

# The Division of Moral Labour and the Basic Structure Restriction

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## *Abstract*

Justice makes demands upon us. But these demands, important though they may be, are not the only moral demands that we face. Our lives ought to be responsive to other values too. However, some philosophers have identified an apparent tension between those values and norms, such as justice, that seem to transcend the arena of small-scale interpersonal relations and those that are most at home in precisely that arena. How then are we to engage with all of the values and norms that we take to apply to us?

In this paper I discuss one way that we might hope to resolve the tension and its relation to John Rawls's 'basic structure restriction'. The prospect of resolution is offered by the idea of a 'division of moral labour', according to which the pursuit of certain values is assigned to institutions and not to individuals. According to Rawls's basic structure restriction, principles of justice are applicable only to the institutions of the basic structure of society. The possibility of a connection between the division of moral labour and the basic structure restriction readily suggests itself.

Taking G.A. Cohen's well-known 'incentives' critique of the basic structure restriction as a starting point, I consider five ways in which that restriction might be defended by appeal to the division of moral labour. I conclude that none of these defences succeeds, for none convinces that the conditions in which it makes sense to apply the division of moral labour idea obtain for Rawls's conception of distributive justice. Although the division of moral labour is an attractive proposal, it can do no work in a Rawlsian context.

## I. Introduction

Most of us think that justice makes demands upon us. But we think that these demands, important and stringent though they may be, are not the only moral demands that we face. We ought to be responsive to other values and ideals which govern what we make of our lives and our relations with those close to us: kindness, fidelity, generosity, aesthetic value, and honesty, among others. In this sense, we are, then, pluralists about value: we think that each person faces a range of different values which make different demands of her.

Yet the right way to meet the various demands that these different values make is not always clear to us. In particular, we may often feel that there are tensions between what is required of us by some of them and what is required of us by others. Thomas Nagel's *Equality and Partiality* is an extended discussion of a tension that he finds between values belonging to the 'impersonal standpoint' and those belonging to the 'personal standpoint', where both standpoints are irreducible components, as he sees it, in each individual's point of view. Samuel Scheffler too emphasises the apparent difficulty of reconciling values and norms that 'transcend the arena of small-scale interpersonal relations' with values and norms which are 'most at home' in precisely that arena.<sup>1</sup> Real-life examples of our encounters with the perceived tension are easy to come by: I feel slighted by the friend who tells me that she has given money to Oxfam instead of sending me a card and gift for my birthday; I argue for more and cheaper housing on one day and sign a petition against building it in my close-knit neighbourhood the next; I count myself an environmentalist even as I fly abroad to attend philosophy conferences. In each case I feel awkward and guilty about my actions' failure to conform to the demands (as I see them) of one value or set of values even as they conform to the

demands (as I see them) of another. But how are we to meet the demands of all of the values and norms that we take to apply to us? How is the tension to be resolved?

In this article I discuss one way that we might hope to resolve the tension and the relation between it and John Rawls's 'basic structure restriction' in his theory of justice as fairness. The prospect of a resolution is held out by the ideal of a 'division of moral labour', according to which the pursuit of some values is assigned to institutions and not to individuals outside these institutions.<sup>2</sup> According to Rawls's basic structure restriction, Rawls's favoured principles of justice are applicable to only the institutions of the basic structure of society.<sup>3</sup> They are not applicable to individual conduct outside the basic structure (this is what I shall mean henceforth by 'individual conduct'), though individuals must support the basic structure. The possibility of a connection between the division of moral labour and the basic structure restriction readily suggests itself. In particular, friends of Rawls might hope to appeal to the division of moral labour to defend the basic structure restriction from G.A. Cohen's well-known 'incentives' critique. Cohen thinks that Rawls's principles of justice should also regulate individual conduct beyond merely that of supporting the basic structure. I think that something like the division of moral labour ideal is in fact often implicitly invoked in replies to Cohen, but it is not always clear what it is or how exactly the appeal to it is supposed to work.<sup>4</sup> I want to suggest that once we have a clear understanding of the ideal and how appeals to it are supposed to work it will become clear that such appeals cannot defeat Cohen's critique.

In what follows I start by offering clarification of the ideal of the division of moral labour. It is appealing because it has the potential to resolve the tension that I outlined a moment ago. But dividing moral labour makes sense, I argue, only when either of two conditions is met. Either institutions must be capable of meeting the all-things-considered demands of the values assigned to them to the greatest extent that this is possible. Or individuals must be *incapable* of contributing to meeting those demands

other than through support for institutions assigned their pursuit. If one of these two conditions is met, the division of moral labour can resolve the tension. But if not, dividing moral labour will fail to achieve its aim.

Cohen's critique can usefully be interpreted in this light as a denial that a division of moral labour makes sense given Rawls's understanding of the values of justice. So friends of Rawls hoping to defend the basic structure restriction as a division of moral labour must show that one of the two conditions is met with respect to the values assigned to the institutions of the basic structure. I consider three ways in which they might hope to show that the first condition is met and two ways in which they might hope to show that the second condition is met. I reject them all, and conclude that the division of moral labour ideal does not offer friends of Rawls a way to defend the basic structure restriction from Cohen's critique.

## II. *The division of moral labour*

As I said above, there seems to be tension between the requirements of different values which we take to apply to us in various situations. Nagel and Scheffler both suppose that at least with respect to some of this tension, a resolution can be found in the division of moral labour.<sup>5</sup> According to this idea, the task of pursuing some of the values involved in the creation of the tension is to be assigned to institutions, leaving individuals free to pursue the remaining values through their conduct within a framework set by the institutions in question.<sup>6</sup> Their pursuit of the former values is mediated by the institutions; pursuit of the values then requires of them simply that they uphold the institutions. As Scheffler describes the idea (in the context of Rawls's theory of justice) with respect specifically to a supposed tension between values of justice and equality and other values:

The task of realizing the values of justice and equality will be assigned primarily to what Rawls calls ‘the basic structure of society’. The basic structure, which comprises a society’s major social, political, and economic institutions, will be regulated by a distinctive set of normative principles. Individuals will be assigned a duty to support just institutions, but within the framework established by those institutions, they will be able to lead their lives in such a way as to honour the values appropriate to small-scale interpersonal relationships.<sup>7</sup>

The attraction of the idea of the division of moral labour is that it promises to resolve the tension by creating a framework in which the appropriate responses to the various values which we take to make demands of us do not conflict with one another:

The idea of a division of moral labour represents an attempt to accommodate the multifaceted character of our own values: to make room for the irreducibly heterogeneous character of the evaluative concerns that move us. The aim is to accommodate these different values by allowing them regulative authority over different aspects of our lives and arrangements.<sup>8</sup>

It is important to be clear about what the division of moral labour is *not*. It is not the idea that tension-creating values can be shown to be ordered by some more fundamental value or that values on one side of the division can be reduced to those on the other.<sup>9</sup> Nor is it an approach to pluralism which involves balancing the claims of one value or set of values against those of others. If the variety of values which make demands of us cannot be ordered by some more fundamental value, then a balancing approach can at best offer a satisfactory *compromise* between demands. The division of moral labour, by contrast, involves no compromise. Our encounters with the perceived tension are

situations in which it seems to us that we cannot accommodate all the values that apply; the prospect that the division of moral labour holds out is that we can structure our lives so that such situations do not arise in the first place. The reasons supplied by distinct values no longer favour the performance of conflicting actions in given situations. Instead, their domains of application are restricted to different contexts. So as Nagel says, the division of moral labour is not ‘merely a way of balancing the claims of the two standpoints...its object ideally is to make possible a more complete satisfaction of both of them.’<sup>10</sup>

For illustration, recall the example I gave above of the tension between my environmentalism and my attendance at philosophy conferences. If no division of moral labour has been effected between environmental justice and the value I pursue when I pursue a philosophical career, I experience a tension between those values when I consider attending an important philosophy conference on another continent. But suppose that we successfully divide moral labour between these two values, assigning the pursuit of environmental justice solely to institutions. The thought is that now the contexts in which I should support the institutions whose task it is to realize environmental justice will be clear and clearly distinct from the contexts in which I should pursue other values. I can now disregard environmental justice in these other contexts, safe in the knowledge that my support for institutions (whatever that involves) fully discharges my obligations with respect to that value. The reasons supplied by the value of environmental justice no longer apply in those contexts in which the reasons supplied by other values apply, and vice versa. But this is not to say that the demands of environmental justice or the other values are in any way reduced. The division of moral labour is not supposed to be a way to reduce the *costliness* of the demands that a given value makes upon us (apart from the psychological costliness of finding oneself unable to do justice to all the values that one takes to apply).<sup>11</sup> Perhaps support for the relevant

institutions is extremely demanding: it might involve voting for a ban on flights, for example, or it might involve accepting such a hefty tax on my income that I cannot afford to go to the conference anyway. Nevertheless, so long as the contexts in which my support for the relevant institutions is required (for example: voting, paying tax, even fighting on the right side in a civil war) are clearly distinguished from the contexts in which it is not (for example: thinking about my career, buying gifts for my friends), the division of moral labour resolves the tension. My support for the relevant institutions means that my pursuit of the values that they are designed to serve no longer puts those values in tension, in the relevant situations, with the other values that it remains up to me to pursue in my non-institution-upholding conduct.

