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Rawlsian justice and the challenge of diversity

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Résumé

Ce mémoire examine le rôle de la diversité dans une conception de la justice. Je débute en considérant l'abstraction de la différence impliquée dans le raisonnement utilisé pour arriver à une conception de la justice. Par la suite j'évalue le rôle des différences des groupes sociaux dans l'application des principes de justice, en considérant si la justice exige des droits individuels ou si les groupes peuvent revendiquer des droits différenciés. Ce mémoire utilise la position originale de John Rawls pour évaluer la première question, et sa conception de la personne et des groupes sociaux pour examiner la deuxième. Je soutiens que nous pouvons et devrions utiliser l'abstraction de la position originale, tant que nous sommes conscients de ses limites. Bien que sa conception politique de la personne soit également utile pour la défense des droits individuels, sa conception du groupe social n'est pas appropriée pour les groupes culturels ou historiquement opprimés, car il repose trop lourdement sur la notion d'association volontaire. J'analyse l'argument de Will Kymlicka concernant les droits minoritaires et j'enrichis la théorie de Rawls en ajoutant l'inégalité entre groupes. Je termine en examinant les problèmes concernant les minorités à l'intérieur des groupes minoritaires et conclue que les droits minoritaires ne sont justifiées que lorsqu'ils sont compatibles avec les droits individuels, et non pas quand ils renforcent une autre inégalité. Par conséquent, même si l'abstraction au niveau théorique est justifiée, les droits des groupes minoritaires exigeront qu'on porte une attention aux différences entre groupes, ainsi qu'à l'intérieur de ceux-ci.

Mots-clés : Rawls, la diversité, la position originale, le voile d'ignorance, l'autonomie, le féminisme, Kymlicka, la culture, le multiculturalisme, l'égalité

Abstract

This thesis examines the role of diversity in a conception of justice. I begin by considering the abstraction from difference involved in the reasoning used to arrive at a conception of justice. I then evaluate the role of social group difference in the application of principles of justice, considering whether justice demands principles that are the same for all in the form of individual rights or whether groups can claim differentiated rights. This thesis uses John Rawls's original position to evaluate the first question, and his account of the self and social group to discuss the second. I argue that we can and should use the abstraction of the original position, so long as we are aware of its limits. While Rawls's political conception of the self is also useful for defending individual rights, his account of the social group is inappropriate for cultural or historically oppressed groups, as it relies too heavily on the notion of voluntary association. I follow Will Kymlicka's argument for minority rights and extend Rawls's theory to consider inequality between groups. I close by considering concerns regarding minorities within minorities, and conclude that minority rights are only justified when they are consistent with individual rights, not when they reinforce a different inequality. Therefore, even though the abstraction at the theoretical level is justified, minority rights for groups will require attention to the differences between groups, as well as within them.

Keywords: Rawls, diversity, original position, veil of ignorance, autonomy, communitarianism, feminism, Kymlicka, culture, multiculturalism, equality

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Introduction

With the recent publicity of the debates over the reasonable accommodations of minority groups in Canada and an increased attention to multicultural, or differentiated rights among political philosophers,¹ there has been increased debate over the relationship between social group differences and justice. This has subsequently led to discussions of “minorities within minority groups,” with a particular concern for the protection of women’s rights.² This has led me to ask, is there a basis for the recognition of diversity more generally? What would this look like? What role should diversity play in a conception of justice?

As Will Kymlicka has pointed out, on the one hand, in reaction to the history of racial segregation in the United States, and apartheid in South Africa, liberal philosophers have emphasized the importance of a difference-blind conception of justice.³ The argument for the difference-blind approach is based on the idea that race, sex or other group-based differences should not influence access to positions of power, or the distribution of other “benefits or burdens” of society. In this paradigm justice applies to individuals, and not social groups.

¹ Will Kymlicka and W. J. Norman, "Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts," in *Citizenship in Diverse Societies*, ed. Will Kymlicka and W. J. Norman (Oxford: Oxford University Press, 2000), 155.

² Penelope Deutscher, *A Politics of Impossible Difference: The Later Work of Luce Irigaray* (Ithaca: Cornell University Press, 2002), 2-6; Anne Phillips, *Multiculturalism without Culture* (Princeton: Princeton University Press, 2007), 12; Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, *Contemporary Political Theory* (Cambridge: Cambridge University Press, 2001), 3.

³ Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Oxford University Press, 1989), 141.

John Rawls's conception of justice is often considered paradigmatic of the liberal view.⁴ According to Rawls, principles of justice can only be agreed upon when we put our differences aside, through the hypothetical choice situation of the "original position." Rawls describes the original position as a "device of representation," that models the conditions under which free and equal citizens would agree to principles of justice.⁵ Deliberators are deprived of all the information that defines their particular situation through a device called the "veil of ignorance." The original position therefore provides an impartial point of view, as it is free from bias and prejudice that come from knowledge of one's social and economic position in society.⁶ Being equally situated, he argues that individuals would agree to two principles of justice. The first principle guarantees a system of basic human rights and liberties that apply equally to all, and the second principle promotes greater social equality, by limiting the contexts in which an inequality of resources would be accepted as just.⁷

On the other hand, this has been seen as problematic in a growing discourse of difference based politics, and differentiated rights theorists have argued that justice requires the political or legal recognition of group differences. As Iris Marion Young points out,

⁴ Ruth Anna Putnam, "Why Not a Feminist Theory of Justice?," in *Women, Culture, and Development: A Study of Human Capabilities*, ed. Martha Craven; Glover Nussbaum, Jonathan (Oxford: Oxford University Press, 1995), 303.; Michael J. Sandel, *Liberalism and the Limits of Justice*, 2nd ed. (Cambridge: Cambridge University Press, 1998), 13.

⁵ John Rawls, *Political Liberalism*, Expanded ed., Columbia Classics in Philosophy (New York: Columbia University Press, 2005), 25.

⁶ John Rawls, *A Theory of Justice*, Rev. ed. (Cambridge: Belknap Press of Harvard University Press, 1999), 165.

⁷ *Ibid.*, 13.

“Oppression happens to social groups.”⁸ She argues that the reality of social groups must be recognized by a conception of justice, and not put aside or “transcended.” Rather, a theory of justice must take the concrete experience of everyday life as its starting point, because according to Young, “social justice means the elimination of institutionalized domination and oppression” and not merely the fair distribution of benefits and burdens.⁹ She questions both the possibility and desirability of achieving an impartial point of view. To the extent that it is thought to be impossible, Young, and other feminists, have charged Rawls with “substitutionalism,” arguing that the original position reflects a distinctively male perspective, which merely masquerades as a universal position, and that other perspectives are excluded.¹⁰ To the extent that the abstraction is undesirable, Young argues that while “impartiality suggests that all moral situations should be treated according to the same rules,”¹¹ the elimination of oppression will at times require attention to social group differences, for instance by implementing affirmative action policies.¹²

Communitarians argue that liberalism fails to recognize the role of social groups in shaping an individual’s life plans. Michael Sandel argues that Rawls’s theory is symptomatic of this problem, as it rests on a flawed account of a self that can choose her/his ends, independent of the social groups to which she/he belongs. Consequently, Rawls’s focus on the individual blinds him to the way groups constitute individuals.¹³

⁸ Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), 9.

⁹ *Ibid.*, 15.

¹⁰ *Ibid.*, 116.

¹¹ *Ibid.*, 10.

¹² *Ibid.*, 11.

¹³ Sandel, 179.

But while Young and communitarians emphasize the need to abandon some elements of liberalism, Kymlicka argues that minority rights are compatible with liberalism. Kymlicka emphasizes the importance of culture for individuals, though he focuses on the way culture shapes its members' "context of choice," that is to say, their range of possibilities for life plans. He argues that when the survival of a minority culture is threatened, justice requires minority rights to secure the context of choice for its members.¹⁴

Yet if we conclude that the particularity of social groups is relevant to the conception of justice, then we also have to keep in mind the differences within groups that might also be relevant to justice. Such a situation would make it difficult, if not impossible to develop a manageable and coherent theory. For instance, if we ought to consider the perspective of farmers, because they form a particular social group, then so do dairy farmers, and organic dairy farmers, and the list would be endless.¹⁵ The worry is that an attention to difference would reduce justice to conflicts between special interest groups. Under such circumstances, it seems unlikely that representatives would be able to agree on any principles of justice, beyond perhaps the most trivial principles.¹⁶

A politics of recognition that pays attention to some group differences also faces the same charge of substitutionalism as Rawls's liberalism. That is to say, such a position suppresses the diversity within a group through particular policies, or concerns that are supposed to affect the group as a whole. A group representative speaking on behalf on the

¹⁴ Will Kymlicka, "The Rights of Minority Cultures: Reply to Kukathas," *Political Theory* 20, no. 1 (1992): 140.

¹⁵ Rawls, *A Theory of Justice*, 82-83.

¹⁶ Putnam, 318.

entire group, say “women” may actually be voicing the concerns of “subset” of the group, such as “middle class women.”¹⁷ At its extreme, a politics of recognition could solidify a group’s identity. Presenting a particular interest or perspective as representative of the group as a whole, may silence dissenting members, who hold valid concerns. Susan Moller Okin holds this view, as she worries that when special group rights apply to cultures, such policies could have the effect of reinforcing structures of oppression internal to the group. She points to the French policy of accepting the polygamous marriages of immigrants in France, as an example of how a minority right has silenced the arguments of critics who spoke out against the practice in Africa. Okin sees the policy as not only suppressing dissent, but also more importantly, as supporting the patriarchal control of women, and limiting women to a context of “no choice.”¹⁸

Similarly, recognizing the identity and interests of a group in a legal context, may solidify their identity in a way that makes the emergence of new, future identities for that group more difficult, if not impossible. Penelope Deutscher gives the example of legal discussions over how to settle indigenous land rights and claims to compensation in Australia worked to define a “Native Identity” that inhibited the transformation of that identity. The common perception among non-indigenous Australians was that “those living in the cities are thought not to be representative of Aborigines, and indeed, not to be ‘real’ Aborigines, particularly if they have some white forbears.”¹⁹

¹⁷ Ibid., 317.

¹⁸ Susan Moller Okin, "Is Multiculturalism Bad for Women?," in *Is Multiculturalism Bad for Women?*, ed. Susan Moller Okin et al. (Princeton: Princeton University Press, 1999), 9-10;15.

¹⁹ Deutscher, 48.

It is with these problems in mind that I wish to consider the concept of diversity and its relation to justice, in order to avoid limiting the discussion to multiculturalism.²⁰ This will make it possible to address the issue of “homogenizing” or essentializing group differences. The concept of diversity also includes differences such as age, ability and gender, which are sometimes left out of discussions of pluralism, because they are not usually considered “cultures.”²¹ Young similarly argues that one of the problems with recent philosophical discussions over justice and difference is the tendency to focus on cultures.²² Along similar lines of thinking, my own focus on diversity is intended to move away from the perspective of groups toward a focus on how groups shape individual identities, as well as how individuals transform group identity.

With an attention to diversity, I will consider the following questions: Should a conception of justice include recognition of social differences? Does putting our differences aside facilitate agreement on the principles of justice and prevent discrimination? Is it possible and desirable to do this, or, does the elimination of oppression require recognition of differences?

²⁰ Kymlicka has limited his discussion of group rights to “narrowly” defined cultures, referring to ‘a people’. Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995), 18-19.

²¹ Deutscher, 3.

²² Iris Marion Young, "Structural Injustice and the Politics of Difference," in *Contemporary Debates in Political Philosophy*, ed. Thomas Christiano and John Philip Christman (Chichester: Wiley-Blackwell, 2009), 363; 371.

A Theory of Justice: Difference Blind, or Potentially Multicultural?

John Rawls's extensive writings on justice and politics²³ will be the focus of this thesis, as it is the starting point for most philosophical projects that pursue the development of just social relations. As I previously mentioned, the original position is a method that puts aside differences between individuals in the interest of arriving at a consensus on the principles justice. Not only does the process require abstracting from the particularities that situate us, but the principles themselves are also meant to be "neutral" with respect to group-based differences. He claims that liberty will preserve a diversity of interests and life plans, as the state does not say anything about which life plans are worth pursuing. Freedom of speech and association would also foster ideological diversity, as individuals and associations are free to articulate different religious and philosophical theories. Moreover, anyone can participate in politics or pursue their life plans, encouraging diversity in civil society.²⁴ As a result, Rawls's *Theory of Justice* has often been cited as an example of the difference-blind approach to justice, both for his method, and the neutrality inherent in the principles of justice themselves. Interestingly though, liberal multiculturalists like Kymlicka have also found that Rawls's liberalism, does provide a useful framework for defending multicultural rights.

Because Rawls's work has inspired both criticism and new possibilities around the subject of diversity, and its relationship to justice, this thesis will devote considerable space to analysing the possibilities and the limits of Rawls's theory. Unlike Young and other

²³ Some critics see significant changes from one book to another. I treat the collection of his work as a whole, and see his later writings as clarifications on earlier writings, unless it was marked as a change.

critics, I do not think that bracketing our differences is impossible. Nor do I think it is always undesirable. I argue that bracketing our differences and particularities in order to attain an impartial point of view remains useful for achieving agreement and justifying principles of equality, so long as we pay attention to the limits of this device. But while we should bracket our differences as part of a method for principles of justice, we cannot afford to take a difference blind approach in the application of those principles. This argument will require the following three parts, examining Rawls's method for arriving at principles, as well as conceptions of self, and social group.

Beginning with an evaluation of the details of Rawls's original position, the first chapter will focus on the question of the role of difference at the conceptual level.²⁵ In other words, what reasons do we use to justify our principles, or what are the meta-principles of justice? This question is not about proper political representation, as an adequate role for diversity in the political arena is a question for political science. Rather, it is about the role of diversity in a conception of justice, including its definition and how we arrive at its conclusion. At this point, the concern is simply, what method of reasoning should be used to come to an agreement on what constitutes a fair social arrangement of benefits and burdens. This question is separate from the (still important) questions of applying a conception of justice and of what is required to successfully protect the rights and freedoms in a multicultural society. To adequately treat the latter question, we must be clear on how we ought to come up with a conception of justice in the first place: do our

²⁴ Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 26.

reasons for particular principles appeal to a common ground, or ought we voice our differences at this very first stage of reasoning about principles of justice.

While Rawls considers the original position to be based on an intersubjective theory of moral reasoning, the point of view of the original position is achieved by situating oneself behind the “veil of ignorance.” The first chapter will therefore consider the arguments in favour of this abstraction, as well as criticisms of it. Here we will examine the charge of substitutionalism, as critical theorists claim the impossibility of detaching oneself from one’s situation. In fact, they argue, the perspective represented in the original position is that of an able-bodied, white, straight, professional male. In particular, they emphasize the impossibility of a disembodied and disembedded quality of the original position. I argue that this is an inaccurate and over simplified depiction of the parties in the original position, and maintain that it is a possible thought experiment. However, the description he gives the characters opens the door to the danger that the original position reflects a particular point of view. I dispel claims of bias by considering the assumptions Rawls uses to describe the parties in the original position.

In this context we must also consider the normative concern, that even if we can abstract from our differences, we should not. The abstraction achieved through the veil of ignorance is intended to eliminate bias from moral reasoning and mitigate structural inequalities. It is meant to enable agreement on the principles of justice, thus resolving

²⁵ The first chapter will be somewhat longer than the other two because it describes a number of important concepts and addresses a substantial number of criticisms.

interest group conflict.²⁶ Yet critics claim it is preferable to begin with the concrete; to find agreement between real, situated individuals. Dialogue is thought to provide a better alternative to achieve these aims and suggests considering our differences from the beginning of our deliberations over principles of justice.²⁷ I continue to defend Rawls by examining the intentions of the original position, but point to its limitations. This does not imply that we should reject the original position. Indeed, I will argue that the two models of moral reasoning are compatible.

The second chapter will focus on Rawls's conception of the self as the subject of basic individual rights that apply equally to all, as the defence of his liberal conception of justice is directly linked to his conception of the self and of society. As Rawls explains, his theory "does not proceed from practical reason alone but requires a procedure that models conceptions of society and person."²⁸ Likewise, critics also point to Rawls's conception of the self and of society as sources of the problem they have with his conception of justice. While Rawls describes the representatives in the original position as free and rationally autonomous, and citizens as "self-authenticating sources of valid claims,"²⁹ communitarians claim this is based on a misconceived sense of self, in which a person is prior to his or her ends, and his or her community. The account of an autonomous self is crucial for both Rawls's emphasis on individual rights, and his treatment of groups. Autonomy justifies why we should respect an individual's life plan, by protecting his/her

²⁶ Rawls, *A Theory of Justice*, 16.

²⁷ Young, *Justice and the Politics of Difference*, 4.

²⁸ Rawls, *Political Liberalism*, 107.

²⁹ *Ibid.*, 72.

rights and freedoms. The freedom of association also protects groups, by interpreting them as formed or joined voluntarily by autonomous individuals. This has the benefit of avoiding problems of essentialism that plague conceptions of social groups.

Nevertheless, his conception of the self is criticized for over-emphasizing our ability to choose, ignoring the way groups shape our identity and our ends. Feminists embrace the concept of an autonomous self, but not at the expense of social relations. They emphasize that our ability to choose *comes from* our relationships with others, so this social dimension cannot be left out of an account of autonomy.³⁰ Coming from a different point of view, communitarians argue that our identity is so bound up in our community that we do not experience the revision of our life plans, or the rejection of our communities' norms without a sense of loss to our identity.³¹

I argue that Rawls's account of the self does include room for the influence of groups on an individual's autonomy, without overstating it. More specifically I argue that his political conception of the self, developed in his later writings, is defensible, as he explains that he is only concerned with an account of the self as a citizen. In other words, there is no need to determine the metaphysical truth regarding the individual autonomy. Rather, a political conception of the self requires only that we accept that individuals are capable of revising their ends for the purposes of determining their political rights. Thus, he correctly argues that reasonable individuals will agree to some variation of the two

³⁰ Linda Barclay, "Autonomy and the Social Self," in *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self*, ed. Catriona Mackenzie and Natalie Stoljar (Oxford: Oxford University Press, 2000), 52.

³¹ Sandel, 179.

principles he has outlined, with an emphasis on a standard set of individual rights and freedoms, regardless of the divergent views about human nature they might have.³² This leaves room for the possibility that someone may identify closely with a religion or moral doctrine so long as they accept political autonomy, which guarantees their right to revise their ends or change religions if ever they should want to, no matter how unlikely that might seem in the moment.

In the third chapter, the question is, must the principles of justice apply to individuals, or can groups claim rights too? On what grounds can some groups claim exceptions to laws? Can groups seek protection to preserve their culture at the expense of some individual rights? One example that has sparked a lot of controversy involves the Santa Clara Pueblo v. Martinez case, which gives the leaders of Aboriginal groups the right to deny some individuals membership if their mother married outside of the group. It should be clear that I am not concerned with actual practice or law but with philosophical arguments. The purpose is not to evaluate the particular case, but to use it to see what that says about a conception of justice. I will argue that cultural and historically oppressed groups raise concerns about justice *between* groups, which Rawls's conception of a social group fails to account for. However, there is potential with his difference principle, which could be expanded to handle such cases. Here we follow Kymlicka's argument supporting rights for cultural groups, which are consistent with Rawls's liberalism.

As we noted at the beginning of this thesis, it is possible for culture to either constrain or enable individuals, so we cannot support groups without appropriate attention

³² Rawls, *Political Liberalism*, 30-32.

to the way minority rights can potentially reinforce structures of oppression. However, by developing an account of minority rights with a Rawlsian framework, the individual remains the priority.³³ Thus, minority rights are not supported if they are intended to restrict the rights of the group's members, for example through censorship. Indeed, developing minority rights with the paradigm of individual rights and freedoms gives a voice to minorities within minorities. As a result, the concern over structures of oppression within minorities does not support a move to abandon all rights for cultural groups.

Thus, while it is appropriate to abstract from group based differences in order to develop and justify principles of justice, a conception of justice cannot afford to ignore differences in its application, but requires a careful balance between respect for individual rights which apply equally to all, as well as minority rights to preserve vulnerable cultural structures.

³³ Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 37.; Phillips, 162.

Chapter 1

The Original Position: a Way to Agree on Equality

The “veil of ignorance” in the original position is the device Rawls develops for arriving at a conception of justice to which all can agree. It involves bracketing knowledge of one’s social position, culture and other individuating characteristics. Critics argue that the required abstraction is both impossible and undesirable, and that attention to difference recognized through dialogue is a more effective method for developing an impartial point of view. As Iris Marion Young claims:

It is impossible to reason about substantive moral issues without understanding their substance, which always presupposes some particular social and historical context and one has no motive for making moral judgments and resolving moral dilemmas unless the outcome matters, unless one has a particular and passionate interest in the outcome.³⁴

After examining in detail the description of the original position, this chapter will assess these criticisms of Rawls. I will begin by arguing that the original position is not an impossible thought experiment. It does not postulate completely ‘disembodied and disembedded’ reasoners, as is sometimes thought. Rather, the parties in the original position are characterized by a few assumptions. Rawls assumes they 1) have the capacity for a conception of the good, 2) have a capacity for a sense of justice, 3) have abilities ‘within the normal range’ and initially, 4) are ‘heads of households.’ However, critics who deny the possibility of original position, also argue that the supposedly impartial point of view actually expresses the perspective of a particular social group. This charge of

³⁴ Young, *Justice and the Politics of Difference*, 104.

“substitutionalism” must also be invalidated in order to establish the possibility of the original position. To do this I will examine each of Rawls’s stated assumptions. With the assumptions of ‘heads of households’ dropped by Rawls in his later work of *Political Liberalism*, there seems to be the potential for bias with only one of the assumptions: that the parties will have abilities within the normal range. Altering this assumption would not change the original position drastically. More importantly, it does not call into question the effectiveness of the “veil of ignorance,” which is the target of the impossibility claim.

