
RIGHTS OF INEQUALITY: RAWLSIAN JUSTICE, EQUAL OPPORTUNITY, AND THE STATUS OF THE FAMILY

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I. INTRODUCTION

Rawls's fundamental conception of fairness, that "the arbitrariness of the world must be corrected for" (141/122),¹ runs deep in the liberal moral sensibility and permeates American jurisprudence.² Rawls's theory of justice is the most profound and elaborated statement that we have of the intuition that justice is freedom from arbitrariness, that social benefits and burdens ought not be distributed on the basis of random factors over which people have no control. The whole apparatus of Rawls's theory is at bottom a way of

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This paper is dedicated to the memories of Benjamin Schwartz and Raymond Michael, father and father-in-law. *Bis vivit qui bene vivit.*

1. *A Theory of Justice* (1971) has been issued in a revised edition (1999a). The new edition involves no significant changes of substance in the topics I address. I cite to the relevant page in both editions, but to avoid clumsiness, I normally cite merely the page numbers separated by a forward slash. The footnoted parenthetical citation "(141/122)" thus refers to p. 141 of the 1971 edition and p. 122 of the revised 1999 edition. Where there is a textual difference, I generally give the version from the revised edition; but I cite language from the earlier version where it seems to me illuminating.

2. This is one interpretation of the underlying idea of due process. See *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (approving "the traditional and common sense notion that the Due Process Clause [of the federal Constitution], like its forebear in the Magna Carta, was 'intended to secure the individual from the arbitrary exercise of the powers of government'" (internal citations omitted)). Even the very deferential "rational basis" standard under which the courts review Equal Protection challenges to social and economic regulation must avoid arbitrariness. A standard formulation is that similarly situated individuals must be treated similarly. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Reed v. Reed*, 404 U.S. 71, 75–76 (1971); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). Likewise, the most common level of review by the courts of decision making by administrative agencies is that the agency action will be overturned if "arbitrary and capricious." 5 U.S.C. § 706; see *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); see also *Davis & Pierce* (1994: 200ff.), discussing the meaning of this test.

representing this intuition with clarity and precision. But the theory runs athwart the institution of the family. As Rawls acknowledges in his treatment of equality of opportunity, the family introduces an irreducible contingency into the circumstances of our social life that any acceptable theory of justice must accommodate. But Rawls's accommodation is unsatisfactory in a way that reveals a deep—indeed, a fatal—problem with the fundamental conception of fairness. Because the family is ineliminable, we must give up a conception of justice based on correcting for the arbitrariness of the world, and adjust our notion of equality of opportunity accordingly.

Rawls's theory of justice, as Pogge remarks, is more radical than its author (1989: 4, 9). It has far-reaching implications for the critique of basic social institutions that Rawls has been unwilling to draw. Pogge has in mind mainly the radical egalitarianism about wealth and income that can be extracted from Rawls's difference principle, roughly that material inequalities must be to the benefit of the least well off. The point applies as well to the implications of Rawlsian justice for the family—something about which, as feminist critics have remarked, Rawls has little to say (Pateman 1988: 43; Okin 1989: 101). More importantly, Rawls's treatment of the family, sketchy and fragmentary as it is, has consequences for his theory of justice. Its failure is suggestive of the shape of a more adequate theory of justice generally.

We may approach the role of contingency in justice by considering whether Rawls's principle of fair equal opportunity demands the abolition of the family. By "the family," I mean the social institution in which biological parents are responsible for the education and upbringing of their own children. By "abolition," I mean breaking the tie between biological parenting and the responsibility for the upbringing of children. Rawls himself dismisses the possibility in passing: "Is the family to be abolished, then? Taken by itself, and given a certain primacy, the idea of equal opportunity tends in this direction. But within the context of the theory of justice taken as a whole, there is much less urgency to take this course" (511/448). Rawls's principles of justice are one thing, however, and his application of them another. Whatever his own preferred treatment of the family, on his own terms he cannot defend it as just. I argue that Rawlsian justice does indeed call for the abolition of the family. I trace the source of Rawls's dilemma to his fundamental conception of fairness. This initially appealing intuition must be rejected if the family is to be reconciled with justice. Since the fundamental conception of fairness underlies Rawls's theory as a whole, rejecting it points us towards a different sort of theory of justice. On this, contingencies like natural capacities and differential upbringings could be bases for the distribution of opportunities as long as other goods were not also inappropriately distributed in accord with the principles appropriate for opportunities, but not for them.

Others, notably Fishkin (1983), have remarked on the antinomies of fair equal opportunity, although they have not explored in depth the extent to

which these infect Rawls's theory.³ This critical articulation is my contribution to the exegesis of Rawls's own views. The novel positive point I develop is that any adequate theory of justice must accommodate the kind of contingency and arbitrariness that the family generates (*see* below, Part V). I do not here propose such a theory, although I do offer reasons to think that it might be possible that suggest its shape or at least its limits. I confine my discussion mainly to Rawls's treatment of the family and equal opportunity in the two editions of *A Theory of Justice*, referring to his other work where relevant. Although analysis of Rawls's views occupies much of the paper, my concern is with liberal theories of justice in general. I discuss Rawls primarily as an example of the dilemma that the fundamental conception of fairness generates for such theories.

The structure of the paper is as follows. Part II explains why the family is inconsistent with fair equality of opportunity. Part III shows that Rawls cannot argue that its abolition is impossible. Part IV criticizes Rawls's attempts to reconcile the family with equal opportunity. Part V addresses some implications of my results for the place and nature of justice in liberal theory, in particular, for the tenability of the fundamental conception of fairness. There I suggest that an adequate theory of justice must embrace the arbitrariness of the world, but that this is not necessarily as disturbing to liberal or egalitarian sensibilities as might seem at first blush.

II. FAIR EQUALITY OF OPPORTUNITY AND DIFFERENTIAL DEVELOPMENT

The basic argument for the abolition of the family is this. First, in treating justice as "the first virtue of social institutions, as truth is of systems of thought," Rawls claims that just as false theories must be rejected or revised, whatever their other virtues, "likewise laws and institutions no matter how efficient or well-arranged, must be reformed or abolished if they are unjust" (3/3). Second, Rawls includes "the monogamous family" on his list of "the major social institutions" forming "the basic structure of society" that is the "subject of justice" (7/6). The family is within the scope of justice and a central case for evaluation as just or not. Third, Rawls says that one part of his two principles, the principle of fair equal opportunity, "can only be imperfectly carried out, as least as long as some form of the family exists" (1999a: 64; *cf.* 1971: 74). It seems to follow as a matter of deductive logic that the family must be reformed or abolished. Rawls's reasons why the

3. Fishkin develops a somewhat similar argument, although with only incidental reference to Rawls. He poses as a general problem for all liberal theory the argument that the three principles of (1) equality of opportunity, (2) the autonomy of the family, and (3) distribution of goods by merit are such that "realization of any two can be expected to preclude the third" (1983: 44). My treatment differs from his both in the detailed attention I give to Rawls's particular arguments and in the conclusions I draw from their failure. For some discussion of Fishkin, *see* below, Part V(A).

family is inconsistent with fair equal opportunity suggest that for him, despite his own conclusions, abolition is more in order than reform.

The principle of fair equality of opportunity states that "positions of authority and responsibility must be accessible to all" (1999a: 53; *cf.* 1971: 61). As Rawls initially formulates it, this means that positions must be "not only open in a formal sense but . . . all should have a fair chance to attain them . . . ; that those with similar abilities and skills should have similar life chances" (73/63). Life chances are centrally an economic notion, defined in terms of wealth and income, among other things (92-95/79-81). Opportunities therefore include occupations. The idea of "similar abilities and skills," however, cannot be taken as given. This is because, first, the "natural distribution of abilities and talents . . . is arbitrary from a moral perspective" (74/64). Second, the arbitrariness includes social contingencies over which individuals have no control. Assigning life prospects on the basis of natural capacities developed under circumstances for which we are not responsible seems no better than assigning them on the basis of race or sex. What I call the fundamental conception of fairness is that "*the arbitrariness of the world must be corrected for*" (141/122, emphasis added). Rawls immediately backs away from this claim as applied to equal opportunity. That retrenchment is the subject of this paper.

The social circumstances in which people develop their natural skills and abilities are primarily the family. Rawls remarks, accordingly, that:

The principle of fair equality of opportunity can only be imperfectly carried out, at least as long as some form of the family exists. The extent to which natural capacities develop and reach fruition is affected by all kinds of social conditions and class attitudes. Even the willingness to make an effort, to try, and so to be deserving in the ordinary sense is dependent upon happy family and social circumstances (1999a: 64; *cf.* 1971: 74).

Different families offer unequal environments for the development of capacities both for effort and for actual achievement. Some parents are more willing or able than others to spend more of their income on their children's formal or informal education, or to spend time with their children in ways that increase their children's aptitude for success. Some parents, in virtue of their own psychologies or conceptions of the good, are more able than others to cultivate in their children habits, skills, and inclinations that enhance their children's life prospects. The upshot is that children with equal capacities will generally have these unequally developed.⁴ Rawls says

4. Insofar as educational attainment, understood in terms of credentials, grades, and test scores, measures the realization of potential, it appears that "family background explains [in a statistical sense] nearly half the variation in educational attainment" (Jencks 1972: 143). We need not enter into the debate about to what extent such capacities are heritable. The highest estimates of the heritability of IQ are about 0.75. Jencks gives a tentative figure of 0.45 (*ibid.*: 315). The less heritable natural capacities are, however, the stronger the case against the family. If the children's capacities are significantly different—in particular, greater—than their parents', their development may be limited by this morally irrelevant fact.

that the school system "should be designed to even out class barriers" (73/63; 1971: 87), but from the perspective of the fundamental conception of fairness, the familial factors are no less important.