We might, of course, have other reasons besides the division of moral labour ideal to create institutions to pursue a given value. Perhaps doing so will, as it turns out, make meeting the demands of the value in question less costly or less time-consuming, for example. Perhaps even the tension I have been discussing will be reduced in some sense. But this is not the point of the division of moral labour. The point of the division of moral labour is to restructure our lives so that situations in which there would otherwise be a tension between what is demanded of us by different values no longer arise at all.<sup>12</sup>

### *III. When is a division of labour appropriate?*

Dividing moral labour achieves its aim only in certain circumstances. If those circumstances do not obtain, the tension we feel between the values to be divided cannot be resolved by such a division. The necessary circumstances are as follows. It must be the case that with respect to the discharging of duties generated by a given value the pursuit of which we are contemplating assigning to institutions, nothing can be achieved through individual conduct—beyond support for the institutions in question—that

cannot be achieved by the institutions themselves. For suppose that it can. In that case, the tension which arises in situations where different values, including the value assigned to institutions by the division of moral labour, make conflicting requirements upon us will not be alleviated by the division of moral labour. Even if everything goes perfectly, institutionally speaking, it will not be the case that the institutionally-pursued value's demands upon us are fully met by our support for the institutions in question. We will still be required by the value to take action to meet those demands (to finish the job, as it were) in the situations at hand. So the tension between its demands and those of other values will remain.

Let me illustrate this point with a fanciful elaboration of an example I gave above. Suppose that we wanted to set up institutions to pursue the values of friendship that we normally pursue by giving one another cards and gifts, leaving us free to devote our remaining resources at the times where cards and gifts are currently appropriate to the alleviation of poverty. Perhaps we would all pay a tax to fund the selection and distribution of cards and gifts to each person, for instance. It seems clear that although this division of moral labour might be *feasible* and even if the institution worked as well as it possibly could, it would nevertheless be true that with respect to the discharging of the obligations that are generated by the value of friendship there would remain something more that could be achieved by individuals and not by institutions in the relevant contexts. For even if the friendship that I express by sending cards and gifts could to some extent be expressed by paying the tax, there is also some aspect of it that surely cannot be so expressed which demands *my* special attention to *my* own friends relative to others at these times. That leftover demand, *ex hypothesi* a demand of the very same value which is pursued by the gift-distributing institution as well as it is possible for it to be pursued by an institution, would be in tension in the relevant contexts with our pursuit of the alleviation of poverty just as sending cards and gifts would have been in the



absence of this attempted division of moral labour. Nor will it do to suggest that the tension is *reduced* by the institution since the leftover demands of friendship are much smaller once it is established. For the question, as I emphasised in the preceding section, is not about the *extent* of the demands of the values in question, but about the domains of conduct over which they apply. Proponents of a division of moral labour think that we can, by effecting the division, distinguish between contexts in which a given set of values applies and contexts in which those that remain apply. The thought is that without the division of moral labour both sets of values would apply in both sets of contexts, and that this is the source of the tension.

Of course the underlying reason that a division of moral labour which assigns the pursuit of the value of friendship to institutions must fail is that the value of friendship is such that it is inappropriate to assign its pursuit to institutions at all. Friendship is a value which must by its very nature be pursued non-institutionally. The fact that after an attempted division of moral labour which assigns its pursuit to institutions there remains a leftover demand of individuals simply reflects that fact. But this illustrates the point that dividing moral labour makes sense only under certain one condition, viz., that nothing can be achieved through individual conduct (not including support for the institutions in question) that cannot be achieved by the institutions themselves with respect to the discharging of obligations generated by a given value. We should expect that in cases where a value could by its nature only inappropriately be assigned to institutional pursuit, the division of moral labour will not make sense. Conversely, where a value could by its nature only inappropriately be assigned to *individual* pursuit, we should expect that the division of labour will make sense, though the institutions necessary for its pursuit may not as a matter of fact be feasible. For values whose nature is such that they might appropriately be pursued by either institutions or individuals (or both), meanwhile, whether or not the condition is met will depend solely on the

feasibility (rather than appropriateness) of institutions which pursue those values to the greatest extent that it is possible to pursue them.

So there are two distinct ways in which the condition might be met. On the one hand, the condition might be met because it is possible to pursue the relevant value(s) via institutions as successfully as it is possible for them to be pursued, although they could *instead* be pursued to this degree by individuals. On the other hand, it might be that (again with respect to the relevant values) institutions can achieve things that *could not possibly* be achieved by individuals. In this case the division of moral labour is necessary for the successful pursuit of those values.

I am assuming here that we may give a specification of the duties that are placed upon us by any given value in advance of any attempt to divide moral labour so as to assign the fulfilment of those duties to institutions.<sup>13</sup> (In section VII below, I consider a reply to my argument which rejects this assumption.) But, as I hope is clear from the foregoing, this is not to assume that some values are not inherently institutional. Being able to give a specification of duties prior to any division of moral labour is consistent with understanding those duties as necessitating the establishment of institutions for their fulfilment. In such cases the tension that we feel between the institutional values and the non-institutional values will be a product of the fact that our duty to establish the appropriate institutions applies to us continuously, as it were, so that the institution-establishing actions required of us by the institutional value conflict with those actions required of us by non-institutional values in those contexts that the latter apply. Dividing moral labour resolves the tension in the way I described in section II above: by restricting the domain of application of the institutional values to contexts which are distinct from those in which the other values apply.

The fact that the division of moral labour is feasible only when the condition that I have been discussing is met implies that a theory which aims to resolve the relevant sort

of tension by assigning the pursuit of some value (or values) solely to institutions must be ready to defend itself against what we can call the *futility objection*. The futility objection denies that the condition for the realization of the division of moral labour as a way to resolve the tension is met with respect to the value which the division assigns to institutions—i.e., it denies that with respect to the discharging of obligations generated by that value or those values everything that it is possible to achieve can be achieved by institutions. Dividing moral labour, it claims, is futile as an attempt to resolve the tension. A defence against the futility objection could proceed in either of two ways corresponding to the two ways in which the condition might be met. On the one hand, it might be argued that institutions are capable of pursuing the relevant value or values as successfully as it is possible for anything to pursue them, though individuals may also be capable of doing this. Call this the *institutional capacity defence*. Or on the other, it might be argued that individuals are *not* capable of pursuing the relevant values with any success (whereas institutions are). Call this the *individual incapacity defence*.