Once I have invalidated the impossibility claim, I will respond to the normative claim that we should not abstract from our differences and hope to arrive at a moral point of view. At this point I will examine the objectives of the veil of ignorance. It is designed to produce a conception of justice that is free of bias and self-interest; does not reinforce unfair bargaining advantages but mitigates contingent structures of inequality; and make meaningful agreement possible. Critics who abandon Rawls’s original position point to moral dialogue as an alternative method for achieving the same goals.³⁵ I think it is a mistake to view moral dialogue as an alternative and I will argue that the two models are compatible. Rather than abandon the original position, we need to be clear about what the original position is trying to achieve and what its limits are. As we shall see, the original position does not provide any criteria to verify whether or not we have achieved an impartial point of view. It thus may not be able to provide the ‘final word’ on justice. Nor

³⁵ I will not describe the alternatives extensively, because I do not reject the original position. The focus of this thesis, from beginning to end is on Rawls so I am mostly interested in the criticisms. I will however, be as fair and comprehensive as possible.

does he provide an account of how social structures oppress groups differently. What is worse, the original position is not complex enough to understand what it is really like to be in the position of “least advantaged.” While these are important limits, the original position is intended to be “an expository device which sums up the meaning of these conditions and helps us extract their consequences.”³⁶ This makes the original position a powerfully imaginative tool for reasoning about justice, and for that reason should not be abandoned.

The original position and its critics point to two radically different ways to treat the relationship between social groups and a conception of justice. This chapter therefore attends to the first part of the question of the relationship between difference and justice, while social groups and the application of the principles will be considered in the following two chapters.

Intersubjectivity

Before we get into the details of the original position, it is important to examine how Rawls’s theory is based on intersubjectivity. He sees society as the result of individuals coming together in mutual advantage. By this he means that cooperation produces a surplus of goods, and that every individual thereby has a better life than she/he would have had on the basis of his or her own efforts alone. As a result, this surplus of benefits must be distributed, and conflicts arise out of competing claims to this surplus. The subject of justice is, therefore, the basic structure of society, and a set of principles is needed to determine the social arrangements for distributing the benefits and

³⁶ Rawls, *A Theory of Justice*, 19.

responsibilities that result from living with others.³⁷ Even though the principles are not intended to apply directly to the lives and actions of individuals,³⁸ this implies that the very need for principles of justice is derived from the fact that our lives are inextricably linked.³⁹

Furthermore, by developing these universal principles of justice according to what all can agree to in a fair initial situation, Rawls preserves the intersubjective aspect of social contract theory in his conception of justice, despite criticisms that his devise involves solipsism. Rawls takes it to be an advantage of his theory that, in contrast to utilitarianism, justice as fairness takes seriously “the *plurality* of distinct persons with separate ends.”⁴⁰ He compares the collective nature of an agreement in social contract theory with utilitarianism, which extends “to society the principle of choice of one man.”⁴¹ Rawls describes utilitarianism as the reasoning of “an ideally rational and impartial spectator,” who calculates the best possible outcome after having considered the situation from every individual perspective.⁴² The calculation a single (idealized) individual emphasizes the monological nature of utilitarianism in contrast to contract theory.

Similarly, Rawls distinguishes his account from Emmanuel Kant’s deontology, which determines “personal maxims.” Kant begins from the point of view of an individual who reasons alone, and proceeds to imagine what would happen if everyone followed that

³⁷ Ibid., 4-6.

³⁸ Ibid., 47.

³⁹ Sandel, 51.

⁴⁰ Rawls, *A Theory of Justice*, 25.

⁴¹ Ibid., 24.

⁴² Ibid., 161.

particular norm.⁴³ The starting point of the original position, comparatively, begins with a collective agreement.⁴⁴

Yet while Rawls's reasoning includes the hypothetical involvement of others, intersubjectivity alone does not tell us how individuals are differentiated, or in what way our differences are relevant in the context of justice. His use of the term plurality is misleading, as it implies different kinds of people. All we know so far is that individuals have particular life plans, or ends. Individuation tells us nothing about the kinds of ends we have, or about how these ends might be connected to a group-based or collective end.⁴⁵

The Veil of Ignorance

In fact, Rawls requires that individuals abstract from their differences to arrive at a "common point of view from which their claims can be adjudicated."⁴⁶ The point of justice as fairness is to get past our individual perspectives, including the content of our rational life plans, to arrive at an impartial standpoint from which actual injustices can be judged and the principles of justice applied.⁴⁷ In particular, we want to get distance from the self-interest, biases, and unfair advantages imbedded in society, to decide on a *fair* distribution

⁴³ Personal maxims also fail to capture the problem that occurs when an individual claims a derogation of the norm. This problem is avoided by beginning from a standpoint of collective agreement.

⁴⁴ John Rawls, "Kantian Constructivism in Moral Theory," in *Collected Papers*, ed. Samuel Richard Freeman (Cambridge: Harvard University Press, 1999), 339.

⁴⁵ Sandel, 53.

⁴⁶ Rawls, *A Theory of Justice*, 4.

⁴⁷ Alison Jaggar, "L'imagination Au Pouvoir: Comparing John Rawls's Method of Ideal Theory with Iris Marion Young's Method of Critical Theory," in *Feminist Ethics and Social and Political Philosophy: Theorizing the Non-Ideal*, ed. Lisa Tessman (New York: Springer, 2009), 60.

of the advantages and burdens that come from living together.⁴⁸ To explicate this standpoint Rawls has us imagine a hypothetical situation, where we would have to reason without having knowledge of the particular facts that situates us, and ask what principles we would agree to. Rawls knows that society is full of inequalities, and that people can be biased. But the original position has us ask, what principles *would* we all agree to, if we were in a situation of socio-economic equality? What principles would we choose if there were no imbalance of power, no one acting under duress; if no one had more or less to lose than anyone else?⁴⁹ The principles would provide a standard to identify and assess instances of injustice that occur in the real world.⁵⁰

In the terminology of contract theory, this abstraction takes the form of restrictive conditions that are imposed to create an initial situation that is fair. This simply means that we have excluded morally irrelevant factors from our reasoning. As Rawls puts it, the original position models our reasoning. Justice is the result of a rational decision-making process and the conditions that restrict the individual's choices are meant to illustrate the kind of information we want to exclude from our reasoning.⁵¹

Establishing a fair initial situation is important for Rawls, because he uses a procedural approach, meaning that the fairness of the reasoning process will be mirrored in the outcome,⁵² or as Samuel Freeman puts it, the fairness is transferred from the procedure

⁴⁸ Rawls, *Political Liberalism*, 9.

⁴⁹ Rawls, *A Theory of Justice*, 11. p

⁵⁰ Jaggard, 60.

⁵¹ John Rawls, *The Law of Peoples; with "the Idea of Public Reason Revisited"* (Cambridge: Harvard University Press, 1999), 30.

⁵² Rawls, *A Theory of Justice*, 11.

to the principles.⁵³ There are no “independent criteria” to judge if the principles of justice are right. Rather, it is the procedure itself, because it is fair, that determines the justness of the resulting principles.⁵⁴ Thus, what Rawls calls ‘justice as fairness’ refers to both the original position and to the principles set forth, as it “conveys the idea that the principles of justice are agreed to in an initial situation that is fair.”⁵⁵ It is also for this reason that the impartiality of the original position, derived from its restrictive conditions, is so important to Rawls’s theory.

Before describing the conditions of the original position, we should note that Rawls suggests a way to test the acceptability of justice as fairness. We check “if the principles which would be chosen match our considered convictions of justice or extend them in an acceptable way.”⁵⁶ When the principles do not match our convictions,

We can either modify the account of the initial situation or we can revise our existing judgments... Eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgements duly pruned and adjusted.⁵⁷

When this occurs, we will be in a state of reflective equilibrium. This highlights the way Rawls moves back and forth between the ideal and the actual. It is important to be aware of this element of his account, as it might seem as if he is working entirely within the realm of ideal conditions.

The restrictive condition that requires the parties in the original position to abstract from the particular facts of their situation is called the “veil of ignorance.” Reasoners

⁵³ Samuel Richard Freeman, *Rawls*, Routledge Philosophers (London: Routledge, 2007), 142.

⁵⁴ Rawls, *A Theory of Justice*, 75.

⁵⁵ *Ibid.*, 11.

⁵⁶ *Ibid.*, 17.

exclude from moral reasoning: their class or social status; their “natural assets and abilities” such as intelligence and strength; their particular rational plans for life or as it is alternatively referred to, their conception of the good; the particular “features of their psychology,” such as attitudes of optimism or risk aversion; the political, economic or cultural circumstances of their own society, and the generation to which they belong.⁵⁸ This limits their knowledge to general facts about human beings and society.⁵⁹

There are many other ways in which we are situated, such as race, gender, ethnicity and religion, which Rawls oddly does not mention here. In fact, these tend to be the “morally irrelevant differences” that most interest authors who discuss Rawls’s work. Susan Moller Okin is particularly concerned with the absence of gender, as Rawls uses the masculine pronoun throughout *A Theory of Justice*. This has her wonder whether justice as fairness really does apply to everyone, or if it perpetuates the male bias typical of the Enlightenment tradition, which Rawls follows.⁶⁰ It sounds similar to the writings of the framers of the American Constitution, who while arguing for the basic rights and liberties for all, excluded women, and non-propertied or non-white men from citizenship.⁶¹ This concern will be discussed in greater detail later in this chapter. However, for now, it is important that we understand simply that the point of the veil of ignorance is to exclude all the particular facts about our situations and societies, and reason only from general

⁵⁷ Ibid., 18.

⁵⁸ Ibid., 118.

⁵⁹ Ibid., 119.

⁶⁰ Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989), 91.

⁶¹ Putnam, 305.

principles. In *Political Liberalism*, Rawls does ultimately add race, ethnicity, sex and gender to the list of things that are irrelevant from a moral point of view.⁶²

Related to the veil of ignorance, Rawls adds a condition of equality. That is, all “have the same rights in the procedure for choosing principles; each can make proposals, submit reasons for their acceptance, and so on.”⁶³ Thus, there should be no imbalance of power between individuals, as they stand in a relation of symmetry to one another. This condition reflects the condition of ignorance, as it requires that there be no relevant differences in situation between the parties and no one has any advantage over any other.

What Goes on Behind the Veil

The parties proceed by comparing different conceptions of justice. Ideally, this process would lead the parties to consider all the options, in order that they may choose the best one. This is not feasible, as we cannot be sure if we know of all the possibilities. While this points to a limit of contract theory, it simply means that the result, justice as fairness, is the best conception of justice we have come up with so far.⁶⁴ In order for their reasoning to lead to a solution, four assumptions are made about the parties, which explain their choice. The first two assumptions affect the outcome of the first principle, and the last two lead to the difference principle.

We have seen that the veil of ignorance deprives the reasoners from knowing the particulars of their conception of the good, which is a person’s plan “designed to permit the

⁶²Rawls, *Political Liberalism*, 25.

⁶³Rawls, *A Theory of Justice*, 17.

harmonious satisfaction of his interests.”⁶⁵ However, they know they have the capacity for a conception of the good. With this in mind, the first assumption we make, is that the parties will be motivated by mutual disinterest, which is to say that they will want to “advance their conception of the good as best they can” whatever it turns out to be.⁶⁶ Mutual disinterest implies that they are not concerned about the socio-economic status of others. Unlike envy, mutual disinterest indicates that no one will be “ready to accept a loss for himself if only others have less as well.”⁶⁷ Envy is antithetical to mutual advantage. A motivation of benevolence would also require them to accept a loss, though in this case for the advancement of the good of others. Mutual disinterest in contrast, is intended to be a weak condition that does not require “extensive ties of natural sentiment” to account for the resulting choice of principles.⁶⁸

Rawls adds a limit to the assumption of mutual disinterest. Rawls is worried that given the account so far, there is no particular reason for the parties not to deplete all the available resources and amass the largest amount of goods as possible, improving the situation for themselves, and their contemporaries. He thus adds a second motivational assumption: that the parties will be heads of households. This way, if we assume that the parties care for at least their immediate descendants, then they would have a reason to agree

⁶⁴ Ibid., 105-106.

⁶⁵ Ibid., 80.

⁶⁶ Ibid., 111.

⁶⁷ Ibid., 124.

⁶⁸ Ibid., 111-112.

to what Rawls calls the “just savings principle,” which would require them to preserve some resources, and ensure justice between generations.⁶⁹

Given the description of the original position, this is how they will reason:

The parties will conclude that there are things they will want regardless of what their rational plan will turn out to be. These are primary social goods, which are divided into three categories: Rights and liberties, opportunities, and income and wealth.⁷⁰ Rights and liberties will be the object of the first principle, and opportunities, income and wealth the object of the second. The parties will be concerned with the distribution of these social goods, because they enable them to pursue their rational plan. A reasoner will realize that “there is no way for him to win special advantages for himself.”⁷¹ Everyone will nonetheless agree to an unequal distribution of income and wealth if that inequality improves the situation of everyone else as compared to an equal distribution. They will agree, therefore, to a principle of equal rights and liberties, and to a principle that allows an unequal distribution of economic goods, so long as the disparity advantages everyone.

How they interpret “the advantage of everyone” is what leads to their acceptance of the difference principle. Here they will reason according to the maximin rule, which instructs them to consider the worst-case scenario in each of the possible conceptions of justice.⁷² The third assumption about the parties is connected to this concern. We assume that the parties have a capacity for a sense of justice, which is to say that the parties agree to

⁶⁹ Ibid., 111; 255.

⁷⁰ Ibid., 79.

⁷¹ Ibid., 130.

abide by the principles, whatever they turn out to be, once the veil of ignorance is lifted. This means that they will not agree to principles that are too demanding to follow.⁷³

The concern for the worst-case scenario is appropriate under these conditions for three reasons. First, they have no way of judging the likelihood of being the least advantaged. Second, they will want to make sure that the worst-case scenario is above some social minimum, to avoid accepting an unreasonably terrible fate. Third, they will not want to accept “grave risks.” For example, utilitarianism could justify slavery, which is not an acceptable risk, and leads them to reject this conception of justice.⁷⁴

As a result of the maximin, the parties will be primarily concerned with how the least-advantaged representative person fares in a society governed by justice as fairness. There are three kinds of “contingencies” that could make someone part of the least advantaged group: family and class origins, “natural endowments” and luck.”⁷⁵ The parties will accept the difference principle, which says economic inequalities are permitted only if they improved the situation of the least advantaged representative person, as compared to an equal distribution.

The fourth assumption comes into play in the description of the least advantaged. Rawls assumes that the parties all have “physical needs and psychological capacities within

⁷² Ibid., 132-133.

⁷³ Ibid., 126.

⁷⁴ Ibid., 134-135.

⁷⁵ Ibid., 83.

the normal range” in order to limit the difference principle to the socio-economic inequalities that arise between “full and active participants in society.”⁷⁶

The maximin will also lead to two other restrictions on socio-economic inequalities. The first principle is given priority over the second principle, so that liberties can be exchanged for other liberties, but no one can sacrifice any of his or her basic liberties for a financial compensation, even if such a sacrifice improved everyone’s position.⁷⁷ Basic human rights are non-negotiable. We also add “the equal opportunity clause” to the difference principle to guarantee that public positions be open to all. Again, even if there could be “an improvement to everyone’s situation” if some groups of individuals were excluded from positions of power and prestige, the exclusion would not be just. This is because there is more to public offices than simply financial rewards. These positions must be open to all, because everyone has the right to “experience the realization of self that comes from a skilful and devoted exercise of social duties.”⁷⁸ Moreover, Rawls specifies that the equal opportunity clause guarantees more than formal access to positions. It must attend to social conditions such that individuals with similar abilities and motivations have a similar chance at attaining the desired public position.⁷⁹ While vague, this is meant to advocate programs such as good public education or daycare, to achieve substantive – as opposed to merely formal – equality.⁸⁰ As a result, the only justifiable inequalities are

⁷⁶ Ibid., 83-84.

⁷⁷ Ibid., 132.

⁷⁸ Ibid., 73.

⁷⁹ Ibid., 63.

⁸⁰ Norman Daniels, "Democratic Equality: Rawls's Complex Egalitarianism," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge: Cambridge University Press, 2003), 249-250.

economic inequalities, and those only if they occur in a situation of equal opportunity and improve the situation of the least advantaged representative person.

At this point, we should note that the veil of ignorance involves completely eliminating the potential influence of the particulars that differentiate an individual's situation and perspective. At *this level* diversity is seen as a negative factor, which undermines fairness and interferes with the development of a conception of justice. This does not necessarily mean that 'justice as fairness' is de facto bad for diversity. As was discussed in the introduction, the absence of diversity at the level of moral reasoning is thought to be necessary to ensure the equal human rights for all that foster diversity. This will be examined in the next chapter. But even at this *level*, critical theorists, feminists and communitarians who are concerned with diversity doubt the possibility and desirability of the required abstraction. Here we will consider whether Rawls's account corresponds to Thomas Nagel pejorative description of impartiality as "the view from nowhere."⁸¹

The Charge of Impossibility

The charge is that, "no one *can* adopt a point of view that is completely impersonal and dispassionate, completely separated from any particular context and commitments."⁸² Claims of impartiality that result from abstraction allow "the particular experience and perspective of privileged groups to parade as universal" and "legitimizes authoritarian

⁸¹ Young, *Justice and the Politics of Difference*, 103.

⁸² *Ibid.*

hierarchy.”⁸³ Seyla Benhabib calls this position “substitutionalist” whereby “the experiences of a specific group of subjects [serve] as the paradigmatic case of the human as such.”⁸⁴

There are therefore two parts to the impossibility claim. Not only do these critics deny the possibility of the original position as a thought experiment, substitutionalism points to the way particular facts have been smuggled into the so-called abstract reasoning process, and thus reflects the particular experience of the dominant group. I agree that complete abstraction is impossible, but as we shall see, Rawls acknowledge this as well. He rejects Nagel’s claim that he is trying to represent the view from nowhere, and agrees, “there is no such thing as a point of view of practical reason as such.”⁸⁵

The claim that the original position represents an impossible point of view is based on the interpretation of the parties in the original position as ‘disembodied and disembodied.’ This decontextualized and ahistorical quality is attributed to the original position, because of his search for an Archimedean standpoint on justice. Recall that justice as fairness takes the basic structure of society to be its subject. Rawls does not want to develop principles of justice that are dependent on the “current conditions” of a particular society, but that are, rather, independent from it.⁸⁶

⁸³ Ibid., 10.

⁸⁴ Seyla Benhabib, *Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992), 152-153.

⁸⁵ Rawls, *Political Liberalism*, 116.

⁸⁶ Rawls, *A Theory of Justice*, 231.

Benhabib describes the disembodied nature of the parties as a mere reformulation of Kant's conception of noumenal agency. She charges Rawls with "epistemic incoherence," claiming that:

Rawls recapitulates a basic problem with the Kantian conception of the self, namely, that noumenal selves cannot be *individuated*. If all that belongs to them as embodied, affective, suffering creatures, their memory and history, their ties and relations to others, are to be subsumed under the phenomenal realm, then what we are left with is an empty mask that is everyone and no one.⁸⁷

And Rawls indeed suggests:

That we think of the original position as in important ways similar to the point of view from which noumenal selves see the world. The parties qua noumenal selves have complete freedom to choose whatever principles they wish; but they also have a desire to express their nature as rational and equal members of the intelligible realm with precisely this liberty to choose.⁸⁸

Nevertheless, we should not be so quick to attribute to Rawls what some have called the Kantian problem of disembodied noumenal selves. Despite maintaining several connections with the Kantian tradition, he also seeks to distance himself from Kant in important ways. He claims to reject Kant's dualisms, in particular, those of reason and desire and that of noumena and phenomena.⁸⁹ Indeed Sandel notes that though Rawls wanted to maintain a Kantian conception of autonomy in which subjects are capable of choosing their ends, he wants to conceptualize the capacity for free will "without recourse to a transcendent or otherwise disembodied subject."⁹⁰ In this sense, it is explicitly the noumenal selves that Rawls rejects when he says he wants to avoid Kantian metaphysics.

More concretely, the parties in the original position are embodied and embedded according to the motivational assumptions. Rawls agrees that it is impossible to reason

⁸⁷ Benhabib, 161.

⁸⁸ Rawls, *A Theory of Justice*, 225.

⁸⁹ *Ibid.*, 226-227.

from a completely disembodied and disembedded stance. With only a lack of information, absolutely nothing would happen and there would be no agreement.⁹¹ As we have seen, he in fact attributes two basic capacities to the parties: that they have a capacity to have a conception of the good, and a capacity for a sense of justice.

Because the veil of ignorance prohibits the parties from knowing the content of their rational plan, all they know is that they have the capacity for one. This means that as a party in the original position, I may not know what my plans are, but I know that I do have plans. This capacity means the parties are motivated by the desire for primary goods. The capacity for justice signifies that the parties agree to follow the principles they choose and live according to them, once the veil is lifted.⁹² This capacity demonstrates how the parties are implicated in the results of their reasoning process. The parties do have some knowledge, and are indeed concerned with the outcome of their reasoning.

We can legitimately make these assumptions because the parties in the original position are not supposed to describe actual people, as they are completely fictional. Comparing the imaginative quality of the original position to that of a play, Rawls explains that the objective is to characterize “citizens as free and equal persons” and from that standpoint determine the formal principles of justice that would regulate a system of fair social cooperation.⁹³

⁹⁰ Sandel, 23.

⁹¹ Rawls, "Kantian Constructivism in Moral Theory," 313.

⁹² Rawls, *A Theory of Justice*, 126.

⁹³ Rawls, *Political Liberalism*, 27.

Substitutionalism

The thought experiment may not reflect decontextualized reasoning, but what about the charge of substitutionalism? Critics claim that there is “one voice” heard in the original position, and that is “the voice of the dominant group in society.”⁹⁴ If this is an accurate description then the interests and concerns of the least advantaged of society might not have their claims heard. Let’s briefly consider whether this is the case in the original position by considering the assumptions.⁹⁵ The concern here is to determine whether or not the original position, by virtue of its assumptions, proves to be an impossible thought experiment. To that extent, it is legitimate to focus on the *potential* for excluding different points of view that might exist in the original position. I will discuss each assumption in turn.

