

PROCEDURE AND SUBSTANCE
IN
ACCOUNTS OF JUSTICE

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In this thesis I present a philosophical argument that defends a particular approach to the legitimation of substantive principles of justice in the context of a modern society. Philosophy must seek to justify a procedure of legitimation that gives us a conception of an impartial point of view. This procedure could then act as a critical test of substantive claims about justice. However philosophy must not actually carry this legitimacy test out itself. This task must be left to all those who are to be affected by the principles in question. The first of three chapters is a critical analysis of the procedure of impartiality that is outlined by John Rawls. I will argue that a consideration of the views of Rawls's communitarian, post-structuralist and feminist critics reveals that his procedure is flawed in a number of important respects. The most important flaw is the fact that Rawls's procedure represents a monological point of view where all differences between represented parties are eliminated prior to a consideration of substantive principles of justice. In the second chapter, Michael Walzer's attempt to theorise justice without recourse to a philosophical conception of an impartial procedure will be examined. While Walzer's approach has certain advantages over Rawls's, his failure to justify an impartial point of view means that his interpretive account of justice is dangerously partial. In the third chapter I will present a theory of justice that overcomes the weaknesses of both Rawls's monological proceduralism and Walzer's contextualist anti-proceduralism. Jürgen Habermas presents us with a dialogical conception of impartiality that can retain Walzer's context sensitivity without losing the critical edge that a philosophical conception of an impartial point of view brings to a legitimacy test for substantive principles of justice. Furthermore, Habermas clearly separates the philosophical task of clarifying an impartial point of view from the democratic task of legitimating principles of justice. I will focus my attention on the dialogical conception of impartiality that is at the core of Habermas's discourse ethics so as to show that his work is the best available theoretical guide for the necessarily procedural task we face, that of legitimating substantive principles of justice in a modern context.

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INTRODUCTION

To demand justice or to claim that an injustice has been suffered is to engage in the practice of social criticism. In this thesis I wish to explore one aspect of justice as a tool of social criticism in the context of a modern society. Social criticism in any society depends on a descriptive understanding of how the institutions and practices of that society came to be as they are. This involves an analysis of the struggles of the society's history, its achievements and its failures. It is to the work of historians, social scientists and legal scholars that we should look for the resources necessary to inform this descriptive understanding.

But criticism also depends on a normative understanding of the society. This normative understanding can be thought of as a substantive account of justice. Such an account provides a test for historical achievements. It articulates the standards or principles by which the institutions and practices of that society are called to account. A social critic will argue that some aspect of society fails this test of justice. The critic is expressing a tension between the descriptive and the normative understandings of the people to whom the criticism is addressed. This tension should be a matter of public concern, the subject of an informed and inclusive discussion.

My chief concern is to inquire as to how a substantive account of justice is to be grounded and justified. One of the most significant characteristics of a modern society is that people do not share one comprehensive conception of what constitutes a good life for human beings. In a modern society there is not one religious or general philosophical worldview that is shared universally but rather there is a wide ranging plurality of worldviews. Furthermore, people can have very

good reasons for not coming to an agreement about certain comprehensive questions as to what constitutes a good human life. It would appear therefore that no one worldview can ground, by itself, an account of justice which all people in a modern society would have good reason to affirm.

Given the many divergent beliefs about how a human life should be led, and the corresponding variety of lifestyles that are represented in modern societies, it is no easy task to say what it is to give an account of justice. It does seem to be the case however that the notion of impartiality, the idea that no one person or group is arbitrarily favoured by any account of justice that could claim to be legitimate, must be central to our concerns here. Under modern conditions justice must be grounded, not in one comprehensive worldview, but within some framework that treats people who do not share worldviews in an impartial manner. The justification of some such framework has been one of the great questions with which political philosophy, since the Reformation at least, has had to grapple. I will address myself to two questions that are related to this problem.

First, who is qualified to give an account of justice? I will argue that no one philosopher, political theorist or indeed anybody else, is qualified to provide an account of the substance of justice in a modern society. To claim to do so is to overestimate the extent to which any one citizen could adopt an objective and impartial standpoint where the various perspectives of all citizens are equally represented. Philosophers are no more or less qualified than other citizens in this regard. Any citizen, who claims to be able to overcome the difficulties involved here, fails to take sufficiently seriously the very real possibility of disagreements, differences and tensions surfacing between the plurality of worldviews and the social groups they represent in modern societies. A substantive

account of justice can only be produced in an on-going manner, as the outcome of democratic deliberation where this plurality of perspectives is more adequately represented. This could only happen if each social group were to speak and act on its own behalf.

For this reason the attempt to derive philosophically a definitive, substantive account of justice for a living political community would appear to be an unproductive one. To pursue that task would be to deny the historical nature of a community's normative self-understanding by closing off any future discussion or revision. This would involve the assumption that the community's history had reached its end, that public debate about justice could with good reason be closed off since things were not going to change in any significant way in the future. This assumption, that history has no future, has a particularly poor track record.

Second, under what conditions could a substantive account of justice that is legitimate be produced? Even though philosophers are not themselves qualified to give a substantive account of justice, I want to argue that they can attempt to provide a philosophical justification for a procedure that would serve as a legitimacy test for substantive principles of justice. The point of advocating such a procedure is to clarify the criteria according to which a political community could judge legitimately between competing claims about justice under particular circumstances. In making this argument I will draw on the work of Jürgen Habermas.¹ According to Habermas, philosophers can, and should, refrain from claiming any special qualification to give a substantive account of justice.

¹ See especially *Moral Consciousness and Communicative Action*, Cambridge, UK: Polity Press, 1990 and *Justification and Application: Remarks on Discourse Ethics*, Cambridge, UK: Polity Press, 1993.

They can however, simultaneously, defend a discursive procedure of legitimation that places certain normatively justified constraints on the on-going democratic deliberation that yields principles of justice for particular political communities.

The discussion is divided into three chapters. Each of these will examine an influential and important theoretical contribution to recent debates about justice. John Rawls has defended what is perhaps the most celebrated theory of justice of this century.² Rawls presents a procedure of legitimation that claims to specify the conditions of an impartial point of view. He also derives from that procedure two substantive principles of justice that are to regulate the basic structure of a modern democratic society.³ In the first chapter I will assess the procedure he presents as a philosophical articulation of conditions of fairness for the choice of substantive principles of justice. The discussion offers a critique of Rawls's procedure by reconstructing arguments that could be made from the theoretical perspectives of communitarianism, post-structuralism and feminism. After anticipating this critique, in the first section, with reference to Marxian objections to contractarian approaches to justice in general, I will develop arguments from each of these three perspectives in the remaining three sections of the chapter.

My suggestion in this chapter is that Rawls's procedure is excessively theorist-centred. By this I mean that it depends too much on the

² His most important work is *A Theory of Justice*, Oxford: Oxford University Press, 1972 but for recent developments in his defence of the argument made there *Political Liberalism*, New York: Columbia University Press, 1993.

³ Although it is not the case in *A Theory of Justice*, it is clear in *Political Liberalism* that Rawls's procedure is justified with reference to the particular traditions of Western democratic societies. The significant difference between this type of justification and the strictly universalist one that Habermas offers for his theory of justice is one of the central themes of this thesis.

unwarranted assumption that a constructivist philosopher, such as himself, can know what all other citizens will agree on to be matters of justice. I will focus on Rawls's attempt to isolate political aspects of citizens' morality from all other aspects of their moral views because I believe that this attempt highlights this theorist-centred assumption. Rawls is forced to make this assumption because of the fact that he theorises impartiality in, what I will call, a monological way. It is a monological in that all citizens of a democratic community are presumed to reason, in isolation from each other, in exactly the same way from an impartial point of view. On this account no real differences between citizens are articulated within the framework of an impartial procedure.

The monological nature of this procedure leads Rawls to argue, mistakenly in my view, that he can derive, as an integral part of the theory, certain definitive and substantive principles of justice for a modern democratic society. Rawls's procedure does not reflect adequately the full variety of perspectives among social groups that one can expect under conditions of modern pluralism. A philosopher must never assume, prior to public deliberation, that some certain aspects of the moral views of citizens are political, and therefore of public concern in relation to the demands of justice, while other aspects of the citizens' moral views are not. The relation between the political and the non-political must itself be treated as a subject of on-going debate among all the citizens of a democratic community.

In the second chapter I will consider the work of one political theorist who rejects entirely the claim that philosophy can defend a procedure of legitimation for substantive accounts of justice. Michael Walzer rejects proceduralism for the sake of democratic pluralism.⁴ He believes that no

philosophically articulated procedure of impartiality can reflect adequately the real differences among the citizens of modern democracies. He does not therefore seek an alternative procedure to that advocated by Rawls but rather he rejects the procedural project altogether. Walzer advocates instead a hermeneutic, or interpretive, approach to justice and social criticism where substantive principles of justice are thought to be embedded in the shared understandings of particular communities. He shifts the focus of a theory of justice away from impartial procedures of legitimation towards the articulation, through democratic dialogue, of the substance of justice in particular contexts.

I will introduce Walzer's work, in the first section of the chapter, by considering the idea of complex equality. This notion gives shape to the substantive account of justice that Walzer advocates for a modern democratic society and I will discuss it in relation to the two substantive principles that Rawls proposes. Both accounts can be thought of as significant contributions to an on-going debate among all citizens as to what the substance of justice for any modern society might be. Both theorists offer serious and carefully worked out proposals that could act as highly stimulating catalysts for democratic deliberation. They are not the last word of course on the substance of justice for any one community since no one citizen can have the last word on that.

My purpose in discussing these two substantive accounts is initially to add some weight to Walzer's claim, that any theory of justice that stresses procedures of impartiality is necessarily insensitive to particular contexts. I will suggest that Walzer's account of complex equality does

⁴ See especially *Spheres of Justice: A Defence of Pluralism and Equality*, Oxford: Basil Blackwell, 1983 and *Interpretation and Social Criticism*, Cambridge, MA: Harvard University Press, 1987.

have important advantages over Rawls's two principles because it facilitates a detailed elaboration of the substantive demands of justice in a way that is highly sensitive to cultural particularity. Of course the fact that Walzer's indeterminate notion of complex equality has significant advantages over Rawls's principles as an account of the substance of justice does not in itself justify his rejection of proceduralism. In fact it merely underlines the fact that a substantive account of justice that proposes particular, determinate principles should not be presented as an integral part of a philosophical theory of justice. The democratic task of articulating a substantive account of justice must be thought of as being strictly separate from the philosophical task of clarifying an impartial point of view.

In the remaining two sections of the second chapter I will explore at greater depth the implications of Walzer's hermeneutic approach to justice. The discussion in the second section will suggest that, despite the views of many critics, an interpretive approach to justice need not defend tradition in a conservative way. However, while this implies that it can facilitate an important form of social criticism, I will suggest in the third section, that in failing to treat the justification of procedures of impartiality as the core of a theory of justice, Walzer's hermeneutic approach remains one-sided and dangerously inadequate.

In the third chapter I introduce Habermas's alternative approach to justice as outlined in his universalist moral theory or discourse ethics. In my view discourse ethics presents us with the best theoretical guide available to us in addressing questions as to how we can test the legitimacy of substantive principles of justice in the public life of a modern society. The discursive procedure that Habermas defends is grounded in certain pragmatic presuppositions of everyday communication that are both necessary and unavoidable. I will first of all

explain, in the first section, the nature of the philosophical argument that Habermas claims to make in justifying this procedure. The way in which his moral theory is, like his critical social theory, built on the notion of communicative action will be explained. By presenting a moral theory in terms of a theory of communication, Habermas can conceive of an impartial point of view in a way that is necessarily dialogical rather than monological. This is because communicative action always takes place within the context of an intersubjective encounter that can never be reduced to the reflections of one isolated individual.

After giving a detailed reconstruction of Habermas's justification of discourse ethics I will argue, in the second section, that the dialogical view of impartiality that this represents is sufficiently sensitive to differences between social groups to avoid successfully the weaknesses exposed in the earlier critique of Rawls's procedure. From this perspective any substantive account of justice must be necessarily the outcome of an on-going public debate and so it can never be presented as an integral part of a philosophical theory. To this extent Habermas agrees with Walzer. At the same time however, he avoids the dangers of hermeneutics by retaining the notion of impartiality as the core of justice in the context of a modern society. Furthermore, by justifying his impartial procedure of legitimation in terms of the pragmatic presuppositions of communicative action, Habermas gives his moral theory a strong universalist grounding. This universalist thrust establishes a critical foothold that is more adequate to the task of challenging the effects of power in contemporary societies than anything that is available to a hermeneutic conception of justice and social criticism.

Habermas's account of discursive legitimation can be thought of as a synthesis of the approaches of Rawls and Walzer. While Rawls's

project, of attempting to give a philosophical justification of an impartial procedure that tests the legitimacy of substantive principles of justice, is the right one, he remains vulnerable to the better criticisms of a variety of contextualists. On the other hand, while Walzer's stress on the dialogical nature of any substantive account of justice is not misplaced, his rejection of Rawls's procedural project leads him into serious difficulties in clarifying theoretically the demands of justice in a modern society. The conception of dialogical impartiality, that discourse ethics makes available, manages to take the best from these two alternative approaches to theorising justice. It also avoids their most serious limitations. Much of this is achieved by the separation of the philosophical task of justifying a procedure of legitimation from the democratic task of actually testing the legitimacy of substantive accounts of justice in particular contexts.

In the third section of this chapter I hope to make it clear that discourse ethics can be defended from the contextualist criticisms of those who are sceptical of its universalist grounding. Finally, in the fourth section I will assess the implications of my argument for one particular dispute about justice where the problems of pluralism are particularly acute. This will be an analysis of the case of Northern Ireland and there I will try to give concrete evidence in support of the claim that discourse ethics succeeds much better than Walzer's contextualist approach in clarifying the demands of justice in that particular context.

My argument overall suggests that, in a modern, pluralist society, political philosophy can at best provide a procedural test of the legitimacy of substantive claims about justice. Disputed claims can only be addressed in the actual context of particular political communities. The discussion can be thought of as a contribution to our understanding of what is at stake when we argue about justice in any modern pluralist

society. My hope is to clarify how we might best support the aspiration to a more just social reality as it is articulated in the on-going public disputes that sustain us as living democratic communities.

1 JUSTICE AS FAIRNESS AND THE ISOLATION OF THE POLITICAL

The separation of a political domain from other aspects of social life is fundamental to liberal accounts of justice. The isolation of a political domain sets a limit to the aspects of social life that are of public concern and anything that falls outside this domain is thought to be beyond the scope of justice. It is certainly nothing new to be critical of naive attempts to isolate the political domain by limiting it to matters of formal civil and legal rights of individuals while ignoring the effects of social and economic structures on the effective exercise of those rights. In this chapter I want to argue that even though this naiveté is not characteristic of the most highly sophisticated theory of justice yet presented within the liberal tradition, that of John Rawls, his approach to questions of justice remains crucially flawed in this regard. Rawls's defence of his account of justice as fairness depends on an attempt to isolate the political domain in a way that places an excessive emphasis on the role of the theorist in testing principles of justice appropriate to a modern society. I will suggest that the attempt to isolate the political involves a monological view of impartiality that is insufficiently sensitive to the differing perspectives among the diverse social groups that are characteristic of a modern society.

The chapter presents a critique of the procedural test of the legitimacy of substantive principles of justice that Rawls defends in his theory. The critique will focus on the consequences of Rawls's attempt to isolate the political. I argue that the boundary between the political and the non-political, that sets a limit to the scope of justice, can never be assumed in any theory constructed by a lone philosopher but rather it

must be treated as an on-going matter of public debate. Rawls presents us with an inadequate account of conditions of fairness, or an impartial point of view. By ruling out the explicit articulation of different perspectives in the choice of substantive principles of justice, Rawls runs the serious risk of giving insufficient attention to the particular concerns of marginal social groups.

In the first section I will place Rawls's work within the liberal tradition in relation to the isolation of the political domain. This discussion will allow us to anticipate the criticisms that are to follow in the remainder of the chapter by introducing certain Marxian objections to liberal assumptions about justice. Marxism can be thought of as, in a sense, the precursor of the three critical perspectives considered in the remaining sections. This is because Marxism highlights the dangers involved for any one theorist who claims to be able to construct theoretically an account of justice that is assumed to be acceptable to all. Marxism concerns itself with the potential danger of a class bias being built into such a construction. This bias may be rooted in certain assumptions that the theorist brings unwittingly to the task. Such a bias would render the account of justice an ideological account, in spite of the theorist's best attempts to remain impartial.

The three perspectives that I draw on in the remaining sections concern themselves in different ways with potential biases in Rawls's account of justice. Each of these perspectives, communitarianism, post-structuralism and feminism, claim to represent distinctive, and often marginal, voices in public debates about justice in the context of a modern society. I will consider the possible objections that could be raised from these three perspectives in relation to three particular aspects of Rawls's theory. The second section deals with communitarian objections to the way that Rawls defends the claim that the right is prior

to the good. The third section presents post-structuralist objections to Rawls's construction of an impartial point of view, what he calls the original position. The fourth section is concerned with feminist objections to Rawls's neglect of issues of justice within the family and also with the relation between justice and solidarity.

My strategy in each section will be to assess the extent to which the criticisms that I reconstruct can be sustained against Rawls. While I do not question the importance of the procedural task that Rawls has set for himself, that of offering a philosophical justification of an impartial point of view that can test the legitimacy of principles of justice, I reject the procedure that he himself proposes. The most damaging criticisms of Rawls's procedure that can be reconstructed from the three perspectives I discuss, converge in highlighting the theoretical difficulties involved in the attempt to isolate the political. I will argue that this is related to his monological view of impartiality. Since all parties to the original position are assumed to reason in the same way, the procedure of choice that is presented is static rather than dynamic. Differences in perspective must be overcome prior to the choice of principles of justice. Furthermore, the basic theoretical assumptions that Rawls builds into his construction are not open to question within the framework of the procedure of choice itself. I hope to show that a procedure of legitimation that is to be adequate to the critical task required of it in a modern society must incorporate, more successfully than Rawls does, the concerns of the critics whose work I examine in this chapter.

1.1 RAWLS, THE SOCIAL CONTRACT AND THE CHALLENGE OF MARXISM

Rawls's work has revived the tradition of social contract theory.¹ Rawls is to be thought of as a contract theorist in the liberal tradition. Liberal contract theory has its origins in the work of Locke but its most significant formulation, at least in relation to our concerns here, was achieved in the work of Kant. First of all, I will make some introductory comments so as to place Rawls in the contractarian tradition of liberalism. In the later part of the section I will outline certain Marxist objections to Rawls's liberal account of justice. This discussion will anticipate the critique to follow, of Rawls's attempt to isolate the political.

Liberalism and Contract Theory

A clearly defined separation of the political, that is the domain of life that is legitimately of public concern, from the non-political is the distinctive feature of the more liberal versions of the social contract, notably those of Locke² and Kant.³ For Locke the protection of our natural rights to life, liberty and private property set limits to the legitimate role of civil

¹ Rawls's *A Theory of Justice* is considered in the context of social contract theory in Michael Lessnoff *Social Contract*, London: Macmillan, 1986. For general introductions to that tradition see J.W. Gough *The Social Contract*, Second edition, Oxford: Clarendon Press, 1957 and Patrick Riley *Will and Political Legitimacy*, Cambridge, MA: Harvard University Press, 1982.

² *The Second Treatise of Government and a Letter Concerning Toleration*, Oxford: Basil Blackwell, 1966.

³ See especially the second section of "On the Common Saying: 'This may be true in theory, but it does not apply in practice'" in *Kant: Political Writings*, Second edition, Hans Reiss (ed.), Cambridge, UK: Cambridge University Press, 1991, 73-87.

government. For Kant the "pure rational principles of external human right" establish the legitimate civil state.⁴ The personal welfare of each individual is a private matter once it is framed in accordance with the public principles of right. It may be worth stressing the liberalism of the versions of contractarianism in Locke and Kant by contrasting them very briefly with the less liberal versions to be found in Hobbes⁵ and Rousseau.⁶

According to Hobbes we defend our primary interests by accepting some limitation on our freedom. We do this by consenting to the power of the state so as to escape from our natural state of war. The sovereign might be one person or it could be an assembly. In either case it is rational for all of us to abandon to the sovereign our judgement as to what is needed to protect each individual's right to self-preservation.⁷ We are equal before the sovereign since in the state of nature we are equally vulnerable to the dangers of potential conflict and loss of our life, "solitary, poore, nasty, brutish and short" as it is.⁸ It is rational therefore, in order to protect our right to life and whatever sustains it, that we accept in a form of social contract the restrictions placed on our freedom by the laws enacted by the sovereign. In the public realm we are subject to the sovereign so that we can enjoy the necessary protection that enables us to sustain our lives and so to pursue our rational self-interest in satisfying our private desires and in living a commodious life.

⁴ *Kant: Political Writings*, 74.

⁵ *Leviathan*, Harmondsworth: Penguin, 1968.

⁶ *The Social Contract and Discourses*, London: Dent, 1973.

⁷ *Leviathan*, 227.

⁸ *Leviathan*, 186.

Hobbes's conclusion is authoritarian.⁹ So long as the sovereign protects us, enabling our self-preservation, it is rational for us to submit to political authority and to obey. While we retain a right of self-defence there are no other particular rights that protect any clearly defined private sphere for the individual. For Locke, in contrast, civil government is legitimately established by contract to protect the individual's natural rights to life, liberty and private property from the interference of any potential threat. It is rational for us to consent to and to trust the power of the state and to take upon ourselves the obligations involved as citizens so that we can enjoy the benefits of these natural rights in our private lives. Our public obligations are legitimate if they protect our private interests.

This division of society into realms of the public, or the political, and that which is excluded from the political domain, is at the very foundation of the liberal tradition. For Locke, the public realm comes into existence in the first place, out of the state of nature, because of our need to come to some agreement as to what could protect our natural rights as individuals. So long as we keep our part of the contract, nobody, not even the state itself, can legitimately interfere in the non-political, or private, realm that is protected by individual rights. If however the government loses the trust of the people by failing to respect their natural rights, then the people are justified in resisting its authority. In this case the government has forfeited its legitimacy.¹⁰

While Locke sees a separation of powers as an essential check on government for the protection of the individual, Rousseau's contract is of

⁹ See especially the chapter "Of the Rights of Sovereigns by Institution" *Leviathan*, 228-239.