#### IV. *Rawls and the division of moral labour*

Let us look at how the division of moral labour ideal might be thought to support Rawls's basic structure restriction. According to that restriction, the primary subject of justice is the basic structure of society, which is

the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. By major institutions I understand the political constitution and the principal economic and social arrangements [including] the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family...<sup>14</sup>

What does it mean to say that the basic structure is the primary subject of justice? It means that the principles of justice that Rawls offers ‘regulate this structure and do not apply directly to or regulate internally institutions and associations within society.’<sup>15</sup> These principles are not appropriate for the regulation of individual conduct in general either: ‘[t]he principles of justice for institutions must not be confused with the principles which apply to individuals and their actions in particular circumstances. These two kinds of principles apply to different subjects and must be discussed separately.’<sup>16</sup> Saying that the basic structure is the primary subject of justice also means giving principles for the basic structure normative priority over principles for other areas: ‘the conception of justice [for the basic structure]...has a certain regulative primacy with respect to the principles and standards appropriate for other cases.’<sup>17</sup>

Rawls does not deny that principles appropriate for individuals or for non-basic structure institutions and associations may be principles *of justice*.<sup>18</sup> But it is plausible to interpret Rawls as supposing that the values of *distributive* justice that he takes his favoured principles to serve (see *A Theory of Justice*, p. 10/9) are served both necessarily and fully through the institutions of the basic structure, and therefore not at all through individual actions besides support for those institutions. Necessarily, because the fact that the basic structure is the primary subject of justice implies that there is no alternative way to build a theory of justice. This rules out, for example, starting by formulating principles for individuals designed to serve the values of distributive justice. And fully, because Rawls’s long discussion of the principles of distributive justice never escapes the basic structure restriction. It is hard to see how he could have failed to mention it if his treatment was not meant to be exhaustive in respect of the realization of the values those principles are designed to serve.

Now values of distributive justice similar if not identical to those served by Rawls’s difference principle are among those that seem to many of us to be in tension with other

values that apply to us in situations analogous to those I gave earlier as examples of the tension that the division of moral labour promises to resolve. When I walk past a homeless man on my way home from buying an expensive gift for a friend, one of the sources of my discomfort is as follows: I suspect that if this society realized the values of distributive justice that I take there to be, I might not be able to afford such an expensive gift because more of my income would have gone to alleviating the poverty of people such as this homeless man. But if a division of moral labour could successfully be effected between the values of distributive justice I have in mind and other values, then if such a situation still arose this source of my discomfort, at any rate, would not exist.

If Rawls intended with his theory of justice to effect just such a division of moral labour, that might explain why he maintains that principles of (distributive) justice apply to the basic structure but not to individuals. Rawls would regard it as a mistake for me to think that principles of distributive justice require that I forego the expensive coat and give most of my money to the homeless man so as to make him as well off as possible.<sup>19</sup> He would think this because he would believe that his theory of justice realizes the ideal of a division of moral labour between distributive justice and other values.

#### *V. Cohen's incentives critique as a futility objection*

Cohen's 'incentives' critique can usefully be interpreted as a form of the futility objection to any such division of labour in Rawls.<sup>20</sup> His argument focuses on Rawls's difference principle, according to which 'social and economic inequalities are to be arranged so that they are...to the greatest expected benefit of the least advantaged'.<sup>21</sup> Rawls says that '[a]ccording to the difference principle...inequality in expectation [between the worst off and the better off] is permissible only if lowering it would make the [worst off] even more worse off.'<sup>22</sup> One implication of this is that productive workers may be offered

material incentives to work in maximally productive roles so long as the resultant increase in productivity is great enough to fund both these incentives and an improvement in the position of the least well-off.<sup>23</sup> But Rawls also thinks that in a just society each person affirms and acts from her sense of justice, where the content of that sense is determined by the conception of justice as fairness that Rawls advocates.<sup>24</sup> Cohen argues that affirming and acting from this sense of justice is incompatible with refusing to work in (equally burdensome but) maximally productive roles unless one is offered incentives. For such incentives are necessary to benefit the worst off only in the sense that one would *choose* to be less productive without them. One could equally well choose to be maximally productive without the incentives, and doing so would be much more beneficial to the worst off. Such incentives would not therefore be necessary in a society where productive workers really did affirm and act from their sense of justice (the content of which is partly determined by a maximin approach to the socioeconomic position of the worst off). So a just Rawlsian society must be one in which productive workers do not take incentives in order to work in maximally productive roles. (As Cohen puts it, the difference principle must be given a 'strict' interpretation: it must be taken not to count as necessary those incentives based on the mere choice of workers not to maximise their productivity without unequal pay.) But this Rawlsian requirement of distributive justice, Cohen thinks, is not something that can be fully satisfied only by the institutions of the basic structure. It requires a widespread 'egalitarian ethos' which informs individuals as they make occupational decisions. Therefore our pursuit of the values assigned to the basic structure in the proposed Rawlsian division of moral labour in fact requires individual conduct besides support for the basic structure. So the basic structure restriction is not justified by that division of moral labour, since that division of moral labour does not achieve its aim.

As I have shown, the futility objection to a contemplated division of moral labour may be refuted by the successful deployment of either the institutional capacity defence or the individual incapacity defence. Each of these shows that the aim of resolving the tension between the values in question can be achieved by dividing moral labour. So if a defence along either of these lines can be successfully mounted to support a division of moral labour between Rawlsian values of distributive justice and other values, that would vindicate the basic structure restriction, since it would show that the division does after all achieve its aim. Cohen would therefore be wrong to suppose that Rawlsian distributive justice requires individual action besides support for a just basic structure.

I shall now consider five attempts to refute Cohen's futility objection to Rawls's division of moral labour. The first three may be familiar from other contexts as objections to Cohen's critique. What I want to do is consider their plausibility as appeals to the division of moral labour in the form of institutional capacity defences. Cohen's arguments suggest that Rawls's basic structure restriction cannot be justified by the division of moral labour between the values of distributive justice on the one hand and other values on the other, since what Rawls sees as required by the values of distributive justice involves the application of principles to contexts outside the basic structure. The institutional capacity defence insists that, on the contrary, what Rawls sees as required by those values can be achieved by the institutions of the basic structure to the greatest extent that it is possible for it to be achieved at all, even if it might instead be achieved by individuals. The final pair of attempts to refute the futility objection are forms of the individual incapacity defence. Rather than insisting that institutions can do everything that individuals can do with respect to the realization of the relevant values, the individual incapacity defence emphasises that individuals *cannot do anything*. So the values must be pursued institutionally or not at all.

As I shall show, all five of these defences fail. This suggests that the futility objection hits its mark in Rawls's theory. The division of moral labour is an attractive ideal, but it is not achieved by justice as fairness and cannot therefore justify the basic structure restriction. I begin, then, with the institutional capacity defences.

#### VI. *The institutional capacity defence*

The first form of this defence starts by conceding that Cohen may be right that the difference principle should be interpreted strictly, so that incentives for productive workers to work productively are to be seen as incompatible with the realization of distributive justice (because they are not strictly necessary). But this does not imply that the difference principle can be fully satisfied only if an egalitarian ethos governs individual economic decisions. And if the difference principle *can* be fully satisfied by the basic structure and without the ethos, then we have an institutional capacity defence which justifies the division of moral labour.

Scheffler is one proponent of this defence:

it is not at all obvious why a government could not implement [the strict difference] principle, by simply prohibiting incentive payments, or taxing them at 100% (absent compelling evidence that the recipients *could* not work as productively in the absence of such payments). Of course, if the society in which the government did this were well-ordered, then citizens would *also* have a sense of justice leading them wholeheartedly to comply with the strict principle. If, on the other hand, citizens lacked such motivation, then some of the talented might refuse to work as productively as they could. But it does not follow from the first of these points that a government could not implement the strict principle by itself. And, notwithstanding the second point, equality would prevail in the society in question,



even if some of the talented refused to work as productively as they could. Cohen is therefore mistaken when he says that, in the absence of an ethos of justice, 'inequalities will obtain that are not necessary to enhance the condition of the worst off'.<sup>25</sup>

On one version of the difference principle, this would, I think, be a conclusive answer to Cohen's challenge. In the scenario that Scheffler envisages, it makes no difference to the success of our pursuit of the values of distributive justice whether or not the talented work as productively as they can, since the difference principle is satisfied even if they do not. (Scheffler appears to concede that if they *do*, this will be because they have an ethos of the sort that Cohen advocates.) So we could fully meet the demands of the distributive values that this version of the difference principle serves through the basic structure; and so the basic structure restriction would be defensible at least in this respect as the result of a division of moral labour between the value of distributive justice and other values. There is reason, however, to doubt that the version of the difference principle which permits this defence is the version to which Rawls is committed. The version in question creates a filter for any inequalities that the basic structure may generate. According to this 'filter principle', inequalities are *permissible*, but not required, if they are necessary to improve the position of the worst off, and impermissible otherwise. But, as Cohen has argued (in a different context), another possibility is that Rawls is committed to the 'lexical difference principle', according to which the position of the worst off is to be maximised first, then the position of the next worst off, and so on until the best off.<sup>26</sup> This version of the difference principle is not compatible with Scheffler's institutional capacity defence, since it requires that productive workers do not refuse to work as productively as they can—something which necessitates an egalitarian

ethos of the sort that Cohen advocates.<sup>27</sup> So the question which version of the difference principle we should attribute to Rawls is not uncontentious.