Mutual Disinterest

That knowledge of their particular conception of the good is excluded, combined with the motivational assumption of mutual disinterest is regularly targeted as a source of bias by communitarians and feminists. The idea is that we should not abstract from our particular conception of the good, because once the veil of ignorance is lifted, some rational plans will be advantaged and others disadvantaged. According to Nagel, “The primary goods are not equally valuable in the pursuit of all conceptions of the good.”⁹⁶ They are not

⁹⁴ Putnam, 301.

⁹⁵ There are some other assumptions that do not describe the parties, so they are not discussed here. One of these assumptions, that society is closed, might seem to be relevant for this discussion as it potentially excludes immigrants. For reasons of space and focus I do not address it here, as it would require discussion of the relationship between nations. This assumption does merit attention, and will be discussed in chapter three.

⁹⁶ Thomas Nagel, "Rawls on Justice," *The Philosophical Review* 82, no. 2 (1973): 228.

useful for the kind of life plans that require a particular kind of social structure. For example a monk, who renounces individual possessions, power, and prestige, might prefer a distribution of goods that facilitates communal life as opposed to goods that facilitate individualistic pursuits. A utilitarian is similarly disadvantaged as he or she puts the good of the group over and above the good of the individual. The problem occurs any time an individual's social position is tied up with their relation to others.⁹⁷ Feminists focus on the assumption of mutual disinterest, which seems to preclude and disadvantage the traditional life taken up by many women to care for others above all else.⁹⁸ As Nagel says:

The original position seems to presuppose not just a neutral theory of the good, but a liberal, individualistic conception according to which the best that can be wished for someone is the unimpeded pursuit of his own path, provided it does not interfere with the rights of others.⁹⁹

The concern here is that by favouring some life plans, the outcome will not be neutral.¹⁰⁰ This might be so, but the original position is not intended to guarantee a neutral outcome with respect to all conceptions of the good. Rather, the original position is designed to ensure that the basic structure of society, and those institutions that comprise it, is fair. There are in fact two kinds of cases in which a conception of the good may be limited or even excluded in a just society governed by the resulting principles of justice. A conception of the good would be excluded if it were in direct conflict with the liberties and freedoms outlined by the first principle.¹⁰¹ Alternatively, a life plan may be disadvantaged

⁹⁷ Ibid.

⁹⁸ Barclay, 58.

⁹⁹ Nagel: 228.

¹⁰⁰ Joseph Raz, "Liberalism, Autonomy, and the Politics of Neutral Concern," in *Reasonable Pluralism*, ed. Paul J. Weithman (New York: Garland Pub., 1999), 8.

¹⁰¹ Rawls, *A Theory of Justice*, 230.

if, over time, it becomes less attractive and fewer people follow that lifestyle. Rawls says some religious groups may be diminished this way. But this does not make the original position biased. The abstraction from particular conceptions of the good and assumption of mutual disinterest would be biased if it were the case that only individualistic conceptions of the good prosper under the principles of justice. This is not the intention of the original position. “The basic liberties are not intended to keep persons in isolation from one another...but to secure the right to free movement between associations and smaller communities.”¹⁰²

To emphasize this point, in *Political Liberalism* Rawls adds that a conception of the good includes “attachments to other persons and loyalties to various groups and affiliations” in addition to any “individualistic” ends we might pursue.¹⁰³ The relationship between groups and a rational life plan will be discussed in greater detail in the next chapter. At this point, it is only important to see how the original position does not smuggle in an individualistic bias with the assumption of mutual disinterest.

Heads of Households

Some feminists also worry about the attempt to abstract from gender. They worry that while the terminology is gender-neutral, women are excluded in the outcome.¹⁰⁴ The particular concern is that a masculine perspective can be found in the assumption that the

¹⁰² John Rawls, "Fairness to Goodness," in *Collected Papers*, ed. Samuel Richard Freeman (Cambridge: Harvard University Press, 1999), 281.

¹⁰³ Rawls, *Political Liberalism*, 19.

parties will be heads of households.¹⁰⁵ Carole Pateman argues that Rawls “inevitably introduces real embodied male and female beings into the course of his argument...Rawls’s participants in the original contract are, simultaneously, mere reasoning entities, and ‘heads of families’, or men who represent their wives.”¹⁰⁶

However, there is no reason for us to assume that “heads of households” would be men. As Ruth Anna Putnam notes, there are plenty of women who are the ‘heads of their households’.¹⁰⁷ Despite the ambiguity of the terminology used in *A Theory of Justice*, Rawls is quite clear in his later writings that all adults are citizens with political rights.¹⁰⁸ Recall that the point of assuming that the parties are ‘heads of households’ is to ensure that they are invested in future generations. The assumption was not intended to exclude women, nor is there any reason to think that heads of households would represent a distinctly male perspective.

Rawls ultimately dropped this assumption. Instead, it is sufficient to say that we will agree to ‘a just savings principle,’ by which we save however much we would have wanted other generations that precede us to have saved and left for us.¹⁰⁹ This is a much more compelling reason to preserve resources and care for future generations.¹¹⁰ Rawls explains this change was suggested by Nagel and Parfit, and outlined independently in an

¹⁰⁴ Okin, *Justice, Gender, and the Family*, 91.

¹⁰⁵ Young, *Justice and the Politics of Difference*, 21. Okin, *Justice, Gender, and the Family*, 92.

¹⁰⁶ Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988), 43.

¹⁰⁷ Putnam, 307-308.

¹⁰⁸ John Rawls and Erin Kelly, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2001), 164.

¹⁰⁹ *Ibid.*, 160-161.

¹¹⁰ This could also serve as a basis for an environmentalist ethic.

article By Jane English. He follows their suggestion saying he “simply missed this better solution.”¹¹¹ As a result, any concern over favouring a masculine point of view associated with the assumption is gone along with it.

Capacity for a Sense of Justice

The assumption that the parties have a capacity for a sense of justice carries the potential for an education or class bias. It refers to both an ability to judge the fairness of a situation, as well as the desire to act justly.¹¹² Even though they bracket their intelligence, the parties in the original position must have already been socialized to develop the capacity for a sense of justice, in order to be able to engage in the thought experiment. With this comes the possibility that he is reflecting the point of view of the well educated.

Lets be clear that Rawls does not require the parties to achieve the equivalent of drafting a constitution. Rather, they must be able to consider the possible conceptions of justice, and judge if they are fair. Habermas nevertheless criticizes Rawls for having done all the normative work in constructing the original position: “The theoretician himself would have to shoulder the burden of anticipating at least parts of the information of which he previously relieved the parties in the original position!”¹¹³ Yet to put this burden back on the shoulders of ‘the people’ would no doubt be too demanding for some who lack formal training.

¹¹¹ Rawls, *Political Liberalism*, 20-21 n.

¹¹² Rawls, *A Theory of Justice*, 41.

¹¹³ Jurgen Habermas, "Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism," *The Journal of Philosophy* 92, no. 3 (1995): 118.

The sense of justice required to engage in the original position is the result of normal socialization, and not of higher education. That is to say, it is acquired by experiencing love from one's family, developing friendships and living under institutions that are publicly recognized to be just.¹¹⁴ It has more to do with the phenomenon of reciprocity, than intelligence: because others have cared about us, we in turn care about the good of others. The capacity is there, in everyone, to develop the desire for fairness and the ability to consider a wider view beyond their own self-interest. While this does seem to rely on a metaphysical assumption about human nature, which we will discuss in the next chapter, this is not a problem of bias.

With a different concern in mind, Fisk argues that this assumption carries a class bias. He claims we are naturally inclined toward class solidarity and not to a Rawlsian sense of justice. The ability and desire to get beyond group interest is achieved by the coercive use of public institutions such as the media, courts, and police by the segment of society that stands to gain from reducing conflict.¹¹⁵ However, Fisk is wrong to think that it is only in the interest of the "dominant class" to come to an agreement on principles of justice. Often the desire for justice comes from those suffering oppression. Principles of justice hold the dominant class accountable for their actions. Thus, both concerns about class and education in this context are misplaced.

Abilities within The Normal Range

¹¹⁴ Rawls, *A Theory of Justice*, 429-230.

As we saw, the veil of ignorance excludes from knowledge our “natural assets and abilities,” yet Rawls also assumes that the parties all have “physical needs and psychological capacities within the normal range.”¹¹⁶ Unlike the description of the parties as heads of households, Rawls never dropped this assumption.¹¹⁷ This has led critics to argue that the parties are all able-bodied, excluding the disabled, old, and young.

We should begin by acknowledging that this assumption does not exclude the young and the old, because the parties will imagine that they will live through a full course of life.¹¹⁸ The principles of justice must protect children to the extent that they are future citizens.¹¹⁹ The parties would also want to ensure adequate care for the elderly. Similarly, what Rawls calls “temporary disability,” would be a concern for the parties, as anyone can become sick or have an accident. This ensures that the parties will be concerned with guaranteeing the availability of basic health care for all.¹²⁰ The assumption that individuals have needs “within the normal range” is prompted by the idea discussed earlier that society is the result of mutual advantage. Thus, all must be able to cooperate and participate in society.¹²¹ But permanent disability or impairment does not preclude participation. For example, being in a wheelchair does not imply that an individual cannot participate, so long

¹¹⁵ Milton Fisk, "History and Reason in Rawls' Moral Theory," in *Reading Rawls: Critical Studies on Rawls' a Theory of Justice*, ed. Norman Daniels (New York: Basic Books, 1975), 69-70.

¹¹⁶ Rawls, *A Theory of Justice*, 83-84.

¹¹⁷ Rawls, *Political Liberalism*, 79.; Rawls and Kelly, *Justice as Fairness: A Restatement*, 170.

¹¹⁸ Rawls and Kelly, *Justice as Fairness: A Restatement*, 174.

¹¹⁹ *Ibid.*, 165.

¹²⁰ The details regarding the kind of health care system that would be worked out and agreed upon are unimportant, because we are only looking at the claim that the interests and perspectives of the disabled are excluded from the original position.

¹²¹ Rawls, *A Theory of Justice*, 110.

as there is accessibility. As a positive aspect of Rawls's theory, the abstraction of the original position highlights the way ability and disability cannot be seen as marking two distinct groups of individuals, but that we can slide easily from one into the other.¹²² It challenges and rejects an essentialist understanding of disability, and in fact makes structures of accessibility and health care a concern shared by everyone.

But differences in ability and the way people function "is hidden by the fact that a large number of us are able to get along in the particular environments we have made for ourselves."¹²³ In other words, disability is defined in terms of those whose physical or mental capacities do not correspond to the structural features of a given society. The possibility of participation depends in part on "the provisions made by the society to enable handicapped people to participate in public life."¹²⁴ How can we provide the necessary structures to enable participation, without attention to the different ways we function?

Attention to difference could occur at a later stage, after the principles of justice have been chosen. This is the route Rawls takes. Disadvantages in natural ability are one of the three characteristics describing the "least advantaged" group. The particular measures necessary to improve the situation of the least advantaged and the measures that achieve equality of opportunity can only be determined if we recognize how individuals function differently. As Amy Baehr explains, the specific measures taken to meet the requirements

¹²² Martha Craven Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, The Tanner Lectures on Human Values (Cambridge: Belknap, 2007), 101.

¹²³ Ron Amundson, "Disability Rights: Universal Accessibility as a Public Good," in *Not for Sale: In Defense of Public Goods*, ed. Anatole Anton, Milton Fisk, and Nancy Holmström (Boulder: Westview Press, 2000), 127-128.

¹²⁴ Putnam, 304.

of the difference principle “is a question for a constitutional convention or a parliament.”¹²⁵ But this question is separate from the development of an argument that would support such a measure.

Nonetheless, The terminology of “normal range” does seem to exclude extreme cases of disability when individuals are so dependent on others that it seems they cannot return the care they receive in anyway. However, even the severely disabled will be considered citizens with equal rights regardless of their abilities, according to the first principle. The normal range caveat is only added to the difference principle. This is still insufficient, as it removes the disabled from the benefits and burdens of cooperation, simply because their needs are less common and can be costly. This is odd, given the fact that the maximin instructs us to look at the cost of being in the least well-off position. The amount of advantage gained by the more privileged positions is irrelevant from the point of view of the maximin. It therefore does not seem justified to exclude some of the least advantaged, simply because the necessary institutional arrangements might be costly. Even when one’s needs are atypical, severely disabled or impaired individuals nevertheless deserve specific institutional arrangements including care, education, and technology that facilitate interaction with others.¹²⁶ This should be seen as a matter of justice, and not a

¹²⁵ Amy R. Baehr, "Toward a New Feminist Liberalism: Okin, Rawls, and Habermas," *Hypatia* 11, no. 1 (1996): 53.

¹²⁶ Nussbaum, 99.

matter of charity. To remove the disabled from the system of social cooperation assumes that someone, usually a family member, will care for them out of love.¹²⁷

Given these problems, I argue that Rawls should have dropped the “normal range” assumption. The assumption is not necessary to arrive at agreement on the principles. It only matters if we assume that there are individuals who are *incapable* of contributing *anything* to society. Even the most dependent individuals can offer love, affection etc.¹²⁸ I take the line that “people with impairments and related disabilities are not unproductive.”¹²⁹ Instead of using the concept of “the normal range,” I think a better way to treat this condition would be to claim that no one is so worthless that they cannot contribute anything to society. This would also support the recognition of the caregivers’ work. Martha Craven Nussbaum mentions that this is part of the issue of gender justice, as women do most of the care giving work. After having dropped the ‘heads of households’ assumption and because their gender is unknown to them, there is good reason to think that care giving would be considered work, even though much of this work is currently unpaid. These issues will come up again, but at this point the concern is over bias. The assumption is problematic, but it could be dropped.

To summarize the argument thus far, there is no reason to think that the original position is an impossible thought experiment. The veil of ignorance does not require us to

¹²⁷ Ibid., 100.

¹²⁸ This comes from Nussbaum’s discussion of several cases of disability and dependency p. 96-98. She describes Sessa Kittay’s “capacities for affection and delight,” that is reciprocated with the companionship and love of others. I take this to be a valuable contribution to the social world. Likewise, her nephew clearly displays complex mechanical skills; a contribution he could make because of his disability, and not in spite of it. Significantly, she considers these examples to be cases of severe impairment p. 112.

imagine ourselves as disembodied and disembodied, reasoners. The parties are situated by their capacity for a conception of the good. At the same time, momentarily bracketing our conception of the good is not an impossible feat. The parties are also implicated in the outcome by their capacity for justice. While the assumption of heads of households initially raised red flags from feminists, it was ultimately dropped and the inclusion of all adults emphasized. I suggest that the assumption that ability “falls within the normal range” be dropped, to remove any able-bodied bias, though this does not affect the construction of the original position, or the outcome of the principles in any important way. It therefore seems reasonable to say that the original position is not impossible to imagine.

Monological or Dialogical?

Some critics have focused on the normative claim, arguing that we should not abstract from our specificity and our differences. As part of this criticism, the original position has been described as “monological.” This label is credited to Jürgen Habermas, who contrasts monological and dialogical modes of moral reasoning. As Christopher McMahon explains, “the distinction turns on the extent to which the identification of the correct principles of morality is a project that must be carried out collectively. Dialogical theories affirm this and monological theories – implicitly, at least – deny it.”¹³⁰ Habermas characterizes the original position as monological, as he says the veil of ignorance “imposes a common perspective on the parties in the original position through informational

¹²⁹ Nussbaum, 105.

constraints and thereby neutralizes the multiplicity of particular interpretive perspectives from the outset.”¹³¹ Young that the veil of ignorance, intended to produce an impartial point of view, reduces “the plurality of moral subjects to one subjectivity.”¹³² Young notes that the original position also prohibits any communication between reasoners, in order to prevent individuals from banding together to develop bargaining advantages. Thus, despite the fact that a plurality of moral subjects is the starting point for Rawls’s conception of justice, the original position is nevertheless a solitary activity in which the reasoning problem is solved by an individual, reasoning alone.¹³³

Rawls does not consider the fact that the characteristics that differentiate us are left out from his moral reasoning to be problematic for his theory. Rawls acknowledges that because the deliberators are behind the veil of ignorance, everyone is “similarly situated, each is convinced by the same arguments.”¹³⁴ He takes this to be a positive feature of the theory because it means, “the original position must be interpreted so that one can at any time adopt *its* perspective. It must make no difference when one takes up its point of view or who does so; ... the principles are always chosen...the information is at all times the same.”¹³⁵ Thus the debate is not over the fact that these characteristics are excluded, but rather why they are excluded and if they should be.

¹³⁰ Christopher McMahon, "Why There Is No Issue between Habermas and Rawls," *The Journal of Philosophy* 99, no. 3 (2002): 112.

¹³¹ Habermas: 117.

¹³² Young, *Justice and the Politics of Difference*, 100.

¹³³ *Ibid.*, 101.

¹³⁴ Rawls, *A Theory of Justice*, 120.

¹³⁵ *Ibid.*

Moral Dialogue

The alternative, which these critics endorse as preferable to the abstraction of the veil of ignorance, is usually a variation of moral dialogue. Habermas's "discourse ethics builds a moment of empathy or 'ideal role-taking' into the representation of the ideal procedure for arriving at reasoned agreement."¹³⁶ This representation is called the ideal speech situation, in which "everyone is required to take the perspective of everyone else." Through this process every individual 'enlarges' his or her own perspective, and develops a "we-perspective."¹³⁷ It is from this impartial standpoint that principles of justice, or more broadly, moral norms would be agreed upon. Young finds that the ideal speech situation is still too idealized because it too remains a hypothetical scenario in which individuals must undertake a series of abstractions in order to arrive at a moral point of view.¹³⁸ She also criticises Habermas for remaining committed to a common good, in which we find what is of interest to everyone, and in this way he also denies difference.¹³⁹ She nevertheless builds her conception of justice on discourse ethics and emphasizes the importance of actual expression, by actual people.¹⁴⁰ As she argues:

Instead of a fictional contract, we need real participatory structures in which actual people, with their geographical, ethnic, gender and occupational differences assert their perspectives on social issues within institutions that encourage the representation of their distinct voices.¹⁴¹

¹³⁶Thomas McCarthy, "Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue" in *Reasonable Pluralism*, ed. Paul J. Weithman (New York: Garland Pub., 1999), 322-323.

¹³⁷ Habermas: 117.

¹³⁸ Its some ways its denial of difference is worse than the original position, as the ideal speech situation is more demanding and its feasibility less likely.

¹³⁹ Young, *Justice and the Politics of Difference*, 118.

¹⁴⁰ Ibid.

¹⁴¹ Ibid., 116.

Thus, despite her radical move, her essential focus, like many other critiques, is on the value of moral dialogue.

Bruce Ackerman also rejects the veil of ignorance, saying it imposes “an unnecessary burden” and that the reasoning of liberal citizens could be modeled more directly.¹⁴² He suggests skipping the original position altogether, and poses a constraint on actual political dialogue, in the form of a single rule to be respected during political discourse. Reasoners could “adopt a protocol that forbids them from engaging in justificatory arguments that require any citizen to assert that he or his conception of the good is superior to his fellow citizens’.”¹⁴³ In other words, Ackerman argues that it is possible to imagine situated individuals reasoning, even when they are aware of their particular identities and group affiliations, so long as they do not break the one rule of political discourse. Citizenship is not achieved in the absence of difference; it is one facet of identity, along with other social roles and group affiliations.

These are compelling claims and it would be naïve to ignore their intersubjective principle. I will argue that it is a mistake to view moral dialogue as an alternative to the original position. In the remaining three sections of this chapter, I examine closely the objectives of the original position. I will clarify what the original position is intended to achieve. In each case I will consider the claim that the original position should be rejected and replaced with attention to difference through moral dialogue. I will defend Rawls from this criticism, but in doing so I will not neglect discussion of its limitations.

¹⁴² Bruce Ackerman, "Political Liberalisms," *The Journal of Philosophy* 91, no. 7 (1994): 371.

Bias and Discrimination

One of the objectives of the veil of ignorance is to eliminate bias from moral reasoning. Rawls's concern is that the principles of justice should not be tailored to "the circumstances of one's own case," whatever those circumstances may be.¹⁴⁴ In other words, the principles should not favour any persons' particular circumstances without good reason. This is because, he argues, people are "likely to stress the criteria which advance their ends" and this would result in a biased conception of justice that might favour a group of individuals who share the same interests, rather than one that reflects a moral point of view.¹⁴⁵

In particular, he prevents the parties from suggesting or choosing principles that are racially or sexually discriminatory, because behind the veil of ignorance, "no one can tell whether such principles would be to his advantage."¹⁴⁶ Rawls notes that in particular, "racial and sexual discrimination presupposes that some hold a favoured place in the social system, which they are willing to exploit to their advantage. From the standpoint of persons similarly situated in an initial situation which is fair, the principles of explicit racist doctrines are not only unjust. They are irrational."¹⁴⁷

Even if the same outcome were possible in a situation where individuals had more information than the veil of ignorance permits, Rawls still thinks a "thicker" veil is

¹⁴³ Ibid.: 369.

¹⁴⁴ Rawls, *A Theory of Justice*, 16.

¹⁴⁵ Ibid., 31.

¹⁴⁶ Ibid., 129.

¹⁴⁷ Ibid.

preferable to a thin veil.¹⁴⁸ A “thin veil” of ignorance would allow people to know what positions exist in society, without the individuals knowing to which position they belonged. Ackerman argues that the primary reason Rawls has for employing this thicker veil is to lead the parties to accept the difference principle.¹⁴⁹ However, there is also the worry that behind a thin veil, reasoners would take chances they might later regret, effectively gambling with their rights and freedoms. For example, I may agree to give the majority an advantage, say to provide public funding to Christian education and not to any other religion if I know my chances of being Christian are 95%.¹⁵⁰ In other words, a thick veil of ignorance is required to protect rights and freedoms for minority groups. This suggests that the thicker the veil of ignorance, the greater the extent of equality that is guaranteed.

Benhabib interprets this as a way to “deactivate” our biases and prejudices. She claims the objective of the original position is to reason about principles of justice knowing only that others are “situated similarly to me” so that any misconceptions I have about others who are different, may have no part in my reasoning, or in my final choice of principles. However, if the association between difference and prejudice is correct, then the original position has not removed these prejudices from my understanding of others, but only from the principles themselves. According to Benhabib assessment:

There is therefore the very real danger that in not making room to confront the ‘otherness’ of the other, the original position, despite Rawls’s own intentions to the contrary, can leave all our prejudices, misunderstandings and hostilities in society just as they are, hidden behind a veil.¹⁵¹

¹⁴⁸ Rawls, " Kantian Constructivism in Moral Theory," 336.

