

Justice and the duties of social equality

Carina Fourie



University College London

I, Carina Fourie, confirm that the work presented in this thesis is my own.

Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Carina Fourie

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Abstract

The aim of this thesis is to demonstrate that John Rawls's conception of social justice should be revised to include duties that will require individuals to uphold social equality. Social equality, as I describe it, is characterised by the values of, at a minimum, respect-for-persons, civility and toleration. Informal social equality occurs when these values are upheld outside of a legal or official institutional context, such as through personal choice and within civil society.

Rawls's conception of justice, which focuses primarily on institutional justice, does not include fair personal choice as a requirement of justice. As choice, I will argue, affects the distribution of primary social goods such as the social basis of self-respect, if we want to describe a fair society, we should include a description of fair choice. If informal social equality is upheld, justice in choice will also be upheld. To correct the neglect of justice in choice, we can thus describe a fair society as one where (1) institutions would be fair and (2) individuals would fulfil duties of social equality.

In the context of current debate on the role of individual behaviour in social justice, my thesis can be distinguished from what I refer to as the original 'personal choice argument'. According to this argument, advocated by G. A. Cohen and Liam B. Murphy, for example, Rawls's principles of justice for institutions should be applied to individuals so that fair personal choice

becomes a requirement of distributive justice. Cohen and Murphy's arguments are unconvincing, however, because (i) we could apply principles other than the institutional, for example, principles for individuals, to choice and (ii) we have good reason not to apply the institutional principles to choice, for example, because they do not properly address interferences with self-respect.

Instead of applying the institutional principles of justice to individuals, I argue that Rawls's principles for individuals should be revised according to the values of social equality:

1. the duty of mutual respect needs to be revised to include requirements for individuals and associations to comply with the demands of social equality, which are (i) respect-for-persons, (ii) civility and (iii) toleration; and
2. the duty of justice should be adapted to specify that individuals are required to help establish and to uphold informal (not merely formal) justice, thus to uphold justice in personal choice.

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Introduction

What is the relationship between justice and equality? Would a fair society also need to be an equal society? Among the many affirmations that justice undeniably requires equality, consensus is scarce as to what type of equality this would be: “Among the competing items to be equalized are welfare, preference satisfaction, primary goods, economic resources, social status, political power, capacity for personal fulfilment, opportunity for welfare, and opportunity for scarce resources and social positions”.¹ The question then is rather ‘what type of equality would a fair society require?’

John Rawls’s conception of justice affirms the need for at least two types of equality expressed through his principles of justice.² Rawls is concerned with social justice, or what I will refer to as broad distributive justice.³ This type of justice, Rawls emphasises, requires institutions to be designed and regulated according to (1) equal liberty, each person should be afforded “an equal right to the most extensive total system of equal basic liberties”, and (2) fair equality of opportunity, “those who are at the same level of talent and ability,

1 Louis P. Pojman and Robert Westmoreland (1997: 1-2). ‘Equality of what?’, as Amartya Sen (1997) put it, is a primary source of egalitarian conflict.

2 My references to Rawls include numerous papers, collected in one edition by Samuel Freeman (2001b-k), and, in the order they were originally published, *A theory of justice* (1999; the revised edition) or what I will refer to as *Theory, Political liberalism* (1993), and *Justice as fairness: a restatement* (2001a).

3 Broad distributive justice describes the way in which society needs to be organised in order for the primary social goods, including non-material goods such as rights and the social basis of self-respect, to be distributed fairly. It can be contrasted to what I refer to as narrow distributive justice which describes only the fair distribution of material or economic goods, such as income and wealth. See Rawls (1999: 78-79) for a description of the primary social goods.

and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system".⁴ When it comes to the distribution of income and wealth, Rawls does not advocate strict equality as such: for justice, we do not require equality in material goods but we must give priority to the worst-off in society.⁵

Is this sufficient for justice? Particularly, are these the only forms of equality required in a fair society? A fair society, understood in these terms, does not seem to be an ideally equal society. One conception of equality missing is social equality. If everyone in a society is genuinely treated as an equal, I think we should expect equality beyond institutionalised equal rights and opportunities; equality would be expressed in everyday behaviour, in private relationships, in people's attitudes to each other. If Rawls's conception of justice does not include social equality, does this mean that there is something missing?

A fair society and a society of equals are clearly not equivalent notions: what we would need to achieve a fair distribution of social goods is unlikely to be precisely the same as what we would need to achieve a society of equals. Equality thus in everyday behaviour, rather than institutionalised equality, could be dismissed as simply irrelevant to justice.

4 See Rawls (1999: 266) for the final statement of the principles of justice and for this description of equal liberty. For the description of fair equality of opportunity, see Rawls (1999: 63).

5 For a statement of the difference principle, which claims that inequalities are only fair if they benefit the worst-off (and only if equal liberty and fair equality of opportunity, in that order, have been fulfilled), see Rawls (1999: 266).

Although admittedly there are differences, there are also important overlaps. I believe that social equality expresses not only what is required of a society of equals, but overlaps with an element of justice which is indeed missing from Rawls's conception, and thus I will argue that justice requires a form of equality in everyday individual behaviour (or what can be called personal choice).

If justice only required the formal institutional equality which Rawls seems to advocate then a hypothetical country, with a pervasive hierarchy of social status which resulted in oppression and private discrimination, and which disadvantaged anyone who was not of the favoured race, gender or religion, and so on, could be classified as ideally fair because it had achieved perfect institutional justice. Calling a country like this fair, however, seems wrong. This thesis is an attempt to demonstrate why this seems wrong and to provide a solution for extending Rawls's conception of justice to compensate for this neglect.

Rawls is concerned with how society would be organised to achieve a fair distribution of the primary social goods, including opportunities and the social basis of self-respect. I will argue that we cannot achieve a fair distribution of these goods through institutional justice alone, because their distribution is also determined by personal choice. Justice then, as G. A. Cohen has emphasised, requires justice in choice, not simply in institutional rules.⁶ If social equality in the informal, thus in everyday behaviour, in private

⁶ See Cohen (2000: 117-147). When I refer to 'Cohen' in this thesis, I am referring to G. A. Cohen. When I refer to Joshua Cohen, I will specify, 'J. Cohen'.

relationships, in civil society, in attitudes and conventions, is upheld, justice in choice will also (predominantly) be upheld. This is why, I argue, social equality should also be a requirement of Rawls's justice;⁷ it will address the justice of choice by expressing equality through everyday behaviour. My answer then to the question 'what type of equality would a fair society require?' is that justice requires, among others, informal social equality. In summary, my thesis is that Rawls's conception of justice should include duties of social equality to address justice in choice.

I defend this thesis in a line of argument that looks like this, broken down by chapter:

I. The basic structure as the primary subject of justice

The focus of Rawls's justice is the application of institutional principles of justice to the basic structure. In chapter I, 'The basic structure as the primary subject of justice', I analyse this notion of institutional justice, focusing on developing an understanding (1) of how the principles apply to the basic structure and what 'the basic structure' is and (2) of the status of other subjects and principles of justice.

Although it is clear that Rawls does describe subjects of justice besides the basic structure (such as individuals) and principles of justice besides the institutional (such as principles for individuals) it is open to interpretation how these subjects and principles fit into Rawls's justice. I consider two

⁷ For short, at times I will refer to 'Rawls's conception of justice' as 'Rawls's justice'.

interpretations of their status: (1) the exclusive and (2) the extensive views. According to the exclusive view, distributive justice, understood broadly to include the distribution of non-material goods, is a function only of the institutional principles (and their subsidiaries). According to the extensive view, principles of justice other than the institutional could be necessary to establish a fair distribution of social goods.

An understanding of how the institutional principles of justice apply to the basic structure and what the basic structure is, will help us to determine whether Rawls's institutional justice does address the justice of personal choice. An understanding of the status of other principles and subjects of justice, will help us to determine how to revise Rawls's justice to incorporate justice in choice if it does not address this form of justice.

II. Social Equality

Why might institutional justice be insufficient for justice? In other words, why might it be necessary to include such things as personal choice within the scope of justice? A preliminary answer is to say that choice affects distribution. Although I believe this to be true, we will achieve a better understanding of how to address personal choice in Rawls's justice, if we examine justice in choice from a broader perspective, according to social equality.

In chapter II, 'Social equality', I analyse the notion of social equality, focusing on (1) providing a description of social equality, (2) demonstrating

the distinction between social equality, formal equality and narrow distributive justice and (3) demonstrating the link between informal social equality and justice in personal choice.

I claim that social equality includes the values of respect-for-persons, civility and toleration of difference. These values are often accommodated as part of theories of broad distributive justice in the form of (1) formal equality, equality through legislation, and (2) narrow distributive justice (what I will refer to as ‘narrow distribution’ for short), the distribution of economic goods. Formal equality and ‘narrow distribution’, however, cannot fully accommodate social equality because they cannot accommodate informal social equality. Informal social equality occurs when respect-for-persons, civility and toleration are upheld in the informal, in the sphere of personal choice, the rule-making of associations, civil society and so on, thus outside the ambit of legislation and material distribution. If informal social equality is upheld, then justice in choice is also likely to be upheld because social equality is likely to result in a fair (informal) distribution of opportunities and the social basis of self-respect. What is missing then from descriptions of a fair society which include only institutional justice is the notion of an egalitarian ethos which would motivate informal social equality and justice in choice.

III. Justice-as-fairness and violations of social equality

After analysing Rawls’s institutional justice and the notion of social equality, whether Rawls’s justice accommodates social equality can be determined. In

other words, we could answer the question, ‘would the application of the institutional principles of justice to the basic structure result in social equality?’

In chapter III, ‘Justice-as-fairness and violations of social equality’, I analyse the impact of Rawls’s institutional justice on social equality arguing that this form of justice cannot address informal social equality because (1) the institutional principles do not apply to the informal and (2) Rawls’s understanding of respect and self-respect does not accommodate respect-for-persons expressed through informal behaviour. Thus if we recognise the importance of social equality and justice in choice, Rawls’s institutional justice is insufficient as a description of a society of equals *or of a fair society*.

IV. The personal choice argument

If we want to accommodate justice in choice, how are we to do so? One solution is expressed through the personal choice argument (PCA). The PCA consists of 3 claims: (1) personal choice affects the distribution of social goods, (2) principles of justice should thus be applied to choice and (3) principles of justice that apply to institutions should also be applied to choice.

In chapter IV, ‘The personal choice argument’, I analyse this argument, (1) claiming that it fails to provide a convincing solution because it applies the institutional principles to choice and (2) I propose a revised version which advocates applying principles of social equality to choice instead. If there are other measures to accommodate justice in choice, then the need to apply the

institutional principles to choice seems lacking. Furthermore, we *should* identify other measures because the institutional principles are designed to apply to institutions and thus can be self-defeating, for example, if applied to individuals. Also, they will not address violations of justice which hamper self-respect even if they are applied to individuals. Instead of advocating the application of the institutional principles, a revised personal choice argument would apply principles which uphold social equality to individuals, as social equality would lead to a fair(er) distribution of opportunities and the social basis of self-respect.

V. Principles for individuals and the duties of social equality

Applying institutional principles to choice is not the solution to the problem of justice in choice. Instead, the values of social equality, respect-for-persons, civility and toleration of difference, should also be applied to choice. How though are we to incorporate this type of solution into a Rawlsian framework of justice? What we need are principles that are designed to apply to individual behaviour and Rawls does provide such principles, the principles for individuals. Can these principles help us to revise Rawls's justice to include personal choice?

In chapter V, 'Principles for individuals and the duties of social equality', I analyse Rawls's principles for individuals, arguing that although they do not address informal social equality, they could be adapted to express informal social equality, which would also express a requirement for justice in choice. I will argue that (1) the duty of mutual respect should be revised to incorporate

requirements for upholding respect-for-persons, civility and toleration, and (2) the duty of justice should be revised to include a requirement that individuals should establish informal justice if it does not exist and uphold informal justice if it does.

Two caveats before I begin:

(1) The form of my argument, criticising others for not taking some particular form of equality into account, may seem so common as to be frivolous, adding unnecessarily to an already cluttered and seemingly self-destructive debate:

when one inquires *what* exactly should be ‘equalized’... one may be bewildered by a plethora of competing conceptions and arguments... One is sometimes tempted to apply Hume’s conclusion on competing theologies to competing egalitarian arguments: when they attack their rival, they seem completely successful, the result being mutual self-destruction.⁸

I suppose, however, that it is precisely because equality and justice are so complex and contentious that many different notions would be, but also *need* to be, explored and presented in order to develop greater conceptual clarity on what an ideally fair or equal society would be like. Furthermore, without being under any illusion about the practical influence of political philosophy, the extent of real-life human rights abuses, violence, discrimination, oppression and increasing inequalities between rich and poor provide

⁸ Louis P. Pojman and Robert Westmoreland (1997: 1-2).

justification for why understanding what we mean by justice and equality is of practical, not solely theoretical, concern.

(2) Taking on Rawls is particularly risky. Rawls's conception of justice is an extensive and complex conception which has inspired abundant and diverse discussions, interpretations and criticisms. Facing the vastness of Rawls *and* his commentators' work, it would be immensely arrogant of me to claim that I have somehow discovered the true meaning of Rawls's justice, which I definitely will not claim. Although I offer a particular understanding of Rawls's work, presented through textual evidence, I recognise that there are, and at times I even discuss, differing and often contradictory ways of interpreting Rawls. As such, I am tempted to reiterate H. L. A. Hart's modest words:

I am very conscious that I may have failed to keep constantly in view or in proper perspective all the arguments which Rawls, at different places in this long and complex work, concentrates on... I would not therefore be surprised if my interpretation could be corrected and my criticisms answered by some further explanation...⁹

⁹ Hart (1975: 231). It is an even more pertinent claim now because Hart was only referring to *A theory of justice*.

I. The basic structure as the primary subject of justice

It is true that the general idea that distributive justice must be promoted through the structural reform of society rather than individuals' do-gooding is not new with Rawls; it has long been taken for granted by pretty much everyone with egalitarian sympathies. Likewise, Rawls is not the first philosopher to discuss the importance of social institutions.... But Rawls offers a novel philosophical interpretation of the role of institutions... For Rawls... institutions are what normative political theory is all about.¹

Rawls's emphasis on the need to design and assess institutions according to principles of social justice, what we can call his *institutionalism*,² provides a significant alternative to traditional conceptions of justice that define justice as a function of particular actions removed from their institutional context.³ Rather than describing justice according to particular actions, Rawls believes that justice will result from the application of principles of justice, what I will refer to as the institutional principles, to the primary institutions of a society, or as he refers to them, the basic structure. This institutional emphasis is important because, as is now widely recognised, institutions cause systemic injustices which cannot be reformed by reforming particular actions. To say

1 Murphy (1998: 252).

2 I am borrowing this term as a description of Rawls from Hugo Adam Bedau (1999: 91). I take it to mean simply that justice requires just institutions and thus that justice cannot be a function merely of the rules governing individuals and particular cases. Bedau seems to take it that institutionalism means more than this, however. He claims, for example, that fundamental principles of justice must refer directly or explicitly "to the structure of basic social institutions" (92).

3 See, for example, Thomas Nagel (2003: 63) and Liam B. Murphy's (1998: 252) descriptions of Rawls's emphasis on the justice of institutions.

social justice requires fair institutions is uncontroversial. Whether this is all that social justice requires is more contentious.

G. A. Cohen and Liam B. Murphy⁴ claim that social justice should not be reduced to formal institutional justice.⁵ The principles of justice that apply to institutions, they argue, should also be applied to personal choice as justice in choice, not merely fair institutional rules, is necessary for achieving justice in the distribution of social goods. These claims form part of what I have called ‘the personal choice argument’. To assess the personal choice argument, and thus also to assess the claim that fair institutions are not sufficient for social justice, we need to understand what we mean when we say that Rawls focuses on institutional justice. This chapter will analyse and interpret Rawls’s notion of institutional justice.

I aim to answer two primary questions in this chapter:

1. What is the basic structure and how do the institutional principles apply to it?
2. What is the status of the basic structure as a subject of justice and the status of the institutional principles as principles of justice?

Within the greater context of this thesis the aim of answering these two questions is, firstly, to determine whether it is legitimate to claim that Rawls

4 Cohen (2000: 117-147), and Murphy (1998: 251-291). My treatment of the personal choice argument is brief here. In chapter IV, I will discuss Cohen and Murphy’s claims in more detail.

5 Formal refers to legislation or policy. I say *formal* because Cohen is not necessarily against reducing justice to institutions. Cohen (2000: 136-140) questions the distinction drawn between institutions and individual behaviour. As such, as long as institutional justice includes individuals’ choices, institutional justice is probably sufficient.

does not accommodate personal choice (and social equality) and, if this is a legitimate claim, secondly, to establish the best way to accommodate personal choice in a Rawlsian framework.

In section 1 of this chapter I will provide an introductory and preliminary reply to the question ‘what is the basic structure?’. To answer the question more fully, in sections 2 and 3, I analyse why Rawls considers the basic structure to be so central to his conception of justice and I contrast the basic structure as a subject of justice to other possible subjects. In section 4, I examine how the institutional principles are applied to the basic structure. This analysis helps us not only to understand what is meant when Rawls claims that the institutional principles should be applied to the basic structure but also to come to a clearer understanding of the basic structure. In section 5, I summarise the analysis of the basic structure and institutional principles.

My discussion of the basic structure and the institutional principles does not aim merely to define or better describe these ideas. By highlighting why the basic structure is central to Rawls’s justice, by examining the contrast drawn between the basic structure and other subjects of justice, and by clarifying the application of the institutional principles, I aim to analyse the status of the basic structure as a subject of justice and the status of the institutional principles. This also means analysing the status of other possible subjects and principles of justice. The reason why this is necessary is that in later sections it will help us to determine what the best solution is for accommodating personal choice in Rawls’s justice: particularly, it will help us assess the claim

of the personal choice argument that the institutional principles should be applied to personal choice. In section 6 I draw together ideas about the status of subjects and principles of justice to identify two rival interpretations of what Rawls means when he claims that the basic structure is the primary subject of justice. These two interpretations will provide two different answers on how best to accommodate personal choice: the first interpretation, the exclusive view, necessitates using the institutional principles to evaluate personal choice, whereas the second interpretation, the extensive view, is able to accommodate personal choice through other principles of justice. In my conclusion, I demonstrate what implications our analysis of the basic structure and the institutional principles have for the personal choice argument.

1. What is the basic structure?

Rawls is concerned with how a society should be arranged in order to achieve a fair distribution of primary social goods.⁶ Primary goods are goods which any rational person would need and would want more of, rather than less of, regardless of her particular life plan.⁷ Rawls claims that these goods are “rights, liberties, and opportunities, income and wealth” and the social basis of self-respect.⁸ They are social goods because the way in which society is organised directly determines their distribution, as opposed to natural goods,

6 Rawls (1999: 78-81).

7 Rawls (1999: 79).

8 Rawls (1999: 54; 79).

such as intelligence and health, which are influenced by the organisation of society but “are not so directly under its control”.⁹

So how should society be organised to achieve a fair distribution of these goods? According to Rawls’s conception of justice, ‘justice-as-fairness’, fair distribution will occur when certain principles of justice are applied to what he calls the basic structure of society. These principles of justice, the institutional principles, are the principle of equal liberty, the principle of fair equality of opportunity and the difference principle, in order of their lexical priority.¹⁰

What these principles apply to, the basic structure, Rawls describes with some variation, but this description taken from *Justice as fairness* is fairly common: “the way in which the main political and social institutions of society fit together into one system of social cooperation and the way they assign basic rights and duties and regulate the division of advantages that arise from social cooperation over time”.¹¹ Firstly, note that the basic structure has to do with *institutions*. So when we consider how to arrange society as best to achieve justice the answer for Rawls is that it is institutions that we need to ‘arrange’ according to the institutional principles of justice.¹² Secondly, not all institutions are included in the basic structure, only what Rawls refers to as the main institutions of society. Typically Rawls claims that the institutions included as part of the basic structure are the constitution, aspects of private

9 Rawls (1999: 54).

10 Rawls (1999: 266-7).

11 Rawls (2001a: 9). See also Rawls (1999: 6-10; 1993: 11; 2001b: 256-258).

12 At least, the partial answer. It is open to debate, and it is to this debate that I turn in section 6, whether this provides us with the complete answer.

property and the economy, and the family.¹³ Thirdly, the basic structure is not equivalent to institutions: we cannot simply reduce the basic structure to its specific institutions because then we would be including too much: we do not thus apply the institutional principles to every aspect of the economy or the family. Rawls's concern is to determine how to organise society to achieve a fair distribution of social goods, thus when we consider how institutions are to be arranged, we need not consider every aspect of that institution but only the way in which the institution needs to be arranged according to its influence on the distribution of social goods.¹⁴

In application to the basic structure the principles of justice-as-fairness then apply (1) only to institutions, (2) only to certain institutions and (3) only to certain 'parts' of these institutions, insofar as they determine broad distribution. What we can thus say, so far, is that in Rawls's justice, distribution is determined by certain parts of certain institutions, and that a fair distribution would occur if the institutional principles were applied to these parts of institutions.

Clearly, however, this provides us with only a vague understanding of what the basic structure is and how the institutional principles might apply to it.

Although Rawls claims that his delineation of the basic structure needs to be fairly vague, as a rigid delineation would jeopardise the adaptability of his theory of justice, we need to have a clearer understanding of the basic

13 Rawls (1999: 6; 1993: 258; 2001a: 10). Susan Moller Okin (1989: 89-109) and Cohen (2000: 137-140), for example, claim that the inclusion of the family in the basic structure has more radically egalitarian consequences than Rawls recognises. I will discuss problems with the family's inclusion in the basic structure in sections 4.2 and 4.4.

14 Rawls (1999: 6).

structure than this if we are to analyse Rawls's institutionalism.¹⁵ To better understand the basic structure, we need to examine why Rawls believes that it is central to social justice and to compare it to other potential subjects of justice.

2. Why is *the basic structure* the primary subject of justice?

The basic structure is a subject of justice, meaning that it is to the basic structure that principles of justice apply. The basic structure is not merely *a* subject of justice, however, it is "*the primary* subject of justice" thus it has special significance in Rawls's conception of justice.¹⁶ What precisely it means that the basic structure is the primary subject of justice is not entirely clear. In section 6 I will discuss two possible understandings of the basic structure as the primary subject of justice based on two interpretations of the status of the institutional principles as principles of distributive justice. For the time being it is enough to say that the basic structure is central to Rawls's justice.

Why is it so central? An immediate answer must be because it plays an important role in determining fair distribution: "liberties and opportunities are defined by the rules of major institutions and the distribution of income and wealth is regulated by them".¹⁷ We can provide a more detailed answer, however, by examining why the basic structure has such an important influence on distribution. Rawls provides two main reasons why the basic

15 Rawls (1999: 8).

16 Rawls (1999: 6; my emphasis).

17 Rawls (1999: 79).

structure should be the primary subject of justice: (1) background justice will be achieved when the basic structure is regulated by the institutional principles over time and (2) because of the “profound and pervasive influence on the persons who live under its institutions”.¹⁸

2.1. Background justice

Let’s say that I sell a piece of property. I do so entirely legally and freely, whatever this may mean, according to the rules of contract. This particular transaction thus seems fair. We may be tempted to claim that as long as all particular cases are fair in this way then justice will be achieved. Rawls claims, however, that this is not true.¹⁹ Justice is not merely a function of an aggregate of fair transactions. The social structure in which the rules are determined and in which transactions take place also needs to be fair and this fairness needs to be maintained over time for justice to ensue.

The claim that justice will transpire as long as particular transactions are free and fair is what Rawls refers to as a traditional conception of justice. He associates this conception with John Locke.²⁰ In contrast to this traditional view, Rawls claims that justice cannot be maintained solely by rules that govern particular transactions even if these rules guarantee that the

18 Rawls (2001a: 52). In *Theory*, Rawls (1999: 7) refers directly only to the profound and pervasive effects of the basic structure as the reason why the basic structure should be the primary subject of justice. In *Justice as fairness* (2001a: 52-7) he cites both background justice and the profound and pervasive effects of the basic structure as the two main reasons why the basic structure is primary. In *Political liberalism* (1993: 257-288) he seems to identify numerous reasons, including background justice and profound effects.

19 See, for example, Rawls’s discussion of background justice (1993: 265-269; 2001a: 52-55).

20 Rawls (2001a: 52-53).

transactions are free and fair. Transactions conducted without further procedures to secure justice will lead to injustices even if the individual transactions are initially just as the transactions could become unjust over time or the combined effect of these transactions will lead to injustices. For example, individuals could accumulate great wealth through free and fair agreements but this accumulated wealth, although fairly acquired, would interfere with equality of opportunity. What is needed, Rawls argues, is background justice: justice in the background structure or institutions of society which would ensure the basic liberties and fair equality of opportunity, and which would arrange social and economic inequalities to benefit the worst-off according to the demands of the difference principle. Background justice is achieved, Rawls claims, when the institutional principles are applied to the basic structure.

As Thomas Pogge emphasises in an analogy drawn with a poker game, Rawls is concerned with ‘the ground rules’ of a social system rather than with particular rules or interactions within that system:

the question is not whether in an ongoing poker game those who have won a great deal shouldn't (be made to) give some of their winnings to those who have lost nearly all they had. The question is whether we ought not to play some other game that does not, time and again, produce destitute losers.²¹

Rawls then draws a distinction between (1) institutional measures to achieve justice, i.e. the institutional principles applied to the basic structure to achieve

21 Pogge (1989: 26).

background justice, and (2) further, or non-institutional measures for justice, which in this case would be measures to regulate particular cases.²² In emphasising the importance of the institutional measures, Rawls aims to demonstrate that (1) non-institutional measures cannot achieve justice alone and (2) institutional measures are a necessary condition for social justice. This does not mean, however, that non-institutional measures are necessarily incompatible with justice-as-fairness nor does it necessarily imply that these measures are not also requirements of justice; it merely emphasises the importance of having the basic structure as *a* subject of justice.

2.2. Profound and pervasive effects

Besides the importance of background justice, the basic structure is the primary subject of justice because of its profound and pervasive influence on individuals within its framework. The reason why the basic structure has what Rawls calls a profound and pervasive influence is (1) because its effects are present from the start of an individual's life, and (2) because its effects include determining or shaping an individual's opportunities, abilities, goals, preferences and character.²³ As an example consider injustices of racial discrimination. This discrimination, embedded in the basic structure, could affect an individual's opportunities in accessing sufficient education, healthcare and employment, shape her views of her life chances and her

22 Non-institutional measures or principles mean 'not the institutional principles'. 'Non-institutional' does not mean that such principles have nothing to do with institutions. The principles of local justice, for example, which I discuss in section 3 have to do with the 'internal functioning' of institutions, and thus with institutions, however, they are non-institutional principles to distinguish them from the institutional principles.

23 Rawls (1999: 7; 2001a: 10; 2001b: 257).

ability to take advantage of those life chances, and negatively influence her notion of self-worth. Thus injustices in the basic structure do not lead to sporadic and isolated harms: Rawls is claiming that such injustices pervade an individual's life. Like the claims made about background justice, the profound and pervasive effects of the basic structure provide reason for why the basic structure has to be at least *a* focus of justice.²⁴ This does not then rule out other subjects of justice, unless the claim is that the basic structure alone has such profound and pervasive effects, and this is not a claim that Rawls makes.

3. Why is the basic structure the primary *subject of justice*?

To say that the basic structure is the primary subject of justice appears to imply that there are other subjects of justice, subjects which are thus 'secondary' to justice. At least, claiming that the basic structure is a subject of justice implies that other conceptions of justice could identify subjects of justice besides the basic structure, whether or not these subjects can be considered to be further subjects of justice-as-fairness, and it is these other conceptions of justice to which Rawls contrasts justice-as-fairness.

Rawls does explicitly acknowledge that there are subjects of justice besides the basic structure to which principles of justice besides the institutional principles do or could apply. However, he explicitly disassociates these subjects *from the institutional principles*, claiming that it is only to the basic

24 See Philippe Van Parijs (2003: 228) for example: "... a profound impact is by no means confined to what could readily be described as an institution. The dispositions that govern people's behavioural responses to redistributive schemes would qualify just as easily as many components of the basic structure".

structure that the institutional principles apply, or at least that we cannot assume that the institutional principles will apply to any other subjects.²⁵

Although Rawls mentions various subjects of justice, I will focus on two that he distinguishes from the basic structure particularly and which are significant for understanding the difference between institutional and non-institutional principles for justice: these subjects are individuals and the subjects of local justice.

3.1. Principles for individuals

A significant distinction that Rawls draws between justice-as-fairness and utilitarianism is that justice-as-fairness distinguishes between different principles with application to different subjects, whereas utilitarianism does not. Rawls's claim is that utilitarianism has no specific subject of justice: it applies the principle of utility indiscriminately:

The principle of utility applies equally to all social forms and to the actions of individuals; in addition, the assessment of character and dispositional traits, as well as the social practice of praising and blaming, are to be guided by it.²⁶

Rawls refers to this application of a principle of justice to an indiscriminate subject as a general theory of justice.²⁷ This he contrasts to justice-as-fairness which applies particular principles to particular subjects. The primary

25 Rawls (1999: 7; 47). Why is it, though, that we would need different principles for different subjects? I consider answers to this question in chapter IV.

26 Rawls (1993: 260).

27 Rawls (1993: 13).

difference is that justice-as-fairness distinguishes between justice as applied to institutions and justice or morality as applied to individuals. The principle of utility is applied to both institutions and to individual motivation and behaviour, thus merging justice as a virtue for institutions with justice as a personal virtue. Justice-as-fairness, on the other hand, applies the principles of equal liberty, fair equality of opportunity and the difference principle to the basic structure, and thus to institutions alone. As a result the institutional principles are explicitly disassociated from principles to be applied to individuals.

Although Rawls makes this distinction, this does not *necessarily* mean that he believes that individuals do not constitute a feasible subject for justice: he is merely stating that they are not the subject of these particular principles of justice-as-fairness. Indeed, Rawls recognises the necessity of incorporating principles for individuals into a theory of justice and claims that principles for both the basic structure and individuals would be chosen in the original position.²⁸ Thus Rawls's claim here seems not to be that it is inappropriate to include principles for individuals within the scope of a conception of justice but that these principles must be distinguished from principles that should apply to institutions.

28 These principles, Rawls (1999: 93) claims, would be necessary for a "complete theory of right" and they "are an essential part of any theory of justice". The original position is the initial situation in which heads of families, under a veil of ignorance about their own circumstances, agree on which principles of justice should regulate society (Rawls 1999: 102-168). We can call the original position a device that Rawls uses to demonstrate the fairness of his principles of justice: see, for example, Dworkin (1975: 16-53) on the original position as such a device.

3.2. The principles of local justice

At times Rawls refers to the type of justice expressed by justice-as-fairness as domestic justice to distinguish it from what he refers to as local justice.²⁹

Local justice applies principles of justice “directly to institutions and associations” and thus regulates the internal functioning of institutions.³⁰ The difference between the principles of justice-as-fairness and the principles of local justice expresses a distinction between the basic structure and institutions themselves. We noted that the basic structure cannot be reduced to institutions or even specific institutions: the basic structure is *the way in which* institutions are arranged and *the way in which* they distribute social benefits and burdens, rather than being equivalent to institutions. Local justice applies, as Rawls puts it, directly to institutions. Principles of local justice would regulate institutions internally. Rawls expressly denies the use of the institutional principles for local justice: “Clearly the two principles of justice ... with their political liberties are not supposed to regulate the internal organization of churches and universities. Nor is the difference principle to govern how parents are to treat their children or to allocate the family’s wealth among them”.³¹ This does not mean, however, that there is no relation between the principles of local justice and the principles of justice-as-fairness:

29 The distinction drawn is between domestic, local and global justice (Rawls 2001a: 11-12). Rawls thus also distinguishes the institutional principles from international or global justice where principles of justice would apply to international law. I am not going to discuss global justice as the distinction drawn between (1) principles for international law and (2) institutional principles internal to a specific society is not clearly relevant to analysing institutional and non-institutional measures for achieving social justice.

30 Rawls (2001a: 11).

31 Rawls (2001a: 14, fn. 8).

Rawls claims that as principles of local justice would function within the basic structure of society they would be limited by its principles, thus we can presume that this would mean that, where relevant, principles of local justice would have to be consistent with principles for the basic structure.

Whereas the distinction drawn between principles for the basic structure and principles for individuals relies on a distinction between the structure of institutions and individual behaviour, the distinction drawn here is different. Both the institutional principles for justice and principles for local justice are applied to institutions, and both can be applied to the structure of institutions, although principles for local justice are likely also to be applied to individual behaviour. The difference then lies in which part of the institution the principles apply to: the institutional principles of justice apply to the arrangement of institutions and their distribution of social goods, thus the *basic structure* of an institution, whereas local justice would presumably apply to (1) the structure of an institution where that structure has no relevance to the overall arrangement of institutions in society and to the way in which the institution distributes social goods, and (2) to individual behaviour within that institution even if this does have an influence on distribution

The basic structure, then, as the primary subject of justice is a distinct subject which can be contrasted to other potential subjects such as individuals. Each of these subjects, Rawls believes, has its own special principles which seem to

apply to that domain alone. The institutional principles apply to the basic structure and seemingly not to individuals or any other subjects.

Is it true, however, that the institutional principles do not apply at all to these other subjects? Surely these principles must affect individuals on some level? Furthermore, we have still not established a more detailed description of the basic structure than our preliminary description. In order to understand whether the institutional principles apply in some way to other subjects and to understand what it is that they do apply to in the basic structure, in the next section I will analyse Rawls's descriptions of the application of the institutional principles.

4. The application of the institutional principles

Rawls claims that for a society to be fair, the institutional principles must determine and regulate the basic structure. To what precisely do these principles apply? In this section I will analyse the application of the institutional principles, by examining (1) background justice, (2) the problem of applying the institutional principles to the family, and (3) the 4-stage sequence of the application of the principles. In doing so, I will establish a more detailed understanding of the basic structure and the application of the institutional principles.

4.1. Background justice and the three applications of the institutional principles

In section 2.1, we established that background justice draws a distinction between the rules for the background structure in which particular transactions occur and the rules that regulate those transactions. Rawls refers to this as a division of labour: (1) institutional principles are applied to the basic structure to achieve background justice and (2) further measures are applied to particular cases. Institutional measures to regulate background justice are essential for achieving social justice and are necessary no matter how fair other rules are. This does not mean, however, that non-institutional principles have no affect on other subjects or on other measures. Background justice establishes a just context in which particular cases occur and thus it constrains the rules that guide those cases. This implies two different applications of the institutional principles: (1) they apply directly to the basic structure and (2) they apply indirectly to particular cases through background justice. When Rawls thus claims that the institutional principles only apply to the basic structure he means that it is only to the basic structure that they apply *directly*.

Rawls refers to background justice as an example of procedural justice: once the institutional principles are applied directly to the basic structure to establish background justice, thus creating a fair context in which individual transactions take place, and thus indirectly applying the institutional principles to individual transactions by constraining them, then justice is likely to ensue.

So, if a fair procedure is followed, justice will occur. This does not mean, however, that Rawls believes that we can rely entirely on the procedure of applying the institutional principles to ensure justice, and thus merely implementing background justice is not sufficient for achieving justice.

The institutional principles determine fair procedures, but the outcome of these procedures also needs to be assessed: “while a large element of pure procedural justice transfers to the principles of justice, these principles must nevertheless embody an ideal form for the basic structure in the light of which ongoing institutional processes are to be constrained and the accumulated results of individual transactions continually adjusted”.³² Thus we can distinguish three applications of the institutional principles: (1) they are applied directly to the basic structure, (2) they apply indirectly to the rest of society (the direct application of the institutional principles determines fair background conditions which constrain civil society, individual behaviour and particular transactions), and (3) they apply as standards to assess whether justice has genuinely ensued from the first two applications.

4.2. The problem of the family

A problem with understanding how the institutional principles apply arises when we consider which institutions are part of the basic structure. The problem is particularly prominent when we consider the family.³³ In *Theory*

32 Rawls (1993: 259).

33 For interpretations and criticisms of the role that the family plays in Rawls’s conception of justice, see, for example, Susan Moller Okin (1989: 89-109), Martha C. Nussbaum (2000: 270-283) and Veronique Munoz-Dardè (1998: 335-352). More generally, for an explanation

Rawls unequivocally includes the family in the basic structure, however, he does not discuss how the institutional principles apply to the family. In *Political liberalism* he admits to omitting the family from his discussion of the application of principles but claims that he assumes “that some form of the family is just”.³⁴ In *Justice as fairness*, he claims that the basic structure includes “the family in some form”.³⁵

If Rawls includes the major social institutions in the basic structure and if he is particularly concerned with ‘the profound and pervasive effects’ of the basic structure, it would seem that he should include the family as part of the basic structure. Susan Moller Okin has emphasised this point:

It would scarcely be possible to deny that different family structures, and different distributions of rights and duties within families, affect men’s life prospects, what they can expect to be and how well they can hope to do, and even more difficult to deny their effects on the life prospects of women.³⁶

If the family is part of the basic structure, then as we have seen from our discussion of background justice, the institutional principles should apply to it directly. However, there is some confusion as to how these principles would apply to the family. If the institutional principles apply directly to the family it

of the family as a seat of injustice, see Nussbaum’s chapter ‘Love, care and dignity’, in *Women and human development: the capabilities approach* (2000: 241-297).

34 Rawls (1993: xxxi).

35 Rawls (2001a: 9).

36 Okin (1989: 93). Okin (1989: 89-109) claims that Rawls is ambiguous about the role of the family in the basic structure, arguing that even though the institutional principles could be used to challenge unfair gender structures, Rawls is silent about such challenges and the need for them. Rawls (2001a: 167-168) responds directly but very briefly to her claims in *Justice as fairness*.

would seem that the family should be organised in such a way that it would achieve the basic liberties, fair equality of opportunity and the difference principle and this would seem to imply that the behaviour of individuals within the family should be directed by these principles. Yet individual behaviour is not supposed to be included as part of the basic structure and thus the institutional principles should not apply to individual behaviour and the ‘internal functioning’ of an institution. What does Rawls thus mean when he claims that the family is part of the basic structure?

In an attempt to clarify the role of the family in the basic structure, Rawls discusses the application of the institutional principles to the family in *Justice as fairness*.³⁷ His comments on the family, however, leave it unclear as to whether the family is actually part of the basic structure. Rawls begins his explanation of the family’s relationship to the basic structure by explicitly insisting that the family is part of the basic structure because “one of its essential roles is to establish the orderly production and reproduction of society and of its culture from one generation to the next”.³⁸ Most of the rest of the claims he makes about the family in the remaining section however confuse, and even contradict, the family’s inclusion in the basic structure.

He maintains that the principles of justice apply directly to the basic structure and yet they do not apply directly to the family, or at least not to the family’s “internal life”.³⁹ He compares the family to other ‘associations’ such as churches and universities, associations that he has claimed are definitely not

37 Rawls (2001a: 162-168).

38 Rawls (2001a: 162).

39 Rawls (2001a: 162).

part of the basic structure, arguing that the principles of justice apply in the same way to all of these associations, only indirectly:

Firms and labor unions, churches, universities, and *the family* are bound by constraints arising from the principles of justice, but these constraints arise indirectly from just background conditions within which the associations and groups exist, and by which the conduct of their members is restricted. For example, while churches can excommunicate heretics, they cannot burn them; this constraint is to secure liberty of conscience. Universities cannot discriminate in certain ways: this constraint is to help establish fair equality of opportunity.⁴⁰

Thus it seems that as equal citizens in a fair state the members of a family, like any other citizens, are guaranteed rights, liberties and fair opportunities; the institutional principles “impose essential constraints on the family as an institution” but do not apply as they would to the basic structure.⁴¹

To understand whether the family is part of the basic structure, we need to deepen our understanding of the basic structure and to examine in more detail how the institutional principles apply to it.

40 Rawls (2001a: 10; my emphasis).

41 Rawls (2001a: 164).

4.3. The 4-stage sequence

Rawls describes the application of the institutional principles according to a 4-stage sequence to simplify explaining their application:⁴²

1. In the first stage, the institutional principles are chosen as the most appropriate principles of justice in the original position.
2. The parties of the original position move to a constitutional convention where the institutional principles guide the choice of political form and constitution.
3. In the legislative stage, laws and policies are chosen which must satisfy the institutional principles and the constitution.
4. In the last stage, the rules that guide decisions and behaviour for particular cases and for citizens are determined.

The second and the third stages represent the direct application of the institutional principles to the basic structure understood as political form, the constitution and legislation. The subject of the fourth stage is not part of the basic structure: it seems to include anything not covered by the basic structure such as individuals, associations and the internal functioning of institutions, subjects which Rawls has clearly distinguished from the basic structure. How the institutional principles apply to this fourth stage is not clear if we focus only on the explanation of the 4-stage sequence. We can infer, however, from

⁴² Rawls describes the 4-stage sequence in *Theory* (1999: 171-176). He makes it clear that it is not supposed to be a description of how constitutions and legislation are actually derived empirically, merely a simplified model of how the principles of justice are applied to establish a fair state.

the claims made about background justice that the application of the institutional principles to the fourth stage is only indirect and that the rules that guide particular cases and individual behaviour directly would be the principles of local justice and principles for individuals.

Through analysing Rawls's discussion of background justice we determined that there are three applications of the institutional principles: the first, direct application, the second, indirect application and the third, ongoing assessment of the outcomes of the direct and indirect application. Only the direct application of the principles to the basic structure (applied according to the 4-stage sequence, at the second and third stage to the basic structure) and the indirect application to anything beyond the basic structure (applied at the fourth stage) are covered by the 4-stage sequence. The ongoing assessment of the outcomes of direct and indirect application implies that we should add a fifth stage to the sequence: at this last stage institutional principles would be used as an ideal standard to judge the results of stages 2 to 4 and to adjust the laws and rules that issue from these stages if they are found to result in injustice.

When we refer back to our original description of the basic structure and our description of the application of the institutional principles to achieve background justice, we find that these descriptions do not match the description of the application of the institutional principles to the basic structure provided by the 4-stage sequence. The basic structure is (1) the arrangement of major social and political institutions in society and (2) the

way in which institutions assign rights and distribute social goods. We noted that this means that the basic structure includes only institutions, only certain institutions (the major social and political institutions) and only certain ‘parts’ of these institutions (the parts that determine how they are arranged and how they assign rights and distribute social goods). In analysing background justice, we find that the institutional principles apply directly only to the basic structure, thus only directly to the way in which the major social and political institutions are arranged and the way in which they assign rights and distribute social goods. In the 4-stage sequence, however, the institutional principles seem to apply only directly to political form, the constitution and legislation. If it is only to these that the principles apply directly, we need to modify our original description of the basic structure in a way which will help us to better understand what is meant by the basic structure.

If we merge the original description of the basic structure with the implications for the basic structure from the 4-stage sequence, we could say that the basic structure is (1) the arrangement of political form, the constitution and legislation and (2) the way in which these institutions determine the distribution of social goods. Thus the institutional principles apply only directly to these institutions, and only to their ‘arrangement’ and the way in which they determine the distribution of social goods. The emphasis on the influence of these on distribution is important. It seems that aspects of the constitution or of legislation which have no bearing on distribution (including the assignment of rights) will not be determined or regulated by institutional principles. So, for example, legislation concerning

access to education could be determined by the institutional principles because this access will influence the distribution of opportunities. Food and beverage licensing laws, for example, however, would not be subject to the principles (unless of course these licensing laws could be shown to have an affect on the distribution of the primary social goods).

Associations, particular cases, particular laws which do not concern the distribution of the primary social goods, individual behaviour and any other institutions, seemingly are not part of the basic structure because the institutional principles do not apply directly to them. There is an overlap though between the basic structure and the non-basic structure. The direct application of the principles to the basic structure limits non-basic structure: this is what is meant when we say that there is an indirect application of the institutional principles to non-basic structure. The institutional principles are not applied directly to individual behaviour or associations such as firms for example, but there are aspects of individual behaviour and associations which are regulated by the law and the constitution, which, in turn, are regulated by the institutional principles.

Even when it comes to their indirect application, the institutional principles do not apply to all aspects of non-basic structure. We can say that they only apply to the public rules of the non-basic structure. Rawls defines an institution as “a public system of rules” which specifies “certain forms of action as permissible, others as forbidden; and [provides] for certain penalties and

defenses, and so on, when violations occur”.⁴³ When the institutional principles are applied indirectly to the non-basic structure, they apply to the public rules which limit and regulate the non-basic structure: through the constitution and legislation, associations and individuals are subject to legally coercive rules which specify permissible and impermissible actions.

So, for example, through the application of the first institutional principle (the principle of equal liberty) to the constitution and to legislation, public rules are created which guarantee all citizens equal political and legal liberties and which specify punishment if these liberties are violated. It is only, however, through these public rules that there is a relationship between the institutional principles and the non-basic structure. The contrast drawn here is between a public and non-public realm; the non-public, Rawls claims, consists of (1) background culture, “the culture of churches and associations... and institutions of learning” and (2) non-public political culture in the form of the media.⁴⁴ The non-public should also include personal choice: behaviour which is not subject to legally coercive rules and which is thus left up to the individual. The institutional principles, then, have nothing to say about actions and informal rules within associations or the media or of individual behaviour, beyond where they are subject to public rules.

Emphasising that the institutional principles apply to the public rules of non-basic structure, and to those rules alone, will help to clarify the relationship between specific institutions and the institutional principles; particularly it

43 Rawls (1999: 47-8).

44 Rawls (2001g: 576, fn. 13).

will help to clarify the family's connection to the basic structure and the institutional principles.