Rawls's own discussions of the difference principle provide no conclusive evidence in favour of one interpretation or the other. On the one hand, for example, Rawls's introduction of the lexical difference principle in *A Theory of Justice* casts it as a refinement to the filter principle's relatively simple permissibility condition for inequalities, designed to cover cases in which inequalities have no effect on the least well off group.<sup>28</sup> In such cases the filter principle appears to give an answer which is out of keeping with the parties' motivations. (They are not envious, where envy is 'the propensity to view with hostility the greater good of others even though their being more fortunate than we does not detract from our advantages'.)<sup>29</sup> The lexical principle is presented as part of the articulation of the filter principle itself, requiring that any inequalities that there are maximise the position of first the least well off, then the next worst off, and so on, rather than that there should be inequalities which do this. Furthermore, Rawls claims that the difference principle 'does not require continual economic growth over generations to maximize upward indefinitely the expectations of the least advantaged' and that if it did so it 'would not be a reasonable conception of justice'.<sup>30</sup> This gives us reason to suppose that the difference principle does not require that productive workers work as productively as they can, and so supports Scheffler's position.

But on the other hand, Rawls says that an arrangement in which '[e]ven higher expectations for the more advantaged would raise the expectations of those in the lowest position' is 'just throughout, but not the best just arrangement'.<sup>31</sup> The precise difference in moral value here is obscure, but it is plain that the preferred arrangement is one in which the position of the worst off is maximised. And he says that 'the difference principle directs society to aim' *both* at 'the most effectively designed scheme of cooperation'—one scheme is more effective than another if its production curve 'always

gives a greater return to the less advantaged for any given return to the more advantaged’—*and* at the highest point on the production curve of that scheme.<sup>32</sup> This suggests that the aims of the difference principle are not after all satisfied by equality (the lowest point on the production curve), which tells in favour of the lexical principle as against the filter principle, and in favour of Cohen as against Scheffler.

In any case, however, what is important is not whether one of these two versions of the difference principle better reflects the totality of Rawls’s own statements on the matter, but whether or not Rawlsians ought to favour one version over the other. For the purposes of assessing the first institutional capacity defence, we can be more precise yet: what matters is whether or not the principle that best fits with Rawls’s arguments would be satisfied by an equal distribution regardless of the absolute level of wealth. For this is what is necessary to sustain Scheffler’s point.<sup>33</sup> Even if ultimately we conclude that the lexical principle itself is more demanding than anything that Rawls should be committed to, that is insufficient to show that what he should be committed to is as *undemanding* as the filter principle.

In fact, there is good reason to suppose that the filter principle is too undemanding. The parties in the original position ‘must secure the fundamental interests of those they represent.’<sup>34</sup> They are therefore concerned to secure for them the conditions for the ‘development and exercise of the two moral powers and the effective pursuit of their conception of the good’.<sup>35</sup> Among the conditions necessary for these is an adequate supply of primary goods.<sup>36</sup> Now, even if we deny that the parties will seek to *maximise* the worst off person’s share of primary goods, regardless of the demands this makes on the productively talented, it seems unlikely that they could, consistent with the specification of their motivation, choose a principle that would be satisfied by equality at *any* absolute level of wealth. For in some cases<sup>37</sup>—where the productively talented made no use of their talents whatsoever—the equal, absolute levels of wealth generated by

social cooperation would be insufficient to secure the conditions for the development and exercise of the two moral powers and, in particular, the effective pursuit of individuals' conceptions of the good.<sup>38</sup> The parties would choose a principle which could not be satisfied without *some* improvement in the position of the worst off as compared with this low baseline and, therefore (if we interpret such a principle strictly), an egalitarian ethos.<sup>39</sup> Any such principle would be incompatible with the first form of the institutional capacity defence.

In reply to Cohen's objection, Scheffler says that 'it would fundamentally transform the thrust of Cohen's critique if he were to argue that an egalitarian ethos is needed not to avoid unjust inequalities but rather to ensure that equal shares are as high as they could possibly be.'<sup>40</sup> (I assume that he would say something similar if Cohen modified his stance to be merely anti-filter rather than pro-lexical.) But this is tendentious. On the lexical interpretation of the difference principle, the ethos aims at *both* of these things—not one rather than the other. Moreover, this does not particularly 'transform the thrust' of Cohen's critique, the essence of which is to charge Rawls with an inconsistency. Cohen need not be seen as endorsing the Rawlsian position that he sees Rawls as being committed to, so his own egalitarianism, which indeed focuses on avoiding unjust inequalities rather than maximising (or increasing) equal shares, is beside the point.<sup>41</sup>

I conclude, then, that the first form of the institutional capacity defence of Rawls's basic structure restriction fails. The second form concedes a little more to Cohen: it grants that the egalitarian ethos is necessary for the avoidance of incentive inequalities, but it denies that this is a reason to suppose that Rawls's conception of distributive justice should dictate principles applicable to individual conduct. This defence begins with the suggestion, which Cohen attributes to Ronald Dworkin, that a Rawlsian

government might be thought to be charged with a duty, under the difference principle, of promoting an egalitarian ethos.

The point of the suggestion is to show that the basic structure restriction is compatible with Cohen's demand for the ethos. It says that the egalitarian ethos may indeed be required, but only derivatively: the institutions of the basic structure are to do what they can to satisfy the demands of distributive justice, and promoting an egalitarian ethos—like discouraging wastage, for example—is one thing that they can do. To the extent that the institutions of the basic structure do promote the ethos, the basic structure is (distributively) just. And since the basic structure is just, Rawls's principles of justice are satisfied, since they apply only to the basic structure. This is so *even if individuals fail to respond as hoped to the promotion of the ethos*. Therefore, as Cohen notes in his reply to Dworkin, we cannot say that 'to the extent that the indicated policy failed [to promote the ethos], society would, as a result, be less just than if the policy had been more successful'.<sup>42</sup> It follows that compliance with the ethos is not a demand of Rawlsian (distributive) justice, since, if it were, society would be less just to the extent that the policy fails. So we should conclude that institutions are capable of fully meeting, on their own, the demands of Rawlsian (distributive) justice. And this is what the institutional capacity defence claims.

But this second form of the institutional capacity defence faces an unappealing dilemma. The first horn is familiar from Cohen's discussion of Dworkin's suggestion. Suppose that individuals do indeed fail to respond as hoped to the promotion of the ethos. In that case, advocates of the proposed view must claim both that distributive justice requires that the institutions of the basic structure aim at the promotion of the ethos and that it does not matter, for the purposes of assessing how just a society is, whether or not they succeed. As Cohen says, this 'threatens to render [Rawls's position] incoherent'.<sup>43</sup>

Turning to the second horn, let us suppose instead that individuals respond as hoped to the promotion of the ethos, and we have no need to worry about what to say if they do not.<sup>44</sup> In that case, individuals take themselves to be subject to the demands of the ethos, and in situations where they might otherwise have chosen to pursue other values, e.g. those of friendship, they submit instead to those demands. Now if, as the institutional capacity defence claims, Rawlsian distributive justice is fully realized in this situation by the institutions of the basic structure, then we might agree that a division of moral labour has been effected between Rawlsian distributive justice and other values including those served by the ethos and such values as friendship. But, when people are moved by the egalitarian ethos in their daily lives, clearly no division of moral labour has been effected between the value that individuals take themselves to be serving in complying with that ethos and other values (besides Rawlsian distributive justice) such as friendship. And the ethos makes its demands upon them in exactly the same set of situations that Rawlsian distributive justice would have made demands upon them had no division of moral labour been effected between it and other values. Moreover, suppose that this division of moral labour not been effected. In other words, suppose that Rawlsian distributive justice applied to us in our daily lives and had not been assigned to institutions only. In that case there would surely be no further egalitarian demands on us beyond those made by Rawlsian distributive justice. It is not possible to distinguish between the demands of distributive justice in this scenario and those served by an egalitarian ethos, since they have exactly the same content. Absent a basic structure to be assigned the pursuit of distributive justice, a line cannot be drawn between distributive justice's demands and those that an ethos would make. This strongly suggests that the ethos's demands are, after all, those of distributive justice. If this is right, the Rawlsian division of moral labour fails to achieve its aim of resolving the tension that we take ourselves to face in the relevant situations. It restricts to a limited

set of contexts some of the demands of one value but leaves the rest in place in exactly the same situations as before.