¹⁴⁹ Ackerman: 372.

¹⁵⁰ Freeman, 157.

¹⁵¹ Benhabib, 167-168.

Benhabib concludes that there should be no constraints on discussion, as the only way to properly “defuse” these biases is if they are discussed and worked out by what she calls “concrete others.”¹⁵² Concrete others are distinguished from “generalized others,” whose perspectives are understood when one abstracts to see what we all have in common. The perspective of concrete others is defined by the way individuals are uniquely situated or constituted.¹⁵³ Her concern is that “without engagement, confrontation, dialogue and even a ‘struggle for recognition’ in the Hegelian sense, we tend to constitute the otherness of the other by projection and fantasy or ignore it in indifference.”¹⁵⁴

There is, however, no guarantee that we will “embrace” otherness. While reversibility might be possible among those who are similar, her account skims over the difficulty involved in understanding radically different perspectives.¹⁵⁵ Moreover, Benhabib’s criticism misses the point. Even though justice as fairness is not intended to regulate individual “attitudes and dispositions,” individuals are not permitted to violate the principles of justice.¹⁵⁶ The parties in the original position know that in agreeing to the principles of justice, they have accepted whatever limitations those principles impose on their individual lives. Thus, they accept beforehand that they cannot pursue the subjugation of others. We should also keep in mind that Rawls imposes informational constraints on reasoning in a specific context: the development of principles of justice. Thus, it is not a

¹⁵² Ibid., 168.

¹⁵³ Ibid., 158-159.

¹⁵⁴ Ibid., 168.

¹⁵⁵ Young Iris Marion, "Comments on Seyla Benhabib, Situating the Self," *New German Critique* 62 (1994): 167-8.

¹⁵⁶ Rawls, *A Theory of Justice*, 6; 27.

constraint on all forms of moral reasoning. Nor does he expect the original position to resolve all moral conflicts.¹⁵⁷ To expect that questions about justice collapse into questions about morality more generally, seems to threaten “the liberal commitment to individual freedom, and the consequent plurality of definitions of the good.”¹⁵⁸ As our concern is the appropriate relation between diversity and justice, this is not an acceptable trade off.

Marilyn Friedman identifies a more pressing problem: we cannot be sure that we have completely “deactivated” all our biases and prejudices. The problem is not that our biases are only temporarily subdued, and that we are free to be as prejudiced as we wish in actual society. Rather, the problem is that our reasons may be influenced by biases we were never aware of in the first place. We have no way of verifying whether our subjective particulars tacitly affect our reasoning and subsequently, affect the principles resulting from it.¹⁵⁹ “Reasons can be couched in terms which are universal and neutral, yet still advance special interests.”¹⁶⁰ This problem is similar to substitutionalism, though Friedman does not doubt the possibility of abstraction so much as the possibility of verifying if we have achieved the *desired* abstraction. Precisely because Rawls takes a procedural approach, there are no independent criteria to verify whether or not the impartial standpoint, free of bias has been achieved.¹⁶¹

¹⁵⁷ Rawls, *The Law of Peoples; with "the Idea of Public Reason Revisited"*, 142.

¹⁵⁸ Young, *Justice and the Politics of Difference*, 36.

¹⁵⁹ Marilyn Friedman, "The Impracticality of Impartiality," *The Journal of Philosophy* 86, no. 11 (1989): 652.

¹⁶⁰ *Ibid.*: 654.

¹⁶¹ *Ibid.*: 645.

As we have seen, moral dialogue does not, unfortunately, guarantee the *elimination* of bias either. Rather, because we “lack privileged access to our own biases,” moral dialogue becomes an important part of arriving as closely as possible to a bias-free standpoint.¹⁶² Moral dialogue is therefore an important part of identifying existing biases, which is something that the original position cannot readily do. But we do not need to choose between moral dialogue and the original position. In fact, we can see the two models working together in Rawls’s notion of reflective equilibrium. Rawls argues that we check the acceptability of the conditions in original position by seeing if the resulting principles “match our considered convictions of justice.” If not, then we can either change our convictions, or alter the conditions of the original position. This is what I attempted to do with my criticism of the condition of “the normal range” earlier on.

We do need to be clear about precisely what the original position is supposed to achieve here. Recall that the objective is to illustrate the conviction that such facts should not provide a bargaining advantage. On a positive note, the original position has an important imaginative quality, which enables us to conceptualize this idea, and see what kind of principles could result from a situation in which our particular characteristics were unknown.

Let’s be clear that the verification problem does indicate a limit to the original position. This indicates that the original position may not describe a perfectly impartial point of view. Indeed, in *Political Liberalism*, the original position is referred to as public

¹⁶² Ibid.: 646.

point of view,¹⁶³ and he characterizes impartiality as altruistic and distinguishes it from the notion of reciprocity.¹⁶⁴ This limitation also indicates that the original position is most likely not the final word on justice.¹⁶⁵ Indeed, there may always be a “better” description of the initial situation that we are not currently aware of, but this is not a fatal problem. This just makes the choice of the two principles, the best solution relative to the list of alternatives,¹⁶⁶ and implies that developing a conception of justice is an ongoing project. It does not mean that we should abandon the original position; we just need to be aware of its limits.

The Basic Structure of Society

We have described the original position as modeling our considered convictions of justice. But pragmatically, will this not simply reinforce existing structures of oppression? In addition to eliminating bias, Rawls says that the veil of ignorance prevents the contingencies of natural talent or social circumstance from influencing the choice of principles of justice.¹⁶⁷ The abstraction required by the veil of ignorance is intended to avoid “a reliance on existing conditions and established expectations.”¹⁶⁸ How does the veil of ignorance achieve this aim?

Recall that the “subject” of justice as fairness is the basic social structure of society. Clearly, the basic structure advantages some more than others when the institutional

¹⁶³ Rawls, *Political Liberalism*, 9.

¹⁶⁴ *Ibid.*, 16.

¹⁶⁵ Putnam, 324.

¹⁶⁶ Rawls, *A Theory of Justice*, 106-109.

¹⁶⁷ *Ibid.*, 16.

arrangements give some a more favourable starting position. According to Samuel Freeman, for example, those born into upper and middle class families tend to have more educational and occupational advantages.¹⁶⁹ Rawls's concern is that social structures and institutions should not necessarily reinforce the circumstantial distribution of social goods. Thus, the primary task of social justice will be concerned with the inequalities that result from institutional arrangements that favour certain starting positions, and the principles of justice should mitigate these inequalities.

In *Political Liberalism*, Rawls explains that he is referring to “the bargaining advantages that inevitably arise with the background institutions of any society from cumulative social, historical, and natural tendencies.”¹⁷⁰ In other words, the veil of ignorance creates distance from our social structure or cultural context to examine the distribution of advantages and power instead of simply reinforcing existing structures of inequality or oppression. These social contingencies are therefore excluded because “the fact that we occupy a particular social position is not a good reason for us to propose, or to expect others to accept a conception of justice that favours those in this position.”¹⁷¹ Thus, these particular advantages coming from chance (i.e. social) circumstance should not have any bearing on the choice of the principles of justice.

When it comes to group identity and diversity, what is particularly insightful about this, is its focus on the structures of society that position individuals differently, without

¹⁶⁸ Ibid., 31.

¹⁶⁹ Freeman, 89.

¹⁷⁰ Rawls, *Political Liberalism*, 23.

assuming that an individual's position is fixed or essential.¹⁷² Young applauds this attention to structure, but does not think it goes far enough. By reducing justice to the distribution of 'benefits and burdens', it seems Rawls's focus is on what Robert Nozick calls "end state patterns" as opposed to processes. We want to know what social processes produce these "end states;" why some groups of people get stuck in the category of the least advantaged.¹⁷³

This criticism is somewhat simplistic, as Rawls is not just concerned with "end state patterns." Rather he focuses on starting positions, which means resources could be allocated to education, or wheelchair accessibility, for instance, and does not just compensate victims for their bad luck.¹⁷⁴ However Young's criticism does point to a lacuna in Rawls's discussion of social structures. A look at *how* different starting positions are more or less advantaged, still does not tell us *why* they are advantaged, or if the social structures or institutions that create and perpetuate the arrangement are just.

As with the problem of bias, attention to difference through moral dialogue can teach us about structures of oppression and the changes that need to be made. It is vital for understanding what the situation of the least-advantaged is like. This is a significant limit of the original position. It does not clearly identify the social processes that bring about inequality, but focuses rather on modeling the conviction that we ought to mitigate

¹⁷¹ Ibid., 24.

¹⁷² Ibid., 15.

¹⁷³ Iris Marion Young, "Rawls and Habermas. Toward a Critical Theory of Justice," in *Reasonable Pluralism*, ed. Paul J. Weithman (New York: Garland Pub., 1999), 299-302.

¹⁷⁴ Rawls, *A Theory of Justice*, 86.; *Rawls and Kelly, Justice as Fairness: A Restatement*, 139.

structures of inequality. Nevertheless, this is not a good reason to reject the original position. It suggests rather, that the two models should work together, in the pursuit of fairness. As Putnam suggests, the dialogic approach “would consist precisely in enhancing one’s ability to recognize a multiplicity of ‘least advantaged’ positions and an ability to hear and heed the complaints raised from these perspectives.”¹⁷⁵

Agreement

The veil of ignorance is motivated by a third consideration, as Rawls notes that differences between individuals are often the cause of conflict. If each individual tries only to further his or her own interests, it seems virtually impossible that they will come to any form of meaningful agreement. Without the veil of ignorance, it seems that, at best, the principles agreed to would be “weak and trivial.”¹⁷⁶ This is important, because principles need to be accepted by everyone for the claims of the oppressed to be heard and recognized as legitimate.¹⁷⁷ He thinks only the most obvious cases of unfairness would be recognized as unjust, but many important issues would remain matters of conflict between individuals or groups.

Rawls has been labelled unrealistic and utopian with respect to this confidence in the possibility of unanimity, particularly given the existence of value pluralism in most societies.¹⁷⁸ Taking this concern seriously, Rawls modified his claim, as he became

¹⁷⁵ Putnam, 323.

¹⁷⁶ Rawls, *A Theory of Justice*, 17; 118; 122.

¹⁷⁷ Putnam, 316.

¹⁷⁸ Joshua Cohen, "Moral Pluralism and Political Consensus," in *The Idea of Democracy*, ed. David Copp, Jean Hampton, and John E. Roemer (Cambridge: Cambridge University Press, 1995), 270.

convinced that not everyone would agree to justice as fairness as a comprehensive view.¹⁷⁹ A comprehensive view is a religious, philosophical or moral doctrine that describes one's view of the world and their relation to it.¹⁸⁰ In light of this, he loosened the conception, putting comprehensive doctrines themselves behind the veil of ignorance, and now maintains that, in a context of reasonable pluralism individuals would agree to justice as fairness, when it is understood as a political conception.¹⁸¹ Reasonable individuals, who recognize others as free and equal, may endorse any number of political liberalisms, each giving different value or priority to the principles,¹⁸² but they will all agree that political liberalism should have the following three features:

“First a list of basic rights, liberties and opportunities (such as those familiar from constitutional regimes);
Second, an assignment of special priority to those rights, liberties and opportunities...
Third, measures ensuring for all citizens adequate all-purpose means to make effective use of their freedoms”.¹⁸³

He admits that an overlapping consensus with unreasonable doctrines like fundamentalist religious groups is not possible, and that a relation of toleration towards unreasonable groups is more appropriate.¹⁸⁴ We can nonetheless say that realistically, abstracting from our differences guarantees the most agreement possible.

It is a mistake to think that *all* forms of difference will necessarily lead to disagreement. It is possible to recognize others as different and still agree on fundamental

¹⁷⁹ Rawls, *Political Liberalism* Rawls, *Political Liberalism*, xlii. Rawls, *The Law of Peoples; with "the Idea of Public Reason Revisited"*, 179.

¹⁸⁰ Rawls, *Political Liberalism*, 15.

¹⁸¹ Ibid., 24-25n. What, exactly, makes justice as fairness a political conception will be discussed in the next chapter.

¹⁸² Rawls, *The Law of Peoples; with "the Idea of Public Reason Revisited"*, 136.

¹⁸³ Ibid., 141.

issues. This possibility being the first premise of discourse ethics as deliberation fosters mutual understanding and respect. Recall that agreement is achieved through a certain empathy, and the development of a ‘we perspective.’ It is this consideration of different perspectives that enables agreement by discovering what interests we share in common.

Unlike the original position, dialogue does not guarantee agreement. Ideological differences in comprehensive doctrines are likely to generate value conflicts, and undermine the possibility of agreement.¹⁸⁵ Habermas admits this, and offers two possible solutions, which Thomas McCarthy considers. The first is to let value conflicts be decided in a situation of fair bargaining. By itself, this seems unsatisfactory. As McCarthy notes and as we seek in actual practice, individuals are usually not content to bargain with their values; values are usually too important to be traded for other things.

McCarthy finds potential in focusing on fair procedures for deciding conflicts, such as majority rule.¹⁸⁶ Benhabib likewise emphasizes the importance of decision making procedures, “which are radically open and fair to all.”¹⁸⁷ Along with Benhabib, Young claims that the “theoretical discussion of justice, then, requires theoretical discussion of participatory democracy.”¹⁸⁸ However, this would still be unsuccessful, as debates concerning value conflicts do not simply disappear once the majority has cast their votes. Minorities concerned that their rights have been violated, or that their interests have been

¹⁸⁴ Ibid., 178.

¹⁸⁵ McCarthy, 331.

¹⁸⁶ Ibid., 331-332.

¹⁸⁷ Benhabib, 9.

¹⁸⁸ Young, *Justice and the Politics of Difference*, 117.

ignored, are not likely to stop protesting because of the legitimacy of majority rule. Civil rights movements can attest to this. If the minority group concerned does abandon their cause, then the result of this democratic process simply silences their perspective. This can hardly be said to be justice. Such decision-making procedures may enable valuable discussion and increased mutual recognition, but they do not necessarily lead to agreement. It is worth repeating that we need agreement for a victim's claim to injustice to be heard.

As a second solution, Habermas suggests that when agreement is lacking we move the "discussion to a higher level of abstraction for example, from different preferences to freedom of choice, from opposed beliefs to liberty of conscience, from conflicting values to rights of privacy and the like."¹⁸⁹ McCarthy notes that this move highlights the usefulness of a Rawlsian abstraction. This also highlights the compatibility of the original position and moral dialogue, as we could move up and down between levels of abstraction. While McCarthy focuses on moving up towards higher levels of abstraction, we can also move down when we are too far away from reality. In this way, moral dialogue would help us get a better understanding for what the position of the least advantaged is actually like.

Conclusion

Unlike the critics discussed in this chapter, I do not think that the original position should be abandoned, but we have to keep in mind that it is a reasoning tool. It is not an impossible thought experiment, but it is a fiction, because it is meant to help us idealize a context that is free of bias and oppression. It is meant to exercise our imagination, to get

past the biases and inequalities that exist in real life, and conceptualize other possibilities. It facilitates agreement, which is one of the biggest weaknesses of the dialogical approach. Moral dialogue does help us become aware of bias, and understand oppression, but this in no way undermines the importance of the original position as a conceptual tool for developing principles of justice. So we have an answer to part of our initial question: we should abstract from our differences in order to develop principles of justice. However, as we shall see, this does not imply that membership in a social or cultural group should not be recognized in the application of these principles of justice.

¹⁸⁹ McCarthy, 332.

Chapter 2

The Social Self: Conditions and Obstacles to Autonomy

I have just shown that we should abstract from our social group differences in the original position, in order to choose the principles of justice. But does such a conception of justice require a difference blind approach in its application of principles? Recall that in the original position, we would first agree that rights and liberties should be distributed *equally*, by which we mean consistently and impartially to all persons.¹⁹⁰ This seems to imply that the relationship between justice and difference in the application of principles also requires us to put differences aside.¹⁹¹

This is an inclusive strategy that seems necessary, given our pervasive history of group-based oppression. However, some critics find this emphasis on individual rights problematic.¹⁹² In some cases, they argue, equality requires attention to social group difference, and not just to individual needs which are the same for all.¹⁹³ They argue that there are situations in which a collective goal or interest should be taken into account in the application of justice and this might require overriding individual rights. According to Young, it is precisely because of our history of group-based oppression and discrimination,

¹⁹⁰ Rawls, *A Theory of Justice*, 442.

¹⁹¹ Vernon Van Dyke, "The Individual, the State, and Ethnic Communities in Political Theory," in *The Rights of Minority Cultures*, ed. Will Kymlicka (Oxford: Oxford University Press, 1995), 48.

¹⁹² Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 26.

¹⁹³ Charles Taylor, "The Politics of Recognition" in *Multiculturalism: Examining the Politics of Recognition*, ed. Charles Taylor and Amy Gutmann (Princeton: Princeton University Press, 1994), 61.

that “some of the disadvantages that oppressed groups suffer can be remedied in policy only by an affirmative acknowledgement of the group’s specificity.”¹⁹⁴

But the argument for recognition and protection of group rights is a vague claim, so we must be clear about what it entails. It would be inaccurate if the claim implied that the difference-blind approach offers no protection to groups. In the liberal paradigm, granting individuals basic rights and freedoms is considered the best way to protect groups. Rawls’s difference principle also refers to our social position, and requires us to view the social system from the perspective of the “least advantaged representative person.” Even though he later revised this aspect of his theory, justice as fairness still includes a principle that guarantees the means to achieve real, substantive equality.

Nor do these differentiated rights theorists advocate a total rejection of individual rights. Indeed, most grant that some basic rights are inalienable.¹⁹⁵ What they criticize is the way the liberal conception of the self does not seem to leave sufficient room for collective rights. Charles Taylor for example is concerned that the liberal conception of the self will always prioritize the individual over the group, even in cases where the individual’s interest at stake is trivial in comparison to the collective good.¹⁹⁶ The idea is that oppressed groups need to be able to discover and promote a positive self-identification, as well as determine their specific needs and interests. This process requires a principle of

¹⁹⁴ Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory*, 2nd ed. (Basingstoke: Palgrave Macmillan, 2006); Young, *Justice and the Politics of Difference*, 174.

¹⁹⁵ Taylor, 59.; Young, *Justice and the Politics of Difference*, 174. They do not, however, specify *which* rights are fundamental.

¹⁹⁶ I will not focus on this debate even though it is important for the communitarian thesis. What I am concerned with is the claim that Rawls’s conception of the self does not accurately describe the relationship between the self and social groups.

“group autonomy” as opposed to individual autonomy.¹⁹⁷ Young gives us a more concrete picture of what group autonomy entails, as she argues in favour of:

Institutional mechanisms and public resources supporting 1) self-organization of group members so that they achieve collective empowerment...2) group analysis and group generation of policy proposals in institutional contexts where decision makers are obliged to show that their deliberations have taken group perspectives into consideration; and 3) group veto power regarding specific policies that affect a group directly.¹⁹⁸

Thus, it is in the context of this concern that Rawls’s conception of the self has been accused of being too individualistic and paying inadequate attention to the way social groups are important to individuals. Critics identify his account of the self as the root of the problem of inadequate attention to groups. His conception of the self is criticized as over-emphasizing our ability to choose, ignoring the way groups shape our identity and our ends. It assumes that individuals constitute groups when in fact groups constitute individuals. While this was a conflict in the 1980s and 1990s, the ‘communitarian vs. liberal debate’ has now subsided. Their criticisms are nevertheless important, for two reasons, in connection with the discussion of justice and social group difference. First, Rawls emphasizes his political conception of the self in the context of this debate. This emphasis is meant to facilitate a “reasonable pluralism” of comprehensive philosophical, religious and moral doctrines, and thus warrants a close examination. But secondly, and more importantly, they raise questions about how cultural or other community ties should be recognized by a theory of justice in a political context.¹⁹⁹

¹⁹⁷ Young, *Justice and the Politics of Difference*, 167.

¹⁹⁸ *Ibid.*, 184.

¹⁹⁹ Kymlicka, *Liberalism, Community, and Culture*, 3.

The concern over *adequate* recognition of difference is important, but I think the emphasis has been put in the wrong place. I will argue that there is no problem with Rawls's conception of the person. Rather it is his conception of a social group, which is the source of some difficulty. A complete treatment of the question regarding the relationship between difference and the application of the principles of justice will therefore be treated in two separate parts. In this chapter I will emphasize the defensibility of Rawls's political conception of the self. I agree with defenders of liberalism that Rawls adequately accounts for the way individuals are shaped by their attachments to groups. After a look at how and why individual rights foster diversity, I will consider three aspects to the charge that his account of the self is individualistic: a) That groups are the source of individual ends; b) That a healthy socialization for autonomy requires attention our earliest social relationships, in particular, the family; c) That groups constitute individual identity.

I also agree with defenders of liberalism that the guarantee of individual rights promotes a good deal of diversity. However, I do not think Rawls's description of the social group as a voluntary association is robust enough to adequately recognize and protect cultural communities or historically oppressed groups. In the next chapter, I will discuss these problems with Rawls's account of the social group. However, his account of social groups can be challenged without rejecting his conception of the person.

Individual Rights and Diversity

That rights and freedoms apply to individuals and not groups is seen as the “defining feature” of liberalism according to Kymlicka.²⁰⁰ Rawls advocates justice as fairness as a particular form of liberalism because he finds it troubling that some conceptions of justice such as utilitarianism can justify a system of slavery. This possibility runs contrary to our deepest intuitions about justice. Young illustrates the persuasive philosophical argument behind this intuition, as she shows how deconstructive criticism has exposed the faulty claim of essentialism that underlies most oppressive political systems.