¹⁰ *Second Treatise*, 105-122.

a rather different character.¹¹ It results in the sovereignty of the general will. Despite the vast differences between Rousseau and Hobbes, the general will resembles the Leviathan, in so far as neither of them guarantee the natural rights of the individual.¹² The general will requires the "total alienation of each associate, together with all his rights, to the whole community."¹³ Rousseau assumes however that the general will cannot do any harm to individual members of the body politic as the purpose of the contract is to protect the associates, allowing each to remain as free as before. Locke's checks on government are therefore thought to be simply unnecessary.

Rousseau's concern for unity and commonality of purpose contrasts sharply with Locke's emphasis on the natural rights of the individual. It is this stress on individual rights, and the implicit protection of a definitive private sphere that distinguishes Locke from Hobbes and Rousseau, marking him out as a liberal. In this respect Kant too is undoubtedly a liberal. For Kant however the non-political realm is not protected by specific natural rights but rather by a distinction between the right and the good. It is the Kantian claim that the right has priority over the good that is the key feature of Rawls's attempt to isolate the political. As we will see later, this is one of the key issues on which debates about contemporary liberalism have been focussed.

Kant's contract is "an *idea* of reason, which nonetheless has undoubted practical reality."¹⁴ The practical reality of the idea of an

¹¹ *Second Treatise*, 73-75.

¹² Gough *The Social Contract*, 173-174.

¹³ *The Social Contract and Discourses*, 191.

¹⁴ *Kant: Political Writings*, 79.

original contract consists in its being a test for the rightness or legitimacy of public law. Justice must be based on principles to which all citizens could consent.¹⁵ This original contract could only come about through the united will of the people, and that in turn requires that the parties to the contract are free, equal and independent. The freedom of the parties consists in the principle that

each may seek his happiness in whatever way he sees fit, so long as he does not infringe upon the freedom of others to pursue a similar end which can be reconciled with the freedom of everyone else within a workable general law - i.e. he must accord to others the same right as he enjoys himself.¹⁶

A workable general law of justice must be willed by a plurality of free agents who do not share a view of their own happiness or a conception of the good. It is by virtue of their capacity to choose a conception of the good, and not its content, that human beings are capable of possessing rights.

The parties are equal as subjects before the law in that no one can coerce any other except through the law. This means that hereditary privilege, which from birth creates an inequality among subjects in terms of their legal position, could not be legitimate. All subjects are equally entitled to pursue their own ends, while none of them is to have any legal advantages over the others in that pursuit.¹⁷ Furthermore the unity of

¹⁵ Onora O'Neill argues that this idea, that we should only adopt principles that the plurality of all possible voices in a shared world could affirm, is the fundamental principle of the entire Kantian enterprise of undertaking a critique of reason. See the first chapter of her *Constructions of Reason*, Cambridge, UK: Cambridge University Press, 1989, 3-27.

¹⁶ *Kant: Political Writings*, 74.

¹⁷ *Kant: Political Writings*, 74-77.

wills that constitutes the original contract can only be achieved if those whose wills it unifies are independent of each other. What Kant means here is that citizens cannot be dependent on others to the extent that they are unable to support themselves economically. If this were the case they could not serve the commonwealth alone, as they would be vulnerable to be used in this respect by those on whom they are dependent.¹⁸

Since Kant's contract is to be thought of as a test for the legitimacy of a law, the political domain is restricted, and the non-political protected, in ways that would not be possible under the absolute rule of Hobbes's Leviathan. Similarly, while Kant shares with Rousseau the desire for a unity of wills that allows each to remain as free as before, he does not stress the common good to anything like the same extent. In fact it is reflected only in the principles of right that constrain, yet permit, a plurality of conceptions of the good.¹⁹ A law is legitimate if all free, equal and independent citizens could agree to it despite the fact that they do not share a conception of the good. In recognition of the significance of Kant's formulation of the contract, we might refer to the philosophical attempt to justify a procedure that is to test the legitimacy of substantive principles of justice under modern conditions, as the Kantian project. We will be concerned throughout this thesis with debates that concern themselves with the issues that are raised by contemporary attempts to pursue this Kantian project.

It is within this liberal tradition of contract theory, with its clearly defined isolation of the political domain, that I would like to situate

¹⁸ *Kant: Political Writings*, 77-79.

¹⁹ Kenneth Baynes *The Normative Grounds of Social Criticism*, Albany: State University of New York Press, 1992, 42-44. Baynes also gives a clear account of some important differences between Kant's idea of the contract and Locke's.

Rawls's work. His emphasis is not on the limits of state power as such, nor on the legitimation of political obligation, but rather on the idea of a public conception of justice which serves to regulate a well-ordered society.²⁰ In this way his theory is much closer to Kant's than to Locke's. He offers us an account of justice as fairness which assigns our rights and duties in society and which presents us with determinate principles of distribution that, according to the theory, can rationally be justified. In this chapter I will argue that the procedure of legitimation that Rawls defends is flawed. It is also one of the central arguments of this thesis that no determinate, substantive principles of justice can rationally be justified by the philosophical arguments of one theorist. The substance of justice can only be justified through public encounters in particular contexts.

I will discuss the isolation of the political rather than the separation of public and private that has been the focus of many important criticisms of liberalism.²¹ The reason for this is that Rawls's account of justice, unlike those of many of his liberal predecessors, does not appear to depend crucially on a naive and rigid dichotomy between public and private. Rawls takes the primary subject of justice to be the basic structure of society. Each of us is born into a particular position in relation to the political system and economic and social arrangements of our culture. Our starting position has profound effects on our life prospects and it is

²⁰ *A Theory of Justice*, 5.

²¹ Of course there are non-contractarian defences of the liberal separation of public and private, notably John Stuart Mill's harm principle. See "On Liberty" in *Utilitarianism, On Liberty and Considerations on Representative Government*, H.B. Acton (ed.), London: Dent, 1972. For a critique of the public/private dichotomy in Mill's essay see the second and third chapters of Richard Norman *Free and Equal*, Oxford: Oxford University Press, 1987.

clear that some people are privileged over others in this regard. Rawls wants to derive principles which test the legitimacy of such deep inequalities by allowing us to "regulate the choice of a political constitution and the main elements of the economic and social system."²² These main elements of the basic structure of society certainly include aspects of life which would be taken by traditional liberals to be beyond the scope of the public realm. They incorporate economic institutions like the competitive market and private property in the means of production as well as social institutions such as the monogamous family.

Rawls's theory does provide critical standards for a public evaluation of the basic structure of society which is understood more broadly than the idea of political justice that is implicit in earlier liberal theories of social contract and individual rights. I want to argue however that despite this broad conception of the subject of justice Rawls formulates some key elements of his theory by attempting to isolate the political domain in a way that is unsustainable. Before assessing the arguments of communitarianism, post-structuralism and feminism in this regard, I will mention briefly certain relevant criticisms that could be made of Rawls's work from a Marxian perspective.

Rawls's Liberalism as Ideology

Marxists have objected that liberal theory is ideological in the sense that it conceals from itself the class bias of its own assumptions. The formal equality of liberal rights masks the substantive inequalities between social classes and rationalises the oppression of the proletariat by the bourgeoisie under the conditions of a competitive economic market.

²² *A Theory of Justice*, 7.

Liberalism represents the ruling ideas of the capitalist age as an expression of the interests of its ruling class.²³ Numerous commentators have argued that Rawls's liberalism is ideological in so far as it expresses bourgeois interests and rationalises class oppression.²⁴

One of the issues involved here relates to the priority of liberty, or the fact that Rawls's first principle of justice, which guarantees equal basic liberties, is given priority over the second, which is to regulate socio-economic inequalities. Marxists maintain that this separation of the strictly political and the economic is an ideological defence of class oppression. I will discuss this criticism more extensively when I come to assess Rawls's two substantive principles in the next chapter. We can leave it aside for now however as the aim here is not to argue through the differences between Marxism and Rawls's liberalism at any great depth, but rather to show how Marxism anticipates other criticisms that I will assess in the remainder of this chapter. This is related to the danger of allowing biases to undermine the claim to impartiality of a theorist-centred approach to the justification of a procedure of legitimation for substantive principles of justice. While Marxism alerts us to the dangers of class bias, the other three theoretical approaches that we will analyse

²³ See Marx "On the Jewish Question" and with Engels "The German Ideology, part 1" and "The Communist Manifesto" all reprinted in *Karl Marx: Selected Writings*, David McLellan (ed.), Oxford: Oxford University Press, 1977. The most celebrated critique of Locke from this point of view is undoubtedly that of C.B. Macpherson *The Political Theory of Possessive Individualism: Hobbes to Locke*, Oxford: Oxford University Press, 1962, 245-247. On Kantianism as a market morality see Ross Poole *Morality and Modernity*, London: Routledge, 1991, 17-21.

²⁴ In the paragraphs that follow I draw on two very useful overviews of Marxian critiques of Rawls, Allen E. Buchanan *Marx and Justice*, London: Methuen, 1982, 103-161 and R.G. Peffer *Marxism, Morality and Social Justice*, Princeton: Princeton University Press, 1990, 361-415.

in greater depth are more concerned with the marginalisation of various other points of view.

It is worth pointing out at this stage that many critics fail to note that Rawls actually shares with Marx many serious objections to free market capitalism. This becomes clear if Rawls's egalitarian liberalism is compared with the libertarianism of Robert Nozick.²⁵ While Nozick simply disregards structural constraints on individual autonomy, Rawls is concerned that the cumulative effect over time of isolated, historical and supposedly free transactions between individuals, can lead to intolerable structural limitations on the possibility of autonomous living for some citizens. This indicates that for Rawls, as for Marx, formal freedom is of questionable worth if it is not supported by effective means for each individual to live a dignified, creative and autonomous life. Rawls is therefore keenly aware of the fact that the basic structure of society must be consciously controlled to the extent that nobody can be denied the chance to live autonomously because of bad fortune with regard to social circumstances or the distribution of natural talent. It is for this reason that the basic structure is the primary subject of justice.

Rawls is however no Marxist. He makes a number of assumptions that could be criticised as ideological. While Rawls may believe that certain of his claims are impartial, the convinced Marxist will argue that they are in fact biased in favour of the dominant economic class. For example, the convinced Marxist might argue that Rawls's Kantian conception of the person, as a free and equal individual, contradicts the claim that his account of justice does not favour any one of a plurality of

²⁵ *Anarchy, State and Utopia*, New York: Basic Books, 1974. For a clear and succinct case for egalitarian liberalism see Ronald Dworkin "Why Liberals Should Care about Equality" in *A Matter of Principle*, Cambridge, MA: Harvard University Press, 1985, 205-213.

reasonable conceptions of the good. This conception of the person, it might be suggested, is too individualistic. It undermines the prospects for generating proletarian solidarity by invoking a bourgeois conception of freedom that is an historically specific reflection of a competitive capitalist economy. Rawls invites us to choose how we wish to live as individuals but he is insufficiently attentive to the ways in which we have to compete for the resources to make that choice effective. This conception of the person deflects our attention from the real issue which is the oppressive nature of the capitalist class structure.²⁶

A second possible objection that a Marxist might raise against Rawls relates to his lack of a theory of transition. Under the conditions of advanced capitalism, Rawls is naive to assume that people will be motivated to support the socio-economic transformations that would be necessary even to bring our institutions into line with his own substantive principles of justice. It is characteristic of bourgeois ideology to assume that people are motivated by moral concerns while underplaying the extent to which we are in fact motivated by our material interests. If Rawls is to close the conceptual gap between a modern liberal capitalist society and his idea of a well-ordered society he would have to explain why people might be willing to risk a deterioration in their material conditions for the sake of justice. He is unable to do so, according to this type of criticism, because of his ideological emphasis on moral motivation.

Thirdly, a Marxist might point out that when we come to consider what institutional arrangements would satisfy Rawls's two principles of

²⁶ I will actually defend Rawls against the charge that his procedure reveals an individualistic bias when I discuss the communitarian challenge in the next section.

justice it seems quite likely that under present conditions certain empirical assumptions will be made.²⁷ These might reflect ideological beliefs in so far as they will mistakenly take characteristics of human behaviour that are particular to capitalist society, to be characteristics of humanity as such. In capitalist societies it may appear that material inequalities are necessary to provide incentives for people to work to the best of their ability. But this appears to be the case, or so the Marxist will claim, because of the existence of private property. It is not clear whether Rawls's theory of justice is sufficiently critical towards such empirical assumptions in assessing the merits of a variety of institutional arrangements and in testing substantive claims about justice.

Finally, Rawls might be accused of assuming a single state structure for his theory. Again this reveals to the Marxist a naiveté towards the workings of international capitalism. Any attempt to satisfy acceptable principles of justice in one state, especially if this involved a limitation on the movement of capital, would almost certainly be undermined by powerful states who would perceive this as a threat to the stability of class relations in their own territory.²⁸ Justice could only come about on a global scale. That Rawls ignores this fact gives further evidence, on a Marxist account, that his theory is presented within a framework of bourgeois ideology.

²⁷ Buchanan *Marx and Justice*, 126-128.

²⁸ Of course this view is supported by many examples. Take the case of paranoia in the US. administration which was caused by the threat of a socialist Nicaragua. The point here could be supported further by criticising Rawls for neglecting to deal adequately with the fact that the establishment of fair terms of co-operation, which is the key feature of his account of justice, will be resisted strongly by those who are in a privileged position at present. This of course relates back to the question of motivation mentioned above.

As I have already pointed out, it is not my intention to assess the charge of bias that all these possible criticisms make against Rawls's account of justice. Some of the issues raised will be discussed in different contexts in later sections. What is important to note here is the form of criticism that is typical of Marxian objections to liberalism. The arguments above attempt to uncover aspects of Rawls's theory that reveal it to be biased in a way that satisfies the interests of the ruling class. It is not necessary to go along with everything that Marx argued about historical materialism or class interests to agree that certain theories that claim to be impartial are in fact incapable of identifying their own biases. While I leave aside the substance of Marxian claims with regard to the biases of Rawls's theory, it is this form of argument that will be used in the critique of Rawls's attempt to isolate the political in the following sections.

In his attempt to isolate the political, Rawls is insufficiently attentive to the danger of ideological assumptions being smuggled into his theory. As I hope to make clear, this is related to the elimination of all differences between the parties to Rawls's contract. In other words it is rooted in the monological view of impartiality that is built into his procedure. If the Kantian project is to be defended it will need an alternative way of conceiving of impartiality. The three sections that follow will support my critique of Rawls in different ways. I will begin by examining the set of objections that has received most attention in recent years. These objections have been raised from the perspective of communitarianism.

1.2 THE PRIORITY OF RIGHT AND COMMUNITARIAN OBJECTIONS

The Kantian claim that the right is prior to the good is one of the striking characteristics of Rawls's theory of justice. Unlike in say utilitarianism, which is a teleological theory that asserts the priority of the good (happiness or the satisfaction of rational desire), in justice as fairness there is no reason to suppose that the right will maximise the good. The right, as represented by principles of justice, is not dependent on any one particular conception of the good. In fact it imposes "restrictions on what are reasonable conceptions of one's good."¹ Justice defines the scope within which we can choose a reasonable plan of life and it limits us to a conception of the good which will not violate the principles of right.

It follows from this that while we must reach some agreement about justice, we do not have to agree about the good.² It is actually to our advantage that we do not since, according to Rawls, we can benefit from the variety of talents that are developed by taking pleasure in one another's activities.³ The constraints that unanimous agreement on the principles of justice impose prevent us from making unreasonable claims on one another and this in turn allows us to enjoy the values of

¹ *A Theory of Justice*, 31.

² Rawls does assume that we will agree on a thin theory of the good which can account for his list of primary goods. These are introduced so that the parties in the original position are motivated to reach some agreement on the principles of justice. They are taken to be aspects of the good for each party regardless of what their various full conceptions of the good turn out to be. See *A Theory of Justice*, 90-95, 295-299. My point here is that agreement on a full conception of the good is, according to Rawls, not possible, but neither is it necessary or even desirable.

³ *A Theory of Justice*, 448.

community.⁴ The right is prior to the good then in that it is the principles of justice and not some agreed conception of the good that form a basis of social unity.

The particular way that Rawls seeks to separate issues of justice, about which we must agree, from questions of the good, which are not susceptible to agreement, reflects his attempt to isolate the political in a relatively straightforward manner. Matters of justice are of public concern to the extent that we can make legitimate claims on each other, and on our public institutions, if we believe that some principle of justice has been violated. These matters fall within the domain of the political in Rawls's sense. On the other hand there are many questions about which we cannot in principle agree, due to the plurality of diverse conceptions of the good and the wide variety of comprehensive moral views. These must be left off the public agenda and so long as they do not violate the principles of justice they can be treated as matters for individuals to decide on for themselves. In other words these questions are personal matters that are beyond the scope of justice.

In this section I will criticise Rawls's strategy of defending the priority of right by attempting to treat matters of political morality in isolation from other aspects of citizens' more comprehensive moral views. I will develop my criticism by assessing the communitarian critique of Rawls's work. Communitarians have questioned the priority of right in Rawls's work by accusing him of supporting the claim on the basis of an untenable atomistic ontology.⁵ In this section I want to defend

⁴ *A Theory of Justice*, 565.

⁵ See especially Michael Sandel *Liberalism and the Limits of Justice*, Cambridge, UK: Cambridge University Press, 1982. Other celebrated works of communitarian criticism include Roberto Mangabeira Unger *Knowledge and*

Rawls from this charge by arguing that his work is best understood as a version of what I will call liberal holism. Nonetheless, the discussion leads us to the suggestion that Rawls's liberal holist defence of the priority of right is undermined by the attempt to isolate political aspects of morality in the public domain.

Kantian Constructivism and the Charge of Individualistic Bias

The initial communitarian challenge to Rawls's work was based on the claim that the priority of right, as expressed through the original position, produces an account of justice that is biased towards certain conceptions of the good.⁶ Rawls excludes from the original position information about the particular conceptions of the good that each party is to have.⁷ He argues that, given the fact that there is a plurality of reasonable conceptions of the good, such a restriction is necessary if unanimous agreement is to be secured. Rawls makes two further assumptions worthy of note here. Firstly, the parties are to be thought of as being mutually disinterested and secondly, they are not to be motivated by envy.⁸ These conditions of choice are said to favour liberal conceptions of the good that are content with the loose social bonds characteristic of

Politics, New York: The Free Press, 1975, Alasdair MacIntyre *After Virtue*, London: Duckworth, 1981, Charles Taylor "Atomism", "What's Wrong with Negative Liberty?", "The Diversity of Goods" and "The Nature and Scope of Distributive Justice" in *Philosophical Papers, II: Philosophy and the Human Sciences*, Cambridge, UK: Cambridge University Press, 1985.

⁶ Thomas Nagel "Rawls on Justice" in *Reading Rawls*, Norman Daniels (ed.), Oxford: Basil Blackwell, 1975, 1-15, Michael Teitelman "The Limits of Individualism" *Journal of Philosophy*, 69 (1972), 545-556, Adina Schwartz "Moral Neutrality and Primary Goods" *Ethics*, 83 (1973), 294-307.

⁷ *A Theory of Justice*, 137.

⁸ *A Theory of Justice*, 151.

highly individualistic cultures over conceptions that depend on a stronger basis of social unity. Indeed the implication is that this restriction could only be justified with reference to some such liberal conception of the good.

Furthermore Rawls's account of primary goods is also said to constitute a bias towards individualistic conceptions as it is blind to the significance of irreducibly common goods, such as solidarity. There are obvious echoes here of the Marxian concerns that were outlined in the last section. The primary goods can, it is argued, be thought of as being of greater value to those individuals for whom such common goods do not matter greatly. The construction of the original position presupposes highly fragmented social conditions and the individualistic bias in the account of the primary goods undermines whatever bonds of social solidarity actually do exist.

Rawls has responded to these criticisms by stressing the central role that the Kantian conception of moral personality plays in providing a normative justification for both the construction of the original position and the account of the primary goods.⁹ According to this conception we view each person as

a moral person moved by two highest-order interests, namely, the interests to realise and to exercise the two powers of moral personality. These two powers are the capacity for a sense of right and justice (the capacity to honour fair terms of cooperation), and the

⁹ "Kantian Constructivism in Moral Theory" *Journal of Philosophy*, 77 (1980), 515-572, "Social Unity and Primary Goods" in *Utilitarianism and Beyond*, Amartya Sen and Bernard Williams (eds.), Cambridge, UK: Cambridge University Press, 1982, 159-185. For Rawls's first response to these criticisms see "Fairness to Goodness" *Philosophical Review*, 84 (1975), 536-554.

capacity to decide upon, to revise and rationally to pursue a conception of the good.¹⁰

Rawls accepts that this is an historically specific conception of the person. It is a conception that he believes to be embedded in the institutions and practices of modern liberal democratic societies. One consequence of this is that justice as fairness is a conception that applies to a particular culture and so it is not set up as an account of justice that claims to transcend all historical or cultural circumstances. The constructivist method that Rawls adopts sets itself the practical task of securing agreement on the first principles of justice that are to regulate the basic structure of society.¹¹ The role of the constructivist political philosopher is to draw out the shared moral beliefs of our public culture and to build them up into a workable conception of justice. This sets it apart from Kant's own moral theory in that the social is primary. While Kant began with personal morality working his way towards principles of social justice, Rawls moves in the opposite direction making personal decisions conform to a prior agreement on the regulation of the basic structure of society.¹²

The elaboration of the Kantian constructivist approach allows Rawls to respond to the criticism that the original position is biased towards individualistic conceptions of the good. Since we are to assume the conditions of modern pluralist democracies, the exclusion of full conceptions of the good from a procedure designed to secure agreement on the first principles of justice is simply unavoidable. Agreement could

¹⁰ "Social Unity and Primary Goods", 164-165.

¹¹ "Kantian Constructivism in Moral Theory", 516-519.

¹² "Kantian Constructivism in Moral Theory", 552-554.

he suggests not be based on the whole truth. By the whole truth he means to include the truths of religion, philosophy and comprehensive moral doctrine.

There is no alternative, then, to founding a conception of justice suitable for a well-ordered democratic society on but a part of the truth, and not the whole, or, more specifically, on our present commonly based and shared beliefs.¹³

These shared beliefs hinge on the Kantian conception of moral personality. The justification of Rawls's claim that justice as fairness is an objective conception, and not a biased one, depends on

its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine for us.¹⁴

This most reasonable doctrine represents, for Rawls, the only acceptable basis of social unity. Full conceptions of the good that involve extensive claims to truth, perhaps even claims to the whole truth, are excluded from the original position. To base our principles of justice on any one conception of the good would lead to intolerable coercion by the state of those who hold reasonable yet radically different conceptions.