Neither horn of this dilemma can be comfortably occupied by a Rawlsian. So I conclude that this second form of the institutional capacity defence fails. The final form that I shall consider appears to concede yet more to Cohen than either of the first two. It grants that the egalitarian ethos is a demand of Rawlsian distributive justice, such that the absence of such an ethos constitutes an injustice in a Rawlsian society. But it insists nevertheless that this does not show that principles governing individual conduct, as contrasted with principles governing the basic structure, are required for Rawlsian justice, and it thereby attempts to demonstrate that the futility objection to a putatively Rawlsian division of moral labour fails. It does this by claiming that the egalitarian ethos *itself* is part of the basic structure, so that principles requiring it and the actions constituting its establishment and maintenance are principles for the basic structure, not for individual conduct outside the basic structure. Hence another institutional capacity defence: the basic structure, on this expanded conception, is capable of achieving as much as even Cohen thinks is possible in the pursuit of distributive justice.<sup>45</sup>

This defence would nevertheless not involve counting *everything* as the basic structure, as Scheffler emphasises:

it does not follow...that there is no distinction to be drawn between the expanded basic structure and individual choices made within that structure...even if the basic structure, properly understood, includes some noncoercive institutions, it does not comprise all or only individual conduct, and it is still possible to distinguish between the basic structure and choices made within that structure.<sup>46</sup>

This seems right. The problem, however, is that the concession of the need for an egalitarian ethos constitutes an abandonment of the idea that Rawlsian justice usefully effects a division of moral labour. Recall that the division of moral labour is supposed to resolve a problem that faces us in certain situations in which it seems that we cannot accommodate all of the values that apply. The idea is that we can structure our lives, by assigning the realization of certain of the values to the basic structure, so that these situations do not arise any more. Meeting the demands of all the values need no longer engender the tension. But if we include an egalitarian ethos as part of the basic structure, it is clear that the division of moral labour we are interested in has not been effected after all. For the set of situations in which one must take the requirements that one internalises when one has the egalitarian ethos to be applicable is no different from the set of situations in which, absent the division of moral labour supposedly effected by assigning the pursuit of distributive justice to a basic structure which incorporates the ethos, one would take the requirements of distributive justice to be applicable. Complying with the ethos just is having a disposition to act in the way that one would act in the absence of any division of moral labour, at least with respect to those values pursued, and to the extent that they are pursued, by the ethos.<sup>47</sup>

Of course the basic structure also includes other institutions. The rules constituting these institutions are not those that would govern individuals in the absence of a basic structure. But to the extent that both these institutions and the ethos serve the value of Rawlsian distributive justice, the futility objection can be made against the division of moral labour defence of the basic structure restriction. And as we saw, it is precisely the point of Cohen's critique that the institutions of the basic structure *do* serve the same value(s) that the ethos serves. This is effectively conceded by the third form of the institutional capacity defence. I conclude, therefore, that the third form of the institutional capacity defence fails.



The three forms of the institutional capacity defence that I have considered are those that I have found suggested in discussions of Cohen's incentives critique and the basic structure restriction. Although there may be others, it seems to me unlikely that they will be able to avoid implicitly conceding the necessity of individual conduct for the realization of Rawlsian distributive justice, given Cohen's forceful arguments. So although proponents of such defences may be able to show the consistency of requirements for individuals with the Rawlsian view and even with the basic structure restriction, I doubt that they will be able to escape some version of the objection that I have pressed against the second and third forms of the institutional capacity defence. What they will not be able to do, that is, is justify the basic structure restriction by appeal to the division of moral labour. I continue, therefore, on the assumption that the institutional capacity defence fails.

#### *VII. The individual incapacity defence*

I now turn to the second type of defence against the futility objection. According to this, the individual incapacity defence of Rawls's basic structure restriction, individuals are *not* capable of realizing the values that Rawls assigns to the basic structure with any success (whereas the institutions of the basic structure are). This means that the pursuit of the relevant values fulfils the condition for the applicability of the division of moral labour idea. The basic structure restriction can be justified, therefore, by the division of moral labour between the relevant values and others.

As I noted in section III above, one reason that we might expect a given division of moral labour to make sense is that the value to be assigned to institutions is by its very nature could only inappropriately be assigned to individual pursuit (just as the value of friendship can only inappropriately be assigned to institutional pursuit). So one

argument for the basic structure restriction in terms of the division of moral labour might be an individual incapacity defence which appeals to the idea that distributive justice is *by its nature* only inappropriately assigned to individuals to pursue. This claim surely requires some support, however.<sup>48</sup> Although some values may be *obviously* only unsuited to individual pursuit, distributive justice is not one of them (as the thriving debate over Cohen's critique demonstrates). Those who wish to offer this kind of individual incapacity defence must offer more than merely the assertion that distributive justice is inherently institutional.<sup>49</sup>

One prominent argument of Rawls's might be thought to supply the necessary further support. This is the argument that distributive justice is what Rawls calls *background justice*. Background justice is a value which is served by principles for institutions, as contrasted with principles for individuals. Rawls's argument runs as follows. The justice of the bargaining positions from which we enter into agreements and relations is standardly thought of as essential for the justice of the agreements and relations. In a theory such as Nozick's, the justice of the bargaining positions derives from the justice of prior transactions only. But Rawls thinks that this is not enough.<sup>50</sup> A distribution satisfying his principles of justice and which, absent the appropriate institutions, will tend to be undermined over time is required (or rather: processes which promote it are required) as a background for the justice of individual bargaining positions. Permitting it to be undermined over time is permitting what we might call foreground agreements and relations to become unjust, even if they appear to have the same features as agreements and relations against a just background—in particular if they appear to respect principles of foreground justice (e.g. relating to fraud and duress) governing individual conduct. The justice of the agreements and relations, in other words, presupposes the justice of the background.

Distributive justice, then, involves non-historical principles of distribution. There are other principles of justice too: the principles of foreground justice. But in the absence of processes regulated by the non-historical principles, the application of these does not entail the justice of the transactions to which they are applied. And it is not the case that the dependence runs both ways. The application of the non-historical principles of distribution to the relevant processes does guarantee the justice of *those* processes, that is, of the background—even if principles of foreground justice are not being followed in individual transactions. The justice of the processes to which principles of background justice apply does not presuppose the justice of the foreground transactions: the justice of one's bargaining position is intact regardless of whether one bargains justly.

So justice of any kind requires background justice. But background justice requires a basic structure, because 'there are no feasible and practicable rules that it is sensible to impose on individuals that can prevent the erosion of background justice.'<sup>51</sup> Moreover, Rawls suggests that we should see distributive justice as a case of 'pure background procedural justice', such that '[t]here is no criterion for a just distribution apart from background institutions and the entitlements that arise from actually working through the procedure.'<sup>52</sup> Given that background justice *requires* a basic structure, and if there is *no criterion* for a just distribution apart from that it arises as a result of individuals' conformity to the rules of the background institutions<sup>53</sup> of a just basic structure (Rawls makes it clear that the institutions in question are indeed those of the basic structure),<sup>54</sup> we might conclude that with respect to at least distributive justice, the task of realizing it can be performed only through individuals' conformity to the rules of the basic structure alone (with no further rules for individuals required).<sup>55</sup> If this is right, it can provide us with an individual incapacity defence of the basic structure restriction at least with respect to that value.