Briefly, essentialism results from a process of “Othering,” whereby the dominant group defines value in terms of its own experiences and characteristics. The dominant group then “*measures* the Others and finds them essentially lacking, excluded and or complementary to themselves.”²⁰¹ The dominant group sees itself as having worth, and projects negative attributes onto the Others. “These oppositions legitimate the dehumanised use of the despised group as sweated labour.”²⁰² Once this process is revealed, it becomes apparent how seemingly natural distinctions are socially constructed.²⁰³ Rejecting this essentialist ideology, liberalism thus concludes that human rights must be ‘difference blind’ and apply equally to all as individuals. Young thinks the rejection of essentialism is right, but takes issue with the resulting conclusion about the role social groups play in the lives of individuals. Young is primarily concerned with how identity groups such as race and gender impact individuals, while Rawls has in mind associations such as unions or

²⁰⁰ Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 80.

²⁰¹ Iris Marion Young, "Together in Difference: Transforming the Logic of Group Political Conflict " in *The Rights of Minority Cultures*, ed. Will Kymlicka (Oxford: Oxford University Press, 1995), 158.

²⁰² Ibid.

scientific communities. In the liberal paradigm, group affiliation is completely voluntary. That does not mean social groups of any kind cease to matter. To the contrary, a difference blind approach facilitates certain kinds of diversity within civil society.²⁰⁴

As I argued in the last chapter, the guarantee of individual rights is intended to enable individuals to form, join and leave associations. Individuals join associations to be recognized and develop a sense of self-worth, share final ends and common activities.²⁰⁵ We want our projects to be recognized as worthwhile, and this is often achieved by joining an association in which others share similar interests and offer us support.²⁰⁶ Rawls is thinking particularly of religious institutions, but also families, friendships, and the arts and sciences. He defines an association as a group united by a shared end, such that when it is realized, the group's members "all find satisfaction in the same thing."²⁰⁷ Kymlicka adds that:

One of the major mechanisms for accommodating cultural differences is the protection of the civil and political rights of individuals. It is impossible to overstate the importance of freedom of association, religion, speech, mobility, and political organization for protecting group difference. These rights enable individuals to form and maintain the various groups and associations which constitute civil society... The protection afforded by these common rights of citizenship is sufficient for many of the legitimate forms of diversity in society.²⁰⁸

Justice as fairness also fosters a diversity of interests and lifestyles because the principles are not contingent on a particular conception of the good. The two principles maintain the social conditions that allow them to pursue and revise their ends.²⁰⁹ Unlike

²⁰³ Ibid., 159-160.

²⁰⁴ Young, *Justice and the Politics of Difference*, 168.

²⁰⁵ Rawls, *A Theory of Justice*, 458.

²⁰⁶ Ibid., 387.

²⁰⁷ Ibid., 461.

²⁰⁸ Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 26.

²⁰⁹ Rawls, *A Theory of Justice*, 131-132.

utilitarianism, justice as fairness looks only at how the basic structure of society distributes these goods, and not at the choices we make in terms of how we use them. This implies that Rawls's theory of justice "does not prejudge the choice of the sort of persons that men want to be."²¹⁰

As we shall discuss in the next chapter, it may be problematic to describe some social groups as voluntary associations. But the underling idea here is that there is more than one possible good life and individuals can choose their conception of the good for themselves. This claim underlies the principles of justice, for if human beings are not autonomous in this way, then it will not make sense to have put so much emphasis on ensuring the social conditions that enable freedom of choice.

The parties in the original position are thought to have autonomy as a result of their two moral capacities: their capacity for a conception of the good and for a sense of justice. Thus, Rawls claims "we use the characterization of the persons in the original position to single out the kind of beings to whom the principles chosen apply."²¹¹ These 'moral powers' thus deserve careful attention to be clear about what they entail. Having a capacity for a rational plan models the parties' freedom, in the sense that they do not think they are bound to any particular rational plan, but rather are independent from the particular aims they hold at any given moment. In other words, this refers to their 'highest order interests,' or rather, the interests they have upon reflection. These are the interests they endorse, or

²¹⁰ Ibid., 230. Of course, one's conception of the good must be consistent with the two principles, and so his theory does prejudge some life plans, as we saw in the previous chapter. Justice as fairness does nonetheless support a wide range of life plans.

²¹¹ Ibid., 442.

want to want. They are also free to revise their plans, as this is not a static achievement, but an on-going process. Our circumstances change, and we must be prepared to reflect on those changes. This leaves room for the reality that we can be mistaken about our ‘highest order interests,’ but we are nonetheless able to alter our plans upon that realization. Their capacity for a sense of justice similarly refers to the parties’ ability to reflect on and choose principles to govern their arrangements. The principles of justice are not merely the convictions of others, but are the choices one makes to govern one’s own life. Thus Rawls claims that when persons act from the principles of justice, they are “acting autonomously: they are acting from principles that they would acknowledge under conditions that best express their nature as free and equal rational beings.”²¹²

It is significant that Rawls refers to a person’s nature as free and equal, as he takes these moral powers to be a feature of human beings. He has moved away from the fictional characters of the original position, to a conception of actual persons. More specifically, he is referring to a ‘potential capacity,’ which almost everyone has to at least a minimum degree.²¹³ By referring to human nature, Rawls’s theory is based on a particular conception of the person. As he explains, if we try to avoid talk of natural rights and focus only on the procedural rule of equal consideration, “there is no guarantee of substantive equal treatment since slave and caste systems...may satisfy this conception.”²¹⁴ But this argument will not

²¹² Ibid., 452.

²¹³ Ibid., 442-3. He admits that in a few isolated cases, some may not have a minimum sense of justice. But this minimal degree is only sufficient for equality, and may not be “a necessary condition.” This implies that the facile claim that someone does not have the capacity for autonomy does not necessary serve as an argument to deny them equal justice.

²¹⁴ Ibid., 444. As I understand it, if you simply avoid the question of *who* is owed justice, it is possible to apply justice consistently to white propertied men only. So, the principle that rights apply equally to all

do: even if it is a nature we must cultivate, we have nevertheless slipped back into the territory of essentialism, which liberalism claims to reject.

The Liberal Conception of the Self as Citizenship

We do not need to dwell on this initial account of natural rights as Rawls has since moved away from talk of human nature. Rather, he now specifies that the original position models a conception of *citizens* as free and equal.²¹⁵ This modification is a crucial part of making justice as fairness a political conception. What prompted his shift was the realization that in addition to the diversity he had considered in *A Theory*, the protection of basic rights and liberties will also foster a diversity of “reasonable comprehensive religious, philosophical and moral doctrines.”²¹⁶ Yet as we have just seen, justice as fairness requires an acceptance of the value of autonomy, and thus that individuals agree to the principles as part of a comprehensive doctrine.

He emphasizes that this is a situation of *reasonable* pluralism, as opposed to the simple fact of pluralism, as reasonable doctrines can find an overlapping consensus about a conception of justice. Those endorsing a variety of reasonable comprehensive doctrines can all agree on “the essentials of a democratic regime” even if they do not all agree on the

requires a conception of the self as autonomous. We can accept this, though frankly, even natural rights are vulnerable to the same problem, as one could simply argue that only white propertied men are autonomous. Even Rawls uses autonomy to distinguish why *some* are owed justice, and specifies that only humans, and not all animals are autonomous. This is not overly problematical, since Rawls quickly rejects talk of human nature for talk of citizenship. He must make this move to a political conception of the self, to disentangle his procedural logic from these metaphysical problems.

²¹⁵ Rawls, *Political Liberalism*, 72.

²¹⁶ *Ibid.*, 36.

same comprehensive doctrine, or even on the specific conception of justice that best satisfies those essentials.²¹⁷

In his shift, Rawls maintains the view that citizens are modeled as free and equal when they have the two, above-mentioned moral powers, and continues to define the capacities required for autonomy in the same way as he did in *A Theory*. His description of autonomy remains the same, as it is primarily the scope that has changed. He also develops the idea a bit more, adding that citizens are recognized as autonomous in an institutional context, as they are considered to be “self-authenticating sources of valid claims,” meaning that they can make claims on their institutions, and that their interests count at the social level, that is to say, the level at which policy is considered and made. He further adds that as free persons, they are also morally responsible for their life plans.²¹⁸

This change in scope is meant to permit a wider range of agreement. As those holding a comprehensive doctrine that does not value autonomy may not agree to justice as fairness as it is described in *A Theory*. A conception of justice must be political enough to appeal to illiberal or religious doctrines that do not value autonomy in their personal lives, so long as they are reasonable doctrines. He now specifies that we must only agree to that account of autonomy for the purposes of our political or public sense of self. Individuals can have a very different sense of self when it comes to other roles they carry out.

I will now briefly review the communitarian-liberal debate to see how and why he came to this specification. The characterization of justice as fairness as a political

²¹⁷ Ibid., xvi. Justice as Fairness is therefore but one possible conception of justice.

²¹⁸ Ibid., 30-34; 72-76.

conception will become clearer in light of this debate, as the critics discussed challenge Rawls's account of autonomy. It will also provide a useful point of departure for the discussion on the relationship between social groups and their relationship to individual rights.

Autonomy and the Metaphysical Conception of the Self

Michael Sandel picks up on the substantialism implicit in Rawls's description of moral capacities. He criticizes the claim that actual people can conceive of themselves as individuals with a conception of the good that they do not identify with. He argues that this assumes there is an underlying self that *has* these interests, plans and desires. Such a conception of the self is more than just a bundle of psychological states. Sandel calls this conception of an underlying self, which is prior to its ends, voluntarist.²¹⁹ We should note that Sandel finds this voluntarist conception of the self to have more nuance than the Kantian abstract self discussed in the previous chapter. A Rawlsian self can stand at a distance from his/her ends “with a certain priority, but [it] is also related to its ends.”²²⁰ He nevertheless thinks Rawls's theory rests on a faulty metaphysical assumption that does not reflect the way we actually experience our relation to our ends.

A person who can stand at a distance from his/her ends is “not simply a product of the vagaries of circumstance, but always irreducibly an active willing agent, distinguishable from [his/her] surroundings and capable of choice.”²²¹ However, Sandel argues that we do

²¹⁹ Sandel, 54-9.

²²⁰ Ibid., 59.

²²¹ Ibid., 19.

not choose our ends because an individual's wants are socially determined. If a rational plan is the effective satisfaction of desires, then our rational plans are merely the 'products of our socialization' and do not reflect that individual's autonomy. Rawls's account includes the condition that they are not merely following their immediate desires, as the required reflection means they are concerned with their highest-order interests. Sandel notes that these second-order interests are still subject to social determinism, implying that the agent's conception of the good is heteronomous.²²² Sandel thinks that for an individual to be free, his ends would have to be "independent from the influence of pre-existing wants and desires – a 'radically free choice'."²²³

This criticism is intended to draw our attention to the social conditions and social groups that influence our life plans.²²⁴ After this analysis of agency, Sandel concludes that an individual discovers his/her ends. "I ask, as I deliberate, not only what I really want, but who I really am," and there is some "relative fixity" to my identity.²²⁵ As Chandran Kukathas rightly points out, this entails that "to reflect on ourselves and the nature of the good, would then be to reflect upon the good of the community."²²⁶

In a related manner, some feminists have argued that Rawls advocates an individualistic conception of autonomy that is antithetical to a feminist conception of the

²²² Ibid., 162-4.

²²³ Ibid., 164.

²²⁴ Chandran Kukathas and Philip Pettit, *Rawls' a Theory of Justice and Its Critics* (Stanford: Stanford University Press, 1990), 105-6.

²²⁵ Sandel, 180.

²²⁶ Kukathas and Pettit, 106.

self.²²⁷ Like communitarians, these feminists point to the way our desires, ends, and identities are formed in “their immersion in networks of relationships.”²²⁸ They share a concern for the social sources of our ends and identities, though they tend to emphasize the role of the family as opposed to the politico-cultural communities that concern most communitarians.²²⁹

MacIntyre interprets Rawls’s liberalism as individualistic, in the sense that “society is composed of individuals each with his or her own interest, who *then* come together to formulate common rules of life.”²³⁰ This is a conception of the person as prior to society. On Rawls’s account, it seems irrelevant how individuals come to have their particular interests, and so the role of community in shaping those ends is non-existent. Young also interprets liberalism to presume “a conception of the self as transcending or prior to social context...[and] carries an implicit normative requirement that the authentic self is one that has voluntarily assumed all aspects of her or his life and identity.”²³¹

I will first respond to these claims somewhat generally, by appealing to the recent extensive discourse on autonomy. This will be followed by a look at the specific response some authors have given to defend Rawls’s account. The claim that our ends are merely discovered and not chosen because they are always determined by our social context, rests on an argument for the incompatibility of autonomy with social determinism, which has

²²⁷ Catriona Mackenzie and Natalie Stoljar, "Introduction: Autonomy Refigured," in *Relational Autonomy Feminist Perspectives on Autonomy, Agency, and the Social Self*, ed. Catriona Mackenzie and Natalie Stoljar (New York: Oxford University Press, 2000), 3.

²²⁸ Barclay, 52.

²²⁹ *Ibid.*, 57.

²³⁰ Alasdair C. MacIntyre, *After Virtue: A Study in Moral Theory*, 3rd ed. (Notre Dame: University of Notre Dame Press, 2007), 250.

been widely rejected in the contemporary literature on autonomy.²³² Reflecting on one's ends does not mean creating them from nothing. It does not imply that one must somehow liberate himself or herself from all social influence. "The autonomous person is not a passive receptacle of these forces but reflectively *engages* with them to participate in shaping a life for herself."²³³ Self-government is widely accepted as the defining feature of autonomy²³⁴ as opposed to having "choices that are uninfluenced or uncaused,"²³⁵ as is implied by Sandel's discussion of "radically free choice." This is important, because whatever problems we might have with Rawls's conception of a social group as a voluntary association, this implies that we can nevertheless accept that individuals to have the capacity for autonomy.

Nor does liberalism require an individual to be prior to his/her community in the sense of being self-made or self-sufficient in the way that Macintyre and Young suggest. Individuals are "prior to their social context" in the sense that social groups are important and relevant only because they are important to individuals.²³⁶ Being 'prior to society' in the sense described by Macintyre is negated by Rawls's account of how "we decide our life-plans, not *de novo*, but rather from examining the models and ways of life of those who

²³¹Young, "Together in Difference: Transforming the Logic of Group Political Conflict", 163.

²³² Catriona Mackenzie and Natalie Stoljar, 15. This is a dominant theme in feminist re-appropriations of the concept of autonomy. James Stacey Taylor discusses the "*current dominant* compatibilist analysis of moral responsibility." James Stacey Taylor, ed. *Personal Autonomy: New Essays on Personal Autonomy and Its Role in Contemporary Moral Philosophy* (Cambridge: Cambridge University Press, 2005), 2.

²³³ Barclay, 55.

²³⁴Catriona Mackenzie and Natalie Stoljar, 5.

²³⁵ Barclay, 54.

²³⁶ Chandran Kukathas, "Are There Any Cultural Rights?," in *The Rights of Minority Cultures*, ed. Will Kymlicka (Oxford: Oxford University Press, 1995), 233-4.

have preceded us.”²³⁷ We can take this at least to leave open the possibility that it refers to the way parents, teachers and friends “provide the support and guidance necessary for the development and experience of autonomy.”²³⁸ Nor does this statement seem limited to the initial acquisition of ends that occurs in childhood. Consistent with Rawls’s statement, Friedman points out that the adoption of new principles or values is likely to come from others, and is unlikely to be newly created by the agent herself.²³⁹ Rawls’s conception of autonomy is therefore at least compatible with these feminist and communitarian concerns.

As a specific response, Kymlicka explains that we only need to “understand ourselves to be prior to our ends, in the sense that no end or goal is exempt from possible re-examination.”²⁴⁰ Rawls takes Kymlicka’s response to be the appropriate defence against the charge that he presupposes a particular, metaphysical conception of the self.²⁴¹ Rawls’s conception of the self requires that individuals be able to get distance from their ends in order to reflect on them, but not as a description of how we come to have such ends. Rawls requires only the capacity to assess one’s conception of the good: to consider whether it is worth pursuing, and be open to changing it if she/he decides it is no longer worthwhile.²⁴² We are all subject to some form of socialization, and to deny this would be to deny the role

²³⁷ Rawls, *A Theory of Justice*, 494. See also Kymlicka, *Liberalism, Community, and Culture*, 75. for a defence of Rawls based on this passage.

²³⁸ Natalie Stoljar "Autonomy and the Feminist Intuition," in *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self*, ed. Catriona Mackenzie and Natalie Stoljar (New York: Oxford University Press, 2000), 95.

²³⁹ Marilyn Friedman, "Autonomy, Social Disruption and Women," in *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self*, ed. Catriona Mackenzie and Natalie Stoljar (New York: Oxford University Press, 2000), 41.

²⁴⁰ Kymlicka, *Liberalism, Community, and Culture*, 52.

²⁴¹ Rawls, *Political Liberalism*, 27n.

²⁴² Rawls, *A Theory of Justice*, 131. Rawls, *Political Liberalism*, 30. Kymlicka, *Liberalism, Community, and Culture*, 50.

of our mothers, teachers, leaders etc. Autonomy would be impossible if it required us to be “self-made,” but this is not what the capacity to reflect on our ends requires.

Rawls’s objective is not to describe actual experience, but a normative conception.²⁴³ the person as a “fully cooperating member of society,²⁴⁴ or in other words, persons as citizens. We should note that this implies an ‘underlying self’ in the sense that political rights attach to the individual, so that despite changes to one’s conception of the good, interests, or projects, she/he continues to be the same person. But this does not require a particular metaphysical conception of the self. Rather, personal identity is assumed only for the purpose of attributing rights, and only in a political context.²⁴⁵ The metaphysical question regarding the nature of the self is irrelevant. It is in this sense that justice as fairness rests on a political, and not a metaphysical conception of the self.

The Socialized Self

While the capacity for a conception of the good may be compatible with socialization, it is in some sense dependent on receiving the proper form of socialization. The concern is that inadequate attention to the process of autonomy development will ignore the way certain kinds of socialization and social relationships can either “impede or enhance an agent’s capacity for autonomy.”²⁴⁶ Even a political conception requires a clarification of our acquisition of autonomy in this sense. For example, Diana Meyers considers the feminist concern that the traditional gendered socialization of girls curtails

²⁴³ Rawls, *Political Liberalism*, 18.

²⁴⁴ Martha Craven Nussbaum, “Rawls and Feminism,” in *The Cambridge Companion to Rawls*, ed. Samuel Richard Freeman (Cambridge: Cambridge University Press, 2003), 494.

their development of the skills necessary to act autonomously. These skills include an aptitude for considering all relevant information and feelings when envisioning possible life plans. An autonomous individual must be willing to change his/her plan in light of new information or feelings, and “be ready to resist the unwarranted demands of other individuals along with conformist societal pressures.”²⁴⁷ Thus, *if* the traditionally gendered family, with its distinct roles for boys and girls, includes teaching girls not to consider seriously life-plans outside the home, to obey her parents and not question what she is told, to disregard concerns for her personal desires, then the moral education she receives will undermine her acquisition of autonomy competency.

This concern is reflected in Okin’s criticism of Rawls’s description of the family in *A Theory*. More specifically, she criticizes Rawls for not requiring that the principles of justice as fairness apply to the family, in order to assure that the family be a just institution. As we have seen, the principles apply to the basic structure, of which the family is a part, but they do not regulate the internal life of the family. In other words, they do not apply to the distribution of primary goods *within* families.²⁴⁸

Rather, in his discussion of the family and its role in the moral education of children, Rawls focuses on love as the basic requirement for the acquisition of the moral capacities. He thinks principles of love are more appropriate than the two principles of

²⁴⁵ Rawls, *Political Liberalism*, 30.

²⁴⁶ Catriona Mackenzie and Natalie Stoljar, 22.

²⁴⁷ Diana T. Meyers, "Personal Autonomy and the Paradox of Feminine Socialization," *The Journal of Philosophy* 84, no. 11 (1987): 627.

²⁴⁸ Okin, *Justice, Gender, and the Family*, 93-6.

justice.²⁴⁹ This implies that families not characterized by justice as fairness are still considered just, so long as they love their children. This includes families with substantial inequalities, for example those in which expectations and roles are determined according to traditional definitions of gender. Okin does not think this is sufficient, as she contends:

Unless the households in which children are first nurtured, and see their first examples of human interaction, are based on equality and reciprocity rather than on dependence and domination...how can whatever love they receive from their parents make up for the injustice they see before them in the relationship between these same parents?²⁵⁰

In other words, Okin and Rawls disagree on what conditions are necessary for the family to be considered just. Baehr distinguishes these two senses of justice, by explaining that Rawls requires the family to be minimally just, and Okin requires that it be maximally just. The distinction becomes apparent in Rawls's response to Okin in "Public Reason Revisited." He maintains that the family plays an important role, ensuring the moral development and education of children, and argues that this implies that "the family must be seen as a matter for political justice."²⁵¹ Okin is therefore mistaken to think that justice does not apply to the family. However, he specifies that the principles do not apply "directly to the internal life" of the family – just as they do not apply to the internal structure of the other associations that make up the basic structure of society.²⁵² Rather, the principles impose "certain essential constraints."²⁵³ In general, these constraints prevent the family or an association from violating an individual's citizenship rights, but do not specify any kind of internal organisation.

²⁴⁹ Rawls, *A Theory of Justice*, 405.

²⁵⁰ Okin, *Justice, Gender, and the Family*, 99-100.

²⁵¹ Rawls, *The Law of Peoples; with "the Idea of Public Reason Revisited"*.156-8 The same response was printed in *A Restatement*, with only minor additions.

²⁵² *Ibid.*,158.

With respect to the socialization of children, he says, “clearly, the prohibition of abuse and neglect of children, and much else, will, as constraints, be a vital part of family law.”²⁵⁴ But he does not think the principles of justice should necessarily regulate how we raise our children. These are political principles, which are relevant to individuals as citizens. Thus, certain legal protections and the appropriate moral education are owed to children as ‘prospective citizens.’ Other than these protections, the details of the parent-child relationship are not the concern of the state.²⁵⁵

As for the division of labour and the model parents provide for their children, all the adult members in a family have the same basic rights and freedoms, but the principles of justice do not require an equal division of labour within the family. These assurances will have an impact on the family to the extent that divorce must be an option, in order to maintain freedom of choice in relationships, and abuse is never tolerated. The work involved in raising children is also recognized and valued by the state, thus entitling a parent who stayed at home to a share in his/her partner’s income.²⁵⁶ Though Rawls does not specify these details, it is likely that day care and maternity leave would also be made available in a well-ordered society. These assurances are part of the social conditions that enable freedom of choice. This is what Rawls means when he says the protection of basic rights and freedoms apply ‘externally’ to the family. But Rawls maintains that “one cannot propose that equal division of labour in the family simply be mandated, or its absence in

²⁵³ Ibid., 159.