Rawls's presentation of his theory of justice in terms of Kantian constructivism brings him close, in some important respects, to the hermeneutic position of a communitarian thinker like Walzer.¹⁵ We will

¹³ "Kantian Constructivism in Moral Theory", 542. In *Political Liberalism*, xx, Rawls goes further than this. There he does not claim that the political conception of justice he defends is true at all, even in a partial sense, but rather it is reasonable. This revision does not affect the argument that follows here.

¹⁴ "Kantian Constructivism in Moral Theory", 519.

¹⁵ Rawls's position is still to be clearly distinguished from that of Walzer with respect to the central theme of this thesis. Rawls has turned towards hermeneutics so as

return to this aspect of Rawls's account of justice briefly in the analysis of hermeneutics in the next chapter. It will suffice for now to note that in so far as Rawls wants to defend particular substantive principles of justice, and there is no reason to believe that he has given up on this, then it seems to me that he had no alternative but to present his two principles as an interpretation of the deeply held convictions of the culture of modern democratic societies. This is because of the fact that he does not separate adequately the philosophical task of justifying the procedural conditions that clarify an impartial point of view from the democratic task of legitimating particular substantive principles of justice. We will return to this point when we examine Habermas's alternative account of an impartial point of view in the third chapter.

But what of the communitarian objection that Rawls's procedure is biased towards individualistic conceptions of the good? The assumptions in the account of the original position, of mutual disinterest and no envy, are to be thought of in the context of Rawls's claim that in a pluralist society principles of justice cannot reasonably be based on one particular conception of the good. Two persons with opposing religious beliefs can be mutually disinterested once they can agree on a framework of justice based on a shared notion of moral personality. It does not follow that they are self-interested nor can we assume that they pursue individualistic ends.¹⁶ The propensity for envy can be taken as a contingency, something which is not essential to the conception of moral personality

to justify his abstract account of the procedural conditions of fairness that are represented in the original position as an impartial point of view. As we will see Walzer does not theorise an impartial point of view at all and his stress on shared understandings leads him to reject the use of all abstract conceptions in political theory. See *Political Liberalism*, 43-46.

¹⁶ "Fairness to Goodness", 542-543.

that informs the construction of the original position. We must assume that the parties are not motivated by envy if the basis for agreement is not to be undermined.¹⁷

Finally, it is clear that what motivates the parties in the original position to choose the primary goods are in fact the two highest-order interests. Here Rawls wants to rule out any interpretation of the parties as merely egoistic rational consumers of goods who are motivated to accept the principles of justice solely in response to external constraints.¹⁸ The primary goods are to be understood as the necessary conditions for realising the powers of moral personality and as all-purpose means for a wide-range of final ends.¹⁹ This is the practical nature of the primary goods. They cohere with the conception of the person to provide a framework of social co-operation that is both workable and stable as a basis of social unity in spite of the wide range of reasonable conceptions of the good. This is, according to Rawls, the only reasonable manner of proceeding in the practical task of securing fair terms of co-operation and so it cannot be charged with being arbitrarily biased in favour of individualistic conceptions of the good.

Justice as Political and the Charge of Atomism

While this emphasis on the ideal of moral personality does seem to allow Rawls to deflect the charge of individualistic bias, some ambiguities remain. The Kantian constructivist approach has been interpreted as a shift towards a form of perfectionism where this ideal of moral

¹⁷ *A Theory of Justice*, 530.

¹⁸ "Kantian Constructivism in Moral Theory", 530-532.

¹⁹ "Social Unity and Primary Goods", 166.

personality is held up as a moral goal which is actively to be pursued. The institutions of the basic structure are judged according to the extent to which they facilitate our highest-order interests in exercising our two moral powers. The basic structure is to express our nature as free and equal rational beings.²⁰ Rawls does not want to accept such a perfectionist interpretation as it is based on a comprehensive moral view involving controversial personal ideals which are not widely shared. On the other hand Rawls insists that justice as fairness is not to be interpreted as a *modus vivendi*, a conception based merely on a convergence of interests. That approach would seem to presuppose some form of moral scepticism since such a basis for agreement is prudential rather than moral.²¹ Rawls wants to steer a course between perfectionism and scepticism.

In his recent work Rawls maintains that justice as fairness is to be thought of as a political and not a metaphysical conception.²² It avoids both controversial claims to truth and comprehensive moral views by

²⁰ See William Galston "Moral Personality and Liberal Theory" *Political Theory*, 10 (1982), 492-519.

²¹ For a critique of Kantian expressivism see Charles Larmore *Patterns of Moral Complexity*, Cambridge, UK: Cambridge University Press, 1987. Although Larmore proposes liberal justice as a *modus vivendi* in his book, he has argued in a subsequent article that it was not his intention to imply any form of moral scepticism. Any difference he has with Rawls on this point is therefore to be thought of as a merely terminological one. See "Political Liberalism" *Political Theory*, 18 (1990), 339-360, here at 358-359.

²² The essays that are incorporated in revised form into *Political Liberalism* include "Kantian Constructivism in Moral Theory", "Justice as Fairness: Political not Metaphysical" *Philosophy and Public Affairs*, 14 (1985), 223-251, "The Idea of an Overlapping Consensus" *Oxford Journal of Legal Studies*, 7 (1987), 1-25, "The Priority of Right and Ideas of the Good", *Philosophy and Public Affairs*, 17 (1988), 251-276, "The Domain of the Political and Overlapping Consensus" *New York University Law Review*, 64 (1989), 233-255.

limiting itself to the subject of political justice for the basic structure of society. It is practical in its aim of securing agreement on fair terms of social co-operation in a context where agreement on comprehensive moral views is not possible. In this respect its application is historically specific to the modern constitutional democracies in which this problem arises. Although Rawls claims that it is not dependent on any particular comprehensive moral view, he stresses the fact that it is a moral conception both in its aim and on the grounds that support it.²³ A political conception of justice for the basic structure of society is itself a moral conception. Furthermore, justice as fairness is affirmed as an overlapping consensus in that all citizens who affirm it do so on the basis of their own reasonable comprehensive moral view. Their comprehensive moral views coincide in the moral conceptions of the citizen as free and equal citizen and the notion of a well-ordered society that is characterised by the principles of justice and political virtues such as tolerance, reasonableness and fairness.²⁴ Justice as fairness is affirmed for its own sake and so it is more stable than a *modus vivendi* which is always vulnerable to a shift in the balance of power between different social groups.

In his writings since the publication of *A Theory of Justice*, Rawls has used an impressive range of arguments to defend the priority of right. This claim is still one of the essential elements of the account of justice as fairness that he now presents as a conception of political liberalism.²⁵ At the same time he has, with some sophistication, managed to use a number

²³ "The Idea of an Overlapping Consensus", 9-12.

²⁴ "The Priority of Right and Ideas of the Good", 263.

²⁵ "The Priority of Right and Ideas of the Good", 251.

of ideas of the good in the construction of his theory which serve to reveal that he understands the right and the good to be complementary.²⁶ However, his recent defence of the priority of right is deeply flawed in one crucial respect. It depends on the implausible attempt to treat questions of political morality in isolation from the rest of our more comprehensive moral views.²⁷ From Rawls's point of view it would appear that for each of us morality has a political aspect that relates to questions regarding the regulation of the basic structure of society, and a non-political aspect that relates to other dimensions of our lives. This key element in Rawls's recent strategy leaves him vulnerable to a number of arguments that can be supported by the work of his communitarian critics. These arguments undermine Rawls's attempt to isolate the political in his efforts to ground the priority of right.

Perhaps the most celebrated critique of Rawls from a communitarian perspective was put forward by Michael Sandel.²⁸ According to Sandel the Kantian conception of the person, on which Rawls's account of justice is constructed, presupposes an idea of an unencumbered self that is prior to and independent of its purposes and ends. The values and ends espoused by the individual are thought to be chosen voluntarily and are never constitutive of the identity of the self. It is the capacity for choice rather than the ends that are chosen that is of importance in Sandel's reconstruction of this Kantian conception of free and equal moral personality. Furthermore it is assumed that any attributes I have,

²⁶ In "The Priority of Right and Ideas of the Good" Rawls discusses five ideas of the good that play important roles in justice as fairness.

²⁷ See for example "The Domain of the Political and Overlapping Consensus", 249.

²⁸ See *Liberalism and the Limits of Justice*.

my talents, my physical appearance or any of my idiosyncratic psychological dispositions are accidental and contingent to my identity. They are therefore arbitrary from a moral point of view, as represented in the original position. There only the moral powers of the unencumbered self inform our choice. For Sandel this conception of the person lacks any depth of moral character. Our character comes from our being situated historically within a particular network of social ties. Each of us interprets our individual identity in a context which we did not choose and under circumstances which we cannot fully control. The issue here is an ontological one between atomistic and holistic conceptions of the self.²⁹

It seems to me that an atomistic conception of the self, such as the unencumbered self Sandel describes, is indeed quite untenable. The holists are right in so far as it is impossible to imagine a recognisably human being whose identity could be said to be prior to and independent of all constitutive ends. I did not choose my parents nor any of the other members of my family, nor the nation of my birth, nor my sex, nor my race, nor the talents I have which have helped me to become friends with particular people, nor my limitations which have almost certainly ruined any possibility of friendship with some others. These attributes that I have, independently of my will, condition and shape, to a greater or lesser degree, my values and ends and therefore my identity. A human identity is never formed by a free floating individual, cut off and isolated from all moral ties with significant others, but rather through a dialogical

²⁹ See Charles Taylor "Cross-Purposes: The Liberal-Communitarian Debate" in *Liberalism and the Moral Life*, Nancy L. Rosenblum (ed.), Cambridge, MA: Harvard University Press, 1989, 159-182. According to Taylor this is an ontological issue in that it structures the field of possibilities for what we might advocate as a political policy.

encounter of recognition with others. Self understanding always depends to some degree on the recognition of parents, friends, lovers, a community of scholars or even perhaps, for believers, God.³⁰

Our identities are formed in the encounter with those others who matter to us. This process will presumably involve some degree of acceptance of the recognition we receive as well as a certain degree of struggle. If we struggle against the recognition, of our parents for example, we will want to move away from them, to draw on encounters with new significant others who can help us to become human beings that we could not have been had we not engaged in that struggle. The point here is that we are not simply encumbered with whatever values and ends our communities of origin happen to espouse. However it does not follow that we are ever unencumbered. We never change our ends or alter our identity without some struggle with or acceptance of the recognition of significant others.

The citizens of a liberal democracy are, in most circumstances, members of a particular political community that few have chosen voluntarily. Many citizens will find that they come to identify with the other members of their political community of origin. They will accept the recognition of their compatriots as constitutive of their identity. The fact that they are British, Irish, French or Portuguese becomes for each of them a part of their answer to the question "Who am I?" The good of their political community is in part constitutive of their own conception of the good.

³⁰ Of contemporary communitarian theorists, Charles Taylor has provided with the most illuminating account of this holistic conception of the self. See his *Sources of the Self: The Making of the Modern Identity*, Cambridge, UK: Cambridge University Press, 1989 and also *The Ethics of Authenticity*, Cambridge, MA: Harvard University Press, 1992.

However even if we were to leave our nation of origin, because we could not come to identify with its ends, we would want to find some new significant others on whom we could draw in the formation of a new political aspect to our identity. This might involve immigration or naturalisation and this process is obviously more common in a predominantly immigrant society like the USA. Yet even in these cases, for those who come to identify with their new political community, the community's good will in part constitute their own personal good. So it would seem reasonable to assume that the personal identity of each of these individual citizens depends, to a greater or lesser degree, on the common good of their political community. If, for example, that political community were to be invaded by an aggressive foreign power then the personal identity of the individual citizen, as well as the political identity of the community, would be under some threat.

Ruling out atomism does not rule out liberalism. It would rule Rawls's theory of justice out if Sandel were right, that it depends on a conception of an unencumbered self. In fact Rawls's position would best be described as that of a liberal holist. Although his recent writings offer more explicit support for this interpretation, I do not think he could ever fairly have been accused of atomism.³¹ It seems to me that Rawls is a liberal holist for two main reasons. Firstly, he can allow for the fact that individual identities are in part constituted by moral ties, such as ties within the family and various associations, that are not voluntarily chosen. By locating such associations beyond the scope of justice, Rawls assumes that he can disregard them in developing a political conception of justice. This move is not without its problems as will

³¹ *A Theory of Justice*, 520-529 and "The Priority of Right and Ideas of the Good", 268-273.

become clear when we come to consider post-structuralist and feminist criticisms of his work. Secondly and more importantly here, Rawls points out that the establishment and successful maintenance of just democratic institutions is itself a common good. That good is achieved and realised "through citizens' joint activity in mutual dependence on the appropriate actions being taken by others."³² The extent to which we realise and exercise our two moral powers depends, at least in part, on the achievement of this common good.³³ If this reading of Rawls is correct, we need pursue the charge of atomism no further. However, I think that a commitment to liberal holism has certain implications that undermine the attempt to isolate the political. I will conclude this section by considering two of these implications.

Some Implications of Liberal Holism

Firstly, communitarians have been critical of the liberal view that the state can, and should, be neutral regarding the plurality of competing conceptions of the good in a modern society. This is taken to be one

³² "The Priority of Right and Ideas of the Good", 271.

³³ For a clear exposition of what I am calling liberal holism see Ronald Dworkin "Liberal Community" in *Communitarianism and Individualism*, Shlomo Avineri and Avner de-Shalit (eds.), Oxford: Oxford University Press, 1992, 205-223, and "Foundations of Liberal Equality" in *The Tanner Lectures on Human Values, XI*, Grethe B. Peterson (ed.), Salt Lake City: University of Utah Press, 1990, 1-119. Taylor identifies with a tradition of holist individualism, influenced by the work of Humboldt, "Cross-Purposes: The Liberal-Communitarian Debate", 163. It is interesting to note that Rawls is also influenced by Humboldt and so can be seen, at least in this respect, as part of the same tradition as Taylor, *A Theory of Justice*, 520-529. It might be added that while both are holist individualists, Taylor's stress is more on the holism, Rawls's more on the individualism. We might also include as liberal holist theorists moderate liberal perfectionists such as Joseph Raz *The Morality of Freedom*, Oxford: Clarendon Press, 1986 and William Galston *Liberal Purposes*, Cambridge, UK: Cambridge University Press, 1991.

implication of the priority of right and its implicit commitment to impartiality. Principles of justice are to be legitimated thorough an impartial procedure and not in terms of any one substantive conception of the good. It seems to me however, that within the context of any one particular state, the ideal of neutrality has its limits.

A particular liberal democratic state is not neutral, for example, between on the one hand, those patriotic citizens who count as a constitutive aspect of their own good the justness of that state's institutions, as they have been shaped historically in a distinctive cultural context, and on the other hand, anti patriotic citizens who, for whatever reason, have come to despise those same institutions and who long for their destruction. These need not be actively involved in attacking the institutions of the state, whether by violent or other means. They may be relatively passive and simply resigned to the fact that they have been unfortunate to live in a political community for which they feel much resentment but no loyalty. For personal or historical reasons their identity precludes that loyalty. Every democratic state has a particular history and lays claim to a certain territory. It is not unusual to have some citizens within that territory who do not identify with the political community in which procedural justice for them is to be embodied historically. These anti patriots may not despise liberal democracy or procedural justice as such but only British democracy or Lithuanian democracy or Spanish democracy or whatever.³⁴

Citizens typically, even constitutional liberals, are loyal not to an abstract form of procedural justice as such but to a distinct cultural and

³⁴ In the final section of the third chapter I will consider the demands of justice in the case of Northern Ireland, which is a society that is divided in a sense that is relevant here.

historical embodiment of that procedure. They identify with the historical reality of a particular democratic community and that identification is, at least in part, the source of their allegiance to the state and their acceptance of its claim to legitimacy. The state cannot but privilege patriotic citizens over its anti patriots. In any society divided in this way the state can never be neutral between the conceptions of the good of those who identify themselves with its historical constitution and those who do not.³⁵

Neither can the liberal democratic state be neutral between those political liberals who affirm the overlapping consensus and those who do not accept the Kantian conception of moral personality on which that consensus is constructed. Rawls would have no difficulty in accepting this since he has always maintained that not all conceptions of the good are permissible within the framework of his account of justice as fairness. This is a crucial consequence of asserting the priority of right. It is enough, according to Rawls, that the overlapping consensus be supported by a substantial majority of its politically active citizens.³⁶ We recall that to support the overlapping consensus one need not endorse liberalism as a comprehensive moral view, by affirming the comprehensive doctrines of say Kant or Mill, but only as a political morality. The question that this claim raises however is whether or not political liberalism could be compatible with comprehensive moral views that are not themselves liberal.

³⁵ This is a challenge not only for the state but also for the particular political culture within which the state institutions are embodied. We will return to this in the discussion of ethical patterning in the third section of the third chapter.

³⁶ "The Domain of the Political and Overlapping Consensus", 235.

Rawls admits that justice as fairness does affirm a particular set of virtues, the liberal political virtues of tolerance, reasonableness and fairness.³⁷ He maintains that what is required of citizens who hold comprehensive moral views that are not themselves comprehensively liberal, is that they recognise the great significance of these liberal virtues to the extent, for example, that they accept that they will be promoted in the education of their children.³⁸ While there may be other virtues, such as religious ones, that are encouraged at home, it is the political virtues that prepare the young for citizenship in a well-ordered society.

But surely this is so demanding that the variety of comprehensive moral views that could accept it is quite limited. There will arguably be many citizens of modern societies who would find this unreasonable in so far as it clashes too sharply with certain important aspects of their comprehensive moral views. Take for example anybody who adheres to a religious conception of the good of all humanity in a fundamentalistic way. For them to accept that the promotion of the liberal virtues as a central aspect of the education of their children is to ask them to risk something that may matter to them a great deal, that the religious upbringing they give to their children will be undermined at school. The comprehensive moral views that could affirm an overlapping consensus begin to look pretty comprehensively liberal. Not only does this reflect quite dimly the diversity of moral views that are held in modern societies but, more importantly, it leaves a great number of people outside of the overlapping consensus. They will be expected to accept the political

³⁷ "The Priority of Right and Ideas of the Good", 263.

³⁸ "The Priority of Right and Ideas of the Good", 268-269.

morality of Rawls's constitutional state not as a matter of conviction but rather merely as a *modus vivendi*.³⁹

The problem here can be illustrated somewhat differently with reference to divisive moral issues which are part of the political agenda in contemporary societies. These include abortion, euthanasia, animal rights and questions such as the criminalisation of sado-masochistic sex or the right to freedom of expression in the light of the Salman Rushdie affair. Take abortion for example. Every modern state has to take some political position on this question and it must reach some conclusion about what rights are involved. Could the state do this by avoiding controversial comprehensive moral claims? If the state were to reach its conclusion by affirming only the liberal virtues of tolerance, reasonableness and fairness, what are we to make of its expectation that these considerations should override the comprehensive moral views of dissenting citizens?

It seems clear to me that there is no way that convinced pro-life campaigners could accept that these particular liberal virtues, of tolerance, reasonableness and fairness, should override their conviction that a mother and her unborn foetus are of equal moral value from the moment of conception, without radically changing their most fundamental moral beliefs. In other words, if they were to be able to digest political liberalism to the extent that they could accept that it would be unreasonable for the state to ban abortion, then they would already have swallowed a fairly large dose of comprehensive liberalism.⁴⁰ Accepting

³⁹ For similar arguments see William Galston "Pluralism and Social Unity" *Ethics*, 99 (1989), 711-726 and Patrick Neal "Justice as Fairness: Political or Metaphysical?" *Political Theory*, 18 (1990), 24-50.

that legal abortion is reasonable is incompatible with the comprehensive moral view that abortion is murder.⁴¹ Political liberalism is only compatible with comprehensive moral views that are themselves thoroughly liberal.

Nor could Rawls dissolve this difficulty by claiming that the question of the liberal state failing to be neutral is not at issue in the dispute about abortion, since this is a matter of political right and not a question of morality in a more comprehensive sense. The problem with a moral issue such as abortion is that we do not agree on a conception of the right. There is dissensus on who has rights and also on the matter of which rights have priority. But this disagreement will always be premised on and informed by disagreements between competing comprehensive moral claims. For one party, perhaps the foetus has equal rights with the mother because it is loved equally in the eyes of God. For another party, the foetus may have a right to life in a qualified sense but this right can be trumped by the rights of the mother, depending on her circumstances. For a third, the woman's right to choose always takes priority over other considerations. Even among those who hold this position there is a no agreement on the time scale involved. The reasons given in support of these various positions as to what is right with regard to abortion will depend on the range of moral resources that could be drawn from the comprehensive moral commitments of the participants. An appeal to a

⁴⁰ In *Political Liberalism*, 243-244, n.32, Rawls suggests that it would be unreasonable not to allow a woman the right to terminate a pregnancy, at least within the first trimester.

⁴¹ A comprehensive liberal can still believe that abortion is wrong but the liberal belief that disagreement about this matter is reasonable will override their possible preference to have all abortion banned. It seems to me to be impossible to hold this liberal belief and at the same time to consider abortion morally to be on a par with the murder of an independently existing human being.

conception of rights does nothing to avoid the moral controversy involved.

A state that permits abortion cannot but favour conceptions of the good that are comprehensively liberal. The attempt to avoid comprehensive moral commitments in public discussion runs the risk of imposing a particular comprehensive morality rather than engaging in critical discussion about the real issues involved. Such a critical discussion cannot mark out in advance the issues that must be avoided for the sake of affirming an overlapping consensus. It must allow the relationship between the political right and the comprehensively moral to be the subject of deliberation in an open public encounter. Controversial moral views, even those on which agreement seems to be most unlikely, must not be excluded from the public agenda, but rather they must be incorporated into that agenda.⁴²

These divisive moral issues make it clear that it is not as easy as Rawls seems to think to isolate a political morality from other comprehensive moral views. It is never obvious which aspects of our morality are political and which are not. Only comprehensive liberals could accept that their moral views on abortion, for example, should be trumped by the claims of political liberalism. The limits of a state's neutrality between conceptions of the good can once more be easily underestimated. Not only must the conception of a patriot be privileged over that of an anti patriot, and the conceptions of those who do affirm the overlapping consensus be privileged over those who do not, but a politically liberal state must, by promoting the virtues of tolerance,

⁴² For a trenchant account of the moral consequences of liberalism's strategy of avoiding public discussion of the good see MacIntyre *After Virtue*, especially chapter 17 and *Whose Justice? Which Rationality?*, London: Duckworth, 1988, 342-348.

reasonableness and fairness, also privilege comprehensively liberal moral views over comprehensive moralities that are less than liberal.