4.4. The 4-stage sequence, public rules and the family

Initially, it would seem that the 4-stage sequence compounds the problem of the family. Although the 4-stage sequence provides an explanation of how the principles of justice apply, it does not include an explanation of how the principles apply to all institutions typically included as part of the basic structure: two significant aspects of the basic structure are missing. The first of these is the economic system and the second is the family.

Although this is not explicit in the description of the 4-stage sequence, Rawls makes it clear that only certain forms of government *combined with* certain economic systems are compatible with the principles of justice: laissez-faire capitalism and communism, for example, conflict with justice-as-fairness, whereas either property-owning democracy or liberal socialism (social democracy) are consistent with the institutional principles as it is only these two political and economic systems that can secure the basic liberties.⁴⁵

Applying the institutional principles to the economic system could be included in stage 2 of the sequence: in the second stage the institutional principles would be used to determine political form, the economic system and the constitution. Although Rawls does not include economic system here, this seems to be merely an omission rather than a problem posed for the 4-

45 Rawls (2001a: 136-138).

stage sequence. The application of the institutional principles to the economic system is probably implied in mention of the form of government, constitution and legislation. We can say something similar about other institutions which Rawls lists as part of the basic structure, such as the (independence of the) judiciary, private property and the organization of the economy: including these in the basic structure can be seen to be implicit in the arrangement of political form, economic system, legislation and constitution, as it is through these that the judiciary and aspects of the economy would be determined and regulated.⁴⁶

The situation is more complicated when it comes to the omission of the family. Although we can surmise the inclusion of the economic system and perhaps other formal institutions as a part of the basic structure, as a separate institution, the family does not tally with the 4-stage sequence. We noted that there is some confusion with the inclusion of the family as part of the basic structure. Rawls claims that the family is part of the basic structure. The institutional principles, however, apply directly to the basic structure and yet Rawls denies that these principles apply directly to the family so it would seem that the family is not part of the basic structure.

The 4-stage sequence seems to demonstrate that the family is not part of the basic structure because it is not included as a separate institution to which the institutional principles apply directly. So is the family part of the basic structure? The answer to this question lies in our modified description of the

⁴⁶ Rawls (2001a: 10) claims, for example, that “The political constitution with an independent judiciary” belongs to the basic structure.

basic structure: the institutional principles apply directly only to political form, the economic system, the constitution and legislation, and indirectly only to the public rules of other institutions, associations or behaviours. The family, thus, is not part of the basic structure as a separate institution in its entirety: only its public rules are subject to the principles of justice. The institutional principles thus do not apply to the family as such but apply to the constitutional and legislative structure underpinning the family: for example, the institutional principles determine that each (adult) member of the family has the same equal basic rights and liberties but it does not regulate individual behaviour in the family, whether or not it has distributive implications, at least where that behaviour does not violate its public rules. Besides the public rules of the family, the institutional principles do not apply to any aspect of the family whether directly or indirectly.

Although answering the question, ‘is the family part of the basic structure?’ by saying ‘only the public rules of the family overlap with the basic structure’ alleviates some of the confusion over the family’s role in the basic structure, it remains misleading for Rawls to claim that the family is part of the basic structure. When Rawls mentions which institutions are included in the basic structure he includes and makes no distinction between, for example, the constitution and the family. This is misleading because it implies that the institutional principles apply directly to both the constitution and the family but they do not. They seem to apply to the family only by applying to the constitution and legislation. By drawing attention to the family Rawls implies that it has a role in the basic structure that is different to other institutions or

associations such as firms, churches and universities. However, the public rules of universities, churches and other associations and institutions are also part of the basic structure. What Rawls should be saying is that the family is included only in the same way that other non-basic structure institutions are: they are determined by the basic structure only according to the way in which their public rules determine how social goods are distributed including how rights are assigned; any other aspects of these institutions, such as their internal functioning and personal choice, are not governed by the institutional principles and are seemingly instead governed directly by other rules, such as the principles of local justice or principles for individuals.

5. Clarifying the basic structure and the application of the institutional principles

By combining information garnered from the original description of the basic structure, from the application of the institutional principles to background justice and from the 4-stage sequence, we are now able to devise a more thorough description of the application of the institutional principles and of the basic structure. We can describe the application of the institutional principles according to a 3-step process.

5.1. The 3-step application of the institutional principles

1. Direct application of the institutional principles to the basic structure:

1.1. Direct application of institutional principles to political form and economic system;

1.2. Direct application of institutional principles to constitution;

1.3. Direct application to legislation.⁴⁷

2. Indirect application of institutional principles to non-basic structure (by applying to its public rules).

3. Application of institutional principles to the evaluation of the outcome of steps 1 to 2.

Step 1 describes the direct application of the institutional principles to the basic structure. This consists of 3 stages, where each stage leads to and helps to determine the next. In the first stage (1.1) the institutional principles determine the political form and economic system most compatible with the institutional principles. The second stage (1.2), determining the constitution, follows from the first stage as the first stage will establish the need for a constitution and the need to enshrine elements of the political form and economic system in the constitution. The constitution is determined both (1) directly through an application of the institutional principles and (2) through constraints determined by the choice of political form and economic system in

⁴⁷ Note, the institutional principles seemingly only apply directly to these institutions where they are relevant to the distribution of primary social goods, thus even elements of these institutions which do not directly influence this distribution are included as part of non-basic structure, not the basic structure.

the first stage. Laws and policies which affect distribution are determined in the third stage (1.3) by the institutional principles and the constitution.

In the second step, the institutional principles apply indirectly to subjects outside of the basic structure. This step is not an independent step but leads from and is determined by the first step. It is not so much that the institutional principles are actually applied to subjects besides the basic structure. Rather, by applying the institutional principles to the basic structure a fair context (background justice) is set up which constrains individual behaviour and the internal functioning of institutions. Thus individual behaviour according to this step does not need to live up to the institutional principles, however, the institutional principles through the constitution and through legislation determine public rules which limit what individuals and associations are able to do.

In the last step, step 3, the institutional principles are used to evaluate the fairness of the outcomes of steps 1 and 2. Although we are likely to achieve fair outcomes by following the procedure of step 1 (which would necessarily imply step 2), we would need to monitor whether the application of the institutional principles to the basic structure (and thus indirectly to the non-basic structure) does result in outcomes that are genuinely fair. If these outcomes were found to be unjust, they would need to be modified so that they would genuinely live up to the ideal demanded by the institutional principles.

5.2. The basic structure

The basic structure seems to consist of the institutions of political form, the economic system, the constitution and legislation. These institutions are fair if the ways in which they assign rights and distribute social goods are regulated by the institutional principles. Other institutions, specific policies and laws, associations and behaviours such as the family, firms and universities are only included in or affected by the basic structure in so much as the public rules applicable to them are determined and regulated by the application of the institutional principles to the institutions of the basic structure. The institutional principles thus only apply to the public rules of these institutions.

As Rawls is purposefully vague in his description of the basic structure and as there are inconsistencies with what is and what is not included as part of the basic structure, I would not claim that this description of the basic structure is definitive. Thus I would agree that there are other convincing ways of describing the basic structure.⁴⁸ However, this description of the basic structure is feasible as it seems to follow logically from our analysis of background justice, the 4-stage sequence and the problem of the family.

Admittedly even this description remains rather vague, however. I do not think that it is clear, for example, precisely what the public rules of an institution are, or how other institutions I have mentioned as implicitly part of the basic structure, such as the judiciary fit into the 3-step process. Most

48 Examine Cohen's description (1997: 18, fn.36 and 2000: 136-140) of the ambiguity of the basic structure defined coercively or noncoercively, or Pogge's claims (1989: 22-25) that the basic structure can be understood widely or narrowly.

important for the purposes of this thesis, however, is not establishing an exact definition of the basic structure but a better understanding of whether personal choice is included as part of the basic structure. As we have seen, personal choice does not seem to be determined or evaluated by the institutional principles either directly or indirectly. It is not evaluated directly as it is not part of the basic structure. However, even when it comes to the indirect application of the institutional principles to individual behaviour, the principles apply to the public rules of an institution and thus seemingly not to personal choice.

6. Why is the basic structure the *primary* subject of justice?

The status of principles and subjects of justice

Thus far I have avoided considering what it means when Rawls refers to the basic structure as the primary subject of justice except that it is clearly central to his conception of justice. At times, Rawls will refer to the basic structure as the first subject and to the institutional principles as the *first principles* of justice-as-fairness. What do primary and first mean here? Answering this question means determining the status of the basic structure as a subject of justice and the status of the institutional principles as principles of justice, and thus also the status of any other subjects and other principles of justice. If the institutional principles are primary or first it seems that there are other principles of justice. The same can be said about the basic structure and subjects of justice. What are these other, perhaps secondary, subjects and principles of justice? Perhaps the secondary subjects of justice are the indirect

subjects of the principles. Or perhaps individual behaviour and other non-basic structure subjects are direct subjects of non-institutional principles of justice. These two alternatives form the basis of two interpretations of the status of the principles and subjects of justice. In this section I will identify and analyse these two views: (1) the exclusive view of the principles of justice⁴⁹ and (2) the extensive view of the principles of justice. This analysis will provide us not only with a better understanding of the basic structure and the institutional principles but it also provides a starting point for determining different solutions to how to accommodate personal choice in a Rawlsian conception of justice.

6.1. The exclusive view: the institutional principles as the *only* principles of distributive justice

According to the first interpretation, the exclusive view:

- the institutional principles of justice are the only principles of justice-as-fairness;
- the basic structure is the only direct subject of the institutional principles of justice, making it the primary subject of justice-as-fairness;
- other subjects such as individuals are only indirect subjects of the institutional principles, meaning they are limited by the application of these principles to their direct subject, the basic structure;

⁴⁹ There is no relationship between this view and the exclusive view of public reason which Rawls discusses in *Political liberalism* (1993: 247-8).

- the fair distribution of the primary social goods is captured exclusively by justice-as-fairness and thus distributive justice is established through the application of only the institutional principles of justice;
- other principles of 'justice' are not directly responsible for distributive justice and are not principles of justice-as-fairness but are principles of something else, such as rightness-as-fairness.

According to the exclusive view the institutional principles are the *only* principles of broad *distributive* justice. This view claims that when Rawls calls the basic structure the primary subject of justice, he means that it is the primary subject of distributive justice. It is primary because it is the only direct subject of the institutional principles. Individuals, associations and any other subjects are secondary subjects of justice, meaning that they are only subjects indirectly as they are constrained by principles of justice only through their application to the basic structure.

What do I mean when I claim that the exclusive view recognises only the institutional principles as principles of distributive justice? How then do other principles and subjects seemingly recognised by Rawls fit into his conception of justice? After all, for example, although Rawls may not always be clear about how principles for individuals do fit into his conception of justice, he does claim that such principles “are an essential part of any theory of justice”.⁵⁰

50 Rawls (1999: 93).

To explain these principles, the exclusive view relies on a distinction drawn between the principles and subjects of distributive justice and those of some broader conception of justice or of morality such as the distinction Rawls draws between what he calls justice-as-fairness and rightness-as-fairness.⁵¹ Justice-as-fairness is a theory of a restricted conception of justice; rightness-as-fairness is a theory of a general conception of justice or of morality more broadly. Rawls contrasts the restricted nature of justice-as-fairness to the broader moral theory, claiming that his aim is to focus almost primarily on the narrow conception:

Justice as fairness is not a complete contract theory. For it is clear that the contractarian idea can be extended to the choice of more or less an entire ethical system, that is, to a system including principles for all the virtues and not only for justice. Now for the most part I shall consider only principles of justice and others closely related to them; I make no attempt to discuss the virtues in a systematic way. Obviously if justice as fairness succeeds reasonably well, a next step would be to study the more general view suggested by the name 'rightness as fairness'.⁵²

The institutional principles, the exclusive view could argue, are the only principles of justice-as-fairness and the basic structure is the primary subject of justice-as-fairness. Other principles, such as principles for individuals, and other subjects belong to rightness-as-fairness.

51 See Rawls (1999: 95-6) for his discussion of rightness-as-fairness.

52 Rawls (1999: 15).

What difference does this distinction make? The central issue is that the exclusive view considers distributive justice to be captured solely by justice-as-fairness. When it comes to the central question with which Rawls is concerned, how to arrange society in order to achieve a fair distribution of social goods, the answer according to the exclusive view comes from justice-as-fairness, not rightness-as-fairness, or at least not directly. Distributive justice fundamentally becomes a function of the 3-step application of the institutional principles (1) directly to the basic structure, (2) indirectly to everything besides the basic structure such as individuals and associations and (3) as an evaluation of the outcome of steps 1 and 2. The institutional principles thus are the only principles of distributive justice and the basic structure, as their primary subject, is their direct subject.

Any other principles of 'justice', such as ones which apply directly to individuals and associations are not principles of distributive justice, as individuals and associations according to this view only affect distribution through their compliance with just institutions. The principles and direct subjects of rightness-as-fairness thus appear to have no direct relationship to distributive justice and are thus not responsible for determining how social goods such as the social basis of self-respect or opportunities are distributed.⁵³

Rather such principles aim to describe such things as political obligation, for

⁵³ I admit that it is not clear what it is supposed to mean that rightness-as-fairness is not directly responsible for distribution and what its precise relationship is to distribution. However, it is not my aim to present a comprehensive version of the exclusive view but rather to highlight what I believe are its primary claims. Furthermore, I believe it is likely that we would struggle to capture the exclusive view precisely, at least on the basis of Rawls's texts, because it is not the only possible interpretation of Rawls. It is thus Rawls's ambiguity that may lead to some confusion over the exact nature of this view (something similar can be said about the alternative interpretation, the extensive view). What is important, rather than the exact nature of this view, is that something like this view can be identified in Rawls and, as I will argue, is in fact implicit in many analyses of Rawls.

example, without which one could argue there could not be a fair distribution of goods but which does not directly determine that distribution.

For my purposes, it is not really necessary for anyone to actually accept the exclusive view: my main purpose in discussing the exclusive view, and in comparing it to the extensive view, which I will discuss in the next section, is to show there are at least two feasible, if ambiguous, ways to interpret the different principles and subjects of justice that Rawls identifies. At times, however, something like the exclusive view is explicitly stated:

we must keep sharply distinct ... *our* subject, *how the ground rules of a social system ought to be assessed/designed*, from the (secondary) subject of how actors (individuals, associations, the government) may and should act within an ongoing scheme whose terms are taken as fixed. The former of these subjects, *justice*, is concerned with the moral assessment and justification of social institutions; the latter, *morality*, with the assessment of conduct and character.⁵⁴

This explicit reference is quite rare. I believe, however, that a similar view is often implicit in analyses of Rawls's conception of justice by both his proponents and critics. I have three reasons for claiming that this view is implicit:

1. When Rawls's conception of justice is discussed the focus is primarily on the institutional principles and their application to the basic structure as opposed to any other subjects or principles.

54 Pogge (1989: 17).

2. When principles besides the institutional are discussed, they tend to be discussed outside of the context of distribution.
3. When individual behaviour is considered to influence distribution, it is discussed within the context of the application of the institutional principles to the basic structure.

Firstly, when Rawls's conception of justice is discussed in terms of principles and subjects of justice the focus is usually on the institutional principles of justice as applied to the basic structure, whereas any other principles or subjects of justice Rawls has identified seem to be discussed much more sparingly. This is in of itself neither problematic nor particularly noteworthy: it is clear that Rawls's central concern is the application of the institutional principles to the basic structure so it seems only reasonable that this should be a central concern of discussions of his justice. The implication, however, seems to be that this is all there is to Rawls's conception of justice, at least as concerns principles and subjects of justice. Examine Samuel Freeman's description: "These principles apply in the first instance to decide the justice of the institutions that constitute *the basic structure of society*. Individuals and their actions are just insofar as they conform to the demands of just institutions".⁵⁵ This seems a perfectly fitting description of the application of the institutional principles, however, it echoes the exclusive view because it seems to assume that justice is only a function of the institutional principles and that all that we can say about individual behaviour is that such behaviour needs to conform to fair institutions.

⁵⁵ Freeman (2003: 3).

The second reason why I claim that the exclusive view is implicit is that when principles besides the institutional are discussed, they are primarily discussed outside of the context of distribution. Other principles, such as principles for individuals, are not discussed according to any direct part they could play in determining the distribution of social goods. For example, the duty of justice, one of the principles of justice for individuals, is often discussed in relation to political obligation, i.e. why the individual has a duty to recognise the authority of the state.⁵⁶ I do not know of an example of where this duty or any of the other principles for individuals are discussed in relation to distribution, even where distribution is regarded broadly to include such goods as opportunities and the social basis of self-respect. I am not claiming that there are no such examples, but if there are they seem to be exceptional. This implies that principles besides the institutional are recognised as having nothing or little to do with determining distribution, which is what the exclusive view claims.

The last reason I have to defend the claim that the exclusive view is implicit is that when individual behaviour is considered as a potential subject of distributive justice as part of a Rawlsian framework of justice, it is discussed according to the application of the institutional principles to the basic structure. What I mean by this is that when questions such as ‘does personal behaviour influence distribution?’ are asked, they seem automatically to be correlated to questions such as ‘should the institutional principles apply to

⁵⁶ See, for example, John Horton (1992: 102-108) on Rawls and the duty of uphold just institutions.

personal behaviour?’ or ‘is personal behaviour part of the basic structure?’ Philippe Van Parijs, Cohen and Murphy, for example, consider whether the institutional principles should be used to judge personal behaviour.⁵⁷ They do not consider, however, whether other principles should be used to judge the influence of personal behaviour on distribution. The implication seems to be that if distribution is affected by personal behaviour, and if we then believe that this means that this behaviour should be evaluated by principles of justice, then we should necessarily be using the institutional principles to evaluate it. This ties in with the exclusive view which recognises only the institutional principles as principles of distributive justice and associates any alternative Rawlsian principles with something like the broader ethical theory, rightness-as-fairness.

These three reasons provide evidence for my claim that the exclusive view often underlies analyses of Rawls. The upshot is often more than merely a neglect of the role of any non-institutional principles or non-basic structure subjects of justice: Rawls’s conception of justice is often simply assumed to be *incompatible* with including anything beyond the institutional. Rawls’s institutionalism is taken not only to mean that institutions play a central role in his conception of justice but that they play the only role. Institutionalism is thus taken to be necessarily antithetical to including any other types of subjects and principles for justice.

57 Van Parijs (1999), Cohen (2000) and Murphy (1999).

The distinction that Rawls draws between the public and private when he emphasises that it is to public rules that the institutional principles apply, is taken to mean that the private is necessarily divorced from social justice. Take Thomas Nagel as an example:

The special demands of equal respect for the interests of all that justice imposes apply to the sphere of collectively sustained institutions, not to personal life. So liberalism involves a division of the moral territory and leaves individuals free to instantiate a great plurality of forms of life...⁵⁸

What seems to add weight to this view is the distinction that Rawls draws between a political conception of justice on one hand, and general and comprehensive conceptions of justice, on the other.⁵⁹ Rawls claims that justice-as-fairness is a political conception of justice, which means it is justified according to reasons which would be acceptable to everyone, no matter what their conception of the good or their personal religious and moral commitments. A comprehensive conception, however, is justified by a comprehensive moral or philosophical doctrine, such as liberal autonomy, for example. Political conceptions are not contrasted to comprehensive conceptions alone. A political conception of justice is also defined according to its limited range: it has a specific subject, the basic structure, to which its principles apply. A conception of justice which does not specify the basic structure as its subject, and which has a more extensive range of subjects than the political conception, Rawls refers to as a general conception of justice.

⁵⁸ Nagel (2003: 82).

⁵⁹ See, for example, Rawls (1993: 131-172; 2001e: 479-484).

This means that the distinction between the principles and subject of justice-as-fairness and the principles and subjects of rightness-as-fairness could be justified as a distinction between a political conception of justice and a comprehensive or general conception, respectively.⁶⁰

Despite the popularity of the exclusive view, and certainly much evidence within Rawls's texts for this view, it is not the only way to understand the status of principles and subjects of justice. The alternative is what I refer to as the extensive view.

6.2. The extensive view: institutional and non-institutional measures for distributive justice

According to an alternative view, the extensive view:

- the institutional principles are not necessarily the only principles of distributive justice;
- thus principles besides the institutional could be used to evaluate or determine distribution;
- thus the basic structure need not be the only direct subject of distributive justice.

The difference between the extensive view and the exclusive view centres on the status of institutional and non-institutional principles, with implications

⁶⁰ In chapter V, I consider the difference between political conceptions and general conceptions of justice, and the relevance of this distinction for the personal choice argument in greater detail.

for the subjects to which they apply, when it comes to *distributive* justice. Whereas the distinguishing feature of the exclusive view is that the institutional principles are the only principles of distribution, the extensive view recognises that principles other than the institutional could have a direct influence on broad distribution. So, for example, according to the exclusive view, personal choice within the family such as the division of household labour is not evaluated by any principles of distributive justice, but if it could be evaluated according to justice, it would be evaluated by the institutional principles. According to the extensive view it could be evaluated directly by principles other than the institutional principles.

Although the extensive view can agree with the exclusive view's claim that the basic structure is the only direct subject of the *institutional* principles of justice, it claims that the basic structure should be seen as only *one* subject of justice and the institutional principles of justice are only *one* set of principles for achieving distributive justice. The institutional principles apply only indirectly to individuals but there are other principles or measures for justice which could apply to individuals. This means that principles for individuals, for example, could be used to judge the influence of personal behaviour on distribution.

The extensive view is a feasible interpretation of Rawls's justice because (1) although Rawls distinguishes subjects other than the basic structure from the institutional principles, this means that we should not directly apply the institutional principles to other subjects, not that we should not apply any

principles of distributive justice to individuals. (2) We also noted that the reasons why the basic structure is so central to justice-as-fairness, background justice and the profound and pervasive effects of the basic structure, do not rule out measures beyond the institutional principles. The reasons why the basic structure needs especially to be regulated merely demonstrate that other measures are not sufficient for justice and that institutional measures are necessary for justice: thus they do *not* demonstrate that other measures are unnecessary or that the institutional principles are sufficient. Thus we could say that according to the extensive view, justice-as-fairness is compatible with establishing distributive justice (1) through the institutional principles applied to the basic structure and through the indirect application of these principles to other subjects, and (2) through further non-institutional principles.⁶¹

Additional evidence for this view can be found in Rawls's discussion of how justice-as-fairness differs from utilitarianism.⁶² Rawls claims that utilitarianism would be problematic even if it recognised a distinction between different subjects of justice. This is because it applies the same principle of justice universally: even if it recognised the need to distinguish between institutions and individuals, it applies the principles of utility to both. The problem with utilitarianism then seems to be not that it applies principles of justice to more than merely the basic structure but that it does not give the

61 When I say that other principles could be compatible with justice-as-fairness, I am not saying that such principles, whatever they may be, will necessarily be compatible with justice-as-fairness. Of course, the content of such principles would have to be examined to determine if they truly are compatible. Furthermore, one could argue that identifying any other fundamental principles of justice would necessarily be incompatible with Rawls's justice because of their potential to conflict with the institutional principles. I will address this objection in chapter V. For the moment, let us say that the extensive view is *prima facie* compatible with justice-as-fairness, but it still needs to be demonstrated that it is indeed so.
62 Rawls (1993: 259-262).

basic structure a unique role with its own specific principles of justice. The institutional principles of justice-as-fairness, unlike the principle of utility, are “special *first* principles ... required for the basic structure”.⁶³ Thus they are not the only principles of justice, although they could be the only principles applied to the basic structure as the “the first subject of justice”.⁶⁴

I claimed that for the exclusive view, what Rawls means when he refers to the basic structure as the primary or first subject of justice is that it is the only direct subject of the only principles of distributive justice, the institutional principles. For the extensive view, this cannot be the same interpretation: there could be subjects of justice besides the basic structure and there can be principles of justice besides the institutional principles. ‘Primary’, according to the extensive view, would rather mean something like a starting point, hence Rawls uses ‘first’ interchangeably with ‘primary’. Rawls thus chooses to begin developing a theory of distributive justice with the application of the institutional principles to the basic structure, clearly because institutional structure has such an important influence on how fair a society can be, but this is not necessarily where such a conception of distributive justice ends as well: “starting with the basic structure and then developing *other principles* sequentially, gives justice as fairness a distinctive character”.⁶⁵ Why start here though? It is not an arbitrary choice. Rawls begins with the basic structure because, as he explains when he discusses why the basic structure is the

63 Rawls (1993: 262; my emphasis).

64 Rawls (1993: 257).

65 Rawls (1993: 259-260; my emphasis). Note also: “There is no attempt to formulate first principles that apply equally to all subjects. Rather, on this view, a theory must develop principles for the relevant subjects step by step in some appropriate sequence” (Rawls 1993: 258).

primary subject of justice, (1) justice requires background justice, and (2) injustices in the basic structure have such profound and pervasive effects on individuals' lives.

The extensive view is not necessarily at odds with Rawls's institutionalism: it does not deny the necessity of fair institutions. It does not, however, limit justice to institutions (understood to exclude personal choice and associations) and more particularly it does not exclude the possibility of demands of distributive justice on individuals (besides the indirect application of the institutional principles).

I have identified two interpretations of Rawls: the exclusive view which limits distributive justice to the application of the institutional principles, and the extensive view which does not limit distributive justice in this way and thus recognises that distributive justice could include more than merely this application. Which interpretation then is correct? I believe it is possible to read Rawls according to either view. However, because either view is possible, both are somewhat vague and contain inconsistencies. I think it is difficult for the exclusive view, for example, to explain precisely what the distinction is between rightness-as-fairness and justice-as-fairness and how these two theories interact. On the other hand, Rawls makes comments, such as this one, which seem to contradict the extensive view's claim that subjects other than the basic structure could be appropriate for social and distributive 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. We also call the attitudes and dispositions of persons and persons themselves, just and unjust. *Our topic, however, is that of social justice...*⁶⁶

Although either interpretation is possible, albeit with inconsistencies, which view is adopted has important implications for the personal choice argument, as I will explain in the conclusion, and, besides helping to clarify the basic structure further by providing an understanding of what is meant by ‘primary subject’, it is because of these implications that I have chosen to identify these interpretations.

Conclusion

In the introduction I stated that there were two primary questions that this chapter aimed to answer:

- (1) What is the basic structure and how do the institutional principles apply?
- (2) What is the status of the basic structure as a subject of justice and the status of the institutional principles of justice as principles of justice?

In answer to (1) we have established that the basic structure seems to include only political form, the economic system, the constitution and legislation where these have distributive implications, and thus it only includes the public rules governing individual behaviour and non-basic structure institutions and

⁶⁶ Rawls (1999: 6; my emphasis).

associations, such as the family. The institutional principles, according to this analysis, apply (i) directly to the basic structure, (ii) indirectly to other subjects of justice (through the application to the basic structure), and (iii) to the evaluation of the outcomes of steps (i) and (ii).

In answer to (2), I identified two possible interpretations of the status of principles and subjects of justice. The exclusive view claims that the institutional principles are the only principles of distributive justice, while the extensive view recognises that there could be principles of distributive justice other than the institutional.

The purpose of investigating what Rawls has to say about the basic structure and the institutional principles is to help us to assess the personal choice argument. The implications of this analysis for the personal choice argument are:

1. Rawls explicitly claims that the institutional principles do not apply to individual behaviour and thus to personal choice.
2. The basic structure seems to exclude personal choice. This is consistent with claim 1 above as the institutional principles are only supposed to apply directly to the basic structure and thus if Rawls maintains that they do not apply to individual behaviour then this implies that personal choice cannot be part of the basic structure. Furthermore, from our analysis of the 4-stage sequence and the problem of the family we found that the institutional

principles only apply to individual behaviour indirectly by setting limitations through the basic structure. Personal choice, however, does not seem to be affected by even this indirect application because personal choice is by definition choice that is left open by the law and yet the institutional principles apply only to the public rules of individual behaviour through such institutions as legislation and the constitution.

3. Rawls acknowledges and briefly discusses other principles, such as principles for individuals and the principles of local justice, which could apply directly to personal choice.

4. The two interpretations of the status of principles and subjects of justice, the exclusive and the extensive views, provide different frameworks for understanding the role of principles which could be applied to personal choice. According to the exclusive view, the only distributive principles of justice are the institutional principles. Thus if the reason why we would want to include personal choice as part of a conception of social justice is because it affects distribution, it seems that we would have to apply the institutional principles to personal choice. According to the extensive view, in contrast, other principles of distribution could be applied to personal choice.

In the introduction I claimed that the aim of answering these two questions is (1) to determine whether it is legitimate to claim that Rawls does not accommodate personal choice within his conception of justice and, if this is a

legitimate claim, (2) to establish the best way to accommodate personal choice in a Rawlsian framework.

In addressing (1), it seems thus that according to Rawls personal choice is not part of the basic structure and the institutional principles do not apply to it directly or indirectly. I do not think that we can come to a conclusive answer yet, however, as to whether Rawls does or does not accommodate personal choice. In chapter III I will examine in more detail whether the justice of personal choice might still be addressed when the institutional principles are applied to the basic structure.

In addressing (2), the two interpretations of the status of the principles and subjects of justice provide us with a starting point for establishing two possible alternatives to accommodating personal choice in Rawls's justice. If we adopt the exclusive view, as this excludes any principles other than the institutional as distributive, we would have to include personal choice as part of the basic structure. According to the extensive view it is possible to apply principles other than the institutional to personal choice. In chapters IV and V, I will assess these alternatives and argue that adopting the extensive view is best.

Whichever view we adopt, however, we have not demonstrated *why* personal choice should be included in a conception of justice. According to the personal choice argument, justice requires fair personal choice because personal choice influences distribution. I agree that personal choice has direct

distributive implications and thus as Cohen points out, if we care about distribution, we should care about personal choice.⁶⁷ Although I agree with Cohen's overall justification, I will, however, take a somewhat different route in establishing the need to include personal choice in a conception of justice. The pressing reason why personal choice should be included as part of a conception of justice is that informal social equality cannot be achieved without fair personal choice. Social equality is, I will argue, a necessary component of justice but it is not equivalent to justice and cannot be reduced to it. In the next chapter, by constructing a detailed conception of social equality, I will provide a justification for why we need more than merely the application of the institutional principles to achieve justice and why the personal choice argument is right in its claim that we need to include fair personal choice as a requirement for justice.

⁶⁷ Cohen (2000: 140).

II. Social equality

Equality, as it is more commonly understood, is not, in the first instance, a distributive ideal, and its aim is not to compensate for misfortune. It is, instead, a moral ideal governing the relations in which people stand to one another. Instead of focusing attention on the differing contingencies of each person's traits, abilities, and other circumstances, this ideal abstracts from the undeniable differences among people. It claims that human relations must be conducted on the basis of an assumption that everyone's life is equally important, and that all members of society have equal standing.¹

Liberal theories of justice have frequently been criticised for focusing almost exclusively on justice defined in terms of the law, rights and the public domain. Karl Marx, for example, claimed that liberalism's attempts to ensure political emancipation through legal rights fails to achieve true emancipation, what he referred to as human emancipation, because it ignores inequalities in social and economic position which determine or interfere with legal and political status.² Also, many feminists have criticised liberals for drawing a distinction between the public and the private which ignores the need for justice even in personal relations.³ This chapter follows a similar thread: I argue that 'private', or what I will refer to as informal social inequalities, which are often neglected, should be addressed by theories of social and

1 Samuel Scheffler (2003: 21-2).

2 See Marx (2000: 46-64).

3 For a description of feminist views on the public/private distinction, see Anita Allen (2000: 456-465).

distributive justice. My aim in this chapter is to identify and describe a notion of social equality which, I will argue, has value independent of formal equality and of the fair distribution of material goods but which nevertheless should be a requirement not only of a society of equals but of distributive justice. In this sense my claims tie in with similar notions put forward by proponents of the personal choice argument: both Cohen, for example, and I claim that fair personal choice is a requirement of distributive justice, however, my slant differs from Cohen's because I focus on the more general notion of equality, social equality, which I believe helps to explain why justice in personal choice is a significant concern.

I aim to answer two primary questions:

1. What is social equality?
2. How is social equality distinguishable from two aspects of distributive justice, formal equality and the fair distribution of material goods?

Within the greater context of this thesis, this chapter serves to identify a notion of equality which, I will argue, should be but is not addressed by Rawls's justice. The demands of social equality which I identify, respect-for-persons, civility and toleration of difference, provide the basis for what we would need to add to Rawls's conception of justice in order to address this neglect.

There are 5 sections to this chapter. In the first section I describe social equality. I claim that social equality includes the values of respect-for-

persons, civility, and toleration of difference. As the fundamental value, I concentrate on describing respect-for-persons, which entails two negative components: (1) an opposition to arbitrary hierarchies of value and (2) an opposition to dehumanisation. In the second section I explore the distinctions between social equality and two other aspects of justice: the fair distribution of material goods (what I will refer to for short as ‘narrow distribution’) and formal equality. I will argue that narrow distribution and formal equality neither fully constitute social equality nor can be relied on to fully cause it. In the third section I claim that what is missing from our descriptions of fair societies is the notion of an egalitarian ethos which motivates behaviour to comply with the demands of social equality. In the last two sections I reiterate why social equality is significant and address objections that social equality should not be a requirement of distributive justice.

1. What is social equality?

Determining social equality means determining what society would be like if people were genuinely treated as equals. A way of answering this question and the way in which I will answer it is by focusing on what ‘attitudes’ people would have towards each other if they considered each other to be equals, in other words I identify which values would underlie behaviour or policy for people to be treated as equals. I will identify three values that I consider are minimum requirements for social equality (1) respect-for-persons, (2) civility

and (3) toleration of difference.⁴ The most fundamental value of these is respect-for-persons, a type of respect which demands that all people should be respected simply because they are people. It would be difficult to find an egalitarian who would shake her head in disapproval at the claim that people should be treated with respect, but, of course, however intuitively appealing this claim is, it provides us with little. What does it mean that people must be respected according to social equality? I am going to explain respect-for-persons as two minimum requirements of (negative) treatment. Respect-for-persons means (i) not treating people according to arbitrary hierarchies of value and (ii) not dehumanising.

1.1. Respect-for persons

In seeking the construction of a community of equals, [social] equality integrates principles of distribution with the expressive demands of equal respect.⁵

In his article ‘Equality and Justice’, David Miller drew particular attention to the notion of social equality, arguing that it is an important yet seldom

⁴ I am only providing a description of the minimum requirements for social equality because my aim is not to provide an account of a society of equals generally but to demonstrate the importance of the overlap between social equality and justice in personal choice. A fuller description of social equality would (1) provide a more detailed description and possibly include even more extensive requirements for the aspects of social equality I have identified. For example, my description of toleration is very brief and it is also negative, i.e. I refer to toleration as something that requires a lack of interference. It could be argued that the notion of toleration required by a society of equals would be positive, i.e. a requirement to encourage diversity or allow it to flourish (see Susan Mendus [1989: 15-6], for example, for a description of positive and negative toleration). Furthermore, (2) such a fuller description may include other requirements, such as a notion of affiliation or solidarity, something like a special commitment we share with others, to one another and to a common life (I have borrowed this description of such a special commitment from Michael Walzer (1983: 62). See also, for example Nussbaum’s description (2000: 79; affiliation part A) of the capability of affiliation.

⁵ Anderson (1999: 289). Anderson refers to it as ‘democratic equality’.

acknowledged form of equality which can be distinguished from distributive equality and the demands of distributive justice.⁶ Since then, Elizabeth Anderson and Samuel Scheffler have used social equality to criticise luck-egalitarianism: they claim that luck-egalitarians do not have the right understanding of equality. Equality is not, they argue, primarily to do with luck, or even with distribution but rather to do with relationships between people.⁷ I am going to use some of the ideas put forward by Miller, Anderson and Scheffler as a starting point for describing the most important value underlying social equality, respect-for-persons.

1.1.1. Respect-for-persons: an opposition to hierarchies of value

A common thread among their ideas is that social equality is opposed to what Scheffler refers to as “hierarchies of social status”.⁸ Miller describes a society of equals as one “that is not marked by status divisions such that one can place different people in hierarchically ranked categories, in different classes for instance”.⁹ Anderson describes inequality as a commitment to “basing a social order on a hierarchy of human beings ranked according to intrinsic worth”.¹⁰ An opposition to ranking people according to hierarchies of social status appears to be a central tenet of social equality. But what exactly does it mean to be opposed to hierarchies of social status? Why are we opposed to them, or to put it another way, what harm do they do? Furthermore, are we

6 Miller (1998: 21- 36).

7 Anderson (1999: 287-337) and Scheffler (2003: 5-39).

8 Scheffler (2003: 22).

9 Miller (1998: 23).

10 Anderson (1999: 312).

opposed to all hierarchies of status or only some of them? What would be the distinction? To begin, let us consider the question ‘why’.

i. The harm of hierarchies of value

Hierarchies of social status are hierarchies of value. People are ranked within these hierarchies according to how much value we attach to them. A first problem with these hierarchies is that they hold that some people are worth less than others; some are treated as inferior to others. The defining feature of inequality for Anderson, for example, is not a problem of the distribution of material goods but of social relationships in which people are unfairly regarded and treated as inferior.¹¹

Think of the traditional status of aristocrat and worker. The worker, born into the ‘lower’ social class, according to this social hierarchy, is a lesser person than the aristocrat, and can (and should) thus be treated as, and is also expected to behave as, an inferior. The aristocrat, born into the ‘upper’ classes, possesses an elevated status as a natural entitlement and it is for her that the privileges of wealth, power and respect are reserved. It is to inequalities of status such as this and their associated privileged or degrading treatment that social equality is opposed: “This is the lively hope named by the word *equality*: no more bowing and scraping, fawning and toadying; no more fearful trembling; no more high-and-mightiness; no more masters, no more slaves”.¹²

11 “Inequality referred not so much to distributions of goods as to relations between superior and inferior persons...” (Anderson 1999: 312).

12 Walzer (1983: xiii).

Although it is possible to have (somewhat) personal hierarchies of value, the hierarchies I am referring to here are publicly acknowledged. When we ask who is doing the valuing, the answer is a social group or community or society, not an individual or isolated groups of individuals. The answer is the same when it comes to who is being valued. Neutral observers would be able to recognise and agree on the hierarchies in place, although usually members even of the society concerned should be able to recognise these hierarchies. Extreme examples would be the caste system in India, the system of racial classification in apartheid South Africa and the hierarchy of slaves, metics (resident aliens) and citizens in Ancient Greece,¹³ although hierarchies of value need not be legally coded and coercively enforced; they are often part of the social structure of a society without necessarily being part of its legal structure.

When someone is treated as a lesser person, the treatment consists of both (1) a mode of valuing and (2) a mode of expression which degrades or disadvantages. In our aristocrat/ worker case, (1) the worker is valued less than the aristocrat, meaning she is considered to be a lesser person, and (2) this valuation is expressed in expectations, behaviour or through policy; for example, our worker is expected to ‘bow’, ‘scrape’ and ‘fawn’ in the presence of her superiors. Generally, the way in which this treatment could be expressed is manifold. It could also include:

13 For an explanation and history of the caste system see Susan Bayly (1999). For a history of apartheid, see Eric Louw (2004) and Sampie Terreblanche (2003). Terreblanche claims that racial segregation in South Africa has developed into a strict class hierarchy. See Walzer (1983: 53-5) on how the resident aliens of Ancient Athens, the metics, were often treated with contempt and denied political and welfare rights. For a more general description of male citizenship, women’s roles, residence and slavery in Ancient Greece see Oswyn Murray (1991: 244-265).

- lack of access to and opportunity for jobs, education and services (for example, not allowing women access to university education);
- denial of civil rights and liberties (denying blacks the vote);
- denial of equal income, and exploitation (paying impoverished workers, who are desperate for income, less than the minimum wage);
- stigmatisation, marginalization or exclusion (not representing the views and interests of the aged in the media);
- biased stereotyping (portraying welfare claimants as lazy);
- discrimination (denying a Muslim a job interview because she is Muslim);
- cultural imperialism (imposing dress codes in the workplace which prohibit minority religious dress);
- humiliation, hate-speech or the use of derogatory language (using racially derogatory insults);
- harassment or intimidation (sexual harassment);
- physical or emotional abuse, assault or violence (anti-gay hate crimes).¹⁴

14 I found Nancy Fraser's (1997: 22) description of the harms of cultural racism useful in compiling this list. Cultural racism, she claims is expressed in a range of harms: "including demeaning stereotypical depictions in the media... violence, harassment, and 'dissing' in all spheres of everyday life; subjection to Eurocentric norms in relation to which people of color appear lesser or deviant and that work to disadvantage them...; attitudinal discrimination; exclusion from and/or marginalization in public spheres and deliberative bodies; and denial of full legal rights and equal protections". Fraser's (1997; 2003) conception of misrecognition shares important similarities with social equality, however, she aims to distinguish misrecognition from the distribution of economic goods, whereas my focus is on the relationship between broad distributive justice and social equality.

The problem, of course, with treating people as lesser is that it is harmful. Different expressions of this treatment constitute or can cause different harms. For example, violence, assault and physical abuse constitute actual physical harm. Exploitation, the denial of equal income and a lack of access to opportunities and services can lead to deprivation and poverty. Often the type of harm caused is dependent on context and how prevalent this treatment is. However, this type of treatment tends to lead to certain characteristic harms:

(1) The first harm is that devaluing people is a violation of equal moral worth. What is often said to underlie both contemporary political theory and the reality of politics in contemporary liberal and social democracies is the ideal of equal moral worth. According to this ideal, all people have equal intrinsic moral worth and this means that they should be treated as equals and thus with equal respect and concern: no person matters more intrinsically than anyone else.

Ronald Dworkin has suggested that despite the conflicting conceptions of justice and equality expressed by contemporary political theories, what they have in common is a commitment to this ideal.¹⁵ Although, as Will Kymlicka suggests, this ideal is so abstract that it can be seen to be reflected in a variety of, and often conflicting, notions of equality, from “Nozick’s libertarianism” to “Marx’s communism”, any political theory that explicitly denies the ideal of equal moral worth would be rejected out of hand.¹⁶ Thus even if one disagrees that all current political theories can correctly be described as being

15 Kymlicka (2002: 3).

16 Kymlicka (2002: 4).

based on the ideal of equal worth, they are all expected to assume this ideal.

“[A]s a principle regulating how societies should treat their citizens”, Anne Phillips claims, equal worth “has achieved almost foundational status”.¹⁷

Violation of this ideal is considered to be intrinsically wrong: “that treatment is morally wrong regardless of the gravity of its effects. It represents a failure to show the moral respect due the recipient, a failure which is by itself sufficient to be judged immoral”.¹⁸

(2) A second harm, and one that is also intrinsic, is that treating someone as lesser is often a violation of rights. This is clear when it comes to, for example, the denial of civil liberties, assault and violence, which are in of themselves violations of rights (the denial of civil liberties may not be a violation of a legal right, as there is no legal right to violate, but the denial of basic civil liberties, is a violation of the moral right to the full complement of basic human rights and freedoms owed to all people).

Besides these direct violations of rights, one could also claim that treating people as lesser is in of itself the violation of a moral right; perhaps we can say that people have a right not to be treated as inferior. Or we could claim that treating someone as lesser is a violation of some other right, such as the right to dignity, which is often understood to reflect something similar to the

¹⁷ Phillips (1999: 2).

¹⁸ Larry Alexander (1992: 159). In the extended quote, Alexander claims that people can be incorrectly judged as having lesser worth, implying that they could also be correctly described as having lesser worth. My description of human worth implies that intrinsic worth is a feature of any and all human beings and thus no-one can be categorised as having lesser worth. I recognise though that in cases of extreme moral abhorrence, my description may be deemed controversial.

ideal of equal intrinsic worth. One could call the right to dignity the legal expression of the moral ideal of equal worth as dignity is taken to mean worth: “Dignity means Worth or Worthiness in some ‘absolute’, autonomized and objectivized, as it were ‘featural sense’”.¹⁹ Moreover, rights generally can be understood as an expression of the notion of intrinsic worth; providing people with rights confirms their worth: “Though people differ in their virtues and abilities, the idea of rights attaches an unconditional worth to the existence of each person, irrespective of her particular value to others”.²⁰

(3) Treating as lesser is also harmful because it damages self-worth and thus can lead to a loss of or a lack of self-respect. Self-respect has to do with how much we value ourselves, what we believe to be our own worth.²¹ Self-respect is considered to be an essential component of the good life: John Rawls, for example, refers to the social basis of self-respect as one of the “primary goods”, goods that all people need in order to fulfil their conceptions of the good life, no matter how diverse those conceptions may be.²² Self-respect is not, however, something that develops in the individual in isolation: our self-respect is dependent on how we are treated by social and political institutions; this is why Rawls refers to it as a social good.²³ Rather than emphasising institutional relationships, Axel Honneth focuses on the impact of intersubjective relationships on self-respect.²⁴ Institutions and other people seem to be the primary source for our recognition of our own worth. If

19 Aurel Kolnai (1995: 54).

20 Jeremy Waldron (1993b: 582).

21 See, for example, Stephen L. Darwall (1977), Thomas E. Hill, Jr. (1995) and Laurence Thomas (1995).

22 Rawls (1999: 79).

23 Rawls (1999: 477).

24 Honneth (1992: 187-201).

institutions treat us as second-class citizens or we are demeaned and stereotyped by others, or both, for example, this devalued notion of worth could be reflected in a lack of self-respect. Similarly, but described more broadly than merely recognition of own worth, oppression and discrimination can be said to distort their targets' identities:

The thesis is that our identity is partly shaped by recognition or its absence, often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves.²⁵

(4) A further but similar harm is that treating someone as lesser can interfere with her formation of her preferences or her conception of the good. When people are treated as inferior it is not merely the case that their self-respect could be undermined. How they form their life-plans, their expectations, their preferences and which opportunities they believe are open to them can be shaped by how others treat them. If they are treated in such a way as to expect little from their lives, it is not so much that their self-respect has been undermined, but rather that their conception of the good has been shaped by devaluation. For example, a black man in a society which systematically devalues blacks might have grown up believing that he would not be capable as a lawyer or a doctor or a politician because he is black.