²⁵⁴ Ibid., 160.

²⁵⁵ Ibid.

²⁵⁶ Ibid., 157. As Rawls puts it, “reproductive labour is social labour.”

some way penalized in law for those who do not adopt it.”²⁵⁷ Rather, political liberalism tries “to reach a social condition in which the remaining division of labor is voluntary. This allows in principle that considerable gendered division of labor may persist. It is only involuntary division of labour that is to be reduced to zero.”²⁵⁸

Rawls is right about this. It is possible for a traditionally gendered family to be just, and to impart autonomy competency to children. What is important is that the division of labour is, as much as possible, *chosen*. In agreement, Meyers explains, “in principle, the traditional feminine role could be the object of autonomous choice, feminists cannot presume to exclude it as a candidate life plan.”²⁵⁹ As Martha Nussbaum notes, this actually treats the family as having a “group right” in the sense that the family is free to organize its internal structure as they wish. Just as with associations, the underlying idea is that the best way to protect groups is to ensure individuals’ autonomy.²⁶⁰ Moreover, Rawls’s account allows for a diversity of family units to be just, including homosexual, single parent, or other non-nuclear families so long as they are capable of fostering the two moral capacities.

While it is unfortunate that Rawls does not describe autonomy competency with the same kind of detail as Meyers does, his theory is nevertheless compatible with her theory. It is unlikely that children will develop the two moral capacities if they are not encouraged to imagine different life plans, and assess their worth.

²⁵⁷ Ibid, 159-163.

²⁵⁸ Ibid., 162.

²⁵⁹ Meyers: 628.

²⁶⁰ Nussbaum, "Rawls and Feminism," 506.

Here we also start to get a better picture of his specification that the conception of the self he is concerned with applies to individuals as citizens only. He says “we can distinguish between the point of view of people as citizens and their point of view as members of families.”²⁶¹ This is not to say that the roles of family member and citizen are mutually exclusive. The public and non-public are *not* separate spheres. The political conception of justice influences the family and imposes certain restrictions on it without determining the particular shape it must take.²⁶² Rawls must strike a delicate balance between respect for groups, and individual choice, while simultaneously protecting the rights and freedoms of others, particularly in the case of the family, the rights of children and other dependents. Rawls has adequately negotiated the conflict, for to simply mandate an equal division of labour, there is the potential to deny an individual’s autonomous choice, and would only permit a certain type of family.

The Constitutively Social Self

Feminists and communitarians have a related concern. It is likely that Sandel, for example, is not so concerned with the source of one’s ends as he is with the importance of a particular kind of end. Constitutively social ends have a social source, but are also shared with a community. Sandel has in mind here religious, national and tribal communities, whereby group membership constitutes some of an individual’s ends, and those shared ends

²⁶¹ Rawls, *The Law of Peoples; with "the Idea of Public Reason Revisited"*, 159.

²⁶² *Ibid.*, 161.

constitute his/her identity.²⁶³ Young points to the way “highly visible social groups” such as ethnicity, gender, and other non-chosen groups constitute identity.²⁶⁴ Sandel clarifies the meaning of ‘socially constitutive,’ saying:

We cannot regard ourselves as independent in this way without great cost to those loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are— as members of this family or community or nation or people, as bearers of this history, as sons and daughters of that revolution, as citizens of this republic. Allegiances such as these are more than values I happen to have or aims I ‘espouse as any given time.’²⁶⁵

Examples of shared ends include religious convictions to abstain from eating meat, or “family values.” The distinction Sandel wants to make, as I understand it, is between decisions as a matter of preference and as a matter of identity. Constitutive communities are more than associations of individuals who share a common goal like employees for a company. Rather, such communities have a common good or end, which plays a role in shaping their members’ self-conceptions. Shared ends are harder to challenge, or perhaps don’t make sense to challenge at all. In other words, Sandel thinks that one cannot revise one’s constitutively social ends, without serious loss to one’s sense of self.

Similarly, Bhikhu Parekh argues that membership in a cultural community structures an individual’s identity by giving meaning to their ends, and constraining their choice of ends.²⁶⁶ As he explains, the particular cultural tastes, values, and habits that we acquire when we grow up in a particular cultural community, “strike deep roots and

²⁶³ Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 92.; Barclay, 57. I imagine this could include other groups with shared traditions, beliefs and values, though Sandel does not discuss this possibility.

²⁶⁴ Young, *Justice and the Politics of Difference*, 44-6.

²⁶⁵ Sandel, 179.

²⁶⁶ Phillips, 108.

become an inseparable part of [our] personality.”²⁶⁷ Like Sandel, Parekh makes a distinction between preferences and shared ends.

The impact of culture on autonomy is particularly significant in a multicultural society, in which there are a diversity of “needs, norms, motivations, social customs and patterns of behaviour.” Parekh argues that in such a situation, “differential treatment,” may be necessary to achieve real equality. Thus, a multicultural society must make accommodations for minority cultures, for example, in Canada exempting Sikhs from wearing helmets, or the Stetson in the RCMP because their culture makes it nearly impossible to comply with the law or policy. There is a difference between someone who does not like uniforms and asking someone not to wear a turban.²⁶⁸ Parekh therefore depicts “some cultural conventions or values as so much bound up in one’s identity as to become beyond one’s control.”²⁶⁹

There are two ways to interpret the claim that shared ends have a special status that should be recognized by a conception of justice, both of which are problematic. This claim implies either that we cannot or should not challenge ends that are shared by a community. As a descriptive claim about our capacity for reflection, it is trivially false as social deviants and protesters for social change challenge accepted norms regularly.²⁷⁰ Alternatively, the descriptive claim might simply imply that one’s identity continues to bear “markings” from

²⁶⁷ Parekh, 156.

²⁶⁸ Ibid., 242-5.

²⁶⁹ Phillips, 108; 165. Of course, like the standard individual rights, cultural rights would need to be balanced against other rights.

²⁷⁰ Barclay, 64.

one's community, even when one rejects some of its shared ends.²⁷¹ But Rawls requires only the capacity for a rational plan, and not to overhaul one's entire identity. Many defenders of the liberal self have responded to this view by taking up Dworkin's argument that we may not be able to question all of our ends, or the entirety of our social context at once, but there is "no one connection or association so fundamental that it cannot be detached for inspection while holding others in place."²⁷²

When understood as a normative claim, this position implies that it is better not to question shared ends, than to live a 'detached' lifestyle.²⁷³ As Barclay argues, it is doubtful that supporting shared ends is necessarily better than challenging them. If an individual lives according to shared values, but would actually prefer to live differently, and thereby represses those desires, it is not clear why we should think that she/he has a "deeper" sense of self than someone who chooses to leave their community to pursue their desires.²⁷⁴ We can recognize that it is difficult to challenge or revise our constitutively social identity. It is nevertheless important to maintain that individuals have the capacity to do so if they want or need to, without claiming that it is an easy thing to do. While describing a cultural community, as a voluntary association may be inadequate, this is a perfectly appropriate account of the self and human capacity.

²⁷¹ Ibid.

²⁷² Ronald Dworkin, "Liberal Community," *California Law Review* 77, no. 3 (1989): 489. The quote is discussed in Kymlicka *Multicultural citizenship*, 91; and Barclay, 62.

²⁷³ Parekh, 150. Parekh says someone who is "culturally footloose, owing loyalty to no single culture... runs the risk of becoming shallow and fragile."

²⁷⁴ Barclay, 64-5.

Illiberal Communities and the Rejection of the Autonomous Self

In response to this critique, Rawls says that the account of the autonomous self refers to what he calls their public or institutional identity. One's status as a citizen does not change if an individual revises his/her life plan. It is in this public institutional context that we are equal, with the same basic rights and freedoms. This is, however, distinguished from the non-institutional or non-public identity. In other words, we can accept that our cultural community or other group affiliations may define or constitute what Rawls calls our non-public identity. Rawls acknowledges the difficulty of challenging shared ends. Perhaps membership in a particular group may constitute who I am so strongly that, if I were to leave that group, I would be disoriented, and no longer know who I am.²⁷⁵ But my basic rights and freedoms are not, and should not be, contingent on my non-public identity. For example, my religion may constitute my identity, so that changing religions is for all intents and purpose equivalent to a change in identity. I may no longer be "me," but this does not change my political self, or my rights.²⁷⁶ Compare this to Saudi Arabia, where a conversion from Islam means a change in public identity is marked by a loss in political rights, as well as a change in personal identity.²⁷⁷

The distinction between public and non-public identity indicates that Rawls allows for the possibility that someone might have a "communitarian" view of their non-public self. Kymlicka thinks that the distinction is unsuccessful. His claim is, if you are going to accept an account of the autonomous self for the purpose of defining a citizen's public

²⁷⁵ Rawls and Kelly, *Justice as Fairness: A Restatement*, 22.

²⁷⁶ Rawls, *Political Liberalism*, 31.

identity, then you must also accept the autonomous self for non-public matters.²⁷⁸ He wonders why someone who has rejected an autonomous conception of his personal identity, would think that he has an autonomous public self.

Kymlicka discusses religious communities that he claims do not value liberal autonomy to make this point. One example is a Supreme Court case in which two members of the Hutterite community in Canada were expelled from their community because they renounced the Hutterite religion. The two members contested the principle of the Hutterite doctrine, which said that no one could “leave the colony without abandoning everything, even the clothes on their backs’.”²⁷⁹ As one of the justices in the case notes, this policy makes it virtually impossible for someone to leave the Hutterite religion. Rawls’s political conception would not allow this kind of policy.

The distinction between a public and non-public identity is supposed to enable a wider agreement than can be achieved with comprehensive liberalism. Kymlicka uses this example to show that some groups that do not value autonomy as part of their comprehensive doctrine will want to restrict the basic liberties of their members, and this will have consequences for those members’ public identity. Kymlicka argues that only individuals who agree to autonomy in their personal lives will also agree to it in a political context; he consequently defends the view that “autonomy must be endorsed as a general rule.”²⁸⁰ Interestingly, this implies that Kymlicka would also refuse the Hutterite

²⁷⁷ Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 165.

²⁷⁸ *Ibid.*, 160-2.

²⁷⁹ *Ibid.*, 161.

²⁸⁰ *Ibid.*, 162.

community special minority rights, and draws the same conclusion he claims Rawls would have to accept. His point is that minority rights will have to be offered on the basis of the value of autonomy. This will be discussed more fully in the next chapter. Here, what is important is that he rejects any concession to a communitarian sense of self.

Kymlicka raises an interesting point, as he indicates how some doctrines do not value personal autonomy, but his is mistaken about what this example demonstrates. The case involving the Hutterite community does not reveal the necessity of valuing autonomy, but rather, the necessity of accepting Constitutional essentials. Rawls is right to stress that individuals can identify deeply with their community and still accept a political conception of themselves for public purposes. That is to say, one must accept that for the *purpose of determining their political rights*, they might change their mind, no matter how unlikely it might seem in the moment. This does include accepting *political* autonomy,²⁸¹ but does not require that individuals value autonomy more generally, or accept a particular conception of the self. Rather, it is to accept that we are fallible. Similarly, it requires us to accept the rights of *other individuals* on the same basis without requiring us to agree on philosophical, moral or religious doctrines. While he is correct to point out that some groups will reject political autonomy, Kymlicka's insistence that a group who does not value autonomy generally, will not value political autonomy, fails to recognize the existence of reasonable non-liberal groups. This includes the major world religions, excluding their more fundamentalist strands, which prioritize submission to God, loyalty to their community and distinct roles for men and women, but nevertheless agree to political equality and political

autonomy. Rawls's political conception of the self is thus defensible and acceptable to a wide range of religious groups.

Conclusion

The critique of liberal individualism attempts to challenge Rawls's conception of justice by showing that it pays inadequate attention to the role of social groups in shaping individual identity and overemphasizes individual rights. It should be clear from the defence, however, that the critique of the self is unsuccessful. There is no question that social groups are important *for individuals*. This is a point that both communitarians and liberals share. Rather, Kukathas has rightly assessed it: "what has been denied, however, is the proposition that fundamental moral claims are to be attached to such groups and that the terms of political association must be established with these particular claims in mind."²⁸²

Rawls's conception of the group is not robust enough, however, to cover all relevant cases, and in particular fails to adequately describe cultural communities, and historically oppressed groups. This does not, however, require changing Rawls's political conception of the self.

²⁸¹ Rawls, *Political Liberalism*, 77-8.

²⁸² Kukathas, "Are There Any Cultural Rights?," 232.

Chapter 3

Social Groups: Is There Room for Culture and the Historically Oppressed?

The focus of chapter two was on Rawls's conception of the self, and how important groups are for individuals. But how does Rawls view groups apart from the individuals that constitute them? We understand that individuals are free to join groups like the Hutterite community, even if the values expressed in the group differ from those expressed by political liberalism. But how does he view the group as a unit, independent from its members? What kind of recognition does a group have, and what kinds of freedoms does this allow the group itself to enjoy? Does he allow for any group rights, beyond the individual's right to form them? This is of particular importance for assessing the relationship between justice and diversity, as minority rights apply to the group. Even when the special rights are exercised by the individual members, they can do so because of the special status accorded to the group.

In this chapter I will argue that Rawls's theory does not properly account for cultural groups or oppressed groups. These groups provide examples of when group membership can make a claim to justice. Following chapter two I maintain that the problem is not with his conception of the person, but with his conception of a social group. I go through Kymlicka's argument for minority rights to show how it fails to account for the way some groups need political recognition in addition to the individual rights accorded to

all. Nevertheless, we will see that we have to be careful about how we articulate these group rights, as they can give too much power to the group, and can reinforce internal structures of oppression. In particular, we must make sure that group rights do not rely on essentialist notions of group identity or solidify identity by silencing internal dissent. I do not take this to mean that we should abandon group rights. On the contrary, this set of problems only highlights the importance of recognition of group-based difference. Not only does Rawls's treatment of groups inadequately respond to the inequalities that a minority group faces when compared to the majority, but also when the inequality is a question of minorities within minorities. We therefore need an account of group rights that views groups as themselves internally diverse. Group rights should not overly penalize a member's choice to reject an established norm or practice. This is best done when the concerns of minorities within minorities are heard and considered.

Associations and Communities

In order to understand how Rawls treats groups, we should recall how he defines them. When Rawls recognizes social groups he interprets them as voluntary associations. After having assessed his account of the self, it is clear why he has done so: he wants to emphasize our capacity to choose, which is essential for his account of political autonomy. The exception is the least advantaged group. Individuals 'belong' to this group for structural reasons. However, the concern is the socio-economic conditions that disadvantage some individuals.²⁸³ It is important because it makes justice as fairness about

²⁸³ Rawls, *A Theory of Justice*, 82.

more than formal rights, and includes the adequate means for everyone to achieve their good. But it does not recognize the identity of the group, and therefore does not get at the concerns of differentiated right theorists.

There is the potential for a broader view of social groups more appropriate for cultures in *Political Liberalism*, in which Rawls makes the reality of reasonable pluralism his focal point. As we saw, he describes this diversity as differences in comprehensive doctrines. While associations are usually united by a shared conception of the good, or a common end, a community shares a comprehensive doctrine, which organizes a consistent set of values. These values are prioritized in a way that facilitates a solution when they conflict.²⁸⁴ This evokes the way a culture impacts most of our life, as these values, including “ideals of personal virtue and character...inform much of our non-political conduct.”²⁸⁵ A comprehensive doctrine could also capture the importance of history and tradition in shaping a cultural community, as Rawls claims it usually “belongs to, or draws upon, a tradition of thought and doctrine.”²⁸⁶

Rawls later adds that we can be born into communities, for example, religions “and their distinctive cultures.”²⁸⁷ This indicates a significant difference from associations as it accounts for the way some individuals do not voluntarily join such groups. But he nevertheless treats comprehensive doctrines along similar lines. He understands a

²⁸⁴ Rawls, *Political Liberalism*, 59.

²⁸⁵ *Ibid.*, 175.

²⁸⁶ *Ibid.*, 59.

²⁸⁷ Rawls and Kelly, *Justice as Fairness: A Restatement*, 20. Religion is not a good example to use here, because we often do think of them as voluntarily joined and left, though Rawls does not say we are *always* born into religions, but that we *can* be.

community to be “a special *kind of association*.”²⁸⁸ Even if our entrance into these communities is not voluntary, what is important is that we can leave them voluntarily. This is commonly referred to as the right to exit.

In terms of the way society treats associations, Rawls argues for a neutral framework within which various associations can coexist. There are two aspects to this neutrality: non-interference in the organisation of the internal life of a group, and non-interference in its survival or dissolution. He does not spell out exactly what kind of freedom this gives associations, or if it allows for anything resembling the group rights advocated by Young and Taylor. The non-interference concept is very similar to a live-and-let-live attitude of tolerance.²⁸⁹ However he specifies that an overlapping consensus is more stable, and more meaningful than a “modus vivendi,” as those endorsing reasonable comprehensive doctrines can agree on basic principles of justice. He accordingly focuses on the limits to their freedom, as the association may not deny its members their basic individual rights. He claims it is a separate question to ask: what principles of justice should regulate the internal life of an association? This is not part of political liberalism, which only asks such groups to find an overlapping consensus on constitutional essentials.²⁹⁰

Rawls does hint at what this freedom for associations could include, and it is a form of group rights, though not as extensive as those defended by differentiated rights theorists, such as Young, Taylor or Kymlicka. In a discussion of religious organisations, Rawls says

²⁸⁸ Rawls, *Political Liberalism*, 40fn.

²⁸⁹ Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 155.

the principles of justice do not require such institutions to be democratically governed. Churches, for example, are not required to elect their leaders, and the distribution of other positions of prestige does not need to follow any particular ‘distributive principle’.²⁹¹

In other words, associations must accept the first principle of justice as fairness. This is part of what qualifies a comprehensive doctrine as reasonable, since the first principle outlines constitutional essentials.²⁹² The difference principle does not apply directly to associations, as the state does not dictate how an association should distribute privileges.²⁹³ In another section, Rawls adds that communities may value its members on a differential basis, depending on how well members achieve or work toward shared ends.²⁹⁴ The freedom to distribute privilege goes so far as to allow the group’s authority figures to revoke all privilege, by permitting, for example, churches to ex-communicate heretics.²⁹⁵ They may do so in part because the principles of justice ensure that individuals disadvantaged within the association always have “other alternatives open to them.”²⁹⁶ In this way, state neutrality gives groups some recognition and status, but the priority is always the protection of individual rights and freedoms.

²⁹⁰ Rawls and Kelly, *Justice as Fairness: A Restatement*, 10-11.

²⁹¹ Rawls, *The Law of Peoples; with "the Idea of Public Reason Revisited"*, 158.

²⁹² Groups that do not accept the first principle should not expect as much freedom. Rawls says we should “contain” such groups, to limit their influence on political discourse. Keep in mind that these are not simply illiberal, but unreasonable groups. They include groups that advocate slavery, or the use of state power to impose their view on others. Rawls, *Political Liberalism*, 64; 151-2fn.

²⁹³ He does say that universities must practice equal opportunity. Technically, equal opportunity is a clause that applies to the difference principle, in order to guarantee liberty. Unfortunately, he does not say if all associations must follow a principle of equal opportunity, or if universities are unique in this respect.

²⁹⁴ Rawls, *Political Liberalism*, 42.; Rawls and Kelly, *Justice as Fairness: A Restatement*, 20.

²⁹⁵ Rawls and Kelly, *Justice as Fairness: A Restatement*, 11.

²⁹⁶ Rawls, *Political Liberalism*, 42.

This may seem obvious, but it is actually significant. It indicates that associations are not required to promote social equality. Okin worries that orthodox and fundamentalist religious groups might teach their daughters that women are inherently inferior to men. She thinks Rawls should be concerned about this, as it could have the effect of undermining an individual's sense of herself as "a self-authenticating source of valid claims," and thus her political autonomy.²⁹⁷

There is, no doubt, a problem if some citizens have equal rights, but do not regard themselves as worthy of those rights. However, based on what has been said so far, Rawls has treated the concern adequately, as he manages the balancing act of tolerance towards religious difference on the one hand, and gender equality on the other. Rawls concludes that it is sufficient to focus on the political realm, as this will indirectly affect comprehensive doctrines. While he does not prohibit the propagation of racist and sexist doctrines within associations, unequal political rights such as slavery or serfdom are excluded from political discourse; their implementation is not an option. He hopes that continued talk of equality in the political realm will encourage citizens to "reinterpret their religious doctrine" or cause those aspects of the doctrine to diminish in popularity.²⁹⁸

This brings us to how society ought to be neutral in the sense that it does not promote any particular conception of the good or comprehensive doctrine, and so does not interfere in the success or failure of a particular social group. This is what makes Rawls's recognition of social groups less extensive than what is demanded by differentiated rights

²⁹⁷ Susan Moller Okin, "Political Liberalism, Justice, and Gender," *Ethics* 105, no. 1 (1994): 30-32.