A second implication of liberal holism, which is related to the first, is the need for widespread active participation in democratic politics if the liberties guaranteed in justice as fairness are to be secured. I will discuss the role of the basic liberties in Rawls's account of justice when we come to analyse his two substantive principles in the next chapter. Rawls's communitarian critics emphasise the bonds of solidarity among citizens that are essential if the common good of just institutions is to flourish. If the rights provided by those institutions are to be of fair value to all citizens there must be a vibrant and vigilant public sphere where open discussion can take place about questions of the common good.

The communitarian stress tends to be on the need for democratic structures of power that encourage citizens to participate actively in public spheres which inform and shape political decisions on matters of common concern. The participatory model of citizenship implied here and the complementary notion of a vibrant public sphere can be contrasted with the strong emphasis on individual rights within certain strands of the liberal tradition.⁴³ The communitarian model of citizenship is based on the republican ideal of citizen self-rule. In contrast the individualistic, liberal model of citizenship is based on the power of the individual to retrieve rights through the judicial process.⁴⁴

Now it seems to me that both of these aspects of citizenship are central to any theory of justice that is presented in liberal holist terms.

⁴³ I have in mind the Lockean strand of liberalism.

⁴⁴ See Taylor "Cross Purposes: The Liberal-Communitarian Debate", 177-181 and Sandel "The Procedural Republic and the Unencumbered Self" *Political Theory*, 12 (1984), 81-96.

Individual rights could never be secured fairly outside the context of a self-ruling democratic community. At the same time that community could not be genuinely democratic if it did not respect the dignity and the personal autonomy of the individual. If we present the holist commitment to active participation among citizens in democratic self-rule and the liberal commitment to individual rights as two sides of the one coin, we do not have to give an account of political justice either solely in terms of the rights of isolated individuals nor solely in terms of the will of a tightly knit community. While the former depends on an untenable atomistic ontology, the latter cannot adequately facilitate the views of dissenting individuals. A liberal holist theory of justice can instead be presented as a normatively justified procedure that is grounded in intersubjective terms. This is the great achievement of Habermas's discourse ethics and we will examine his defence of that approach in detail in the third chapter.⁴⁵

Although I have suggested that Rawls is a liberal holist, he does tend to stress an individualistic model of citizenship, one that is given in terms of the judicial retrieval of rights, at the expense of the holist concern with democratic self-rule.⁴⁶ Again the attempt to isolate political morality from other comprehensive moral views is crucial here. This sets a limit to the scope of open political discussion by excluding issues about which it is presumed that we will not agree. I have already suggested that this

⁴⁵ In this paragraph I have anticipated some of the ideas that Habermas has outlined in his most recent writings, especially *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt am Main: Suhrkamp Verlag, 1992.

⁴⁶ Rawls accepts that classical republicanism is not incompatible with justice as fairness, "The Priority of Right and Ideas of the Good", 272, but, as we will see, this is overshadowed by his failure to theorise adequately the role of a vibrant democratic public sphere.

method of avoidance that Rawls has adopted, fails to isolate political morality as neatly as he seems to imply. Furthermore the method does not do justice to the diversity of conceptions of the good that could be represented in the public domain since, as we saw in the discussion about neutrality, it marginalises conceptions that are not comprehensively liberal.

Rawls's emphasis on the liberal political morality that forms the basis of the overlapping consensus does not reflect very satisfactorily the kind of differences that characterise a vigilant public sphere in a modern society. The equal opportunity of all social groups to participate in public discourse must be incorporated into any procedural account of justice that is to be adequate as a test of the legitimacy of substantive principles which are to regulate the basic structure of a modern society. Rawls procedure does not give a sufficiently central role to the notion of a vigilant public sphere. For this reason the role of democratic deliberation is unclear since basic principles are agreed upon before real public discussion even begins to take place.⁴⁷ This causes a further problem, as to how the procedure that Rawls defends is itself to be assessed critically and legitimated. This problem is central to the discussion of the next section.

The importance of the communitarian model of citizenship that stresses active self-rule should not be overlooked. Within the framework

⁴⁷ The point is made at greater length by Chantal Mouffe "Rawls: Political Philosophy without Politics" in *Universalism Vs. Communitarianism*, David Rasmussen (ed.), Cambridge, MA: The MIT Press, 1990, 217-236. I think that Rawls's problem here is rooted in the monological nature of his procedure. Since we have to agree on basic principles in advance of any public encounter, moral reflection does not involve any flexibility on the part of participants who want to come to an agreement with one another. This criticism will be developed in the following two sections and will be addressed once again in the discussion of Habermas.

of liberal holism, citizens are committed to the common good of their shared achievement of just institutions and the vigilant maintenance of those institutions over time. This will secure their individual rights and the effective value of the liberties they guarantee.⁴⁸ From this perspective all of our moral claims must be open to question since there is no reasonable way to decide in advance which claims are matters of political morality and which are not. The boundary between the political and the non-political is constantly under negotiation in the ongoing democratic debates that are informed by our moralities. It seems to me that this is unavoidable as our comprehensive moralities, and therefore our conceptions of the good, always underpin our political moralities.

If we wish to question and to assess critically the presuppositions of those political moralities then we are inevitably drawn into democratic deliberation about particular conceptions of the good. This does not mean that we can agree about a full conception of the good or that a shared comprehensive morality should be the aim of our deliberation. Nor does it mean that we should reject the priority of right. In fact Rawls is clearly right in so far as justice in modern societies must be defended in terms of the priority of right. What I have argued in this section is that Rawls himself has not provided us with a convincing defence of that priority. We will have to wait until the third chapter, when I discuss Habermas's work, before we can consider what I take to me a more convincing alternative .

A rejection of the method of avoiding public discussion over comprehensive moral views is necessary if we want to ensure that our

⁴⁸ Kenneth Baynes draws on the work of Habermas to give a convincing critique of Rawls's neglect of the need for widespread participation and a vibrant public sphere in a democratic society that could claim to be just. See *The Normative Grounds of Social Criticism*, 161-181.

democratic practices can be engaged in a self-critical assessment of their most fundamental moral presuppositions.⁴⁹ Rawls's recent strategy of avoidance does give sufficient evidence to suggest that he has not yet abandoned the unhelpful isolation of the political domain that dominates liberal thinking about justice. The most persuasive communitarian criticisms of liberalism can be used to highlight the inadequacy of that aspect of his procedural account of justice. Further evidence of the potential biases in Rawls's procedure can be constructed from a reconstruction of possible post-structuralist objections to his work.

⁴⁹ Seyla Benhabib *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics*, Cambridge, UK: Polity Press, 1992, 7.

1.3 THE ORIGINAL POSITION AND POST-STRUCTURALIST OBJECTIONS

The notion of an original position is to be thought of as an impartial procedure that is to test the legitimacy of substantive principles of justice. Rawls introduces this particular procedure because he conceives of principles of justice as the fundamental terms of association that free and equal moral persons would agree to in an initial situation of fairness. These principles would then be accepted as the standards according to which all features of the basic structure of society are to be regulated.¹ He derives his two principles by arguing that they are the ones that would be agreed to in such an original contract.

The original position then is a hypothetical situation that represents conditions of fairness. These conditions specify the moral point of view. Rawls's strategy is to use the idea of the original position to provide a moral justification for his principles. If the conditions of agreement are fair, then the object of the agreement will also be fair and so the principles chosen provide us with a rational and stable basis for social unity. Obviously the construction of the original position is itself in need of some justification. Why should we think of it as specifying the conditions of a moral, or an impartial, point of view?

In this section I will analyse Rawls's procedure by assessing possible post-structuralist objections to the notion of an original position. These objections will be reconstructed through a brief examination of Michel Foucault's work on power. I will maintain, against the stronger claims of post-structuralists, that under modern conditions a theory of justice must be presented in terms of a procedural conception of an impartial point of

¹ *A Theory of Justice*, 11.

view. However, Rawls's procedure is flawed in that the attempt to isolate the political is built into the conditions of the original position. This approach is monological in that there can be no articulation of the differences between parties who are choosing substantive principles from an impartial point of view. To conceive of impartiality in this way is to run the risk of constructing an account of justice on a conception of citizenship that may not adequately take into account the perspectives of social groups at the margins of modern societies.

The Veil of Ignorance and Social Unity

The idea that is central to Rawls's procedure is that all morally arbitrary aspects of our personality should be excluded from our considerations about justice. The feature of the original position that achieves this is the veil of ignorance. According to this notion we must assume that in the original position none of the parties know their place in society, their class, their social status, their natural abilities such as intelligence, good looks, strength, their particular psychological propensities such as a tendency towards optimism, risk-taking or envy.² We have already discussed communitarian objections to the fact that we are also to assume that in the original position none of the parties know their conception of the good. The idea of the veil of ignorance is to ensure that

no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to

² For a full account of the original position see chapter 3 of *A Theory of Justice*, especially 118-150, and for a more recent account of its role, *Political Liberalism*, 22-28.

design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain.³

All of the personal attributes that are excluded are to be thought of as morally arbitrary, as the contingent results of our good or bad fortune. Such matters should be considered irrelevant to the concerns of justice. Rawls supports this by pointing out that it is one of our considered convictions that the fact that I have a particular natural asset (say physical strength) or that I occupy a certain social position (say I'm a lawyer) is not a good reason for me to accept a conception of justice that favours people like me. I clearly have no good reason to expect others to accept such a conception either.⁴ No person should be disadvantaged simply because they are not physically strong or because they are not lawyers. If they were to be so disadvantaged, that would be unjust. The argument is that the conditions of the original position provide the best available match for our considered moral judgements in reflective equilibrium.⁵ They are, in other words, according to Rawls the conditions of fairness that we do in fact accept.

Rawls wants the parties to the contract not to be prejudiced or biased by knowledge of their particular natural assets or social circumstances for at least two reasons.⁶ Firstly, allowing such knowledge of contingencies would in practice make any agreement unlikely as different parties would be biased in different ways depending on their own good fortune. It would be impossible for us to say anything definite about justice at all.

³ *A Theory of Justice*, 12.

⁴ "Justice as Fairness: Political not Metaphysical", 237.

⁵ *A Theory of Justice*, 21-22, 48-51 and see Rawls's comments in "Justice as Fairness: Political not Metaphysical", 236-238.

⁶ *A Theory of Justice*, 140-142.

Secondly, the moral basis of the agreement would be undermined as the deliberations in the original position would be informed by factors which do not reflect the highest-order interests of the parties. If we were not to exclude such knowledge then any contract would almost certainly be partial towards those in a more powerful bargaining position. The less powerful would accept it for prudential, and not for moral, reasons.

Free and equal moral persons are to be motivated by their interests in choosing and revising a conception of the good and in exercising their sense of justice. This is why the conditions of the original position must be reasonable and fair, independent of chance and contingency, and grounded in the concern for rational autonomy that characterises our moral personality. In the original position our interests are to be reconciled in a reasonable and impartial way.⁷

Rawls's use of the veil of ignorance reflects the isolation of the political by excluding from the original position all aspects of our moral personality that are not relevant to our public life as citizens of a democratic community. Our public identity as citizens does not include certain convictions and attachments that may be constitutive of our personal "non-public" identity.⁸ Thus while I might be disoriented, or even thrown into a crisis of personal identity, were I to think of myself as no longer committed to certain religious or moral convictions, these same convictions are not a part of my identity as a citizen.

⁷ On the moral justification for the conditions of the original position see "Kantian Constructivism in Moral Theory", section IV of "Justice as Fairness: Political not Metaphysical" and "A Kantian Conception of Equality" in *Post-Analytic Philosophy*, John Rajchman and Cornel West (eds.), New York: Columbia University Press, 1985, 201-214.

⁸ "Justice as Fairness: Political not Metaphysical", 239-244.

Thus for example Rawls would maintain that if it is my firm belief that Jesus is my Lord and Saviour then that is undeniably fundamental to my self-understanding, but it is irrelevant to my public identity. For that, it is enough that I view myself as having the moral power to have and to revise some conception of the good, as a self-originating source of valid claims and as a being capable of taking responsibility for my own ends. In this way we each of us is a politically free citizen. Since we all share this public identity, we are not only free but also equal as citizens. This concentration on our public identity as citizens is part of the method of avoidance that Rawls has espoused in his later writings. He wants to stay "on the surface, philosophically speaking" and to construct a workable conception of justice while avoiding controversies about religious, moral and philosophical doctrine related to metaphysical questions of the truth or the nature of the self.⁹

We have already discovered, in assessing the import of some communitarian criticisms of Rawls's work, that the attempt to isolate the political domain leads him firstly, to overestimate the extent to which the state can be neutral between conceptions of the good and secondly, to underestimate the extent to which a procedural account of justice must reflect active participation by citizens in defence of the shared good of just institutions. What communitarians are concerned with is to give justice and social unity a more adequate moral foundation than Rawls has provided due to his stress on individual plans of life. In contrast post-structuralists do not object to Rawls's project, and specifically to the idea of an original position, on the grounds that it lacks an adequate moral foundation.¹⁰ They would rather reject all attempts to secure a

⁹ "Justice as Fairness: Political not Metaphysical", 230-231.

distinctively moral foundation for social unity and justice. Their objection could therefore be applied even more forcefully to the communitarians than to Rawls.

For post-structuralists the self is constituted not so much by shared moral ends as by power.¹¹ Rawls's work can be thought of as a moral discourse about justice that seeks to establish an impartial basis for social unity. What he does not seem to realise, according to the post-structuralist, is that power is built into all discourses and that any claim to impartiality is another hidden form of power.¹² It rests on the binary

¹⁰ The term post-structuralist is usually applied to the work of theorists such as Michel Foucault, Jacques Derrida, Gilles Deleuze and Jean-François Lyotard. In constructing this objection to Rawls I will be relying on the work of Foucault because I take his work on power to represent the most important post-structuralist challenge to liberal political theory. See for example *Power/Knowledge*, Colin Gordon (ed.), New York: Pantheon Books, 1980, especially chapters 5 and 6. For a rare essay that confronts Rawls directly from a post-structuralist perspective, but drawing primarily on Lyotard rather than Foucault, see Anne Barron "Lyotard and the Problem of Justice" in *Judging Lyotard*, Andrew Benjamin (ed.), London: Routledge, 1992, 26-42. Two books that seek to incorporate post-structuralist concerns into recent debates about justice are Stephen K. White *Political Theory and Postmodernism*, Cambridge, UK: Cambridge University Press, 1991 and Iris Marion Young *Justice and the Politics of Difference*, Princeton: Princeton University Press, 1990. For a contribution to democratic theory that shares much with the neo-Nietzscheanism of Foucault, William E. Connolly *Identity/Difference: Democratic Negotiations of Political Paradox*, Ithaca: Cornell University Press, 1991.

¹¹ Foucault "The Subject and Power", afterword to Hubert L. Dreyfus and Paul Rabinow *Michel Foucault: Beyond Structuralism and Hermeneutics*, Chicago: University of Chicago Press, 1982.

¹² *Power/Knowledge*, 83-85, 115-117. While Foucault usually speaks of scientific and social scientific discourse I think that a post-structuralist would argue that Rawls's account of justice is a power-laden discourse that conceals its power in its aspiration, through the construction of the original position, to be neutral and impartial. Derrida adopts a similar critical position towards what he takes to be supposedly neutral discourses or impartial procedures. See the interview with him "Deconstruction and the Other" in Richard Kearney *Dialogues with Contemporary Thinkers*, Manchester: Manchester University Press, 1984, 107-126. More generally for an account of Derrida's own ethics see Simon Critchley *The Ethics of Deconstruction: Derrida and Levinas*, Oxford: Basil Blackwell,

opposition of reason/power assuming that impartial agreement is driven by reason alone and that the effects of power can be eliminated by some such device as a veil of ignorance. To claim impartiality for justice as fairness is of course crucial to Rawls's project of providing a basis for social unity. According to this post-structuralist objection however that project must be, at least in part, driven by power. The discourse involved, in this case the construction of the original position, will always exclude some marginalised "other" from its terms of reference.¹³ It will repress difference for the sake of unity.

There are a number of candidates to be considered as possible excluded others from Rawls's theory. Firstly, the excluded other could be non-human entities (animals, plants, external nature). Secondly, the excluded other could be other human actors (women, non-whites, non-Christians, lesbians and gays, children, past or future generations, the unborn, the insane, the comatose). Thirdly, the excluded other could be other aspects of a human life (feelings, fantasies, sexual desire, as well as our full conception of the good including religious and comprehensively moral convictions).

The post-structuralist claim is that the original position is a discourse of power that claims to legitimate a conception of justice by excluding the other, devaluing it, marginalising it. This conception of justice will inevitably reflect the hierarchical assumptions that are built into the discourse that produced it. Justice as fairness is simply another form of

1992 and for two relevant critiques of Derrida, Thomas McCarthy "The Politics of the Ineffable: Derrida's Deconstructionism" in *Ideals and Illusions*, Cambridge, MA: The MIT Press, 1991, 97-119 and Richard J. Bernstein "Serious Play: The Ethical-Political Horizon of Derrida" in *The New Constellation*, Cambridge, UK: Polity Press, 1991, 172-198.

¹³ White *Political Theory and Postmodernism*, 17-19.

power and the original position is a form of power/knowledge which subjugates the other that cannot be identified within its framework. Post-structuralism represents a deep scepticism about the possibility of a reasonable and impartial conception of justice.

Foucault on Power and Resistance

Before assessing whether or not Rawls can be accused of arbitrarily excluding some other from his discourse on justice, we can clarify what is at stake here by contrasting this post-structuralist perspective with Marxism. As I mentioned in the first section of this chapter, a Marxist might criticise the notion of the original position, or indeed of the priority of right, by claiming that these are ideological notions that reflect a bourgeois conception of morality. This conception is an historical product of the capitalist mode of production that serves to uphold the power of the ruling class.

For a post-structuralist, or at least for Michel Foucault, there are serious problems with the notions of ideology and power which would have to be elaborated in order to ground this criticism. Firstly, ideology is to be opposed to truth, but for Foucault there is no truth outside of power. Secondly, ideology serves class power in that it represents the interests of the ruling class, but for Foucault power cannot be derived from interests nor does any one class have power. Thirdly, power for the Marxist is primarily a function of economic relations and so must be resisted by a liberating revolutionary class struggle, but for Foucault all resistance to power must be local, immediate and anarchistic with no illusion of ever being liberated from all the effects of power.¹⁴

¹⁴ *Power/Knowledge*, 89, 118-119, 131-133, 142, 145, 187-188, "The Subject and Power", 211-212.

I cannot discuss in great detail the theory of power implicit in Foucault's rejection of Marxism. It will suffice to give a brief sketch that should illuminate the objection to any theory that claims to be impartial. According to Foucault, every society has a "regime of truth". What counts as true is always a reflection of the operation of power, so power produces truth and truth in turn induces the effects of power. It is illusory to imagine a society where truth is not bound up with power in this way and so critical theory is best directed towards advocating a new regime of truth rather than liberating truth from all power as such.¹⁵

The reason that many people are under this illusion is that, according to Foucault, they fail to understand the nature of power, specifically power in modern societies. No one class, or one person, has power which can be used with negative effects on the powerless. This sovereign notion of power is misleading in that it fails to account for the complexity of specific mechanisms at work in the exercise of power throughout the social body.¹⁶ Power is not located in the state, nor is it confined to the basic structure of society which is, for Rawls, the subject of justice. It does not leave a private sphere of autonomous individuals untouched but rather it pervades all institutional domains of modern society. Any discourse that locates power outside of our private lives, which we supposedly protect with rights, is itself a form of domination concealing the nature of modern power. Liberalism typically concerns itself with rights and legislative practices while ignoring power in the form of "invisible societal constraints that defy such practices while continuing to influence them."¹⁷

¹⁵ *Power/Knowledge*, 131-133.

¹⁶ *Power/Knowledge*, 98, 142, 187-188.

Modern power is a capillary network of micropractices from the penal to the educational, from the medical to the familial and even the sexual. These micropractices are productive as well as prohibitive of action. They are integrated into a modern macrostrategy of "bio-power" that concerns itself with the production and reproduction of life in modern societies. We have become the objects of social scientific research, a form of power/knowledge that acts as an instrument of surveillance, discipline and control. Whatever is deviant is "normalised" through practices of therapeutic correction. Power is productive of action by constraining, directing and normalising our behaviour.¹⁸

Most importantly, Foucault claims that we internalise the disciplinary "gaze" of these strategies of surveillance by thinking of ourselves as subjects. Modern subjectivity is constituted by the effects of "pastoral power" that ties us to an identity informed and controlled by a conscience we learn from priests, therapists, the police, doctors, teachers, social workers, personnel officers and any organisation that concerns itself with our personal well-being.¹⁹ We can recognise here how the institutions of the welfare-state are implicated in the macrostrategy of bio-power. The welfare-state, even if it aims at a redistribution of goods to benefit the worst-off, is itself part of the problem. This is because it functions to administer and control the lives of those who depend on it.²⁰

¹⁷ Seyla Benhabib and Dufcilla Cornell "Introduction" to their edited collection *Feminism as Critique*, Cambridge, UK: Polity Press, 1987, 11.

¹⁸ In general see chapters 3, 5, 6, 9 and 10 of *Power/Knowledge* and also "Right of Death and Power over Life" in *The Foucault Reader*, Paul Rabinow (ed.), London: Penguin, 1984, 258-272. Foucault's most important book on power is *Discipline and Punish*, New York: Pantheon Books, 1977.

¹⁹ "The Subject and Power", 214-216.

The notion of confession is central for Foucault here. This idea of course has its origins in early Christianity but it has been secularised in modern social life. In the Christian tradition confession involves the verbalisation, to a spiritual director, of one's most intimate thoughts (and actions). The subject excavates, interprets, analyses and evaluates these thoughts by bringing them into the open. The spiritual director is the listener who represents the image of God. By unburdening oneself of all secrets, one is seeking to be at rights with God. This process was to reflect an on-going permanent activity directed towards personal conversion, turning away from Satan and so renouncing oneself, and turning towards the love of God.

The renunciation of self expresses a wish not to be subject to one's own will but rather to be obedient to the will of God as manifested through the guidance of the spiritual director. Foucault maintains that in these confessional practices of Christianity, we can see most clearly a link between the search for the truth about oneself and self-sacrifice.