This, Andrew Kernohan argues, is one of the primary harms of what he refers to as cultural oppression: "This is the harm of interfering with one of an

²⁵ Taylor (1994: 25).

individual's most important interests: her interest in forming a conception of what is meaningful and valuable in her life".²⁶ Kernohan claims that it is from our cultural environment that we learn what is meaningful and valuable. If our cultural environment is imbued with inegalitarian beliefs and attitudes which treat some as having less value than others, then those who are devalued could develop distorted conceptions of the good (this would probably also be true of those who are over-valued).

(5) A further harm of treating people as inferior is that it interferes with their life-chances and opportunities. Often this harm results from a lack of self-respect or through interference in the formation of a conception of the good, where a person's sense of worth or their aspirations are so undermined that they are unable to recognise the range of options in life-chances available to them. However, this harm can occur more directly. Take the case of a girl who grows up in a family where women are treated as inferior to men. Such a child may be denied the same access to education as her male siblings, and thus she will be denied the opportunity both for education and for developing the skills or learning the knowledge necessary for many jobs. In this case it is possible that her conception of the good is also distorted but what is important to note is it is not merely her *conception* of the options open to her which may be distorted: she is prevented from or hindered in taking up opportunities which should be open to her and which are open to others.

²⁶ Kernohan (1998: viii). This is similar to the notion of adaptive preferences: people shape what they want based on what they can get. See Elster (1983), for example, for an explanation of adaptive preferences.

(6) Inequalities of status have been shown to lead to poor health and lower life-expectancy rates through stress and depression. Richard Wilkinson, for example, claims that *inequalities* of status and income, rather than merely poverty, are a leading cause of poor health.²⁷ As evidence, Wilkinson points out that societies which are poorer overall but which have fewer inequalities are likely to have a higher average life expectancy, than countries which are richer but have greater inequalities: Greece and the United States respectively, for example. The stress and depression caused by the disrespect and lack of esteem associated with being on the lowest rungs of status hierarchies, he argues, lead to heart disease and premature birth.²⁸

(7) All the harms that have been discussed so far are harms to the individual, but a last harm of treating people as inferior is social. When some are treated as having special value and others are devalued, co-operation is impaired.²⁹ To some extent it is the deep divisions drawn between groups of people which impairs co-operation: instead of emphasising mutuality and a need to work to a common good, groups are pushed apart. It is not so much, however, the emphasis on difference itself that I believe impairs co-operation: it is that some are treated as if they are not the equals of others and are marginalised or excluded from full participation that diminishes co-operation. Additionally, the distrust and suspicion encouraged between social groups further impedes co-operation: tyranny and privilege, R. H. Tawney argued, “create a spirit of domination and servility, which produces callousness in those who profit by

27 See Toynbee’s (2005) book review of Wilkinson.

28 See also, for example, research by Cherkas *et al* (2006), which claims that low social status seems to speed up the ageing process.

29 See, for example, Richard Norman (1987: 71-88) on co-operation as justification for equality.

them, and resentment in those who do not, and suspicion and contention in both”.³⁰

The extent of the harms caused by these hierarchies is often proportional to how widespread the treatment is. Although individual examples of treating someone as inferior can be harmful, the greatest harm often occurs when groups of people suffer from pervasive structural injustices and they are systematically treated as inferior. The reason why social equality is such an important issue is because of the prevalence of hierarchies which have deemed, and still do deem, many social groups as lesser. Although new groups of those devalued could be identified and new groups could come to be devalued, there are certain social categories which are typically expressed in terms of hierarchies of worth: race, ethnicity, religion, gender, sexuality, socio-economic status, class, ability and age. Which types within these categories, or whether these types, have been devalued and overvalued often depends on historical and cultural context. However, there are certain global trends: women, for example, have been treated as lesser people across cultural contexts although the degree and the manner to which they are treated as such differ.³¹

So the problem with hierarchies of social status is that they devalue people. Of course, devaluing some means attaching special value to others: there is always a group/ individual who is privileged or treated as the superior of those

³⁰ Tawney (1964: 90).

³¹ See, for example, Janet Radcliffe Richards (1980) on discrimination against women.

who are inferior.³² Besides ranking women as having less worth than men, the pattern in what are now liberal and social democracies has been and/or is to favour whites over non-whites, Christians over non-Christians, heterosexuals over gays and lesbians, the able-bodied over the disabled, the young over the aged, the rich over the poor, and the aristocratic over the working classes.³³

A hierarchy which treated some as having less worth than others would necessarily treat others as having greater value, as in our original example of the aristocrat and worker, so it would seem that not only is devaluing a problem, treating someone as better is also wrong. Like treating someone as inferior, treating as superior, is also (1) a mode of valuing and (2) a mode of expression, but in this case it is a mode of valuing someone more and a mode of expression that reveres or privileges those valued as superior, or at least treats them better than those who are devalued. Like with devaluing, overvaluing could be expressed in different ways. It could take the form of:

- snobbery or elitism (giving preference, in university selection procedures, to students from public schools);
- treating those overvalued as if they are above norms, rules or the law (allowing the rich to buy their way out of punishment for legal violations);

32 Although I believe that it is likely that there will always be a privileged group this does not mean that there is always a group directly oppressing the disadvantaged.

33 Nancy Fraser (1997) refers to these as cultural injustices, claiming that they take two primary forms: firstly, the systematic privileging of the characteristics of one social group and secondly, the systematic devaluation and disparagement of a corresponding social group. Taking race as an example, this would mean firstly, eurocentrism, the systematic privileging of 'whiteness', and secondly, cultural racism, the systematic devaluation and disparagement "of things coded 'black', 'brown', and 'yellow'" (22).

- giving greater weight to members of certain groups' interests and preferences (giving greater weight to the employment interests of the young over the aged)

When I say that some are valued more and others less this does not necessarily imply that those valued more are treated very well or that those valued less are necessarily severely disadvantaged. The point, when I refer to hierarchies of social status, is the arbitrariness of the inequality not the absolute level of treatment. So, it is not that those devalued are necessarily treated badly or that those valued are treated well: they should be treated as equals. Women, for example, in levels of management in the corporate world might be paid less than their male counterparts, and we can view this as a violation of social equality. These particular women, however, are often not seriously economically disadvantaged as they tend to earn an above average income. This inequality is still wrong, however, for there seems to be no reason for such inequality except an arbitrary assignation of value based on gender: it is no excuse to say that they are being treated reasonably well. This is not to say that social equality is not concerned with the treatment itself, however, this is not the primary problem with hierarchies of social status, which are necessarily comparative. In the second part of this section, I will address how people are actually treated.

The harm that valuing more does is clearly that it leads to someone else being treated as lesser. Does this mean, however, that treating-as-better is harmful only because it implies treating-as-lesser? Could those being treated as better

be harmed themselves? I do not think that the harm that results from hierarchies of worth only harms those deemed to have lower worth. A morally distorted social system which falsely deems some to have lesser worth and others greater, is likely to harm not only the disadvantaged but also those it privileges.³⁴ Think of South Africa under apartheid. The harm that apartheid did to black people is evident. However, one could argue that whites were also harmed, albeit clearly not in the same way or to even nearly the same extent as blacks. The constant tension or the threat of conflict between races, the demonisation of blacks and the tenuousness of apartheid's purported justifications for a racial hierarchy, I believe, fostered fear, suspicion, cruelty and aggression in many whites, which would influence not only their interactions with other races, but could permeate any of their relationships.³⁵

Moreover, superior treatment is likely to create pressure to meet unrealistic or elevated expectations, and this pressure or the failure to meet these expectations is often harmful. Think of traditional norms of masculinity which demand that men must remain strong and in control, and must provide for their families. The pressure men may feel to meet these expectations or the failure they experience if they do not meet them could be linked to emotional

34 Or potentially any third parties who are part of that society but who are neither over- nor under-valued.

35 For a description of the harm of apartheid on all races, see Desmond Tutu (1999) on his experience as chair of the South African 'Truth and Reconciliation Commission': "This vicious system has had far more victims than anyone had ever thought possible, because it is no exaggeration to say that we have all in different ways been wounded by apartheid... In one way or another, as a supporter, a perpetrator, a victim, or one who opposed the ghastly system, something happened to our humanity... Those who were privileged lost as they became more uncaring, less compassionate, less humane and therefore less human.... Those who opposed apartheid could also end up... becoming like what they most abhorred..." (154-5).

breakdowns, stress-related illnesses and even aggression and violence.³⁶ It seems that being treated-as-better is not necessarily good for you (or those around you).

Before I move on to the next part of this section, let me briefly mention why I have chosen to state this problem of social equality in terms of treating some as lesser and some as better, devaluing some, while valuing or overvaluing others. Often problems associated with social equality such as discrimination are described in terms of differential treatment: the claim is that what is wrong with discrimination, for example, is that it treats people differently in a morally arbitrary way. Mainly there is no substantial difference between these descriptions: when we devalue someone we are treating them differently to those we privilege, in a morally arbitrary way. However, I have chosen to refer to this aspect of social equality according to rankings of value rather than merely differential treatment for two reasons.

The first is that differential treatment seems not to be descriptive enough: it does not get to the root of the problem. It is not merely that we are treating people differently but that in our differential treatment we are treating some worse than others. After all, we can treat people differently without treating them as if they have less value. Secondly, sometimes it is treating people as if they are all the same that is the problem, and it is a form of differential treatment that is needed. This is a problem associated particularly with one of the expressions of inferior treatment: cultural imperialism. Cultural

³⁶ See, for example, Rosalind Miles (1991) on the relationship between violence and masculinity.

imperialism occurs when the conventions and experiences of one social or cultural group are accepted as the norm and other groups are expected to conform to this norm. Here the problem is that people are being treated as if they are the same but they are not. Take a country where holidays from work and school are based on Christian holidays. If, for example, Jews are not able to take time off for Jewish holidays, they could justifiably feel aggrieved because their interests have not been taken into account. Of course, we can describe this situation as one of differential treatment: the problem is that Jews are being treated differently in the sense that they are not accorded equal concern. Although this is something of a mere terminological difference, I believe though that inferior treatment or devaluation is a more accurate description: it is not merely that Jews are being treated differently, they are being treated worse which is the problem.³⁷

ii. Morally unacceptable value hierarchies

So the problem with hierarchies of social status is that they value some less and some more. Does this mean, however, that social equality is opposed to any social hierarchies? Could hierarchies of value be justifiable in certain circumstances? It seems that a blanket ban on these hierarchies would not make sense. In life, we do value certain people more and certain less in ways which do not seem morally objectionable. Take technical skill as an example.

³⁷ Moreover, the use of 'arbitrary' can be misleading because it implies that discrimination is random, whereas it is systemic and systematic. Consider Arneson's (2002) claims about the difference in harm between random discrimination and discrimination based on social group membership: "Although whimsical hiring violates formal equality of opportunity just as much as discrimination against some applicants done because the applicant is a member of a socially disfavored group, the latter is evidently a more serious violation of formal equality of opportunity. Whereas being the object of discrimination because one is a group that has been targeted for oppressive treatment in the past is likely to be a wound to one's sense of dignity and self-respect, being the victim of whimsical or idiosyncratic hiring practices is less likely to inflict a significant psychic wound over and above the loss of the job itself."

It seems perfectly reasonable and fair for me to consult a doctor who I know to have superior medical skills to her rival.³⁸ In fact at the risk of behaving irrationally if I do not (as long as I have no other reasons for using the inferior doctor such as that she is my friend), I *should* consult the doctor with superior skills. In this example we have a type of hierarchy of technical skill: I value the doctor with superior skills more than her rival and act on this valuation by giving the superior doctor my business. However, my valuation and the way in which I express this valuation is not a violation of social equality. In this example I am thus not treating the inferior doctor as inferior or at least not in the requisite way for it to be a violation of social equality. So it seems that there are reasons for valuing someone less and acting on that valuation which seem acceptable: in this case it seems acceptable due to skill.

Even if my preference is morally justifiable, this does not mean that any way in which I treat the inferior doctor is justifiable. I can choose not to do business with her and I can choose to take my business to her competitor. But just because I have reason to believe that the inferior doctor is inferior skill-wise does not justify any manner in which I treat her: I should not exploit her, or force her into another profession which I believe to be more suitable for her, or simply treat her as if all she is her inferior medical skill.³⁹ It seems that her inferior skills do not justify certain forms of treatment.

38 Miller (1998: 32-3) uses the example of how we treat better or worse doctors in his discussion of social equality. He claims that better doctors should only be treated differently to worse doctors where it is relevant to that skill and not in any other sphere of interaction.

39 I am assuming here she is a capable doctor, just not very good at it. Obviously if she was very bad at it, she could justifiably be struck off, perhaps condemned in the press, and so on.

So there seem to be two things to say here: (1) there are reasons for justifiably valuing someone less and I am justified in expressing that valuation by acting on those reasons and (2) even though I may be justified in valuing someone less than someone else, this does not justify treating that person in any way I choose. In relation to point (1) the answer to the question ‘do all hierarchies of value violate social equality?’ is no. What we need to determine then is which hierarchies are acceptable and which are not, and more importantly why this is so. In relation to point (2) we need to determine why even acceptable hierarchies only justify certain treatment. Let’s start with the first point and I will address the second point in the next part of this section.

When it comes to the example we have looked at, a type of hierarchy which seems to be acceptable is a hierarchy which has to do with the ability to perform a task or fulfil a role such as the ability to be a good doctor. It is acceptable to talk about someone being a more skilful doctor than someone else. Similar examples would be the ability to sing well or to be a successful lawyer or to be a good gardener. When we examined what it means to treat someone as inferior, I highlighted certain hierarchies which are typical violations of social equality: judging someone to be better according to their gender, race, class, religion, whether or not they have a disability, and so on. What then is the difference between saying one doctor is better than another in comparison to saying that someone who is white is better than someone who is black? Why is it acceptable to favour one class of doctors over the other but unacceptable to favour one race over another?

To start, certain hierarchies necessarily violate social equality because they treat some people as having less worth as people than others. In the case of the doctors, we are not saying, or at least should not be saying, that the superior doctor is a better person than the inferior doctor; we are merely saying that she is a better doctor. Whereas if we said that a white person is better than a black person we are not comparing any sort of specific ability but rather we are comparing them as human beings and judging the white person to be a superior person and the black person to be inferior. These types of hierarchies cannot but violate social equality which accepts as a starting point that no human being is a better human being than the other, that no-one has more intrinsic worth than the other. Hierarchies of intrinsic worth are necessarily harmful.

So can we leave our answer at that? Acceptable hierarchies do not violate intrinsic worth; unacceptable hierarchies do. No, we cannot. This distinction does not prove to be sufficient: few people or institutions justify their prejudices or discriminatory behaviour or unfair policies on a direct claim of lesser intrinsic worth or something similar:

Few can be found who will explain their practice merely by saying, 'But they're black: and it is my moral principle to treat black men differently from others'. If any reasons are given at all, they will be reasons that seek to correlate the fact of blackness with certain other considerations which are at least candidates for relevance to the question of how such a man should be treated.⁴⁰

40 Williams (1997: 467).

The problem is that those who would justify differential treatment claim that the acceptable and unacceptable hierarchies overlap. Our categories of gender, race, and so on, are said to overlap with the ability to perform a task or fulfil a role: the claim is that women make inferior scientists or that black people are less successful skilled workers. Furthermore, the criteria for determining what it takes to perform a task or fulfil a role properly or well are not morally neutral: think of what it takes to be a good mother or a good father. What makes one successful at these social roles is laden with values and norms associated with particular genders. Hierarchies of worth often underlie biases in decisions, behaviour or policy but they are not always referred to explicitly or directly (often they are not even consciously recognised), and they are often linked with our expectations of social roles or our criteria for ability. Few people justify their preferences for one person or one group over another by simply saying, ‘they’re inferior therefore we should treat them differently’. As John Baker explains, “Instead they propound a similar but more sophisticated theory: that the pyramid of wealth and power is also a pyramid of intelligence, industry, skill and culture”.⁴¹

So where a violation of the ideal of intrinsic worth is not sufficient to counter justifications for devaluation, we need to establish further criteria for why certain preferences are acceptable and others are not. Why is it that if I say that I don’t want to consult an inferior doctor I am not violating social equality but if I said that I didn’t want to be treated by a doctor because she is black, I am?

⁴¹ Baker (1987: 28).

We could start here by saying that in order not to violate social equality I need a reason for favouring the superior doctor and that reason is inferior medical skill.⁴² However, having a reason for favouring can't be the distinguishing factor as 'he's black' is also a reason. So the next step would be to say we need a relevant reason for favouring one person over another. The criterion for whether we should favour one doctor over another is medical skill, or even a bedside manner, not race, so race is an irrelevant reason. This still proves insufficient however because what is relevant and what is irrelevant is often what is under debate: "labelling a trait on which discrimination is based as 'irrelevant' begs the question of what makes the trait irrelevant".⁴³ I could claim that the reason why being black is a relevant reason for favouring one doctor over another is because I believe that black people are more likely to have lesser medical skills than whites. The problem is that often oppression and discrimination have been defended with so-called relevant reasons, often with the backing of seemingly scientific evidence, which purported to prove the inferiority or something similar of women, blacks, gays, and so on, and which thus supposedly justified hierarchies of status and worth.⁴⁴ If we used

42 In the following section, the discussion owes much to Bernard Williams' analysis of equality in 'The Idea of Equality' (1997) and Larry Alexander's taxonomy of discriminatory preferences in 'What Makes Wrongful Discrimination Wrong?' (1992). Williams claims that we need socially operative and relevant reasons to justify inequalities. Alexander claims that it is the disadvantaged status of a group which distinguishes unfair from fair discrimination. Neither one of them is dealing with precisely the same topic as I am. Williams is referring to equality generally, not to a specific form of equality, such as the social. Alexander, on the other hand, is talking about something more specific than social inequality, i.e. discrimination.

43 Alexander (1992: 151).

44 See, for example, Gunnar Myrdal (2000), who traces the development of the notion of blacks' inferiority in the United States and Stephen Jay Gould (1997) who demonstrates how prejudice has frequently informed and driven science.

only this criterion, we would be likely to justify too much treatment which is actually morally objectionable.

There is, however, a further guide we can use to help determine whether reasons provided are relevant or not, or to determine whether the criteria set for which reasons can be provided are themselves fair: whether the preference is made against someone of disadvantaged status. We can examine the historical and contemporary standing of the social groups to which those disfavoured and favoured by the preference belong. The implication here is that if the person disfavoured belongs to a disadvantaged group, and if the person favoured belongs to a traditionally privileged group, we might have reason to be suspicious of this disfavour. Using the disadvantaged status of social groups as an indicator of the fairness of preferential or differential treatment may seem, like the issue of relevance, to be begging the question because one could argue that it is precisely the status of these groups that is under debate. I do not think that this is true in this case, however. If we compare the status of the two social groups in question in our example, inferior doctors and black people, we can see a clear difference in the way in which these groups have been (and are) treated. Unlike black people, inferior doctors, as a group, have not been subject to slavery and colonisation; they have never been denied civil liberties; they have never been systematically stereotyped, disadvantaged and oppressed. Society should not be arranged so that what goods you get is primarily dependent on being black or on whether you make a better or worse doctor, or gardener, or card player, but the

difference is that society has been arranged in such a way that being black does make a pervasive difference.⁴⁵

The systematic disadvantage that groups have suffered or continue to suffer is an indication to us that disfavouring them is often part of that systematic disadvantage. Furthermore, although it is open to debate how disadvantage should be measured, this does not mean it cannot be measured: levels of education, income, political representation and legal rights, and so on, can be used as an empirical basis for establishing disadvantage.

There are two ways in which disadvantaged status can provide us with a guide to whether an unacceptable hierarchy of value is in place, and thus whether social equality has been violated:

- (1) if a preference is justified by the characteristic of devaluation;
- (2) if a preference is justified by a biased system which rules out the disadvantaged.

- (1) Social equality has not been violated simply because someone from a valued group has been favoured over someone from a devalued group.

Evidently I can choose a white doctor over a black doctor without violating social equality. Where it becomes likely that social equality has been violated

45 See, for example, Anderson (1999: 317) on justice and poor card players: "Democratic equality thus aims for equality across a wide range of capabilities. But it does not support comprehensive equality in the space of capabilities. Being a poor card player does not make one oppressed. More precisely, the social order can and should be arranged so that one's skill at cards does not determine one's status in civil society. Nor is being a good card player necessary for functioning as a citizen. Society therefore has no obligation to provide free card lessons to citizens".

is when my reason for preferring the white doctor is because she is white or the reason why I disprefer the black doctor is because she is black, or both as, for example, I might believe that whites make better doctors than blacks. It is thus when I use the characteristic of devaluation or over-valuation as the reason for my preference that the preference is likely to violate social equality. It is when I disprefer, for example, blacks or women or Muslims, or whomever may be disadvantaged in a particular society, because they are black or because they are women or because they are Muslim that my preference is suspicious because it appears to have been made on the basis of a hierarchy of value which reflects a pervasive pattern of undesirable and inaccurate biases or stereotypes.

(2) Often the problem is not so simple: it is not clear that anyone is being subjected to an unfair hierarchy of value, because the hierarchy is built into the reasons that are supposedly relevant to the preference, or the devaluation is built into institutions which hamper or make it impossible for people of certain groups to meet the conditions set. Disadvantaged status here is a guide to examining the fairness of the criteria set for achieving certain positions:

(i) Often bias against certain disadvantaged groups is built into the reasons which supposedly justify preferences. Kymlicka uses the following example: fire-fighters are often chosen according to criteria such as height and weight which rule out most women.⁴⁶ These criteria, however, are not actually relevant so much to being a fire-fighter as it is to the expectation that men will

⁴⁶ Kymlicka (2002: 379-380).

be fire-fighters and thus the equipment fire-fighters use are made for men. So in this case it would seem that women cannot be fire-fighters for relevant reasons but those reasons reflect gender biases which have nothing to do with the ability to be a fire-fighter and are thus seemingly unfair. In this case it seems it is not the particular preference, a preference for male fire-fighters, that should be revised but rather the institutional expectations and mechanisms which lead to women being unfairly precluded.

(ii) Often reasons why someone is denied a particular position seem perfectly justifiable. The conditions for the job, for example, are a bachelor's degree and a number of years' experience. It seems fair that if candidates cannot meet these conditions, they should not be considered for the job. Of course, where disadvantage is expressed at least partially in terms of a lack of education and training opportunities, these conditions no longer seem fair: certain groups of people are precluded from the job because they are unable to achieve the education or experience or talents or even traits required because they are devalued and not treated as the equals of others in society. We can borrow Richard Arneson's example of gender socialisation as an illustration. He asks us to imagine a society where:

overwhelmingly boys develop the ambition to pursue challenging and lucrative careers and girls overwhelmingly do not. The explanation is that boys and girls alike are subjected to a rigid form of socialization which instils ambition in boys and quashes it in girls. In this case one might say that even though EFO [fair equality of opportunity] is not violated when Sam and Ben become lawyers and doctors and Sally and Samantha, equally talented as Ben and Sam but far less ambitious,

become homemakers and check-out clerks in convenience stores, genuine substantive equality of opportunity has not yet been achieved. In the society with rigid sex-stereotyped socialization, Sally and Samantha have not had a fair opportunity to develop the ambition that Ben and Sam have developed because only the latter benefited from the good luck of receiving favorable socialization.⁴⁷

To explain the problem in this case we can borrow the term ‘background justice’ from Rawls:⁴⁸ patterns of injustice are ingrained within institutions and within cultural values, and in order to remedy these injustices, we cannot remedy particular cases but need to reform the institutions and structures of value which cause the injustices.⁴⁹ So the solution is not necessarily to change the conditions set for jobs, for example, but to improve the opportunities of those disadvantaged to help them to be able to meet these conditions.

Although we can use disadvantage as a guide to judge whether particular preferences are wrongful or whether the criteria which justify preferences are fair, disadvantaged status does not provide us with some sort of golden standard to determine the moral status of preferences and the status of hierarchies of value which underlie these preferences. Firstly, if we rely on historical disadvantage to help determine wrongful discrimination we may ignore the devaluation of newly identified disadvantages or newly

47 Arneson (2002).

48 Note, Arneson uses the above example, among others, to demonstrate defects in Rawls’s fair equality of opportunity (see also Arneson 1999b). Arneson claims that Rawls would not be able to classify this seemingly unfair socialisation in terms of fair equality of opportunity. Although I agree that this example problematises Rawls’s justice, I am using it to demonstrate that a notion of social equality will help explain why such socialisation is wrong. I will discuss Rawls’s fair equality of opportunity and its relationship to social equality in more detail in the next chapter.

49 Rawls would probably simply say institutions. I use the term values to cover personal choice as well as institutions.

disadvantaged groups. Secondly, certain forms or particular examples of discrimination against disadvantaged groups which use race or religion, or whatever the characteristic of devaluation may be, as the reason for discrimination could still be justifiable. Larry Alexander has provided a useful taxonomy of different forms of discrimination judged as innocent or wrongful according to whether they are intrinsically immoral, irrational or whether they have undesirable social consequences.⁵⁰ Certain forms of proxy discrimination, for example, are acceptable he claims, even if they discriminate against disadvantaged groups or discriminate seemingly arbitrarily according to such characteristics as race or gender.⁵¹

Proxy discrimination means justifying a preference on a trait which is not the directly relevant trait but a proxy for some other correlated trait. This form of discrimination, Alexander argues, can be morally unacceptable if it is based on “inaccurate and usually bias-driven stereotyping” but it can also be acceptable.⁵² An example of an acceptable case would be, let’s say, a position in the military which requires such exceptional strength that virtually no women and most men would not be able meet its strength conditions. In this case it seems reasonable to consider only applications from men, as although gender is not the directly relevant trait, it serves as an accurate proxy for the relevant trait, strength. In this case, a disadvantaged group may be discriminated against according to the characteristic of devaluation but it seems a justifiable discrimination.

50 Alexander (1992: 149-219).

51 Alexander (1992: 149-219).

52 Alexander (1992: 193).

Thus although disadvantaged status provides us with some guide for determining what makes certain forms of discrimination wrong and thus which hierarchies of value that motivate discrimination are unacceptable, it does not provide us with a foolproof formula. Such a formula, though, seems impossible to find. At times, establishing whether a preference is wrongful may require an analysis of particular cases and the circumstances surrounding them which cannot always be translated into set criteria for moral acceptability. This means that although we can say that hierarchies of value which violate the notion of equal intrinsic worth or which cannot provide relevant reasons for discrimination (when taking account of disadvantaged status) are unacceptable, we cannot identify the criteria for relevant reasons perfectly.

1.1.2. Respect-for-persons: an opposition to dehumanisation

Social equality, then, is an opposition to unacceptable hierarchies of value, where unacceptable means that they are (1) hierarchies of intrinsic worth, or that they reflect (2) preferences which cannot be justified because they violate intrinsic worth or because they are not justified by relevant reasons.⁵³

However social equality is not purely comparative; it is not merely a question of how we value one person in comparison to another. It is concerned with how we value people full-stop.

⁵³ 'Cannot' here does not mean that it is not possible to justify such a preference but that the reason that the person in question has for this preference does not justify it.

In the previous section when we looked at the example of the inferior doctor I claimed that there were two things we could say about treatment of the doctor. The first was that there are certain instances where it is morally justifiable to value one person less than the other for particular purposes and to act on this valuation. In the previous section we established what reasons might make this justifiable. The second claim was that even if we are justified in valuing one person less this does not mean we can treat them in any way we choose. Although I am justified in favouring the superior doctor over the inferior doctor by taking my business to the superior doctor, I cannot treat the inferior doctor any way I choose. What I want to explore in this section is this idea that no matter what justification we have for valuing one person over another, certain treatments are necessarily violations of social equality.

Certain forms of treatment, such as exploitation or treating people according to false biases or stereotypes, denying someone the right to make their own autonomous choices or deciding on their own conceptions of the good,⁵⁴ violence, violating basic freedoms and rights, slavery and torture, seem wrong whether or not they are comparative. The unfairness, in these cases, is not whether we are exploiting some people and not others, but that we are exploiting some. Whereas certain hierarchies of value can be justified for particular purposes, certain forms of treatment cannot be or cannot be except under extreme circumstances, and thus whether or not you are morally justified in valuing some people more than others, you are not morally justified in treating them in certain ways. Instead of the problem discussed in

54 As long as these choices or conceptions of the good are just and legal.

the previous section where the focus was on treating people as lesser, meaning we are treating people badly in comparison to others, in this case, we can describe the situation as one where we are treating people as less than people, as if they weren't people: we are dehumanising them. This implies that there is a certain minimum standard of treatment that people deserve simply because they are people. The harm that a violation of this minimum standard does is similar to the harms identified in the previous section. Like, treating people according to unacceptable hierarchies, dehumanisation devalues people and harms them by, for example, violating rights, undermining self-respect, interfering with their formation of the good, interfering with their life-chances and equality of opportunity or undermining co-operation, or a combination of these. When it comes to the ideal of equal worth, the emphasis when we condemn treating people as inferior is that all people have equal intrinsic worth and thus cannot be treated as if they have lesser worth. When it comes to dehumanisation, the emphasis is rather that all people have intrinsic worth and thus cannot be treated in certain ways.

Devaluing some and attaching special value to others is directly a problem of inequality. The problem with dehumanising seems not so much related with inequality; it is primarily a problem of sufficient treatment (although it can be expressed in terms of equality in that all people should be respected as people and thus not dehumanised).

To illustrate the difference let's compare two societies. In the first society, women are expected to raise children and fulfil all other domestic duties,

whereas men are expected to provide for the family through their careers. In this society, childrearing and domestic labour have low social status and are not paid, whereas having a career has high social status and is paid. Here we can talk about an unacceptable social hierarchy which violates women's equality and treats them as lesser by relegating them to low status and financial dependence.

Compare this to our second society. In this society, women are also expected to raise children and fulfil all other domestic duties, and men are also expected to pursue careers. However, let us also imagine that in this society household duties have no lower social status than a career, that household duties are paid and let us say that the reason why women are expected to fulfil all the domestic duties is not because they are considered to be inferior in some way to men but for some other reason which neither devalues women nor attaches special value to men. Let us also say that in this hypothetical society, women have never been discriminated against or oppressed. In our second society, men and women are equals: both genders are forced into fixed social roles and neither role is considered to be more favourable. Thus here it seems inappropriate to describe the situation as a problem of relations between inferiors and superiors: there is no hierarchy. However, this does not mean that this is an acceptable state of affairs. We can say that our second case is an example of dehumanisation because individuals are subject to fixed social roles which discount their own interests and aspirations. One gender is not favoured over the other but members of both genders are devalued as their individual conceptions of the good and autonomous choices are violated.

The relationship between a stipulation that people should not be dehumanised and social equality may not yet seem entirely clear. The example of both genders forced into fixed social roles seems as if it is unconcerned with issues of equality; it is rather concerned with a sufficient level treatment. However, that we should not dehumanise people is an essential part of a society of equals. We said in the previous section that not devaluing people means that we assume that one person does not matter intrinsically more than another thus that people should be treated as having equal intrinsic worth. This, however, means very little without the added assumption that people have some worth. We are not merely saying with social equality that people should be treated equally which could mean that they are treated equally badly: they should all be treated as having worth as well as having equal worth. Furthermore, as I pointed out earlier it is possible to refer to an opposition to dehumanisation in terms of equality: people should be treated as equals which means, in this case, that they should all be treated according to a basic standard of treatment (thus forbidding certain forms of treatment).⁵⁵ An opposition to dehumanisation helps to guard social equality from a popular objection to egalitarian theories: the levelling-down objection.

Sufficientarians and prioritarrians have criticised egalitarians by arguing that we should not be concerned with equality *per se* but with how much of some

⁵⁵ Which forms of treatment would be forbidden is open to some debate. I cannot identify and defend all forms of dehumanising treatment here. It is enough for the purposes of my argument to accept that there simply are ways in which we should not treat people if we recognise that they have moral worth.

good individuals receive.⁵⁶ Derek Parfit claims that a concern with inequality itself is open to the ‘levelling down objection’: if inequality is the injustice, then in circumstances where the lot of the worst-off cannot be improved, egalitarians should be in favour of levelling down, i.e. making the better-off as badly off as the worst-off, in order to eliminate the inequality. Levelling down, Parfit believes, is an unacceptable yet seemingly unavoidable consequence of a certain form of egalitarianism (Parfit refers to it as telic egalitarianism).⁵⁷ So in terms of social equality, the levelling-down objection would claim that if our concern were merely with equality, disrespecting those whom are currently overvalued by hierarchies of social status, to bring them down to the level of those devalued, would be an acceptable solution because equality would be achieved.⁵⁸ However, if social equality demands both that people are treated equally in comparison to one another as well as equally in terms of having some form of worth, then the levelling-down objection no longer holds so strongly because levelling down is likely to violate the ban on dehumanising.

56 For an explanation of the sufficientarian critique of equality, see Harry Frankfurt (1997) and for the prioritarian critique, see Parfit (1998).

57 See Parfit (1998: 3-7) for an explanation of the difference between telic and deontic egalitarianism. Telic (teleological) egalitarians believe “It is in of itself bad if some people are worse off than others” (4). As inequality is intrinsically wrong, according to their view, levelling down could be acceptable as a means to bring about equality (9-10).

58 The levelling-down objection seems to have slightly less force against social equality than it does against narrow distributive equality because in reality it is highly unlikely that a situation would ever come to pass where it would be necessary to respect some less instead of respecting others more to achieve equality. Money, material goods and services are limited, thus taking away from some to give to others may be necessary. But with social equality there would be no shortage and thus no need to level down. This however does not mean that we should not be wary of this objection: it is after all hypothetically possible, even if it is not realistically necessary or likely, to level down in order to achieve social equality. Thus we do need to explain the difference between equality achieved by levelling up and that achieved by levelling down, and to explain why the former is preferable to the latter.

Thus far we can say that social equality is two things: an opposition to unacceptable social hierarchies (which unfairly devalue some and which attach special value to others) and an opposition to dehumanising treatment. Whereas the first demands that people should not be subject to unfair social inequalities, in the second case we aim to look beyond inequalities and differences. The problem with the gender example, where neither gender is valued more than the other, is that men and women are defined solely according to their gender and this forces them into set social roles. When we say this is wrong we are partially saying that people should not be defined solely according to certain traits, such as their gender. Similarly the inferior doctor is not merely an inferior doctor, and should not be defined and treated as if this is all she is. She is more than merely her skills. What this aspect of social equality is saying is we need to look beyond job-titles, abilities, traits and social group membership and recognise that we are all people, no matter what our differences, inequalities, successes and failures are, and as such we deserve to be treated in ways which are not dehumanising. This claim is similar to what Bernard Williams refers to as the 'human approach' in his analysis of equality:

the titles which [the human approach] urges us to look behind are the conspicuous bearers of social, political and technical inequality, whether they refer to achievement... or to social roles... It enjoins us not to let our fundamental attitudes to men be dictated by the criteria of technical success or social position, and not to take them at the value carried by these titles and by the structures in which these titles place them... each man is owed the effort of understanding, and that in

achieving it, each man is to be (as it were) abstracted from certain conspicuous structures of inequality in which we find him.⁵⁹

These two aspects of social equality help us to establish which inequalities are acceptable, and once these inequalities have been established, they urge us not to treat people as merely their inequalities. The different values we attach to different jobs provide an important example. Compare a doctor to a cleaner. We attach more value to being a doctor than being a cleaner. This value is economic and it is also value expressed in terms of status and prestige. Now according to the first stipulation of social equality, that we should not unfairly treat people as lesser or better, the special value we accord being a doctor and the lack of value we accord being a cleaner is suspect if it is associated with a hierarchy of lesser worth, for example if cleaners are considered to be 'lesser' people and suffer from inferior treatment. This does not mean, however, that any inequalities between cleaners and doctors are necessarily problematic. Perhaps we can provide relevant reasons for valuing doctors more than cleaners. Perhaps due to the essential nature of their services, we need to encourage people to become doctors, and that incentive is expressed in terms of higher salaries or prestige. However, even if certain inequalities between doctors and cleaners are justified, our second stipulation for social equality, not dehumanising people, comes into play and despite the job of cleaner possibly being justifiably deemed less valuable than the job of doctor, we still

59 Williams (1997: 469).

need to see past this difference in value and not dehumanise cleaners by stereotyping or exploiting them.⁶⁰

There may seem to be some conflict within social equality when we focus on the value we place on jobs. If we find that certain groups of disadvantaged people tend to do the least valuable jobs in society, we seem to have two choices. On the one hand, we can revalue the jobs, adopting the attitude that the reason why the job is devalued is because people who are unfairly devalued do these jobs. On the other hand, we can adopt the attitude that it is because people are unfairly devalued that they tend to do the least valuable jobs and thus, for example, through fair equality of opportunity applied to education and employment procedures, aim at getting more disadvantaged people doing more valuable jobs. This implies conflict because according to the first claim we want to increase the value attached to these jobs and according to the second claim we are admitting that these types of jobs have less value.

This type of conflict is often associated with ‘women’s work’, such as carer roles, where appeals are made (1) to increase the pay or to have some form of pay for this type of work and (2) to lift restrictions which prevent or discourage women from being able to take up other types of work.⁶¹ I do not think that this is a genuine conflict, however, if we view it according to both requirements for social equality. The reason why we may need to revalue jobs

60 One could perhaps argue, however, that by nature of the work, cleaning up after someone else is necessarily demeaning but my argument would hold for a comparison of other types of jobs which have different status.

61 For an analysis of the devaluation of women’s work see, for example, Janet Radcliffe Richards (1980: 157-180). Although Richards admits that the devaluation of women’s work is arbitrary, she claims that women’s work is often “inherently degrading”, (179).

is that we should not unfairly devalue people. If our devaluation of women has led to a devaluation of the types of jobs that they often do then we need to revalue these jobs. No matter how valuable a job is deemed to be, however, we should not expect or force people to fulfil certain roles merely on the basis of their gender. Thus even though we may consider carer roles to be more valuable, we should still be suspicious if women are expected to fulfil only these roles and are hindered from pursuing others.

1.1.3. Respect-for-persons: recognition respect

We can summarise the negative requirements of social equality, an opposition to unfairly devaluing people and an opposition to dehumanisation, as a manifestation of respect-for-persons. When we talk about respecting someone or something, we can mean different things. Respect-for-persons is a particular form of what has been called recognition respect. Stephen Darwall has made an influential distinction between two forms of respect which can help us to understand what we mean by respect-for-persons.⁶² He distinguishes appraisal respect from recognition respect. When we say that we respect someone for his or her achievements or talents we are referring to appraisal respect. This type of respect means that we evaluate something or someone or someone's actions or traits positively. When we talk about owing everyone respect solely because they are human beings, respect-for-persons, we are referring to recognition respect. This is respect that results from the recognition that a person, object, institutional role or institution deserves respect simply because of what it is. For example, respect for your country's

⁶² Darwall (1977: 36-49).

flag is a form of recognition respect for an object. Recognition respect thus includes but is not limited to respect-for-persons.

So when we refer to respect-for-persons, we are not referring to respect earned as is the case with appraisal respect; recognition respect has nothing to do with someone's characteristics or merits or talents. If we go back to my example of the two doctors, we can say that when we judge the better doctor to be superior we are giving her something akin to appraisal respect: even if we don't so much respect her, we appraise her positively. The inferior doctor is appraised negatively. There is nothing morally objectionable about this. However when we appraise someone negatively as a person, thus applying appraisal respect to personhood as if some people are worth more intrinsically than others, we are denying them recognition respect but for reasons which confuse recognition respect with appraisal respect. According to social equality, all people deserve recognition respect, no matter their particular talents or traits or, particularly, group membership.

Respect-for-persons though, at least as I have described it here, remains a negative description of social equality. Although we can say that social equality demands respect-for-persons, what respect-for-persons means here is that we should not devalue people or dehumanise them. Is there something positive that we can say that social equality requires? Does social equality merely tell us not to act in certain ways or are there certain ways in which it requires us to act?

It is much more difficult to establish a positive description of social equality. It seems reasonably uncontroversial to talk about requirements not to devalue people but as soon as we talk about requirements to value people or to treat them well in order to achieve social equality we seem to defy commonsense: we should not be forced to like or have affection for people simply because they are people. Furthermore positive emotions and attitudes such as love, desire and care seem to become meaningless if applied to everyone; it is partially through their exclusivity that these emotions and attitudes are significant.

Our reason for respect-for-persons is simply 'because people are people' and there is only so much we can get out of the idea. It might provide us with reason not to treat people badly but once we start considering why we treat people well, mainly we find our reasons for doing so are because they are more than merely people to us. We attach special value to people, and thus treat them in certain positive ways, primarily because we know them (we tend to value and have more concern for people we know in comparison to people we do not know), or because we have a special relationship with them (family or loved ones for example), or simply because we like them or appraise them positively (a confident speaker or a talented athlete). It seems impossible for social equality to demand of us that we treat all people as if they have special value to us. This means that there does not seem to be too much that social equality can demand from us.

However, I do believe that there are at least two positive requirements for social equality, besides the requirement of respect-for-persons: these are civility and toleration. The reasons why I believe that these are important aspects of social equality will not be presented in the form so much of an argument but rather as an appeal to a notion of what a society of equals would be like: if we want to live in a society in which people are truly treated as equals, I believe that not only would respect-for-persons be essential, but also the values of civility and toleration. I will discuss civility first.

1.2. Civility

Civility means extending basic courtesies, such as listening and providing an opportunity for others to present their views, to everyone. Civility, Kymlicka claims, is the logical extension of non-discrimination:

The norms of non-discrimination also entail that it is impermissible for businesses to ignore their black customers, or treat them rudely... Businesses must in effect make blacks feel welcome, just as if they were whites. Blacks must, in short, be treated with civility. The same applies to the way citizens treat each other in schools or recreational associations, even in private clubs.⁶³

A primary reason why social equality would require civility is we cannot claim that we treat people as equals if we extend civility only to certain social groups and not to others: this would be an expression of wrongly devaluing some and attaching special value to others. This, of course, is subject to

63 Kymlicka (2002: 301).

levelling down: what if I treated everyone uncivilly? If the problem is equality of treatment it would seem that as long as I did not extend civility to all people, I would not be violating social equality. Admittedly, the main problem with being uncivil in its relationship to social equality is that people are unequally civil: whites are smiled at, blacks are scowled at; whites are not kept waiting, blacks are, and so on. However, being equally uncivil to everyone does not seem to fit comfortably with the notion of a society of equals.

Treating people rudely seems difficult to reconcile with the notion of a society which recognises everyone as equals and demands respect and equal concern. Perhaps here the relationship to equality is that the person who is uncivil seems to be making exceptions for herself. For example, if I keep someone waiting by being late for no good reason this can be interpreted as an indication that I value my own time more than I value other people's. Also communication would be impossible in a society in which nobody listens properly to anyone else, thus if I don't listen properly to others, I would still probably expect them to listen to me. So my lack of civility, rather than being a form of equality, marks me out to be special. A society of equals would then require equality of civility, and not merely equality of incivility.

Furthermore, we can claim that incivility can cause harm, although it is most likely to cause harm when there is an inequality in the civility and lack of it shown to particular social groups. It is likely that incivility will cause harm if it is part of a pattern of behaviour perpetrated against the devalued. Of the

harms caused by violations of respect-for-persons, incivility is likely to interfere with the development of self-respect and with social co-operation. Being pervasively scowled at, kept waiting, not listened to, and so on, could contribute to a lowered or lack of sense of self-worth. When it comes to co-operation, where one group in society is treated better, through among others, civility, while the other is devalued through a lack of civility, it is likely to create or reaffirm social tensions and exclusion which could hamper co-operation.

Civility cannot be an unconditional requirement of social equality however. Respect-for-persons is, I believe, unconditional: it is always wrong to treat people according to unacceptable hierarchies or to dehumanise them. Being uncivil however is not always wrong and it is likely that it is subject to reciprocity. I do not see any reason why social equality should demand that people should be civil towards people who are uncivil towards them. More importantly, however, requiring people to be civil under certain circumstances seems wrong. If respect-for-persons is not fulfilled, civility should not be required from those wronged. For example, a black worker exploited by her white employer should not be required to be civil to her employer. Indeed it would be wrong to expect civility from her. Civility can too easily be expected as a form of subservience which only reinforces hierarchies of intrinsic worth.

Moreover, incivility could actually be an acceptable form of behaviour as a means to demonstrate disapproval for violations of respect-for-persons. While

rational debate is clearly the ideal, how do you deal with a defiant racist who refuses to argue reasonably? Resorting to incivility could be a form of sanction for demonstrating condemnation for violations of respect-for-persons.⁶⁴ Furthermore, civility should also not be over-emphasised by the privileged, as if being civil to those who are disadvantaged compensates for disadvantaged treatment. Civility should thus never be seen as a substitute for the genuine reform of discriminatory and oppressive practices and social systems. To use the typical example, the solution to slavery is clearly not that slave-owners should be nicer to their slaves, but rather that slavery should be abolished. Thus although civility is a requirement of social equality, respect-for-persons takes precedence if these values clash, and no amount of civility counterbalances violations of respect-for-persons.

1.3. Toleration of difference

Respect-for-persons is an opposition to arbitrary overvaluation or devaluation and to dehumanisation. It is not opposed to all hierarchies of value, however, and it does not demand that we appraise all things and people equally or positively: such uniform appraisal is neither possible nor desirable. In a society of equals there will thus be beliefs, conceptions of the good, characteristics, and many other kinds of differences which some people will dislike, disapprove of, or perhaps even find abhorrent.