It seems that Rawls should call for replacing the family by childrearing practices that better equalize the effects of the natural and the social lotteries. This may seem utopian. It is certainly radical. But Rawls's is a theory of justice for a "well-ordered society." That is a society "effectively regulated by a public conception of justice," one in which "the basic social institutions generally satisfy and are known to satisfy [the] principles of justice" (4-5/4-5). As Rawls recognizes, this is an ideal from which existing societies depart (5/5), and one dimension on which they depart is the way in which the family compromises fair equality of opportunity. Rawls does not normally allow such departures to license violations of the principles.⁵ That is what it means to say that justice is the first virtue of social institutions. His admission that the family undermines justice suggests that he should not tolerate a departure here either.

The argument is different from Okin's concern that excluding the internal structure of the family from the scope of justice undermines the sense of justice. The "sense of justice" is our developed capacity to respect justice as a constraint on the pursuit of particular conceptions of the good (474/415). If children are raised in a sexist environment, Okin worries, they will be less likely to grow up with a fully developed sense of justice that operates outside the natal family (1989: 97-101). But even if the family satisfies any criteria of *internal* justice one likes, and regardless of whether it is monogamous, polygamous, or polyandrous; nuclear, extended, nontraditional, or egalitarian in ways feminists would hail—as long as it exists, children will be raised in ways that arbitrarily affect their potentials due to the morally irrelevant facts of who their parents happen to be and what they happen to be like or to value. The question posed here is not justice within the family, but the justice of the family as an institution, as part of the basic structure of society.

Rawls replies, first, that there are no alternatives to the family that would better or more perfectly implement fair equal opportunity. "It is impossible in practice to secure equal chances of achievement and culture for those similarly endowed" (74/64). So, second, the best we can do is to ameliorate, so far as possible, the effects of arbitrary variations in upbringing. I argue in Part III that the abolition of the family is not impossible in any sense available to Rawls, and, in Part IV, that his suggestions for ameliorating its injustice are inadequate.

5. Rawls is now more lax about departures. See, e.g., his recent discussion of "constitutional essentials" as not requiring fair equality of opportunity or the difference principle (1993: 226-30). This softening reflects an implicit acknowledgment of some of the tensions and difficulties with Rawlsian justice explored here, but it is hard to avoid disappointment with Rawls's handling of the problem. He lowers his standards rather than recasting his argument in the thoroughgoing way that would be required to avoid the problems.

III. THE POSSIBILITY OF ABOLISHING THE FAMILY

Even if absolutely equal chances are impossible to achieve, that does not mean that we cannot do better than the family. And if we can, justice would seem to require that we do so. The question depends in part by what is meant by "impossible." It might mean that: (1) no alternative arrangement would produce more equal development of equal capacities; or (2) while some such might well, it would compromise justice in other ways that would bar it; or (3) we, those to whom Rawls addresses his theory, would refuse to accept any such alternative even if it did not thus compromise justice. I address each of these in turn.

A. Feasible Alternatives

Are there feasible alternative arrangements that might equalize life chances by developing our capacities more fully? We need not describe such institutions in detail. What is required is to indicate the constraints that they must satisfy and to give some reason for thinking that these might be satisfiable. We are dealing, after all, with the basic structure of society, which may be realized in various ways, and not with a specific proposal for detailed institutional reconstruction. One constraint is that childrearing must involve the concerted effort of a small number of people who can devote much attention to the task. Another is that upbringing that develops natural capacities to their fullest requires bonds of affection that only develop over a long period, so that children are best raised by the same people over years.

However, none of this requires the central feature of the family as defined here, namely, that children be raised mainly by their biological parents. Children could be assigned to parents by lottery, thus defeating any special advantage anyone might have from merely being born into particularly fortuitous circumstances (*see* Fishkin 1983: 60–61).⁶ Or, to maximize the realization of potential, small groups of children could be raised by teachers assigned in view of estimates of their natural capacities, as in Plato's *Republic* (459d3–462e2). The assignment need not be made by the government. Rousseau thought it best, given the corrupt state of civil society, that parents give their children over to governors who would raise them to be virtuous (1979:42, 48–50)—although this proposal embodies arbitrariness in access to suitable governors. To defeat the natural lottery, a random assignment of persons to opportunities might be necessary, perhaps taking into consideration preferences and qualifications (*see* Fishkin 1983: 61–64), as is done

6. In Sergio Leone's film *Once Upon a Time in America* (1971), the gangster protagonists mix up the newborns in the hospital to extort money from a wealthy parent (a corrupt official). When he pays, they tell him which, purportedly, is his own child. In fact, it is a random assignment. Leone, a socialist militant, is making a point about the social lottery. On the fundamental conception of fairness, the gangsters may have done justice.

with medical school residencies and has been proposed for judicial clerkships (Wald 1990).

Working out the details would be an immense task. The basic idea, though, is that children should be raised by those best suited to develop their natural capacities, with no presumption that these are the biological parents; and that people should not be able to gain unfair advantages in virtue of those arbitrarily distributed capacities. I do not see why implementing some such proposal would be "impossible" in practice if we could start the design of society with a clean slate. Some distorted or caricatured form of "Platonic" family assignment has, in living memory, been actual. The American government carried out what it conceived to be this policy with many Native American children (*see* Lacey 1986: 349–72).

B. Would Abolishing the Family Violate the Priority of Liberty?

Such a proposal may be practicable but unacceptable on other grounds. Perhaps more perfect implementation of fair equality of opportunity would violate more important claims of justice. "[A]n injustice is tolerable only when it is necessary to avoid an even greater injustice" (4/4). In Rawls's scheme, only one candidate is lexically prior and thus permitted, indeed, required, to trump fair equality of opportunity, viz., equal liberty. Lexical ordering means that the highest ranked principle must be satisfied first, then the second, and so forth (300–03/265–67). The equal liberty principle says that all should have the most extensive liberties compatible with equal liberties for others (243ff./214ff.). The liberty in question here is the freedom to bring up one's own children as one wishes, without undue interference by others. The injustice to children thus produced is a violation, not of liberty, but of fair equal opportunity, which is lexically secondary. If repairing a violation of the latter requires a violation of the former, justice will disallow it.

This strategy, however, can be deployed against any application of lexically secondary principles. Nozick argues against the difference principle that "liberty upsets patterns" (1974:160). Why should inequalities of wealth and income be constrained to benefit the least well off if that limits the equal liberty of individuals to acquire and dispose of property? Why should access to opportunities be arranged, short of abolishing the family, to equalize life chances so far as possible, if that interferes with the equal liberty of each to go as far as her talents and skills permit? Rawls must explain how his other principles can be applied at all, if they restrict such liberties, without carrying their application as far as the abolition of the family.

Rawls's most natural reply, however, undermines a liberty-based defense of the family. He can say that Nozick begs the question by claiming that the difference principle restricts an individual's right to dispose of *her own*

property as she likes. This assumes that the property is *hers* in a morally relevant sense. Rational people considering only morally relevant factors would not agree to libertarian property rights, and it is that perspective that “determines [which are the] legitimate claims the honoring of which yields the resulting distribution” (88/76). As Rawls says in a related context, “there are no prior claims on the things to be distributed” (88/77). Equal liberty to dispose of property as one likes is constrained by the principle that would be accepted in the proper circumstances, namely, the difference principle.

A similar Rawlsian argument, however, can be constructed for the family. Does it not beg the question to suppose that children “belong” in some sense to their biological parents, who have a “prior claim” to a special say in their upbringing? Equal liberty cannot be simply invoked in defense of the family without raising questions about who has a claim to raise children. If I say that I should be free to raise *my own children*, Rawls should ask: “In what morally interesting sense does the fact that you produced them make them *yours*?” To reply that the assignment is justified by the voluntary choice of the parents would be as egregiously circular as Nozick’s claim that the property distributions of a libertarian society are so justified (1974: 163). Not all arrangements resulting from voluntary choice are just. Rawls would not allow a distribution of wealth that resulted from voluntary choices but departed drastically from the difference principle. Without argument that what people choose is just, there can be no presumption that biological parents have a claim to “their” children. Given the conflict between fair equality of opportunity and the family, the presumption must be rather the opposite.

C. Is Abolition of the Family too Horrific?

A different sort of response—perhaps closer to Rawls’s real concern—turns on the horror evoked by the proposal. The idea of tearing children away from their parents will strike many as the psychotic dream of a Skinnerian rationalist social engineer with no human feelings. Perhaps it would be feasible to do so, and consistent with justice, but would be impossible nonetheless because we would not accept it (1) in Rawls’s original position, (2) in reflective equilibrium, or (3) in the real world. Consider each of these in turn.

1. *Abolition of the Family in the Original Position*

The original position is a hypothetical decision situation in which the parties are deprived of all morally irrelevant information about their class, race, gender, natural capacities, or particular conceptions of the good. Thus placed behind a “veil of ignorance,” they choose principles of cooperation to benefit themselves (17ff./15ff.; 136ff./118ff.). Any unequal capacities or upbringings play no role in their deliberations except as a constraint on the

acceptable outcomes. The parties know that in the real world, outside the original position, they might have differing natural and acquired potentials, and so are concerned to protect themselves if their lot is lesser rather than greater. The fact that a certain set of principles would be chosen in this position is supposed to vindicate it as correct. We should accept principles that would be chosen by the parties to this position precisely because their deliberations under those circumstances represent the fair way to make the choice (118ff./102ff.).