²⁹⁸ Nussbaum, "Rawls and Feminism," 510.

theorists. In his early writings, he explains that the government should be neutral between different conceptions of the good, “not in the sense that there is an agreed public measure of intrinsic value or satisfaction with respect to which all these conceptions come out equal, but in the sense that they are not evaluated at all from a social standpoint.”²⁹⁹ Similarly, in *A Restatement*, Rawls argues that the state should not interfere in the success or failure of a comprehensive doctrine beyond the guarantee of basic rights and freedoms.³⁰⁰

In other words, if a comprehensive doctrine demands the infringement of individual rights in order to survive, it is considered unreasonable.³⁰¹ Rawls considers the issue of certain religious groups and their desire to separate themselves from the modern world.³⁰² Such religious communities want to shelter their children from the ‘corruption of the modern world’. Regardless, political liberalism requires that children be equipped to understand their rights, and, in particular, to understand that when they are old enough they are legally free to leave their community. This policy is meant to ensure that membership “is not based simply on ignorance of their basic rights or fear of punishment for offences that are only considered offences in their religious sect.”³⁰³ The conflict between the demands of isolationists and the requirements of political liberalism is highlighted in a few contemporary legal cases. It is reflected in the Amish community’s request to have their

²⁹⁹ John Rawls, "Social Unity and Primary Goods," in *Collected Papers*, ed. Samuel Richard Freeman (Cambridge, Mass. ; London: Harvard University Press, 1999), 373. The issue is discussed in Will Kymlicka, "Liberal Individualism and Liberal Neutrality," *Ethics* 99, no. 4 (1989): 886.

³⁰⁰ Rawls and Kelly, *Justice as Fairness: A Restatement*, 155.

³⁰¹ *Ibid.*, 64.

³⁰² Kymlicka and Norman, "Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts," 22. Kymlicka and Norman categorize this as a concern for special rights coming from ‘isolationist’ religious groups, and cite the Hutterites and Amish as examples.

³⁰³ Rawls and Kelly, *Justice as Fairness: A Restatement*, 156.

children removed from school before the age of sixteen. This is not necessarily problematical, so long as they show that the children have received adequate civic education before they quit school. But the Amish would not be permitted to completely shelter their children, thereby preventing them from learning anything about the modern world.

An example of this type of total segregation is the curricula taught in some Christian fundamentalist schools in the United States. In these programs, Christianity is taught as the “only way.” Questioning the teacher is not permitted. Jeff Spinner-Halev adds a concern regarding the homogeneity of the student body, as they will not likely be exposed to a significant diversity of ideas or lifestyles, or get much practice cooperating with others who are different.³⁰⁴

The conflict between political liberalism and religious group rights in this case results from the possibility that civic education for all children may encourage individuals to leave their community in greater numbers than in cases where the community has *complete* control over the education of their children. Such a conflict may indeed threaten the survival of the community. Nevertheless, there is some room for accommodation, as this concern does not necessarily exclude the possibility of private, religious schooling, although it does require some common curricula across different forms of education. We should not take this to imply that Rawls believes that communities are without value. On the contrary, he says that the passing away of communities and different ways of life is

³⁰⁴ Jeff Spinner-Halev, "Extending Diversity: Religion in Public and Private Education" in *Citizenship in Diverse Societies*, ed. Will Kymlicka and Wayne Norman (Oxford: Oxford University Press, 2000), 75-78.

something to lament. But civic education is owed to children as future citizens. This reflects an idea that has already been discussed in depth in this thesis: political rights and freedoms are fundamental and universal. The demise of a culture is regrettable, but it does not trump individual rights.

I agree with Rawls that civic education for all children is a reasonable requirement, but I would argue that while this model of neutrality is acceptable for dealing with some issues that result from divergent religious doctrines, it is inappropriate for some cultural communities and historically oppressed groups. Note that Christianity is the dominant religion in the United States; so Christian fundamentalists are not what writers generally have in mind when they discuss multiculturalism, though fundamentalists may also be affected by multicultural policies. The Christian ‘way of life’ is not threatened in the United States, so Christian fundamentalists will find some of their practices and beliefs supported, even if other requests are restricted. Minority cultures or subcultures, in contrast, might find their entire way of life threatened. In light of this, we can see that there are two problems with the model of state neutrality. First, as Kymlicka convincingly argues, in some cases we do have a reason to be concerned about the survival of a culture, and should take measures to protect it. Second, in a multicultural society, the state cannot always be neutral with respect to different cultural communities.³⁰⁵ Therefore, not only does the state have a reason to be concerned about the survival of such communities but the state also (perhaps unintentionally) contributes to a minority culture’s demise. This makes the state’s treatment of different cultures an issue of equality, which a conception of justice should

consider. Young adds that this not only applies to culture, it applies wherever structures exist that privilege some social groups over others:

“If particular gender, racial or ethnic groups have greater economic or political power, their group related experiences, points of view, or cultural assumptions will tend to become the norm, biasing the standard procedures of achievement and inclusion that govern social, political and economic institutions.”³⁰⁶

In such situations, a purportedly group-neutral approach only denies the way the majority perspective is taken to be the norm.

Recognition of Cultural Groups

In the previous chapter we saw that Rawls’s theory can leave room for the possibility that we identify closely with a given culture. This is because he understands that any association can be important for individuals, therefore he does not give culture a unique status. A cultural community is just a ‘special kind of association’. We also saw that most critics focus on the voluntary nature of the association model as the problem for an interpretation of culture. They tend to emphasize that we do not create cultural groups, and that we cannot leave them in the same way that we can leave associations.³⁰⁷ While I agree that cultural communities are misunderstood if they are thought of as associations, such assessments focus on the way culture limits an individual’s capacity for autonomy, which I maintain is not a problem in Rawls’s conception of justice.

Kymlicka’s argument for multicultural rights does not rest solely on the premise that culture is a constituent of individual identity. According to him, the protection of a

³⁰⁵ Kymlicka and Norman, "Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts," 10.

³⁰⁶ Young, "Together in Difference: Transforming the Logic of Group Political Conflict ", 163.

³⁰⁷ Parekh, 162.

cultural community is a *precondition* for liberty. Our freedom to accept or reject various conceptions of the good requires a range of options, which our cultural community provides. We become aware of these options through the medium of our language and history. Our capacity for autonomy, and our freedom of choice is dependent, then, on our cultural structures.³⁰⁸ Thus, while the principles of justice enable diversity to flourish by protecting the basic rights and liberties of individuals as citizens, Kymlicka demonstrates that justice will also require special minority rights to protect some cultural structures in order to enable the exercise of those freedoms.

Note, however, that this does not challenge Rawls's conception of the self. Kymlicka is concerned with culture to the extent that it is an individual's "context of choice." Based on this definition, culture lays out in front of us a variety of possibilities and meanings, which can be taken up, reflected on, challenged and modified. He focuses on culture as a structure within which we choose our rational life plans. He thus distinguishes his sense of culture from the common usage that refers to the particular character of a culture.³⁰⁹ The particular "character" of a culture is important to his account to the extent that he restricts his discussion to societal cultures, or "a culture which provides its members with meaningful ways of life across the full range of human activities, including social, education, religious, recreational, and economic life."³¹⁰ Thus, even though his emphasis is always on culture as a context of choice, it is the shared history and

³⁰⁸ Kymlicka, *Liberalism, Community, and Culture*, 164-66.

³⁰⁹ *Ibid.*, 166.

³¹⁰ Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 76.

meanings of a cultural group that give content to a particular context of choice and explain why individuals have a claim to protect “their own” culture.³¹¹

The problem is that, in a multicultural society, the survival of a minority culture can be threatened.³¹² The focus on societal cultures means Kymlicka is primarily concerned with nations, or well-established historical communities that are “more or less institutionally complete” and geographically concentrated.³¹³ Yet, despite their establishment, in a multinational state there is a dominant culture, and the survival of national minorities is at risk. Consider the situation of the Aboriginal communities in Canada. Historically, where there was commercial interest in a particular area inhabited by Aboriginals, the actions of the companies involved led to the disintegration of the Aboriginal community.³¹⁴ Other examples of national minorities include the numerous Indigenous communities around the world, Quebec, Puerto Rico, Basque territories and Catalonia.

The concept of the group as association does not capture the way in which culture is one’s context of choice. While Kymlicka focuses on autonomy in general, his argument shows how one’s specific culture is necessary for Rawls’s political autonomy. The capacity to form a rational life plan is one of the moral powers required for political autonomy and citizenship. When the existence of a cultural structure is threatened, it is insufficient to simply regret its extinction. The near complete dropout rate of Aboriginals in

³¹¹ Ibid., 84-86.

³¹² Ibid., 5. In this context “multicultural” refers only to the coexistence of two or more cultures within one state, and not to any particular policies.

³¹³ Ibid., 11.

integrated schools demonstrates how a vulnerable cultural structure erodes individual members' ability to form a conception of the good as opposed to merely eliminating a particular choice.³¹⁵

The Impossibility of Neutrality

Inattention to culture does not come, as communitarians allege, from a misunderstanding of how important culture is for individuals. Rather, the reason for the absence of culture in Rawls's work flows from an assumption that a political community will be culturally homogenous. Rawls never says this explicitly, but there are a few passages that suggest it. Rawls puts culture and society together when he discusses the difficulty that individuals experience when they leave their *country* because of how ingrained their *culture* is and how deeply it can shape someone's life.³¹⁶

Rawls's treatment of culture is most likely the result of his assumption that a society is self-sufficient and individuals enter it only by birth and exit only by death. This assumption is supposed to restrict the question of justice to the relationship between the individual and the state. It is meant to force us to take seriously the idea that we must live in accordance with the principles we choose, by removing the possibility of leaving if we are unsatisfied with the results. Once we get this first question right, we can then consider questions regarding international justice, and the related issue of immigration.³¹⁷ This

³¹⁴ Kymlicka, *Liberalism, Community, and Culture*, 148.

³¹⁵ *Ibid.*, 145.

³¹⁶ Rawls and Kelly, *Justice as Fairness: A Restatement*, 94. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 86.

³¹⁷ Rawls, *Political Liberalism*, 40-41.

assumption has unacceptable consequences, however, as the reality of cultural diversity present in most countries makes the kind of neutrality Rawls describes impossible.

In a multicultural society, the state cannot be neutral with respect to culture, as it can with religion. While it is possible “for a state not to have an established church,”³¹⁸ political functions and deliberations must take place in a particular language and there is a limit as to how many languages can be officially recognized and used in public forums.³¹⁹ The government will similarly support some cultures and disadvantage others through its choice of “internal boundaries, public holidays, and state symbols.”³²⁰ Culture is embodied in public institutions, making it impossible for the state to be neutral in this respect.³²¹

This implies that national minorities demanding multicultural rights³²² are not seeking special privilege. Rather, “they are simply asking for the same sort of rights taken for granted by the majority culture.”³²³ Rawls’s theory should be concerned about this kind of injustice. This is about justice *between groups*. To reiterate, because his conception of the group is limited to associations, his theory falls short here.

While the absence of cultural diversity is highly problematic for Rawls’s theory, Kymlicka extends Rawls’s theory to include minority rights. He connects these rights with Rawls’s theory of unfair disadvantage, as they would help mitigate the inequality that

³¹⁸ Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 111.

³¹⁹ Phillips, 111.; Alison M. Jaggar, "Multicultural Democracy," *Journal of Political Philosophy* 7, no. 3 (1999): 310-12.

³²⁰ Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 108.

³²¹ Iris Marion Young, "Rawls's Political Liberalism," *The Journal of Political Philosophy* 3, no. 2 (1995): 184.

³²² For this reason, I will refer to Kymlicka’s argument as supporting minority rights, or multicultural rights. This is contrasted with Young’s “differentiated rights,” as they apply to more than just cultures and include women, who do not constitute a minority.

results from the way the basic structure disadvantages members of a minority group.³²⁴

Recall that Rawls's theory is intended to mitigate "the effects of natural accident and social circumstance."³²⁵ As Putnam explains, "Rawls assumes that the least advantaged group is *economically* disadvantaged."³²⁶ Rather than abandon Rawls's principles of justice, we ought to pay attention to the 'multiplicity of least advantaged positions'.³²⁷

At this point, we should be clear about the kind of rights Kymlicka thinks legitimately protect a cultural structure, and how these connect to Rawls's conception of justice. Because he focuses primarily on national minorities, he advocates self-government rights, giving them some territorial and political autonomy.³²⁸ For example, he argues that in Southern Canada, non-Aboriginals should be prohibited from living on or buying land on the reserves. In the North, his concern is over protecting resources from temporary workers, who might form the majority while they are working there. This vulnerability justifies denying non-Aboriginals the right to vote, unless they meet a minimum residency requirement.³²⁹ He also advocates a right to guaranteed representation in the dominant political institutions, to ensure their interests are heard by the majority in the larger political context.³³⁰ Rawls's work could thus be expanded to include this category of minority right, by considering the perspective of national minorities as an instantiation of the least-advantaged group, because their context of choice is threatened.

³²³ Will Kymlicka, ed. *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995), 10.

³²⁴ Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 109.

³²⁵ Rawls, *A Theory of Justice*, 86.

³²⁶ Putnam 321.

³²⁷ Putnam 319-323.

³²⁸ Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 27.

³²⁹ Kymlicka, *Liberalism, Community, and Culture*, 147.

Immigrant cultures can also be threatened in a multicultural society. If special measures are not in place to protect their culture, the language of recent immigrants is often no longer spoken in the home by the third generation.³³¹ But these are not societal cultures because there is no institutional structure in place. In many cases, immigrants chose to leave a country where their cultural structure was stable. It therefore does not make sense to give immigrant groups rights to self-government. In any case, this is not what they request.³³² Rather they are concerned about fair treatment, as the state can be non-neutral with respect to such groups as well.³³³ The recognition and special rights they want are what Kymlicka calls “polyethnic rights,” which consist primarily of exemptions from laws that penalize and policies that encourage bilingualism. These rights facilitate their integration into the new country, by enabling them to maintain their distinct culture while participating in the dominant economic, political and social institutions.³³⁴ For example, public holidays reflecting the calendar of the dominant religion unfairly disadvantage groups whose holy days do not correspond. In these cases, neutrality is not impossible, but it can only be achieved by recognizing the diversity of cultural groups that exist within a given territory, including attention to the way the dominant culture is embodied in institutions. Without attention to groups, the state will tacitly support a particular comprehensive doctrine: that of the dominant group.

³³⁰ Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 32.

³³¹ *Ibid.*, 78.

³³² *Ibid.*, 14-15.

³³³ *Ibid.*, 114.

³³⁴ *Ibid.*, 86-101.

This is the position held by Gerard Bouchard and Charles Taylor in their justification for reasonable accommodations in Quebec. Their definition of neutrality corresponds nicely to Rawls's stance of non-interference, especially given his account of reasonable pluralism. Describing the standpoint of the Quebec government, they explain:

The secular State must be neutral in respect of all religions...it must maintain its position of neutrality when faced with deep-seated moral convictions, whether they are religious or secular. However, the secular State is based on a moral code and on certain principles that are non-negotiable...Ideally, all citizens must share these same principles and political moral code, although their deep-seated convictions may differ.³³⁵

That this objective might require the reasonable accommodation of difference through policies that resemble Kymlicka's polyethnic rights is telling. It implies that polyethnic rights are consistent with, and indeed required by Rawls's position of neutrality.

This list of minority rights is meant to be provisional, as there are cultural groups that do not fit into either category of national minority or voluntary immigrant; for example, refugees and African Americans.³³⁶ Nor does this include other social groups such as women, gays and lesbians, and the disabled, as they do not constitute cultures so much as "cut across cultures."³³⁷ Agreeing that these groups are left out on this 'societal cultural,' model of group rights, Young advocates a more capacious view. She emphasizes how all historically oppressed groups require recognition of their difference in order for justice to be done. Much like recent immigrants, these groups suffer inequality compared to the dominant group. This requires attention to the processes that disadvantage oppressed

³³⁵ Gérard Bouchard, Charles Taylor, and Québec (Province). Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, "Building the Future a Time for Reconciliation: Abridged Report," (Québec: Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, 2008). <http://collections.banq.qc.ca/ark:/52327/66286>, 44.

³³⁶ Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 25.

³³⁷ *Ibid.*, 19.

social groups, such as normalization, marginalization and exploitation. This will not occur through a difference-blind approach, for “to remove unjust inequality it is necessary explicitly to recognize group difference and either compensate for disadvantage, revalue some attributes, positions, or actions, or take special steps to meet the needs and empower members of disadvantaged groups.”³³⁸

I agree with Young that attention to groups should not be limited to cultures. But we can move past the limitation of the societal cultural model if we focus not on the examples Kymlicka gives, but on his argument for differentiated rights. What Kymlicka added to Rawls’s treatment of groups is a method for determining whether a group has a legitimate claim to minority rights. The remedy might not always be the same, but in each case a disadvantaged group could demonstrate the inequality that exists, how they are vulnerable to the majority, and how this vulnerability threatens the autonomy of their members, in order to show that appropriate measures should be taken.³³⁹ This avoids Rawls’s concern that attention to all social groups is an impossible task, as Kymlicka’s proposal identifies which social groups are relevant.

Working within a Rawlsian framework, it should not be surprising that we will find many similarities in the ways in which Rawls and Kymlicka treat groups. The principle difference is that Rawls’s liberalism lets minority cultures die out, while Kymlicka gives some of them a *bona fide* legal status. At this point, we have to ask: does giving legal

³³⁸ Young, "Structural Injustice and the Politics of Difference," 364.

³³⁹ This does not, therefore, justify differentiated rights for minority groups that are more powerful than the majority, as in the South African apartheid system, which exacerbated inequality. See Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 36.

recognition to cultural groups go too far in the opposite direction? The coherence of minority rights with individual rights is insufficient, however, as the existence of structures of inequality internal to cultural groups is sometimes used to discredit special measures to preserve these cultures. As Kukathas argues, “The divided nature of cultural communities strengthens the case for not thinking in terms of cultural rights.”³⁴⁰ In general, this position claims that minority rights are not justified if they simply reinforce a *different* inequality. More specifically, Okin worries that rights for cultural groups gives power to male members as “patterns of socialization, rituals, matrimonial customs and other cultural practices...make it virtually impossible for women to choose to live independently of men, to be celibate or lesbian, or to decide not to have children.”³⁴¹ In other words, she worries that cultural practices often directly limit a woman’s freedom of choice. She lists “clitoridectomy, polygamy, the marriage of children or marriages otherwise coerced” as examples of practices that should not be accommodated through polyethnic rights, because of the harm they could cause to women.

Despite the sensationalism of these examples, and the scant research used to support her claims,³⁴² within the liberal framework she is right to demand that the resolution of one inequality not simply reinforce a different one. Cass Sunstein examines cases of gender discrimination in religions, finding: “certain Jewish schools refuse to admit girls,” “a Catholic university refuses to tenure several women teachers,” and “Mormon

³⁴⁰ Kukathas, "Are There Any Cultural Rights?," 236.

³⁴¹ Okin, "Is Multiculturalism Bad for Women?," 14.

³⁴² Phillips, 2.

employers...refuse to hire women for certain jobs.”³⁴³ This starts to give us a picture of more widespread discrimination.

Cultural and religious groups are not only divided by gender. Phillips adds a concern for the way minority rights might oppress the poor, children, and gays and lesbians who make up other internal minorities.³⁴⁴ As Joseph Raz explains, in many cultures, “repression of homosexuality is widespread...as is blindness to the needs of many people whose physical abilities or disabilities, or psychological needs, fail to conform to the approved ways of the community.”³⁴⁵ Children are particularly vulnerable, if a request for an exemption from laws has the effect of limiting their autonomy by emphasising loyalty and obedience, as we saw with the examples discussed at the beginning of this chapter.³⁴⁶

For the remainder of this chapter I will examine whether these concerns regarding the fair treatment of internal minorities undermine Kymlicka’s approach to minority rights. The concern can be divided into three related issues: First, does Kymlicka’s argument for minority right conceptualize culture in a way that is too rigid to allow for a group’s self-transformation? Second, does it reinforce an internal inequality? Finally, does it represent the culture as a unified whole, thereby silencing internal movement for change? Though it is a legitimate concern, I will argue that the problem of internal minorities does not support a rejection of minority rights. Indeed, Rawls’s conception of voluntary social groups and

³⁴³ Cass R. Sunstein, "Should Sex Equality Law Apply to Religious Institutions?," in *Is Multiculturalism Bad for Women?*, ed. Susan Moller Okin et al. (Princeton: Princeton University Press, 1999), 86-87.

³⁴⁴ Phillips, 12.

³⁴⁵ Joseph Raz, "How Perfect Should One Be? And Whose Culture Is?," in *Is Multiculturalism Bad for Women?*, ed. Susan Moller Okin et al. (Princeton: Princeton University Press, 1999), 96.

his position of non-interference will be subject to the same sort of problems. Instead of rejecting minority rights, I find Kymlicka makes important progress in this area. The minority rights he defends are justified *because* they are good for individuals. He thus advocates ‘weak multiculturalism’, meaning that he pays attention to who bears the costs of the minority right.³⁴⁷

I agree with Kymlicka’s project to support both minority rights to protect the group, and respect the individual’s right to revise or reject a particular cultural practice, though I emphasize Rawls’s political liberalism as a preferable foundation for minority rights, than the comprehensive liberalism Kymlicka endorses. Otherwise Kymlicka’s theory is relatively impervious to the problem of internal minorities, with the exception of the veto rights he gives to national minorities as a part of their self-government rights. However, attenuating this aspect of his theory does not require eliminating minority rights altogether.

Rejecting a Solidified Notion of Culture

One of the ways in which recognition of cultural groups can be problematical for internal minorities is if it reifies an essentialist view of cultural identity. As we saw in the second chapter, Rawls’s treatment of groups cannot be labelled essentialist. It is not an issue for Rawls’s treatment of groups because their *identity* is not recognized so much as the right individuals have to come together and work towards a common goal. There is no

³⁴⁶ Avigail I. Eisenberg and Jeff Spinner-Halev, "Introduction," in *Minorities within Minorities: Equality, Rights, and Diversity*, ed. Avigail I. Eisenberg and Jeff Spinner-Halev (Cambridge: Cambridge University Press, 2005), 2.

³⁴⁷ Shachar, 29.

need to distinguish individuals according to groups, except to identify the least advantaged, to ensure they have the means to achieve substantive equality.

Some writers worry that land rights appeal to a romanticized image of indigenous groups as having a special relationship with nature. This undermines the identity of Aboriginals who live in the city. In a related manner, some environmentalists have urged that reservations should be “protected” from modernization.³⁴⁸ This similarly has the effect of essentializing their identity, and can make change difficult – both symbolically in terms of how the identity of Aboriginals is viewed by members and non-members, and concretely, in terms of modernizing life for those living on the reservations, or by discouraging those who wish to live or work outside the reservation.