However, the reasons that Rawls offers to show that the task of realizing distributive justice requires the basic structure do not support the conclusion that the task of realizing distributive justice can be performed *only* through individuals' conformity with the rules of the basic structure.<sup>56</sup> They support the conclusion that the task of realizing distributive justice *cannot be performed only through individual conduct that does not count as conformity with the rules of the basic structure*. That is compatible with the possibility that it can most successfully be performed only through *both* the conformity of individuals with the rules of the basic structure and their acting on an egalitarian ethos which is not part of the basic structure.<sup>57</sup> The conclusion that distributive justice is a case of pure background procedural justice is not licensed.<sup>58</sup>

It may seem that I have missed the point here. Surely if we concede that distributive justice involves background justice, and background justice necessarily involves a basic structure, then we must concede that Rawls's decision to take the basic structure as the primary subject of justice makes sense? For without background justice there is no possibility of establishing foreground justice, and therefore no possibility of establishing justice at all. But we can concede this without conceding that the division of moral labour idea is applicable, and so without conceding that the division of moral labour justifies any basic structure restriction. As I mentioned earlier, to take the basic structure as primary is to take it that we can respond appropriately to the values (at least in part) assigned to it *only* if there is a basic structure. And if background justice is a presupposition of justice and can be achieved at all only if a basic structure is assigned its pursuit, then it is right to take the basic structure as primary in this sense. But taking the basic structure as primary is not the same as theorising under the basic structure restriction. That restriction insofar as it is justified by the division of moral labour reflects the view that we can meet the demands of the values assigned to the basic structure not just *only* but also *fully* with the basic structure. It is precisely this that the

futility objection denies. What my discussion has shown is that taking the basic structure to be the primary subject of justice is justified, on Rawls's assumptions about background justice. But taking the fact that it is the primary subject of justice to justify the basic structure restriction is not justified. It can be the primary subject of justice yet incapable of pursuing the values that it is assigned to pursue as successfully on its own as it could pursue them in combination with non-basic structure principles for individuals. So a division of moral labour may not allow us fully to meet the demands of those values.<sup>59</sup>

In Section III above I explicitly assumed that we can give a specification of the duties that are placed upon us by any given value in advance of any attempt to divide moral labour so as to assign the fulfilment of those duties to institutions. I want now to consider a form of the individual incapacity defence which challenges this assumption.<sup>60</sup> According to this line of argument we cannot give a specification of our duties of distributive justice prior to the specification of institutional arrangements because our duties are sensitive to the *success* of those arrangements. Which duties of distributive justice we have is a matter of which principles of justice are capable of playing a particular role in the societies they regulate, namely the role of securing well-ordered social co-operation. Together with the arrangements that satisfy them, some principles—those which ‘arouse excusable general envy...to a troublesome extent’,<sup>61</sup> for example—may not be capable of playing that role. So although we might have some prior conception of the duties that the value of distributive justice imposes, it may turn out that these are not our duties after all if the institutions necessary for their fulfilment would fail to secure well-ordered social co-operation.<sup>62</sup>

This approach could provide the basis for an individual incapacity defence of the division of moral labour in the following way. The only principles of justice which are capable of playing the specified role, it might be argued, are essentially institutional. If so, then principles of distributive justice which assign duties to individuals are incapable

of playing the appropriate role. So there are no duties of distributive justice for individuals: it is not possible for individuals to offer anything in pursuit of distributive justice beyond support for the basic structure. Hence the individual incapacity defence.

Why might we suppose that those principles of justice which are capable of playing the appropriate role must be institutional? Rawls suggests a variety of constraints on principles of distributive justice which pertain to their ability to play the appropriate role, including completeness, finality, and especially publicity.<sup>63</sup> Principles suitable for a well-ordered society must also, of course, represent fair terms of co-operation.<sup>64</sup> Now, as we saw above, any principles which are to be applicable to individuals must be relatively simple. So perhaps the thought is that there are no principles which are both sufficiently simple and capable of playing the appropriate role.

But there is no good reason to grant this. To be sure, the principles of justice as fairness which Rawls defends dictate the need for background justice, as Rawls specifies it, and so necessitate an institutional division of labour which assigns *some* role to institutions.<sup>65</sup> And those principles themselves are too complex to offer a feasible guide for individual conduct. But principles which *would* be sufficiently simple<sup>66</sup> to offer such a guide might, in combination with Rawls's principles of justice for institutions, represent fairer terms of co-operation than the institutional principles alone—where the conception of fairness operative here is cashed out in terms of Rawls's own arguments from reciprocity and the natural lottery.<sup>67</sup> It is just Cohen's point that these arguments which justify the difference principle also justify the need for an egalitarian ethos. There is no reason to exclude the possibility of ethos-specifying principles in advance by insisting that the difference principle's place must be in a conception of distributive justice which is essentially institutional.

Even if we reject my assumption that our duties of distributive justice can be specified in advance of any institutional arrangements, then, my rejection of the

individual incapacity defence stands. It may be that we cannot specify our duties before we have ascertained whether proposed principles of distributive justice are capable of securing well-ordered social co-operation. But we cannot assume that the only principles capable of playing that role must be institutional. It might be that the role is best played by principles for institutions and principles for individuals in tandem. And indeed this is just what Cohen's critique asserts. So the individual incapacity defence fails.

### *VIII. Conclusion*

The division of moral labour is an appealing idea. We feel that we have obligations of justice to our fellows and we often feel that in an unjust world these obligations create a tension with the pursuit of other values. We may sometimes feel frustrated that the pursuit of these other values is tainted by the tension. The thought that we can restructure our social world so that the situations in which justice should guide us and the situations in which the other values should guide us are separate is therefore very attractive, even if, as it turns out, the latter situations are very few or what is demanded of us in the former situations is very great.

Rawls's basic structure restriction, by appearing to restrict the applicability of principles of distributive justice to basic structure institutions, seems to license the conclusion that once we have established a just basic structure, we need in most situations no longer worry about distributive justice (which is not to say that we need not worry about other values, or about justice more generally). In this context, Cohen's incentives critique comes as an unwelcome insistence that Rawls is not entitled to that conclusion, for Rawls's own conception of distributive justice implies that individuals in a just society must contribute more than merely their support for the just basic structure. I have argued that a series of possible replies to Cohen, each appealing to the thought

that the basic structure restriction is justified as effecting a division of moral labour between distributive justice and other values, cannot establish that Cohen is wrong. This is not because the division of moral labour idea itself is somehow mistaken or unappealing, but because the conditions of its realization are not met. Given Rawls's conception of distributive justice, a division of moral labour between distributive justice and other values is not feasible. Restructuring our social world so as to alleviate a tension in the principles guiding our actions is a worthy aim. But restructuring our social world so as to shirk some of their demands is not.

### Notes

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<sup>1</sup> Samuel Scheffler, 'Egalitarian Liberalism as Moral Pluralism', *Proceedings of the Aristotelian Society Supplementary Volume 79* (2005): 229-253, p. 233.

<sup>2</sup> The precise phrase 'division of moral labour' is due to Scheffler. See *ibid.* Nagel calls the same idea the 'moral division of labour'. I follow Scheffler's wording in this paper.

<sup>3</sup> For Rawls, an institution is a 'public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like. These rules specify certain forms of action as permissible, others as forbidden; and they provide for certain penalties and defenses, and so on, when violations occur'. See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971; revised edition 1999), p. 55/48-9 (original/revised edition). Citations from *A Theory of Justice* hereafter follow this format.

<sup>4</sup> Scheffler explicitly invokes it in Samuel Scheffler, 'Is the Basic Structure Basic?', in *The Egalitarian Conscience*, edited by Christine Synowich (Oxford: Oxford University Press, 2006): 102-129.

<sup>5</sup> To quote Scheffler: 'Notwithstanding their internalization of [one class of 'local'] limiting norms...many people also affirm other values and principles—ideas of justice and equality, perhaps, or conceptions of the value of human life—about which they feel strongly, and whose compatibility or incompatibility with the



limiting norms is a matter of at least sporadic concern to them. There are a number of possible responses to the perceived tension between these two sets of values [...]