The characterization of the original position derives from the fundamental conception of fairness. The original position is a way to capture the intuition behind that conception, that fairness requires abstraction from the morally irrelevant arbitrariness of the world. The original position insulates our deliberations from the distorting effects of knowledge of contingent, so morally arbitrary, facts about ourselves. Rawls's argument for the two principles, that they would be chosen in the original position, depends on the fundamental conception of fairness at a very deep level. So the problems raised here for the fundamental conception of fairness are difficulties for Rawls's whole theory, not merely for particular formulations of principles of justice. If the fundamental conception fails, so too does the argument from the original position, which is really a way of representing that conception. Rawls cannot abandon or compromise the fundamental conception of fairness without putting his whole theory of justice at risk.

However, Rawls's project, or any attempt to vindicate a justice based on the fundamental conception of fairness, is faced with an antinomy. The family is an affront to the fundamental conception of fairness. Rawls rightly does not wish to abolish it, but his theory has no place for it. This points up a structural defect in his argument for the two principles of justice. These principles are generated by an elaborate argument involving the construction of the original position, which is itself the most sophisticated and intelligible articulation that we have of the fundamental conception of fairness. If Rawls is committed despite himself to the abolition of the family, that compromises not merely the argument from the original position as a heuristic, but also the fundamental conception that the original position expresses and for which it is a heuristic. It shows that the fundamental conception of fairness is inconsistent with the family. Because I agree that the family is inviolable, I conclude that the fundamental conception, and with it the argument from the original position, must go.

Would individuals in the original position reject the application of fair equality of opportunity to the family if that meant the abolition of the family? Rawls builds the family into the original position by making the parties "heads of households" with some concern about their immediate descendants (128/111). The use of "heads of households" is a technical device to deal with concerns about intergenerational justice (128/111; 289/256), but it may beg the question by assuming that the family is morally uncontroversial. However, "it is not necessary to think of the parties as

heads of families" as long as they have some concern for those in the next generation (1971: 128; *cf.* 1999a: 111). The concern need not be for their own offspring in particular. So we will not conceive of the parties as heads of families.

Rawls deprives the parties to the original position of knowledge of their race, sex, class, natural capacities, or particular conceptions of the good, and assumes that their motivations consist in mutual disinterest and a preference for individual maximization of the primary social goods—roughly freedom, opportunity, and wealth (129/111–12; 142–43/123–24). Also behind the veil of ignorance should be knowledge of their age, a contingent fact on par with race or sex. Parties so motivated and ignorant of their age would prefer that they themselves be raised so that their natural capacities would be as developed as possible, insofar as that improves their life chances. If that means the abolition of the family, so be it. They would want the worst upbringing they might possibly have to be as good as it could be. The institution of the family cannot guarantee this outcome, and in fact frustrates it.

We also cannot presume, if we drop the heads of families assumption, that mutually disinterested people would care about who raises their offspring. "A conception of justice should not presuppose extensive ties of natural sentiment" (129/111–12). Finally, the possibility that raising one's own children might be a particular conception of the good that some might have in the real world will not influence the parties any more than the possibility that their particular conceptions of the good might involve acquisition of despotic power (violating equal liberty) or immense wealth (violating the difference principle). Conceptions of the good inconsistent with the results of the original position are ruled out even in a liberal society, where the state is neutral on the good. The parties, then, would not choose the family in the original position.

Perhaps this is not right, however. The parties have knowledge of "the laws of human psychology . . . [and] whatever general facts affect the choice of the principles of justice" (137/119). Suppose that among these laws was a biologically based affinity between parents and children rooted in natural sentiments that are manifested in all environments where the circumstances of justice obtain. If so, in popular terms, the family would be "human nature." Then perhaps the family would be chosen in the original position, because the parties would know that without it, deep-rooted ineradicable tendencies to raise one's own biological children would upset the social order. Rawls, however, would be reluctant to say this. It would amount to conceding that human nature embodies a particular conception of the good, and abandoning the liberal notion that justice is wholly neutral among such conceptions of the good.

In any event, the claim is not plausible. People care strongly about raising their own children in many environments, but for the parties to accept the family in the original position despite the possibility that it might reduce

their prospects, it would have to be shown that "human nature" would assert itself in any environment where something like the two principles of justice could be realized, triggering the commitment of parents to raise their biological children, and upsetting the stability of an order in which they do not. History will not support such a claim. Despite profamily ideologies, people in many cultures often failed to put those ideals into practice, or did so only in a limited and partial way. Child abandonment and fostering-out, for example, were common or prevalent arrangements until modern times.⁷ Such practices were stable for centuries and did not provoke widespread or systematic resistance. Why then think that people raised in a Platonic manner, without profamily ideals, would find themselves irrepressibly impelled to raise their own children or be made miserable because they did not do so? It is therefore unlikely that the family would have to be retained in the original position because of "human nature."

2. *Abolition of the Family in Reflective Equilibrium*

Still, the family might be defended by appeal to the coherence of our considered moral judgments in "reflective equilibrium." In attaining reflective equilibrium, we start from "provisional fixed points which we presume any conception of justice must fit" and go "back and forth" between particular moral judgments and principles that explain them, adjusting each to cohere with the other and attempting to "yield principles which match our considered judgments duly pruned and adjusted." Once we have attained a reflective equilibrium, "at last our principles and judgments coincide, and . . . we know to what principles our judgments conform and the premises of their derivation" (20/18). This provides the "best account of [our conception] . . . of justice." Rawls rejects an interpretation on which reflective

7. Child abandonment was common and ethically condoned "from Hellenistic antiquity to the end of the Middle Ages" (Boswell 1988: 428–29), as the legends of Oedipus and of Romulus and Remus suggest. In the only Roman requirement that parents had responsibility for rearing their children, the Justinian Code decreed that parents who abandoned their children were subject to the penalty prescribed by law—but no penalty was prescribed (*id.*: 166). Throughout the Middle Ages, child abandonment often took the form making the child a permanent "gift" to a monastery. See, e.g., the Rule of St. Benedict, ch. 59 ("children of nobles or poor people who are donated") (Boswell 1988: 231). The pattern persisted well into the early modern era. Urban child abandonment rates in France and Italy in the eighteenth century ranged from 15 to 30 percent of registered births (*id.*: 16).

Upper and middle class families that did not abandon their children, or abandon all of them, often left childrearing to servants. Between 1450 and 1630, "fostering out" of children was the norm among the English population (Stone 1977). An Italian observer wrote around 1500, "Few . . . are exempted from this fate, for everyone, however rich he might be, sends away his children into the houses of others . . . [The children] never return . . ." The less well off among the late medieval English commonly "put . . . out [their children], both male and female, [at about age seven] to hard service in the houses of other people, binding them . . . for another seven or nine years" as apprentices (Ariès 1962: 365). This way of life "was probably common in the West during the Middle Ages" (*id.*). Significantly, these practices were not just those of the lower classes. The better-off had a choice in the matter, and decided against raising their own children. As Laslett summarizes his cross-cultural studies, "It is simply untrue . . . that there ever was a time or place where the complex family was the universal background to the ordinary lives of ordinary people" (1972: xi).

equilibrium is mainly a matter of "smoothing out of certain irregularities" in our conception of justice "more or less as it is." Because attainment of equilibrium might require "radical shift[s]" (49/43), views that are far removed from our prereflective ones are possible outcomes of the process.

There may, however, be fixed points, nonrevisable in the face of any arguments we can imagine ourselves accepting. Rawls argues that utilitarianism would license slavery if slavery maximized total or average utility (167/145); but the impermissibility of slavery is a fixed point, and so utilitarianism would not be chosen in reflective equilibrium. If the inviolability of the family was also a fixed point that any acceptable principle of justice must accommodate, it would be a reduction if a conception of justice called for its abolition. The horror with which modern Westerners would receive a proposal to abolish the family, at least if put just that way, might indicate that it is such a fixed point. The fact that this conviction may be historically variable may be neither here nor there if Rawls intends only to explicate the shared views of political justice prevailing in the modern West, or to express the "basic intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and the public traditions of their interpretation" (1993: 199–200, 225).

That a conviction is strongly held, however, does not show that it would be held in reflective equilibrium. It may be a strongly held *prejudice*. For equilibrium, "our principles and judgments [must] coincide"; and for reflectiveness, we must know "to what principles our judgments conform and the grounds of their derivation" (20/18). Given the effect of the family on equal opportunity, its defense requires a statement of *principle* that either permits a situation that is less just than it might be or squares the family with fair equality of opportunity. Here the simple settledness of the conviction is irrelevant. The tension between the family and fair equality of opportunity shows that any system that incorporates both is not, without more, in reflective equilibrium. Our principles and our judgments do not coincide.

Moreover, Rawls cannot appeal to reflective equilibrium *as against* the results of the original position. The original position, as a way of representing the exclusion of morally irrelevant factors and capturing the fundamental conception of fairness, is Rawls's own procedure for attaining reflective equilibrium. It is "the result of such a hypothetical course of reflection" (21/18). The original position is not, for Rawls, a separate procedure the results of which are to be checked against those of a reflective equilibrium attained in some other way. If the family is indefensible from within the original position, that will simply *be* the result of reflective equilibrium. We will have concluded that the family is unjust because it violates fair equality of opportunity. Our considered moral judgment will be that the family must go.

Insofar as reflective equilibrium is just *thinking*, without making the original position particularly central (*see, e.g.*, Daniels 1996; Hurley 1989), one might indeed appeal to its results as against those of the original position.

If the principles attained there require us to abandon a fixed point, someone might say, so much the worse for the original position. Other principles, perhaps utilitarian, libertarian, Marxist, or communitarian ones, might do better in preserving our considered moral judgments, including those about the family, and are therefore preferable. Someone might say this, as I do, but *Rawls* cannot. He is bound to this construction of fair equality of opportunity if it is a result of the original position. His dilemma is that what he must hold to be the correct interpretation of the procedure for attaining reflective equilibrium does not attain reflective equilibrium if he insists on the inviolability of the family.