⁶⁴ I admit that drawing the line here between incivility and disrespect can be difficult to determine. It seems intuitively acceptable to ignore a racist in a conversation in which she is being racist, for example, but how far can one go? Is it acceptable, from the viewpoint of social equality, that racists should be ridiculed in the press or be barred from associations or be refused the right to publicly express their racist views? When does incivility become a violation of respect-for-persons? This would require a more nuanced study of these concepts.

How would people in a society of equals react to things of which they disapprove? With toleration seems to be the answer here.⁶⁵ A lack of toleration would mean trying to prevent or inhibit things of which we disapprove. To take an example: a Christian fundamentalist who believes that gay sex is a sin could try to prevent or inhibit gay sex by condemning it in public, or campaigning to withhold certain rights from gays, or by encouraging violence against gays. It is often groups who have been discriminated against or oppressed who suffer from attempts to negate their characteristics, beliefs and lifestyles, while the characteristics, beliefs and lifestyles of the privileged in society are encouraged or revered or accepted as the norm. Preventing or inhibiting what we disapprove of seems clearly inappropriate in a society of equals where all people are deemed equals and need to be treated as such: if we try to restrict ways of life or characteristics, we are not treating the people who practice those ways of life or who have those characteristics with respect as if they are our equals.

Furthermore, intolerance causes harm: (1) it could interfere with rights, and by devaluing and thwarting choices (2) it could interfere with self-respect, (3) the formation of a conception of the good and (4) opportunities. Moreover, pervasive intolerance which is directed against specific social groups becomes a violation of respect-for-persons because certain groups' choices and differences are devalued due to their group membership while others are

⁶⁵ I am going to use Iain Hampsher-Monk's (1999) description of how the circumstances of toleration are often understood. Toleration occurs when we voluntarily accept "attitudes and/or actions" of which "we seriously disapprove" and which "we could prevent or inhibit if we chose" (18). Hampsher-Monk claims that toleration actually requires a stronger definition than this traditional understanding (19).

privileged, and by denying the expression of autonomous choices, intolerance can be interpreted as a form of dehumanisation.

An alternate response would be to tolerate differences by refraining from trying to negate them even though we dislike or disapprove of them; we thus allow difference to exist without interfering.⁶⁶ Toleration has (1) an objection component, we disapprove, and (2) an acceptance component, which overrides the objection component.⁶⁷ Toleration of difference would be the appropriate response in a society of equals; instead of punishing people for their differences or trying to suppress those differences, they are respected despite our disapproval. Rainer Forst calls this type of toleration, a respect conception of toleration:

the parties tolerating each other respect one another... on moral grounds they regard themselves and others as citizens of a state in which members of all groups... should have equal legal and political status. Even though they hold incompatible ethical beliefs about the good and right way of life, and differ greatly in their cultural practices, they respect each other as moral-political equals.⁶⁸

Precisely because respect is the more fundamental value, respect overrides toleration when the two values clash. Conceptions of the good, for example, which violate respect-for-persons, should not be tolerated. This prioritising of respect is similar to the priority placed on the right over the good in the liberal

66 As I am using both the terms dislike and disapproval, my understanding of toleration is what Mendus (1989), using Mary Warnock's phrase, refers to as a wide interpretation of toleration. See Mendus's (1989: 9-18) discussion of the scope of toleration and whether it should be defined only as a response to moral disapproval or if it should include dislike.

67 Forst (2003: 72). Forst borrows these terms from Preston King.

68 Forst (2003: 74).

egalitarian conception of social justice, which rules out conceptions of the good that violate justice. This is how Dworkin describes the restriction that justice places on toleration:

liberal equality cannot be neutral toward ethical ideals that directly challenge its theory of justice. So its version of ethical tolerance is not compromised when a thief is punished who claims to believe that theft is central to a good life. Or when a racist is thwarted who claims that his life's mission is to promote white superiority.⁶⁹

As is the case with social justice, the requirement of toleration only applies if those conceptions do not violate social equality. This is the reason why I not only do not have to, but should not, tolerate the Ku Klux Klan or a neo-Nazi's conception of the good, at least where that conception of the good is related to respect-for-persons. This means that respect-for-persons takes precedence over toleration, just as it does over civility.

To summarise: social equality then includes (at least) three values. (1) Respect-for-persons, which has two negative components, we should not subject people to unacceptable hierarchies of value and we should not dehumanise people; (2) civility; and (3) toleration of difference.

⁶⁹ Dworkin c.f. Kernohan (1998: 4).

2. What distinguishes social equality? Distinguishing social equality from narrow distribution and formal equality

Emphasising the values of social equality, at least within a framework of liberal egalitarian philosophy, is not particularly controversial. If anything, emphasising these values seems banal. Where debate would lie, however, is (1) whether social equality captures something unique and (2) what its relationship is with distributive justice.

One could agree that something like social equality needs to be achieved without agreeing that we need social equality as a requirement of an equal society. The equal provision of rights and liberties, opportunities for education and jobs, and an adequate income, some could argue, will result in a society of equals; social equality seemingly adds nothing new. Furthermore, even if the distinctiveness of social equality is recognised, whether social equality should be a concern of distributive justice is likely to lead to dispute. In the rest of this chapter I will argue that social equality is and should be a distinctive concern of distributive justice, although clearly it is also a concern of more than justice.

Social equality, I have said, expresses an ideal of what society would be like if people were genuinely treated as equals. A society of equals and a fair society are not precisely the same notions but there would clearly be ample correlation. Social equality would demand rights and freedoms guaranteed by

the law (formal equality) and a fair distribution of material goods (narrow distribution): how can we say that people are respected, are treated as equals, if they are unprotected by the law or they are impoverished?⁷⁰ Achieving broad distributive justice seems then to be a means of achieving a society of equals. Formal equality and narrow distribution can only go so far in achieving social equality, however. Moreover, formal equality and narrow distribution *can only go so far in even achieving distributive justice*.

Social equality does not distinguish between whom or what should treat people as equals: governments, institutions, people in their private capacities, can uphold or violate respect-for-persons; social equality requires respect-for-persons from all of these. Social equality is thus required both in the formal realm of rights, the law and institutional rules but also in the informal realm of personal choice and associations of civil society, and so on.⁷¹ As I will argue, informal social equality would not be addressed, at least not in full, by formal equality or narrow distribution. If we adopt Rawls's notion of the primary social goods, thus to include opportunities and the social basis of self-respect, we could argue that distributive justice should also include an informal realm because associations or individuals' behaviour could interfere with the fair distribution of opportunities and the social basis of self-respect.⁷² Thus distributive justice, like equality, is also required in both the formal and

70 Violations of rights and impoverishment, I take it, would both be ruled out as dehumanisation.

71 We could include as part of the informal also the family, social structure generally, norms, the media and the market (where this is not regulated). I will often simply refer to this as the informal, or to personal choice and associations, although this is not an exhaustive list of what might be included under the informal.

72 I do not expect readers to accept this claim merely because I assert it; by distinguishing social equality from formal equality and narrow distribution, and through arguments and examples in chapters III and IV, I aim to provide convincing reasons for accepting that justice requires informal justice, and thus justice in personal choice.

informal realms. Informal equality and informal justice would both occur if informal social equality is upheld. Among the harms of violations of social equality are interferences with self-respect and opportunities, and as I will argue below, these harms occur when social equality is violated in the informal or the formal, thus if respect-for-persons, civility and toleration are practised in the informal (and the demands of institutional justice are fulfilled) a fair(er) distribution of opportunities and self-respect would ensue. This is the relationship between justice in personal choice and social equality.

To understand what we mean by social equality and to understand what is missing from broad distributive justice, it will be useful to distinguish it from (1) formal equality and (2) narrow distribution. It is important to note that the distinctions I will be drawing between social equality, formal equality and narrow distribution are not meant to be rigid: there will be some, frequently much, overlap between them. Speaking about these forms of equality and distribution as if they are entirely distinct is problematic, and yet it is not the purpose of this chapter to encourage the understanding that social equality is entirely self-sufficient. Despite this qualification, however, there is need to make some distinction, partially precisely because we find that certain forms of equality are neglected either because no distinction is made or because distinctions have been drawn too rigidly. Liberal egalitarians, for example, have been accused of focusing almost entirely on narrow distribution and economic equality, and thus of ignoring capabilities and social inequalities,⁷³ whereas multiculturalists and some feminists, among others, have been accused

⁷³ See Anderson (1999), Sen (1997) and Scheffler (2003), for examples of such criticisms.

of the opposite, of disregarding material conditions in favour of highlighting recognition as the essential feature of equality and justice.⁷⁴ Debates about equality have too often become, as Fraser has pointed out, a case of either/or, as if a commitment to one form of equality makes a commitment to any other impossible: “While one side insists in retrograde accents that ‘it’s the economy, stupid,’ the other retorts in hypersophisticated tones that ‘it’s the culture, stupid’”.⁷⁵

Although the focus of this chapter is social equality, and the reason I am focusing on this form of equality is because it is often neglected while other forms of equality or aspects of distribution are touted as the genuine and only subject matter of political philosophy, I am not advocating sacrificing a concern with narrow distribution or formal equality. Although I will be drawing a link between social equality and broad distributive justice, this does not mean that I believe that if social equality is achieved this will be sufficient for justice.⁷⁶ Also, the inter-relatedness of these forms of equality and distributive justice means that although social equality, as I will be arguing,

74 See Fraser’s (1997: 2-3; 11-39) description of the divide between recognition and redistribution; “a decoupling of cultural politics from social politics, and the relative eclipse of the latter by the former” (2). See also Phillips (1999: 1-16) on how focusing on equality has become primarily a concern with political equality, while economic equality is seldom considered seriously.

75 Fraser (1997: 3).

76 Richard Arneson (1999a) criticises Anderson’s notion of democratic equality claiming it is insufficient for justice. He claims that democratic equality fails to provide us with answers to dilemmas in which the worst-off should be benefited: “Suppose that society faces an issue, say a choice of tax policy, where the interests of those who are far above the basic capability threshold (and thus on the average high in well-being) are starkly opposed to the interests of those who are just above the threshold (and thus on average significantly lower in well-being)... Democratic equality says that the issue is a ‘don’t care’ from the standpoint of justice. I disagree”. I am not claiming, however, that when it comes to justice our only standard should be social equality. How different standards could be reconciled and what to do when they conflict are causes for concern, and in chapter V I do consider conflict between social equality and the difference principle, but I do not believe that social equality should be dismissed because it cannot provide an answer to all the problems of distributive justice and I do not pretend that it can.

has independent value, we also require formal equality and certain fair schemes of narrow distribution to be realised in order to achieve (among others) social equality.

2.1. Formal equality and narrow distribution

A broad conception of distributive justice could recognise at least two primary components: a notion of formal equality and a notion of the fair distribution of material goods ('narrow distribution'). Formal equality is composed of both legal and political equality. This type of equality aims to establish equality of democratic citizenship through the constitution and through legislation and would include basic rights and freedoms (such as those of expression and religion) and the equal right to participate in politics by voting and standing for elections.⁷⁷

'Narrow distribution' is concerned with how material goods, such as income and wealth, should be distributed. It is 'narrow' because a broader understanding of distributive justice would include the distribution of non-material goods such as the rights and freedoms covered by formal equality. Those sceptical of the substance of social equality could claim that social equality is not an independent form of equality but is constituted by either formal equality or narrow distribution or both, and thus that theories of distributive justice which include adequate understandings of these components are not neglecting or undermining social equality. It is my

⁷⁷ See, for example, Arneson (1993: 489).

contention, however, that social equality cannot be reduced to formal equality or narrow distribution.

2.2. The difference between narrow distribution and social equality

Social equality and narrow distribution are interdependent. When people do not receive an adequate income and do not receive adequate welfare benefits, for example, we can say that social equality has been violated because poverty and deprivation are inconsistent with respect-for-persons; they fall below the minimum standard of how people should be treated if they are to be treated as equals. Furthermore, often low social status is not merely accompanied by, but determined by, how much money you earn. Moreover, although economic inequalities are often accepted as a necessary part of a productive and healthy economy, those inequalities become unacceptable when they form part of the pervasive disadvantage and devaluation suffered by groups who are oppressed and discriminated against.⁷⁸

This does not mean, however, that social equality is merely a lack of adequate resources. A primary difference between narrow distribution and social equality is that each deals with different types of 'goods'. Narrow distribution is concerned with material goods such as income and wealth. It thus closely resembles a model of everyday distribution, such as the distribution of goods from retailers to the public, as in both cases a stock of goods can be divided

⁷⁸ See, for example, Phillips (1999) who claims that although economic equality has become an unpopular notion, this form of equality is necessary between social groups; economic inequalities between different types of jobs may be acceptable but inequalities between what blacks and whites earn, for example, are not.

up and allocated for consumption. Furthermore, in both narrow and everyday distribution, goods are scarce and some rivalry occurs for the possession of these goods. Even where narrow distribution includes goods that are not strictly material, socially-allocated resources such as education and healthcare, these goods still tend to be scarce, subject to rivalry and can be made to fit the model of narrow distribution reasonably easily.

Social equality, on the other hand, although it can be concerned with the same types of goods as narrow distribution, is also concerned with goods that are non-material, not scarce and not directly distributable. Jonathan Wolff refers to goods of this kind when he claims that there might be “more to a society of equals than a just scheme of distribution of material goods. There may also be goods that depend on the attitude people have toward each other”.⁷⁹ Quoting R. H. Tawney, Wolff maintains that there is a realm of goods “where to divide is not to take away... There are ways of giving certain goods to the people without taking from others”.⁸⁰

When we focused on what social equality is, we identified various ways in which social inequalities are expressed. These include an unfair distribution of material goods and social resources, and when it comes to these goods, there is an overlap with narrow distribution. We also identified expressions of social inequalities, however, such as cultural imperialism, stereotyping, derogatory language and snobbery, which are difficult to express in terms of material goods. They have to do with people’s attitudes to each other. We can,

79 Wolff (1998: 104).

80 Tawney c.f. Wolff (1998: 104).

however, say that these social inequalities are related to problems of distribution, even if it is not a problem of narrow distribution. The harms of social equality correlate to unfair distributions of the social basis of self-respect, for example. Like money or rights we can say that some people receive or have more of the social basis of self-respect than others, and like other social goods, how these are distributed is often socially imposed, as oppression and discrimination for example, will systematically privilege some groups, and devalue and disadvantage others by not affording them economic goods, rights and respect, among others. This implies that although social equality is related to the distribution of social goods, it cannot be sufficiently described according to the same framework used to describe *narrow* distribution because the types of goods which require a fairer distribution are not always material.

Furthermore, using a framework of narrow distribution can lead to problems of social equality being overlooked even when they seem to be dealing with the same types of goods. While our concern for the poor may be primarily that what they receive is not enough, this is not always the case when it comes to differences in income. If women who are highly paid receive lower salaries than men for the same job, then, according to a distributive framework that does not consider equality per se to be a problem, we may not consider this to be an injustice: after all, they may receive much more than many others.

However, in this case, *it is* the inequality itself which is the injustice: women are treated as if they have comparatively less value than men, and thus we can say that social equality has been violated. Whereas the injustice suffered by

the poor in being poor is clearly distributive (although one could argue that it is more than that), the injustice suffered by women who are paid less than men, although reflected in the distribution of income, is a violation of social equality: the problem is that women are devalued and that devalue is reflected in income. Although the solution may lie with the redistribution of income, and thus with narrow distribution, identifying this injustice could require a conception of social equality. Social equality is, thus, distinct from narrow distribution.

2.3. The difference between formal equality and social equality

Similarly to narrow distribution, social equality and formal equality influence each other. When we violate social equality we are often breaking the law or violating legal rights: this is particularly clear when it comes to violations such as harassment and any form of violence. While social equality leads to formal inequalities, violations of formal equality also lead to social inequalities: by not providing people with the full complement of basic human rights and liberties, we are treating them as inferior, as second-class citizens. Although interdependent, they are distinguishable but the distinction between formal equality and social equality is not based on a difference in types of goods.

Both formal and social equality deal with non-material goods which are not scarce. Whether we are talking about rights and liberties or respect-for-persons, generally, we will not be depleting a stock of goods when we provide those who do not have enough, or any of these goods, with more. The

distinction between formal equality and social equality lies rather in which sphere these forms of equality apply. The key to the difference lies in the fact that social equality aims at achieving a society of equals rather than establishing equality before the law (formal equality) or, for that matter, an equal (or prioritarian or sufficient) narrow distributive scheme. Social equality is much wider in scope. Whereas formal equality establishes equality through the state, and more particularly through the constitution and the law, social equality requires people to treat each other as equals in any sphere, whether this is within politics, the law, the market, civil society or in personal relationships and interactions. Thus although social equality would demand that equal worth is reflected in the law, it also demands equality in interactions beyond the scope of the law.⁸¹

There is one clear area where we can say social equality is concerned but which cannot be addressed properly by formal equality. We can refer to the sphere of behaviour outside the ambit of formal equality as the informal. The informal covers any forms of behaviour about which the law or official rules are (mainly) neutral. This includes behaviour which an individual can choose to do or not do, i.e. it is a matter of personal choice. For example, according to the law, if I have a job and my income exceeds a certain minimum, I must pay income tax, however, the law is neutral concerning what job I choose to do, and thus this is subject to personal choice. The distinction is not always easy to draw. Smoking in liberal democracies is referred to as a personal choice,

81 This is also a further difference between social equality and narrow distribution, but it is a difference in practice rather than in definition. Per definition formal equality establishes equality through legislation, and thus differs in scope from social equality. Although narrow distribution is established by the state through legislation, we could imagine a society in which this need not necessarily be the case.

however, we cannot say that the law is entirely neutral about whether or not individuals should smoke. Although individuals can choose to smoke (in private), government policy strongly discourages smoking. Although I admit that this distinction between the formal and informal spheres is somewhat artificial or tricky, what is important for the purposes of this discussion is that there are many forms of behaviour which are either entirely or partially left open to choice, and despite doubts about the influence of formal policies on choices, it is clear that much of what we do or do not do is mainly irrelevant to the law.

Informal behaviour is thus something you are allowed to do but you do not have to do. This is where social equality and formal equality depart company. Formal equality does not compel or prohibit behaviour which would be described as personal choice, per definition: what we mean by personal choice is precisely that the law does not either compel you to do or prohibit. However, social equality can evaluate this type of behaviour: whether or not you violate social equality is not directly concerned with whether or not you have violated the law or rights or rules. You violate social equality if you violate respect-for-persons, civility and toleration, whether or not your behaviour was a matter of personal choice. This means that social equality and formal equality can differ in how they evaluate individual behaviour.

We may have 'the right' to make certain decisions or behave in certain ways and thus formal equality is neutral about this type of behaviour. However, social equality need not be. Take one's choice of friends or partners or

neighbours. According to the law, if you are white, there is nothing wrong with choosing only to be friends or to choose a partner that is also white, or to choose not to live in a predominantly black neighbourhood. However, we can say that social equality is violated when someone rules out friends or such who are non-white because they attach special value to whites as a race and attach less value to non-whites.⁸²

The informal extends not only to individual behaviour but also to the decision-making within, and rules of, private associations. Within certain limits set by the law, formal equality is often mute when it comes to the 'private' rules established by associations of civil society such as churches. Decisions by religious organisations not to ordain women or gays as priests are examples of such private rules. Although the law remains neutral here, social equality does not. If women or gays are not ordained because they are devalued then social equality has been violated.

There is thus a realm of individual behaviour and of associations, the informal, where it would clearly not be sufficient to describe social equality in terms of formal equality. Even, however, when it comes to behaviour where

⁸² There is, of course, a difference between this and simply being more likely to have white friends, partners or neighbours because you are white. The violation of social equality occurs when conscious or unconscious choices are made on the basis of biases which rank blacks and whites hierarchically according to their value as human beings, or some such proxy value as intelligence. Furthermore, and this is a more difficult issue, I understand that group identity and culture play a fundamental role in people's lives. This means that people rightfully seek out others with the same cultural or religious identity and this may have to come to exclusion of others. The attitude in a society of equals cannot be, however, that others are inferior or have less worth and that is why I must stick to my own kind. Hypothetically, however, it seems then that a society of equals could consist of different communities who separate themselves entirely from each other as long as they are civil, tolerating and they do not violate respect-for-persons. Somehow this level of separation and the exclusion and lack of co-operation it implies seem difficult to tally with a society of equals. It is for this reason that a more comprehensive notion of social equality might need to include something like solidarity or affiliation.

formal equality does demand compliance, it remains insufficient to describe social equality according to formal equality. To do so would miss the point of social equality. Reducing social equality to formal equality implies that the essential feature of equality is legislation through rights and freedoms. However, it is the aim of social equality that people should treat each other as equals, not that they should abide by the law. A society of equals cannot be properly described with claims about formal equality because it is not the ideal that people should respect rights or obey the law but that in their relationships to each other they should treat each other as equals. From the viewpoint of social equality, firstly and as a priority, we expect individuals to act in a way which upholds respect-for-persons in their relationships (and thus also through the choices expressed in informal structure), and, secondly, we demand legislation to ensure that they treat each other equally *in case they do not*. According to social equality, the law and rights are a safeguard; a set of coercive rules designed to ensure that people treat each other as equals, but it is a last resort, not the embodiment of equality.

Considering the law to be *the* means with which to establish equality in human relationships is bizarre as this would require equality only as mediated by the state through legislation. Expecting the state, for example, to act as mediator and to rely on the law to regulate interactions between family members, loved ones and friends is evidently problematic, and yet this is precisely what would be required if we chose only to describe injustices solely through formal equality. In a liberal state, extreme injustices suffered by women, for example, are often perpetrated in the private sphere by intimates

such as husbands and fathers, and although evidently we require formal equality to prevent women from suffering such emotional and physical abuse, that this is a sufficient description of a society of equals is implausible. Can we really claim that a society is either just or equal when we rely on a husband not to beat his wife because it is against the law or against her rights? Surely these relationships and the beliefs, attitudes and norms of gender discrimination and oppression that underlie violations such as domestic violence, need to be reformed, rather than merely regulated?

This point I am making is similar to the point Jeremy Waldron makes in response to criticisms of rights-based theories from socialists and communitarians.⁸³ Waldron claims that when it comes to social relationships, such as marriage, rights should not be seen as constitutive of those relationships “but [should] instead... be understood as a position of fallback and security in case other constitutive elements of a social relationship ever come apart”.⁸⁴ Once partners in marriage, for example, insist on their rights, the relationship has started to fail: “If we hear one partner complaining to the other about a denial or withdrawal of conjugal *rights*, we know something has already gone wrong with the interplay of desire and affection between partners”.⁸⁵ This does not mean, however, that I am arguing that the only way in which to describe social relationships is according to social equality: this is evidently untrue as it is emotions and attitudes such as desire and affection rather than respect or toleration, for example, which are most likely to be the defining features of close relationships. The values of social equality,

83 Waldron (1993a: 370-391).

84 Waldron (1993a: 374).

85 Waldron (1993a: 372).

however, provide a description of what it takes for social relationships to be considered to be equal.

Formal equality is only concerned with behaviour which is related to the formal realm; it is when I violate rights, or laws, or official rules, that formal equality is violated. Social equality is concerned with behaviour in any of these spheres, whether formal or informal. Violations of respect-for-persons are expressed in numerous forms which include problems of formal equality such as a denial of rights but which are also expressed through the informal behaviour of individuals and rules of associations. This does not mean that all behaviour is related to social equality; it simply means it has the potential to be. No type of behaviour can be ruled out as necessarily inapplicable to social equality.⁸⁶

As social equality insists on equality even in personal choice, it points to an element of distributive justice which seems to be neglected by theories which consider only such things as formal equality and the distribution of material goods: justice in choice. When devaluations and dehumanisation are expressed in the informal, through, for example, private discrimination and through people's attitudes to each other, then, among others their self-respect can be harmed. This harm is suffered by some systematically because of their race or their sexuality, for example. When this happens it seems clear that there is something wrong with the way in which the social basis of self-respect is being distributed; there is thus an injustice in choice, which can be

⁸⁶ Furthermore, this difference between formal and social equality is also similar to the difference between fair equality of opportunity and social equality. I will discuss Rawls's notion of fair equality of opportunity and how it relates to social equality in the next chapter.

expressed by social equality as a lack of respect-for-persons in people's everyday behaviour. Informal social equality can capture this injustice; while narrow distribution and formal equality cannot.

What has thus been established in this section is that social equality is distinguishable from narrow distribution and formal equality. A primary difference between social equality and narrow distribution is that narrow distribution deals only with divisible, directly distributable goods, whereas social equality can deal with these types of goods but also deals with non-material goods which do not conform to a literal model of narrow distribution. As opposed to formal equality, social equality is concerned not only with laws and rights but also with informal behaviour.

2.4. Narrow distribution and formal equality are not sufficient to achieve social equality

One could agree, however, that social equality is distinguishable from formal equality and narrow distribution but still disagree that social equality is something that needs to be addressed independently of these aspects of distributive justice. Some will claim that formal equality or narrow distribution, or both, although constitutively different from social equality, result in social equality. This seems to be the typical attitude to social equality or to aspects of social equality in liberal theory: "Liberals tend to believe that cultural oppression cannot survive under conditions of civil freedom and

material equality”.⁸⁷ This view of social equality is not exclusively liberal: Marxists are likely to claim that social equality would be taken care of through changes to the economy and ownership of the means of production.⁸⁸ As the objection goes, the analytic distinction between social and formal equality, or social equality and narrow distribution may stand but when it comes to actually resolving these inequalities, we do not need to include social equality in our descriptions of just and equal societies.

Social equality is clearly not going to ensue without the basic rights and protections guaranteed by formal equality. Also, social equality requires at least some form of redistribution if not economic equality. Violations of social equality require intervention of a formal nature and the social inequalities suffered by the poor in the form of, for example, degradation and a lack of respect need to be resolved, at least mainly, by improving their material conditions. So there is *something* to the claim; we will go at least some way to achieving social equality if we live in a society with formal equality and fair distributive schemes. But are formal equality and the redistribution of material goods all we require to achieve a society of equals? In this section I will argue that social equality does require more than merely measures for fair narrow distribution and formal equality.

87 (Kymlicka 2002: 257).

88 Classes will be abolished, and thus seemingly, greater ‘equality’ will be achieved when the proletariat gain control of production; for an in-depth analysis of Marx’s notion of class, see Elster (1985: 318-397). I say ‘equality’ because Wood (1986) claims it is false that Marx was interested in equality as either an aim or an ideal. For a specific example, see Robert Miles, who claims that race is “an ideological effect, a mask that hides real economic relationships” (Back and Solomos 2000: 7; they refer to Miles’s claims in his book *Racism and migrant labour* and his article ‘Marxism versus the “sociology of race relations”’).

2.4.1 Narrow distribution is not sufficient for achieving social equality

i. The case of economic inequality

In the previous section we discussed the different types of ‘goods’ with which social equality and narrow distribution are concerned. However, one could agree that the ‘goods’ of social equality cannot be described adequately as directly distributable but still claim that the distribution of economic goods remains the solution to injustices of social equality: if we provide social groups who suffer injustices with a certain amount of such goods, such as income, the ideal of social equality will be achieved. One of the harms of violations of social equality, for example, is that it interferes with self-respect. We cannot distribute self-respect but if the goods of narrow distribution, such as wealth and income, are fairly distributed, the argument could go, we will achieve a fair distribution of the social basis of self-respect.

Claiming that narrow distribution will lead to social equality implies that one believes that as long as enough of certain material goods are distributed to the right groups of people, then social equality will prevail. This can only be true, however, in cases where a lack of material goods is the only cause of a violation of social equality. Perhaps a close enough example here would be the poor: when it comes to a lack of self-respect suffered by the poor, it is feasible that the redistribution of material goods is sufficient for, and even the only solution for, an increase in self-respect, as long as the poor suffer from a lack of self-respect solely *because they are poor*. This is not the case when it comes to all injustices involving self-respect: redistribution, I would argue, is not going to alleviate (or not solely alleviate), for example, a lack of self-

respect suffered due to racial discrimination. Racial discrimination usually includes unfair narrow distribution: black people, for example, are often paid less than white counterparts. The injustices they suffer, however, are not solely economic. Racial discrimination also includes other direct violations of respect-for-persons where blacks are systematically devalued and disparaged, such as, for example, through stereotyping in the media. How can these injustices be remedied purely through a redistribution of material goods?

Respect is not solely expressed through the distribution of economic goods. How we value people cannot be expressed in economic terms alone. A wealthy black person is still harmed when she is treated as inferior. In such cases, it is respect-for-persons itself which is the concern, not the goods of narrow distribution. Most distributive justice theorists, Fraser claims:

assume a reductive economic-cum-legalistic view of status, supposing that a just distribution of resources and rights is sufficient to preclude misrecognition. In fact, however, not all misrecognition is a by-product of maldistribution, nor of maldistribution plus legal discrimination. Witness the case of the African-American Wall Street banker who cannot get a taxi to pick him up.⁸⁹

Thus although the type of injustice that leads to a lack of self-respect or respect may be remedied by the redistribution of material goods, this form of redistribution cannot be the solution or the entire solution to violations of

89 Fraser (1997: 93). When Fraser refers to this as a problem which is not a by-product of maldistribution she means narrow distribution, although she is likely to disagree with my claims that we should see it as a problem of even broad distributive justice. See section 5 for Iris Marion Young's criticism of 'over-extending' the distributive paradigm to include non-material goods and my response.

social equality. What we would need are remedies specifically focused on addressing the aspects of social equality with which narrow distribution cannot deal.

In this section, I have referred to a non-ideal world in which there are material inequalities which need to be addressed through material redistribution. The objection may be, however, that although social inequalities cannot be resolved through material redistribution, in a world of perfect economic equality, social inequalities could not exist.

ii. The case of economic equality

Consider David Hume's description of a world in which there is an abundance of material goods:

Let us suppose, that nature has bestowed on the human race such profuse *abundance* of all *external* conveniences, that, without any uncertainty in the event, without any care or industry on our part, every individual finds himself fully provided with whatever his most voracious appetites can want.⁹⁰

In such a world, Hume claims, there would be no need for justice, because there would be no rivalry over scarce goods, and thus no injustices. Although Hume was describing a world with an abundance of material goods, a similar claim can be made about the need to address social equality in a world of economic equality. One could argue that although it is true that in an economically unequal society, social equality could still be violated, in an

⁹⁰ Hume (1998: 83).

economically equal society, violations of social equality would not occur, and thus, economic equality must be the solution to problems of social equality. This is similar to Marx's claims that inequalities in social, legal and political status will be eliminated through economic change.⁹¹

This is a tricky claim to address as it is empirical. We could speculate, however. Imagine a society in which there are no economic inequalities: so men and women, whites and blacks, and other groups likely to suffer social inequalities, are economically equal. Could violations of social equality occur in this society? I think it is safe to speculate there would be less social inequalities. I do not agree, however, that we would achieve perfect social equality.

Take the case of gays and lesbians. Gays and lesbians tend to be as well off economically as heterosexuals. However, they suffer from pervasive violations of social equality expressed through stigmatisation, exclusion, humiliation, public and private discrimination, harassment and violence. This is how Will Kymlicka states the problem:

many gay people feel wrongly excluded from their own national culture. The source of this exclusion is not any economic inequality... Rather, they are stigmatised within their own national culture, whose official symbols are heterosexual.⁹²

91 See, for example, Andrew Heywood (2003: 126-7) on Marx's claim that "social consciousness and the 'legal and political superstructure' arise from the 'economic base', the real foundation of society".

92 Kymlicka (2002: 330).

Although your position on the status hierarchy often corresponds to your position in the economic hierarchy, this relationship is not necessary. It is possible, in fact, to be in inverse positions on the status and economic hierarchies. Gays and lesbians are probably as likely as heterosexuals to be in a privileged position on the economic hierarchy but are in a disadvantaged position when it comes to the status hierarchy. There are thus cases where social and economic status do not correspond. In these cases, where social status is low but economic status is not, it seems very unlikely that a society characterised by economic equality will eliminate social inequalities. Thus it seems that violations of social equality could occur even in a perfectly economically equal society.

2.4.2. Formal equality is not sufficient for achieving social equality

i. The non-ideal

Formal equality differs from social equality because it is focused only on equality determined by the law and by formal rules. This leaves the informal, the personal choice of individuals and the private rules of associations, unaddressed by formal equality. Severe disadvantages are embedded not only in the law or in economic structures but also in social structure and interaction. We cannot and should not sanction the legislation of all aspects of life: we should not, for example, compel people to stop being snobs or to stop using derogatory language or to make unjust private decisions about family life and yet we still need to find some way to acknowledge and describe these violations of social equality; which we cannot do using the notion of formal

equality alone. In a non-ideal world then, formal equality cannot fully address social equality because it cannot address informal inequalities.

Furthermore, I have claimed that even where social and formal equality overlap, within the ambit of legal and political equality, formal equality is still insufficient for describing social equality because this form of equality is concerned with relationships and with motivation whereas formal equality is concerned with the law. In this case, imperfections in the law may make it necessary to rely on more than the formal to describe a society of equals when both social and formal equality are violated. Here, we can make a distinction between what the law demands and where formal equality is socially operative. Take the example of sexual harassment suffered by women. We cannot say that sexual harassment is a matter of personal choice when the law forbids this form of behaviour. Thus sexual harassment falls under the ambit of formal equality. However, this is not always socially operative, i.e. the law is often unwilling or unable to act against harassment. Women may be protected from harassment in the workplace through legislation but it is impractical to expect the law to protect women in many other circumstances, for example, from strangers in the street or in informal contexts. What this means is that in certain cases, even where formal equality is at issue, we cannot use only a notion of formal equality to describe the inequality in this situation. The problem is not solely that someone has violated the law or that the law is not socially operative when a woman is sexually harassed; *this cannot be the sum of inequality*. Besides imperfections in the law and so on, in these situations, the problem is a failure of informal social equality; it is a

failure on the part of those who commit harassment to uphold respect-for-persons.

ii. The transition from injustice to justice and the ideal fair society

A response to this is that when it comes to an ideally fair society, there will be no imperfections of the law and thus formal equality will adequately address violations of social equality where these violations are also forbidden by the law. One could go further and argue that in an ideally fair society or in a society that has become fair, violations of social equality, including violations through personal choice, will no longer occur. According to this claim, perfect formal equality results in social equality. The types of values underlying formal equality in a society that has become fair, so the argument could go, will filter down into consciousness and motivation. So, for example, in response to claims that the British police force is racist, according to this argument, direct intervention is unnecessary: conservative members of the force who espouse racist beliefs and attitudes cannot be forced to change but will eventually be replaced by newer, mainly younger, members who espouse the values common to liberal societies.

Like the issue of perfect economic equality, this is an empirical question. There is evidence for there being something to this claim. Clearly the values reflected by the laws and institutions of a fair society do not develop instantaneously and part of the explanation for why fair norms and values become more widely espoused has to do with the influence of formal institutional justice. Take post-apartheid South Africa as an example: in a

country where racism is a deeply-entrenched norm, establishing a democratic constitution, legislation and measures to redress the inequalities between white and black will not lead to immediate changes in the ways in which people treat each other, but it is likely that after time, when for example, racists see that democracy is working well, they may come to accept democratic values. An even stronger case can be made for an ideally fair society where there is no history of injustice. It can be argued that no violations of social equality would occur because there has never been a history of oppression and discrimination.

There are at least two problems, however, with the claim that social equality will simply develop from formal equality. The first is that it seems to assume an absurd social ontology in the relationship between values and formal equality. We can say that formal equality will reinforce fair values or that it can make those values more widespread but we cannot claim that those values develop solely from formal equality, for if these values are the values underlying formal equality they are clearly already at least partially present. We cannot believe that formal justice develops in a social vacuum, unconnected to the values and norms reflected in the broader society, and thus we cannot simply claim that the values of social equality develop *from* formal justice. It is likely that there is a mutually reinforcing relationship between informal social equality and formal equality. The egalitarian values that inform formal equality need to be to some extent present for formal equality to occur; in turn the justness of the state provides a formal expression of the values of equality which will reinforce an egalitarian ethos, and so on. That

social equality is not merely a straight-forward product of formal equality means that in describing a society of equals, one would need to include both formal and informal equality.

The second problem is that I do not believe that it is clear that violations of social equality would not occur in an ideal fair state. As Cohen has pointed out, unjust personal choices, such as a gendered division of household labour, could still occur as personal choice is not restricted by fair laws.⁹³ If we do not rule out such injustices, by describing a fair and equal society as one with both formal and informal equality, then there can be no guarantee that a so-called fair state is necessarily fair. If social equality is not a requirement, then a hypothetical society with perfect formal equality (and a fair scheme of economic distribution) but with pervasive disrespect, snobbery, bias and discrimination, could be called a society of equals, when it seems clearly that it is not, and calling it fair seems as spurious if we consider that violations of social equality are also interferences with opportunities and self-respect.

Although formal equality and narrow distributive justice are required for achieving social equality and although there is much more that can and should be done through the law and through distribution to secure social equality and justice in liberal democracies, it seems unfeasible that this is all that is required. This means that in our descriptions of a society of equals and a fair society we need more than merely descriptions of formal equality and narrow distribution; we also need to include social equality.

93 Cohen (2000: 136-142).

3. What social equality requires: an egalitarian ethos

When we examined Rawls's conception of social justice in the previous chapter, I claimed that Rawls's primary concern is how a fair society should be organised. We can ask a similar question about social equality. If I say that formal equality and narrow distribution are not sufficient for describing how a society should be organised to achieve equality, then how should it be organised? A similar question we can ask, by linking social equality to distributive justice, is 'how do we organise society to encourage a fair distribution of the goods influenced by social equality, such as the social basis of self-respect?' These seem to be particularly challenging questions to answer because it is *informal* social equality which is being neglected and this form of social equality includes individual behaviour, for example. How can we describe how individual behaviour needs to be 'organised' without sacrificing the rights and freedoms of formal equality, or simply, how can we 'organise' individual behaviour? The best way to describe this, I believe, is according to a social ethos.⁹⁴

Individual behaviour and the organisation of particular associations are not atomistic: they function within a larger social context which provides them with meaning. Violations of equality, where these contribute to or result from the disadvantage of social groups, although they are expressed by individuals, are pervasive patterns of value and behaviour. These patterns of violations

94 Cohen (2000), Mason (2000) and Wolff (1998; 2003) claim that an ethos could be a necessary requirement of a fair or equal society.

should not exist within a society of equals, so in order to describe what a society of equals would look like, we would need something to capture pervasive patterns of ‘not violating social equality’ or patterns of value and behaviour which uphold social equality. We can refer to the structure of norms that determines such a pattern as an egalitarian ethos. I will explore the answers to three questions in this section: (1) what is an ethos? (2) what is an egalitarian ethos? and (3) why would social equality require an egalitarian ethos as opposed to rules or laws governing individual behaviour?

I am going to describe an ethos as a set of values which are translated into norms or principles and which, in turn, are applied to individual behaviour in the form of (i) an assessment of behaviour and (ii) motivation for behaviour.⁹⁵ In application to behaviour, an ethos does two things. Firstly, it provides an assessment of behaviour: conduct which conforms to the values and norms of the ethos are encouraged and behaviour which violates those values and norms are discouraged, even sanctioned. As an ethos is part of informal social structure rather than formal legislation, sanctions are informal and social, rather than legally coercive. Sanctions take the form of “criticism, disapproval, anger, refusal of future cooperation, ostracism, beating... and so on”.⁹⁶ Secondly, individuals internalise its values and norms, and thus are motivated to act from those values. This is why Cohen refers to an ethos as “a

95 My discussion of an ethos has three important sources: G. A. Cohen (2000), Jonathan Wolff (1998; 2003), and Brian Fay (1996). My definition of an ethos is influenced particularly by Wolff (1998: 105) who explains the notion of an ethos according to values, principles and application: “[e]ssentially ... a set of underlying values, which may be explicit or implicit, interpreted as a set of maxims, slogans, or principles, which are then applied in practice”.

96 Cohen (2000: 145).

structure of response lodged in the motivations that inform everyday life”.⁹⁷

An ethos should thus not be seen as something entirely external to the individual.

Furthermore, we should not see an ethos as something which influences behaviour and which is not influenced in return. As part of social structure, an ethos depends on the behaviour it encourages: while it encourages conformity, it is reinforced, even shaped by behaviour. The stronger the influence of an ethos, the greater the likelihood that individuals will conform to its norms; in turn, the greater the number of individuals who conform to its norms, the stronger the influence of the ethos. Cohen uses environmental awareness as an example:

At first, only a few people bother to save and recycle their paper, plastic and so forth, and they seem freaky because they do so. Then, more people start doing 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 behaviour, behaviour determines expectations, which determines behaviour and, so on.⁹⁸

An *egalitarian* ethos would then be a set of egalitarian values translated into norms which would assess and motivate behaviour. If our aim is to achieve social equality, the values of such an ethos would then be (i) respect-for-persons, (ii) civility and (iii) toleration of difference. These would be

97 Cohen (2000: 128).

98 Cohen (2000: 144). For a more general description of the influence of culture/ society on identity and the interplay between the individual and society, see Brian Fay’s (1996) chapter entitled ‘Does our culture or society make us what we are?’.

translated into norms such as ‘do not discriminate against people on the basis of their race’. Such an ethos would encourage behaviour which conformed to these norms and which discouraged behaviour that did not. In this way, non-material goods such as the informal social basis of self-respect (through attitudes for example) could be ‘distributed’ fairly. By encouraging behaviour which upholds social equality, an egalitarian ethos also provides a description of justice in personal choice.⁹⁹

Something more needs to be said about why particularly an ethos is required as part of a description of a society of equals, or a fair society. It does not necessarily follow logically from the claim that because of violations of social equality in the informal that we need to include a description of an egalitarian ethos in our descriptions of these societies. Legislation, for example, could be put in place to regulate personal choice. I will highlight three reasons why we should choose an ethos above further legislation.

The first is that the solution I am trying to find is a solution for a liberal or social democracy which upholds civil liberties and freedoms. Even if we could legislate every aspect of individual behaviour, and practically this seems highly unlikely, if we did so this would hardly be compatible with the basic rights and freedoms which should be guaranteed each person.

⁹⁹ There will undoubtedly always be many different ethi in one particular society. I am not claiming that an egalitarian ethos would be the only one. Besides ethi that are neutral about equality, it is likely that there will probably also be inegalitarian ethi; and there would potentially also be different kinds of egalitarian ethi. How strong and how predominant an egalitarian ethos would need to be, I cannot say, however, as this would require empirical research.

The second point, and this is related to my claims about the difference between formal and social equality, is that legislation cannot achieve what it is we want to achieve when we talk about a society of equals. Social equality demands equality in the form of respect, civility and toleration from individuals, reflected in their interactions and relationships. If we directly coerce people into social equality, we have not achieved social equality, which is concerned with what motivates behaviour, not merely with whether or not individuals comply with the law or a set of standards. From the perspective of social equality, we make laws to protect individuals against violations of equality in relationships but these laws should be last resorts, not the basis of equality. The answer to the problem of justice in the informal is thus not to make choice legally enforceable or to subject it to formal rules, but to describe equality in the form of an ethos of respect, civility and toleration, with legislation providing a safety net to ensure that rights are not violated. Indeed, we would not be able to achieve social equality in informal structure through legislation or formal rules: the point is to achieve social equality in the informal, not to make the informal, formally coercive.

A third reason is that the law will always have imperfections which means we need something more than merely the law to address violations of social equality. No matter how stringently anti-discrimination laws are enforced, no matter how liberal a constitution may be, legal and procedural mechanisms for justice are unable to combat all violations of social equality even if these violations are against the law. Social pressure exerted through the norms of an egalitarian ethos serves to encourage egalitarian behaviour within personal

choice and within associations, covering behaviour which legislation cannot address.

4. The significance of social equality

When we start looking at how social equality would apply as distinguished from formal or distributive equality, its relevance can become easily misunderstood because we are dealing with the everyday world of choice, attitudes and relationships, a world where differences are so much a part of what we expect that what we mean by equality in these attitudes and interactions is not necessarily apparent. It is clear that formal equality is essential: we are not considered and treated as equals if we do not have the requisite political and legal rights and protections. Once we apply our social ideal of equality to the informal, however, thus to a realm of application beyond the formal, making it more clearly distinct, the significance of social equality could be questioned.

In its concern for personal choice and ordinary relationships, is social equality claiming, in contrast to common-sense and everyday practice, that I should treat a stranger in the same way as I treat my best friend, or is social equality merely expressing a banality, ‘why can’t we all just get along?’ Understood in either of these ways, social equality is problematic: according to the former it is absurd, the latter, trivial. It is not absurd, however: social equality should not be misunderstood as an ideal of literal equality which aims at regulating all relationships or all aspects of relationships according to equality. This is

clearly not the way human relationships can or should be understood: we treat loved ones differently to acquaintances, and acquaintances differently to strangers; we accept and indeed require some inequality between parents and children, employers and employees, teachers and students, and so on.

If social equality, however, is not advocating a breakdown of all hierarchies and inequalities, can it really be so significant? Surely if it is not advocating a radical rethink of relationships it can only be the trivial platitude that we should be nicer to each other?

The significance of social equality becomes easier to understand when we remind ourselves of the harm that is caused by its violations. It is not trivial: what social equality is opposed to is discrimination, unfair social hierarchies, injustices, oppression, and as such, social equality matters greatly. Social equality outside of the bounds of traditionally-conceived social justice, detractors may claim, is a pointless focus on symbolism and language, something akin to ‘political correctness gone mad’. Commenting on controversy caused by a wheelchair called ‘spazz’, a disabled comedian claimed that it is patronising of the able-bodied to become outraged on the behalf of the disabled over derogatory words.¹⁰⁰ An emphasis on the harm of names, he maintains, deviates from the real issues which the disabled face: a lack of rights and unequal material conditions. There are three responses to this type of objection.