The revelation of the truth about oneself cannot be dissociated from the obligation to renounce oneself. We have to sacrifice the self in order to discover the truth about ourselves, and we have to discover the truth about ourselves in order to sacrifice ourselves.²¹

For Foucault one of the great problems for Western culture has been to break the link between a technology of interpretation of the self and self-sacrifice. Much of Western thought has been a quest for a positive foundation for the interrogation into subjective truth.

²⁰ For discussions of the welfare state in this context see Young *Justice and the Politics of Difference*, 76-81 and Habermas *The Theory of Communicative Action, Volume 2*, Cambridge, UK: Polity Press, 1987, 361-373.

²¹ Foucault "About the Beginning of the Hermeneutics of the Self" *Political Theory*, 21 (1993), 198-227, here at 221.

What has been produced however are various discourses that amount to technologies of normalisation that set a certain image of the human self to be paradigmatic. This image then is the standard towards which we seek to be converted as we seek to know and to control ourselves. Such a quest for self-knowledge does not break with the self-sacrifice involved in Christian confessional practices. We still subjugate our own will to the modern practices of pastoral power. The discourses of therapists, social workers and so on have replaced theological discourse in our regime of truth. These discourses are crucial elements to the distinctively modern macrostrategy of bio-power.²²

Resistance to bio-power cannot be reduced to a class struggle that identifies the roots of power to be embedded in the economic base of society. There is an irreducible plurality of struggles that can be thought of as resistance to particular effects of power, for example the medical profession which "is not criticised primarily because it is a profit-making concern, but because it exercises an uncontrolled power over people's bodies, their health and their life and death."²³ Other such struggles include the feminist challenge to the power of men, the lesbian and gay challenge to the power of heterosexual normalisation, the challenge of ethnic, racial or religious minorities to the power of majorities.

These struggles are against forms of power that make individuals subject to control, or subject to their own identity through the internalised gaze of pastoral power. They are struggles for new forms of subjectivity. These groups cannot be identified as members of the proletariat

²² On the importance of confessional practices in sexual discourses of modern power see Foucault *The History of Sexuality, Volume 1: An Introduction*, London: Penguin, 1990, 53-73 and *Power/Knowledge*, 93-94.

²³ "The Subject and Power", 211.

struggling to overcome the effects of capitalist power. Class identity can repress the actual differences they are expressing in their struggle against a more immediate enemy, be it sexism, homophobia, racism or sectarianism. It is other aspects of their lives that can provide the source for resistance to the identity that has been forced on them through the effects of pastoral power and the modern forms of confessional practice. Refusing the overarching identity of a revolutionary proletariat may well also be a strategy for such resistance.²⁴

This digression on Foucault's notion of power has been necessary in order to reconstruct clearly a direct post-structuralist challenge to Rawls. We can see how, like Marxism, post-structuralism detects elements of power in Rawls's theory of justice. Unlike the case of Marxism however, the possibility of an alternative theory that might guide our liberation from unjust power is rejected as illusory. Like communitarianism, post-structuralism is critical of the notion of a separate public identity of the self as citizen that can be affirmed independently of non-political concerns. Unlike the communitarian, who stresses the moral ties that are partly constitutive of the self, the post-structuralist stresses the effects of power beyond the public arena that constitute the self as a subject.

What post-structuralism alerts us to is the danger of assuming unity in the face of real differences. I believe that historical research, including that of Foucault himself, has produced enough evidence for us not to treat

²⁴ Foucault discusses the relationship between power, resistance and freedom in "The Ethic of Care for the Self as a Practice of Freedom" *Philosophy and Social Criticism*, 12 (1987), 112-130. We practice freedom by transgressing the limits that have been imposed on us historically and by trying to go beyond the particular dangers involved. This is a process of self-invention. It is this attitude that characterises critique under modern conditions. For a clear statement on this and related issues see "What is Enlightenment?" in *The Foucault Reader*, 32-50.

this danger lightly and not to be complacent about the inclusiveness of any theory.²⁵ Marxism, which has undoubtedly been a rich source for the theoretical clarification of the effects of power on human lives, fails dismally in this regard. It has tended to repress otherness for the sake of the revolutionary struggle against capitalism. I now want to turn to the assessment of the challenge to Rawls and his veil of ignorance. Is Rawls sufficiently aware of the dangers of excluding others in his attempt to provide a theoretical basis for social unity and justice?

An Excluded Other?

First of all does the original position exclude non-human entities? Yes, it does, but I do not think that this is a problem for Rawls since he explicitly limits himself to a theory of justice between persons. The scope of the theory extends only to moral relationships among people and even then only to the institutions of the basic structure of society.²⁶ The parties to the contract have specifically human characteristics, notably the two moral powers to have a conception of the good and a sense of justice. Rawls does not discuss in any detail the relationship a human being might have with animals, plants or external nature, although he assumes these to be questions of great importance. He notes that while it is clearly wrong to treat animals with cruelty, it is not clear that they should receive strict justice in the same way that human beings, with these two moral powers, are entitled to justice from each other.²⁷ Moral

²⁵ The most important extracts from Foucault's histories of madness, discipline and punishment, and sexuality, are included in *The Foucault Reader*.

²⁶ *A Theory of Justice*, 17.

²⁷ *A Theory of Justice*, 512.

issues that are raised with respect to the status of animals, plants and external nature can be treated as separate matters and there is no need to give a full account of them in a theory that deals explicitly with questions of justice between human beings.

So non-human entities are, with reasonable justification, excluded from Rawls's discourse. Much more important from his own point of view is the second possible exclusion that was mentioned earlier. Does the original position also in some way exclude, or at least marginalise, other human actors? The parties to the original position are representative persons who hold the various social positions that are established by the basic structure of society.²⁸ Since all persons are to be represented, then at first glance it seems unlikely that Rawls can be accused of excluding some group of persons or other. All features of people's lives that are the result of natural fortune or social circumstance are hidden behind the veil of ignorance so as not to disadvantage anyone for such arbitrary reasons in the choice of principles of justice. Although Rawls may not be fully explicit about all of these features the parties would have to be deprived of knowledge of their sex, their race, their social status, the generation to which they belong as well their conception of the good which presumably would include their religion, their ethnicity and their sexual orientation and preference.

The strategy Rawls adopts in trying to ensure that no human actors are excluded in the original position, is to think of the parties in such a way that they are all identical to each other. All aspects of their lives that make them different from each other are shrouded in the veil of ignorance. The veil excludes all human features other than those features

²⁸ *A Theory of Justice*, 64.

of our public identity as free and equal citizens. This of course is the third possibility of an excluded other. For Rawls this exclusion is necessary in order to avoid the only exclusion that we should worry about in terms of a theory of justice between persons, that of other human actors. Only by eliminating from the moral point of view whatever differentiates us from one another can we have any guarantee of impartiality, social unity and justice for all citizens.

There are problems here however in that the conception of the citizen may obliterate differences that are important in terms of the way that power operates. The use of the veil of ignorance amounts to an assumption that what is relevant for our public identity and what is not is uncontroversial and already fixed before we even come to assess possible principles of justice. Since the contract is hypothetical Rawls must presume that every reasonable person would and should agree to the conditions of the original position. In this respect Foucault's post-structuralism alerts us to the dangers of such a presumption.

Rawls has no adequate way of testing whether or not marginalised groups within his own society have good reasons to accept the particular characterisation of the political domain that the veil represents. He runs the risk of building his own biases into the outline of a supposedly impartial procedure from which a substantive account of justice is to be constructed. Rawls's conception of citizenship may draw on a particular view that reflects the self-image of the dominant social group. The only adequate test for this would be to conceive of an impartial point of view not as a hypothetical contract but rather as an open public debate where the participants could raise any matter as a potential subject of justice and

where the constraints on the debate are not fixed once and for all before substantive issues can be considered.²⁹

The general knowledge about social life that Rawls relies on in his outline of the original position, and in deciding where the veil of ignorance should fall, is, from a Foucauldian perspective, power/knowledge. All such knowledge, that is the general presuppositions of any one theorist in a modern society, must be thought of as having been produced not only by reason but also by power. If this is right, then the potentially biased assumptions that are built into the discourse must be submitted to a test where all those affected by its outcome could make a contribution in deciding what is and what is not politically relevant and what the most appropriate conditions of moral justification would be. Rawls's own potential biases are not effectively tested since the parties in the original position are identical and so the discourse represents not a dialogue but a monologue. The only real participant is Rawls himself as the constructivist theorist who provides us with a "philosophical soliloquy".³⁰

If, in contrast, the choice of substantive principles is thought of as the outcome of an open public debate with real participants then we can be somewhat more confident that all human actors will be represented

²⁹ Seyla Benhabib "The Generalized and the Concrete Other" in *Feminism as Critique*, Benhabib and Durrill Cornell (eds.) here at 93-94. Kenneth Baynes makes some telling points along similar lines in "The Liberal/Communitarian Controversy and Communicative Ethics" in *Universalism Vs. Communitarianism*, David Rasmussen (ed.), 61-81.

³⁰ Michael Walzer "A Critique of Philosophical Conversation" in *Hermeneutics and Critical Theory in Ethics and Politics*, Michael Kelly (ed.), Cambridge, MA: The MIT Press, 1990, here at 189. For evidence that the original position is a monological moral point of view see *A Theory of Justice*, 19, 119, 139, 564 and "Kantian Constructivism in Moral Theory", 550.

adequately. An impartial point of view must reflect a real discourse that gives every marginalised social group the opportunity to publicise the effects of power that had formerly operated on them in the private realm. Real public dialogue has definite advantages over monological philosophical construction in identifying and confronting the more subtle effects of power in modern societies when it comes to choosing substantive principles of justice. These marginalised social groups can represent themselves in public and so they do not have to rely on the sensitivity of one political theorist to design the choice of substantive principles in a way that will adequately take into account their particular point of view.

We can think of a number of social groups that have in the past suffered discrimination or arbitrary exclusion from the public arena and have asserted their rights as citizens to be included fully in public deliberations. But they have also demanded that the boundary of the political be renegotiated so as to accommodate this change.³¹ Whatever was previously considered to be a contingent matter of merely private relevance is then placed in the public realm as an effect of power and a subject of justice. Historical examples might include the struggle for legislation to improve working conditions that followed the inclusion of working people in the public realm, the struggle against cultural stereotyping that followed the inclusion of ethnic and racial minorities, the struggle to include domestic violence as a matter of public concern that followed the inclusion of women, and the struggle against discrimination on the basis of sexual orientation that followed the open inclusion of lesbians and gays in the public arena.

³¹ Benhabib "Liberal Dialogue Versus a Critical Theory of Discursive Legitimation" in *Liberalism and the Moral Life*, Nancy Rosenblum (ed.), here at 154-155.

These groups have resisted the power that had previously constituted them as citizens, they have refused that identity and have struggled for new forms of subjectivity that demand a renegotiation of the boundary of the political domain. It has been through public reflection on the differences between various groups of citizens, and not what they have in common, that has made possible this form of resistance to power. An adequate conception of citizenship then can only be produced dialogically in an on-going public struggle rather than in the reflections of one philosopher. The choice of substantive principles will be all the more inclusive, with less potential for bias, if every social group represents itself and is allowed to, and encouraged to, articulate its own particular needs and concerns.³²

The main point here is that it does not matter how open Rawls is to the particular needs of marginalised social groups, he is not in a position to construct a conception of citizenship on which we can all be expected to agree. We should be suspicious of any one theorist who can claim to represent adequately all perspectives in the derivation of substantive principles of justice. Rawls's procedure is not well equipped to identify or to represent groups that are marginalised now but who have not yet found their voice. His conception of citizenship, dependent as it is on the attempt to isolate the political domain, is as likely to be as distorted as earlier conceptions of citizenship, including those that excluded women for example, were in their own context.

³² Of course such a public dialogue would have to be subject to some constraints that would constitute an impartial point of view or else no agreement on principles of justice would be possible at all. We will have to wait until the third chapter to assess Habermas's alternative conception of impartiality. Since this conception is based on public dialogue it has clear advantages over Rawls's monological procedure.

A procedural test for principles of justice must reflect differences and not a taken for granted conception of the identity of citizens. Otherwise it will not be sufficiently critical to allow the perspective of the marginalised to be heard adequately. Particular aspects of social life cannot be newly incorporated within the political domain without changing our understanding of the identity of citizens. If the more subtle forms of social control and domination are to be confronted then we cannot have a final definitive conception of citizenship. To choose principles of justice on the basis of such a conception is to run the risk of imposing norms that might marginalise some social groups. This would simply reinforce particular effects of power that act as subtle forms of social control.

Reason, Power and the Moral Point of View

I have been advocating a moral point of view that involves the direct representation of all concerned. While I believe that this overcomes many of the problems that Rawls creates for himself in his outline of the original position, there are however limits to this directness. Human actors that were inadequately represented in the original position can represent themselves in the public realm and challenge the privatisation of certain features of their lives that suffer the effects of power. This makes the separation of political and non-political a matter of public concern and not a once and for all constraint on our deliberations about justice.³³ But this still does not cater for some human actors who may not have the capacity to represent themselves effectively (children, past or future generations, the unborn, the insane, the comatose). Some potential

³³ Rawls places a condition of finality on the decisions that would emerge in the original position. See *A Theory of Justice*, 135.

voices are not given an adequate hearing even in the most open public dialogue imaginable.³⁴

An awareness of this problem should make a theorist all the more cautious about presuming that everyone could agree to the constraints that he finds reasonable. Even in open public dialogue we must try as best we can to represent these persons indirectly, acknowledging the fact that this indirect representation is not altogether adequate. Such an acknowledgement reminds us of the fact that all moral theories have their limits and their openness to all potential voices must be finite. We must be careful to remind ourselves of those limits by conceiving of the moral point of view in such a way that makes it as open as possible to diversity and difference and as sensitive as possible to the danger of allowing power driven assumptions to enter the discourse. This is clearly not best achieved behind a veil of ignorance.

However it is important to stress that the criticisms I have made of Rawls do not in any way endorse the strong post-structuralist claim that the distinction between reason and power is somehow arbitrary. In fact everything I have argued depends crucially on maintaining that distinction and asserting the privileges of reason over power. This is where I believe Rawls's perspective has some very important advantages over that of Foucault. Rawls seeks to articulate the moral point of view so that we can distinguish between claims based on reason and claims based on power. While I have suggested that his approach does not achieve this effectively, I believe this task to be indispensable to any theory of justice that is to facilitate a critical assessment of social institutions and practices.

³⁴ White *Political Theory and Postmodernism*, 22, n. 18.

Foucault himself is simply not articulate enough on this question. This is partly because his important work on the capillary nature of power tends to blind him to the possibility of some normatively grounded criteria that are more sensitive to difference than for example, the strong claims of Marxism could allow for. Such criteria can still enable us to distinguish between more and less rigid forms of power, more and less adequate ways of evaluating what is and what is not morally arbitrary, and more and less reasonable principles of justice.

Actually since it seems that Foucault does seek to minimise domination then I believe he must presuppose some such normative framework.³⁵ If not, then it is difficult to make sense of any motivation for struggle or resistance to particular effects of power or even our attempts to avoid the danger of excluding others from our discourses. Foucault does, perhaps despite himself, provide good reasons as to why we should be suspicious of any theory that presumes unity or identity in the face of difference. If he were to deny that we can have more or less reasonable views on this question then it would seem difficult for him to avoid some form of contradiction.³⁶ He would be denying the very

³⁵ "The Ethic of Care for the Self as a Practice of Freedom", 124-130. There have been a number of excellent critiques of Foucault based on the charge that his work is normatively inarticulate. Among the best are Nancy Fraser "Foucault on Modern Power: Empirical Insights and Normative Confusions" in *Unruly Practices*, Cambridge, UK: Polity Press, 1989, 17-34, Michael Walzer "The Politics of Michel Foucault" and Charles Taylor "Foucault on Freedom and Truth" both in *Foucault: A Critical Reader*, David Couzens Hoy (ed.), Oxford: Basil Blackwell, 1986, 51-68 and 69-102, Jürgen Habermas *The Philosophical Discourse of Modernity*, Cambridge, UK: Polity Press, 1987, 266-293, Thomas McCarthy "The Critique of Impure Reason: Foucault and the Frankfurt School" in *Ideals and Illusions*, 43-75 and Richard J. Bernstein "Foucault: Critique as a Philosophic Ethos" in *The New Constellation*, 142-171.

³⁶ I think that Foucault is vulnerable to Habermas's claim that his normative inarticulacy enmeshes him in a performative contradiction. This notion will be

grounds that could make his arguments normatively justifiable. If all human actors are to enjoy as little domination as possible in their lives then it seems reasonable to suppose that Foucault should have been asking the same type of question that Rawls, and Habermas, try so carefully to answer. This involves the articulation of a moral, or an impartial, point of view that enables us to assess the reasonableness of competing principles of justice.³⁷

I believe that Habermas's answer to this question has certain important advantages over Rawls's, including the fact I take it to be less vulnerable to post-structuralist criticism. While Rawls's articulation of the moral point of view is seriously flawed, his emphasis on impartiality is not misplaced. If we think of impartiality on the model of public dialogue then we can see historically how this affords discourse a self-correcting mechanism. If a certain social group has not been represented adequately in some discourse that claims to be impartial then they can use that claim to criticise the conditions of the discourse internally. Similarly any theory that bases its claim to be impartial on the model of a public dialogue provides the resources needed for a self-critical test of its own biases. The problem with Foucault is that he does not take seriously enough our need for an impartial procedure that could legitimate substantive principles of justice. This is tantamount to surrendering an important tool of social criticism. To justify an impartial point of view need not involve the imposition of unity over difference. In fact it may

explained in the discussion of Habermas's justification of discourse ethics in the third chapter.

³⁷ Foucault's later work on ethics and the care of the self does not deal seriously with the need for normatively justified limits to the process of self-invention.

well involve the articulation of difference as well as the attempt to seek common ground.³⁸

In this section I have argued that the original position with its veil of ignorance is built on a conception of the citizen that Rawls assumes in his theory without any adequate way of testing whether or not those affected by the principles that are chosen in the original position share that assumption. I have suggested that post-structuralism and specifically the work of Michel Foucault reveals the naiveté of that approach. Throughout modern history difference has been suppressed by subtle and informal normalising effects of power. These effects certainly cannot be confined strictly to the political or economic systems, or even to the basic structure of society as such. We should therefore be suspicious of any theory that hides difference for the sake of unity. In the next section I will look in more detail at the feminist charge that Rawls's theory has a male bias because he fails to comprehend the effects of power, and the need for justice, within the family.

³⁸ Iris Young believes that seeking to be impartial necessarily involves an abstraction from particular situations. See Young *Justice and the Politics of Difference*, 96-121. I am arguing here that we can continue to seek to be impartial in public dialogue about justice even though that may well involve asserting the differences between particular social groups. This point will be developed in the discussion of discourse ethics.

1.4 JUSTICE IN THE FAMILY AND FEMINIST OBJECTIONS

There is some ambiguity in *A Theory of Justice* regarding the status of the family as a subject of justice. When Rawls gives examples of the major social institutions that are to be included as features of the basic structure of society, and therefore as parts of the primary subject of justice, he includes the "monogamous family." Since the basic structure is basic precisely because "its effects are so profound and present from the start" there was no option for Rawls but to include the family as one institution within that structure. The family is arguably the institution that most profoundly influences the life-prospects of individuals, "what they expect to be and how well they can hope to do."¹ Some starting places in life are favoured over others due to the family circumstances into which an individual is born and in which nurturance and growth of that individual occurs.

It is clear that from Rawls's point of view the very deep inequalities involved here could not be said to be merited or deserved by those who have had the good fortune to benefit from them. Family circumstances determine to a very significant degree the expectations (the index of social primary goods; liberties and opportunities, income and wealth and most significantly the bases of self-respect) that any representative individual could reasonably look forward to.² This is surely one of the most urgent problems that must be addressed if we are to try to regulate the major institutions of society according to the principles of justice that Rawls's constructs from the procedure of the original position. We would

¹ *A Theory of Justice*, 7.

² *A Theory of Justice*, 95.

have to ensure that any unequal distribution of primary goods is to the advantage of the least favoured.³ The fleeting reference to the monogamous family as part of the basic structure does not make it at all clear how the principles of justice are to apply to that institution.

It seems plausible that what Rawls meant by including the family as part of the basic structure was to indicate that it is a matter of justice whether or not some such public commitment between consenting individuals is legally protected. Marriage, for example, is a social institution that provides an important publicly supported option as to how individuals exercise their capacity to choose a long term rational plan of life. If the existence of legal marriage, or any other legislation related to the family such as divorce or adoption law, could be shown to lead to inequalities that are not to the advantage of the least favoured, then that would be unjust.

According to this interpretation, the family is a matter of justice only in this external sense in that we can and should regulate the legal constitution of the family so that the relevant options available for individuals are consistent with the principles of justice. This is quite different from the claim that the family is a matter of justice in an internal sense, that what goes on within the family can be assessed publicly in terms of justice and injustice. What this implies is a distinction between what constitutes the family externally and the order of the family internally. It seems to me that Rawls must assume some such external-internal distinction and that furthermore, his inclusion of the family as a feature of the basic structure is only intended to allow for an assessment of the justness of the family in an external, but not in an internal, sense.

³ *A Theory of Justice*, 303. I will discuss the substantive principles that Rawls believes to be legitimated by his procedure in the next chapter.

If this were not the case it would be difficult to make sense of what he says, and does not say, elsewhere about the family. I will return to that later but first we must consider why the family might be thought of as just or unjust internally as well as externally.

Feminism and the Internal Justice of the Family

It is important to assess Rawls's comments on the family from a feminist perspective because many feminists believe that the internal structure of the traditional, monogamous, heterosexual family does raise questions of justice. The gender structure of modern societies, that is the social construction and institutionalisation of sexual difference, particularly with regard to the division of labour within the traditional family, has led to serious injustice against women in terms of political and economic powers, opportunities and responsibilities.⁴ To assume that the family is beyond the scope of a theory of justice is to deny that the traditional division of labour within the family is unjust. It is to deny that the public sphere of political and economic life is inextricably intertwined with the private domestic sphere of family life. As is clear from our examination of the claims of post-structuralism, it is implausible to maintain that there are any aspects of our private lives that are immune from the effects of power. This is what feminists mean by asserting that the personal is political. They mean that any attempt to exclude the general structure of

⁴ In the following paragraphs I will be relying on the work of Susan Moller Okin. See her "Humanist Liberalism" in *Liberalism and the Moral Life*, Nancy Rosenblum (ed.), "Gender, the Public and the Private" in *Political Theory Today*, David Held (ed.), Cambridge, UK: Polity Press, 1991, 67-90 and especially *Justice, Gender and the Family*, New York: Basic Books, 1989 where she gives numerous references to empirical evidence in support of her claims. For a comprehensive analysis of contemporary issues related to women's struggle for equality and the law, Deborah L. Rhode *Justice and Gender*, Cambridge, MA: Harvard University Press, 1989.

personal, even intimate, relations from public reflection serves to conceal and protect the more subtle effects of power on the lives of women. Substantive political and economic equality between the sexes is now widely accepted, in public at least, to be a reasonable norm. Yet any genuine aspiration to make this substantive equality a reality demands a radical reconsideration of the way in which the public and private spheres of life are intertwined.