3. Abolition of the Family in the Real World

Still, it may be that, in the real world, we could not abide by Rawls's principles if these meant the abolition of the family. Rawls takes considerations of stability seriously. "However attractive a conception of justice might be on other grounds, it is seriously defective if . . . it fails to engender in human beings the requisite desire to act upon it" (455/398). A conception of justice that could not be implemented is no good. So perhaps the argument is that no such proposal could be implemented, given the "natural sentiments," not of hypothetical parties to the original position, but of people as they actually are. This is presumably because we care so deeply about raising our own children that no alternative system could be put into practice and be stable. This need not reflect some universal "human nature." It may be a merely contingent historical fact about modern Westerners.

There is something deeply right about this reply, and, properly construed, it states the main reason that I myself oppose the abolition of the family (*see below*, Part V(C)(1)). But it is not a reply available to *Rawls*. For him, a theory of justice is a theory for a "well-ordered society." While the theory is meant to provide a standard by which to appraise our actual societies, it is justified by the fact that the parties would choose it in the original position, where morally irrelevant features like "the particular circumstances of their own society" (137/118), and its peculiar values and traditions, are hidden by the veil of ignorance. The theory is supposed to capture the moral principles underlying a modern constitutional democracy; but no more specificity than that is allowed behind the veil, or else the fundamental conception of fairness would be violated. His concerns about stability are about the stability of the well-ordered society itself. They do not bear on a transition to a well-ordered society from one that is not. (*See Schwartz 1997* for a discussion of Rawls's lack of a theory of a transition.)

So it is no objection, from Rawls's perspective, if we modern Westerners would not abide by the abolition of the family. If citizens of the well-ordered society could not abide by it, the result would be different; but the claim that *we* would not, even if true, is not to the point. Likewise Rawls would be unimpressed by an objection to the difference principle that its economic equali-

tarianism could not be implemented in our societies as they are. If the parties to the original position would reject the family, that institution has no place in a well-ordered society. Apart from the rejected argument that the family is "human nature," we have no reason to think that the citizens of a well-ordered society could not abide by its abolition. No doubt it would be hard for us to win acceptance for a proposal that abolished the family or was intended to have this effect.⁸ That does not mean, were people raised outside families in a Platonic manner, that those arrangements would be upset by irrepressible desires to rear one's own children. This is the only point that matters for Rawls, given that his theory of justice is a theory for a well-ordered society and not of a transition to such a society. In Part V(C) (1), I explain why our resistance as we are should matter to us, even if it cannot matter to Rawls.

IV. RAWLS'S ATTEMPTS TO RECONCILE THE FAMILY AND EQUAL OPPORTUNITY

A. Democratic Equality and the Appeal to the Difference Principle

Rawls is aware that the family is in tension with fair equality of opportunity. He discusses this less than he might, but still he attempts to adhere to the fundamental conception of fairness. That is why he rejects the interpretation of fair equality of opportunity as "liberal equality," where that means that "those with similar abilities and skills should have similar life chances" (73/63). This interpretation concedes too much to "the arbitrary effects of the natural lottery" (74/64). Rawls admits that the natural as well as the social lottery is called into question by the fundamental conception of fairness.

Rawls's initial interpretation of fair equality of opportunity is "democratic equality," where "fair equality of opportunity [is combined] with the difference principle" (75/65). He contrasts the difference principle with a "principle of redress" that says that "undeserved inequalities . . . [such as] birth and natural endowment are to be compensated for. . . . [I]n order to treat all persons equally, society must give more attention to those with fewer native assets and to those born into less favorable social positions" (100/86), for example, spending more to educate the less intelligent than

8. Insofar as it is evidence of our deepest historically contingent convictions, it may be relevant that the U.S. Supreme Court has never quite found that there are fundamental parental rights to children. Perhaps the closest it has come is to say, "[T]he interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests entitled to due process under the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 774 (1982). See also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). A liberty "interest," however, is not a "fundamental right," and has less (though very considerable) weight. See *Plyler v. Doe*, 457 U.S. 202, 221, 231-33 (1982). The Michigan Supreme Court rejected any such fundamental right in *People v. Bennett*, 501 N.W.2d 106, 112 (Mich. 1993) (upholding a prohibition of home schooling). See Daniel E. Witte, Note, *People v. Bennett: Analytic Approaches To Recognizing a Fundamental Parental Right under the Ninth Amendment*, 1996 BYU L. REV. 183-279.

the more intelligent. In contrast, the difference principle says roughly that material inequalities must be to advantage of the least well off. It "does not require society to even out handicaps as if all were expected to compete on a fair basis in the same race (101/86)."⁹ Under democratic equality, then, some are allowed to benefit from undeserved advantages. Democratic equality ensconces both the natural and social lotteries in the basic structure of society, but Rawls thinks that the difference principle "does achieve some of the intent of the [redress] principle" (101/87), at least in its egalitarian bias.

B. The First Version: Democratic Equality and Pure Procedural Justice

Rawls has two versions of the principle of fair equal opportunity as democratic equality. Each is beset with problems. According to the first version, democratic equality is liberal equality plus the difference principle. How is the difference principle supposed to help with the problems for fair equality of opportunity? His idea is that in realizing the difference principle, we put any undeserved advantages that anyone has due to a fortuitous family to work for the benefit of the less fortunate (102/87). Rawls explains:

Suppose law and government act effectively to keep markets competitive, resources fully employed, property and wealth (especially if private ownership of the means of production is allowed) widely distributed by the appropriate forms of taxation, or whatever, and to guarantee a reasonable social minimum. Assume also there is fair equality of opportunity underwritten by education for all; and that the other equal liberties are secured. Then it would appear that the resulting distribution of income and pattern of expectations will tend to satisfy the difference principle. . . . [T]he advantages of the better situated improve the condition of the least favored (1971: 87).¹⁰

9. Rawls then subtly shifts his ground in characterizing the contrast, saying:

No one deserves his greater natural capacity nor merits a more favorable starting place in society. But it does not follow that one should eliminate these distinctions. . . . The basic structure can be arranged so that these contingencies work for the good of the least fortunate (102/87).

He has quietly moved from reading the principle of redress as a matter of leveling *up*, as would be implemented by spending more on the education of the less endowed, to treating it as a matter of leveling *down*, of eliminating the natural advantages of the better endowed, as in Nozick's nightmare of "forcible redistribution of body parts." (1974: 206). This is not literally implied by Rawls's language, but it must be his meaning. If we could eliminate the distinctions by leveling up, why would we have to tolerate and use them?

10. In the revised edition, this passage is dropped, and Rawls refers to his later treatment of "Institutions for Distributive Justice" (274-84/242-51). The account of these institutions, though more elaborated, is the same as those in the omitted passage; and the point of the discussion is identical, namely, that with the appropriate set of institutions in place, "there is no reason why just distributive shares cannot be achieved" (280/248). For Rawls, these must be ones that respect the difference principle. Rawls retains the idea that with the right set of institutions in place, distributive justice can "be left to take care of itself" (87/76).

The role of fair equality of opportunity is to ensure “pure procedural justice” (id.). That is a situation where, because the ground rules have been established in a fair way, the outcome is fair by definition if the procedure is properly followed (86/75). (In contrast, “imperfect procedural justice” involves a procedure such as a trial that seeks a result that is correct in virtue of some independent criterion.) The operation of the market as corrected by the welfare state is the practical procedure that assures the fair result, but this requires fair equality of opportunity. Unless that is satisfied, “distributive justice could not be left to take care of itself . . .” (87/76). The market, even corrected by the welfare state, would not realize the difference principle without fair equality of opportunity. That is what assures the fairness of the procedure.

This solution, however, is inconsistent, question begging, or both. It will not do to say that the “institutions which satisfy . . . [the two] principles are just” (102/88), without explaining why these institutions do satisfy those principles. On Rawls’s own account, they do not fully satisfy fair equality of opportunity if the family is inviolate. Rawls is therefore inconsistent. Even if the difference principle could correct for the social lottery if there *were* fair equality of opportunity, the appeal to the difference principle will not work because there cannot *be* fair equality of opportunity as long as the family exists. Rawls therefore begs the question. Because the satisfaction of the difference principle depends on the satisfaction of fair equality of opportunity, neither principle can be satisfied if the family exists. The difference principle therefore cannot do what Rawls claims for it here. Let us consider these problems in more detail.

First, Rawls faces the inconsistency between the family and fair equal opportunity head-on, and deals with it by begging the question explicitly. Acknowledging that “[t]he internal life and culture of the family influence, perhaps as much as anything else, a child’s motivation and his capacity to gain from education, and so in turn his life prospects,” he says:

[T]hese effects are not necessarily inconsistent with fair equality of opportunity. Even in a well-ordered society . . . , the family may be a barrier to equal chances between individuals. *For as I have defined it, [fair equality of opportunity] only requires equal life prospects in all sectors of society for those similarly endowed and motivated.* If there are variations among families in the same sector in how they shape the child’s aspirations, then while fair equality of opportunity may obtain between sectors, equal chances between individuals will not (301/265, emphasis added).¹¹

Now this is startling. In his initial discussion of fair equality of opportunity, Rawls rejected liberal equality. That interpretation held that, “regardless of

11. Or again: “One is to *hold* that [inequalities of opportunity] are not unjust, since the conditions for achieving the full realization of the principles of justice do not exist” (302/265, emphasis added).

the income class into which . . . [individuals] are born[, i]n all sectors of society there should be roughly equal life prospects for everyone similarly endowed and motivated" (73/63). This fails to "mitigate the arbitrary effects of the natural lottery . . . [and] encourages one to look for another interpretation" (74/64).

