I have supposed.

exhaust the structure falling within the purview of justice: accordingly, so I concluded, justice must also judge everyday actions.

The truths rehearsed two paragraphs back challenge my articulation of the distinction between coercive structure and action within it. They thereby also challenge the contrast that I drew between two relationships, that between coercive structure and action, and that between informal structure and action.

This problem needs more thought than I have to date spent on it. For the moment I shall say this: even if coercive structure counts as such only if appropriate compliance obtains, that structure may nevertheless be *identified* with a set of laws which are not themselves patterns of behavior. And one can distinguish sharply between behavior forbidden and directed by those laws, and behavior that is optional under them, however systematic and widespread it may be. By contrast, the identity of informal structure is less separable from practice: no distinction is sustainable between widespread practices which manifest or represent informal structure and widespread practices which do not.

If the would-be saving contrast which I there essay is an unrealistic idealization, then the distinction, vis-à-vis action, between coercive and informal structure, may be more blurred than I have been disposed to allow. Yet that would not be because informal structure is more separable from action than I claimed, but because coercive structure is less separable from it. Therefore, even if the dilemma constructed on pp. 21–22 was for the stated reasons misframed, the upshot would hardly be congenial to Rawls's position, that justice judges structure rather than actions, but, if anything, congenial to my own rejection of it, if not, indeed, to the terms in which some of the argument for that rejection was cast.