In the first place it is impossible for the state not to have some effect on the domestic sphere. Historically the effect has more often than not bolstered a patriarchal gender structure. The more obvious sex-based discrimination in family law and restrictions on the participation of women in the public sphere have relatively recently been removed.⁵ However it has been argued that even from a legislative point of view, this has not yet gone far enough and that divorce laws, for example, continue to arbitrarily privilege men in Western societies.⁶ This is because generally speaking women (and children) stand to lose more than men in economic terms should a difficult marriage end in divorce. It is therefore more likely for wives to have less power in marriage, being vulnerable to the threat of its dissolution from the more economically independent husband.

These issues make it clear that there is a direct connection between the external legal constitution of marriage and the internal order of family life. In any society that is rigidly gender structured, the legal constitution of the family will affect women and men in different ways when they

⁵ Okin "Humanist Liberalism", 42.

⁶ Okin *Justice, Gender and the Family*, 160-169. Okin restricts herself to a discussion of divorce law in the USA. but I think that the general point clearly has a wider relevance.

contemplate the possibility of marriage, while they are married and when they contemplate ending a marriage. What goes on within the family, the internal, is always being shaped and determined in part by legislation on the family, the external. If the family is part of the basic structure of society externally, then it is difficult to see how it could be argued that it is beyond justice internally.

It is not only direct legislation on the family that causes the internal order of the family to be intertwined with the basic structure. We have to take seriously the fact that women continue to perform far more unpaid labour than men in the domestic sphere, most notably in the reproduction of life and the care of children. The decision of a woman to bear the greater part of this burden often makes good economic sense since men continue to dominate in jobs with higher-pay and better career prospects. This is not surprising if women are expected to compete in the market with their hands tied behind their backs because of the social expectation that they will take primary responsibility for domestic affairs. But so long as men dominate in the public workplace and women continue to do most domestic work there will be at least two important consequences that lead to the perpetuation of a patriarchal gender structure.

Firstly, women are underrepresented in public workplaces, particularly in the most powerful and prestigious positions. This translates into a lack of influence and a public sphere organised from an excessively male perspective with the result that important decisions are made without due regard for the interests of women, particularly those who work at home. If the perspective of those who care for children were not so marginalised it might well also be of great benefit to men who are driven to a competitive public life that often demands the suppression of their own personal needs. This suppression will continue

to affect their behaviour, both at work and at home, often without their being aware of it.

It might be pointed out that men in powerful and influential positions do not take the interests of most other men into account any more than they consider the interests of women at home. It might also be suggested that the few women who are in powerful positions do not seem to take the interests of most people, be they men or women, into account either. This objection could be given a Marxist formulation if we suggest that it does not matter whether or not the powerful person is a man or a woman because in either case the interests of capital and the dominant class will be best served, and not those of most men and women, that is wage-labourers (or those who cannot even find a buyer for their labour-power).

Feminism is certainly not incompatible with this form of Marxian objection but, as the discussion of Foucault suggested, it does represent a distinctive aspect of resistance to power in capitalist society. The task for feminists is not simply to involve women to a greater degree in public life but rather to actually change the way that public life is conducted so that gendered stereotypes are challenged and overcome. Challenging the gender structure of society is one, but by no means the only, form of resistance to power that aspires to the transformation of our social world for the better. Marxian inspired class struggle and other forms of resistance that also cut across sex differences, such as anti-racist movements, all play important roles in challenging and overcoming the structures of power that dominate the lives of a variety of social groups.

Apart from their under-representation in powerful positions, the continuing marginalisation of women also has a detrimental effect on those women who do go out to work. Their struggle for respect and authority is compounded and they are often vulnerable to various forms of sexual harassment. Despite the achievements of feminism in the West,

and these are not to be dismissed, such obstacles to women having greater influence and power remain entrenched in this culture. Comparisons with other cultures, where feminism has still greater obstacles to overcome, should not lead to complacency in this regard. The point is that continuing stereotypes of cultural expectation make it less difficult to challenge effectively the gendered division of labour within the traditional family. They hinder the radical social measures that would be necessary to alter satisfactorily the balance of work in and out of the home for both women and men.⁷

Secondly, some feminists have drawn on psychoanalytic theory to argue that the predominance of female parenting has led to a tendency for girls to identify with the nurturing mother who is of the same sex and so they value closeness and intimacy to a high degree, while boys tend to identify with the working father and so to a much greater degree they value independence and public participation.⁸ Even without accepting any of the psychoanalytic assumptions that could be used to support this argument I think it is clear that the identity of a child is very profoundly shaped, in relation to gender, by the balance of parental involvement in the earliest years of nurturance. The division of labour within the traditional family can be internalised and hence perpetuated at this early stage of the child's life.

Recent feminist research undoubtedly offers a strong challenge to any straightforward dichotomy between public and private. In the remainder of this section I hope to show that it also supports significant objections

⁷ Okin *Justice, Gender and the Family*, 175-186.

⁸ Nancy Chodorow *The Reproduction of Mothering*, Berkeley: University of California Press, 1974 and Dorothy Dinnerstein *The Mermaid and the Minotaur*, New York: Harper and Row, 1977.

to Rawls's attempt to isolate the political domain. I have already suggested here that Rawls does not see the family as a subject of justice internally. This is a flaw in his conception of the basic structure that reflects once again the problems associated with any attempt to isolate the political. We will see later how this flaw can be connected to the monological nature of Rawls's procedure, thus adding weight to the central argument of this chapter. Firstly we will assess Susan Moller Okin's careful analysis of Rawls's work from a feminist perspective.⁹ Okin argues that Rawls is blind to the injustice of gender as embodied in the internal structure of the traditional family.

Gender Blindness in Rawls's Theory

Given the sexism of the tradition in which Rawls writes, we might, with good reason, have expected that it would be made very explicit at every relevant point that the theory applies to women as well as to men.¹⁰ In his initial account of the original position he does not mention that the parties should be deprived of knowledge of their sex.¹¹ Now perhaps Rawls implicitly considered our sex to be morally irrelevant but the fact that he neglects to mention it specifically may indicate an oversight on his part in failing to recognise the highly contentious issues surrounding the

⁹ In particular *Justice, Gender and the Family*, 90-97.

¹⁰ Okin *Women in Western Political Thought*, Princeton: Princeton University Press, 1979 and Jean Bekthe Elshtain *Public Man, Private Woman: Women in Social and Political Thought*, Oxford: Martin Robertson, 1981. More specifically since Rawls is usually identified within the tradition of Kantian moral theory, see Okin's critique of Kant, "Reason and Feeling in Thinking about Justice" *Ethics*, 99 (1989), 229-249, here at 231-235.

¹¹ *A Theory of Justice*, 12.

past exclusion of women from the scope of theories of justice as well as the continuing injustices of the gender structure.¹²

Furthermore, since the parties are to know "the general facts about human society"¹³ they presumably know that most societies are and have been gender structured in ways that disadvantage women in political and economic terms. Rawls never mentions this. It cannot be discounted as a possibility that he was not sufficiently aware of this fact himself. If this were the case, then it would constitute evidence that could be used in support of the argument I made in the last section, that the conditions of an impartial point of view must themselves reflect a public discussion rather than merely allowing for the constructive work of a lone theorist. Rawls runs the risk of building his own biases into the construction of his substantive account of justice. All social groups must be able to speak from their own particular point of view in the critical assessment of principles of justice.

Earlier I suggested that we think of Rawls's initial inclusion of the family as part of the basic structure to have been intended in an external sense only. This seems plausible because certain other features of his theory seem to require him to assume that the family is internally just. He never discusses the institutions of the family directly when he comes to assess how the principles of justice he derives from the original position apply to the institutions of the basic structure, such as the political constitution, property relations and economic arrangements. This might lead to some doubts as to whether or not he intended to include the

¹² It must be noted however that Rawls does place knowledge of one's sex behind the veil of ignorance in "Fairness to Goodness", 537.

¹³ *A Theory of Justice*, 137.

family as a subject of justice even in an external sense.¹⁴ It is not clear why he ignores family law as an institution of the basic structure of a well ordered society except perhaps that he realised that it would be impossible to discuss the question of the external justice of the family's legal constitution without also treating the internal order of the family as a matter of justice. There are reasons why he would want to avoid this.

Rawls suggests that we think of the parties in the original position as heads of families.¹⁵ This allows us to think of them as being motivated to care for some members of the next generation and so ensures that the interests of the latter are taken into account, something which is particularly important in relation to the question of justice between generations and the savings principle.¹⁶ Although Rawls adheres to traditional assumptions by using examples of fathers and sons in the discussion of this problem¹⁷ it could fairly readily be claimed that the head of the family need not be the father. However what cannot be denied is that by suggesting that we think of the parties to the original

¹⁴ In *Justice, Gender and the Family* Okin gives support to this suspicion by pointing out that in one article Rawls does not even mention the family as part of the basic structure. See "The Basic Structure as Subject" *American Philosophical Quarterly*, 14 (1977), 159-165, here at 159. However this may be unfair to Rawls since in the longer, revised version of this paper, in *Values and Morals*, A. Goldman and J. Kim (eds.), Dordrecht: Reidel, 1978, 47-71, here at 47, "the nature of the family" does remarkably reappear as part of the basic structure. This longer version of the essay is reproduced unchanged in *Political Liberalism*, 257-288 with the family reference at 258. What can certainly be said is that this indecisiveness does little to encourage any feminist confidence in Rawls.

¹⁵ *A Theory of Justice*, 128.

¹⁶ *A Theory of Justice*, 284-295.

¹⁷ *A Theory of Justice*, 289.

position as representatives of families he does assume that the family itself is internally just. As Okin puts it

he is thereby effectively trapped into the public/domestic dichotomy and, with it, the conventional mode of thinking that life within the family and relations between the sexes are not properly regarded as part of the subject matter of a theory of social justice.¹⁸

This of course means that the claims of less advantaged members of a family, usually women and children, are not adequately taken into account in the original position.

Even though Rawls challenges discrimination against women in the public sphere it is his inability to theorise adequately the relationship between the political and the non-political, the external constitution and the internal order of the family that leaves him vulnerable to this charge.¹⁹ He simply does not dig deep enough into the gender structure to effectively identify the roots of discrimination based on sexual difference.

Further evidence that Rawls assumes an internally just family can be offered by considering his comments on how the family sets a limit to the operation of fair equality of opportunity.²⁰ Families within one social sector may differ in the way in which the aspirations of the children are shaped. For this reason Rawls considers whether or not the family should be abolished. But he feels that the difference principle and the principles of "fraternity" and redress, all of which are designed to ensure that any social inequalities are to the benefit of the worst off, make any disadvantages in this regard easier to bear. At no stage does Rawls

¹⁸ Okin *Justice, Gender and the Family*, 92.

¹⁹ Rawls mentions discrimination based on sex as a subject of justice in *A Theory of Justice*, 99.

²⁰ *A Theory of Justice*, 301, 511.

question whether the traditional division of labour within the family should be confronted and challenged as a matter of justice. This seems to indicate that he is blind to the importantly different ways in which the aspirations of girls and boys are shaped in the context of the traditional family. He is also blind to the fact that this difference contributes to the perpetuation of the present gender structure.

Finally, Rawls assumes that the family is internally just in his discussion of the central role it plays in the development of the individual's sense of justice.²¹ Children's moral development depends crucially on the internal order of the family and the way in which the parents exemplify their own morality. Throughout his account Rawls fails to consider how the division of labour within the family might involve an injustice to one of the parents. This is a serious flaw in the theory since it depends so heavily on our moral capacity to have a sense of justice. If our sense of justice is distorted from the start because of the structure of the traditional family then it seems likely that the subsequent moral development of the individual will be shot through with assumptions about gender.²²

It seems that Rawls never satisfactorily deals with the family as a subject of justice.²³ He includes it in the list of institutions of the basic structure because it would be absurd not to do so given the profound

²¹ *A Theory of Justice*, 462-472.

²² Okin *Justice, Gender and the Family*, 97-101 and "Reason and Feeling in Thinking about Justice", 235-238.

²³ Even in *Political Liberalism*, xxix, Rawls defends his conception of justice by stating baldly that he believes "the alleged difficulties in discussing problems of gender and the family can be overcome." He also, rather unconvincingly, notes that he does not try to show this in the lectures included in the book. Nor does he show it elsewhere.

effects of family circumstances on the individual's chances in life. Yet he omits to question whether or not the family is itself internally just. I have argued here that this omission was unavoidable for him since he needs to assume an internally just family for the sake of some other central features of the theory. This is why he only included the family as part of the basic structure in an external sense.²⁴ The question of the justice of the family then points to further problems for Rawls in his attempt to isolate the political from other aspects of our moralities.

The evidence of recent research convincingly supports the claim that an external-internal distinction, such as I have interpreted in Rawls's work, is not tenable. This is because of the fact that the family is structured internally by its external legal constitution as well as by other economic and political aspects of the basic structure. It is also noteworthy that the question of external justice is never adequately dealt with in Rawls's very detailed analysis of the institutions of a well ordered society. Surely marriage, divorce and adoption law, as well as questions related to claims of rights for gay and lesbian marriages, and issues such as polygamous or arranged marriages merited some discussion in this broad analysis of the basic structure.²⁵ It would appear that Rawls is

²⁴ For evidence that Rawls thinks of the family as a private association see "Justice as Fairness: Political not Metaphysical", 245, n. 27 and "The Priority of Right and Ideas of the Good", 263. If he were to view the internal order of the family as a political matter of justice then he would have to revise again the central feature of his recent work, the identification of a distinctively political morality that underpins the overlapping consensus.

²⁵ Okin herself fails to deal with many of these issues regarding the legal constitution of the family. She is therefore vulnerable to the charge that she takes far too many aspects of the traditional family for granted in her own work. The point is made by Will Kymlicka "Rethinking the Family" *Philosophy and Public Affairs*, 20 (1991) and by Joshua Cohen "Okin, Justice, Gender and the Family" *Canadian Journal of Philosophy*, 22 (1992), 263-286.

unwilling to enter into any serious consideration of the justice of the family in any sense.

Perhaps this is so because he wants to avoid the communitarian criticism, that he presupposes in his construction of the original position a metaphysical conception of an atomistic, unencumbered, disembodied human self. As we have already seen, in the discussion of the second section, Rawls has responded by arguing that the original position, as a device of representation, relies only on a political conception of the person as a free and equal citizen and not on any metaphysical view of the person. This political conception simply avoids any aspects of our comprehensive moral views that are not relevant politically. At the same time these views may reflect private ties of affection, devotion or loyalty in the personal life of the citizen.

Now it is often within the family that such ties of affection, that constitute in part the personal identity of the citizen, will be most intensely experienced. From Rawls's point of view it is necessary to abstract from these ties of affection, to leave them behind the veil of ignorance, in order to construct a workable conception of justice. This might help to explain why he is reluctant to consider the family as a subject of political justice. But as we saw in the last section the use of the veil of ignorance involves certain dangers because it tends to take for granted what is and what is not of relevance to a publicly affirmed political morality. It is simply not possible for a lone theorist to construct a substantive account of justice on the basis of a political morality and a conception of the citizen that are taken for granted in the outline of a procedure that is to represent an impartial point of view. The procedure Rawls advocates does not reflect adequately the diversity of possible worldviews in modern societies. I think that the consideration of feminist

arguments related to injustices within the family strengthens that criticism.²⁶

Justice, Care and Solidarity

There is another important issue, related to the procedure outlined in the original position, that has been put on the agenda by feminist theorists. This has to do with the charge that to consider the type of abstract reflection on justice that takes place in the original position to be representative of the highest stage of moral reasoning is to reveal a male bias. Justice emphasises separation and autonomy while care, which according to the empirical research of Carol Gilligan is of greater significance in the actual moral judgements of women, emphasises

²⁶ The feminism I elaborate here is compatible with the type of liberal holism I defended in the second section. A commitment to a holist view does not preclude the questioning of any particular aspect of a tradition. Contemporary feminists tend to be critical, rightly in my view, of versions of communitarianism that stress the moral ties of tradition, as being insensitive to gender-based oppression. See for example Okin *Justice, Gender and the Family*, chapter 3, Marilyn Friedman "Feminism and Modern Friendship: Dislocating the Community" in *Communitarianism and Individualism*, Shlomo Avineri and Avner de-Shalit (eds.), 101-119, Iris Marion Young "The Ideal of Community and the Politics of Difference" in *Feminism/Postmodernism*, Linda Nicholson (ed.), London: Routledge, 1990, 300-323, Susan Heckman "The Embodiment of the Subject: Feminism and the Communitarian Critique of Liberalism" *The Journal of Politics*, 54 (1992), 1098-1119. Many feminist critics of communitarianism tend to embrace postmodern celebrations of difference in ways which enmesh them in the type of normative contradiction that undermined, as I argued above, the cogency of Foucault's work. For a useful account of why feminism and postmodernism can readily be drawn into an alliance see Nancy Fraser and Linda Nicholson "Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism" in *Feminism/Postmodernism*, Linda Nicholson (ed.), 19-38. For the best account of why feminists should avoid such an alliance, while still incorporating the better insights of both communitarianism and post-structuralism in a way that broadly supports the arguments of the earlier sections of this chapter, see Benhabib *Situating the Self*, especially her critique of postmodernism at 203-241.

connectedness and interdependence.²⁷ It has been argued that Rawls's concentration on justice and his abstraction from the concrete context of care for others contributes to the continued repression of the voice of women in contemporary moral theory. This argument has been made most effectively by Seyla Benhabib.²⁸

Benhabib builds on Gilligan's claim that women's moral judgement is typically more immersed in the details of relationships, in the awareness of the standpoint of particular others, in feelings of empathy and sympathy for the differing needs of others that we encounter in the context of concrete human interaction. If the findings of Gilligan's research are valid then it seems to imply that any vision of moral maturity that stresses separation and abstraction rather than connection and interaction arbitrarily undervalues care and our responsibility to concrete others. An ethic of care provides a necessary complement to an ethic of justice and a fully adequate account of morality cannot afford to divorce one from the other. They must both be placed together at the centre of a moral theory's concern.²⁹ The important implication from our point of view here is that an adequate theory of justice must take an ethic of care into account.

²⁷ Gilligan *In A Different Voice: Psychological Theory and Women's Development*, Cambridge, MA: Harvard University Press, 1982 and "Do the Social Sciences have an Adequate Theory of Moral Development" in *Social Science as Moral Inquiry*, Norma Haan et al. (eds.), New York: Columbia University Press, 1983, 33-51.

²⁸ "The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory" in *Feminism as Critique*, Seyla Benhabib and Durrill Cornell (eds.), 75-95. See also, in the same volume, Iris Marion Young "Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory", 57-74.

²⁹ Gilligan "Do the Social Sciences have an Adequate Theory of Moral Development", 35.

It does not follow that care is essentially a matter for women or that justice is essentially a matter for men. On the contrary this has been one of the chief ideological weapons that has helped to institutionalise the present gender structure that deprives women of an adequate voice in public affairs. The point that Gilligan's work underlines is that if we stress justice at the expense of care in our moral theories, then we are reinforcing patriarchal assumptions that privilege the traditionally male public concern for justice over the traditionally female private concern for care and nurturance. Our efforts to overcome gender based oppression will be better supported by a shift in moral theory from an almost exclusive stress on justice, to a perspective that gives care equal significance in the characterisation of moral maturity.

Benhabib argues that Rawls eliminates from moral consideration any real differences between us and any connection we might have to other concrete individuals. He tries to theorise justice without taking any account of an ethic of care. He deals only with the need for public justice among autonomous individuals. Of course there is still a very important distinction between justice and care but Rawls makes too sharp a division between them and so fails to pay sufficient attention to the role that care for the concrete other has to play in theorising about justice.

In the original position the other is a generalised other, not a concrete other, since all features that distinguish one party from the other are hidden. This makes it impossible for one party to be moved in moral judgement by the experience of facing concrete others, by the needs, desires and different perspectives that we are called on to recognise in such an interactive encounter.³⁰ The moral dignity of each party comes

from whatever they have in common, their two formal moral powers, rather than whatever particularises them, their individuality, their distinctive needs and interests. This implies that our deliberations on justice are informed by abstract reasoning alone and not by moral considerations that emerge in the light of an experience of the needs of concrete others. Much of our moral experience is thereby ignored.

Benhabib's objection to Rawls's procedure indicates that in order to make any moral decisions about justice we need to draw on our knowledge of the particular needs of concrete others. Without this we run the risk of assuming that care for one another, and for the intersubjective bonds that bind each of us to some significant others, has no role to play in the justification of a public conception of justice. These moral concerns are relegated to the private sphere of the family and other intimate relationships. Benhabib's accusation is that Rawls's procedure marginalises these concerns in a way that distorts our thinking about justice.³¹

This does not mean that the generalised other, the stress on the formal moral powers that we all share, has no role to play in characterising the moral point of view. According to Benhabib

the recognition of the dignity and worthiness of the generalized other is a necessary, albeit not sufficient, condition to define the moral

³⁰ Young *Justice and the Politics of Difference*, 99-107. See *A Theory of Justice*, 139 where Rawls's comments on the possible role of a referee in the original position make it clear that there would be no real dialogue between the parties.

³¹ Both Benhabib and Gilligan discuss the marginalisation of moral feelings such as care, sympathy and compassion from an overly rationalistic procedure. I do not consider rationality to be in tension with moral feeling and so I do not want to phrase the objection in terms of a rationalistic marginalisation of moral feelings. It seems to me that a procedure that allows no place for our concern for concrete others is in fact insufficiently rational. This will be explained fully in the third chapter when the centrality of intersubjectivity in Habermas's rational procedure will be discussed.

standpoint in modern societies. In this sense the concrete other is a critical concept that designates the ideological limits of universalistic discourse. It signifies the unthought, the unseen, and the unheard in such theories.³²

What is important is that we come to recognise the dignity and the rights of the generalised other through an acknowledgement of real concrete others. This can only take place in a process of political engagement and dialogue and not through abstraction from everything that differentiates individuals, or social groups, from one another.