One way of interpreting egalitarian liberalism is as attempting to provide a response that does justice to both sets of values...the egalitarian liberal proposes what amounts to a division of moral labor...Both sets of values will be accommodated without either being reduced to or derived from the other.' (Scheffler, 'Egalitarian Liberalism as Moral Pluralism', pp. 234-6).

<sup>6</sup> I mean this formulation to be neutral between consequentialist and non-consequentialist understandings of the demands made of us by our values. I shall also talk of 'realizing' values. But if at this point or any other my phrasing seems to bias things objectionably in favour of one or the other, the reader should feel free to substitute unobjectionable phrasing instead. I believe that my argument holds regardless of which is correct.

<sup>7</sup> Scheffler, 'Egalitarian Liberalism as Moral Pluralism', p. 236. The division of moral labour is distinct from what Scheffler calls 'the institutional division of labour'. We effect an institutional division of labour when we formulate on the one hand principles for one set of institutions and on the other hand different principles for a different set of institutions (see *ibid.*, p. 240). The principles on either side of the division may serve the same or different values. Since Rawls thinks that his principles of justice are principles for the institutions of the basic structure restriction and not for other institutions or individuals, he effects an institutional division of labour. My question here, however, concerns whether the basic structure restriction, conceived as restricting the pursuit of distributive justice to the basic structure, can be justified by appeal to the division of *moral* labour.

<sup>8</sup> *Ibid.*, p. 251.

<sup>9</sup> See *ibid.*, pp. 248-9: 'Egalitarian liberalism insists on the autonomy of the values and norms governing human interpersonal relations, and it refuses to treat them, in the consequentialist manner, as having only derivative significance...They do not need to be justified by reference to some putatively more fundamental level of value...Yet, at the same time, it denies that our normative repertoire is exhausted by the values that govern our personal lives and small-scale interpersonal relations.'

<sup>10</sup> Thomas Nagel, *Equality and Partiality* (New York: Columbia University Press, 1991), p. 54.

<sup>11</sup> So, for example, in reply to Liam Murphy, who argues that the demands of justice under a division of moral labour between it and other values are likely to be no less great, Scheffler insists that Rawls—whom Scheffler takes to be a proponent of the division of moral labour—is not concerned with reducing the

demands of justice. See Liam Murphy, 'Institutions and the Demands of Justice', *Philosophy & Public Affairs* 27 (1999): 251-291, p. 289; and Scheffler, 'Egalitarianism Liberalism as Moral Pluralism', pp. 244-5.

<sup>12</sup> This, at least, is what is required if the division of moral labour is to justify Rawls's basic structure restriction. And that is the question I want to focus on in this paper.

<sup>13</sup> I am grateful to two anonymous referees for *PPE* for making me see the need to make this explicit.

<sup>14</sup> Rawls, *A Theory of Justice*, p. 6/6; cf. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 258; and John Rawls, *Justice as Fairness: A Restatement*, edited by Erin Kelly (Cambridge, MA: Harvard University Press, 2001), pp. 8-10.

<sup>15</sup> Rawls, *Justice as Fairness*, p. 10.

<sup>16</sup> Rawls, *A Theory of Justice*, pp. 54-5/47.

<sup>17</sup> Rawls, *Political Liberalism*, pp. 257-8.

<sup>18</sup> See Rawls, *A Theory of Justice*, p. 7/7, where Rawls writes that the justice of the basic structure is only 'a special case of the problem of justice'; cf. Rawls, *Justice as Fairness*, p. 11.

<sup>19</sup> Obviously this greatly oversimplifies the demands of the difference principle even allowing for changes that might be necessary for its application in this context. But I take it that the point is clear.

<sup>20</sup> Cohen has advanced and refined the critique over a series of lectures, books, and articles. See G.A. Cohen, 'Incentives, Inequality, and Community', *The Tanner Lectures on Human Values* 13 (Salt Lake City, UT: University of Utah Press, 1992); 'The Pareto Argument for Inequality', *Social Philosophy and Policy* 12 (1995): 160-185; 'Where the Action Is: On the Site of Distributive Justice', *Philosophy & Public Affairs* 26 (1997): 3-30; *If You're An Egalitarian, How Come You're So Rich?* (Cambridge, MA: Harvard University Press, 2000); and *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008).

<sup>21</sup> Rawls, *A Theory of Justice*, p. 83/72.

<sup>22</sup> *Ibid.*, p. 78/68. This is only one of a number of possible interpretations of the difference principle's requirements. (It may be conditional upon what Rawls calls 'close-knitness' at *A Theory of Justice*, pp. 80-2/70-2. I discuss other interpretations below.) Cf. Cohen, 'Incentives, Inequality, and Community', p. 266, n. 6, and Philippe van Parijs, 'Difference Principles', in *The Cambridge Companion to Rawls*, edited by Samuel Freeman (Cambridge: Cambridge University Press, 2003): 200-240.

<sup>23</sup> See e.g. Rawls, *A Theory of Justice*, p. 78/68.

<sup>24</sup> See *ibid.*, p. 454/398 for the requirement on a just society that its members have and act from a sense of justice. See p. 516/452 for Rawls's expectation that an understanding of the reasoning for the principles of justice will be involved in having and acting from a sense of justice.

<sup>25</sup> Scheffler, 'Is the Basic Structure Basic?', p. 116. The quotation is from Cohen, 'Where the Action Is', p. 10.

<sup>26</sup> See Rawls, *A Theory of Justice*, p. 83/72. Cohen stresses the point at e.g. Cohen, *Rescuing Justice and Equality*, pp. 157-61. Cf. van Parijs, 'Difference Principles', pp. 205-10. Cohen also thinks that the difference principle itself fails to serve the values of distributive justice to which Rawls is really committed (see *Rescuing Justice and Equality*, Chapter 4), but I ignore that point here.

<sup>27</sup> Michael Titelbaum argues that the priority of Rawls's liberty principle over the difference principle will engender an ethos which does not maximise the position of the worst off, since even those with a strong ethos will see its egalitarianism as subordinate to their freedom to choose work of any productivity. (See Michael Titelbaum, 'What Would a Rawlsian Ethos of Justice Look Like?', *Philosophy & Public Affairs* 36 [2008]: 289-322.) But as others have pointed out, the egalitarian duties that the egalitarianism of the ethos imposes do not violate any basic liberty, so the subordinate status of the difference principle is consistent with the existence of such duties. See e.g. Andrew Williams, 'Incentives, Inequality, and Publicity', *Philosophy & Public Affairs* 27 (1998): 225-247, p. 228.

<sup>28</sup> See Rawls, *A Theory of Justice*, p. 83/72.

<sup>29</sup> Rawls stipulates that the parties are not moved by envy at *ibid.*, pp. 143-4/124-5. Envy is defined at p. 532/466.

<sup>30</sup> Rawls, *Justice as Fairness*, pp. 63-4.

<sup>31</sup> Rawls, *A Theory of Justice*, pp. 78-9/68.

<sup>32</sup> See Rawls, *Justice as Fairness*, pp. 61-3.

<sup>33</sup> It might be argued that the need for adequate development of individuals' moral powers that I discuss below creates a requirement not for equality of expectations but for a guaranteed social minimum (cf. Rawls, *Political Liberalism*, pp. 228-9; although see also note 39 below). In that case, Scheffler's point would not require that distributive justice be realised by an equal distribution regardless of absolute levels of wealth. But if I am right (see note 37 below and accompanying text) that in some cases the social minimum could not be guaranteed in the absence of an ethos—not necessarily an egalitarian ethos, to be sure, but an ethos nonetheless—then this modification of Scheffler's position will not save this form of the

institutional capacity defence. I am grateful to an anonymous referee for pointing out the need for clarification on this point.

<sup>34</sup> Rawls, *Justice as Fairness*, p. 84.

<sup>35</sup> *Ibid.*, p. 85.

<sup>36</sup> *Ibid.*, p. 88.

<sup>37</sup> I take it that these cases are not excluded by the fact that we are assuming ‘reasonably favorable circumstances’ (see e.g. Rawls, *Political Liberalism*, p. 325), since such circumstances would presumably include the fact that members of society had sufficient productive talents that the conditions for the development and exercise of the two moral powers and effective pursuit of conceptions of the good *could* be secured (given, say, some encouragement of the productively talented to employ their talents).