This concern emanates in part from the tendency for recognition to protect already-existing identities, especially given Kymlicka’s focus on societal cultures and their well-established institutions. These minority rights are intended to be fixed in law, which has the power and tendency to “solidif[y] the group into something very substantial.”³⁴⁹ How much room does he leave for a culture to change itself, or to recognize “newly constituted and recreated identities” that have yet to be formed?³⁵⁰

Kymlicka avoids the problem of essentialism by focusing on the structure of a culture as opposed to its character. As a result, there is no particular trait, practice or ritual necessary to define a culture. Rather, he is concerned with the institutions and the language through which one’s culture is expressed. That is to say, he seeks to protect the places

³⁴⁸ Deutscher, 48.; Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 104; 218 fn 30.

³⁴⁹ Phillips, 19.

where ceremonies can be held, schools where ideas and practices can be taught, and governments or forums to choose community leaders. The particular practices can always be challenged but the institutional structure must be there. Kymlicka concludes that this leaves room for the group to transform itself.

Internal Structures of Inequality

Clearly, Kymlicka's conception of multiculturalism is intended to protect a minority group's institutions when they are vulnerable to the majority's decisions. He calls these rights "external protections," because they limit the rights of the majority, and distinguishes them from "internal restrictions," which limit the rights of the members of the minority.³⁵¹ Like Rawls, Kymlicka specifies that he does not defend the kind of internal restrictions that could conflict with constitutional essentials. Traditions of arranged marriages, or practices of clitoridectomy – when these are imposed on members who do not want to partake in such practices – are not justified simply because they are part of a particular culture's traditions or history.³⁵²

As part of the protection of rights and freedoms for the members of a minority group, Kymlicka adds that the minority groups must respect other liberal principles such as gender equality and individual autonomy to be eligible for special rights. Illiberal groups, then, should be tolerated without imposing liberal values on them, but they will not be eligible for minority rights. The group rights Kymlicka defends are therefore only

³⁵⁰ Deutscher, 5.

³⁵¹ Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 109-110.

³⁵² *Ibid.*, 41.

somewhat more extensive than Rawls's. Indeed, his distinction between internal restrictions and external protections is supposed to eliminate all costs to internal minorities by disqualifying some claims altogether.

Okin thinks that if we take this distinction seriously – as she does – then we would have to conclude that no cultural rights are justifiable. She claims no culture “passes the no sex discrimination test” so his distinction is bound to fail. In fact, she finds that most claims for special cultural rights concern gendered issues and protection for that culture may reinforce an internal structure of inequality, as “most cultures have as one of their principle aims the control of women by men.”³⁵³

To be clear, Kymlicka's requirement that a culture accept liberal principles of autonomy and gender equality applies to self-government rights, as these rights transfer power to political subunits. National minorities must be liberal, because self-government rights gives leaders increased authority over their members, while this legal-jurisdictional authority does not accompany polyethnic rights. Agreeing with Kymlicka, it would not make sense, for instance, to deny Sikhs the exemption from helmet laws on the grounds of gender inequality within the Sikh community. That sort of exemption does not reinforce an internal inequality.

However, Kymlicka's distinction is likely to permit some polyethnic rights that facilitate the kind of practices Okin is concerned about, so long as they are the result of autonomous choice. Generally, Kymlicka supports the exemptions or privileges necessary to maintain a cultural practice for those who chose to uphold it but also supports individuals

who choose to reject it. Polygamy, for example, does not undermine anyone's basic rights, so long as the parties are fully consenting. As Parekh points out, wearing the hijab, arranged marriages and cliterodectomy are in some cases "complex autonomous" acts.³⁵⁴

Yet Okin thinks no support should be given to facilitate these practices, as those who engage in them often "openly acknowledge that the customs persist at men's insistence" and that they are *intended* to control women.³⁵⁵ She even goes so far as to reject the idea that illiberal groups should be tolerated.³⁵⁶ Not only does she oppose exemptions from laws, it seems she would also support proactive policies like the law passed in Denmark in 2005 which bans the Niqab or Burka in any public space, as well as the policies that ban the hijab in public schools, even though this form of dress did not contradict any prior laws or policies.³⁵⁷

Note that Okin's position is not satisfied by Rawls's liberalism either. Rawls's also permits discriminatory practices within religious organisations, such as those described by Sunstein. As we saw in the beginning of this chapter, Okin is concerned about this too. This is because Okin advocates a form of comprehensive liberalism, as opposed to Rawls's political liberalism. As Nussbaum explains, "It seems to her half-hearted for the state to endorse equal citizenship and not to construct, and vigorously support, the rest of a

³⁵³ Okin, "Is Multiculturalism Bad for Women?," 13.

³⁵⁴ Bhikhu Parekh, "A Varied Moral World," in *Is Multiculturalism Bad for Women?*, ed. Susan Moller Okin et al. (Princeton: Princeton University Press, 1999), 73. Parekh explains that some women choose to have a cliterodectomy after having their children, to emphasize their role as a mother first, marking a rite of passage and a break with their past lives. However we should nuance the issue by discussing genital cutting, as opposed to the removal of the entire sexual organ and add that women must have full knowledge of the possible effects of this operation.

³⁵⁵ Okin, "Is Multiculturalism Bad for Women?," 14.

³⁵⁶ *Ibid.*, 11.

comprehensive way of life that protects it by teaching a comprehensive doctrine of sex equality.”³⁵⁸

Rawls’s political liberalism is preferable for two reasons. First, we would not be able to form an overlapping consensus on the metaphysical equality of men and women. As a result, enforcing such liberal principles on non-liberal, though reasonable groups would require the use of the state’s coercive apparatus. Secondly, and more importantly, as we saw in the second chapter, political liberalism respects the possibility that an individual might choose to live a “communitarian” life; characterized by obedience and submission, so long as they agree to the value of political autonomy.

Okin’s position stems from an erroneous assumption that all women experience their culture in the same way.³⁵⁹ Take the hijab for example. In the sociological literature, it is described as both a “symbol of women’s subordination,” and “an expression of women’s agency.”³⁶⁰ Wearing the veil was used as a sign of protest against the Shah government in Iran.³⁶¹ Other women choose to wear the veil against the advice of their husbands or families, making it difficult to see the veil as necessarily reflecting the wearer’s passivity. As part of the mosque movement in Egypt, it is worn as a sign of submission to God, and not to men.³⁶² The autonomy involved in the decision to live a life of devotion and submission to God, and to a patriarchal tradition, is somewhat paradoxical,

³⁵⁷ Phillips, 8; 115-116.

³⁵⁸ Nussbaum, "Rawls and Feminism," 515.

³⁵⁹ Bonnie Honig, "My Culture Made Me Do It," in *Is Multiculturalism Bad for Women?*, ed. Susan Moller Okin et al. (Princeton: Princeton University Press, 1999), 37.

³⁶⁰ Phillips, 117.

³⁶¹ Homa Hoodfar, "The Veil in Their Minds and on Our Heads: The Persistence of Colonial Images of Muslim Women," *Resources for Feminist Research* 22, no. 3/4 (1993): 12.

but not unlike the example of the traditional woman discussed in the previous chapter. It is possible for a religious, pious life to be the result of critical reflection on the kind of life one wants to live.

We must pause for a moment, as Kymlicka also claims to advocate a comprehensive liberalism that values individual autonomy, as we saw at the end of the previous chapter, with his critique of Rawls's public/non-public distinction. Kymlicka's theory is actually more consistent with political liberalism. For while the value of individual autonomy forms the foundation of his theory of minority rights, he separates this from the question of how a liberal government should treat illiberal groups, who do not share liberal values.³⁶³ As we have already seen, he advocates tolerance, and so has the same outcome as Rawls's political liberalism. Kymlicka also considers non-liberal groups to be eligible for polyethnic rights, in the form of external protections. He also clearly does not want to deny that some might choose to uphold one's cultural traditions.

Building a defence of minority rights on Rawls's political liberalism is preferable to comprehensive liberalism, which rules out some lives as not worth living. It also explains why polyethnic rights are not contingent on the liberalism of the group, and why illiberal groups should be tolerated, though not accommodated. More importantly, it explains why the existence of hierarchies within a culture does not undermine Kymlicka's minority rights. For unless the minority right entails giving increased authority to a community's leaders, as is the case with self-government rights and internal restrictions, the organisation

³⁶² Phillips, 117.

³⁶³ Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 164.

of the group is irrelevant. There is nothing incoherent about supporting the survival of a culture by providing legal exemptions that permit different cultural practices while simultaneously supporting an individual's refusal to partake in those practices.³⁶⁴

Consensus

Okin uses such controversial examples, in order to emphasize how culture practices can be supported by the state even if a large portion of the minority group's members contests them.³⁶⁵ She is concerned that minority rights silence dissenters, who seek to change discriminatory practices. Anne Phillips similarly considers how "discourses of culture allow the more powerful members of a group to codify what are normally changing and contested practices, thereby establishing their own authoritative readings that they employ to enforce conformity among group members."³⁶⁶ The acceptance and support of polygamy for example, "legitimizes multiple wives for men"³⁶⁷ and undermines the criticism of women in Africa and France.

When Kymlicka says minority rights protect what the members want, does this really speak for everyone in the group? In the discussion of indigenous groups, he says, "*they* demand the right to decide for themselves what aspects of the outside world they will

³⁶⁴ In practice, it may be hard to distinguish whether the custom is exercised freely, or under coercion. However, in theory, the distinction between coerced and autonomous choice is good. Moreover, developing adequate support measures for coerced individuals, such as education, and legal protection can handle this problem without abandoning group rights, unless the level of coercion is significant.

³⁶⁵ Okin, "Is Multiculturalism Bad for Women?," 14.

³⁶⁶ Phillips, 18.

³⁶⁷ Anne Phillips, "Dilemmas of Gender and Culture: The Judge, the Democrat and the Political Activist," in *Minorities within Minorities: Equality, Rights, and Diversity*, ed. Avigail I. Eisenberg and Jeff Spinner-Halev (Cambridge: Cambridge University Press, 2005), 114.

incorporate into their cultures.”³⁶⁸ In discussing the jurisdiction of the Pueblo Tribal Council, he says they “might well wish to put their trust in tribal courts. If that is the *consensus* amongst the Pueblo, then surely it should be respected.”³⁶⁹ We have to ask, when does such a consensus ever occur, and how it is determined. When the decision-making procedures within a community are not democratic, there may well be a consensus, but in appearance only. When there is no consensus, there is a risk that dissenting groups will be oppressed. For example, when cultural leaders seek to maintain traditional practices, it is a common strategy to portray reformers as ‘self seeking,’ or as tempted by the majority’s culture.³⁷⁰ As a result, we have to be careful of the way the minority rights discourse can be used by a cultural elite to repress movements for change.

To illustrate a thorny instance of this, I will examine the case of Santa Clara Pueblo v. Martinez. In the 1930s, the Santa Clara Pueblo Tribal Council had stated, that if a female member marries outside of the tribe, her children would be denied Indian status, while the children of a man in the same scenario would be fully recognized. In the 1970s, the issue went through the various levels of adjudication when Julia Martinez’s children were permitted to live on the reservation, but were not recognized as Pueblo Indians, because Julia Martinez had married a Navaho man. Ultimately, the Supreme Court ruled in favour of the Tribe, claiming it was necessary for the “Tribe’s cultural survival,” to permit

³⁶⁸ Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 104.

³⁶⁹ Kymlicka, *Liberalism, Community, and Culture*, 197.

³⁷⁰ Yael Tamir, "Siding with the Underdogs," in *Is Multiculturalism Bad for Women?*, ed. Joshua Cohen, Matthew Howard, and Martha Craven Nussbaum (Princeton: Princeton University Press, 1999), 48.

them to determine their own membership policies, even if these are discriminatory.³⁷¹

While he claims that the minority rights he defends would not permit these internal restrictions, Kymlicka agreed with the Supreme Court's decision, claiming that the Tribe's policies should nevertheless be respected as an example of non-interference.³⁷²

In some ways, this is a particularly difficult example, and most likely constitutes what Kymlicka calls an extreme case. Either the self-government of the Pueblo would be undermined, or the state would support "the systematic maltreatment" of women.³⁷³ In either case, a disadvantaged group would lose out. Moreover, Young's more extensive view cannot help us here, as she also concentrates on inequality between groups, as opposed to within groups; thus the problem appears highly specific and potentially entrenched.³⁷⁴

In other ways, the Pueblo case is also typical of a group that lacks consensus. The example shows that Kymlicka's account will tend to support the view of the culture as defined by that culture's elite. As we saw, Kymlicka allows individuals to reinterpret their culture for themselves. His distinction prohibits multicultural policies from being used to force particular cultural practices on its members. Nevertheless, if the group decides to expel the individual as a consequence of their decision, this too must be supported. Therein lies the rub, as this usually means siding with the elite, whose practices may solidify identities in a contestable fashion.

³⁷¹ Shachar, 18-19.

³⁷² Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 40.; Kymlicka, *Liberalism, Community, and Culture*, 196-197.

³⁷³ Shachar, 19.

³⁷⁴ Jaggard, "Multicultural Democracy," 313-314.

We might think that Rawls avoids the problem of internal dissent by focusing purely on citizenship rights. However, his inadequate conception of the group leaves this concern unresolved as well. Phillips discusses a case involving the expulsion of a leader from the Scouts when the Boy Scout Council discovered he was gay. Once in court, the case revealed significant internal disagreement over the discriminatory policy. The Supreme Court nevertheless sided with the group's leadership, referencing that freedom of association "protects a minority association's right to be distinct from the majority."³⁷⁵ This demonstrates that even the clearest example of a voluntary organisation has an internal structure, and the position of the leaders tend to be considered representative of the group.

By focusing on a shared system of beliefs and values, comprehensive doctrines also emphasize strong homogeneity within the group. As we saw, Rawls, like Kymlicka, permits communities to establish their own membership policies, which may be discriminatory, and gives community leaders the right to expel individuals. This makes some sense for religions, when they are defined by belief systems. Indeed, there is a sense in which an individual is no longer Catholic if they do not believe the core tenets of Catholicism. Similarly to Kymlicka, this concept most likely allows for the reinterpretation of a doctrine, whereby individuals can reject some elements and modify others. But the situation becomes more problematical when the group in question is the culture an individual enters by birth.³⁷⁶ The best Rawls's theory can do under the present circumstances is to similarly allow the Pueblo to exclude the Martinez family from the

³⁷⁵ Phillips, *Multiculturalism without Culture*, 155.

³⁷⁶ *Ibid.*, 154-5.

Tribe, even though the justification of their exclusion has nothing to do with belief, but was the result of an individual's marriage choice.

While this may appear disappointing, there is one significant difference in Kymlicka's theory, which has the potential to silence internal minorities in a more profound way. As part of their right to self-government, Kymlicka does not think the Tribal leaders' decisions should be subject to judicial review.³⁷⁷ Young similarly supports giving groups "veto power regarding specific policies that affect a group directly."³⁷⁸ She cites, as her example, giving Aboriginal groups veto power over land use for reservations. This would have prevented the Martinez case from going through the American legal system.

This is a mistake, as it gives unnecessary authority to the community leaders. If individuals or minorities within a group claim their rights are not respected, their claims should be heard. There is no reason to suppose this would diminish the external protections accorded to the group, as the criticism would have to come from a member.

We should also note the way constitutional essentials generally protect the voice of dissenters within minority groups. Vulnerable subgroups and individual members within a minority culture have the right to free speech and protection from violence. They have a safe environment in which they can express their views, no matter how much they diverge from the views held by their community leaders. Thus, organizations like Women Living Under Muslim Laws, who argue for a more progressive treatment of women, based on a reinterpretation of Islamic texts, are free from censorship. Individuals who depart from

³⁷⁷ Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 38-39.

³⁷⁸ Young, *Justice and the Politics of Difference*, 184.

their communities' accepted norms, for example by refusing to wear the veil, are protected under the law.

The diversity within a culture does not necessarily undermine Kymlicka's argument for minority rights. It is a legitimate concern, and it seems the exemption from judicial review attached to the self-government rights he defends unnecessarily gives excess privilege to the leaders of a community, potentially harming sub-groups. But this can easily be denied without also denying self-government rights. Moreover, this problem is only associated with self-government rights, as polyethnic rights do not transfer authority to the community's leaders.

Conclusion

What does all this imply for Rawls's conception of justice? Rawls correctly stresses that individual rights and freedoms are basic, and not up for discussion. However, the state must take measures to ensure that it does not unfairly disadvantage some minority cultures or oppressed groups, and it cannot simply dissociate itself from these concerns. In doing so, it reinforces already existing structures of inequality. Kymlicka's defence of multiculturalism is particularly useful here, as it makes it possible to see minority rights as an extension of Rawls's conception of justice, necessary to achieving real equality. By maintaining that individuals remain the priority in the context of group rights, Kymlicka's account handles the concerns regarding internal minorities. Though his defence of external protection for cultural groups that coexist with rights for individuals is more consistent with Rawls's political liberalism, than with comprehensive liberalism. This allows us to reject

the imposition of cultural practices or traditions on unwilling participants, while maintaining that obedience to culture, and gendered roles can be the object of autonomous choice. One element of Kymlicka's minority rights that must be rejected, is the exemption from judicial review, or veto power attributed to self-government. This goes beyond external protections, by limiting the movements for change that occur within the group. Removing this aspect does not deny the right to self-government as a whole. Group protections can be consistent with individual rights, though it is a careful balance.

Conclusion

After this extensive examination of diversity and justice, we see that we must distinguish the conceptual from the application. For as a method for reasoning about principles of justice, we should abstract from group-based differences, even though this is not the case in the application of those principles, which does require attention to difference.

Despite the arguments presented by the critiques discussed in this thesis, Rawls's original position should not be abandoned, nor is the abstraction of the original position impossible. The veil of ignorance does not require us to imagine ourselves as disembodied and disembodied reasoners, as the parties in the original position are situated by their capacities for a conception of the good and a sense of justice. While I suggest that the assumption that ability "fall within the normal range" be dropped to remove any able-bodied bias, this does not effect the construction of the original position, or the outcome of the principles in any important way. Rather, it emphasizes a more inclusive perspective behind the veil of ignorance, and widens the least advantaged group to include more difficult cases of disability.

In response to those who accept its feasibility but reject its desirability, I argue that the original position offers a powerful tool for combating bias and discrimination, by imagining ourselves behind a veil of ignorance. It justifies a fair arrangement where justice must pay attention to structural disadvantages, and makes agreement possible. That said there are limitations to the original position. Critiques arguing for a method of moral dialogue as an alternative to the veil of ignorance correctly indicate that there is no way to

verify whether our reasons are free of bias. Nor can we be sure that we have come up with the best possible arrangement, or that we fully understand what it is like to be the least advantaged of society. Nevertheless, these limits are acceptable: we can accept that developing a conception of justice is an ongoing process. Indeed this idea underlies Rawls's concept of reflective equilibrium. Incorporating elements of moral dialogue through reflective equilibrium can help improve a conception of justice, as we get a better understanding of the experience of the least advantaged, as well as the social structures that disadvantage individuals differently. None of this suggests abandoning the abstraction of the original position, which remains a powerful conceptual tool for arriving at agreement and combating bias and discrimination.

In this thesis we also discover that the question regarding the recognition of groups in the application of the principles of justice, is not about denying or affirming attention to social group difference. Rather, the question refers to the *kind* of recognition we should give to groups. As we have seen, the 'difference blind approach' does give some protection and recognition to groups and fosters various forms of diversity by protecting and recognizing individual choice. This conception of the group has the added advantage of avoiding the problems of essentialism, which plague other conceptions of groups. Therefore, the charge that *A Theory* is difference blind refers to an *excessive* attention to the individual. More specifically, Rawls is accused of being inattentive to the way social groups are important to individuals. That is to say, he denies the way groups shape an individual's ends, identity and capacity for autonomy.

There is no question that social groups are important *for individuals*, and the concern over *adequate* recognition of difference is important. However, these critics have put the emphasis in the wrong place by focusing on Rawls's conception of the self. He does not assume individuals are born autonomous, but describes the role of the family in fostering that capacity. He also allows for the possibility that an individual may identify closely to a social group, and that it may be very difficult and unpleasant to revise one's ends. His political conception of the self requires only that individuals accept political autonomy, but does not require that individuals value autonomy more generally, or accept a particular conception of the self. That is to say, individuals must accept that for the *purpose of determining their political rights*, they might change their mind, no matter how unlikely it might seem in the moment. In this context, we should be concerned about protecting individual choice. To this extent, we could say that we should take a difference blind approach when it comes to the first principle of justice: all individuals should have the same rights and be treated the same way.

However, Rawls's conception of the group is not robust enough to account for the way individuals are situated by minority cultures or oppressed groups. His focus on voluntary associations and communities leads him to claim that the state ought to be neutral with respect to groups. That is to say, the state should not interfere in the functioning or survival of associations or communities. This does not account for the way cultures provide individuals with a "context of choice," and thus merit state-protection.

Therefore, while abstraction from difference at the conceptual level is appropriate, attention to difference is required in the application of principles of justice. Rawls allows

for attention to difference in order to ensure equal opportunity for the least advantaged. However, his theory must be expanded to include attention to the way individuals can be disadvantaged if their context of choice is threatened. Moreover, the state must be aware of the diversity of disadvantaged groups that exist within a political community, to be sure that the public institutions do not unintentionally favour members of the dominant group.

It is useful to work with Kymlicka's defence of minority rights and remain within a Rawlsian conception of justice, so that we do not lose sight of the fact that individuals are important. However I argue that these minority rights are more consistent with Rawls's political liberalism, as opposed to comprehensive liberalism. Regardless, individuals always remain the priority as the reason for the attention to groups remains that groups are important for individuals. Thus, I defend Kymlicka's condition that group rights do not permit "internal restrictions." I argue that we must further reject veto power for minority groups, as this gives too much authority to cultural leaders.

Despite the need to expand Rawls's conception of justice, it is worth working within the Rawlsian framework. The original position, his conception of the self that defends fundamental human rights, and his political conception of justice are invaluable concepts for the discussion of diversity and justice.

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