If Rawls has not here adopted liberal equality, the interpretation of fair equality of opportunity rejected there, what has he done? Presumably he will reply that he has coupled it with the difference principle to give us democratic equality. But the interpretation of fair equality of opportunity *itself*, as stated here, is liberal equality. Rawls surrenders the point about the natural lottery. Still, even if the difference principle could make up for the social lottery, which I have argued it does not, and even if Rawls could appeal to the difference principle for that purpose, which I shall argue he cannot, it would not make liberal equality other than what it is to invoke a quite different principle, the difference principle. It seems that the arbitrariness of the world need *not* be corrected for, but may be put to work for the benefit of the less advantaged. Rawls has, malgré lui, abandoned the fundamental conception of fairness.

The second problem turns on the role that Rawls gives fair equality of opportunity in underwriting pure procedural justice. If that principle is not satisfied, free markets and the welfare state will not produce pure procedural justice, a guarantee that just results are attained in virtue of correctly following fair procedures. Set aside Rawls's Panglossian assumption that free markets, a welfare state, and fair equality of opportunity will more or less automatically realize the difference principle.¹² Rawls's explanation of how democratic equality is supposed to realize fair equality of opportunity through the operation of the difference principle is inconsistent with the lexical ranking of the two principles in a way that also creates a vicious circularity.

Fair equality of opportunity is lexically prior to the difference principle. That is, they are ranked "in an order that requires us to satisfy the first principle before we can move on to the second, . . . and so on" (43/38). This, however, is just what Rawls does not do. In democratic equality, the lexically *tertiary* difference principle amends the inadequacy of the lexically *secondary* principle of fair equality of opportunity. Fair equality of opportunity is not satisfied *first*, before the difference principle, but only, if it is satisfied at all, by the operation of the difference principle. The difference between democratic and liberal equality, in Rawls's first formulation, is that the former incorporates the difference principle and the latter does not. His "final

12. As libertarians and Marxists agree, free markets by themselves tend to do nothing of the sort. What must do the work here, then, is the market-corrective redistributive taxation and the provision of the social minimum (granting fair equality of opportunity *arguendo*). There is nothing approximating automaticity in this correction. In setting the tax rates and establishing other redistributive mechanisms, the legislature must make conscious and very rough guesses about the point at which any authorized inequalities do in fact tend to benefit the least well off.

statement" of fair equality of opportunity differs from liberal equality (*see below*, Part IV(C)), but there too Rawls relies on the difference principle to make up for ineliminable inequalities of opportunity (511–12/448).

This means that Rawls in practice abandons lexical ranking. This is not a trivial difficulty. Such ranking plays an important methodological role in Rawls's theory. It is supposed to solve "the problem of assigning weights to competing principles of justice" by some means other than by unargued appeal to raw intuition (40/36). Whether or not it could thus solve the problem is debatable, but it surely cannot do it if the ranking is abandoned by an appeal to a tertiary principle to satisfy a secondary one. Rawls then faces another dilemma. If he retains the ranking to defend the family on the basis of lexically prior equal liberty, he cannot use the lexically tertiary difference principle to save fair equality of opportunity from the charge of arbitrariness. If he uses the difference principle to formulate "democratic equality," however, he cannot simply appeal to the lexical priority of liberty to save the family from fair equality of opportunity within the original position. Having given up lexical ordering, he will be left with a messy and uncertain intuitive balancing that might well come down on the side of the abolition of the family.

Third, the appeal to the difference principle raises a yet deeper problem of circularity. If the social system will not tend to produce results that respect the difference principle unless fair equality of opportunity is satisfied, we cannot appeal to the operation of the difference principle to underwrite fair equality of opportunity. Without fair equality of opportunity, the difference principle will not be satisfied. It therefore cannot ameliorate the unfairness of the social or natural lotteries. Nor can Rawls reply that the principles are mutually supporting; that they are implemented together and work hand in glove to support one another. This abandons lexical priority, because it then makes no sense to say that fair equality of opportunity must be satisfied before the difference principle. If the difference principle is not satisfied, neither is fair equality of opportunity. It also undermines pure procedural justice, because the outcomes according with the difference principle will not be results of the free market with a welfare state and fair equality of opportunity. They will be built into the notion of fair equality of opportunity to start with. Democratic equality thus begs the question.

C. The Second Version: The Difference Principle for Opportunities

So far Rawls has allowed the social and natural lotteries to introduce arbitrariness into a well-ordered society. He then reformulates fair equality of opportunity once more, this time to allow unequal opportunities "in the light of the difference principle" (1971: 302; *cf.* 1999a: 265). This does not

mean just the coupling of the two, as in the initial characterization of democratic equality. In the "final statement," Rawls imports the logical structure of the difference principle into fair equality of opportunity. It now says that "an inequality of opportunity must enhance the opportunities of those with the lesser opportunity" (302/266).

This reconstruction of fair equality of opportunity is no more defensible than the previous version.¹³ In addition to the problems raised in Part IV(B), there is a new difficulty. The difference principle for wealth is justified by three empirical hypotheses, namely, that: (1) there are incentive effects: People will be more productive if material inequalities are allowed; (2) this productivity will accrue to the benefit of all, enhancing the material welfare of the least well off; and (3) no other means exist to thus enhance their material welfare (78/68). The difficulty is that no plausible corresponding set of hypotheses warrants differential opportunities.

Inequality of opportunity might enhance the material welfare of society by placing the efficient in positions where they can be most productive. By the lexical rankings of the two principles, however, opportunity cannot be traded off against a gain in material welfare, because opportunity is lexically prior to welfare and secondary to liberty. It can only be traded off against a gain in liberty or opportunity. How can it enhance the liberties or opportunities available to those with lesser opportunities for others to have greater ones? The thought may be that allowing unequal opportunities will give those advantaged thereby an incentive to create opportunities that would not otherwise exist for those with less opportunity, perhaps in virtue of the entrepreneurial activity of the advantaged. This, however, corresponds only to the first two hypotheses about wealth.

The third hypothesis about wealth, namely, that there is no other way to increase the social product, fails because opportunities, unlike wealth, can be created at will in a society rich enough to support the two principles of justice.¹⁴ Since wealth must be created by work, inequalities of wealth may be necessary to provide incentives to enhance the material welfare of society. While inequalities of opportunity *may* provide incentives to create more opportunities, and entrepreneurship is *one* means by which this may occur, there is a crucial asymmetry. Given enough wealth, we can simply announce job openings and hire for them, create positions and staff them. Even if we are not rich enough to provide the corrective education required by the principle of redress, we could cut out the middleman and make the jobs available directly much more cheaply. At least we could do so as long as creating these positions did not create so much make-work and ineffi-

13. For a different set of objections to Rawls's reformulation, arguing also that Rawls has available only "formal" or liberal equality of opportunity, see Pogge 1989: 169–70.

14. Justice applies only in the "circumstances of justice," moderate scarcity and moderate egoism (127–28/109–110); the two principles apply in a comparatively rich society. In a poorer society, a "general conception of justice" abandons the lexical ordering and requires only that any inequalities, including inequalities in rights and liberties, be to the benefit of all (62–63/55).

ciency that the society would be dragged below the level of productivity necessary to realize the two principles at all. Surely it would be possible to find opportunities for all who could work, in a way that created a net gain in social wealth or at least avoided a catastrophic loss, even if that was not the most efficient use of resources according to some criterion of efficiency. Accordingly, inequality of opportunity is not needed to create greater opportunity as inequalities of wealth might be needed to create greater wealth. Therefore, inequalities of opportunity are unjustified even if they enhance the opportunities available to the least advantaged.

To see this, suppose that wealth could be created at will, like opportunities, as well as by work. We pray for manna and manna falls. To remain within the circumstances of justice, including moderate scarcity, suppose that we could get no more manna by prayer than we could get wealth by working (for more on manna, *see* Ackerman 1980:24–31). Then say we can choose between a society governed by the difference principle where wealth is created by work and can be enhanced by incentives and one governed by equality of wealth where wealth is created by prayer. Does anything impel us to choose one over the other? For Rawls, “[t]he inequality in expectation is permissible *only if* lowering it would make the working class even more worse off” (78/68, *emphasis added*). Here it need not, since we could eliminate inequality by praying for manna. So the difference principle for wealth would be unjustified. A difference principle for opportunity is similarly unjustified, because we *can* create opportunities by other means than the entrepreneurial efforts of those favored by inequalities of opportunity.

Rawls cannot justify the ineliminable inequalities of opportunity that result from the inviolability of the family, either by interpreting democratic equality as liberal equality plus the difference principle for wealth or as a difference principle for opportunity. Merely stipulating that either version is a principle of justice does not make it so. In the end Rawls is left only with the argument from impossibility: “One is to hold that [inequalities of opportunity] are not unjust, since the conditions for achieving a full realization of the principles of justice do not exist” (302/265). But that is only because Rawls will not countenance the abolition of the family.

V. RIGHTS OF INEQUALITY AND THE FUNDAMENTAL CONCEPTION OF FAIRNESS

In a deep sense, then, no society with the institution of the family can be just on any theory that starts from the fundamental conception of fairness. Such a society will not be well-ordered, because it will not be regulated by the two principles of justice, except by stipulation. In particular it will not embody fair equality of opportunity; and if that principle is necessary to realize the difference principle, it will not realize the difference principle either. These consequences may reasonably be described as devastating for

Rawls's theory. After discussing an unsatisfactory solution, I suggest that Rawls's dilemma derives from his fundamental conception of fairness. I then explore some alternatives that reject this conception.