I have already suggested, in the last section, that the abstraction involved in the idea of a veil of ignorance runs a serious risk of leaving the prejudices and biases of the theorist unchallenged in constructing his moral discourse. The issue that is raised in the controversy about justice and care relates more directly to the type of moral reasoning that is required of each of us if we are to consider matters of justice from an impartial point of view. Once behind the veil of ignorance, the parties to the contract cannot be sensitive to the actual experience of the least advantaged group in society, the worst off concrete other. This is because none of the parties, who are of course identical with one another, can speak from that particular perspective. However if we are adequately to carry out the sort of universalizability test that is implied by our accepting that the original position does in fact represent conditions of fairness, then this sensitivity to the concrete reality of the least advantaged group would seem to be necessary. It is only in real encounters that citizens can genuinely develop the sensitivity to adopt the perspective of the least advantaged social group. Such a real encounter

³² Benhabib "The Generalized and the Concrete Other", 92.

must therefore be built into the very procedure of legitimating principles of justice.

Now it may be argued that an ethic of care simply involves an inappropriately strong commitment among citizens who seek justice but not any ties of sentiment or affection. Certainly an intimate concern for the needs of each individual is not a realistic requirement for all participants seeking fair terms of co-operation in a political context. But the demand to incorporate the standpoint of the concrete other in moral discourse need not be interpreted as requiring such care for all concrete individual others. Rather we could shift the emphasis, as Nancy Fraser suggests, from the standpoint of an individualised concrete other to that of a collective concrete other.³³

Adopting the standpoint of the collective concrete other still involves real interactive encounters that do not require us to hide particular needs, desires and feelings behind a veil of ignorance. We encounter the others, however, not so much as individuals for whom we have feelings of care but rather as members of social groups with distinctive identities, needs and forms of life. Such a shift leads us to think of the bonds of solidarity that are to sustain collective concrete others as a necessary component of our thinking on justice. We cannot concern ourselves with the rights of concrete others without also taking into account the bonds of solidarity on which the formation of their particular identity depends.³⁴

³³ "Toward a Discourse Ethic of Solidarity" *Praxis International*, 5 (1986), 425-429.

³⁴ This theme will also be developed in the chapter on Habermas. As we will see there the claim is based, in part, on the holistic conception of the self that I defended in the second section of this chapter.

If all participants reflecting on the demands of justice were to adopt the standpoint of the collective concrete other, then each of them would be enabled "to speak and be heard, to tell one's own life-story, to press one's claims and point of view in one's own voice."³⁵ This would be an important feature of a procedure of impartiality that, in contrast to Rawls's original position, would reflect differences in an effective way. Each social group that is suffering some form of injustice at present could articulate publicly its own needs. This articulation generates solidarity among those who come to recognise the injustice they suffer for what it is.³⁶ The necessity of bringing this generation of solidarity into the heart of a theory of justice owes much to recent feminist theory. But there is nothing essentially feminine about the recognition of collective concrete others. The insights involved correct a distortion in the thinking of men and women who seek to eliminate all particularity from impartial procedures that are to test principles of justice.

Rawls as Feminist?

The extent to which Rawls's approach could be revised in ways that would allow him to evade the sting of these criticisms has been a matter of some dispute among feminist theorists. Okin believes that Rawls's work represents a potentially rich source for a critique of the gender structure of contemporary societies.³⁷ This would of course require

³⁵ Fraser "Toward a Discourse Ethic of Solidarity", 428.

³⁶ Fraser is somewhat ambiguous on this point. It might be noted that this solidarity is not incompatible with mutual disinterest between persons with incommensurable conceptions of the good. Mutual disinterest with regard to full conceptions of the good was, as we recall, premised on a shared commitment to a framework of justice. This disinterest is shattered and transformed into solidarity with the recognition of an injustice to some collective concrete other.

certain modifications in order to overcome all aspects of gender blindness in the theory. First of all, Rawls must put greater emphasis on the fact that the parties to the original position are to be deprived of knowledge of their sex so that the basic structure should not arbitrarily favour one sex over the other in the distribution of the primary goods.

Secondly, the parties must no longer be thought of as heads of families but rather as individuals. This would transcend the public/domestic dichotomy to the extent that it would extend the scope of justice to include the internal order of the family. We could then argue from within Rawls's overall framework that if the traditional division of labour in the family contradicts the principles of justice that are derived in the original position, as it surely does, then it is unjust.

Furthermore if the internal order of the family were to be considered a subject of justice then the question of fair equality of opportunity between the sexes and the tendency for gendered assumptions to infect the moral development of children at an early stage could more readily be confronted. We might also suggest that the parties be deprived of knowledge as to whether they are to be parents or not, thus providing some guarantee that the interests of the next generation are taken into account, without assuming a just family.

Despite the fact that a revision of Rawls's work in this direction does indeed offer considerable support to the feminist critique of the gender structure, there remain more fundamental flaws in the theory that undermine its potential usefulness as a tool of feminist criticism. It must be noted that Rawls himself has not made all of the necessary revisions that a feminist reading of his work would demand. So long as he remains

³⁷ *Justice, Gender and the Family*, 101-105 and "Reason and Feeling in Thinking about Justice", 238-249.

reluctant to allow the family to be considered as a subject of justice in an internal sense, his theory will, according to Okin, contain "an internal paradox."³⁸ On the one hand, the theory depends on an understanding of moral development where our capacity to have a sense of justice must be nurtured in the context of a loving and just family. On the other hand however, Rawls does not himself apply the principles of justice to the realm of the family.

In our assessment of the communitarian critique we saw that Rawls attempts unsuccessfully to isolate the political domain by avoiding other comprehensive moral views in constructing an account of justice. In the last section I argued that the insights of post-structuralism highlight the possible danger of marginalising certain perspectives in the monological procedure of the original position. We can now see how Rawls's strategy of avoidance has made it more difficult for him to treat the family as a subject of justice internally since that would appear to leave very few aspects of our moral concern on the "non-political" side of the divide. Rawls's most recent work has offered little in the way of concessions to the stronger arguments of his feminist critics.

Furthermore, Rawls is not sufficiently aware of the fact that within a gender structured society it seems likely that there will be a difference of emphasis in the ways in which men and women reason morally. As we will recall, it is for this reason that it is absolutely imperative, from a feminist perspective, that solidarity be considered to be a core concern of any adequate theory of justice. Under gendered conditions the structure of the society in general, and of the family in particular, leads to the fact that women are more likely to be involved in nurturing activities and

³⁸ *Justice, Gender and the Family*, 108.

hence they are more likely to stress solidarity in their moral reasoning, while men, for whom separation is more important, will stress justice in terms of abstract individual rights. In a society where gender-based oppression had been overcome one might expect all members of both sexes to have integrated successfully solidarity and justice in their capacity for moral reasoning.

Now this relates back to the problems of the monological nature of the original position. Under gendered conditions, such as those that continue to prevail, the possibility of all parties being adequately represented by Rawls in his construction of an account of justice from that perspective would be undermined. The conditions of choice that the original position represents may not be equally acceptable to all since those conditions abstract from the possibility of generating solidarity in our reflections on the demands of justice. Unanimity, if it is to be possible at all regarding principles of justice, can only be the result of open common deliberation where all participants reach the same conclusion having argued through their differences. It could not be reached by abstracting from those differences. Only in an open public encounter, and not in the original position, could the effects of the gender structure on the differing stresses in people's moral reasoning be identified and challenged. Ironically our conclusion must be that rather than enabling us to overcome gender structuring, the original position must presuppose that this has already been achieved if it is to be of real use itself as a tool of criticism.³⁹

³⁹ See Okin's comments in *Justice, Gender and the Family*, 107-108 on the revisions that might be made to Rawls's substantive account of justice were it to be reformulated under non-gendered conditions.

While Okin is aware of the fact that contemporary gendered conditions place the coherence of the original position in doubt, she defends its usefulness against the criticisms of theorists who, like Benhabib and Fraser, maintain that the original position is fundamentally flawed in that it allows no role at all for a sense of solidarity with collective concrete others.⁴⁰ For these critics, the original position abstracts from all particularity and represents a monological procedure that obscures, represses and denies difference. In response, Okin recalls the fact that the combination of mutual disinterest and the veil of ignorance in the original position "achieves the same purpose as benevolence"⁴¹ without requiring Rawls to make strong assumptions about the motivation of the parties. But rather than endorse a rational choice interpretation of the argument, Okin maintains that moral feelings are crucial to the derivation of the principles of justice.⁴² Since the parties do not know which position they are going to have in society they would have to consider the interests of people in all possible positions. They cannot think from the position of nobody, but rather they must think from the position of everybody.

It follows that for us to enter the original position, to adopt it as a moral point of view according to Okin's interpretation of it, we would have to be motivated by empathy and strongly committed to benevolence. These are hardly weak assumptions. This is because we have to consider

⁴⁰ "Reason and Feeling in Thinking about Justice" is an egalitarian, liberal, feminist response to Gilligan, Benhabib, Young and other feminists who are highly sceptical about the use of the original position for feminist criticism.

⁴¹ *A Theory of Justice*, 148.

⁴² "Reason and Feeling in Thinking about Justice", 243-249. Rawls himself has clearly rejected a rational choice interpretation of the original position, see "Justice as Fairness: Political not Metaphysical", 237, n. 20.

the goals and aims of all others, no matter how different they are from us, to be of equal concern in our deliberations in the original position.

Indeed this would involve our "caring about each and every other as much as about ourselves."⁴³ Far from abstracting from all particularity this implies that the original position indicates a deep concern for all human difference. An ethic of care is, on this reading, indistinguishable from an ethic of justice. We must be capable of recognising differences between ourselves and "concrete others," of being empathetic with them and of caring for them if we are to formulate principles of justice that could be acceptable to all.

Okin's stress on care here, again seems rather inappropriate. It is a feeling of solidarity with all social groups who suffer injustice, rather than a intimate feeling of care for all individual others that is relevant in our reflections about justice. Not only is such care too demanding in this context, it is also, unlike solidarity, a feeling that can easily allow for over-protective, patronising attitudes towards marginalised groups. Emphasising care also tends to obscure the important distinction between those significant others with whom our personal identity is inextricably entwined and our fellow citizens with whom we share little else but a commitment to just political institutions.

Solidarity better embodies the type of respect for collective concrete others that supports all who suffer injustice and drives each of us to choose principles and to design institutions so as to put that injustice right. As I already outlined, it is solidarity for the collective concrete other rather than care, that must be integrated with the generalised other's claim to justice. The integration of solidarity into the core of a theory of

⁴³ "Reason and Feeling in Thinking about Justice", 246.

justice does not involve the incorporation of inappropriate affective elements into the choice of principles of justice. It merely affirms that fact that one cannot respect the rights of individuals without also protecting the intersubjective bonds of solidarity on which the particular identities of those individuals depend.

Benhabib agrees with Okin to the extent that she recognises the need for a universalist moral theory that defines an impartial point of view, where the needs and interests of all concerned must be taken into consideration. The crucial question of this section is how we, as citizens, are best enabled to adopt this point of view, where we can acknowledge the rights of others through a recognition of their concrete otherness. The issue brings into opposition what Benhabib calls "substitutionalist" and "interactive" universalist moral theories.⁴⁴ While Okin undoubtedly has provided an interpretation of Rawls where an ethic of justice and an ethic of care are no longer opposed, she still defends a version of "substitutionalist" universalism that is inadequate to the task of facilitating genuine mutual understanding of otherness.

It is the restrictions on moral reasoning set by the veil of ignorance that make any possible reading of the role of the original position necessarily "substitutionalist." All we can know about the others is that they have the same very general interests as ourselves. As we already considered in the last section this monological conception merely demands that we imagine ourselves as individuals in this hypothetical situation. We do not have to confront whatever it is that makes us different from the other imaginary participants, since none of the parties

⁴⁴ Benhabib gives a critical response to Okin in a revised version of "The Generalized and the Concrete Other" in *Situating the Self*, 148-177, here at 165-168.

can speak from any particular perspective. The result is that no commonly generated insight into principles of justice is possible. In imagining oneself in the original position, one does not have to listen to the particular experiences of others. This is surely inadequate as a device that is to enable us to take up the perspective of all.

It would seem much more plausible that we would come to a mutual understanding of each other's needs and interests if we were to discuss them and argue about them in the light of all the information that would open our eyes to the differences between us. Despite Okin's optimism we cannot simply trust that empathy and benevolence will guarantee that the interests of all are adequately taken into account. We may simply be wrong about what it would be like to occupy a different position in society, to be a woman rather than a man, to be black rather than white, to be unemployed rather than a managing director of a large company. These misperceptions will not go away if we try to imagine ourselves in the original position.

In contrast, I am suggesting that in any procedural test for principles of justice, all citizens must be allowed to speak for themselves and the only way that we can hear them is if we reason without the veil of ignorance in a real dialogue where our prejudices and hostilities could be tested and worked through interactively. We cannot substitute ourselves for all others in the original position but rather we must confront each other interactively in collective moral and political deliberation.

The point is that if we were to have the capacity to take the interests of all into account we could not do it alone but only as participants in a collective venture. Once we had attempted to engage with each other in public dialogue by trying to work through our disagreements, then perhaps we might decide to test our collective views about justice in a monologically carried out thought experiment, such as that outlined in the

original position. We may indeed all reach the same conclusions. If this were so then our collective deliberation would have done its work and the original position would not have been in any way necessary. If we reached different conclusions, then it would be a sign that we were still in need of more collective deliberation. Again in this case the original position would do nothing to resolve those disagreements except perhaps to confirm what should already have been obvious from the public discourse, that we were still some way short of reaching agreement on appropriate principles of justice.

In the original position all social groups are to be represented but the identity of each is to be concealed, as if their faces were blank. This does not seem nearly as effective a challenge to unreasonableness as the prospect of encountering other real participants and having to deliberate over principles of justice with them, with the full face of each in view. The prospect of reasoned agreement is best served by lifting the veil of ignorance and allowing all participants to express themselves fully, to be visible in their particularity to all the others, as they engage in the co-operative venture of determining principles of justice to fashion their political institutions in a way that does justice to them all.

In such a real dialogue there is no *a priori* restriction laid down about what is a subject of justice and what is not, what is an aspect of political morality and what is not. That must be worked out by the participants themselves and the boundary between the political and the non-political is always under negotiation. In this way we can see that the communitarian, post-structuralist and feminist critiques of Rawls coincide on this point which I have returned to throughout this chapter, that Rawls's attempt to isolate the political prior to public discussion fails. If we wish to work out adequately what the scope of justice is then we will need a moral and political theory that can incorporate the stronger

arguments of these critical perspectives. We will need a theory that does not assume a clearly defined political domain that can be dealt with in isolation from the rest of the moral domain but rather one that treats that the constitution of the political domain as a matter of on-going concern for all the citizens of a democratic community.

1.5 CONCLUSION

In this chapter we have assessed critically the procedure of impartiality outlined in John Rawls's theory of justice. In the first section of the next chapter the two substantive principles of justice that Rawls advocates will be examined in relation to the work of Michael Walzer. As we will see, Walzer claims to derive his substantive account of justice without recourse to any procedural clarification of an impartial point of view. Rawls, in contrast, maintains that his two principles are legitimate because they would be chosen under conditions of fairness, as represented in the original position. So far we have examined Rawls's procedure as a philosophical outline of an impartial point of view that could test the legitimacy of substantive principles of justice.

I have argued that there are serious defects in Rawls's procedure of legitimation. The most serious defect is the attempt to isolate political aspects of morality from other aspects of our comprehensive moralities prior to any reflection on substantive principles of justice. This strategy for the construction of an overlapping consensus is much less inclusive, and therefore a less stable basis for social unity, than Rawls must assume it to be. Rawls's procedure is grounded in this attempted isolation of political morality. In outlining the original position, as representing the conditions of choice that would be accepted by all who could affirm the overlapping consensus, Rawls assumes that he can speak for all parties when it comes to choosing substantive principles of justice. The monological nature of the procedure requires that the choice be made by one voice behind a veil of ignorance, rather than by a plurality of different voices who have, though an open interactive encounter, achieved a common insight into the demands of justice.

Rawls characterises the parties in the original position as being representative of our public identity as citizens. By taking for granted a certain conception of citizenship, Rawls believes that he can take on himself the task of constructing of an account of justice that will legitimately regulate the basic structure of society. Such a construction is neither sufficiently sensitive to the possibility of bias in the conception of citizenship that is at its foundation, nor does it reflect adequately the need for real political encounters between citizens with different perspectives if the solidarity which is a necessary condition of reasonable democratic deliberation is to be generated.

In the first section I placed Rawls in the tradition of liberal social contract theory. His most significant debt is to Kant, who presents the contract as a procedural test of the legitimacy of law. This conception of the contract is the precursor to Rawls's procedural test for principles of justice that are to regulate the basic structure of a democratic society. The most serious challenge to liberal contract theory has traditionally come from Marxism. Having outlined the most plausible Marxian objections to Rawls's project I argued that the basic thrust of these objections anticipates the other objections that I go on to consider in the central three sections of the chapter. The thrust of the Marxian challenge is that despite its claim to impartiality Rawls's approach involves a certain bias, in this case a class bias.

Communitarians share with Marxists a concern about the possibility of an individualistic bias in Rawls's procedure and the atomistic ontology that it would appear to presuppose. Unlike Marxists, communitarians stress moral ties to particular communities that are constitutive of personal identity. Post-structuralists, like Marxists, maintain that the bias reflected in Rawls's procedure is driven by power. Unlike Marxists, they refuse to conceive of power relations as being necessarily rooted in the

class structure of the capitalist mode of production, but rather they see power as a capillary network of micropractices. While post-structuralists, like communitarians, reject atomism, they do not seek to correct it with a holist moral foundation for justice, but rather seek to uncover and to resist the power driven assumptions of all possible accounts of justice.

Most contemporary feminists, like Marxists, question the scope of justice as it is defined within a liberal framework. They do so however so as to argue that patriarchal, rather than bourgeois, assumptions have distorting effects that lead to ideological biases in liberal accounts of justice. Specifically, some feminists claim that Rawls's procedure fails to deal adequately with the inextricable links between the private, intimate sphere of family life and the public matter of the regulation of the basic structure of society. The personal, and not only the economic, is also political. Furthermore Rawls's procedure does not reflect the necessity that solidarity be integrated into any public reflection on justice that could generate a co-operatively achieved agreement on substantive principles. Feminists who stress this point about solidarity would have much in common with communitarians here, although they would certainly reject any holist ontology that enmeshes personal identity too tightly in communal ties of tradition. These ties are likely to be loaded with gendered assumptions. While the suspicion of pervasive gendered assumptions embedded in all traditions might make these feminists sympathetic to post-structuralist scepticism towards all accounts of justice, they would not reject the possibility of a more adequate procedure of impartiality that could avoid the dangers of bias to which Rawls's approach is most vulnerable.

In this assessment I have maintained that, despite certain communitarian claims, Rawls advocates a version of liberal holism.

However his attempt to construct an overlapping consensus is flawed since the isolation of the political domain, on which it depends, is untenable. We simply cannot avoid moral controversy in our disputes about justice. If Rawls's method of avoidance is rejected the possibility of an alternative way of theorising an impartial point of view is opened up. This will have to reflect more adequately the differences between the wide variety of comprehensive moral views that characterise modern pluralist democracies.

I have also defended Rawls's Kantian project in general against the scepticism of post-structuralism. Despite their criticisms we still need some theoretical resources to enable us to distinguish between reason and power, between legitimate and illegitimate principles of justice. But the study of post-structuralism does reveal the need to move beyond Rawls's stress on citizenship identity that leads him to assume that he can speak for us all in the choice of principles. That is not the role of the political theorist.

Finally I have maintained that feminist criticisms of Rawls, while not undermining his overall project of theorising an impartial point of view, do add further weight to the conclusion that Rawls's strategy does not succeed all that well in this task. In the first place his avoidance of comprehensive moral views leads to his reluctance to question the justness of the family in an internal sense. Secondly, the veil of ignorance rules out the type of encounter with collective concrete others that generates the solidarity on which reasonableness in democratic deliberations about principles of justice depends.

Rawls's procedure is monological in that all parties are in agreement as soon as they manage to adopt an impartial point of view. What all the criticisms of Rawls I have defended seem to point towards is a view of impartiality that can allow for real differences. The project then is to

conceive of how we might look at things from an impartial point of view without ruling out of the discussion the articulation of any need or interest that is particular to some social group or other. The hope is that we can bring to the discussion our comprehensive morality, our conception of the good, our dissident conception of citizenship, our feelings of solidarity for specific collective others, our experience of family life, our criticisms of the procedure itself. Any issue related to any of these matters could be raised and discussed openly without giving up on the claim that impartiality represents the core of justice in a modern context.

In an attempt to fulfil this hope we will assess in detail a conception of an impartial point of view which presents itself as dialogical, rather than monological. This conception is defended in the work of Jürgen Habermas. Habermas shares with Rawls the Kantian project. This important shift however, conceiving of the test for the legitimacy of principles of justice as dialogical rather than monological, relieves the project of many of the burdens that it has had to carry in the theories of both Rawls and Kant. This is the argument of the third chapter but before we get there we should consider an influential theory of justice that is presented as an alternative to the Kantian proceduralism that we find in the work of both Rawls and Habermas. I will turn now to the hermeneutics of Michael Walzer.

2 SPHERES OF JUSTICE AND INTERPRETIVE SOCIAL CRITICISM

So far I have considered one highly influential presentation of a procedural test for the legitimacy of substantive principles of justice. The aspiration of this Kantian project is to conceive of an impartial point of view that could ground a critical assessment of social institutions and practices. It hopes to do this by providing us with a standard according to which the reasonableness of competing claims about justice that might arise in a modern society could be evaluated critically. The actual procedure considered, that advocated by Rawls, dealt with the pluralism of modern societies by insisting that in order to adopt an impartial point of view, we must abstract from our comprehensive moral commitments, or our thick conception of the good life, and eliminate them from our reflections about the choice of legitimate principles of justice.

In my discussion of Rawls I highlighted the weaknesses of his approach without, however, endorsing a rejection of the Kantian project. In this chapter I will assess the views of a political theorist who urges us to do precisely that. For Michael Walzer the attempt to provide a philosophical justification for an impartial point of view that can test the legitimacy of substantive claims about justice should be abandoned. He maintains that justice is always embedded in the moral world of a particular form of life and that therefore such abstract proceduralism necessarily violates the self-understanding of particular communities.¹

¹ The main sources for Walzer's views in this regard are *Spheres of Justice* and *Interpretation and Social Criticism* but see also "Philosophy and Democracy" *Political Theory*, 9 (1981), 379-399, *The Company of Critics: Social Criticism and Political Commitment in the Twentieth Century*, London: Peter Halban, 1989 and "A Critique of Philosophical Conversation".