¹⁰⁰ My source is the BBC Radio 4 programme, ‘You and yours’ (21/07/2005).

Firstly, an emphasis on symbolic injustices, such as derogatory language, does not need to detract from formal equality and narrow distribution. Social equality *requires* the full complement of human rights and liberties and a fair scheme for the distribution of income and wealth; it does not merely focus on the symbolic. Brian Barry, however, has argued that although it may be conceptually possible to attend to both problems of recognition *and* redistribution, practically we cannot address both: trying to resolve symbolic and cultural injustices will jeopardise redistribution, and thus, he argues, our focus should be redistribution.¹⁰¹ There is some doubt, however, about the empirical accuracy of Barry's claims. Discussing multiculturalism, Kymlicka claims that there is no evidence to support Barry's claims, and, in fact, there is "fragmentary evidence" for a contrary claim: he points out that evidence from Canada and Australia seems to suggest that multicultural politics might promote social unity.¹⁰²

Secondly, social equality beyond formal equality and narrow distribution is not concerned with symbolic injustices alone: for example, choices made in the family about education and the division of household labour which violate social equality are also often violations of fair equality of opportunity. If we care about fair equality of opportunity it is important to care about violations of informal social equality.

Thirdly, I think that claims that symbolic injustices are insignificant underestimate or do not consider the harm that these injustices can cause by

101 Kymlicka (2000: 376 n.43).

102 Kymlicka (2000: 367).

diminishing self-respect and by interfering with the formation of conceptions of the good. Developing a notion of one's own self-worth requires some positive feedback from others; when people are systematically devalued they risk suffering substantial harms to self-respect, among others. Insults or degradation, as Axel Honneth claims, "impairs these persons in their positive understanding of self- an understanding acquired by intersubjective means".¹⁰³

5. The relationship between social equality and justice

An objection common to the claim that we need to consider justice beyond material distribution and equal rights is that when we move beyond these institutional measures we are no longer engaged with justice. Charles Taylor and Seyla Benhabib, for example, claim that focusing on narrow distribution is problematic but this is not a problem of *justice* which per definition is concerned with the distribution of material goods, and with this distribution alone.¹⁰⁴ An analysis of institutional frameworks and social structure, so they claim, moves beyond distribution and thus beyond justice.

Furthermore, as social equality emphasises equality in personal choice, discussions of social equality are open to the criticism that they confuse morality with justice. Violations of social equality, so the objection goes, may be wrong but they are wrong in the same way as telling a lie may be wrong or greed may be wrong. These are issues of ethics; they are not concerns of political philosophy and social justice. Often, underlying this criticism is the

103 C.f. Fraser (1997: 14).

104 Young (1990: 34-5).

assumption that justice is a matter of state, meaning governance, not of society or of individual behaviour. When we talk about justice, according to this assumption, we need necessarily to be talking about something enforceable by law.¹⁰⁵ I disagree, however, that reference to social equality requires moving beyond the framework of justice.

My disagreement lies not in a specific definition of justice but in the way the term and its scope are commonly understood both by theorists and in everyday life. Firstly, think of Rawls's project of social justice: he is concerned with how to arrange society in such a way as to achieve the best fair distribution of primary social goods. According to how I have described social equality, the goods of social equality, which include primary Rawlsian social goods such as opportunities and the social basis of self-respect, will be distributed whether or not we recognise the importance of social equality. If then we are concerned with how to arrange society so as to achieve the best distribution of these goods we need also to be concerned with achieving social equality. Part then of describing distributive justice in a society would be to describe it as requiring an egalitarian ethos. Moreover, the harms that result from violations of social equality, such as a violation of fair equality of opportunity and diminished self-respect, are accepted by theorists as interferences with justice; the disagreement lies not with whether these are relevant to justice but with whether fair equality of opportunity and self-

105 Take Jan Narveson (1998: 79) as an example: "we are considering here the claim that equality of the type in question is a demand of justice, to be imposed by force of law". Admittedly though there is some ambiguity here; although I am taking it that what he means is that a demand of justice is necessarily imposed by force of law, he could mean that it is a demand of justice and it is to be imposed by force of law. Despite this ambiguity, it seems uncontroversial, however, to claim that justice is frequently associated with what is imposed by the law.

respect can feasibly be dealt, without addressing the justice of personal choice and of associations.

Additionally, much of what we consider to be part of social equality is related to the oppression of and discrimination against members of disadvantaged social groups. As such the onus is on those who believe that we have moved beyond the scope of justice to demonstrate why this is the case, as oppression and pervasive discrimination are clearly injustices. Why would it be then that when we consider these forms of injustice from the perspective of formal equality and of narrow distribution that we are dealing with the issue of justice but when we view these from the perspective of social equality we have moved beyond justice?

Lastly, political theory explicitly or implicitly relies on assumptions about the duties or virtues of individuals which problematises the claim that justice is a concern of the state and is far-removed from individual behaviour. William Galston, for example, has argued that although liberalism claims to demand little from the individual, in reality, a fair state requires liberal virtues: “liberal theory, institutions, and society embody– and depend upon– individual virtue”.¹⁰⁶ Thus defining justice according to a distinction between state and society or state and citizens seems untenable.

To say that social equality deals with morality and not justice merely reiterates the point that my discussion of social equality is trying to refute:

106 Galston (1991: 215).

formal equality and narrow distribution are insufficient for justice and equality. If we neglect social equality, I have argued, we neglect important injustices. That those injustices may be perpetrated in the realm of the ‘private’, of personal choice and of associations, should not make them any less problems of justice. Besides, this view that it is society not merely government that perpetrates injustices is not a novel or entirely unusual idea in liberal theory. After all, it is John Stuart Mill who argued that it is not only political tyranny that should be guarded against, but also social tyranny:

Society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practises a social tyranny more formidable than any kinds of political oppression... Protection, therefore against the tyranny of the magistrate is not enough.¹⁰⁷

This is not to say, however, that I believe that social equality and justice are interchangeable. I am simply claiming that there is an important overlap between them without saying that everything that has to do with social equality necessarily has to do with justice nor that social equality provides a sufficient understanding of justice.

Iris Marion Young would be likely to provide a different type of objection to my association of social equality with distributive justice. For Young, the problem is describing oppression and discrimination in distributive terms.¹⁰⁸

107 Mill (1991: 26). Of course, using Mill to defend my claims can be problematic. Mill’s claims about social tyranny could be used as an argument against an egalitarian ethos. I will address this objection in chapter V.

108 Young (1990).

Young claims that it is mistaken to use a model of distribution to capture the injustices associated with decision-making, culture, the division of labour, domination, rights and power.¹⁰⁹ She identifies two problems with using a distributive model: the first is that theorists of justice tend to focus on the distribution of material goods and “ignore the social structure and institutional context that often help determine distributive patterns”.¹¹⁰ As my concern is with non-material goods, I will not address this objection as it does not apply to my claims or to Rawls’s conception of justice, which provides the framework for this thesis.

Her second objection is relevant however: she claims that where theorists like Rawls include non-material goods, such as rights and the social basis of self-respect, in their conceptions of justice, the distributive paradigm “represents them as though they were static things, instead of a function of social relations and processes”.¹¹¹ My first response to this criticism is pragmatic: I am using a distributive model as I aim to provide an internal critique of Rawls’s justice and thus I am framing my inquiry in his terms. My second response is more substantive however. It is that I see no necessary relationship between using a distributive paradigm and ignoring the social relations, such as domination and oppression, which determine the distribution of non-material goods. I agree with Young that a successful description of social justice requires an acknowledgement of the significance of social relations, but I disagree that distribution is necessarily unsuccessful here: you can describe justice in terms

109 Young (1990: 8).

110 Young (1990: 15).

111 Young (1990: 16).

of distribution while ignoring social relations or you can describe distribution according to social relations.

As an example of what she means, Young claims that rights are not usefully understood as things which people possess:

We can conceive of a society in which some persons are granted these rights [such as free speech] while others are not, but this does not mean that some people have a certain ‘amount’ or ‘portion’ of a good while others have less. Altering the situation so that everyone has these rights, moreover, would not entail that the formerly privileged group gives over some of its right of free speech...¹¹²

Part of her point is to claim that rights cannot be described in the same way as material goods: there is no need to deprive some people of rights if we wanted to grant others more rights as if these are scarce material goods. Point taken, however, this says nothing about the problem of using a distributive paradigm to describe rights; it merely tells us that we should not use a paradigm of *narrow distribution* to describe the distribution of non-material goods, a point I emphasised when I claimed that the goods of narrow distribution and social equality are often distinct, and thus we need to address deficiencies in both. Distribution is simply a useful way of describing who gets what and how much but in describing who gets what you need not nor should not ignore the causal story of how and why they are getting what they are getting.

112 Young (1990: 25).

Conclusion

In the introduction, I claimed that the aim of this chapter would be to determine what social equality is and to demonstrate that it has value independent from narrow distribution and formal equality. I have argued that social equality is:

1. Respect-for-persons, which has two negative requirements: (i) not treating people according to unacceptable hierarchies of value and (ii) not dehumanising;
2. Civility; and
3. Toleration of difference.

Social equality, I have argued, is distinguishable from narrow distribution and formal equality both constitutively and causally:

1. Narrow distribution cannot adequately capture social equality because it relies on a model of distribution based on goods that are material and scarce. Furthermore, narrow distribution cannot fully result in social equality because it can only address interferences with respect and self-respect where these are functions of economic injustices.
2. Formal equality cannot adequately capture social equality because its scope is necessarily limited to legislation and policy, whereas social equality is committed to a *society* of equals which demands equality beyond the law.

This means that formal equality cannot fully result in social equality because it cannot address injustices that arise in the informal: the realm of personal choice, and so on. Furthermore, trying to reduce social equality to formal equality cannot be successful as the point of social equality is to achieve equal respect in relationships, not to achieve equality mediated by the law.

What we are missing from current descriptions of a fair society is the notion of an egalitarian ethos. A fair society would include an egalitarian ethos which motivates fair personal choice, thus achieving informal social equality and not merely formal equality or a fair distribution of material goods. Without such an ethos, which would encourage the values of respect-for-persons, civility and toleration, social goods such as opportunities and the social basis of self-respect would be distributed unequally, with those devalued receiving too few of these goods.

I have argued in this chapter that informal social equality, thus social equality in personal choice and associations, is a requirement of distributive justice unique from formal equality and narrow distribution. In the previous chapter I analysed Rawls's conception of social justice. In the next chapter I will use the notion of social equality that I have developed to evaluate Rawls's justice to determine whether it addresses social equality, particularly informal social equality and justice in choice. I will argue that it does not.

III. Justice-as-fairness and violations of social equality

In chapter I, I claimed that in Rawls's theory of justice priority is placed on the application of the institutional principles of justice to the basic structure. I also argued, however, that despite this emphasis, one does not need to read Rawls in such a way that justice-as-fairness consists only of such institutional measures to achieve justice. I claimed that according to one reading of the principles of justice, what I referred to as the extensive view, justice-as-fairness could be compatible with additional principles of justice applied to subjects of justice besides the basic structure. In chapter II, I argued that distributive justice needs to take account not only of formal equality and narrow distribution but also of social equality, which demands respect-for-persons, civility and toleration from *both* institutions and individuals. Thus far, we can say that what has been established is that informal social equality is an important component not only of a society of equals but also of broad distributive justice, and thus this implies that Rawls *should* accommodate the demands of informal social equality (chapter II) and that he *can* accommodate principles of justice other than the institutional or other subjects of justice besides the basic structure, i.e. justice-as-fairness can be read as being compatible with measures for justice besides the institutional (chapter I). In this chapter, however, I will argue that justice-as-fairness *does not* provide fully for the demands of social equality.

The question I aim to answer in this chapter is:

Could violations of social equality still occur in a society regulated by the institutional principles of justice?

I will examine (1) the implications for social equality of the institutional measures of justice (i.e. the 3-step application of the institutional principles of justice)¹ with particular reference to the problem of injustice in the family and (2) Rawls's treatment of the notions of respect and self-respect. Respect and self-respect are also important components of social equality. In the broader context of this thesis this chapter aims to demonstrate that Rawls's justice is indeed lacking when it comes to addressing informal social equality, at least when we consider his notion of institutional justice.

In the first section I will argue that, at best, justice-as-fairness is only able to provide measures for achieving social equality through formal equality, fair equality of opportunity and a fair scheme of narrow distribution. It thus neglects violations of social equality which occur informally, such as injustices in the family. I will also argue that although the values of social equality, such as respect, appear to play an essential role in Rawls's justice, Rawls neither has the correct notion of respect and self-respect in order to address social equality, nor does he consider the significance of respect through informal behaviour. In the second section I will revisit the two interpretations of the principles of justice in justice-as-fairness, the exclusive and the extensive views, and compare how informal social equality could be

¹ Perhaps there are non-institutional measures for justice which could apply to social equality. In chapter I, we determined that Rawls does recognise principles for individuals. I will consider whether the application of these could still allow for violations of social equality in chapter V.

reconciled with justice-as-fairness according to these conflicting interpretations.

1. The three-step application of the institutional principles and the problem of informal social equality

In chapter I, I summarised Rawls's institutional solution for justice as a 3-step application of the institutional principles of justice. The institutional principles, of equal liberty, fair equality of opportunity and the difference principle, apply (1) to the basic structure of society directly, (2) to individual behaviour and particular cases indirectly through the direct application to the basic structure and (3) to the outcome of processes (1) to (2). The basic structure seems to consist of the institutions of political form, the economic system, the constitution and legislation, and through their influence, to the public rules of other institutions. The question now is, 'could violations of social equality still occur in a society in which the 3-step process has been applied?' Could a Rawlsian society designed and regulated by the institutional principles allow violations of respect-for-persons, civility and tolerance? The answer, I will argue, is yes: it could allow violations of social equality.

The problem with the 3-step application is that it does not address violations of informal social equality. According to the first step of the process, the institutional principles are applied to the basic structure. This step may provide for social equality where it coincides with formal equality and fair

schemes for narrow distribution but it does not provide for informal social equality.²

Formal equality establishes legal and political equality through, for example, legally codified rights. The first principle, which states that each person has “an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all”, is likely to demand a constitution which enshrines “the liberties of equal citizenship” as a requirement of fair basic structure, and thus it can be seen to provide for formal equality.³ The difference principle, which demands that “[s]ocial and economic inequalities are to be arranged so that they are ... to the greatest advantage of the least advantaged”, could demand an inheritance tax, for example, to ensure that inheritance benefits the worst-off, and thus it makes some provision for the fair distribution of material goods.⁴ The first step of the process applies directly only to political and economic institutional design and to determining the constitution and legislation (at least where the principles of justice are relevant to the distribution of the primary goods) and thus the direct application of the institutional principles to the basic structure will prohibit violations of social equality where these can be addressed through narrow distribution, legislation and rights.

2 I say it *may* provide for what social equality would demand of formal equality and the narrow distribution of material goods but it is not necessarily clear that Rawls’s justice would provide for these demands of social equality. Determining whether justice-as-fairness would uphold social equality through formal equality and narrow distribution would require greater investigation of both Rawls’s theory and social equality. What is clear, however, is that at least something like the formal and narrow distributive demands of social equality would be achieved in a Rawlsian ideal society. My concern is with an aspect of social equality, the informal, which seems not to be addressed at all by such a Rawlsian society.

3 The statement of the first principle is taken from Rawls’s final statement of the principles of justice in *Theory* (1999: 266). The second quote is also from *Theory* (1999: 243).

4 This is the final statement of the difference principle in *Theory* (1999: 266). Rawls discusses particular applications of the difference principle such as inheritance tax on pages 245-6.

What this step does not address, however, is the informal. Violations of social equality which are perpetrated through personal choice or through the rules of associations are not tackled. A woman in the workplace, for example, would benefit from the rights of formal equality and from pay equity which may result as part of a Rawlsian scheme of justice but she will not be protected from damage to self-respect and to her life-chances through, for example, private discrimination, verbal abuse and harassment, marginalization and incivility. Formal rights and money may go some way to make her feel valued but it does not go all the way: to be treated as a valued and respected equal member of society she needs to be treated as worthy beyond the formal realm and beyond the distribution of material goods.

Although the subject of the second step of the application includes individual behaviour it still does not apply to the informal: the institutional principles are only applied to individual behaviour through the initial direct application of the institutional principles to the basic structure. So the principles only apply to individual behaviour, for example, by guaranteeing rights through the constitution and by enforcing particular systems of taxation. Individual behaviour is not actually evaluated according to the principles of justice but rather it is evaluated according to whether it conforms to the demands of a legislative and distributive structure which is determined by the principles. As long as individuals do not violate the rules determined by the principles, the institutional solution has nothing to say about individual behaviour: “individuals and associations may do as they wish insofar as the rules of

institutions permit”.⁵ Personal choice and the rules of associations are thus left unevaluated by principles of justice.

The third step of the process, the application of the principles to steps (1) – (2), again does not apply to the informal. This third step is necessary to ensure that justice is maintained. If we regulate the basic structure according to the institutional principles, over time, injustices could still occur, thus we would need to adjust the basic structure where necessary to ensure that justice is sustained:

The two principles also specify an ideal form for the basic structure in the light of which ongoing institutional and procedural processes are constrained and adjusted. Among these constraints are the limits on the accumulation of property... We need such an ideal to guide the adjustments necessary to preserve background justice.⁶

Rawls’s just state will not be determined once-off by the institutional principles. Even if we have institutions and policies designed by the principles of justice, unfair inequalities such as an accumulation of wealth and property may still occur and thus ongoing monitoring and possibly adjustment is necessary. We can use the principles to evaluate the fairness of inequalities that could arise and make adjustments to institutional rules and policy in the light of any newly developed injustices. As this application remains focused on the basic structure, which does not include the informal, it will not,

⁵ Rawls (2001a: 50).

⁶ Rawls (1993: 259).

however, correct violations of social equality that occur through personal choice or through the rules of associations.

Formal equality and a fair distribution of material goods are not Rawls's only concerns. The principle of equal liberty corresponds to formal equality and the difference principle corresponds to narrow distribution, however, there is of course a third element to Rawls's justice: fair equality of opportunity. This form of equality of opportunity does not merely require that positions which confer advantage are open to all, which is the traditional understanding of equality of opportunity, but that "those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system".⁷ So being born into a poor family in comparison to being born into a rich family, for example, should not provide you with fewer or weaker opportunities for attaining social advantages and successes.

Although social equality cannot be reduced to fair equality of opportunity because violations of social equality cause harms beyond interferences with opportunities, such as a lack of self-respect, social equality and fair equality of opportunity do overlap. Firstly, equality of opportunity is often stated in terms of an opposition to hierarchies of social status.⁸ Secondly, violations of social

7 Rawls (1999: 63). See, for example, Arneson (1999; 2002) for a detailed description of various forms of equality of opportunity and for a criticism of Rawls's fair equality of opportunity.

8 See, for example, Arneson (2002): "Equality of opportunity is a political ideal that is opposed to caste hierarchy but not to hierarchy per se... when equality of opportunity prevails, the assignment of individuals to places in the social hierarchy is determined by some form of competitive process, and all members of society are eligible to compete on equal terms".

equality can be violations of fair equality of opportunity. When individuals are denied education or jobs because they belong to a devalued social group, both social equality and fair equality of opportunity are violated. However, the application of the principle of fair equality of opportunity to institutional structure still does not solve the problems posed by violations of social equality. Firstly, this is precisely because social equality is necessary beyond merely establishing fair equality of opportunity but also because the application of this principle remains at an institutional level, which like the principle of equal liberty and the difference principle, does not address informal injustices: a girl who is denied the same educational opportunities as her brothers by her parents would be a case in point here, or any rigid gender socialisation which encouraged girls to be less ambitious than boys.

For the institutional principles to account for social equality, they would have to ensure that, in the informal, individuals uphold respect-for-persons, civility and toleration (although this could be a result of the application of these principles; they need not do so directly). Yet, if the institutional principles are only applied to public rules and only to the informal indirectly, I am unsure how they would ensure that these values are upheld in personal interactions and in civil society, and so on. They do not rule out unacceptable devaluing, nor certain forms of dehumanisation, such as the social coercion of what should be autonomous choices, nor do they require civility or toleration.

That the 3-step application does not apply to the informal should come as no surprise. Applying the institutional principles to the informal would be

inconsistent with Rawls's stipulations that these principles do not apply directly to individual behaviour and associations.⁹ The application of the institutional principles *aims* to establish formal equality and fair equality of opportunity within the basic structure and to manage institutional design and policy to establish a fair scheme of narrow distribution. This is likely to prohibit violations of social equality which coincide with violations of formal equality, fair equality of opportunity and narrow distribution, but they will not address informal violations. Although one can argue Rawls *intends* not to address the informal through the application of the institutional principles and thus it is not necessarily a criticism to say that these principles cannot fully address social equality, *something*, however, needs to be done about addressing injustices of social equality even if it is not through the principles applied to the basic structure.

1.1. The problem of the family again

[I]t would be difficult to deny that the family has been a, if not the, major site of the oppression of women. Love and care do exist in families. So too do domestic violence, marital rape, child sex abuse, undernutrition of girls, unequal health care, unequal educational opportunities, and countless more intangible violations of dignity and equal personhood.¹⁰

What one *can* accuse Rawls of is over-estimating the institutional principles.

When it comes to the family, for example, Rawls insists that justice-as-

⁹ See, for example, Rawls (1999: 47; 2001b: 10).

¹⁰ Nussbaum (2000: 243).

fairness can cope adequately with gender inequalities. However, his claim seems to be that the institutional principles applied to the basic structure alone will secure gender equality:

Since wives are equally citizens with their husbands, they have all the same basic rights, liberties, and opportunities as their husbands; and this together with the correct application of the other principles of justice, suffices to secure their equality and independence.¹¹

When Rawls refers to “the other principles of justice”, he does not mean principles other than the institutional principles: in the first half of the sentence he is referring to the first principle (of equal liberty) and thus “the other principles of justice” are fair equality of opportunity and the difference principle. So, for Rawls, the application of the institutional principles “suffices to secure” gender equality. This, however, cannot be the case according to social equality which demands that respect-for-persons, among others, is secured not only on a legislative level but also in private behaviour. If the institutional principles do not apply to everyday individual behaviour, and Rawls insists that they do not, then some other measures for justice need to provide for respect-for-persons expressed through everyday behaviour.

The gendered distribution of household labour is an example of the problem.¹²

When women perform the majority of household tasks, all other things being equal, this could interfere with their opportunities for leisure, education and

¹¹ Rawls (2001g: 597).

¹² This is one of the examples that Cohen (2000: 139) uses in order to demonstrate that unjust personal choice is still possible in a Rawlsian society. In the next chapter, I will consider his argument in more detail.

career development, and it would thus seem to be unfair if women are pressurised or (socially) coerced into this imbalanced division of labour simply because they are women. Yet, the application of the institutional principles to the basic structure cannot condemn such a distribution of household tasks as unjust because the principles of justice are precluded from applying to personal choice at any stage of the 3-step application.

Rawls argues that a gendered division of labour cannot be prohibited because this would interfere with the basic liberties;¹³ as Martha Nussbaum claims, “It just seems an intolerable infringement of liberty for the state to get involved in dictating how people do their dishes”.¹⁴ The concern, however, is with how to describe a fair society, and if we do not include requirements for justice in personal choice, we cannot claim that at times a gendered division of labour is unjust: we do not need to, should not in a free society, legally prohibit all unjust choices but this does not mean we should not even consider whether they are indeed fair. Although Rawls claims that this division of labour cannot be prohibited, he does claim that where it is involuntary it should “be reduced to zero”.¹⁵ Now there are two related points to emphasise here. One is being able to even judge whether or not something that is the function of choice can be conceived of as fair or unfair. The other is how we would describe a fair society if we recognised that choice could be fair or unfair and that justice in choice should be a requirement of such a society.

13 Rawls (2001g: 599-600).

14 Nussbaum (2000: 280).

15 Rawls (2001g: 600).

In relation to the first issue, why is it that Rawls should be concerned about reducing involuntary gendered household labour, where household labour is at least partially a function of choice (as opposed to legislation or public rules)? With what is he judging this choice, if we can't either judge choice according to the institutional principles, and Rawls claims we cannot, or we do not have any other standards with which to judge choice (and about this we can say that either Rawls is against judging justice in choice by any other standards, which would conform to the exclusive view of the status of principles of justice, or he does not explicitly affirm such standards)? So why is he concerned? He claims that "If the gendered division of labor in the family is indeed fully voluntary, then there is reason to think that the single system [the basic structure] realizes fair equality of opportunity for both genders".¹⁶ This seems to be an admission that we do indeed require informal justice because it seems that Rawls is conceding that an involuntary division of labour would interfere with fair opportunities.¹⁷ However Rawls may be judging such choices as unfair, by the institutional principles or some other standards, this would then bring us to the next point which is how do we account for justice in household labour and thus justice in personal choice in our descriptions of a fair society?

Unsurprisingly Rawls's answer seems to be that justice in household labour would occur through the regulation of the basic structure by the institutional principles: he claims, in the above quote, that it would be 'the basic structure'

¹⁶ Rawls (2001g: 600).

¹⁷ Unless he denies that this division of labour is related to choice. Although clearly government policy, such as funding day-care facilities, can influence decisions about household labour, unless gendered divisions are prohibited, and Rawls claims they cannot be because of the principle of equal liberty, then he must concede that they are subject to the informal, thus to choice, norms, and so on.

that would realise fair equality of opportunity. How is it though that the application of the institutional principles to the basic structure would achieve justice in choice, if it does not apply to choice? Either then the institutional principles should apply to choice or some other principles should. The only alternative I can see is if Rawls believes that by making the public rules of institutions fair, then somehow the informal will become fair. There may be something to this interpretation, as Rawls emphasises that formal justice is likely to result in its acceptance:

The liberties of the intolerant may persuade them to a belief in freedom. This persuasion works on the psychological principles that those whose liberties are protected by and who benefit from a just constitution will, other things equal, acquire an allegiance to it over a period of time.¹⁸

In the previous chapter I claimed, however, that it is spurious to assume a simplistic relationship between formal and informal equality because each is likely to reinforce the other and thus, we cannot explain informal equality merely as a product of the formal. Furthermore, there are no guarantees that formal equality will result in informal equality, so if we recognise that justice in the informal is a requirement of justice, we must explicitly include this recognition in our descriptions of a fair society.

This unwarranted faith in the ability of the institutional principles alone to secure equality is particularly peculiar when Rawls goes on to claim, in response to John Stuart Mill's notion that the family "is a school for male

¹⁸ Rawls (1999: 192).

despotism”, that the principles of justice “can plainly be invoked to reform the family”.¹⁹ How can the principles of justice be used to reform gender inequalities conditioned by the family when these principles are not meant to apply to personal choice and informal social structure, considering that these inequalities, if inculcated by the family, are clearly neither necessarily or only caused by legislation or a lack of rights or distribution, nor necessarily directly influenced by it? From his discussion of the gendered division of labour and of the family more generally, Rawls seems to implicitly recognise something of the need for informal justice but he seems under the misapprehension that the institutional principles applied to public rules will secure informal justice.

It is interesting that Rawls chooses to focus his discussion of the family on *adult* women. He claims that if choices, such as who should bear the brunt of household labour, are voluntary and do “not result from or lead to injustice”, then they are not a problem according to political liberalism.²⁰ Although of course there is some question, which Rawls recognises, as to whether and which choices can be said to be voluntary or involuntary, I agree that if such choices are genuinely voluntary then they are not a concern of either social equality or justice.²¹ According to social equality, as long as such choices do not occur because of devaluation or are not dehumanising, and such choices, if genuinely voluntary would not be, then they are not violations of respect-for-persons; indeed such a voluntary choice should be treated with toleration. Furthermore, if you voluntarily choose a particular distribution of goods, in

19 Rawls (2001g: 598).

20 Rawls (2001g: 599).

21 See Andrew Mason (2000) on how gender socialisation problematises the notion that people should be held responsible for the consequences of even their autonomous choices.

this case opportunities, then the result of that choice, that you receive an unequal share of that good, cannot be unjust. In the family, however, and when it comes to gender inequalities, there is a less complicated case, where voluntariness of the targets of violations of equality and justice does not play a role, and that is with female children.²² Whatever one's conclusions may be about the role that rigid gender socialisation plays on the autonomy or voluntariness of adults' choices later in life, it seems that this socialisation, which could interfere with a female child's ambitions, opportunities for education and careers (and so on), conceptions of the good, and sense of worth, is in of itself a violation of informal social equality and of justice in choice (the choice here then is not hers but her parents' or caregivers', or such). It cannot be fair if it denies the child a fair distribution of social goods or a fair future distribution, and it cannot be acceptable in a society of equals if it devalues girls or forces them into set social roles without providing them with the opportunity to make their own autonomous choices, or without providing them with the means of making those choices.²³

If we require justice in the family it seems that a description of institutional justice will not suffice; we also need something like a description of the values and norms of an egalitarian ethos in which social equality will be upheld:

22 "Children are [the family's] captives in all matters of basic survival and well-being for many years... Nor is a child's choice to be a member of such a unit at all voluntary, as membership in a university is, or as membership in a church is apart from the issue of family pressure." (Nussbaum 2000: 274).

23 This interference with autonomy, I take it, would be dehumanisation.

[W]e might say that full equality of access requires a social ethos that precludes the widespread, even if informal, operation of a norm which holds women primarily responsible for caring for their children... In the absence of such an ethos, a fully just distribution of the benefits and burdens which attend these decisions seems impossible in practice.²⁴

Rawls's over-confidence in the institutional principles to secure justice is not limited to the family and to gender equality. When Rawls addresses respect and self-respect directly, he continues to rely on formal measures to achieve justice and equality whereas both formal and informal requirements are necessary.

1.2. The problem of respect and self-respect

Claiming that Rawls neglects social equality may seem strange when we consider that the values of social equality, i.e. respect, civility and toleration, play an important, if not (in the case of respect) foundational, role in Rawls's conception of justice. Equal respect and concern, Dworkin claims, underlie and justify the principles of justice, while Charles Larmore argues that the public recognition of the principles of justice, not so much the principles themselves, expresses respect-for-persons.²⁵ Rawls claims that the social basis of self-respect is a primary good, recognises that respect is necessary to achieve self-respect and stipulates a duty of mutual respect with which

24 Mason (2000: 245).

25 Dworkin (1975:50) and Larmore (2003: 373).

citizens of a just society must comply.²⁶ Toleration motivates political liberalism, and civility seems to be accounted for through the duty of civility and the duty of mutual respect.²⁷

Although Rawls acknowledges something similar to the values of social equality, this does not mean, however, that he employs the correct notions of these values nor more importantly does this mean that they operate in the correct spheres, where ‘correct’ in both these cases means correct for addressing social equality. When it comes, for example, to respect and self-respect, Rawls does not use the same understanding of respect and self-respect that is applicable to social equality and he does not consider the importance of informal harms to respect and self-respect through violations of social equality in personal choice and in associations.

In this section I am going to discuss the notions of respect and self-respect to highlight that although Rawls’s justice does recognise the importance of these values, he does not do so in the requisite way for social equality. I will (1) reiterate the criticism that Rawls confuses notions of self-respect and self-esteem and thus does not acknowledge that recognition self-respect is an essential component of a fair society, and (2) argue that he neglects the

26 See Rawls (1999: 386-391) for a discussion of self-respect and Rawls (1999: 297) for a discussion of the duty of mutual respect.

27 See, for example, Horton and Mendus (1999: 1-5) on political liberalism as a solution for toleration and Nagel (2003: 72-3) on toleration as a condition of mutual respect. See Rawls (1999: 312; 2001g: 576-7) on the duty of civility.

informal social basis of self-respect, focusing almost exclusively on the legislative and distributive social conditions which influence self-respect.²⁸

Rawls describes self-respect as having two features.²⁹ Firstly, self-respect means believing that your conception of the good is worthwhile. Secondly, self-respect is the confidence that you are able to fulfil your conception of the good. Self-respect (or the social basis of self-respect) is a primary good³⁰, thus any rational person will want this good regardless of her conception of the good life because “[w]ithout it nothing may seem worth doing, or if some things have value for us, we lack the will to strive for them”.³¹ This understanding of self-respect, however, has been frequently criticised for confusing self-respect and self-esteem.³² Evidence for the claim that Rawls confuses these notions is that (1) he uses the terms interchangeably,³³ and (2) his description and treatment of self-respect makes it seem as if he is discussing self-esteem rather than recognition self-respect.

Recognition respect includes respect-for-persons, the recognition that every person has intrinsic worth. Recognition self-respect is a recognition of your

28 I am not going to address the duties of respect and civility in this chapter. I will discuss them in chapter V which focuses on what Rawls has to say about individuals and informal behaviour. My focus in this chapter is on the provisions that Rawls makes for institutional justice and whether those provisions would accomplish social equality.

29 Rawls (1999: 386).

30 Rawls (1999: 54, 386, 388; 2001d: 158) refers directly to self-respect as a primary good. At times, however he refers to the social basis of self-respect as the good (2001b: 260; 2001j: 314). Joshua Cohen (2003) regards both self-respect and the social basis of self-respect (respect from others) as primary goods. See Nussbaum’s (2000: 89) comments on why we should refer to such goods according to their social basis and not to the distribution of the goods themselves.

31 Rawls (1999: 386).

32 See Darwall (1977: 48; fn. 18), Larry L. Thomas (1999: 37-48) and Jeanne S. Zaino (1998: 738; fn. 5). For a prominent analysis of the difference between esteem and respect, see David Sachs (1999: 22-36).

33 For example, Rawls (1999: 386), “We may define self-respect (or self-esteem) as having two aspects”.

own intrinsic worth as a person merely because you are a person.³⁴ Having good self-esteem requires a positive assessment of such aspects of the self as character traits or accomplishments, but it is not an assessment of one's character (whereas appraisal self-respect is an assessment of character).³⁵ By defining self-respect according to a conception of the good and by associating the worth of that conception of the good with one's activities and capacities, Rawls seems much closer to describing self-esteem than recognition self-respect. Rawls claims that we know our conceptions of the good are worthwhile when our activities are appreciated and considered worthy by others.³⁶ He also claims that our life-plans can only be worthwhile if they satisfy the Aristotelian Principle, which states that "human beings enjoy the exercise of their realized capacities (their innate or trained abilities), and this enjoyment increases the more the capacity is realized, or the greater its complexity".³⁷ Recognition self-respect is not dependent on our activities or our abilities or how others view these; self-esteem, however, is dependent on an affirmation and appreciation of what we do or how we do things. Rawls thus seems to be describing self-esteem and not self-respect.

This is a significant confusion when it comes to social equality, which is concerned as a priority with recognition respect rather than with appraisal respect or esteem. Damage done to self-respect through injustice is often more

34 Darwall (1977: 47-48). For further explanations of notions of self-respect which correlate to recognition self-respect, see for example, Thomas E. Hill, Jr. (1995) and Laurence Thomas (1995).

35 Darwall (1977: 36) discusses the difference between self-esteem and appraisal self-respect.
36 Rawls (1999: 387).

37 The description of the Aristotelian Principle can be found in Rawls (1999: 374) and the claim that our conceptions of the good are worthwhile if they are rational plans of life which satisfy the Aristotelian Principle, in Rawls (1999: 386).

fundamental than damage done to the worthiness of a conception of the good or to the ability to fulfil a conception of the good: the disadvantaged and the devalued are considered to have less worth, to be less worthy of respect as people, thus they are not accorded recognition respect, and thus they suffer from a lack of recognition self-respect (although I am not denying that they probably also suffer from a lack of self-esteem).

Larry L. Thomas uses the example of the Black Consciousness Movement [BCM] in his critique of Rawls's confusion of self-esteem and self-respect. The BCM, he argues, led to an important change in blacks' self-description which enhanced their self-respect. This notion of self-respect, however, does not conform to Rawls's description of self-respect as it is primarily unrelated to worthwhile conceptions of the good and the ability to fulfil these conceptions:

The change in black's self-description, then, was not indicative of the fact that they came to pursue more worthwhile plans of life, though many in fact did. Rather, it indicated a more fundamental change, namely, a change in the way blacks came to view themselves as persons *qua* persons. For the BCM was a rejection of a conception of persons according to which to have a certain pigmentation of the skin was *ipso facto* to be less worthy of rights and liberties to which other members of the American society had been so long accustomed.³⁸

Thomas is emphasising that racial oppression damages what I have referred to as recognition self-respect: black people are not treated as having the same

38 Thomas (1999: 41).

worth as white people, and in turn are denied the rights which should apply to all human beings, and this, among others, damaged their notions of their own worth.

I think there are numerous ways in which people's notions of self are affected by oppression and discrimination and would not like to claim that only recognition respect is affected. Furthermore, these notions of respect and esteem are probably interdependent and failures of one might cause failures of another. Social equality, however, is most concerned with the notion of recognition respect, because social equality relies on the recognition that people, as people, have equal intrinsic worth and should be treated as such. A lack of recognition respect from others would lead to a lack of recognition self-respect. Thus to address social equality and the harms caused to self-respect through violations of social equality, one would need to consider and incorporate a notion of recognition self-respect and not merely self-esteem into a conception of a fair society. Rawls cannot be said to be addressing social equality suitably if he does not have a notion of self-respect which coincides with that of social equality.

Even if Rawls *did* have the correct notion of self-respect, he could still not be said to provide for social equality. A further problem with Rawls's notion of self-respect relates to how we achieve self-respect. As (the social basis of) self-respect is a primary good, indeed, he refers to it as "perhaps the most important primary good",³⁹ he claims that "the parties in the original position

39 Rawls (1999: 386)

would wish to avoid at almost any cost the social conditions that undermine self-respect”.⁴⁰ From the perspective of social equality, however, Rawls has neglected some of the social conditions that undermine self-respect.

As Rawls acknowledges, an important condition, or *the* condition, for achieving self-respect is respect from others: “our self-respect... depends in part upon the respect shown to us by others; no one can long possess an assurance of his own value in the face of the enduring contempt or even indifference of others”.⁴¹ This is why Joshua Cohen claims that the social basis of self-respect is “essentially, respect from others”.⁴² How is respect from others expressed in a society? How, in other words, do we achieve the social basis of self-respect?

Rawls appears to believe that purely formal and narrow distributive measures for justice (the application of the institutional principles to the basic structure) are sufficient for establishing the right conditions for self-respect: “a desirable feature of a conception of justice is that it should publicly express men’s respect for one another. In this way they ensure their own value. Now the two principles achieve this end”.⁴³ Although he seems to acknowledge the role of the difference principle, and thus of economic factors, in determining respect and thus self-respect through this quote which emphasises that the “two” principles accomplish a public expression of respect, on other occasions, he

40 Rawls (1999: 386).

41 Rawls (2001d: 171).

42 J. Cohen (2003: 109).

43 Rawls (1999: 156). Freeman (2003: 23): “Equal basic liberties and political and economic independence are primary among the bases of self-respect in a democratic society”.

claims that the first principle alone is essential for establishing respect. Thus the social basis of self-respect seems to be fairly distributed when the first principle is applied to the basic structure: “The basis for self-respect in a just society is not then one’s income share but the publicly affirmed distribution of fundamental rights and liberties”.⁴⁴ For Rawls then, the distribution of the social basis of self-respect is a function of the institutional principles, whether this is all of them or only the principle of equal liberty.

I claim, however, that these expressions of respect are not sufficient to achieve the social conditions of self-respect because respect from others is not determined alone by the distribution of rights and liberties, or goods such as income and wealth. If the institutional principles apply only to the legislative and distributive framework of institutions it seems that they cannot address forms of individual behaviour and the rules of associations which, for example, discriminate against the members of certain social groups, and thus violate respect-for-persons, and which could thus undermine self-respect.

Imagine a society in which perfect equal liberties have been established by the law but one group in society, let us say people with brown eyes, treat any member of another group in society, let us say blue-eyed people, with extreme disdain in their everyday behaviour. Brown-eyed people are frequently rude to blue-eyed people; they discriminate against them privately; they insult them; they refuse to live in the same neighbourhoods or date them or become friends with them. Although blue-eyed people have the same rights and liberties as

⁴⁴ Rawls (1999: 477).

brown-eyed people, their self-respect is undermined through the patterned and persistent lack of respect they suffer. The Rawlsian application of the institutional principles to basic social institutions can provide us with no answers to this problem, and yet, not all of the social conditions which establish self-respect have been achieved because blue-eyed people are systemically and socially devalued simply because they are blue-eyed. Political and legal equality does not suffice to express respect and neither would the redistribution of material goods or economic equality; even if the brown-eyed and the blue-eyed have similar or the same income and wealth, this does not preclude violations of informal social equality. It is because self-respect can be undermined by informal behaviour and not exclusively by the formal and narrow distributive framework of institutions that social equality demands respect-for-persons both from institutions and from individuals. If we aim at establishing respect and self-respect, on what basis should we only concern ourselves with establishing respect through the fair distribution of liberties and material goods?

Furthermore, that respect is expressed through equal liberties is often only socially operative, when informal social equality has been achieved. Joshua Cohen emphasises the importance of respect expressed through political equality in justice-as-fairness:

others show respect for me by expressing their willingness to share responsibility on equal terms for making judgments of justice that provide supreme guidance for collective political life – not simply by recognizing me as an equal in some way, or attributing to me some

equal rights regardless of the content of those rights, but as an equal with respect to the final authoritative judgments about collective affairs.⁴⁵

I agree that political equality is an essential component of respect-for-persons, however, we cannot claim that people share responsibility for collective decisions on equal terms when equal opportunities and the power to make decisions are hampered through violations of informal social equality. It is fairly uncontroversial to claim that a fair distribution of material goods is necessary for political equality to be a reality: if, for example, it is made very difficult for me to access a polling booth because I am poor, then it is difficult to see how I can be an equal with respect to the final authoritative judgments about collective affairs. Something similar can be said about social inequalities: if as a woman I am treated and expect to be treated as an inferior in decision-making within my own household or by society more generally, for example, it seems likely that I would also consider myself to be unequal when it comes to collective decision-making in the political sphere, no matter whether my legal and political status insists that I am an equal.

Using G. A. Cohen's terms to describe the Rawlsian divide between the coercive and noncoercive, and thus by implication between public and private behaviour, it seems as if there is an arbitrary divide between the formal and distributive conditions for self-respect on the one hand and informal conditions on the other.⁴⁶ If Rawls is genuinely concerned about establishing

45 J. Cohen (2003: 109).

46 Cohen (2000: 136-140).

the social conditions for self-respect, a fair society should demand that the informal conditions that help to establish self-respect must also be fulfilled.⁴⁷

2. How can social equality be reconciled with justice-as-fairness? The exclusive and extensive views

Justice-as-fairness, understood only as the application of the institutional principles, cannot fully establish social equality. How then can we reconcile social equality with justice-as-fairness? Is social equality even compatible with justice-as-fairness? In chapter I, I discussed two interpretations of what Rawls means when he calls the basic structure the primary subject of justice: the exclusive and the extensive views. In this section I will discuss how justice-as-fairness can be read to be compatible with the demands of social equality and justice in choice according to these two interpretations.

The exclusive view claims that principles for individuals cannot be distributive or perhaps cannot even be principles of justice at all. The only principles of distributive justice are the institutional principles (and formal subsidiary principles which aim at achieving the ideals embodied in the institutional principles). If we want to reconcile Rawls's justice, as understood through the exclusive view, with the demands of social equality, we would not be able to introduce additional principles of justice aimed at individual

47 In the section of *Theory* entitled 'Self-respect, excellences, and shame' Rawls (1999: 386-391) notes the significance of "associative ties" in developing self-respect (or more accurately, self-esteem) but he appears to believe that the "variety of communities and associations" which will affirm and appreciate individuals' plans of life will be a result of a society well-ordered by the institutional principles applied to the basic structure (1999: 387). Thus, even in this case, the work to achieve self-respect is done by formal institutions rather than through an acknowledgement of the independent role of informal behaviour.

behaviour and associations to address informal violations of social equality. So if we cannot address social equality through principles of justice for personal choice and associations, it seems that the only way to reconcile the exclusive view with social equality would be to try to make the only distributive principles of justice that the exclusive view acknowledges, apply to informal justice. Thus the institutional principles would have to establish informal social equality. Cohen aims at something similar to the first strategy. He argues that in order to realise justice in personal choice the institutional principles should be applied to individual behaviour directly. The basic structure, according to Cohen's claims, needs to be extended to include personal choice. I will discuss Cohen's claims in the next chapter.

The exclusive view, as we have seen however, is not the only interpretation of the status of principles of justice in justice-as-fairness. According to the extensive view, subjects of justice other than the basic structure, and other principles of justice besides merely the institutional principles can be the subjects of and principles for distributive justice. The extensive view is thus compatible with developing or adapting measures which aim to address informal justice directly, as it can allow for additional principles of distributive justice and these principles can be applied to subjects such as individual behaviour. At least when it comes to Rawls's conception of principles and subjects of justice, it would not be inconsistent, *prima facie*, with justice-as-fairness to apply principles of justice, or at least some sort of measures for justice to the informal which would aim to establish distributive

justice in personal choice and through associations.⁴⁸ Thus the extensive view, unlike the exclusive view, does not require that the basic structure be redefined or that the institutional principles be applied beyond the 3-step application. Including social equality in justice-as-fairness would be an extension of justice-as-fairness, rather than an alteration of it. In chapter V I will discuss Rawls's principles for individuals and how these can be developed and adapted to accommodate the demands of social equality.