<sup>38</sup> Rawls does say that ‘it is assumed the members of society are rational persons able to adjust their conceptions of the good to their situation’ (Rawls, *A Theory of Justice*, p. 94/81), which might be thought to undermine my argument here. But this is a reply to a welfarist objection to the primary goods metric rather than to the objection that too few primary goods might make the effective pursuit of one’s conception of the good impossible. Rawls goes on, in the same passage, to claim that ‘[e]veryone is assured an equal liberty to pursue whatever plan of life he pleases as long as it does not violate what justice demands’; when, in his later work, he turns to the question whether this liberty is not merely formal, his answer makes it clear that the maximizing aspect of the difference principle—the fact that as a result the least well off have sufficient primary goods even if they have less than others—is an important part of the reason why it is not. See Rawls, *Political Liberalism*, p. 326.

<sup>39</sup> Cf. Rawls’s objections to the social minimum as compared to the difference principle’s ‘minimum that...maximizes the life-prospects of the least advantaged over time’ at Rawls, *Justice as Fairness*, p. 129. Rawls claims that the fact that the social minimum covers ‘only the needs essential for a decent life’ counts against it. The difference principle is presumed (all other things equal) to guarantee more than this.

<sup>40</sup> Scheffler, ‘Is the Basic Structure Basic?’, p. 117, n. 6. Scheffler also points out there that in Rawls’s view ‘citizens in real life may well lack the maximising motivation that he ascribes to the parties’ This is true, but irrelevant. The question is whether the principle which serves the values of distributive justice requires the maximisation, or at least the increase in cases such as the one I described, of the position of the worst off or not. Rawls’s argument from the original position appears to justify a principle which does require such increases. Citizens’ acquisitiveness regarding primary goods for themselves does not bear on what

justice requires of them except insofar as it shapes the thin theory of the good which determines the parties' motivation in the original position. Since Rawls thinks that this motivation is a maximising one despite the possibility, which he explicitly notes, of low acquisitiveness in citizens, clearly that low acquisitiveness cannot exempt them from the maximising/wealth-increasing demands of justice.

<sup>41</sup> This is also how Cohen responds to those critics who appeal to the Cohenian ethos's high degree of demandingness in charging his view with implausibility. For that criticism, see e.g. Pogge, 'On the Site of Distributive Justice: Reflections on Cohen and Murphy', *Philosophy & Public Affairs* 29 (2000): 137-169, pp. 152-3; and Jonathan Quong, 'Contractualism, Reciprocity, and Egalitarian Justice', *Politics, Philosophy & Economics* 6 (2007): 75-105, pp. 85-7. For Cohen's response see *Rescuing Justice and Equality*, p. 402.

<sup>42</sup> Cohen, 'Where the Action Is', p. 13.

<sup>43</sup> *Ibid.*, p. 13.

<sup>44</sup> Joshua Cohen suggests that this is indeed what we should suppose. He thinks that doing so is justified by 'a set of substantive assumptions about how social arrangements work, assumptions about the pervasive influence of social institutions on political-economic outcomes and on culture and identity', that he reads Rawls as making. See Joshua Cohen, 'Taking People As They Are?', *Philosophy & Public Affairs* 30 (2001): 363-386, p. 384.

<sup>45</sup> This form of the institutional capacity defence is suggested by some of the things that Scheffler says in 'Is the Basic Structure Basic?', although he never explicitly offers it. He countenances the inclusion of noncoercive practices and institutions within the basic structure in response to Cohen's charge that there is a 'fatal' ambiguity in Rawls's specification thereof. Since the ethos is a noncoercive institution and including it within the basic structure would, on the surface of it, permit the basic structure restriction to stand in the face of Cohen's arguments, the third form of the institutional capacity defence is naturally suggested.

<sup>46</sup> Scheffler, 'Is the Basic Structure Basic?', p. 126.

<sup>47</sup> See Cohen, 'Where the Action Is', pp. 19-20.

<sup>48</sup> Note that it is consistent with the demand for further support to suppose that the value of distributive justice has a place only in certain circumstances, such as the Humean 'circumstances of justice' which Rawls appeals to at *A Theory of Justice*, pp. 126ff/109ff.

<sup>49</sup> Of course we might, for whatever reason, take a particular interest in the specification of principles for institutions. The duties implied by any such principles would be such that they could be fulfilled only by

support for the relevant institutions. But the fact that the principles in question are inherently institutional does not entail that the duties imposed upon us by the *values served by those principles* are fully discharged by support for the relevant institutions. This remains to be shown. So our special interest in the specification of principles for institutions cannot justify an individual incapacity defence.

<sup>50</sup> See Rawls, *Justice as Fairness*, p. 53.

<sup>51</sup> Rawls, *Political Liberalism*, p. 267. This is because ‘any sensible scheme of rules [must] not exceed the capacity of individuals to grasp and follow them with sufficient ease [or] burden citizens with requirements of knowledge and foresight that they cannot normally meet’ (*Political Liberalism*, p. 268). Rules for individuals whose implementation would ensure background justice would fail to meet these requirements.

<sup>52</sup> Rawls, *Justice as Fairness*, p.51.

<sup>53</sup> Which should not be thought of as including the egalitarian ethos. Otherwise my objection against the third form of the institutional capacity defence of the putative Rawlsian division of moral labour applies here also.

<sup>54</sup> At Rawls, *Justice as Fairness*, p. 51: ‘The word “background” in the phrase “background procedural justice”...is intended to indicate that certain rules must be included in the *basic structure*...’ (my italics). (Recall that institutions are to be understood as public systems of rules; see n. 3 above.)

<sup>55</sup> Scheffler also seems to assume that the discussion of background justice can be adduced in favour of a restriction in the applicability of principles of distributive justice to the basic structure. See Scheffler, ‘Is the Basic Structure Basic?’, pp. 103-7.

<sup>56</sup> I do not mean to imply that Rawls supposed that they do. But defenders of the basic structure restriction by appeal to the division of moral labour might be tempted to.

<sup>57</sup> Note that the content of that ethos need not be ‘too complex, or require too much information to be correctly applied’; indeed, its content may be very simple, if extremely demanding. See Pogge, ‘On the Site of Distributive Justice’, p. 152, for a short, clear specification of the duty that those with the ethos take themselves to have.

<sup>58</sup> One conclusion that is licensed is that we need an institutional division of labour (see note 7 above): at least *some* of the work required to realize the value of distributive justice must be assigned to institutions and not to individuals. Scheffler reads Rawls as drawing this conclusion: see ‘Egalitarian Liberalism as Moral Pluralism’, pp. 239ff.

<sup>59</sup> It might be tempting at this point to revert to institutional capacity defences of the basic structure restriction. I take it that if the arguments of the preceding section were sound, this will not work.

<sup>60</sup> I am grateful to an anonymous referee for *PPE* for making me see the need to address this defence.

<sup>61</sup> Rawls, *A Theory of Justice*, p. 537/471.

<sup>62</sup> In ‘Kantian Constructivism in Moral Theory’, Rawls writes: ‘in a constructivist view first principles are to satisfy the requirements of publicity. The moral conception is to have a wide social role as part of a public culture...if it is to play this wide role, a conception’s first principles cannot be so complex that they cannot be generally understood and followed in the more important cases’ (Rawls, ‘Kantian Constructivism in Moral Theory’, in his *Collected Papers* [Cambridge, MA: Harvard University Press, 1999]: 303-57, p. 347). This is one example of the general approach which underpins the line of argument I am considering.

<sup>63</sup> See *A Theory of Justice*, pp. 133-5/115-7. Rawls emphasises the publicity condition especially in *Political Liberalism*; see in particular pp. 66-71.

<sup>64</sup> See *Political Liberalism*, pp. 15-22.

<sup>65</sup> For the distinction between the institutional division of labour and the division of moral labour, see note 7 above.

<sup>66</sup> See note 57 above.

<sup>67</sup> For which see e.g. *A Theory of Justice*, pp. 102-6/87-91; *Political Liberalism*, pp. 16-7; and *Justice as Fairness*, pp. 64, 76-7.