A. The Threat of Unprincipled Intuitionism

Fishkin, considering a generalized version for all liberal theory of the sort of argument that I have worked out in detail for Rawls, concludes that we must live with "inconclusiveness" (1983: 169). Fishkin says that what the puzzle shows is that:

[W]e are left with no more than an intuitionism of conflicting principles, to be traded off in particular cases. . . . [Our moral theory can have no] general priority relations among [the] conflicting parts. . . . It does not offer a general direction for public policy (ibid.: 192–93).

Practically speaking, all we can do is to consider various concrete suggestions to mitigate the effects of the natural and social lotteries, and, in some unstructured manner, balance their costs for liberty, the family, and other things we care about until we are provisionally the least dissatisfied. The dissatisfaction cannot be eliminated. We can do no more than muddle through. Some, like Rorty (1991: 191–92) or Posner (1990: 465; 1998: 227ff), would cheerfully embrace this result in the name of pragmatism.¹⁵ However, it has unhappy consequences. In Rawls's terms, we would abandon the possibility of a reflective equilibrium. There would be no equilibrium. Our moral views would never make sense to us on our own terms. And the result would not be, in Rawls's sense, reflective. We could not know "to what principles our judgments conform and the grounds of their derivation" (20/18).

Moreover, Fishkin's unprincipled intuitionism dulls the edge of a justice-based critique of social institutions. Like the conservative view of reflective equilibrium Rawls rejects (49/43), Fishkin's method would merely smooth out the rougher edges of the views we happen to hold, while treating most of our beliefs as immune from criticism. Fishkin's method is as deeply conservative as Rawls's is at least potentially radical. Fishkin concedes in effect that we are condemned to live with injustice, which is the practical analogue of "living with inconclusiveness." Rorty or Posner would not think such conservatism is a bad thing. If one doubts the justice or morality of our

15. Rorty attributes this view to Rawls himself on the basis of Rawls's more recent work (see, e.g., Rawls 1999b: 388–420), perhaps with some justification—see above, note 5. It should be remarked that Posner's economic analysis of the law can lead to some fairly radical attacks on commonsense convictions; Posner suggests that selling babies is okay (1992: 416). I have reservations about whether pragmatism must be quite so unprincipled. After all, *Rawls* is a pragmatist, and his theory of reflective equilibrium is the best account pragmatism has to offer of a theory of knowledge. For more principled, but less abstract, pragmatic theories, see, e.g., Herzog 1985; Anderson 1993.

institutions, however, one will reject a method that is guaranteed not to disturb them. Even granting the pragmatist platitude that all our conclusions are revisable in the face of further argument (*see* Quine 1961: 43; Goodman 1983: 64), and the idea that a variety of mutually inconsistent social arrangements might well be just (Fisk 1989: 312, 326), Fishkin's inconclusiveness would be a lot to swallow. Nothing except the bare conflict of our principles impels us to it. We would lack even an account of why we faced such an intellectually and morally grim alternative. I now explore one diagnosis that may offer promise for a solution.

B. Rights of Inequality

My suggestion is that the antinomy into which Rawls's fair equal opportunity falls is an instance of a problem that Marx located in a famous, if cryptic, comment. For Marx, the notion of "equal right" fails on its own terms because any such right is "a right of inequality" (1989: 86). Any principle of justice whatsoever requires treating like cases alike ("the application of an equal standard" (*id.*)), but in doing so necessarily ignores the fact that there really are no like cases. Justice as such is therefore directly self-defeating (*see* Parfit 1984: 3). It treats as the same, persons who are, by the standards of justice itself, dissimilarly situated. No principles of justice can avoid this by capturing all the differences that *they themselves* hold to be relevant. Criticizing the principle that labor should be remunerated according to its contribution, Marx said this "tacitly recognizes the unequal endowment and thus productive capacities of the workers as natural privileges." It treats "unequal individuals" as equal "one-sidedly," merely as workers, and ignores relevant differences among them, such as need (1989: 86–87).

Marx therefore rejected, at least implicitly, the fundamental conception of fairness, that the arbitrariness of the world must be corrected for. Any conception of justice must inconsistently allow for arbitrariness on its own terms. So Marx did not seek refuge from arbitrariness in an original position or even advocate its correction in the real world. He rather accepted contingencies of the appropriate sort as relevant bases for distribution of goods: "To avoid all these defects, right would have to be unequal rather than equal" (*id.*: 87). *Right* cannot do this, however, so for Marx the correct distributional principles were not principles of right. Marx identified justice with the fundamental conception. He thought that rejecting the latter meant rejecting the former. His thesis was that any claim of equal right must fail on its own terms, those of "right" or justice, not that it would be unjust by *his* standards, which were not those of justice.

This is doubtful as a critique of justice in general. As Wood says, "[w]hether any system of rights could be devised that does not give unequal results seems to be a factual question" (1986: 293); but that is not the issue here. My point is that Marx captured fairly precisely what is at the root of

Rawls's particular dilemma. Marx's idea explains the antinomy between the family and the ideal of a well-ordered society governed by the two principles of justice. Fair equality of opportunity is a "right of inequality." The relevantly like cases are persons with like natural assets. This "one-sidedly" neglects their differentially developed cognitive and motivational capacities (see Marx 1989: 86). It "considers them only from a certain side" (*id.*), merely as similarly abled. The differences due to the family are ignored. Persons with equal natural capacities should have equal opportunities; but because of the social lottery, they do not have them. Their natural capacities, moreover, are arbitrary in what is, according to the fundamental conception of fairness, a morally irrelevant way. This is why Rawls struggles unsuccessfully to explain how democratic equality makes up for this arbitrariness by appeal to the difference principle. Moreover, even if the difficulties due to the social lottery could be surmounted, the natural lottery would remain. To *define* fair equality of opportunity as a way of permitting the full realization of natural talents unhampered by social circumstance (301/265) is to concede this in the most strict and literal sense. It is to "tacitly recognize . . . unequal endowment[s] . . . as natural privileges" (Marx 1989: 86).

In the end, Rawls concedes what Marx asserted, namely, that justice cannot be realized, or, as Rawls puts it, can only be realized "imperfectly" (74/64), at least as long as the family exists. Rawls is reduced to stipulating that a system that satisfies the two principles, including the inadequate principle of fair equality of opportunity, is just by definition. "One is to *hold* that [inequalities of opportunity] are not unjust . . ." (302/265, emphasis added). Marx's critique may not be effective as to justice in general, but it applies to Rawls's theory of justice.

C. Alternatives

If the family and fair equality of opportunity are inconsistent, and this is because fair equality of opportunity is a "right of inequality" in the sense explained, where does that leave us? There are three alternatives. We may: (1) attempt to institute justice more perfectly than Rawls allows by abolishing the family, thus accounting for all the morally relevant facts or equalizing all the morally relevant facts for which we account; (2) retain the family, but give up the notion that justice is the first virtue of social institutions; or (3) retain the family and justice as the first virtue, but seek a theory of justice that takes account of the morally relevant facts, thus practically refuting Marx's claim that all rights are rights of inequality. The first alternative cleaves to the fundamental conception of fairness. The second two abandon it in different ways. If the first alternative is unacceptable, as I shall argue, the fundamental conception of fairness must go. Any adequate theory of justice must then accommodate the arbitrariness of the social and

natural lotteries at a deep level, and not merely acknowledge their inevitable existence. We may be able to accommodate them by disconnecting the distribution of different sorts of goods from one another, in particular that of life chances from that of opportunities.

1. The Family Is Here to Stay

Rawls is committed by the logic of his theory to abolishing the family, and unless the family is human nature in the very strong sense discussed above, it has no place in a well-ordered society. Such a society would have some quasi-Platonic method of assigning children to those best qualified to develop the children's potentials, canceling out any advantages that anyone might derive from a fortuitous biological family. As remarked (*see above, Part II (A)*), a random assignment of persons to opportunities by a jobs lottery might also be necessary so that the talented could not enjoy their capacities as a sort of natural privilege.

At this point, however, the solution has departed from reality. As Rawls says, "[c]onceptions of justice must be justified by the conditions of our life as we know it or not at all" (454/398). Above I approved the objection that the abolition of the family would be unrealizable in the real world, even if this abolition were chosen in the original position. Rawls could not avail himself of this, because for him the principles of justice are those that would be chosen in an ideal choice situation to govern a "well-ordered society." He helps himself to a set of psychological assumptions to argue that people could abide by a set of principles so chosen—but only if people were already in a well-ordered society. His account of the origin of the sense of justice describes "the course of moral development as it might occur *in a well-ordered society realizing the principles of justice*" (461/404, *emphasis added*). People raised in a well-ordered society might be able to abide by principles of ideal justice, but it is not clear that this has much force for *us*, who are not in a well-ordered society. If *ought* implies *can*, the fact that *we* could not abide by them, as I take it that we could not if they directed us to abolish the family, would seem to show that we ought not try to abide by them. It is neither here nor there that people might be able to if their circumstances were different from ours.

I do not here wax conservative. Radical changes might be justified were some practical basis to be found for a transition to a situation where they could be realized. The radical egalitarianism for wealth indicated by the difference principle has such a practical basis, even though it would be desperately resisted by those in our societies who would stand to lose thereby. There exist demonstrable social forces to which we can point empirically in history that under real world circumstances demand such changes and resist social regimes that deny them. The economically disadvantaged are a group that has the demonstrated historical potential to become a politically cohesive organized force supporting egalitarian policies, which is why we have as much of a welfare state as we do (*see, e.g., Piven*

and Cloward 1971). Here the *can* that justifies the *ought* is one we can ourselves invoke.