Conclusion

In the introduction I stated that the aim of this chapter is to determine whether violations of social equality could still occur in a society regulated by the 3-step application of the institutional principles of justice-as-fairness. I have argued that, yes, such violations of social equality could still occur because this application of the principles would not address informal violations of social equality, through, for example, personal choice. This is particularly clear when we examine injustices in the family, which seem as if they cannot be rectified by institutional justice alone, and Rawls's understanding of respect-for-persons, which firstly tends towards the wrong type of respect, and secondly which seemingly relies entirely on respect through formal and distributive rules. We can say that although justice-as-fairness should accommodate the demands of social equality, the institutional measures for justice cannot accommodate these demands because they do not apply to

48 I say *prima facie* because particular principles may well conflict with the institutional principles, however, as I mentioned in chapter I, I will discuss this potential conflict in chapter V.

individual behaviour. So what are we to do with justice-as-fairness in light of social equality?

Accommodating social equality would require either changing the institutional measures so that they could be applied to individual behaviour (this is what the exclusive view would require) or it would require establishing requirements for achieving justice beyond the application of the institutional principles (this is compatible with the extensive view). In the next chapter, I will analyse and evaluate attempts to change the institutional measures so that they are able to accommodate fair personal choice as a requirement of justice. I will focus primarily on Cohen's argument which aims to demonstrate that the basic structure should include personal choice and thus that the institutional principles of justice should apply to both individuals and institutions.

IV. The personal choice argument

And then I shall ask whether structural design is enough – whether we can settle for changing the world and not *also* the soul.¹

In chapter I, I claimed that Rawls's conception of justice has come under criticism for focusing on institutional measures to implement justice; some critics, proponents of what I refer to as the personal choice argument, claim that justice should include personal choice and not merely institutional design. Cohen is one such critic who argues that a fair society requires both fair institutional rules and fair individual choice. More particularly, he claims that Rawls's account of justice is internally inconsistent because it should, but does not, include personal choice as a subject of justice. In this chapter I will explain and evaluate the personal choice argument, focusing particularly on Cohen's version of this argument. By elaborating on the personal choice argument (PCA), I provide an account of where this argument succeeds and where I believe it fails to prepare the ground for what it is that we need from, or what we need to do to, Rawls's justice to ensure that it includes the justice of personal choice. It fails, I will argue, by advocating that in order to address justice in personal choice we should measure choice according to the institutional principles. Instead of accepting the personal choice argument as is, I describe a revised version of this argument, which advocates applying

¹ Cohen (2000: 44).

principles of social equality to choice and thus avoids many of the drawbacks associated with the original argument.

The aim of this chapter is to answer two primary questions:

1. What is the personal choice argument?
2. How successful is it in providing a solution to the problem of justice in personal choice?

Within the broader context of this thesis, my aim is to provide justification for why, in response to the problem of informal social equality and justice in choice, I choose to part ways with the original personal choice argument and its claim that the institutional principles of justice should apply to choice. Instead I will provide an alternative in which I formulate duties of social equality to be applied to individual behaviour.

There are 6 sections to this chapter. In the first section I briefly explain the personal choice argument and summarise two versions of this argument, Liam B. Murphy's and Cohen's. In section 2, I elaborate on Cohen's personal choice argument. In section 3, I provide support for the PCA's claims that personal choice should be subject to standards of justice because personal choice affects justice. In section 4, however, I argue that the PCA's conclusion, that principles of justice applied to institutions should also be applied to individuals, is not convincing because (i) if there are other measures used to judge the justice of personal choice, then there is no need to apply the institutional principles and (ii) there are good reasons not to apply

the institutional principles to individual behaviour. In the light of this criticism, in section 5, I provide a revised version of the PCA which substitutes the claim that the institutional principles should be applied to choice with the claim that the justice of choice should be judged by principles of social equality. In the last section I defend the revised PCA from objections that are commonly aimed at its original version, arguing that these objections are usually only aimed at the claim that the institutional principles, particularly the difference principle, should be applied to individuals.

1. What is the personal choice argument?

Personal choice means behaviour which is not subject to the law or official rules: if behaviour is open to personal choice then it is open to an individual or groups of individuals how they choose to act. There are three components of the personal choice argument:

1. Personal choice affects the justice of the distribution of social goods.
2. Principles of justice (or some such measures)² should thus be applied to personal choice.
3. The principles of distributive justice that apply to institutions should be applied to personal choice.

It is significant that I break the PCA into three parts. Neither proponents of this argument such as Murphy or Cohen present the argument in this form, nor

² My use of the word 'principle' is not necessary. What I mean is that some standard for judging the justice of personal choice is required.

do their critics. As they do not make this distinction between different parts of the argument, it seems that both proponents and critics of the PCA assume that the second part of the argument also implies the third.³ By doing so they seem to implicitly assume the exclusive view of Rawls's principles of justice: if the claim is that personal choice relates to distribution, they seem to assume that this implies the claim that the institutional principles should be applied to choice seemingly because these principles are the only principles of distributive justice in Rawls's theory. I will argue that the first two parts of the PCA are convincing but the last statement is not.

Before explaining the strengths and the weaknesses of this argument, however, it is important to explore it in more detail. I will briefly summarise two versions and then in the next section I will elaborate on the second version, Cohen's version, to provide a more in-depth understanding of the PCA.

Murphy distinguishes between two approaches to normative principles: monism and dualism. According to monism, the view Murphy defends, "all fundamental normative principles that apply to the design of institutions apply also to the conduct of people".⁴ Dualism, a view that Murphy associates with Rawls and Rawlsians such as Pogge, requires different fundamental principles for institutional design and personal choice and conduct.⁵ Murphy criticises

³ For example, Cohen (1997: 3) makes the general claim (statement 2), which I endorse, "principles of distributive justice... apply... to people's legally unconstrained choices" but implies that this is equivalent to the claim that we should apply Rawls's institutional principles to choice.

⁴ Murphy (1999: 251).

⁵ Murphy (1999: 25).

dualism for encouraging people to “aim at the good of institutions rather than at the good institutions can best do”.⁶ Instead of dividing fundamental principles of justice into types for individuals, such as the duty to support fair institutions, and types for institutions, such as the difference principle, Murphy provides an example of a monist principle, the principle of weighted beneficence, which would apply to both personal choice and institutions.⁷

Cohen aims to extend the scope of justice beyond the limits usually set within liberal philosophy by claiming that distributive justice requires both fair personal choice, informed by an egalitarian ethos, and fair rules, as opposed to the typical liberal view associated with Rawls that distributive justice requires only, or primarily only, justice in institutional rules.⁸ Cohen’s argument can be broken into two primary parts: (1) he claims that demands for material incentives, usually justified by the difference principle, are inconsistent with Rawls’s stipulation that in a fair society citizens would act upon the principles of justice, and thus these demands are unjust. (2) In response to the basic-structure objection, which claims that it does not matter if personal choice is inconsistent with the principles of justice because these principles should not be applied to individuals, Cohen argues that choice, such as the demand for incentives, should be subject to the principles of justice, otherwise, the application of these principles to coercive structure only is arbitrary. In the next section I will provide a detailed explanation of Cohen’s argument,

6 Murphy (1999: 272).

7 Murphy (1999: 262-4).

8 I rely mainly on Cohen’s critique of Rawls in the chapters ‘Justice, incentives, and selfishness’ and ‘Where the action is: on the site of distributive justice’ in *If you’re an egalitarian, how come you’re so rich* (2000), which develops from (and is often precisely the same as) ‘Where the action is: on the site of distributive justice’ (1997).

divided into two sections according to the two parts of his argument, (1) the argument against incentives and (2) the reply to the basic-structure objection.

2. Cohen’s critique of Rawls: the incentives argument and the basic-structure objection

2.1. Applying the difference principle to economic choice: the argument against incentives argument

The difference principle, which states that social and economic inequalities should be “to the greatest benefit of the least advantaged”,⁹ has been used to defend inequalities which result from material incentives given to the talented.¹⁰ According to the incentives argument, material incentives are fair if they benefit the worst-off, by for example, increasing the productivity of the talented. Cohen claims that for the incentives argument to justify inequalities it must demonstrate that incentives are necessary to benefit the worst-off as this is a requirement of the difference principle. He claims, however, that incentives can only be necessary to benefit the worst-off if dubious assumptions are made about human nature (particularly about the nature of the talented). Incentives, he claims, are not necessary in the requisite way: they are not necessary “*tout court* – that is, independently of human will, so that with all the will in the world, removal of inequality would make everyone

9 Rawls (1999: 266).

10 I use the term talented in the same way as Cohen (2000: 125): “All that need be true of them is that they are so positioned that, happily for them, they do command a high salary and they can vary their productivity according to how high it is”.

worse off”.¹¹ They are not necessary in this way because the talented could choose to work without incentives. The only way in which it seems that incentives would be necessary is if the talented are unavoidably acquisitive: they are incapable of working more productively for average pay due to their ingrained selfishness. Not only does Cohen doubt that this acquisitiveness could be so embedded, more importantly, he claims that assuming that people are unavoidably selfish is inconsistent with Rawls’s demands for a fair society.

Cohen argues that a stipulation for Rawls’s justice is that a fair society requires fair citizens, or more specifically, that citizens in a fair society would affirm the institutional principles of justice,¹² and this Cohen claims means that they would “apply the principles of justice in their daily life”.¹³ In the case of incentives this would mean that individuals would apply the difference principle to their own decisions, thus agreeing that an unequal economic distribution can only be justified if it is necessary to benefit the worst-off.¹⁴ If their choices were motivated by the difference principle, the talented, Cohen claims, would agree that incentives are not necessary to benefit the worst-off as they could choose to work without receiving special incentives:

11 Cohen (2000: 127).

12 Cohen does not refer to the institutional principles as specifically institutional. This is my term not his. He does not differentiate between different types of principles of justice and refers to what I have called ‘the institutional principles of justice’ as ‘the principles of justice’, as they are referred to by Rawls himself and in the secondary literature. However, to avoid confusion, and as part of the purpose of this chapter is to demonstrate that we need to differentiate between institutional principles and other principles of justice, I will continue to refer to them as ‘the institutional principles of justice’ or merely ‘institutional principles’ for short.

13 Cohen (2000: 126).

14 Cohen (2000: 126).

*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. High rewards are, therefore, necessary only because the choices of talented people are not appropriately informed by the difference principle.*¹⁵

Inequalities in pay in these circumstances are only made necessary if the talented *choose* not to work as productively without incentives, and as they would choose to work without them if their choices were informed by the difference principle, Cohen concludes that incentives are unjust.

Cohen believes that because the difference principle should influence individuals' economic choices and more generally because personal choice should be informed by Rawls's principles of justice, that distributive justice requires not only fair rules applied to institutions but also an egalitarian ethos that would motivate individuals to make fair personal choices. We can say that an ethos is necessary for justice because as personal choice influences distributive justice, an ethos that motivates justice in personal choice will inspire a fairer distribution of goods than no such ethos or a different kind of ethos (such as a non-egalitarian ethos or an anti-egalitarian ethos).

Cohen's argument rests on the claim that it is a stipulation of Rawls's conception of justice that citizens must affirm the institutional principles, meaning they must apply the principles to their choices, and specifically in the case of incentives, to their economic choices. It is here that some critics are

¹⁵ Cohen (2000: 127).

likely to object to Cohen's claims. Rawls, they might argue, means something different when he claims that citizens should affirm the institutional principles (for example, he could merely mean that they should agree that institutions be regulated by the institutional principles and that they agree to comply with the rules of these institutions). Evidence for this view is that Rawls explicitly disassociates individual behaviour from the institutional principles, claiming that these principles apply to the basic structure and not to individuals. Cohen anticipates this claim and calls it the basic-structure objection. He addresses this objection by arguing that limiting the primary subject of justice to the basic structure would either be arbitrary if it applied to coercive structure alone or, if noncoercive structure was included as part of this subject, personal choice should also be incorporated because noncoercive structure is (at least) partially constituted by choice.

2.2. Personal choice as part of the primary subject of justice: rebuttal of the basic-structure objection

Cohen claims that advocates of the basic-structure objection would accuse him of confusing where the difference principle should be applied.¹⁶ Rawls stipulates that the principles of justice only apply to the basic structure of society: "the way in which major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation".¹⁷ They are not, he claims, intended to apply to individuals, and

¹⁶ See Cohen (2000: 129-130) for his explanation of the basic-structure objection.

¹⁷ Rawls (1999: 6).

thus the difference principle should not be applied to the personal choice of the talented.¹⁸

Cohen has two replies to this objection:

(1) A preliminary reply in which he points out that three aspects of Rawls's justice, (i) the notion of fraternity, (ii) the dignity of the worst-off and (iii) the stipulation that citizens should act from the principles of justice, are inconsistent with applying the principles of justice only to the basic structure and not to personal choice.¹⁹

(2) A fundamental reply in which he argues that the basic structure, if it is not arbitrary, must include the noncoercive structure of an institution. Once noncoercive structure is allowed into the framework of justice, then personal choice must also be included.²⁰

Cohen admits that the preliminary reply is not decisive against Rawls: Rawls could abandon the claims inconsistent with the basic-structure objection.

However, he believes that the fundamental reply demonstrates that the institutional principles of justice can be applied to personal choice.

The basic-structure objection states that principles of justice should be applied only to the basic structure. Cohen's fundamental reply, the rebuttal of the basic-structure objection, questions what is meant by the basic structure.

Cohen claims that when we talk about the structure of society, we can distinguish two types of structure: (1) coercive structure, and (2) noncoercive

18 Rawls (1999: 47).

19 Cohen (2000: 134-5).

20 The fundamental reply can be found in Cohen (2000: 136-142).

structure. Coercive structure is constituted by the broad formal rules, laws and policies of society.²¹ Noncoercive structure is a framework of informal ‘rules’, “convention, usage, and expectation”.²²

Cohen maintains that there is some ambiguity in Rawls’s conception of the basic structure as to whether it includes only coercive structure or both coercive and noncoercive structure. At times, Rawls considers only “the *broad coercive outline*” of society as part of the basic structure but in other descriptions of the basic structure he includes all major social institutions, such as the family.²³ Cohen claims that if institutions such as the family are included as part of the basic structure then the basic structure cannot be defined merely as coercive as the structure of the family is mainly noncoercive: it is guided primarily by convention rather than by formal laws and policies. Not only does Rawls at times seem to include noncoercive structure as part of the basic structure, Cohen argues, his reason why the basic structure is the primary subject of justice determines that noncoercive structure *should* be part of the basic structure.

In chapter I, we identified that one of the reasons that Rawls has for why the basic structure is the primary subject of justice is because “its effects are so profound and present from the start”.²⁴ Cohen argues, however, that the effects of noncoercive structure are also ‘profound and present from the start’. If we are concerned about the effects of the justice of coercive structure on

21 Cohen (2000: 137).

22 Cohen (2000: 137).

23 Cohen (2000: 137).

24 Rawls c.f. Cohen (2000: 138).

individuals' lives, we should also be concerned about noncoercive structure. This means that if the basic structure only includes coercive structure, it is arbitrary: if the basic structure is the primary subject of justice because of its effects on individuals' lives there seems no good reason why only part of such structure should be included as part of the scope of the principles of justice. So, to avoid arbitrariness, the basic structure should include noncoercive structure. Once noncoercive structure is included as part of the scope of justice, Cohen argues, then choice needs to be included as well.

Noncoercive structure, Cohen claims, although conceptually distinguishable from choice, is partially constituted by chosen behaviour; this structure is what it is because of the behaviour of individuals.²⁵ By choosing to act according to the conventions of noncoercive structure, an individual sustains that convention and puts social pressure on other individuals to act in a similar way. One can say that it is the convention itself that pressurises individuals to conform, but that convention only exists because of conforming behaviour:

*When A chooses to conform to the prevailing usages, the pressure on B to do so is reinforced; and [when] no such pressure exists, the very usages themselves do not exist, in the absence of conformity to them.*²⁶

So, for example, in a society where it is common for the talented to receive material incentives (we can call this a society with an acquisitive ethos), and thus where there is an expectation or convention of incentives, this convention can only be sustained *by* the demand for material incentives. The convention,

²⁵ Cohen (2000: 137-140).

²⁶ Cohen (2000: 138).

which we can say is part of the noncoercive structure of that society, and the choices of the talented to demand incentives are not easily distinguishable because if there was no demand, there would be no such convention. Thus if we want to tackle the justice of the convention, then we would need to tackle the justice of personal choice. If the basic structure includes noncoercive structure, and it must do so Cohen argues if it is not arbitrary, then the basic structure includes choice, and thus principles of justice that apply to the basic structure must apply to both the formal rules of institutions and to the choices made within them. If we only apply the institutional principles of justice to coercive structure, choices, such as the demand for material incentives, which could lead to severe inequalities in the distribution of social goods, would be consistent with justice, and yet how can we accept maximizing economic choices, or other choices which violate the principles of justice, if our aim is to achieve distributive justice?

According to Cohen, one doesn't even need to agree that choice is (at least partially) constitutive of noncoercive structure to agree that choice could be evaluated according to the principles of justice. Cohen claims that merely acknowledging that choice has 'profound and pervasive effects' on the lives of individuals would mean that we should apply the principles of justice to choice, because if choice affects the distribution of social goods then we should be concerned with making it fair.²⁷

²⁷ Cohen (2000: 138).

Thus according to Cohen the basic-structure objection cannot stand: it makes no sense to apply the principles of justice only to coercive structure and not to personal choice as (1) choice determines noncoercive structure, and noncoercive structure partially determines the distribution of social goods, and (2) choice has ‘profound and pervasive effects’ on individuals’ lives, which influences the justice of their lives. Justice, thus, is a function not only of fair rules but also of fair personal choice.

3. Defending the personal choice argument: Cohen, personal choice and informal social equality

In this section, focusing particularly on the example of the family, I defend Cohen’s general claim that personal choice should be included in the scope of justice. Including personal choice and an egalitarian ethos as requirements for justice receives significant support from the notion of social equality which demonstrates an important overlap between informal social equality, which includes personal choice, and distributive justice.

3.1. The significance of personal choice for justice

In chapter I, I explained that we could describe the application of the institutional principles of justice in three ways: (1) they apply directly to the basic structure, (2) through the direct application to the basic structure, they apply indirectly to institutions themselves and to individual behaviour and (3) they apply as an evaluation of the outcome of the direct and indirect

application. If we were to agree with Cohen that personal choice should be included what we would be saying is (i) that these applications of the institutional principles do not address (or do not properly address) noncoercive structure and personal choice and (ii) that this failure to address these is relevant to broad distributive justice (justice cannot be properly achieved without addressing the justice of noncoercive structure and personal choice). Thus we would be saying that the application of the institutional principles described above is not sufficient for achieving justice. I believe that in this case Cohen is right. In the previous chapter I explained that applying the institutional principles to the basic structure does not address informal justice. Using the extended example of the problem of justice and equality in the family, we can elaborate on why this is an issue of justice, and thus lend support to the first part of the personal choice argument, the claim that personal choice affects the distribution of social goods.

In chapter I, I argued that although Rawls includes the family as part of the basic structure, this inclusion is not only confusing but indeed misleading: when we analyse what is meant by the basic structure we find that only the public rules that regulate the family are included in the basic structure and that the principles of justice apply directly only to these rules, through, for example, the constitution and through legislation, and thus the family, as a whole and as a separate institution, is not actually part of the basic structure. This then means that the institutional principles do not apply (directly) to the family and thus they do not apply to personal choice within the family. This is consistent with general claims that Rawls has made, in which he states that the

principles of justice do not apply to individuals, and to more specific claims he has made about the family, in which he argues that the principles of justice constrain the family by, for example, providing legal equality to all adult members of the family, but which do not apply to its “internal life”.²⁸ So, according to Rawls the institutional principles of justice should not apply to choice in the family.

Returning to Cohen’s argument, we can say that what Cohen would be saying is something like this: the principles of justice should not only apply to the public rules regulating the family as the choices that occur within the family impact on the fairness of distribution because of (1) the profound and pervasive effects of certain choices, and because (2) the choices made within the family are constitutive of family structure.

In chapter III, I discussed the problem of the gendered division of household labour for Rawls’s justice: although Rawls seems to concede that an involuntary gendered division is a problem, the application of the institutional principles to the basic structure neither demonstrates why it is a problem nor provides us with an account of justice in household labour. Let’s examine the implications of Cohen’s critique of Rawls on this example of injustice in choice.²⁹

28 Rawls (2001d: 163).

29 Cohen (2000: 139) also uses the example of the injustice of a gendered division of household labour. Unlike his argument from incentives, however, he does not explicitly explain the injustice involved in sexist family structure. Like Andrew Williams (1998: 230, fn. 18), I have to infer some of Cohen’s argument.

The female members of a household often have a much greater burden of household labour than male members: this is true usually of both the adult females and female children (for example, mothers are expected to spend more time looking after the children than fathers, and girls are expected to do more household chores than their brothers). In a state where the division of household labour is not regulated through legislation, who does what in the household is a matter primarily of (1) choice and (2) convention (although this is not to deny that such choice and conventions are also influenced by policy, such as a wage for housewives or day-care funding).

Although it would be difficult to find a contemporary liberal theorist who would condone norms that direct women to bear a greater burden of domestic duties, if we define justice as the application of institutional principles to the basic structure, understood as coercive, we could not claim that this division of labour implicit in family structure is unjust because this application is not meant to apply to choice or convention. According to only the application of the institutional principles of justice to the basic structure, if women are pressurised through expectation or social coercion to do a greater share of household labour, this is not unjust.

We should, however, agree that choice (and convention) be part of the scope of justice when we consider how an unfair gendered division of household labour can affect the distribution of opportunities. Let us say that both a man and a woman in a family have full-time employment which takes up the same amount of time and requires the same levels of productivity and the man

chooses not to share in the domestic tasks. His choice, we can say according to Cohen, (1) contributes to maintaining (and creating in the first place) an unfair division of labour within specifically that household, and (2) contributes to maintaining the social norm that would pressure other individuals to conform to that division of labour.

According to the first claim we can say that his choice is unjust because of its ‘pervasive and profound effects’ as, let us say in this case, the division of labour interferes with the woman’s opportunities: she is unable, for example, to dedicate the extra time she would have if her husband shared the domestic tasks to studying or to furthering her career. According to the second claim, the man’s choice is unjust because his choice is constitutive of noncoercive structure: it helps to sustain a convention of an unfair division of household labour. Here we could say that this convention could pressurise both (i) individuals within his household (for example, his children could be pressurised into sustaining this division of labour in their own households) and (ii) individuals in entirely separate households who could be influenced because his choice helps to sustain a social convention. This could be judged to be unjust on the same grounds as claim (1) as the continuation of this social pressure interferes (or contributes to interfering) with the fair equality of opportunity of the women affected.

This does not mean, however, that justice and choice is only a problem when it comes to the household division of labour in the family nor that this is a problem of the family as an institution alone. Within the family, much

individual behaviour can disadvantage members. For example, female children in a family may be denied education or resources, and both female children and adults may be treated as inferior or marginalized (in decision-making procedures, for example) in ways which are not subject to formal rules or the law. Furthermore, the family is not a unique institution when it comes to its relationship between justice and choice. Many institutions and associations such as churches, firms, and universities have a legislative or formal side and also an informal noncoercive side, where norms and choice influence behaviour. For example, in a firm, although government policies may prohibit discrimination in hiring and promotion procedures, much scope is left open for personal choice that could marginalize and disadvantage black employees. The influence of choice on justice has wide application.

3.2. Informal social equality

Clearly there is an overlap with Cohen's argument and my claims about the problem of informal social equality. In chapters II and III, I argued that the aspect of social equality that is (at least) not addressed by formal equality, legislative fair equality of opportunity and the principles of narrow distribution is the informal, the realm of personal choice and associations, where choices and rules are left open to individuals and groups of individuals to decide. In these cases, the law and schemes of narrow distribution have nothing to say about the behaviour of individuals and associations, even though that behaviour influences the distribution of opportunities and the social basis of self-respect. Injustice, however, is suffered when individuals

are denied social goods even where this occurs through personal choice. So social equality, and thus justice, cannot be fully addressed without considering its informal, rather than merely its economic, political or legal bases. What is missing from descriptions of ideally fair societies is the notion of an egalitarian ethos which would inform and evaluate personal choice and motivate individuals to make fair choices. In order to then describe such an ethos, we need to identify measures that can be used as standards to evaluate the justice of personal choice. Here the argument from informal social equality coincides with Cohen's claims and echoes the first two parts of the more general PCA: (1) personal choice affects distributive justice and (2) principles of justice should be applied to personal choice.

This does not mean, of course, that it is necessary to buy into the notion of social equality in order to recognise that principles of justice should be applied to personal choice. Furthermore, as Cohen does not use the notion of social equality, clearly his argument does not rest on it. One can agree that distributive justice requires justice in personal choice purely on the basis that, if personal choice affects distribution then, if we aim at describing a fair distribution, we should include a description of justice in choice. What the notion of social equality does, however, is provide further ammunition for the personal choice argument by demonstrating an important and yet neglected area, informal social equality, where personal choice and justice overlap particularly.

More importantly, however, the description of social equality becomes especially necessary because it provides us with an explanation of what it is that we are looking for in order to describe personal choice as fair. I identified social equality with three primary values, respect-for-persons, civility and toleration. These need to be upheld institutionally and individually in order to achieve (1) a society of equals, and, where violations of social equality coincide with unfair distribution, (2) justice. Thus choice would be fair if it upheld respect-for-persons, civility and toleration. The significance of identifying these values will become clearer in the next section where I criticise the personal choice argument. Social equality's description of justice in personal choice will help to provide what I believe is a preferable alternative to Cohen and the PCA's claims that *institutional principles* of justice should apply to personal choice.

4. Which measures for justice in personal choice? The problem of the institutional principles

In the first section of this chapter I summarised the personal choice argument as having three components:

1. Personal choice affects the distribution of social goods.
2. Therefore, we need principles of justice to evaluate personal choice.
3. The same principles that are used to evaluate the justice of institutions should be applied to personal choice.

Both the proponents and critics of the PCA seem to assume that statements 2 and 3 are equivalent. I believe, however, that the personal choice argument is successful only when it comes to statements 1 and 2. The weakness of the argument lies in claim 3. In this section, I will explain why I believe that Cohen and Murphy fail to demonstrate that we should use the same principles of justice to judge institutions and personal choice. They fail to consider other principles of justice which could be applied to personal choice. As long as personal choice is addressed sufficiently by *some* measures of justice, it does not seem appropriate to use the institutional principles to judge personal choice.

4.1. Cohen and the basic-structure objection

In chapter III, I claimed that the application of the institutional principles to the basic structure, as is, is not sufficient for distributive justice. This is because it neglects the influence of informal social equality on the distribution of goods. This is where Cohen's claims and the argument from social equality coincide. What I do not agree with, however, is that this means that we should apply the institutional principles of justice to personal choice. The problem with Cohen's interpretation of Rawls is that he does not differentiate between whether Rawls's argument should include personal choice as part of the scope of justice (I agree with Cohen that it should) and whether Rawls's institutional principles can and should be applied to individuals (here Cohen fails to convince).

Cohen's argument that the institutional principles of justice should apply to choice rests on the claim that it is a stipulation of *Rawls's* conception of justice that individuals need to act upon the principles of justice and Cohen takes this to mean that they must apply these principles in their everyday life. He quotes Rawls: "Citizens in everyday life affirm and act from the first principles of justice" and "They act from these principles as their sense of justice dictates' and thereby 'their nature as moral persons is most fully realized'".³⁰ Of course, Rawls explicitly denies that the institutional principles apply to individuals: "[t]he principles of justice should not be confused with the principles which apply to individuals and their actions in particular circumstances".³¹ This is where the basic-structure objection comes in: according to this objection, the principles of justice apply solely to institutions and not to personal choice.

Now, if the basic-structure objection is formulated to say that one shouldn't apply *any* principles of justice to personal choice, then I agree with Cohen that it is wrong. However, we could formulate a more particular basic-structure objection which claims that *the institutional principles of justice* should only be applied to institutions and not to personal choice. Cohen's response does not address the basic-structure objection in this form. He claims that it would be arbitrary to apply the principles of justice only to institutions and not to personal choice as both justice in choice and justice in institutions are necessary for achieving distributive justice. However, it is only arbitrary if *no* principles of justice or insufficient principles are applied to personal choice.

30 Cohen (2000: 207, fn 28).

31 Rawls (1999: 47).

According to Cohen's account, Rawls is wrong when he says that the institutional principles do not apply to individuals because he seems to believe that fair personal choice and the application of institutional principles to choice are inseparable. One could agree, however, that you need justice in choice (because, for example, you are convinced of the need to achieve social equality) and still agree with Rawls that the institutional principles should not apply to choice. There are two main reasons why I am making this distinction: (1) it does not follow from the claim that choice should be included in the scope of justice that the institutional principles of justice should necessarily be applied to choice and (2) Rawls's conception of justice can be read to be consistent with the claim that we need to address justice in choice but that we should not apply the institutional principles to personal choice.

(1) By arguing that personal choice should be included as part of the primary subject of justice Cohen has demonstrated that *something like* the institutional principles of justice should be applied to individual behaviour; however he has not demonstrated why specifically these principles should be applied directly to choice. As long as we recognise that justice in noncoercive structure is needed, then we can agree with Rawls that we should not apply the institutional principles of justice to individuals, and we could apply principles other than the institutional to individuals instead.

(2) A further problem with the application of the institutional principles to choice is that this is inconsistent with aspects of Rawls's justice, whereas

acknowledging that personal choice should be addressed as part of distributive justice but not applying the institutional principles to individuals could be consistent, if we accept what I have called the extensive understanding of the principles of justice. According to this interpretation of Rawls's justice, the institutional principles are not necessarily the only principles responsible for distributive justice thus principles besides the institutional could be used to evaluate or determine distribution, including principles specifically designed to evaluate the justice of personal choice.

Let us say that we accept, as I believe we should, Cohen's claim that personal choice needs to be included in the scope of Rawls's justice. After this recognition, our next step would be investigating how to do so. Cohen's solution is to appropriate the institutional principles of justice and use them to judge the justice of personal choice. Thus personal choice should be judged according to whether it conforms to the institutional principles: for example, when the talented demand incentives we should judge whether their demands are fair by evaluating them according to the difference principle, and thus according to whether those demands are necessary to benefit the worst-off. However, this is a direct contradiction of Rawls's claims that such measures for justice should not be applied to individuals. Cohen does not consider an alternative which does not seem to contradict this claim: measures other than the institutional principles could be used to judge the justice of choice and could be incorporated into our descriptions of what a fair society would be like.

4.2. Murphy and the problem with monism

Whereas Cohen claims that, at least within a Rawlsian framework, *Rawls's* institutional principles should apply to personal choice, Murphy makes a slightly different claim. He argues that the same fundamental normative principles that apply to institutions should also apply to personal choice.³² I agree with Murphy that the same sort of fundamental ideal, such as equal respect and concern, will underlie principles of justice for institutions *and* principles for individuals. Within a cohesive theory of justice, we could say that the 'spirit' of these measures would be the same but this does not mean that the same principles should guide both.

Like Cohen, Murphy seems to conflate the problem of having no or insufficient principles for individuals, with the notion of having different principles for institutions and individuals. He refers to any form of dualism, the view that we should have different fundamental principles of justice for institutions and for individuals, as "implausible precisely because they have us aim at the good of institutions rather than at the good institutions can best do".³³ Yet, I do not understand why claiming that there should be different principles of justice should commit one to the view that there should be insufficient principles of justice for individuals for addressing justice in choice. Why is it infeasible in Murphy's view to have two different sets of principles, principles for individuals and principles for institutions, where the principles for individuals *do* address the justice of personal choice?

³² Murphy (1999: 251).

³³ Murphy (1999: 272).

The problem seems to be that Murphy is setting up dualism in such a way that makes it difficult not to agree with monism, as long as you accept that justice in personal choice is necessary. It fails thus to provide a fair comparison between monism and dualism. If monism claims that fundamental normative principles which apply to institutions, should also apply to individuals, then dualism should be the claim that different principles apply to institutions and individuals, not the claim that only principles which do not address justice in choice apply to individuals (although such a claim might be a particular form of dualism). Yet Murphy, as we have seen, seems to define dualism as necessarily deficient.³⁴ Murphy's argument, however, would not apply so strongly against a different form of dualism which would apply different principles to both institutions and individuals, and which would apply principles to choice which would address Cohen and Murphy's problems with the neglect of justice in personal choice.

Murphy may claim that I am missing the point, and that actually our views about personal choice and principles of justice coincide: his emphasis is that the same *fundamental* principles need to apply to institutions and individuals, although practically there would be different subsidiary principles. Thus perhaps we could say that the different principles applied to institutions and individuals which I seem to be advocating are merely practically different and that they rely on the same underlying fundamental principle.³⁵ Murphy, however, implies that Rawls's principles of justice are fundamental which

34 See also Murphy (1999: 265-6).

35 Murphy (1999: 254) admits that there are different practical principles which apply to personal choice and institutions.

means that if you agree that the institutional principles should be applied to institutions, then according to Murphy, you should agree that they also apply to personal choice. Yet it is with this that I take issue. I believe that either Murphy has to let go of the notion that Rawlsian principles are fundamental or he has to let go of the notion that we cannot have different fundamental principles of justice for individuals and institutions. My response to Murphy resembles my response to Cohen: as long as we have other principles to apply to individuals which will take care of the justice of personal choice then we do not need to apply institutional principles to personal choice.

4.3. Why we should not apply the institutional principles to personal choice

I have argued that Cohen and Murphy have not shown that we need to use Rawls's institutional principles to apply to personal choice. I agree that something needs to apply to personal choice but I fail to see why it has to be the institutional principles. We can go further than this, however, and question why it would be desirable to apply these principles to individuals. In this section I will discuss four reasons why it is not desirable to apply the institutional principles to personal choice. I do not believe that these reasons demonstrate that there could never be a good argument in favour of this form of application, thus I do not consider them to be conclusive. My aim in this section, however, is to demonstrate that (i) Cohen and Murphy are not convincing on insisting that the same principles applied to institutions should

be applied to personal choice and (ii) there are good reasons for not applying the institutional principles:³⁶

(1) The institutional principles have been designed specifically to apply to institutions. Surely we should design a solution to the problem of justice in personal choice that is specifically geared towards individuals and not institutions? Simply appropriating the institutional principles of justice, as is, to guide individual behaviour is problematic because they were designed to apply to institutions, and as such we will struggle to make them fit properly as guides for individual behaviour. At a minimum, we cannot assume that they *do* apply readily to individuals and this is precisely what Rawls claims:

if one supposes that the concept of justice applies whenever there is an allotment of something rationally regarded as advantageous or disadvantageous, then we are interested in only one instance of its application. There is no reason to suppose ahead of time that the principles satisfactory for the basic structure hold for all cases.³⁷

Murphy might argue that if we were to start from the drawing-board, and perhaps he would argue that we *should* start from the drawing-board precisely because Rawls's principles were designed for institutions, we should design principles from scratch that would apply to both institutions and individuals.³⁸

The point, however, is not merely that Rawls's principles for institutions are probably inappropriate to apply to individuals but that *any* principles made to

36 These are enough for my purposes in this chapter which is to lay the groundwork for providing an alternative to the PCA. I will discuss this alternative in the next chapter.

37 Rawls (1999: 7).

38 Murphy (1999: 262-4), as I mentioned, claims that a principle of weighted beneficence could be applied to both institutions and individuals.

design and regulate institutions would probably be unsuitable for individuals. Murphy could concede, as I mentioned in the previous section, by claiming that these different principles are then not fundamental and that some more fundamental principles underlie both sets of principles. As such I would be likely to agree with him but then his claims would provide no objection to mine.

(2) One of the reasons why Rawls claims that justice cannot be achieved solely through the application of rules to particular transactions is because the principles of justice are too complex to be applied to particular transactions. Although Rawls uses this claim as an argument against using rules of justice based on particular transactions as sufficient for justice, we could use the same claim for why the institutional principles of justice should not be applied to individuals. Let us say that an individual is directed by Cohen's egalitarian ethos to conform to the difference principle. Surely in many cases it would be very difficult, if not impossible, for this individual to work out which choices would benefit the worst-off. Rawls uses bequests as an example:

Individuals and associations cannot comprehend the ramifications of their particular actions viewed collectively, nor can they be expected to foresee future circumstances that shape and form present tendencies... It is obviously not sensible to impose on parents (as heads of families) the duty to adjust their own bequests to what they estimate the effects of totality of actual bequests will be on the next generation.³⁹

³⁹ Rawls (1993: 268).

If the difference principle, however, is only directly applied to the basic structure, and thus it is not expected to be applied to individuals or particular cases, then there is no need for individuals or associations to attempt to calculate what will benefit the worst-off as the basic structure of society has been ‘rigged’ to help the worst-off: “Once this division of labor is set up, individuals and associations are then left free to advance their (permissible) ends within the framework of the basic structure, secure in the knowledge that elsewhere in the social system the regulations necessary to preserve background justice are in force”.⁴⁰

(3) It is not merely, however, that the effects of the institutional principles applied to particular transactions are difficult for individuals to calculate; they could be self-defeating. Van Parijs asks us to imagine that if a manager had to take the difference principle into account when she had to hire a new employee, it would seem that she would have to employ the person who most needed the job but who was also “likely to be the least employable, the least productive among the applicants”.⁴¹ This would become self-defeating as a decrease in productivity will hamper, not benefit, the worst-off in society:

Surely this inference from the maximin at the macro-level to maximin at the micro-level is spurious, as the latter, when consistently practiced, is bound to undermine the former, by gravely impairing the economy’s performance, and hence making the best material condition that can sustainably be granted to the worst off considerably worse than is necessary.⁴²

40 Rawls (2001i: 54).

41 Van Parijs (1999: 119).

42 Van Parijs (1999: 119-120).

If individuals and associations were expected to apply such principles to their decisions and behaviour, the worst-off could be further disadvantaged.

(4) A last problem with applying the institutional principles to personal choice is that they would not be sufficient to address certain injustices in personal choice. The previous two problems identified with the institutional principles, that they are too complicated for individuals and that they could be self-defeating, apply particularly to the difference principle. Cohen could argue, however, that fair equality of opportunity is more clearly applicable to individuals. Indeed when I described the problem of the gendered division of household labour, I described its injustice in terms of a violation of fair equality of opportunity and thus it seems that there is a clear case here for applying such an institutional principle to choice.

Although I agree that applying the institutional principle of fair equality of opportunity to individual behaviour would, at times, cover certain injustices in personal choice, and for that matter, certain violations of social equality, this does not provide sufficient reason for claiming that the solution to the neglect of justice in personal choice is that we should apply the institutional principles to individuals.⁴³ Besides problems with other principles, such as the ones just highlighted with the difference principle, even if we had to modify the claim and say that the solution is to apply only fair equality of opportunity to choice,

43 Furthermore, recognising that choice affects the distribution of opportunities is not necessarily to judge choice directly by the principle of fair equality of opportunity. It could be justified instead according to Rawls's (1999: 79) list of primary social goods which need to be distributed fairly and which includes opportunities.

this would still not cover all of the injustices caused by personal choice. A significant omission would be injustices caused by interferences with self-respect.

If you accept that the social basis of self-respect is a good that needs to be distributed fairly in order to achieve justice and you accept that self-respect has an informal basis which should also be a concern of justice, which I have argued is the case, then it is difficult to see how the application of any or all of the institutional principles to personal choice will resolve problems with the distribution of the informal basis of self-respect. None of the institutional principles are geared to resolving injustices caused through people's attitudes to each other such as for example through biases, stereotyping, derogatory or abusive language, and avoidance and exclusion, and yet it is these, among others, which affect self-respect. The solution we need to the problem of injustice in personal choice should address not only informal fair equality of opportunity but also self-respect; as such applying the institutional principles to personal choice does not seem to be a sufficient solution.

A similar rejoinder could be formulated to a potential counter-claim from Murphy. He could concede that at times it is problematic to apply the institutional principles to choice but where it is not too complicated and where it is not self-defeating, we should judge choice according to the difference principle. Consider his claim that sometimes it is clear that acting according to the difference principle, rather than supporting fair institutions, is more likely to benefit the worst-off:

it could not be right that an individual rich First Worlder is required to devote her resources to the Quixotic task of promoting just international institutions. Such a person could clearly do so much more to alleviate suffering or inequality by doing what she can on her own – by giving money to humanitarian aid agencies.⁴⁴

It is preferable, however, that the solution to justice in choice should be consistent. For example, we should judge choice according to social equality, or according to the institutional principles, or some such consistent standard and not piecemeal by a standard which is sometimes applicable and sometimes not, particularly as such inconsistency would, on a practical level, only increase the complexity and confusion of an individual's decisions. Thus although fair equality of opportunity and the difference principle sometimes seem to be applicable to individuals' choices, we would do better to address justice in choice if we used a standard of justice which could be applied reliably, not erratically, to choice.

5. Revising the personal choice argument

I have claimed that I agree with the first two statements of the PCA:

1. Personal choice affects the distribution of social goods.

⁴⁴ Murphy (1999: 281).

2. Therefore, we need principles of justice to evaluate the justice personal choice.

As the reasons presented by Cohen and Murphy for applying institutional principles to personal choice are unconvincing and as there are reasons why we should not apply these principles to choice, I am going to present a revised version of the PCA which will not include the third claim of the original argument. Instead I will substitute it for this:

3. Injustices in choice will not occur or are less likely to occur if social equality is upheld

4. Therefore, we should apply principles which aim to uphold social equality to choice in order to evaluate the justice of choice.

These four statements are what I will refer to as the revised personal choice argument. A qualification is necessary: I am not claiming that principles which uphold social equality are the only option; perhaps some other principles would be able to achieve justice in personal choice. My concern is to provide an alternative to the problem of justice in choice, not to present such an alternative as definitive.

In the next section I aim to show that this revised argument avoids some of the objections aimed at the original argument. Of course, I have not explained in detail yet what these principles of social equality are, and as such they may still need to be defended from objections. Much will depend on the content of

these principles, and in the next chapter I will explain this content and defend it from objections. For the time being it is sufficient for me to demonstrate that many objections to the PCA are usually only applicable to its original form, and particularly to the claim that the difference principle should be applied to individual behaviour.

6. Defending the revised personal choice argument from objections

In this section I aim to address objections to the personal choice argument. I will focus on the prerogatives argument, the publicity condition argument and Thomas Pogge's criticism of Cohen and Murphy. I aim at demonstrating that these objections do not show that personal choice should not be a subject of justice. At times, I will be defending both the original personal choice argument and my revised personal choice argument. However, mostly, I will demonstrate that criticisms levelled against the PCA only apply to its original version: in these cases, the revised personal choice argument does not seem to be subject to the same objections. This is because many or all of the objections raised by critics such as Andrew Williams (the publicity condition argument) and Pogge are directed at statement 3 of the original PCA, i.e. that the same principles of justice that apply to institutions should be applied to personal choice. Thus as the revised PCA rejects this claim, it is not subject to these objections.

6.1. The prerogatives argument

The real question is not whether a person has a right to a private space but what its shape should be.⁴⁵

The prerogatives argument could apply to both the original and the revised PCA. Here I will respond to this argument as an objection aimed at Cohen's incentives argument, however, this defence could also apply in general to other forms of the personal choice argument.

The prerogatives argument is centred on the claim that personal choice that violates the demands of justice can be justified by inequalitarian but acceptable prerogatives.⁴⁶ Cohen accuses the talented of selfishness in their demands for incentives. Surely, the prerogatives argument goes, we can justify incentives according to individuals' own commitments and projects which form an integral part of their lives, and which would be difficult to reduce to pure material selfishness, or according to an individual's commitments to loved ones and dependants, commitments which are clearly not motivated by acquisitiveness? Perhaps I demand material incentives because I want to pay for a life-saving operation for my mother or I demand incentives in order to fund my child's education. If Cohen denies the acceptability of these prerogatives, the 'rightness' of an individual's economic choices becomes a function solely of whether or not they benefit the worst-off. This, the prerogatives argument claims, is too demanding. Furthermore, this violates our understanding of common-sense morality: Cohen would then place too

45 Cohen (2000: 168).

46 My formulation of the prerogatives argument is based on David Estlund (1998), Norman Daniels (2003) and Pogge's (2000) critiques of Cohen's stance.

great an emphasis on justice and the needs of the worst-off to the detriment of common-sense prerogatives to pursue self-interest and the interest of friends, family and loved ones: “Unless it recognizes a range of prerogatives, Cohen’s radicalised Rawlsianism would, to a notable degree, subordinate the concern for one’s brother, sister or spouse to the concern for one’s very badly off fellow citizen”.⁴⁷

A first response to this claim is that not only is denying prerogatives not a logical consequence of judging personal choice according to justice, Cohen actually explicitly endorses at least one prerogative: he claims that he is not “an extreme moral rigorist”, meaning that he agrees that “*every person has a right to pursue self-interest to some reasonable extent (even when that makes things worse than they need be for badly off people)*”.⁴⁸ Thus recognising that personal choice should be included in the scope of justice is not necessarily too demanding nor does it defy the precepts of common-sense morality by subordinating concern for oneself and one’s loved ones to concern for the worst-off. In response to Cohen’s argument, Norman Daniels claims “A commitment to fair equality of opportunity and the difference principle as principles of justice should not require us to shape our plans of life so the pursuit of the goals of those principles become our primary motivations”.⁴⁹ Sounds like a terrible idea: having to shape your life plans according to fair equality of opportunity and the difference principle. I am unsure though what it has to do (necessarily) with Cohen’s position or any version of the personal choice argument, which does not have to deny prerogatives.

47 Estlund (1998: 106).

48 Cohen c.f. Williams (1998: 227, fn. 7).

49 Daniels (2003: 271).

In response, the prerogatives argument could claim that although Cohen explicitly acknowledges prerogatives, incorporating recognition of prerogatives into Cohen's argument is inconsistent because once prerogatives are accepted, Cohen cannot demonstrate that incentives are unacceptable because they can be justified by prerogatives. This response misses the point, however. Cohen's claim is that incentives are unjust not that they are unjustifiable: justifying incentives on the basis of prerogatives may even make incentives acceptable but they do not make them fair. It is important to make a distinction between the claim that the talented *should not* demand incentives under any circumstances and that incentives are unjust: Cohen, I believe, has only aimed at demonstrating the latter and not the former. Thus his claim is that we should be able to judge the justice of personal choice but this should not necessarily mean that unjust personal choice is always prohibited: Cohen has not argued that the justice of personal choice should always be the deciding factor in choice.

A further rejoinder from the prerogatives argument could be that there *is* something necessarily incompatible with accepting both judgements of personal choice from the standpoint of justice and from the standpoint of prerogatives because these values underlying personal choice compete and the competition that justice affords prerogatives undermines prerogatives. This, however, cannot be an argument against judging choice according to justice as, whether or not we recognise justice as a value which should motivate choice, the values that do motivate choice are multiple and often do conflict.

Think, for example, of Thomas Nagel's list of motives behind choice. He argues that there are five fundamental types of value that give rise to conflict: obligations to people and institutions, constraints on action from rights, utility, perfectionist ends, and an individual's own projects.⁵⁰ It cannot be an argument against a value that there are other values with which it competes (and even if it were, it is not then self-evident why justice should be sacrificed. At least some explanation would have to be given about why prerogatives trump justice).

A further response then from the prerogatives argument could be that Cohen fails to provide us with guidelines for what to do when justice does compete with prerogatives; he fails to provide us with guidelines as to under which circumstances, justice should prevail in personal choice. This may be true. However, this is evidently not a refutation of Cohen's claims but rather a call for extension or for further research. It does not demonstrate that Cohen's argument fails as it does not demonstrate that incentives are fair nor that personal choice should not be included in the scope of justice.

6.2. The publicity condition argument

A further argument claims that the problem of prerogatives is really a problem of publicity: as prerogatives could justify certain inegalitarian choices, the injustice of market choices is not open to the publicity condition. Publicity, however, is a requirement of justice and thus applying the difference principle

⁵⁰ Nagel (1979: 129-130).

to choice should not be included in the scope of justice. This is the publicity condition argument. A proponent of this argument is Andrew Williams.

Williams argues that Cohen's reply to the basic-structure objection rests on identifying the basic structure with legal coerciveness. Cohen defines the basic structure according to its legal coerciveness, and Williams claims that it is because Cohen identifies the basic structure with this intrinsic property that limiting the principles of justice to the basic structure seems arbitrary.⁵¹ If, however, you identify the basic structure with a different intrinsic property then, Williams argues, Cohen's response to the objection no longer holds.

Williams claims that the defining intrinsic feature of the basic structure is that it consists of public rules: "the structure comprises those actions which realize public rules in a way that exerts profound and unavoidable influence on individuals' access to social goods".⁵² The problem with an egalitarian ethos which motivates market choice is that it cannot be public in the requisite way, mainly because it is too "informationally demanding".⁵³ Williams argues that acceptable prerogatives which could justify market choices are often too complex and vague to be publicly scrutinised and thus "it is highly improbable that Cohen's favoured ethos could be represented as an institution embodying public rules... Instead the ethos appears to lie outside the basic structure".⁵⁴ A market ethos then fails to fulfil the publicity condition and thus, according to Williams, it cannot be a requirement of justice.

51 Williams (1998: 231).

52 Williams (1998: 234).

53 Williams (1998: 241).

54 Williams (1998: 241).

To explain this problem, let's take the example of Pauline. Pauline is about to be promoted from a human resource officer to the human resource manager in a large company. Although this position does not require extra work or extra time, she demands a substantial increase in salary to accompany the promotion. We can imagine that Cohen might argue that Pauline's demands would be unjust. Receiving a salary substantially higher than average is not necessary for benefiting the worst-off. If Pauline was motivated by an egalitarian ethos, she would choose to work for an average salary, and this would be the fair choice. The publicity condition argument could claim something like this in response: Pauline's choice could be motivated by an acceptable prerogative but as we cannot know why she is demanding this incentive, the ethos that motivates her choice fails to live up to the publicity condition, and thus does not fall under the scope of justice. As Williams claims:

some choices, although they may be profoundly influential, cannot be regarded as according with, or violating public rules. Consequently the nonpublic strategies and maxims that individuals employ in making those choices need not be assessed as just or unjust by means of Rawlsian principles.⁵⁵

Stated so far, the publicity conditions argument seems circular. If the question is 'why should we apply principles of justice only to the basic structure and not to personal choice?', then it seems circular that the answer should be a definition of the basic structure, i.e. 'because the basic structure comprises

55 Williams (1998: 234).

public rules and personal choice does not'. It is as if we are answering the question 'why should we only apply principles of justice to public rules?' with the answer 'because the basic structure is comprised of public rules'. This answer assumes something about the relationship between justice and public rules which is not yet explicit: it needs to be explained why publicity is a necessary condition of justice and thus why, if an ethos cannot fulfil the publicity condition, it should be considered to be outside the ambit of justice. Williams' answer is that a conception of justice which fulfils the publicity condition is necessary to achieve Rawls's ideal of social unity. Social unity means that a society is well-ordered, and Williams claims that according to Rawls, a society can be "well-ordered only if it is regulated by a conception of justice that is both *public* and *stable*".⁵⁶ To complete the argument without circularity then, we can say that social unity requires a conception of justice that fulfils the publicity condition, and thus, as a market ethos does not fulfil this condition, it cannot be a requirement of justice.

Three primary responses are potentially open in defence of the original personal choice argument:

- (1) claiming that a market ethos that motivates personal choice does fulfil the publicity condition,
- (2) denying that that the publicity condition is a requirement of justice,
- (3) denying that social unity requires a conception of justice that is public.

⁵⁶ Williams (1998: 244).

I believe that option 2 might be able to defend the original PCA from this objection. I will briefly explain why I believe it has this potential but then I will turn to what I believe is a more pertinent point: that the publicity condition argument does not pose an objection to the revised personal choice argument and, indeed, it seems that Williams might actually endorse this revised argument.

In defence of the original PCA, one could argue that a publicity condition is an unfeasibly strict condition of justice and as such should not be a condition of justice. To illustrate, take an example from fair employment procedures: as a manager in a company looking to employ a new member of staff, I am not supposed to discriminate among the candidates on the basis of their race. Conceivably, however, I could choose not to hire a black candidate because she is black and yet feign to justify my choice on the basis of seemingly fair standards. An outsider judging this situation may not know what my motivations are and indeed, due to deep-seated unconscious prejudices and the conventions in my social environment, I may not even know that I have discriminated against this candidate, however the lack of publicity in this situation does not mean that such discrimination is not unjust nor could it mean that we should not aim towards non-discrimination as a matter of justice merely because some examples of discrimination are hidden or inscrutable or some such thing.⁵⁷

⁵⁷ Michael Otsuka (2006, forthcoming) emphasises a similar point in his article 'Prerogatives to Depart from Equality'.

Whether we are able to scrutinise motives does not seem to change the justice of the decision: how could we claim that discriminating against someone on the basis of their race is unjust only if such discrimination is transparent? It seems that it is the discrimination that is unjust not its fulfilment of the publicity condition. Publicity seems to be an issue not with determining whether discrimination is fair or unfair, but rather with whether we can accuse a particular person of making an unjust decision or censure them for that decision. I can understand that in our example, I should not be fired, or accused of discrimination, on the basis of this decision, because others and perhaps even I would not be able to identify whether the decision I made was unjust. Publicity then seems useful in determining the fairness of denouncement or censure. Publicity does not determine justice, however, for if I did discriminate against this candidate because of her race, what I did is unjust even if I or others do not know that this is what I did; the point is that *if I did it*, it is unjust.

Whatever one can say about the problems associated with the original PCA and the publicity condition argument, it is significant that if one does not accept the last claim of the PCA, the claim that the principles of justice that apply to institutions should apply to personal choice, Williams' objection no longer applies. The publicity condition argument focuses on the application of the difference principle to personal choice and claims that such an application fails to fulfil the publicity condition, and thus a market ethos, motivated by the difference principle, cannot be a requirement of justice. If, however, we concede that the difference principle does not have to apply to personal

choice, but that some other principles of justice do, then Williams' argument no longer provides an objection.

Williams claims that it would be “highly erratic of Rawls to be unconcerned” by the threats posed to fair equality of opportunity when it comes to Cohen's examples of injustices which occur in the informal, such as the gendered division of household labour,⁵⁸ and claims that “such practices and attitudes are unjust regardless of whether they violate legal rules”.⁵⁹ Williams thus agrees that we could evaluate personal choice according to justice, and indeed, according to one of Rawls's principles, fair equality of opportunity. His problem with Cohen's argument is the application of the difference principle to individuals because a *market* ethos which inspires personal choice to be motivated by the worst-off does not live up to the publicity condition, but he claims that an egalitarian ethos which motivates informal justice in the family could fulfil this condition: “it may be possible to devise a domestic ethos which provides a public basis to condemn the relevant forms of gender injustice”.⁶⁰ Why domestic choice differs from market choice, Williams does not make explicit, however, perhaps we can surmise that this is probably related to the problems identified thus far with applying the difference principle to choice. Williams objection though is clearly directed, not even at the original PCA because he seems to think it is acceptable to apply fair equality of opportunity to choice, but at the application of the difference principle to individual behaviour.

58 Williams (1998: 230, fn. 18).

59 Williams (1998: 242).

60 Williams (1998: 242).

6.3. A response to Pogge

Thomas Pogge develops two primary types of objections which would apply to the original PCA.⁶¹ The first is aimed specifically at Cohen's incentives argument and thus at the application of the difference principle to personal choice. Among other objections, he claims that the calculations involved in working out how best to benefit the worst-off are too complicated for individuals to make when it comes to particular cases.⁶² This, however, is only a response to the application of the difference principle to personal choice and thus does not apply to the revised version of the PCA.

The second type of objection addresses the more general claim that justice "must have a wider range than Rawls's" to include personal choice and convention, for example, which would, at least stated this generally, apply to either version of the PCA.⁶³

Pogge believes that the claim that justice in choice is a requirement of justice can fall into one of two categories: (1) mastergoal monism, according to which both individuals and institutions must promote the goal underlying justice, or (2) supergoal monism, according to which both individuals and institutions should aim at this goal.⁶⁴ I am uncomfortable with Pogge's description of the PCA in these terms as I do not believe that any of its claims, even statement 3 which I have criticised, would necessarily commit it to either

61 Pogge (2000: 137 – 169).

62 Pogge (2000: 147).

63 Pogge (2000: 138).

64 Pogge (2000: 155-6). Pogge claims that Cohen is clearly a supergoal monist but that it is ambiguous whether Murphy favours super- or mastergoal monism.

mastergoal or supergoal monism.⁶⁵ As such, I will not try to defend these two forms of monism but will restate the argument in Rawls's terms and examine how Pogge would respond to the PCA based on his criticism of mastergoal and supergoal monism.

Rawls is concerned with how we can organise society so as to achieve the best distribution of primary social goods. The original and the revised versions of the PCA both claim that you will get a better distribution of primary social goods if personal choice *and* institutions are fair rather than if institutions, merely, are fair. What would Pogge's response be to this? Much of his response has already been addressed in my criticism of the original PCA as, although he aims to criticise the more general claim that Rawls's justice should have a more expansive range to include personal choice, his criticisms continue to be directed against the application of the difference principle to personal choice and thus do not necessarily apply to the revised PCA.⁶⁶

65 I am uncomfortable with such a restatement of Cohen and Murphy's claims for two reasons. (1) This restatement seems to avoid addressing one of the primary points around which debate should be centred, i.e. the claim that personal choice affects distribution. (2) It seems to infer a dubious association between utilitarianism and the PCA. For example, Pogge (2000:156) describes the tension between super- and mastergoal monism as similar to the tension between whether utility should be promoted (even through non-utilitarian action), or whether it should always be aimed at through utilitarian action. He also associates the PCA with the claim that justice is of "ultimate moral importance" (2000:156-6). This seems to imply that the PCA is a consequentialist argument, thus something like the claim that actions are only acceptable if they promote or aim at justice. It also seems to imply that the PCA is open to typical objections against consequentialism, such as that it is too demanding or that it denies agent-centred prerogatives (for a statement of consequentialism, see Kagan [1989] and for an example of criticism, see B. Williams [1973]). I am not aware, however, that Cohen and Murphy ever claim that their arguments are consequentialist, and Pogge provides no evidence that they are. At the least, it is not necessary for the PCA to be understood in such a way. It attempts to revise our descriptions of a fair society; it does not aim to tell us that justice is the most important or only moral value against which all our actions should be judged as acceptable or unacceptable.

66 To say that Pogge's objections are geared towards the application of the difference principle to personal choice is not to find fault with Pogge's argument. Cohen and Murphy focus mainly on the difference principle and thus it seems consistent for Pogge to direct his criticism to this application.

For example, he claims that if justice needs to be achieved through personal choice, then it may not be best achieved by individuals trying to promote justice as “a goal may not best be promoted by people pursuing it”.⁶⁷ This, however, is an argument specifically directed against applying the difference principle to choice and does not need to apply to other principles of justice which are used to measure the justice of the behaviour of individuals and of associations. As I highlighted in the previous section, expecting individuals to apply the difference principle could be self-defeating and this is one of the reasons why the institutional principles should not be applied to choice.

Pogge also claims that accepting personal choice as a requirement of justice seems to make justice of “ultimate moral importance”.⁶⁸ This is a problem because (i) Rawls does not make the principles of justice of ultimate moral importance and (ii) it would be totalitarian to force such ultimate moral values on individuals to pursue. This seems similar to the prerogatives argument, and indeed Pogge also criticises Cohen’s views because he claims that applying principles of justice to personal choice may lead to violations of agent-centred prerogatives.⁶⁹ Although one could argue in response that the PCA does not necessarily make justice an all-demanding value (see footnote 65), or, as I argued earlier, the PCA does not have to contradict common-sense prerogatives, I want to spend a little more time on this issue because there is a genuine concern that needs to be addressed.

67 Pogge (2000: 159).

68 Pogge (2000: 157).

69 Pogge (2000: 161).

Pogge seems to be concerned that if we start including personal choice as part of justice there is a chance that we could come up with some frightening totalitarian answers to the question ‘how should we arrange society so as to achieve the best distribution of social goods?’. Pogge, for example, claims that:

It is quite possible that crime and poverty in the U.S. could be reduced most effectively through a national ethos involving a common religious allegiance to lifelong marriage, fidelity and other family values.⁷⁰

If we thus demand that individuals should aim to accomplish the same goals as institutions, this “would commit us to use our professional positions for supporting conservative efforts at rebuilding such an ethos and for projecting shining personal examples of pious and devoted family folk”.⁷¹ Consider another example: if broad distributive justice is our goal, both through institutions and through personal choice, then perhaps the best way of distributing goods such as opportunities would be to abolish the family and have everyone raised equally in government-controlled communes.⁷² If we start considering the justice of personal choice, are we not opening ourselves up to the possibility of governmental control over aspects of our lives which should be open to choice?

70 Pogge (2000: 158).

71 Pogge (2000: 158).

72 See, for example, James S. Fishkin (1983) who claims that equality of opportunity and the autonomy of the family are incompatible.

My reply to this objection reinforces my claim that the answer to the problem of justice in personal choice lies not with the institutional principles but in social equality. Murphy and Cohen may be tempted to respond to this by saying that in a Rawlsian society in which the principle of liberty is prioritised such governmental control would be unacceptable. Pogge might point out here, however, that to be consistent the principle of liberty would also have to apply to personal choice. Not only might this be as self-defeating as applying the difference principle to choice, it could also cause excessive interference with people's own priorities similar to those caused by an over-controlling state: "[individuals] might then be permitted or even required to engage in freelance efforts against criminals, intolerant sects, and the like whenever such efforts improve overall fulfilment of the basic liberties".⁷³

Using the notion of social equality to respond to Pogge is more helpful. Social equality includes the notion of respect-for-persons, which I argued can be broken down into two primary components (1) an opposition to unfair hierarchies of worth and (2) an opposition to dehumanisation. In order to achieve social equality both of these (at least) need to be achieved. The opposition to dehumanisation provides us with an answer to why social equality does not seem to be subject to the levelling-down objection (see chapter II) or to Pogge's claims about totalitarianism. This is because dehumanisation provides constraints on how people can be treated. So, for example, dehumanisation prevents people from being forced into set social roles, such as particular jobs. Furthermore, respect toleration which demands

⁷³ Pogge (2000: 162).

toleration of differences, as long as these do not violate respect-for-persons, is another requirement of social equality which guarantees freedom in many of our choices including our conceptions of the good. Although we may aim to achieve a fair distribution of social goods, we are limited by dehumanisation and toleration in what we can expect or coerce people into doing in order to achieve such a distribution. Pogge is probably right that if our only aim is distributive justice we might come up with some illiberal solutions to the problem of justice in personal choice, but if an underlying concern is to uphold social equality, which includes a concern to uphold rights and autonomous choices, Pogge's apprehension no longer seems applicable.

As I have emphasised, Pogge's problems with the PCA apply predominantly to the original version of this argument. A rare occasion in which he seems to consider an idea closer to my conception of the PCA is when he claims that "one may also find disturbing that the members of a thoroughly D-inspired society [difference-principle-inspired society] would be morally required to devote to those in the lowest socioeconomic position not merely money, but also respect and friendship, which are, after all, social bases of self-respect".⁷⁴ He seems to find this idea so self-evidently disturbing that he devotes no more time to its consideration except to refer to Bernard Williams' dismissal of such an idea as "'righteous absurdity'" in a footnote.⁷⁵

Without any need for Pogge to explain himself further, perhaps it is fairly self-evident why associating the notion of friendship with justice is disturbing.

74 Pogge (2000: 161).

75 Pogge (2000: 161 fn. 43).

Friendship has to do with such things as bonds of loyalty, familiarity, affection, positive appraisal, likes and dislikes. It seems strange to associate such a notion with justice which is concerned with what people deserve as people or as citizens, removed from our particular preferences and biases. Even if the distribution of the social basis of self-respect is affected by friendship, a lack of friendship cannot be remedied by a general standard of justice: including as a requirement of justice something like a duty to be friends with people would be bizarre because, among others, (1) it contradicts what friendship is and (2) it cannot possibly solve issues of self-respect associated with friendship because it seems impossible to direct us to be friends with everybody or with people who most need friendship.

I do not think, however, that it is self-evident why demanding respect from individuals is either disturbing or absurd (as long as we are talking about respect-for-persons). A choice not to be friends with a particular person because of personal preferences seems to have nothing to do with justice, but denying a particular group of people or particular individuals respect, civility or toleration seems clearly related to justice when we consider a history of real-life injustices in which both institutionally and individually, people have been systematically denied social goods and the justification for this denial, among others, has been that they are less worthy of such goods because of their class, race, gender and so on.⁷⁶ Pogge would need to address these claims directly and not merely dismiss them as absurd.

⁷⁶ Not being friends with someone because they are black, or so on, can be deemed a violation of social equality but this does not mean that we have obligations to be friends with particular people or anyone for that matter, merely that certain justifications for our actions are out of place in a society of equals.

Conclusion

In the introduction I claimed that the broad aim of this chapter was to provide justification for why I would not be using the original personal choice argument as a solution to the problem of justice in personal choice in Rawls's theory. Although I agree with Cohen that personal choice affects the justice of distribution and as such we need to apply some standard of justice to choice, I do not agree that the solution is to apply the institutional principles to justice. Neither Cohen nor Murphy demonstrate why these principles should be so applied if other principles of justice, which would address the justice of personal choice, can be applied to individuals. Furthermore, applying the institutional principles does not seem convincing if we consider: (1) they are not designed to apply to individuals, (2) their outcomes are difficult to calculate, (3) they could be self-defeating and (4) they do not address interferences with the informal social basis of self-respect. It is for these reasons that I believe we should find an alternative to the original personal choice argument.

An alternative to the original argument, which circumvents at least some of its drawbacks, replaces the claim that we should apply institutional principles to choice with the claim that we should apply principles which uphold social equality to individuals in order to address the justice of choice. This is because if informal social equality is upheld we will go at least some way to upholding justice in personal choice.

Although I may have demonstrated why the general format of this revised argument provides an alternative to the original, I have not yet made its content explicit. In the next chapter, I will explain what these principles would look like. I will argue that by revising Rawls's principles of justice for individuals according to the values of social equality we will find a solution to the deficiencies in Rawls's justice by using resources *within* his theory of justice.

V. Principles for individuals and the duties of social equality

Some writers have distinguished between equality as it is invoked in connection with the distribution of certain goods, some of which will almost certainly give higher status or prestige to those who are more favored, and equality as it applies to the respect which is owed to persons irrespective of their social position. Equality of the first kind is defined by the second principle of justice ... But equality of the first kind is fundamental. It is defined by the first principle of justice *and by such natural duties as that of mutual respect...*¹

Rawls's institutional justice seems insufficient for achieving a fair distribution of the primary social goods. For a fair distribution of these goods, we need fairness in institutional rules, the focus of Rawls's justice, *and* fairness in choice, a neglect of Rawls's justice. Cohen and Murphy's attempts to reconcile Rawls's justice with justice in choice are flawed. How then are we to accommodate this requirement of justice in choice within Rawls's theory? Rawls's theory *does* include principles for individuals, and principles for individuals, rather than principles for institutions, seem to be the kind of measure we are looking for when it comes to judging the justice of choice.

An examination of Rawls's principles for individuals, however, demonstrates that, as is, they do not address justice in choice and thus they would need to be revised if they are to provide a solution to the problem of informal social

¹ Rawls (1999: 447; my emphasis).

equality. I have claimed that applying principles of social equality to individual behaviour and the rules of associations will help to achieve justice in personal choice as an alternative preferable to applying the institutional principles to choice. The precise content of these principles has not yet been determined, nor how they would be made to fit into Rawls's justice. In this chapter I aim to describe the content of the principles necessary for justice in choice and demonstrate how to situate them in Rawls's justice by incorporating the requirements of social equality into Rawls's principles for individuals. For this purpose, I will propose a revised version of two of Rawls's principles for individuals, the duty of mutual respect and the duty of justice, as a solution to accommodating justice in choice.

I aim to answer two primary questions in this chapter:

1. Do Rawls's principles for individuals address informal social equality?
2. As I will demonstrate that the answer to the above question is 'no', then how can we adapt these principles to fulfil the demands of social equality?

In the broader context of this thesis, I aim to provide an alternative to the original PCA's claim that the institutional principles should be applied to choice. This alternative, the duties of social equality, addresses justice in choice and addresses, at least, the minimum requirements of informal social equality, yet it does so without violating Rawls's stipulation that institutional and individual principles should be separate, or at least, not presumed to be the same.

There are 5 sections to this chapter. In the first section, I will briefly examine what it is that social equality can be said to demand and thus what it is that we would need as a solution for accommodating social equality within a conception of broad distributive justice. In the second section I examine Rawls's principles for individuals to determine whether they would be able to address the requirements of social equality. I claim that although there is some correspondence between the principles for individuals and the demands of social equality, I find that they cannot. In the third section, I examine how the principles for individuals could be adapted in order to fulfil the demands of social equality. I argue that we could revise two of Rawls's principles. (1) The duty of mutual respect should be revised to include specific requirements of respect-for-persons, civility and toleration, and (2) the duty of justice needs to be revised to include a demand that individuals would help to establish and comply with not only formal but also informal justice. In the last section I address some objections to, or questions that are raised by, the duties of social equality, which lead from their perceived demandingness and their consistency within a liberal and Rawlsian framework of justice.

1. The demands of social equality

The notion of social equality demonstrates that equality cannot be achieved by fair legislation and fair formal institutions alone. Equality also requires an egalitarian ethos: norms, values, attitudes and relationships, even in what is considered the private sphere, need to reflect the equal worth of persons. This ethos, I have argued, would consist of egalitarian values and norms which

would (1) provide a standard against which individual behaviour could be measured and (2) would motivate individual behaviour. In this way, social equality makes demands of individuals: in order to achieve a society of equals, and also in this case, the fair distribution of certain social goods, individuals need to uphold the values of social equality.

How best can we describe such an ethos? What values would it espouse and what would it ask of individuals? Social equality, and thus an egalitarian ethos that upholds social equality, consists of three primary values which could be used to judge individual behaviour and from which individuals would act:

- (1) respect-for-persons, which disallows arbitrarily treating some as lesser or better than others and which disallows dehumanisation;²
- (2) civility, which requires individuals to extend basic courtesies to all others, and
- (3) toleration, which demands that individuals are tolerant of, thus do not prevent or inhibit, differences of which they disapprove or which they dislike.

Rawls's conception of justice, if it is to take account of informal interferences with the fair distribution of the primary social goods, should also demand that individuals, not merely institutions, uphold these requirements of social equality, or something similar to these requirements.

² 'Disallows' does not denote a legal duty or any necessary legal implications. These are moral requirements.

2. The demands of justice-as-fairness

Much recent discussion of how personal choice features (or does not, rather) in Rawls's justice has focused on the basic structure.³ Emphasis on the basic structure tends to overshadow Rawls's account of what is required of an individual in a fair society, for Rawls *does have* such an account: an explanation of which principles of the right would apply to individuals.⁴ Rawls's justice makes demands on individuals and provides measures against which individual behaviour should be judged. As something like principles for individuals, rather than principles for institutions, seem to provide a solution for describing justice in personal choice, it is important to examine what Rawls demands of individuals to demonstrate whether these measures do or can accommodate justice in choice. In this section I will describe Rawls's principles for individuals:

- (1) to demonstrate that they do not require individuals to uphold informal justice or the values of social equality, and
- (2) to begin to demonstrate that we can use them as a basis to revise Rawls's justice in order to accommodate informal social equality and thus justice in choice.

The reason why Rawls claims that principles for individuals need to be adopted sounds as if it corresponds to social equality. Rawls claims that

³ Examples are Cohen (2000) and Pogge (2000).

⁴ See Rawls (1999: 93-101; 293-343).

although his principles for individuals are not based on a single principle there are similar reasons for why many of these principles would be adopted:

Once we try to picture the life of a society in which no one had the slightest desire to act on these duties we see that it would express indifference if not disdain for human beings that would make a sense of our own worth impossible.⁵

This description of the principles for individuals seems similar to a general description of the need for duties of social equality because of its emphasis on respect and the importance of a sense of worth. However, when we examine these principles, we will find that despite some very broad correspondence with social equality, they are unable, as is, to provide for respect-for-persons, civility and toleration and they are unable to address informal justice.

2.1. Principles of justice for individuals

Rawls explains that principles for individuals consist of permissions and requirements, where permissions are acts which individuals may perform but are nonetheless not required to perform, and requirements comprise obligations and natural duties, thus, acts (and omissions) deemed compulsory. Obligations concern particular relationships we have to institutions whereas duties apply to us as moral beings, without reference to any particular role.

⁵ Rawls (1999: 298).

Obligations and some of the natural duties seem quite clearly irrelevant to social equality. Rawls claims that all obligations develop from one principle, the principle of fairness, which states “that a person is under an obligation to do his part as specified by the rules of an institution whenever he has voluntarily accepted the benefits of the scheme or has taken advantage of the opportunities it offers to advance his interests”.⁶ When it comes to finding measures for accommodating social equality we need to look to duties rather than obligations. This is because we are looking for requirements that are not tied to a particular institutional role and which are also not dependent on consent or reciprocity based on benefits received, because social equality is not conditional on consent or on accepting certain benefits.

Rawls identifies a number of natural duties, some of which seem mainly unrelated to social equality, such as the duty of mutual aid and the duty to comply with unjust laws.⁷ There are three duties, however, which seem as if they could be relevant to informal social equality. These are: the duty of justice, the duty of civility and the duty of mutual respect.

⁶ Rawls (1999: 301).

⁷ According to the duty to comply with unjust laws, as long as a state is nearly just and provided unjust laws “do not exceed certain bounds of injustice”, even unjust laws must be obeyed (Rawls 1999: 312). See Rawls (1999: 308-312) for his discussion of the duty to comply with unjust laws. The reason why we have a duty to comply with even unjust laws, Rawls argues, is explained by our duty of justice. The duty of justice demands that individuals support a just constitution. In turn this implies a duty to support a constitution’s principle of majority rule, as long as institutions in a society are mainly fair, we need to comply with unjust laws (1999: 311). Rawls also acknowledges Kant’s duty of mutual aid, which demands that we help others (Rawls 1999: 297-8; 2001j: 318). The primary reason why he believes such a duty should be adopted is because the knowledge that others will come to our aid would have a “pervasive effect on the quality of everyday life” (1999: 298). The duty of mutual aid could be particularly relevant to social equality if this form of equality also included a notion of solidarity, although one could also probably argue that both mutual aid and the duty to obey unjust laws would also be requirements of a society of equals, even based on the minimum requirements of social equality I have identified.

2.1.1. The duty of justice

The duty of justice consists of two requirements: (1) individuals must comply with fair institutions and (2) they must help to establish fair arrangements as long as this is not too costly.⁸ “From the standpoint of the theory of justice”, Rawls claims, this duty is “the most important natural duty”.⁹

The first requirement seems straightforward. However, the second requirement is less clear. Firstly, what establishing just arrangements would require of the individual is not apparent and, secondly, Rawls provides no guidelines for what would be too costly and how to measure such costs. One could perhaps try to use the second requirement as a requirement for establishing informal social equality. Helping to establish just arrangements would then include a requirement for individuals in a private capacity, i.e. informally, to comply with the demands of social equality, thus with respect-for-persons, civility and toleration. It seems particularly interesting from this viewpoint that Rawls has chosen to use the words ‘just arrangements’ rather than just *institutions* as if the implication here is that individuals need to help to establish informal justice and that they are not merely required to comply with formal justice as specified by the first requirement.

However, (1) it seems unlikely that Rawls intended this duty to be used to justify informal justice, and (2) it would need to be made clearer and more

⁸ See Rawls (1999: 99-100; 293-296) for his explanation of the duty of justice.

⁹ Rawls (1999: 293).

explicit if it is to be used for achieving informal social equality. Although it is not entirely clear what this duty demands of individuals, it seems that Rawls would consider the duty of justice to be limited in scope. Firstly understood within the greater context of Rawls's theory, that Rawls does not explicitly require informal justice, makes it unlikely that this is what he would mean by the second requirement of the duty of justice. It is probably easier to understand it entirely in terms of formal justice: individuals are thus required to help to establish a fair basic structure, by for example, voting for the political party that would bring about justice in institutions. This is Pogge's interpretation of the duty of justice; moreover, he implies that a duty which urged more direct intervention from individuals would be infeasible:

Our causal contribution to the suffering of the poor is extremely indirect and intermixed with the causal contributions of others. It is quite infeasible for us to adjust our conduct so as to avoid such effects. And here again, Rawls's institutional approach is crucial for showing the alternative to such an (infeasible) adjustment of our conduct... our responsibility vis-à-vis existing injustices hinges upon our ability to initiate and support institutional reforms.¹⁰

Besides the fact that this duty does not explicitly direct individuals to achieve informal justice, more importantly, whatever Rawls's motives may be, this duty *does not* provide a requirement for individuals to fulfil the demands of social equality or to strive for justice in choice. If we wanted it to function in this way it would need to be changed to specify explicit demands of compliance with respect-for-persons, civility and toleration.

¹⁰ Pogge (1989: 12).

2.1.2. The duty of civility

One of the few duties for individuals which is emphasised in *Political liberalism* is the duty of civility. This seems to be less of one specific duty and more an assortment of requirements which have been classified under one mutual term, civility.¹¹ One aspect of civility is the “duty to give... *public reasons*”, although at times Rawls treats this less as one aspect of civility than as equivalent to civility.¹² Public reason means the reasons given in a public forum for political actions.¹³ Using public reason would include using only a political conception of justice and not comprehensive doctrines to justify political actions. The duty to use public reasons is limited to a public political forum: public reason is not required for background culture (the realm of personal choice and associations) where it is acceptable to use comprehensive doctrines for justification.¹⁴

The civility that social equality requires and this Rawlsian duty of civility share mainly only a name: the demands of Rawls’s civility do not cover what is required of civility from the perspective of social equality, which is civility understood on a more common-sense level, i.e. basic courtesies. The only clear association is that both civility for social equality and Rawls’s civility

11 See Rawls (1999 312; 1993: 217; 2001g f: 576). Catriona McKinnon (2000: 146-151) claims that this duty includes the following components: good faith, compliance with the law, civil disobedience, voting in favour of the common good and public reason.

12 Rawls (2001c: 617).

13 Rawls (2001g: 573-615).

14 Rawls (1993: 215).

demand what Rawls refers to as “a willingness to listen to others” and what we can call a general willingness to debate reasonably.¹⁵

This does not mean, however, that Rawls’s duty of civility is dissimilar from social equality more generally understood. The requirements of public reason could be justified with reference to social equality. Firstly, the motivation underlying public reason could be described as an appeal to respect-for-persons and toleration: individuals within a public forum must provide reasons which are divorced from comprehensive doctrines in order to treat others as equals by treating others’ conceptions of the good as counting for as much as their own and to demonstrate toleration for reasonable pluralism. However this does not mean that public reason accommodates respect-for-persons or toleration adequately: no demand is made to fulfil the requirements of respect-for-persons or toleration; there is merely an overlap in broad values.

2.1.3. The duty of mutual respect

As a principle for individuals, mutual respect demands showing “a person the respect which is due to him as a moral being, that is as a being with a sense of justice and a conception of the good”.¹⁶ The reason why this duty would be chosen in the original position is because it is essential for achieving self-respect:

¹⁵ Rawls (1993: 217): “This duty also involves a willingness to listen to others and a fairmindedness in deciding when accommodations to their views should reasonably be made”.
¹⁶ Rawls (1999: 297).

Their self-respect and their confidence in the value of their own system of ends cannot withstand the indifference much less the contempt of others. Everyone benefits then from living in a society where the duty of mutual respect is honored. The cost to self-interest is minor in comparison with the support for the sense of one's own worth.¹⁷

Of all the principles for individuals, this duty shows the most promise as a requirement of social equality. Rawls's description of this duty as respect due to all people because they are moral beings matches the ideal of equal worth underlying respect-for-persons. Rawls claims that this duty is demonstrated, among others, "in our willingness to see the situation of others from their point of view... and in our being prepared to give reasons for our actions whenever the interests of others are materially affected".¹⁸ Although not quite so specific, this willingness to give reasons for our actions resembles the need to demonstrate that our preferences are not based on hierarchies of worth or to provide reasons for our preferences to show that they do not violate respect-for-persons. Also this duty implies a duty of civility similar to the type of civility required (somewhat) by social equality: "Also respect is shown in a willingness to do small favors and courtesies, not because they are of any material value but because they are an appropriate expression of our awareness of another person's feelings and aspirations".¹⁹

Although there is some correspondence between Rawls's duty of mutual respect and the demands of social equality, we cannot say that this duty is, as

17 Rawls (1999: 297).

18 Rawls (1999: 297).

19 Rawls (1999: 297).

is, an adequate means to reflect the requirements of social equality. The duty of mutual respect is too sparse and it does not directly cover respect-for-persons or any of the other requirements of social equality fully. Furthermore, it does not demand compliance for informal interactions, and thus informal justice is not addressed.

If we were hoping to find a solution to the problem of social equality within Rawls's principles for individuals, we would be disappointed: none of the demands for individuals accommodate social equality.²⁰ Overall, there are two main reasons why the duties of justice that Rawls identifies cannot fulfil the requirements of social equality: (1) they do not address the specific requirements of respect-for-persons, civility and toleration, and (2) they do not demand informal social equality.

The duties seem mainly to be supplements for achieving formal institutional justice, rather than substantial principles which, on their own, aim at achieving justice besides the institutional. Thus they mainly direct individuals to comply with the law and with the rules of fair institutions, and provide justification for when refusing to comply with unjust laws is acceptable: the focus is thus on compliance or non-compliance with the law or with formal rules. For example, when Rawls discusses an individual's non-compliance with unjust arrangements he focuses on the relationship between the individual and the law, establishing criteria for civil disobedience and conscientious refusal, thus focusing on when and how it is acceptable for an

²⁰ I am not evaluating these duties generally but only according to their ability to accommodate social equality. Thus I am not finding fault with them: I am merely claiming that they do not fulfil the requirements of social equality.

individual to challenge formal institutional injustices.²¹ Even where their scope seems to coincide somewhat with social equality they do not address its requirements explicitly or adequately. None of the principles would directly bring about what is required from individuals through the specific demands of social equality and furthermore most of the principles do not demand informal fair behaviour, which is precisely the reason why we need to look beyond the institutional principles in the first place. Thus, as is, Rawls's principles for individuals will not do for social equality or justice in choice.

3. The duties of social equality

It is hardly remarkable that the principles for individuals do not provide for the demands of social equality: Rawls has not designed these, even partially, in order to achieve social equality or informal justice. What is significant, however, is that the principles for individuals:

- (1) seem to deal with similar kinds of values, such as respect and courtesy, and
- (2) they seem to have the type of structure (they are measures applied to individual behaviour) we would need to address social equality.

Principles for individuals seem to be the right type of thing we need in order to accommodate social equality because what we need is some measure to enable us to evaluate the justice of individual behaviour and associations.

²¹ Rawls (1999: 308-343).

What we seem to have with the principles for individuals is a structure and broad content sympathetic to the demands of social equality although, as we have seen in the previous section, we do not yet have the specific content. It seems then that the best option for accommodating social equality as part of Rawls's justice is to incorporate its requirements within the principles for individuals.

As the principles for individuals cannot yet accommodate social equality clearly they either need to be supplemented or adapted. We could, for example, design new, specific and exclusive principles for each requirement of social equality as supplements for the existing principles: so we would then have a duty of respect-for-persons, a duty of civility and a duty of toleration. Alternatively, we could adapt the existing principles. There are numerous feasible options. My aim, however, is to conceive of the best way in which to accommodate social equality within Rawls's justice. As such, although I do not believe that this is the only alternative, instead of designing brand new principles, I think it would be best to adapt principles which already share something of the 'spirit' of social equality.²² In this sense, I think that the duty of mutual respect would be most suitable to adapt because it already shares

²² Another option which I do not pursue is to expand on the notion of 'good faith' as an aspect of Rawls's duty of civility. Although Rawls (1999: 312) does not explain the notion of good faith in any detail, he does claim that "we have a natural duty of civility not to invoke the faults of social arrangements as a too ready excuse for not complying with them, nor to exploit inevitable loopholes in the rules to advance our interests. The duty of civility imposes a due acceptance of the defects of institutions and a certain restraint in taking advantage of them". This is what McKinnon (2000: 147) refers to as 'good faith', which means acting in the spirit of the law: "If, in her judgement, her proposed course of action would be ruled out by a perfectly just system of law, she will not pursue it... Defining good citizenship in terms of action in good faith means that in the ideal society the choices of the good citizen are restricted not only by law, but also by her conscience". Acting in good faith would cover *some* of the same behaviour expected of the individual by social equality; this duty, at least as McKinnon interprets it, is the only one of Rawls's duties which seems to bear directly on the informal.

some of the (very broad) content needed for both respect-for-persons and civility. Besides the duty of mutual respect, I also think it is important that the principles for individuals should express the relationship between justice and personal choice, and specify that this relationship demands both formal and informal justice. For this purpose, the duty of justice needs adapting to state explicitly that individuals should help to establish informal justice and conform to informal justice when it exists.

3.1. The duty of mutual respect

Rawls's duty of mutual respect demands showing "a person the respect which is due to him as a moral being".²³ In adapting this duty to the demands of social equality, I would revise it by making it more specifically aimed towards achieving the values of social equality. The revised duty of mutual respect would read like this:

As a requirement of justice, individuals should fulfil the duty of mutual respect, meaning that they are required to uphold respect-for-persons, civility and toleration.

Upholding respect-for-persons, civility and toleration would mean the following:²⁴

23 Rawls (1999: 297).

24 I am not going to present a complete list of the precise scope and content of these requirements; indeed, I have no such list, and thus this discussion will not provide a comprehensive description. I think that what should be included under these requirements is open to debate, a debate for which this thesis does not have sufficient scope. For now, I aim only to provide a start to understanding the duties of social equality.

(1) Upholding respect-for-persons: This has two components: (i) individuals should not treat others according to arbitrary hierarchies of worth and (ii) individuals should not dehumanise others.

Upholding the first component of respect-for-persons, which forbids devaluation (and over-valuation), would mean that individuals would not treat others (or themselves) as inferiors or superiors based on their social group membership. In chapter II, I claimed that treating someone as a lesser person is both a mode of valuing, devaluing, and a mode of expressing that devalue, while treating someone as superior is a mode of over-valuing and of expressing that over-value. This component of upholding respect-for-persons would mean that individuals should neither (i) devalue or over-value others according to social group membership nor (ii) express that devalue or over-value.

Modes of expressing devalue that this duty would condemn are, for example, discrimination against any person arbitrarily on the basis of her race, gender, and so on, whether they occur privately or within an institutional role, or denying any person equal opportunities for education or jobs on this basis. An employer thus who does not hire a Muslim because she is Muslim, or parents who do not provide their daughter with the same opportunities for education as their son, simply because she is a girl, have violated respect-for-persons.

Upholding the second component of respect-for-persons, which forbids dehumanisation, would demand a basic standard of treatment for all by ruling

out certain extreme forms of behaviour which are difficult to reconcile with the notion that everyone has moral worth. I would imagine that this should include forbidding torture, slavery, violence, and verbal, emotional and physical abuse, violating freedoms and rights, and denying people the right to make their own autonomous choices. By demanding a basic standard of treatment for all, forbidding dehumanisation helps to ensure that justice and equality are not aims to be achieved at any costs, such as through human rights violations. A society of equals, then, and justice in choice need to satisfy both components of respect-for-persons.²⁵

Upholding respect-for-persons would help to prevent or diminish the prevalence of these harms: violations (1) of equal moral worth and (2) rights, and interferences with (3) self-respect and identity, (4) preferences and conceptions of the good, (5) opportunities and life-chances, (6) physical and psychological health, and (7) co-operation.

In chapter II, I described an ethos as a set of values which is translated into norms or principles and these, in turn, are applied in the form of (1) motivation for behaviour and (2) an assessment of behaviour. We can call respect-for-persons a value of an egalitarian ethos necessary for a society of equals. The duty of mutual respect and its subsidiary, this duty to uphold respect-for-persons, are principles of this ethos. In application to individual

²⁵ Perhaps priority rules can be developed to settle conflicts between the two conditions of social equality. I think it is unlikely that in cases where they conflict that one of the two should always take precedence over the other. So, for example, I do not believe that a prohibition on dehumanising should always take precedence over a prohibition on devaluation. It is more likely that particular examples of dehumanising, such as torture or violence, would take precedence over (particular examples of) devaluation.

behaviour this duty is a motivation for behaviour: individuals should act *from* respect-for-persons. The duty is also a standard with which we can judge behaviour: behaviour which conforms to respect-for-persons would be encouraged and behaviour which violates respect-for-persons would be discouraged or sanctioned. So, for example, a music group whose songs' lyrics violate respect-for-person by using derogatory language, stereotypes and verbal abuse directed at gays, could be sanctioned as part of fulfilment of the duty of mutual respect, by being condemned in the press or by being refused airplay on radio stations.

Besides respect-for-persons, an egalitarian ethos would encourage at least two further important values, civility and toleration, and two further principles which make up the duty of mutual respect: a duty to uphold civility and a duty to tolerate difference.

(2) Upholding civility: This would mean that individuals should extend basic courtesies to all others. These courtesies would include a willingness (i) to listen, (ii) to provide others with an opportunity to present their own views and (iii) to debate reasonably about issues.

Unlike respect-for-persons, I do not think that civility is required under all circumstances. If respect-for-persons is not fulfilled, incivility should be allowed. If someone does not uphold respect-for-persons, an individual should be allowed (i) not to have to uphold civility if she is personally affected by the violation and (ii) to treat the person who does not uphold respect-for-persons

uncivilly as a means of showing disapproval for the violation. Someone who is not treated respectfully should not have to act civilly towards the person who treats them without respect, otherwise this may only reinforce the devaluation as civility may be mistaken for subservience. Furthermore, if rational debate has failed or cannot be expected, such as in the case of a stranger who shouts racial abuse in the street, the only way in which to treat someone who violates respect may be with incivility, and this would apply even if you are not the person directly affected by the violation of respect.

(3) Upholding toleration: This would mean individuals should refrain from trying to prevent or inhibit differences even though they disapprove of these differences. Thus differences should be allowed to exist without interference. In this case, even if you dislike or disapprove of someone's behaviour or beliefs, you should still respect their right, as a moral equal, to differ from you. For example, you may believe that homosexuality is morally unacceptable but you must tolerate it by, for example, not lobbying or pressurising government to ban gay and lesbian unions.

Like civility, this requirement is dependent on respect-for-persons being upheld.²⁶ This means that individuals should not have to, indeed might be required not to, tolerate conceptions of the good, behaviour or beliefs which violate respect-for-persons. So, for example, a racist's claims about the superiority of the white race do not need to be tolerated. Practically, what this

²⁶ Not only are both civility and toleration dependent on the fulfilment of respect-for-persons, the institutional principles also take precedence over these values. So, for example, on the level of policy, toleration of violations of equal liberty, and such, are not only not required, they are unacceptable.

could mean is that it should be acceptable to exclude the racist from certain social situations or to publicly condemn her beliefs. Exactly what lengths, however, one can go to in not tolerating someone's beliefs is controversial and open to debate: denying a racist the freedom to express her racist views in a public forum, for example, could be said to interfere with freedom of speech.