However, with regard to the abolition of the family (or indeed the redistribution of wealth) a Rawlsian *can* based on the "sense of justice" for an ideal society that already implements the principles of justice is more of a hypothetical *could*. It is not available to us as we are. First, no real forces tend to bring about these changes. The history of the Western family points, if anything, in the opposite direction. Circumstances have strengthened a family tie that was formerly rather tenuous—child abandonment and fostering-out, for instance, are now rare. No forces exist that might bring about a transition to a world without the family. While economic egalitarianism has a constituency in the economically disadvantaged, the abolition of the family has no such constituency. Those disfavored by family and nature have never organized as such to promote such ends, nor has any other group cohered around such a demand on their behalf. It is not likely that any ever shall. Those so disfavored are too diverse in their other interests to be a cohesive force for change.

Not only is there no force that might organize for such changes, but all forces would organize against such changes were they proposed in a serious way. It is not merely that opposition would tend to come from a relatively discrete group, as is the case with the opposition of the wealthy to economic egalitarianism. With the proposal to abolish the family—even more, I think, than with a random assignment of jobs—opposition would draw from persons all across the social spectrum. It would include virtually all those actually disadvantaged by their family upbringing. The *could* is not a *can* based in real social possibility, and it is opposed by a powerful *cannot* thus based. Rawls is thus right to be reluctant to abolish the family, although this is something he cannot, on his own terms, evade.

2. *Giving Up on the Priority of Justice*

We are stuck with the family, then. We must either reconcile it with justice or give up justice or its priority, at least where it impinges on the family. Consider the second alternative first. Various moral conceptions make justice subordinate to other values,¹⁶ but I illustrate this alternative and its problems with a brief treatment of communitarianism, which faces the issue squarely. Generically this view holds with utilitarianism that the good is prior to the right, but against utilitarianism, that the good is not a matter of utility maximization. Rather the communitarian good is rooted in the particular valuations of historically located concrete communities. What we value as good depends on who we happen to be. Communitarianism is

16. Other conceptions on which justice is subordinate include Fishkin's unprincipled intuitionism. A second such approach is utilitarianism, which replaces an independent notion of justice with a teleological conception of utility maximization. Rawls's objections to utilitarianism (see 1971: 161ff.), among others, seem decisive to me, although I would not argue from the original position. There is also Rawls's own *de facto* position, where the family is simply taken as given, with justice realized to the greatest extent possible within that constraint.

quasi-relativistic (*see* Dworkin 1985: 217); but it attributes a certain sort of objectivity as intersubjectivity to the good, and allows for immanent criticism of different social conceptions of the good and related conceptions of justice as internally contradictory (*see* Taylor 1985a: 15; Walzer 1983: 312ff.).

For communitarianism, the possibility of justice depends on shared understandings of the social meanings of the goods we value. Principles of justice spring from the correct distributional principles inherent in the valuation of things *as* good in the way that they are good. "Distributive criteria are intrinsic not to the good-in-itself but to the social good," says Walzer. "All distributions are just or unjust relative to the social meanings of the goods at stake" (1983: 8–9). Taylor writes, "The framework for distribution can also be determined for a given society by the nature of the goods they seek in common" (1985b: 296; *see also* Sandel 1982: 172–74). Thus it is the nature of honors to go to the deserving, and not to those who are merely able to pay for them. A bought honor does not convey the social meaning we give to honor (Walzer 1983: 102). It is not really an honor at all. To allow principles of justice that govern certain goods (like money) to operate out of their proper spheres and to influence the distribution of goods for which they are not the proper principles (like honors) is unjust and indeed incoherent. "To convert one good into another, when there is no intrinsic connection between the two [as we understand them], is to invade the sphere where another . . . properly rules" (*id.*: 19).

With a proper articulation of the kinds of goods and the appropriate principles of justice for them, one might hope to avoid Marx's objection that all rights are rights of inequality by taking into account the relevant considerations for the distribution of those sorts of goods and those only. The young Marx may have held some such view. In his critique of "the power of money" in bourgeois society, he wrote:

What I *am* and *am capable of* is by no means determined by my individuality. . . I . . . am *lame*, but money furnishes me with twenty-four feet. Therefore I am not lame. I am bad, dishonest, unscrupulous, stupid; but money is honored and hence its possessor. Money is the supreme good, and therefore its possessor is good (1975: 324).

Marx's point was that the race should go to the swift, the battle to the strong, and bread to the wise (*Ecclesiastes* 9:11), but in a society dominated by money these goods become improperly fungible. Breaking the domination of money, he seems to have thought, would allow the proper distributions according to "individuality." Marx was no communitarian, however, even at this early period. He did not presume that understandings of the good were shared across classes.

Because for communitarians justice depends on historically given conceptions of the good or contingently shared understandings, they must deny the fundamental conception of fairness as correcting for the arbitrariness

ness of the world. They cannot treat our contingent features, such as our natural assets and family upbringings, as per se morally irrelevant.¹⁷ Walzer argues that the proper principle for the distribution of opportunities is pure meritocracy, “the monopoly of the qualified” (1983: 134), as reflecting our shared understanding of the nature of “office,” taken broadly as job opportunities—“favor to the men of skill,” as *Ecclesiastes* 9:11 says. However, Walzer explains, this monopoly must be constrained so that office holders do not command goods not due to their office in virtue of the sort of office it is. We “set limits to their prerogatives” so that office does “not become the basis of . . . claims to power[,] privilege, [or income]” that transcend the narrow purposes of the office (1983: 135). The social and natural lotteries would not then be sources of injustice, given our shared understanding of the nature of office as a good, unless office itself became a way of distributing other goods according to principles alien to *them*. To allow meritocratic distribution of office to invade the sphere of the family would therefore also be unjust.

One might discuss, within a communitarian conception, whether merit or qualification is the sole appropriate principle for the distribution of opportunities, or what we mean by “qualification” in any given context.¹⁸ The main problem with the communitarian solution, however, is in its neglect of the lack of consensus that is the fundamental factual premise of liberalism. What we might call the “liberal condition” is one of irreconcilable disagreement on fundamentals. “The political culture of a democratic society is always marked by a diversity of opposing and irreconcilable religious, philosophical, and moral doctrines” that is “the inevitable long-run result of the powers of human reason at work within the background of free institutions” (Rawls 1993: 3–4), as well as of opposing interests. Divergence might be less in a well-ordered society, but nothing short of Rousseau’s enforced conformity,¹⁹ if that, could eliminate it. As I argued above in a different context (Part IV (C) (1)), even if a well-ordered society had no divergence, its consensus would have no relevance for us, who live in different circumstances, unless there existed tendencies to realize those circumstances. I see no forces in our society that tend towards the emergence of a communitarian shared understanding.

The significance of this dissension is that the shared understandings of the good required by the communitarian solution do not, and perhaps

17. Sandel objects that Rawls operates with a metaphysical conception of persons as radically “unencumbered,” “shorn of all contingently-given attributes” (1982: 94). Rawls denies this (1999b). How persuasive is his answer may be debated. My own criticisms, however, depend on no such claim about Rawls’s conception of the self, but only on Rawls holding a fundamental conception of fairness that he unambiguously maintains.

18. For instance, Walzer rejects affirmative action for historically disadvantaged groups such as Blacks (1983: 151–54). This does not follow from the tie between qualifications and opportunity, unless talent is the sole relevant consideration in distributing opportunity. Perhaps opportunities should go to the “best” person, but who the “best” person might be is subject to debate.

19. Rousseau advocated the imposition of a civil religion to enforce community cohesiveness—the penalty for apostasy was death (1987: 226–27).

cannot, exist in a large, complex, and relatively free society, much less one marked by opposing group interests. A "constitutive" community based on the idea that citizens are "friends" (*see* Sandel 1983: 81–83) is not a feasible ideal for the modern world. If so, we must lack the agreement about the nature of the goods at issue that would allow us to decide on the right principles for the just distribution of these goods: for example, that opportunities are the sort of goods that should be distributed according to merit, but in a way that prevents this from invading the sphere of the family. We may have no stronger common ties, if we have that much, than the "overlapping consensus" of Rawls's recent work (1993, 1999c), in which we endorse not a comprehensive conception of the good, but a political conception of justice, each of us from the perspective of more parochial shared conceptions that make no political claim to universal assent (1993: 134). But this is to reassert the priority of the right over the good, and justice as the first virtue of social institutions.

The communitarian argument that justice requires a prior shared conception of the good, and the liberal rejoinder that no such shared conception is possible in a free society, both seem to me to have tremendous force. It is logically possible that both are right. If so, any justice acceptable to all may be impossible in a complex modern society. That outcome would be troubling, through it would not have bothered Marx. I suspect that consensus on justice is indeed impossible in a divided society marked by deep systemic inequalities, although it might be possible in a less divided society. But if we were to give up on the priority of justice within the communitarian framework, we would need a way to reconcile the liberal condition with *enough* sharing of conceptions of the good to allow for minimal consensus on the appropriate distributive principles for goods of those kinds—something like a Rawlsian "overlapping consensus." One might start with the nature of opportunities as goods. A detailed account of this complex topic here, however, would take us too far afield.

Retaining the priority of justice, however, requires an explanation of how justice is possible without prior shared conceptions of the good. I have argued that while in a divided society, conflict on conceptions of justice is ineliminable and even an overlapping consensus unattainable, nonetheless some such conceptions can be shown to be objectively better than others (*see* Schwartz 1997). My argument was not cast in terms of the relation of justice to the good, but it might be adapted to that purpose. The basic idea was that if justice is a pattern of distribution of goods and bads, patterns that are sufficiently acceptable to most to be self-perpetuating are objectively better than patterns that are self-undermining in the long run because of the resistance they generate. The connection to the present point is that it does not seem to matter, on this conception, whether there is any consensus on what the goods and bads are. There might be disagreement, and yet a pattern of distribution might be stable; there might be agreement, and yet a pattern might be self-undermining. The relative superiority of one con-

ception of justice to another would therefore be independent of whether there was consensus on the nature of the good. Developing this thought is a project for another time. For the purposes of exploring the possibility of retaining the priority of justice, however, I will suppose that justice might somehow or other be shown to be independent of any conception of the good. The sketch indicated here only points at one way that this might be demonstrated.