As we need to ensure that both formal and informal social equality are established, it is essential to specify the scope of mutual respect. Individuals should uphold respect-for-persons, civility and toleration in any situation, whether in a public or private forum, whether fulfilling a formal institutional role or making a personal choice. There is no limit to the type of situation to which these requirements could apply.

Although these are principles for individuals it also needs to be specified that this duty applies to individuals as rule-makers of and decision-makers in associations. The rules of an association, such as for example a country-club which bans black members, can be said to be in violation of the duties of social equality if they violate respect-for-persons, civility or toleration, although it is the responsibility of the individuals who establish or maintain the rules of the association to change them to make them compatible with the demands of social equality. If these individuals set up or maintain rules that do not fulfil the demands of social equality, we can say that both they and the association have violated social equality.

3.2. The duty of justice

The duty of justice demands that individuals (1) comply with fair institutions and (2) help to establish just arrangements. In order to demonstrate the link between mutual respect and justice, this duty should include a requirement for individuals to establish fair informal arrangements and not merely to help establish formal justice. I take it that helping to establish formal justice might include such things as voting for a political party with policies which conform to the requirements of the institutional principles of justice or undertaking civil disobedience in order to influence a government to amend unjust policies.

As informal justice is also necessary, this duty should include a requirement to (1) comply with informal justice when it exists and (2) establish informal justice where it does not, by fulfilling the requirements of mutual respect. The duty of justice thus requires the duty of mutual respect. This does not add any new content to the requirements for social equality different from the duty of mutual respect; however it explicitly demands mutual respect as a requirement of justice. It thus demonstrates that the duty of mutual respect is not merely a general moral duty: it is a requirement of social justice; without its fulfilment we cannot guarantee a fair distribution of social goods such as (the social basis of) self-respect or opportunities.

The original duty of justice looks like this:

This duty requires us to support and to comply with just institutions that exist and apply to us. It also constrains us to further just arrangements not yet established...²⁷

The revised duty of justice should look like this:

This duty requires us to support and comply with just institutions and an egalitarian ethos that exist and apply to us. It also constrains us to further both formal and informal just arrangements not yet established ... In order to support and comply with an egalitarian ethos and in order to establish informal just arrangements, we are required to fulfil the duty of mutual respect.

3.3. Justice in personal choice and the duties of social equality

The revised Rawlsian duties would censure certain forms of individual behaviour and certain rules of associations which have previously been left uncensored by both Rawls's institutional principles and his principles for individuals. More specifically, if individuals fulfilled the duties of social equality, many of the socially imposed injustices, reflected and reinforced in personal choice, that have been identified would not occur. The unfair distribution of the informal basis of self-respect and informal fair equality of opportunity would be prevented. Informal harms to self-respect and opportunities, among others,²⁸ in personal choice, such as through stigmatisation, marginalization or exclusion, biased stereotyping, unfair

27 Rawls (1999: 99).

28 I emphasise these as they correspond to Rawls's notion of distributive justice. In chapter II and the previous section, however, we identified other harms associated with violations of social equality, such as harm to the development of a conception of the good.

discrimination, cultural imperialism, humiliation, hate-speech or the use of derogatory language, harassment or intimidation and physical or emotional abuse, would not occur or be minimised if individuals upheld respect-for-persons, civility and toleration. As the duties apply to any individual behaviour, individuals would also be motivated by the duties to comply with fair laws.

In the previous chapter, I argued that we need a revised version of the personal choice argument, which claims that the solution to injustices in personal choice is to apply principles of social equality to choice. How do these principles, the duties of social equality, fare when it comes to Cohen's criticism of Rawls? These duties would accommodate at least one of the two primary cases Cohen uses as examples of the need to be able to judge personal choice as just or unjust. The gendered division of household labour, where women are expected to bear the greater burden for household responsibilities, could be said to violate the duty of mutual respect on both counts of respect-for-persons. Firstly, we could say that such a division of labour treats women as if they have lower moral worth than men because it provides them with fewer opportunities than men. Secondly, it could also be condemned as dehumanisation because it does not take proper account of how women choose to live their lives: we could say that the commonly-accepted expectations that they are primarily responsible for child-rearing and household duties pressurises them into fulfilling household roles without taking account of their choices, or what might be their choices if they had not been pressurised.

Cohen's principal example of the need to apply principles of justice to personal choice is that of incentives. His claim is that the talented should be motivated by the difference principle; if they were motivated as such they could not justify incentives as incentives are not necessary to benefit the worst-off. However, from the perspective of the revised duties, demands for incentives are not evidently ruled out. Perhaps one could argue that demands for incentives do violate these duties but, unlike examples of social group discrimination, it is not immediately apparent how a demand for incentives would violate respect-for-persons, civility or toleration.

One of the reasons why the link between incentives and the argument of social equality is not apparent is because of my emphasis on informal social equality. I have argued that if Rawls's justice does address social equality, it is most likely to address the formal equality and the fair distribution of material goods required by social equality. What it clearly seems to neglect is the informal. Injustices in the informal often have to do with people's attitudes to each other rather than the distribution of income and wealth. This, however, means that (1) informal injustices could still be economic and (2) Rawls's justice could still be found wanting economically, both institutionally and individually. It is simply, however, not part of the focus of my argument to determine whether this is the case.

Thus while Cohen's application of the institutional principles to personal choice does not seem to provide the most feasible solution to the problem of

accommodating social equality, it seems that achieving social equality would not have the clear implications for incentives which Cohen's argument has. If one wanted to establish the injustice of incentives one would either need to devise an argument to demonstrate that social equality does rule out incentives or use an entirely different basis for this claim, such as relying on Cohen's original argument. This does not mean, however, that social equality cannot rule out incentives; I am merely highlighting that an argument against incentives is not an evident implication of the duties of social equality.

3.4. Compliance with the duties of social equality

the real question for any instrumental theory of virtue is why people would choose to exercise these virtues when they conflict with other preferences or goals... Why engage in civility when one benefits from the current patterns of discrimination and prejudice against minority groups?²⁹

My argument is that if we want to describe what a fair society would be like we would need to include a requirement of social equality, and as, in Rawls's conception of justice, informal social equality is not required by the institutional principles or the principles for individuals, we would need to revise the principles for individuals to accommodate the informal. As such, my claims are concerned with establishing a more accurate abstract notion of social justice; thus it is primarily concerned with describing an ideal society.

²⁹ Kymlicka (2000: 310-1).

The more practical question remains, however, how and why individuals would come to comply with these duties under non-ideal circumstances. There are two issues here: (i) where and how do individuals learn the values of social equality and (ii) why would they choose to be motivated by these values? Many of the answers to these questions are at least partially empirical so I cannot answer them with much confidence: a more complete answer would require some empirical research. I do feel, however, that it is necessary to at least briefly consider these issues.

(1) A preliminary answer to the question of how individuals develop the values of social equality is that they do so under the influence of an egalitarian ethos. A fair society would have prevalent norms of justice for personal choice and thus norms of social equality which would influence behaviour at the level of motivation; a fair society would have what we can thus call an egalitarian ethos. So, individuals would develop the values of social equality and be motivated to fulfil the duties of social equality because of an egalitarian ethos which influenced them to fulfil its norms. I am assuming that the values of an egalitarian ethos are learnt in the same places that any values would be learnt: in the family, through formal education, in civil society, and so on, although this would also be where inegalitarian values are learnt, so there is nothing specific to these 'schools' of value that ensure that they will promote egalitarian values. This is only a preliminary answer, however, because it raises at least two further questions.

It seems that the stronger an egalitarian ethos, the greater compliance will be as the greater the pressure will be to follow its norms. What can be done, however, to make it stronger if its norms are not yet prevalent? I would assume that in a liberal or social democracy there is already some sort of egalitarian ethos because the values underlying these democracies resemble or match the values of social equality. But is there something that can be done, by the government for example, to further encourage such an ethos to make compliance more likely? Or is there something that can be done to further encourage egalitarian values in a society in which inegalitarian values are predominant? The answer to these questions would require empirical research. Perhaps, however, if it became clear that formal education or public awareness campaigns were able to strengthen egalitarian values, then it seems likely that they should be so strengthened, to encourage greater compliance with the duties of social equality and thus to encourage greater justice in personal choice.³⁰

This, however, still does not answer a second question, the question raised by Kymlicka in the introductory quote to this section, ‘why would people choose to exercise these virtues when they conflict with other preferences or goals?’ Even if there is an egalitarian ethos that promotes fair personal choice, choice remains legally open to the individual and thus unjust choices can be made. An individual could even agree that it is better for society as a whole to be fair without agreeing that she should make fair choices. Why would the rich and

30 Formal education is seen by some liberals as a necessary or potentially acceptable means of encouraging values such as toleration and autonomy. See, for example, Amy Guttmann (1987: 14-5), on “conscious social reproduction” through schooling and Harry Brighouse (1998: 719-745) on autonomy-facilitating education.

privileged agree to act in ways which do not benefit them, indeed may interfere with the hierarchies of status and wealth which make them privileged?

(2) A Rawlsian answer is that individuals possess a sense of justice which is “the capacity to understand, to apply, and to act from (and not merely in accordance with) the principles of political justice that specify the fair terms of social cooperation”.³¹ Having a sense of justice implies that individuals would act against their own self-interest for the sake of justice because they are motivated by justice. According to Rawls the sense of justice seems to result from natural moral development within a formally just society; as long as an individual has undergone basic moral development, she will develop a sense of justice because she will recognise that fair institutions benefit her and her friends and family (and such).³² Rawls’s answer seems to be missing something however: the implication seems to be that formal equality or justice in the public rules of institutions is all that is required for the development of a sense of justice. The institutionalisation of justice is not the most salient point, however. I would claim that it is more likely that the stronger the general prevalence of fair and egalitarian values, the stronger the sense of justice would be (meaning the greater the likelihood that individuals would act from a sense of justice), and thus that it is important that these values are institutionalised *and also* that these values are embedded in a strong egalitarian ethos which influences choice. How likely then an individual is to

31 Rawls (2001a: 18). See Rawls (1999: 397-449) for a more detailed description of the sense of justice and how it develops.

32 See Rawls (1999: 405-419) for a description of overall moral development and the three moral laws. For a description of the development specifically of the sense of justice according to the third moral law, the morality of principles, see Rawls (1999: 414-419).

act from a sense of justice would be a function not only of the strength of institutional justice but also the strength of the egalitarian ethos. Again, we can say that if empirical research demonstrates particular ways in which such an ethos can be strengthened, then the need for compliance with the values of social equality may provide justification for strengthening that ethos.³³

4. The demandingness and consistency of the duties of social equality

The justification for why a demand would be made seems as if it would be all-important in determining whether an action or trait is considered part of political morality. However, the justification for why demands on individuals would be relevant to political morality, although clearly important, is often not where debate lies, as it is not so much the case that there is disagreement about whether an action helps to achieve a political ideal or whether it is intrinsically valuable. Two factors often play a more significant role than justification in determining the demands of political morality that can be placed on the individual: (1) the *demandingness* of political morality, i.e. whether the demands placed on individuals are excessive (or perhaps in some cases, whether they demand enough), and (2) the *consistency* of the demands with the overarching political context. It may be accepted that a political ideal

33 There is some debate as to whether a sense of justice is a sufficient explanation for why individuals would forgo their own interests for the sake of justice. There are claims that a sense of national identity or a common good are necessary to inspire justice in choice (See, for example, Kymlicka (2000: 252-261; 311-312). See, for example, Miller (1995) for an explanation of the importance of a sense of national identity and Kymlicka (2000: 261-8) for a description of liberal nationalism. This could provide further reason for why solidarity may also need to be included as part of an understanding of a society of equals, and seemingly here, possibly also for justice.

would be better achieved if individuals complied with certain requirements. However, if the demands placed on individuals are too excessive or if those demands are inconsistent with the rest of the overarching political theory, then they could be rejected. In this section I consider questions raised by or objections to the duties of social equality due to their demandingness and their consistency with liberalism and Rawls's justice.

4.1. The demandingness of social equality

Adapting the duties for individuals to accommodate social equality has meant extending them: if we include the revised duties as demands on individuals, it seems we will be demanding more of individuals. In this sense, the costs associated have increased, not necessarily because what is demanded of individuals is particularly costly, but because more is expected of them than with the original Rawlsian duties.³⁴ As is, this cannot provide an objection against accepting these revised duties; simply requiring more does not demonstrate that we require too much. However, how much these duties demand may cause some concern. I will address concerns raised by (1) the claim that the duties of social equality are too demanding because they imply radical and costly changes and (2) the argument from virtue ethics, which could claim something like the reverse: these duties do not demand enough.

³⁴ The comparison is quite difficult to make however because what exactly Rawls demands of individuals is not entirely clear due to the brevity and somewhat vagueness of his descriptions of the principles for individuals. Despite this, it does seem clear that by adapting the principles to accommodate social equality we are expecting more of individuals, as the revised duties are not substitutes for Rawls's duties; individuals are thus expected to comply with the original demands, whatever these may be, as well as the additions to the duties.

4.1.1. *Describing a fair and equal society*

Besides expanding the principles for individuals, the duties of social equality seem to imply radical and costly changes to ways of life, which may be deemed unacceptably demanding. Consider the implications of the duties of social equality on the Christian church, for example.³⁵ These are some potential examples of violations of social equality which either seem to defy respect-for-persons by assuming hierarchies of value based on social group membership or seem to dehumanise by violating moral or legal rights or denying the autonomy of choice:

- not ordaining women or gays as priests;
- quoting or referring to passages in the bible or other religious texts which disparage or treat as inferior women, gays, members of other religions, atheists, or anyone else;
- banning the use of contraception and prohibiting abortion.

Although social equality would demand freedom of religion, aspects of religions could violate social equality and these are seen to be wrong. It is no excuse thus to devalue or dehumanise women, or gays, or other religions, to say, it is part of my religion. Claiming, however, that the Christian church is doing something wrong by positing a hierarchy of value between Christians and other religions, or Christians and atheists, for example, seems to question

³⁵ There is nothing particular about Christianity as a religion that would make it likely to violate social equality in contrast to any other religions. Islam, Judaism and so on, would all be likely to come under similar criticism.

some of the basic tenets of Christianity's existence. Thus insisting that the church fulfils the duties of social equality would imply fundamental change. This seems much more demanding than Rawls's justice. Norman Daniels would probably claim that this is too demanding:

To suggest that the demands of justice ... must outweigh the moral and religious commitments within my life is to pit justice against reasonable pluralism. It is to invoke a substantive conception of how individuals must weigh their moral commitments that goes beyond making justice the prime virtue of institutions and makes it the prime virtue of individual motivations and behaviour. It no longer simply constrains individual pursuit of the good; it defines it.³⁶

How can associations like churches and individuals who choose to express their religious beliefs be expected to uphold respect-for-persons and toleration? This seems to ask too much.

The perceived excessive demandingness of the duties of social equality is a function, however, of the assumption that they are prescriptive. As prescriptive prohibitions that cannot be over-ridden, they seem particularly costly and may imply radical changes to certain ways of life. They may even threaten religions.

This is not the way, however, that they are meant to be understood. Like Rawls, I am interested in describing a fair society. The duties of social equality are meant to be descriptive, thus I am not claiming that they *must* be

³⁶ Daniels (2003: 268).

fulfilled. I am merely describing how people would act in a society of equals and in a fair society: in such societies, these are the duties with which people *would*, not should, comply. This does not mean then that churches and Christians have to make radical changes to their doctrines and actions. It does mean, however, that in a society of equals, Christian doctrines and actions would not violate respect-for-persons, and thus in a description of a society of equals, Christianity, and a number of other religions and ways of life, might take a different, possibly radically different, shape, from what they are now.

4.1.2. Actions vs. virtues

The duties are expressed in terms of actions; what is fair is the action that upholds social equality. However, what is required of individuals need not, and according to many virtue ethicists, should not, be expressed in terms of actions: they should be expressed in terms of character traits instead.³⁷ Justice is performed not through isolated actions or by fulfilling moral duties but by having the virtue of justice. To some extent then, virtue ethicists would say that the duties of social equality do not demand enough, although more importantly, they are saying that the demand is something entirely different: we should not demand that individuals fulfil duties of justice, we should demand that individuals should *be* just.

³⁷ See, for example, Solomon (2001: 169-186). For a more specific criticism related to descriptions of toleration, see Newey (1999: 38-64). Newey is likely to accuse me of reductivism as I claim that describing the values of social equality in terms of character would not add anything substantial. He might call this a reductivist approach because I reduce character to motivation (38-9).

This seems to be a relevant criticism of the duties of *social equality* particularly. Social equality, I have argued, is not about obeying the law or doing your duty through gritted teeth: it demands that individuals treat each other as equals even in what are traditionally considered to be private interactions. As such it seems to ask more from individuals than that they should act *according to* the demands of equality; it appears to demand that they agree with social equality and are motivated by it. It thus seems more accurate to say that they need to be fair, rather than merely that they need to act justly.

I have three responses to this, however, to demonstrate that it is appropriate to express what social equality demands in the form of actions and duties.

Firstly, I aim to accommodate social equality within Rawls's justice. As such, duties appear to be the most appropriate way of describing what social equality demands of individuals because the structure of Rawls's principles for individuals seems best suited to accommodating social equality.

Secondly, I do not believe that expressing what is required of social equality in terms of virtue will provide any new content to what social equality requires of the individual. If anything, it is the actions that demonstrate what being a fair person means not the other way around: we need to know precisely what it is that social equality demands and the duties provide us with these details. Claiming that individuals need to be fair seems to make no substantial difference to what it is that we require.

Lastly, however, I believe it is problematic to express violations of social equality in terms of unjust individuals. An emphasis on individuals as unjust, rather than actions, seems to blame and chastise individuals excessively. Although an egalitarian ethos would create a framework of approval and disapproval for judging others' behaviour, more importantly, its aim is for individuals to internalise justice, to affect them at the level of motivation, by creating a social environment more conducive to fair choice and behaviour. It should not be viewed as something that directs and constrains the individual as if it were an independent entity assigning blame and praise for certain choices. The aim is not to reproach individuals for specific choices made, and to classify them as fair or unfair but to reduce or eradicate inequalitarian norms that encourage individuals to make unjust choices. I agree with the way in which Cohen describes the issue of blame in this case:

people do have choices: it is indeed, only their choices that reproduce social practices ... But one also must not say: look how each of these people shamefully decides to behave so badly ... since, although there exists personal choice, there is heavy social conditioning behind it ... 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.³⁸

38 Cohen (2000; 143).

4.2. Consistency and the duties of social equality

The duties of social equality could seem feasible on their own but they could still be problematic because they could be inconsistent with the greater political theoretical framework of which they are supposed to form a part. I will address three concerns of consistency. The first is whether the duties of social equality are consistent with the broader liberal framework of which Rawls's theory of justice forms a part. The second and third concerns are more specifically whether these duties are consistent with Rawls's justice: I consider their compatibility with (i) political liberalism and (ii) the institutional principles.

4.2.1. Social equality and social tyranny

John Stuart Mill's claim that tyranny occurs even in democracies might seem initially to support my argument from social equality. Mill argues that although democracies avoid political tyranny they can still stifle freedom through social tyranny.³⁹ Translated into an argument about social equality one could argue that an inegalitarian ethos which reinforces violations of respect-for-persons is a form of social tyranny and in order to counteract this tyranny, an inegalitarian ethos needs to be replaced by an egalitarian ethos.

However, Mill's claims are more likely to be used as a counter-argument: we should not try to replace one set of norms with another. Any ethos is a form of

³⁹ See Mill (1991: 61-3).

social tyranny which compels conformity, dissuading individuals from making autonomous choices. I think something like this idea is quite prevalent in real-life politics in which some violations of respect-for-persons, such as the use of derogatory language, are dismissed as ‘political correctness gone mad’ or as a violation of freedom of speech.

Furthermore, it is true that although the duties of social equality are moral duties, as opposed to legal duties, and thus they have no legally coercive force, they can be as, at times more, coercive than legal duties. The shame or stigmatisation that can occur if social norms are violated can be said to coerce compliance. In this sense, the fact that violations may constitute legally acceptable behaviour does not necessarily make it any easier to perform these actions and thus, at least in some sense, one could say that our freedom in choosing to perform them is restricted. On an extreme view of this, arguing for the duties of social equality implies arguing for a form of thought control. Fraser, for example, argues against focusing on the subjectivity of the oppressed or the oppressor claiming that if we construe “misrecognition as damaged identity, it emphasises psychic structure over social institutions and social interaction. Thus, it risks substituting intrusive forms of consciousness engineering for social change”.⁴⁰

40 Fraser (2003: 89). Also, see her claims that her approach to recognition adopts a status model which avoids the problem of focusing on the “psychic damage” (92) suffered by targets of racism (92-93). Fraser presents this as an either/or, as if we cannot acknowledge distortions of identity as well as “externally manifest and publicly verifiable impediments to some people’s standing as full members of society” (93), but does not provide reason as to why they should be exclusive. It is very difficult to deny that pervasive and systematic injustices to social groups distort identity, self-esteem, self-respect and so on, and Fraser does not explicitly deny this. Yet, as such, a notion of justice which ignores this harm I believe must be insufficient, just as it would be insufficient if it ignored other harms and the institutional causes of distorted identity.

The norms demanded of social equality, however, can be interpreted as consistent with Mill's claims because violations of social equality cause harm and thus expecting compliance with the duties of social equality could be defended under the harm principle.⁴¹ Furthermore, although I think there is reason to be concerned about censorship and the curbing of freedom of speech, I do not think that the problem lies with the claim that we need to prohibit or discourage violations of respect-for-persons but rather with determining what constitutes a violation of respect-for-persons, or how best to discourage or sanction these violations. Many claims that violations of respect-for-persons have occurred, such as not interviewing someone for a job because they are Muslim or not allowing black people to be members of a golf club, seem uncontroversially unacceptable in a fair and equal society.

There are contexts, however, where it is not clear whether respect-for-persons has been violated or where it is not clear what should be done about violations of respect-for-persons. I think that comedy, popular music and art provide some of the trickiest examples. Is it a violation of justice to use stereotypes and insults of social groups during a stand-up comedy routine or in a novel or in the lyrics of a song? I believe that in many cases it would not be. However, I also believe that violations of justice can occur even in such a context. For example, lyrics which encourage listeners to “murder dem [gays] fast”

41 Mill (1991) argued that the only justifiable reason for restricting freedom is preventing harm to others: “the sole end for which mankind are warranted, individually or collectively, interfering with the liberty of action of any of their number is self-protection” (68). Whether this principle could defend all aspects of the duties of social equality, including restrictions on the use of derogatory language and hate speech, for example, would mainly depend on how harm is defined. Mill seemed to believe that freedom of speech should not be curbed under any circumstances (75-118), with the implication that speech cannot cause harm, although he does admit that speech which is “a positive instigation to some mischievous act” can be censored (119).

clearly violate social equality as they violate both conditions of respect-for-persons, devaluing and dehumanising, as well as toleration.⁴² What is likely to cause controversy, however, is which sanctions should be imposed and whether this song should be officially censored is. From the viewpoint of social equality both censoring and not censoring such songs could be justified: the former because they violate respect-for-persons; for the latter an argument could be made that curbing freedom of speech is dehumanising.⁴³ Difficulties in establishing when the duties of social equality have not been upheld or in how to react to those violations, however, should not make us abandon a notion of informal social equality. Rather, on a practical level, it demonstrates that what social equality is would at times need to be decided on a case-by-case basis and, on a theoretical level, it demonstrates a need for the refinement of the notion of social equality.

Furthermore, the general objection from Mill's notion of social tyranny to the duties of social equality, would apply to any type of ethos whether egalitarian or not, and thus it seems only to work if we can achieve an ethos that is neutral about equality or where we have no ethos at all. It seems virtually impossible, if not impossible, to imagine a real-life society in which there is no ethos or in which there are no values which influence equality. There will always be norms of behaviour and values which society expects individuals to uphold; it is thus preferable that these values be fair rather than unfair.

42 These lyrics have been cited from an online BBC news article (18/09/2003), which did not identify the artist.

43 A way of resolving this case could be to deny a right to freedom of expression when that expression advocates hatred because of sexuality, race, gender, and so on.

4.2.2. A political conception of justice?

Although the duties of social equality seem to be somewhat consistent with justice-as-fairness because they do not apply the institutional principles of justice directly to individual behaviour, there is some question as to how they fit in with the notion of political liberalism and with its corresponding political conception of justice. The question is, are the duties of social equality duties of political justice? If not, how do they correspond to the rest of justice-as-fairness? Are they inconsistent with Rawls's conception of justice if they are not part of a political conception of justice?

Seemingly, per definition, the duties of social equality as applied to informal individual behaviour cannot be part of a political conception of justice unless they are part of the basic structure. As the basic structure appears to include the public rules of institutions but not personal choices within those institutions, then these duties are not political.

What is difficult to understand is what the implication of this might be. A Rawlsian might be tempted to respond by claiming that this means that the duties of social equality are inconsistent with political justice, and are thus inconsistent with Rawls's justice, and should be abandoned. I argue, however, that no implications of inconsistency seem to follow necessarily from the claim that the duties of social equality are not part of a political conception of justice.

Two primary characteristics of a political conception of justice are: (1) it is not tied to any comprehensive moral or philosophical doctrine and (2) it is not general, meaning its scope is limited to the basic structure.⁴⁴ Rawls claims that reasonable pluralism demands that justice should not be tied to any comprehensive doctrine; it needs to be justified by reasons which will be acceptable to anyone, no matter to which particular comprehensive doctrines they subscribe. In this sense, there is no inconsistency between the duties of social equality and a political conception of justice because the duties are no less tied to any comprehensive doctrines than the institutional principles: the same values and ideals underlie both. However, the duties of social equality are ruled out of being part of a political conception of justice by the second characteristic. Rawls claims that a political conception is not general: it is “a moral conception worked out for a specific kind of subject, namely for political, social, and economic institutions”.⁴⁵ As informal social equality applies to personal conduct and associations, which Rawls describes as being part of ‘background culture’⁴⁶ and which he precludes from the basic structure, this means that the duties of social equality, at least where they apply informally and not formally, cannot be part of a political conception of justice and are rather part of ‘general’ justice:

44 Rawls (1993: 11-15; 175; 2001h: 389-390). For an explanation of a political conception of justice from a secondary source, see, for example, Burton Dreben (2003). Many find fault with political liberalism. Dworkin (2000), for example, claims that “a theory of political morality... should be located in a more general account of the humane values of ethics and morality” (4) See also Stephen Mulhall and Adam Swift’s (1996: 167-246) detailed and critical assessment of political liberalism, which can be summarised as the charge that Rawls’s “anti-perfectionism seem[s] vulnerable to a charge of circularity, and (even by his own admission) appear to violate the limits of the purely political” (250).

45 Rawls (2001h: 389).

46 Rawls (2001g: 576).

This is not to deny that there are appropriate conceptions of justice that apply directly to most if not all associations and groups as well as to the various kinds of relationships among individuals. Yet these conceptions of justice are not political conceptions.⁴⁷

The implications of this, however, are not entirely clear. If one wanted to formulate some sort of objection from the fact that the duties of social equality cannot be part of a political conception of justice, then the implication would be that there is ‘something wrong’ with any form of justice besides the political. This does not clearly follow however.

It seems apparent that Rawls believes that conceptions of justice which are tied to comprehensive doctrines are problematic because they do not respect reasonable pluralism. However, not being part of a political conception of justice does not necessarily mean being tied to comprehensive doctrines: the point is that the duties of social equality are sought for the same reasons as the institutional principles, which *are* part of a political conception of justice. If the institutional principles are not tied to a comprehensive doctrine then the same should apply to the duties of social equality. Rawls does say that what distinguishes background culture from the public forum in terms of comprehensive doctrines is that within background culture it is permissible to justify choice on comprehensive doctrines, while this is not permissible within

47 Rawls (2001a: 164). That the duties of social equality, or duties of such kind, would necessarily be excluded from a political conception of justice is not always clear. Indeed, at times Rawls includes individuals’ characters and attitudes in a political conception of justice: “The focus of a political conception of justice is the framework basic institutions... as well as how those norms are expressed in the character and attitudes of the members of society who realize its ideals” (Rawls 2001f: 423). Also: “a political conception... covers the right to vote, *the political virtues*, and the good of political life” (Rawls 2001c: 617; my emphasis). A case could probably thus be made that individual choice and duties for individuals are part of a political conception of justice.

a public forum.⁴⁸ It does not follow from this however that all choice within background culture has to be tied to comprehensive doctrines, and, from the perspective of social equality, the argument could be that when justice is violated within background culture, choice cannot be justified with reference to comprehensive doctrines, thus, a violation of justice is not made acceptable by culture or religion, for example. The duties of social equality are thus not inconsistent with political justice; they are merely not a part of political justice, because they are general and thus do not apply to the basic structure. It seems that all that follows from this is a difference in description which demonstrates a distinction between different principles of justice applied to different subjects.

4.2.3. A conflict of principles?

According to the extensive view of the principles of justice, there could be principles of distributive justice that differ from the institutional principles. Thus there could be principles which aim at, or partially aim at achieving distributive justice, which are not the institutional principles. The duties of social equality are such principles. Although their primary aim is to achieve informal social equality, they can be conceived of as principles of distributive justice because, if fulfilled, they would help to achieve a fairer distribution of social goods. In chapter I, I claimed that from the way in which Rawls describes different principles and different subjects of justice, the extensive view seems consistent with his conception of justice. I did, however, add a

48 Rawls (2001g: 576).

caveat claiming that whether such principles actually are consistent is something to be seen because it would depend on their content. In this section I will explore the notion that the duties of social equality are inconsistent with Rawls's justice because they conflict with the institutional principles.

According to the exclusive view, only the institutional principles of justice can achieve distributive justice; duties for individuals such as the duties of social equality are moral duties which may be necessary for a complete theory of the right but which are not related to achieving a fair distribution of social goods. By arguing that justice in personal choice is a necessary requirement for distributive justice, and then by arguing that the institutional principles applied to the basic structure or to personal choice, or to both, will not achieve justice in personal choice, I am claiming that the exclusive view is wrong. We need justice in personal choice to achieve a fair distribution of opportunities and self-respect and as the institutional principles are insufficient, some other principles must be required for distributive justice.

There is a way that proponents of the exclusive view could try to incorporate the duties of social equality, however. They could argue that these duties are subsidiary principles of justice, subsidiary to the fundamental principles, i.e. the institutional principles. Of course, they could argue, the institutional principles are not the only principles necessary to achieve justice but any other principles are merely subsidiary: they aim at achieving what it is that the institutional principles are trying to achieve by supplementing them at a local

or individual level where the direct application of the institutional principles would be inappropriate.

If the only relationship between distributive justice and the duties of social equality was in achieving a fair distribution of opportunities I would agree with this assessment: the duties would be supplements to achieving the principle of fair equality of opportunity. As the duties also aim at establishing the informal social basis of self-respect, and as there is no principle of self-respect among the institutional principles, however, it cannot be true that the duties are only subsidiary. Perhaps one could argue that there are some more fundamental principles or ideals, such as that of self-respect, which both the institutional principles and the duties of social equality aim to achieve, however, this does not change the point at hand which is that even if this were the case, the duties of social equality and the institutional principles are thus somewhat independent and the duties cannot be reduced to supplements for the institutional principles.

A similar argument from the exclusive view could draw a distinction between background justice and other forms of justice. Insisting on a requirement for justice in personal choice, this objection could go, misses the point of Rawls's justice. Rawls is concerned only with background justice and the duties of social equality or justice in choice do not influence background justice. Pogge advocates this understanding of Rawls:

The crucial point, then, is that Rawls focuses on the fundamental ‘rules of the game’, and not on what moves players are morally free or constrained to make within a particular game in progress.⁴⁹

Injustices in choice can occur; moreover, there may be other injustices which are not included in Rawls’s justice: “Convicting an innocent person of murder is a very grave injustice, even if it occurs within a just basic structure”.⁵⁰

Although other injustices can occur, so this view goes, these are not injustices within the background institutions of society and are thus irrelevant to Rawls’s justice. When Rawls claims, for example, that a limit would need to be set which inequalities of wealth could not exceed, he maintains, however, that “On this sort of question theory of justice has nothing specific to say. Its aim is to formulate the principles that are to regulate the background institutions”.⁵¹ If then the duties of social equality can be incorporated into Rawls’s justice, they would be some sort of general principles of justice or morality, but they are unlike the institutional principles. They cannot achieve the same kind of justice as the institutional principles.

I do not find this interpretation of the exclusive view convincing either. It is a mistake to believe that personal choice occurs only *within* social and institutional strictures. Choices reinforce or undermine the structures in which they occur and thus constitute that structure.⁵² Thus when the claim is that personal choice influences distribution, this does not mean that individual

49 Pogge (1989: 26). ‘The game’ Pogge is referring to here is a poker game. As I explained in chapter I, he draws an analogy between the choice to play poker and background justice, as opposed to the choices made within a poker game which are analogous to personal choice.

50 Pogge (2000: 164).

51 Rawls (1999: 246).

52 This, as I explained in chapter IV, is Cohen’s argument (2000: 137-8).

choices sporadically influence the distribution of goods. The claim is that unjust choices help to sustain unjust social structures and norms which pervasively and systematically devalue and disadvantage certain social groups. As such, a concern with the justice of choice is also a concern with ‘the ground rules’, with background justice, even if it is not a concern with formal or legally coercive institutional structure.

Neither the claim that the duties of social equality are subsidiary or that they are not principles of background justice is convincing. For this reason, I cannot accept the exclusive view and thus believe that in order to accommodate justice in personal choice in Rawls’s justice, the extensive view should be adopted.

By insisting, however, that the duties of social equality are not merely subsidiary but also by insisting that they are not different types of principles from the institutional, I am opening my argument to a problem of the consistency of the duties with the institutional principles. What would happen, I could be asked, if the institutional principles and the duties of social equality conflict? If the duties were merely subsidiary, then any clash would be resolved by saying that the institutional principles must take precedence, for if the duties aim at achieving only what the institutional principles aim at and these principles are the more fundamental, then if a choice needs to be made it must be made on the side of the institutional principles. If the duties of social equality have value independent of the institutional principles then that option is not open, however, and the question remains, ‘what would happen if they

clash?'. If then there are times where the duties of social equality should be chosen above the institutional principles, and thus if the duties can violate the principles of justice, how then can I argue that they are consistent with the greater framework of Rawls's justice? Before attempting to answer this challenge, let's consider how these principles could come into conflict.

Where conflict could occur is when it comes to the distribution of resources required to achieve justice. Aiming to achieve informal social equality and adhering to the institutional principles could clash if resources are required to achieve social equality. I claimed in an earlier section that the policy implications of social equality would not be clear without empirical research. Let us say for argument's sake, however, that it is proven that the best way to achieve informal social equality is by teaching school children citizenship theory and let us say that in order then to achieve a fairer distribution of self-respect, the government decides to implement citizenship education. In order to do so, however, funds from welfare schemes which would have benefited the worst-off need to be diverted. Here we could say that the duties of social equality conflict with the difference principle. In such a case, we need to ask, which should take priority? And if social equality should take priority, how can the principles of social equality be consistent with Rawls's justice, if it implies a violation of Rawls's justice.

Another example of a clash could be between social equality and the priority of liberty.⁵³ If liberty is always prioritised, then it seems that freedom of speech, for example, should always be defended against the claim that hate speech should be prohibited, and yet one could argue from the principles of social equality that hate speech should not be tolerated because it violates respect-for-persons.⁵⁴

A way of resolving this which seems to make sense is to make an appeal to the fundamental values or ideals underlying both the institutional principles and the duties of social equality. Let us say then, for example, we agree that the notion that all individuals are equal moral beings and thus should be treated with equal respect and concern is the fundamental ideal underlying both sets of these principles.⁵⁵ The institutional principles and the duties of social equality are thus complementary principles which aim to capture this ideal, or something like it. If, however, these principles clash, the solution to choosing which should take precedence would then be solved by appealing to which best fulfil the more fundamental ideal. Probably in these cases, the answer is unlikely to be straight-forward and often arguments could be made either way through an appeal to this ideal. This would, however, provide us

53 The principle of equal liberty is lexically prior to fair equality of opportunity and the difference principle (Rawls 1999: 214-220), and so “liberty can be restricted only for the sake of liberty” (220). See Hart (1975: 230-252) for his well-known criticism of this priority.

54 This could also be a clash between the two components of respect-for-persons, as I explained in section 5.2.1. I mentioned a possible way out of this clash, however, and that is to say that certain liberties are precluded by justice. Just as there should be no liberty to harass or assault, there should also be no liberty to propagate racial hatred, for example. Thus if we are to accept this argument, there is no clash between the principles of social equality and the priority of the liberty principle (or between the two requirements of respect-for-persons) because there is no such liberty.

55 Dworkin (1975) claims that the “highly abstract” right to equal respect and concern underlies Rawls’s justice (50). As it is so abstract, it can be expressed in different ways. The original position, Dworkin claims, is a means to test which principles best express this right.

with at least some standard against which to measure conflict. This standard would also address the problem of consistency. Even if the duties of social equality could violate the principles of justice, this we can argue is only to better achieve the ideal underlying the institutional principles. Understood in this way, the duties are not inconsistent with Rawls's justice as even if it is possible for them to violate the institutional principles, they conform to the more general ideal underlying these principles.

Conclusion

In the introduction, I claimed that my aim in this chapter was to answer two primary questions. The first question is whether Rawls's principles for individuals address informal social equality (or even justice in choice). I have argued that these principles do not: (1) they primarily tend to provide support for formal institutional justice, and not for informal justice, and (2) where they seem similar to social equality or justice in choice, they are too brief and imprecise. These principles seem much more of a promising solution to the problem of justice in choice, however, because they are principles for individual behaviour. As they share a structure and broad content sympathetic to the demands of social equality, it seems appropriate to adapt them as a solution to accommodating justice in choice in Rawls's justice.

This leads to the second question this chapter aimed to answer: how can we adapt Rawls's principles for individuals to fulfil the demands of social

equality? I have argued that Rawls's duties of mutual respect and justice could be revised:

1. the duty of mutual respect would demand that individuals uphold respect-for-persons, civility and toleration and;
2. the duty of justice would, among others, demand that individuals should comply with informal justice when it exists and help to establish fair informal arrangements when they do not exist, by fulfilling the duty of mutual respect.

I claimed that in the broader context of this thesis, this chapter would aim to provide an alternative to the original PCA's claim that the institutional principles should be applied to choice. I have argued that the duties of social equality are a better solution: they are principles designed to apply to individuals, and although their direct aim is to achieve social equality, they will also help to uphold justice in choice because when the values of respect-for-persons, civility and toleration are upheld by individuals, the informal social basis of the primary goods of opportunities and self-respect would be more fairly distributed.

Although the duties seem to imply extreme changes to religions and certain ways of life which violate respect-for-persons and toleration, I have emphasised that they are not meant to be prescriptive. I aim to describe a fair society and a society of equals; my claim is that in such societies, individuals would fulfil the duties of social equality. Furthermore, although these duties depart from Rawls's original justice, they can be defended as an extension of

his theory as they can be reconciled with (i) liberal notions of harm, (ii) political liberalism and (iii) the ideals underlying the institutional principles.

General Conclusion

In my introduction I asked the question ‘what type of equality would a fair society require?’ Among other forms of equality, my answer is that a fair society requires informal social equality, which includes equality and justice in personal choice. If informal social equality is achieved, justice in choice would also be upheld, as the primary social goods of opportunities and the social basis of self-respect would be distributed fairly. Although a fair society clearly requires fair institutions, it seems then that it also requires fairness and equality in personal choice. Rawls’s conception of justice primarily only recognises institutional justice. To extend his description of a fair society to include justice in choice, the thesis I have argued to support is that Rawls’s principles for individuals should be revised to incorporate the values of social equality.

For Rawls, justice is primarily a function of the application of the institutional principles to the main institutions of society, or as he refers to them, the basic structure. Although there are different ways in which to understand the basic structure, I have argued that a feasible interpretation is that the basic structure is limited to political form, the economy, the constitution and legislation where these are relevant to distribution, and through these institutions, the basic structure includes the public rules of other institutions and associations and the public rules applicable to individual behaviour. Basic structure does not include individual behaviour, at least where this behaviour is not subject

to public rules, thus the institutional principles, which are meant to evaluate and regulate basic structure, do not apply to personal choice. Injustices in choice, such as interferences with the development of self-respect through systematic and pervasive devaluation, thus remain unaddressed by Rawls's institutional justice.

This neglect of justice in choice seems to pose a problem for Rawls's conception of justice as described according to the fair distribution of primary social goods. Justice in the distribution of goods such as opportunities and the social basis of self-respect is affected by choice and convention, such as, for example, through private racial discrimination, exclusion, stereotyping and verbal harassment. If we are going to describe a fair society according to a fair distribution of these goods, we should include a description of justice in choice. A description of a fair society thus cannot rely solely on Rawls's institutional justice. How then do we describe a fair society which includes the requirement of justice in choice?

If we aim to expand or revise Rawls's conception of justice to include justice in choice, we are presented with two primary alternatives based on two different interpretations of the status of principles and subjects of justice. According to the exclusive view, the only (direct) subject and principles of broad distributive justice are the basic structure and the institutional principles. According to the extensive view, principles besides the institutional could apply to subjects other than the basic structure in order to achieve distributive justice. If we aim to incorporate a requirement for justice

in choice into Rawls's justice, in keeping with the exclusive view, we would have to make choice part of basic structure and apply the institutional principles to choice, or, in keeping with the extensive view, we could design or adapt principles other than the institutional to apply to choice.

A solution consistent with the exclusive view is the solution proposed by advocates of what I have called the personal choice argument. According to this argument, the justice of choice should be judged according to how well it conforms with the institutional principles. Cohen, who promotes this argument, claims that demands for material incentives are unjust if measured according to the difference principle. In response to the objection that the principles of justice cannot be applied to individuals, Cohen argues that choice, such as the demand for incentives, could be subject to the principles of justice because (1) choice is constitutive of the noncoercive structure of institutions, which it would be arbitrary not to include within the scope of justice, and (2) choice has profound and pervasive effects on individuals' lives.

This solution, I have argued, is unconvincing. We could design principles of justice specifically for choice, which would negate the need for applying the institutional principles to choice. Indeed, there are good reasons not to apply the institutional principles to choice because, among others, they can be self-defeating when applied to individuals and they do not address the injustices of unfair distributions of the informal basis of self-respect. Instead of adopting the exclusive view and forcing the application of the institutional principles,

as the only principles of distributive justice, to choice, we could instead adopt the extensive view, recognising that principles designed to be applied to choice, and thus individual behaviour, could help, in conjunction with the institutional principles, to capture broad distributive justice.

Rawls's institutionalism does not mean that he focuses exclusively on institutions. Rawls recognises that principles for individuals, such as the natural duties of justice and mutual respect, would also be chosen in the original position. These principles are described only briefly and where they do seem to correspond to something similar to justice in choice, they do not do so explicitly. Mainly these principles demand that individuals support fair institutions rather than demanding that individuals themselves act justly.

Thus although these principles seem to be the right kind of principles we are looking for as opposed to principles designed to regulate institutions, their content does not address the justice of choice, so we would need to adapt them if we wanted to use them to describe justice in choice. If neither the institutional principles nor the principles for individuals can capture the notion of justice in choice convincingly, what can? I have argued that social equality, which illustrates what a society of equals would be like, would also result in a fair distribution of goods such as opportunities and the social basis of self-respect. Social equality is, at a minimum, respect-for-persons, civility and toleration upheld in informal and formal spheres, thus both in the realm of choice, and through rights and legislation. If social equality is upheld by individuals then justice in choice is also likely to be upheld. A means then of

including justice in choice within Rawls's conception of justice is to adapt the principles for individuals according to the values of social equality. I have argued that in order for Rawls's justice to express justice in choice as a requirement of a fair society, we could:

1. adapt the duty of mutual respect to state a requirement to uphold respect-for-persons, civility and toleration, and;
2. adapt the duty of justice to state a requirement for individuals to establish and uphold informal as well as formal institutional justice.

The scope of this thesis has been limited. The limits of this thesis mean that we still do not have answers to some of the questions raised as part of the argument about personal choice and, furthermore, a number of new questions about social equality have been raised which still need answering. One of the most important questions, a question which helped inspire the debate about personal choice, whether demands for incentives are fair, remains unanswered. The implications of my argument for the justice of incentives might be a worthwhile topic to explore as an extension of my argument.

Moreover, my focus in this thesis has been on the distribution of non-material goods. A further important issue which needs to be explored in greater detail is the relationship between social equality and economic equality, or, if not economic *equality*, exploring what type of distribution of material goods is consistent with a society of equals.

Furthermore, although I have provided something of a description of a society of equals, I have done so only as a function of exploring justice in choice.

How to model a society in which people can be said to be treated genuinely as equals can be explored in much more depth. My descriptions of the values of respect-for-persons, and especially civility and toleration of difference could be expanded to be more detailed and nuanced, and perhaps stronger definitions of these values are required. For example, in chapter II, I mentioned that my description of toleration might need to be revised to include a requirement not merely of accepting difference but of encouraging difference, if it could be demonstrated that this is indeed what a society of equals requires. I also claimed that further values of social equality, such as solidarity, may need to be included: a society of equals seems as if it might need a description of a shared commitment and affiliation which individuals have towards each other and their society.

Although there are thus limitations to the scope of this thesis and much further research is needed, what I have aimed at is providing a solution to the problem of justice in choice within Rawls's conception of justice. In order to provide this solution, I have argued that if we include a requirement for individuals to uphold informal social equality, thus respect-for-persons, civility and toleration, within Rawls's justice, we will achieve a fairer distribution of social goods. Thus, to improve our model of a fair society, we could include as requirements for justice (1) institutional justice, achieved through the application of the institutional principles to basic structure, *and* (2) justice in

personal choice, achieved through individuals upholding the duties of social equality.

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