3. *Retaining the Priority of Justice*

If, then, justice is inevitably prior in a pluralistic society, and the family is ineliminable, the problem is to reconcile the two as far as possible. At this late date, I have no rabbits to pull out of hats; but any solution will have to face the problem located by Marx's critique of rights of inequality, that principles of justice inevitably neglect morally relevant features of individuals, their irreducible "individuality." On this view, the problem with Rawls's idea of equal opportunity is that it turns on the fundamental conception of fairness as correcting for the arbitrariness of the world. This points us in the wrong direction, leaving out too much that matters rather than taking into account too much that does not. We are then led either to the absurd conclusion that justice requires that the family be abolished or to the antinomy that we cannot seriously advocate what justice requires. So I think it a mistake to treat equality of opportunity as an "unrealizable *heuristic ideal* and [argue that] . . . realizable approximations of it should be taken as what it is, functionally and practically speaking, to attain equality of opportunity" (Nielsen 1985: 170). The fundamental conception of fairness must go. We must rather accept that certain contingent differences, including differences in cognitive and motivational capacities due to variations in family upbringing, are morally relevant to the distribution of opportunities, but insist these differences must be confined to their proper place.

Here we might take a leaf from the communitarians' book. We need not accept their theory that justice in the distribution of goods depends on universally shared understandings of the nature of goods, understandings that we have not got. But we can agree that there is something to the idea that it would be unjust to allow the distribution of goods to be governed by inappropriate principles. That is why the example of the incoherence of a bought honor is effective. Rawls implicitly accepts something like this in insisting on strict equality for liberty but allowing constrained inequalities for wealth and income. Different principles are appropriate for different goods. He objects that libertarianism "permits distributive shares to be improperly influenced by [natural assets, social circumstances, and luck,] . . . factors so arbitrary from a moral point of view" (72/63). This is expressed in terms of the fundamental conception of fairness, as a problem of arbitrariness; but it could be reformulated without that commitment.

One might argue that the problem with distributing opportunities according to something like merit or qualification is not that the bases of

these are arbitrary, but that such a distribution, in the sort of society we have, causes *other* goods to be distributed according to whether people have the characteristics that *should* in part govern their opportunities. These other goods notably include wealth and income as well as liberty and rights or at least their value—life chances, in short. Opportunities for the “better” jobs are associated with more wealth, prestige, and power, and with more—and more valuable—freedoms and rights than those for the “worse” ones. It is not at all obvious, however, that life chances should track opportunities in this way.

Surely opportunities to be physicians or attorneys should be confined to those who have the requisite talents. Why, though, should medical or legal talent translate into wealth, security, and political power in a way denied to those whose talents run to auto mechanics? Perhaps what is to be done is to constrain the prerogatives of opportunity and limit its benefits to the scope necessary for the exercise of those opportunities. Opportunities should not be determinative of life chances, except in the limited regard that these include as one of their components the opportunities themselves.²⁰ This would be a sort of “Nozickean” conception of careers open to talents, with the proviso that such careers could not translate into command of other goods with which talents are not associated in the way they are with opportunities. Nozick would be appalled, but that is probably a point in favor of the view urged here. The problem with libertarianism is that while the ideal of careers open to talent is unexceptionable, the notion that all the good and bad things of life should be distributed according to talents is not.

Something like this is implicit in Marx’s ideal, “From each according to his ability, to each according to his needs” (1989: 87); roughly, that each does what she can and takes what she needs. Here, there is no connection between the distribution of material goods according to need and that of opportunities according to ability. Marx’s ideal is problematic insofar as it is interpreted to require escaping material scarcity, one of the circumstances of justice. It depends on a situation where “all the springs of common wealth flow more abundantly” (*id.*). Moreover, how to ascertain what needs are becomes a much sharper problem if scarcity is unavoidable. Since I am not here advocating this notion, I need not address these difficulties. What I wish to emphasize, rather, is breaking the link between opportunities and life chances. As Nagel, neither a communitarian nor a communist, expresses the idea:

[T]he economic [and social] rewards which some talents are able to command . . . cannot be said to be merited just because of the recognition of

20. Is there any place for policies such as increased spending on the education of the socially and naturally disadvantaged if we do this? Such policies could no longer be justified by the need to correct for the arbitrariness of the world. But they might be justified by the need to promote the development of talent so that people could take advantage of opportunities.

excellence on which they are based is merited. To try to sever the connection between talent and excellence would be wrong. But to sever the connection between talent and income, if it could be done, would be fine. Those with useful talents do not naturally deserve more material [and social] benefits than those who lack them (1991: 113).

Just as one should not be able to buy honors with money, one should not be able to buy money with opportunities. Distribution of opportunities in accord with talents, though differentially granted by nature and differentially developed in families, would be much less disturbing if one could not use these opportunities to acquire disproportionately differential wealth and income. We could then say it was just to so distribute opportunities, as long as life chances—money, liberty, and other goods that are not appropriately connected with the exercise of talents—were distributed according to the correct principles of justice for *those* goods. I have not, of course, said what these might be.²¹ I have only expressed the intuition that they diverge from the distribution on which they track opportunities distributed according to, among other things, talent and other natural capacities as developed in social circumstances.

The problem of formulating and ordering principles for the distribution of such goods so as to avoid unprincipled intuitionism is considerable, and I have already disavowed any attempt to solve it here. Moreover, it might be wondered whether the link *could* be severed. With respect to income, Nagel doubts it, although he thinks it could be done with respect to class (*id.*: 114). Nagel's worry concerns the incentive effect that induces Rawls to adopt the difference principle instead of strict equality of wealth. Might not the link be necessary for acceptable level of material prosperity for the least well off? Another worry concerns information rather than incentives (*see* Hayek 1948): How can we rationally allocate labor without pricing it differentially according to its economic value? I agree that there is no point in embracing an ideal that is utterly unfeasible, but I think that these important objections are surmountable. I hint at one sort of reply in a moment. Others could be suggested. Speaking generally, I would say that if the link could be severed with regard to class, differential income would not matter as long as everyone had a comfortable minimum. For my purposes, though, the main points are that a solution to Rawls's dilemma requires rejecting the fundamental conception of fairness, and that this might be achieved if we disconnected life chances, so far as we could, from opportunities. How far that is feasible and how to distribute life chances are topics for another time.

The final objection I shall mention pulls in an opposite direction. It is that when all is said and done, I have not proposed anything that different from what Rawls himself proposes. Does not the difference principle break the

21. For some partial treatments in the context of a discussion of what goods should not be marketed, *see* Walzer 1983: 95–128; Anderson 1993: 140–67. Young suggests that with many goods, even thinking about them in terms of distribution is misleading (1990: 14–38).

link between opportunities and life chances by limiting inequalities of wealth to what is necessary to provide incentives to maximize the material positions of the least well off instead of distributing it, for example, according to desert or talent? Indeed, for all I have said, the correct principle for the distribution of wealth might *be* the difference principle.²² There is something to this, and it may contain the germ of a reply to the objection that the link cannot be broken. If the difference principle breaks the link and can be realized, then fair equality of opportunity can be attained despite the natural and social lotteries, accepting differential income due to talent as just if that inequality benefits the least well off. Then there would be no pressure to abolish the family or other such sources of arbitrariness, because arbitrariness would not be seen as the basic source of injustice. Neither would the lexical ordering of the two principles be disturbed, because the concessions to the natural and social lotteries embodied in democratic equality would not be problematic as long as all goods were distributed according to appropriate principles.

If the correct principles of justice might be Rawls's when all is said and done, does that not undermine the argument of this paper? I think not. My critique has been directed not against the content of Rawls's principles of justice in themselves but against his argument for those principles. I have criticized Rawls's theory of justice because it is based on the derivation from the original position and its underlying assumption, the fundamental conception of fairness. That conception is what forces us ineluctably to the unpalatable conclusion that the family must be abolished, and drives Rawls's unconvincing attempt to evade this conclusion. It also underlies the argument from the original position, which must be abandoned with it. My proposed solution would give us, at most, Rawls's principles without his argument for them—which is just as well in view of where that argument leads.

In conclusion, then, if Rawls's principles of justice can be supported in ways that do not depend on a conception of justice as a "right of inequality," that do not appeal to his fundamental conception of fairness, and that discard his theory of justice with the ruthlessly abstractive machinery of the original position, then that might show that the link between the distribution of opportunities according to talent and that of other goods can be broken. A proper articulation of an alternative theory along the lines sketched here would require at least the following: (1) a structured account of acceptable distributional principles for the main social goods, including liberties, opportunities, wealth, and income (which might be Rawls's as far as I have argued); and (2) an explanation how such principles can be mutually applied to the appropriate goods in a way that neither leads to misapplication to inappropriate goods nor unnecessarily interferes with economic efficiency. How one might argue for some such theory, I cannot

22. Actually I think it is not, and I doubt that there can be a single correct principle for the distribution of wealth, or perhaps even for any goods (see Schwartz 1997: 145–48).

take up here, although I note that it is progress to see what is to be done. In this paper, I have only shown that any such theory must eschew the fundamental conception of fairness. Then Rawls's two principles, or something like them, might enable the reconciliation of equal opportunity with the family.

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