For Walzer every account of justice is a local account.² It must therefore be given, not with reference to an abstract procedure that claims to represent an impartial point of view, but rather from within the context of a particular commitment to a shared understanding of social goods. A substantive account of justice is an interpretation of the meaning of social goods, and more specifically the principles of distribution that are inherent in those meanings, for a particular community.

In relation to the central theme of this thesis, we can say that Walzer rejects the assertions of any lone theorist or philosopher who claims to be able to construct a substantive account of justice for a modern society out of an abstract procedure of legitimation. The meanings which are interpreted in any account of justice are necessarily common social meanings to which no one citizen has privileged access. The conditions under which such an account can be given must therefore be characterised by a public encounter where these meanings are co-operatively interpreted. This is only possible if we respect the historical particularity of different political communities.

In the first section of the chapter I will consider the form that Walzer's own approach to substantive accounts of justice takes. He advocates a conception of justice which he calls complex equality. Complex equality is to be contrasted with simple equality. It insists that substantive principles of justice depend on the meanings that social goods have in particular societies. Principles of justice are implicit in the social meanings of particular goods and so each society will have its own distinctive account of justice depending on the meanings that goods have in that distinctive historical and cultural context. While no bald principle

² *Spheres of Justice*, 314.

of simple equality can be sensitive to cultural particularity in this way, Walzer's claim is that complex equality can prevent injustice by allowing each citizen to have their due in each of the variety of spheres of justice that are constituted by the particular variety of social goods in any given society.

I will assess Walzer's defence of complex equality by comparing it with the argument that Rawls makes in advocating his two substantive principles of justice. I believe that Walzer's work has certain important advantages in this regard especially in relation to its greater context sensitivity. Complex equality indicates how justice may vary in its demands in different cultural contexts. By stressing this context sensitivity I hope to bring out some of the philosophical points which are at issue in Walzer's rejection of the Kantian project. Rawls's abstract procedure could never legitimate principles of justice for Walzer because these are necessarily a cultural product. The substance of justice must be interpreted openly in the public deliberations where all the citizens of particular political communities participate.

In the second section we will move on to consider Walzer's anti-proceduralism in more detail. The main purpose of this section is to consider more generally what is involved in a hermeneutics of justice. It will be noted briefly that Rawls himself now understands his own procedure to be justified hermeneutically. The recent shift towards contextualist approaches to justice reflects a general trend away from universalism in moral theory.³ This is a trend which raises important philosophical questions, not least with regard to the inherent dangers of

³ We have already considered some of the manifestations of this trend in the first chapter. The arguments of communitarians, post-structuralists and feminists have all contributed to the undermining of moral theories that defend universalist principles.

relativism. It might be suggested for example, that a hermeneutic approach to justice must necessarily involve a relativistic endorsement of institutions and practices that characterise a particular culture. It might then be thought to be irredeemably conservative and incapable of grounding any adequate form of social criticism. The implication of this type of objection is that hermeneutically grounded accounts of justice always legitimate the dominance of one particular account of justice in a way that is entirely inappropriate in a modern pluralist society.

I want to suggest here that hermeneutics can defend itself, at least to some extent, from these charges. In order to support this view I will turn, in the later part of the section, to the philosophical hermeneutics of Hans-Georg Gadamer.⁴ Hermeneutics can ground one important form of social criticism in modern societies. This is connected to a form of ethical reflection that involves a community in a process of critical self-questioning. When faced with the question as to whether or not a particular community has lived up to its own ideals as to what it should be, a significant space is opened up for social criticism within that community. This can happen in a way that is importantly related to the interpretation of the demands of justice in particular contexts. The communal self-clarification that this type of ethical reflection involves is also related to the idea of a holist approach to justice in that the historical embodiment of just institutions in a particular context is, in part, constitutive of the identities of the individual members of that community.

A hermeneutic approach to justice does however have some serious limitations and so a convincing defence is impossible. In the third section

⁴ *Truth and Method*, Second Edition, London: Sheed and Ward, 1979 and also the collection of Gadamer's essays *Philosophical Hermeneutics*, David Linge (ed.), Berkeley: University of California Press, 1976.

I will expose the most significant of these limitations by offering a critique of Walzer's approach to justice. I will argue that if Walzer is concerned to distinguish between legitimate and illegitimate accounts of the substance of justice then he is ill-advised to reject the Kantian project of philosophically justifying the conditions of an impartial point of view. This does not mean however that he is wrong to stress the fact that a substantive account of justice could never legitimately be derived from a monological procedure like the original position. The substance of justice is always the product of an open public encounter. However we must have a firm theoretical grasp of the ways in which the distorting effects of power are to be eliminated, or at least minimised, in such public encounters. As we will see, Walzer fails to deliver on this score.

Walzer's failure here will lead us to the conclusion that in a modern context substantive principles of justice must be legitimated from an impartial point of view and not in relation to the ideals of one particular form of life. For this reason the only defensible holist approach to justice must be a liberal holism that defends the priority of right. Liberal holism can acknowledge the fact that the self is constituted dialogically but at the same time it locates the autonomy of the individual at the core of a theory of justice. This can only be achieved in a modern context by grounding the substance of justice in a philosophically justified procedure that represents an impartial point of view. In this final section of the chapter I hope to show that it is the rejection of the Kantian project that makes it impossible for Walzer to defend himself from the charge that his hermeneutic approach to justice is deeply flawed as a theoretical grounding for social criticism.

2.1 SUBSTANTIVE PRINCIPLES AND COMPLEX EQUALITY

I have two main aims in this section. First, I will analyse critically the substantive principles of justice that Rawls believes to be legitimated by his procedural outline of an impartial point of view. Second, I want to introduce the notion of complex equality. This is the key idea in Walzer's approach to substantive accounts of justice in modern societies. The argument here will indicate certain advantages of thinking about substantive principles of justice in the open-ended way that is characteristic of Walzer's view, rather than in the restrictive way that leads Rawls to believe that he can derive substantive principles through a monological procedure. Complex equality is more sensitive to particular contexts and this in itself would seem to give significant theoretical support to Walzer's rejection of the Kantian project. The philosophical issues that are at stake in that rejection are introduced here but we will go on, in the remaining sections of this chapter, to consider at greater depth the implications of this anti-procedural approach to theorising justice.

I want to argue that we should think of Rawls's principles as a defence of a right to equal citizenship. From Walzer's point of view however, Rawls's idea of a primary good does not allow for adequate consideration of the complexity of the social meanings of goods in modern societies and so Rawls's principles do not tell us very much about the demands of justice in particular contexts. Complex equality allows for the fact that each political community will have its own distinctive account of justice. Differences of historical context and the cultural creativity of particular communities are both to be given expression in the details of each substantive account of justice. Before assessing the merits of complex equality, I will indicate why we should think of Rawls's

principles as a straightforward defence of a right to equal citizenship. In order to do this I will return to one of the Marxian objections to Rawls's theory that I outlined early in the first chapter. We will consider the charge that in giving priority to his first principle, guaranteeing equal basic liberties, over his second, regulating socio-economic inequalities, Rawls assumes an ideological separation of the political and the economic.

Rawls's Principles and the Priority of Liberty

In his introduction to the two principles of justice Rawls states that they "presuppose that the social structure can be divided into two more or less distinct parts, the first principle applying to the one, the second to the other."¹ The first principle guarantees an equal right to each of the most extensive total system of equal basic liberties compatible with a similar system for all. The second principle regulates acceptable social and economic inequalities according to the conditions of fair equality of opportunity and the difference principle, the idea that any inequality must be to the greatest benefit of the least advantaged. At this stage he does not mention any way in which we are to give one principle priority should they conflict in a particular case.

He later places the two principles in serial order in a way that "forbids exchange between basic liberties and economic and social benefits."² This asserts the priority of liberty which means that "liberty can be restricted only for the sake of liberty itself."³ Rawls points out

¹ *A Theory of Justice*, 61.

² *A Theory of Justice*, 151.

³ *A Theory of Justice*, 244.

that this priority is dependent on the persons in the original position assuming that their basic liberties can be exercised effectively.⁴ He then proceeds to give a number of reasons in support of his view that this ranking would be rational from the perspective of the original position. All of these reasons tend to assume favourable conditions under which the effective establishment of the rights and liberties guaranteed by the first principle present no real problem.⁵ This amounts to a claim that under these circumstances the domain of the first principle is unaffected by the inequalities which are sanctioned within the domain of the second principle. Rawls's argument for the priority of liberty maintains a separation between the narrowly-defined political sphere and the social and economic spheres. While he undoubtedly modifies this traditional liberal dichotomy, as I argued in the first section of the last chapter, he certainly does not transcend it completely.

The separation involved in the argument for the priority of liberty does not exclude social or economic arrangements from the test of justice. As we saw, this distinguishes Rawls from a traditional liberal like Locke, or a contemporary libertarian like Nozick, both of whom are more explicitly protective of property rights and competitive markets.⁶ On the other hand, by prioritising civil and political rights within a framework of strict legal but not socio-economic egalitarianism Rawls does however remain vulnerable to the criticisms of Marxists and egalitarian socialists who argue that the effective equality of these rights

⁴ *A Theory of Justice*, 151-152, 542.

⁵ *A Theory of Justice*, 542-548.

⁶ Of course Nozick identifies himself with the Lockean tradition, *Anarchy, State and Utopia*, 174-182.

and the liberties they protect will inevitably be undermined by inequalities in the social and economic spheres. Based on his assumption of a two-part basic structure Rawls tries to side-step such criticism by claiming to be able to reconcile liberty and equality within his conception of justice. His attempt to do so depends on a distinction he makes between liberty and the worth of liberty

liberty is represented by the complete system of the liberties of equal citizenship, while the worth of liberty to persons and groups is proportional to their capacity to advance their ends within the framework the system defines. Freedom as equal liberty is the same for all; the question of compensating for a lesser than equal liberty does not arise. But the worth of liberty is not the same for everyone. Some have greater authority and wealth, and therefore greater means to achieve their aims.⁷

From these remarks it is not very clear that Rawls can evade the sting of one of Marx's most scathing criticisms of liberal or bourgeois ideology, that it concerns itself with merely formal liberty.⁸

Marx points out that this liberty is rendered relatively ineffective for the exploited proletarian class because of their powerlessness which is rooted in the property relations of the capitalist mode of production. Only a radical transformation of the mode of production itself by a revolutionary proletarian class could overcome this ineffectiveness. It is not necessary to endorse all aspects of Marx's views on historical materialism to accept that this central aspect of his critique of liberalism poses insurmountable problems for any account of justice that

⁷ *A Theory of Justice*, 204.

⁸ See for example Marx and Engels "The German Ideology, part 1" and "The Communist Manifesto" in *Karl Marx: Selected Writings*, David McLellan (ed.).

presupposes a strict separation of politics and economics. But just how serious a problem does it pose for Rawls?

Norman Daniels, in an influential critical analysis of the distinction between liberty and its worth, argues that Rawls is guilty of the traditional liberal failure to recognise this point that Marx was so clear on, that inequalities of power and wealth are not consistent with an equal system of liberties.⁹ It is clear that certain rights which are assigned to each citizen equally, such as the right to vote, the right to a fair trial or the right to free speech, have historically been exercised with unequal effectiveness. Wealthy citizens have been able to exercise their rights with greater influence, authority and power than those who are less privileged. A number of relatively uncontroversial sociological claims support this.

First, political parties always try to satisfy powerful interest groups on whom they feel dependent for investment in the economy. Furthermore, the interests of all politicians tend to be closer to those of the wealthy than to those of the poor. Second, money can buy a higher quality legal service and again those who most directly shape legislation and legal practice tend to share the class interests of the wealthy. Third, the media of mass communication throughout the capitalist world are under the control of a small wealthy elite. They not only enjoy greater effectiveness in exercising their right to free speech but they also exert an inordinate influence on the ideas and concerns of other citizens and hence also on the political agenda.

The equality of these rights and liberties has been, and continues to be in fact, merely formal. Of course a full explanation of the various

⁹ "Equal Liberty and Unequal Worth of Liberty" in *Reading Rawls*, Norman Daniels (ed.), Oxford: Basil Blackwell, 1975, 253-281.

causal mechanisms at work here would have to be highly complex and multi-faceted. The comprehensiveness of Marxism as a theoretical resource which can facilitate such a task is clearly its great strength. Our need for some such comprehensive social theory is to my mind beyond question but to pursue these issues would take us too far from the matter in hand.¹⁰

It is not necessary to argue pursue this general point anyway as it seems clear that Rawls accepts it. What is at issue is whether or not, given this historical reality, Rawls's distinction between liberty and its worth leads to an inconsistency between his two principles of justice. While the first principle establishes equal basic liberties for all, the second principle regulates inequalities in the value of these liberties to various representative individuals. Of course the difference principle operates to maximise the worth of the liberties for the least advantaged. So while they are not to enjoy as much value from these equal liberties as those who are more advantaged, they are compensated by the fact that the inequality of worth renders their own liberties of greater value than they would otherwise be. In relative terms they are worse off since the equal liberties are worth less to them than to others, but in absolute terms the liberties are worth more to them than if there were a strict equality of worth.¹¹ The crucial question here is whether it makes any sense to

¹⁰ As we will note in the third chapter, Habermas's theory of justice is integrated impressively with his own comprehensive critical theory of late capitalist societies. This in itself is a good reason to favour Habermas's theory of justice over those of Rawls and Walzer. Neither Rawls nor Walzer effectively link their normative concerns with a well-worked out critical social theory and so they are, in some respects, vulnerable to the charge of utopian idealism. I will not argue this point here.

¹¹ For a critique of Rawls on the question of absolute and relative advantage see Lawrence Crocker "Equality, Solidarity and Rawls' Maximin" *Philosophy and*

suggest that while those with greater wealth, power or authority have greater worth of liberty, we can all claim to be guaranteed equal basic liberties.

Daniels argues convincingly that Rawls arbitrarily excludes economic factors from the possible constraints on liberty.¹² Being poorer than my fellow citizens may mean that, unlike them, I cannot afford a holiday abroad, or private medical insurance, or the financial strain of sending my children to a private school. I am not at liberty to do certain things that other citizens are at liberty to do. It makes little sense to say that while it is of less value to me, I still enjoy an equal liberty with my fellow citizens to do these things. In these cases there simply are no equal liberties.

It is important to note that what Rawls is primarily concerned with however is not liberty in general but the specific basic liberties that define the scope of the first principle.¹³ Of particular relevance for our purposes

Public Affairs, 6 (1977), 262-266. Though Crocker's argument is aimed at a slightly different aspect of Rawls's theory it is also of relevance for the point in hand. His main criticism however has more in common with communitarians who charge Rawls with a bias in favour of more individualistic conceptions of the good, as discussed in Section 1.2 above.

¹² "Equal Liberty and Unequal Worth of Liberty", 259-263.

¹³ Despite some ambiguity in his first statement of the principle, *A Theory of Justice*, 60, Rawls is very explicit in his later statements that he is concerned with equal basic liberties, *A Theory of Justice*, 250, 302. For criticisms of the notion of a right to liberty in general and for an illuminating analysis of Rawls's idea of liberty see H.L.A. Hart "Rawls on Liberty and its Priority" in *Reading Rawls*, Norman Daniels (ed.), 230-252. It is clear from a later lecture that Rawls is in general agreement with Hart, "The Basic Liberties and their Priority" in *The Tanner Lectures on Human Values, III*, Sterling M. McMurrin (ed.), Salt Lake City: University of Utah Press, 1982, 1-87, here at 4-6. This important lecture is reproduced unchanged in *Political Liberalism*, 289-371. Ronald Dworkin has argued that not only do we not have a general right to liberty but that liberalism is actually primarily concerned with equality. See "What Rights Do We Have?" in *Taking Rights Seriously*, London: Duckworth, 1977, 266-278 and "Why Liberals Should Care about Equality" in *A Matter of Principle*, Oxford: Clarendon Press, 1986, 205-213 as well as "Foundations of Liberal Equality."

here are the political liberties or rights of equal citizenship, such as the right to vote and the right to participate in the political process. If it can be shown that economic inequalities that are sanctioned by the difference principle similarly undermine these rights of equal citizenship then it is difficult to avoid the conclusion that there is indeed an inconsistency involved in the operation of Rawls's two principles. A consideration of this issue will lead us to explore the way in which Walzer's alternative conception of complex equality relates to equal citizenship.

Justice and the Rights of Equal Citizenship

Rawls's strategy is to show that the parties in the original position would choose equal basic liberties while accepting inequalities in their worth. Daniels provides an immanent critique of this claim by arguing that the parties in the original position would have the same reasons to choose equal worth of citizenship rights as they do to choose equal citizenship rights themselves.¹⁴ The equal worth of these rights is as much a social basis for self-respect as are the equal rights themselves. Those who are publicly recognised to be less effective as participants in the political process would be likely to suffer in terms of their self-respect as this would mark them with a "subordinate ranking in the public forum."¹⁵ This is precisely the main reason Rawls gives in support of the liberties of equal citizenship. If Rawls is not to undermine these equal political liberties then there must be some measures taken to protect their equal worth as well.

¹⁴ "Equal Liberty and Unequal Worth of Liberty", 263-278.

¹⁵ *A Theory of Justice*, 544.

There are at least two lines of argument which could be adopted in defence of Rawls here. Firstly it might be said that strictly equal effectiveness in the exercise of our basic liberties is an impossible dream or even a dangerous nightmare. Rawls argues that the minimisation of inequality under the regulation of the difference principle is as far as we can legitimately go in this direction.¹⁶ It might well be accepted that strictly equal effectiveness is impossible as it would involve intolerable state regulation which could not but fail in its task. There almost certainly are some aspects of personality or matters of individual choice that could not be legitimately regulated but which would lead to an inequality of effectiveness in exercising basic liberties. The fact that the scope of justice does have some limit is not at issue.

It does not follow however that there are no socio-economic inequalities allowed by the difference principle which undermine the equal effectiveness of basic liberties and which might legitimately be ruled out in a more egalitarian regulation of that effectiveness. The question of course is how to decide which inequalities might be involved here. It can be argued with some cogency, that the framework adopted by Rawls does not yield the best solution to this problem. More specifically, the fact that Rawls allows inequalities of wealth, power and authority regardless of their inegalitarian effects on the worth of the basic liberties seems to indicate that the traditional liberal separation of civil-political and socio-economic spheres of society is central to his theory. This separation is unconvincingly established. If the assumption of a two-part basic structure were abandoned it is at least plausible that we could question the ways in which these spheres are related and how they

¹⁶ "The Basic Liberties and their Priority", 44-45.

should be distinguished and separated without accepting the same degree of inequality overall.¹⁷

Secondly we might recall that the grounds for the priority of the first principle actually presuppose that the basic liberties can be effectively exercised.¹⁸ This is rather vague however and it is I think best understood as an indication that a certain level of material well-being must be enjoyed by all citizens before the idea of prioritising equal basic liberties could even be considered.¹⁹ This may well serve as a criticism of any society where homelessness or abject poverty are accepted since that might suggest to Rawls that the quality of that civilisation was not sufficiently enhanced for its citizens to enjoy equal liberties. However we can safely assume that this point is not intended to undermine the distinction between liberty and its worth under social conditions where this level is attained. We do not have any reason to suppose that Rawls believes contemporary Western democracies not to be at this level, or at least near to it. So this point does not answer the Marxian criticism we have been considering here.

There is however a more specific and stringent guarantee that Rawls mentions with regard to the political liberties. While they need not be of strictly equal worth they must be of fair value to all. This was a central theme in his discussion of equal political participation.²⁰ He has placed even greater emphasis on it since;

¹⁷ As we will see this is precisely what Walzer's idea of complex equality is designed to achieve.

¹⁸ *A Theory of Justice*, 151-2, 542.

¹⁹ The effective exercise of basic liberties requires the satisfaction of basic needs for all citizens. This means that the first principle does cover, to a minimal extent, the distribution of material goods. See for example *Political Liberalism*, 7.

the worth of the political liberties to all citizens, whatever their social or economic position, must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions.²¹

If, as I have been arguing, socio-economic inequalities in liberal democratic societies are readily translated into wide disparities in political effectiveness then this condition should have very far-reaching effects. This point has not been lost on a number of critics.²² If the political liberties are to be given fair value then it is difficult to see how other basic liberties, such as freedom of speech, would not also have to be given fair value. Unequal effectiveness with regard to freedom of speech has serious inegalitarian effects on the value of the political liberties, even if the subject matter is not overtly political. Newspapers can have important political effects without reporting on the political process in a direct way. It might even be suggested that in some cases the less they report on politics the greater their effect in undermining the fair value of the political liberties.

Furthermore, if fair value is to be secured for the political liberties then the difference principle would not play such a significant role. In fact it may not be necessary at all given the stringent egalitarian measures that might be required to guarantee the priority of the first principle. In order for the rights of equal citizenship to be exercised effectively we must inevitably bring the distributive arrangements of many spheres of social life into question. This obviously does not tell us how these

²⁰ *A Theory of Justice*, 221-234.

²¹ "The Basic Liberties and their Priority", 42.

²² Daniels "Equal Liberty and Unequal Worth of Liberty", 279-280, Buchanan *Marx and Justice*, 152, Baynes *The Normative Grounds of Social Criticism*, 159-160.

spheres are to be separated but it does point us in the direction of, what we might call, a more complex social map of justice. The fact that Rawls continues to maintain this division between the domain of the first principle and that of the second, the political and the socio-economic, suggests that he does not envisage the kind of wide effects involved in securing the fair value of the political liberties that would appear to be necessary to preserve equal rights of citizenship.²³

What is most important here is that the priority of liberty, as expressed in the priority Rawls gives to his first principle over his second, does not seem to be tenable. Since the fair value of basic liberties cannot be secured without far-reaching, stringent and rigorous regulation of socio-economic aspects of the basic structure, the second principle of justice seems to be redundant. What we are left with is a principle of equal citizenship that guarantees effectiveness in the exercise of basic liberties and equal rights of citizenship for all. As it stands this principle is rather vague and may even appear to be trivial. It might also be considered to be too general to be of any use in real concrete disputes about justice. The crucial questions about substantive justice still remain to be asked. If we wish to secure the rights of equal citizenship, how are we best to bring into question the social arrangements in other spheres, not political in the narrow sense? How are we to work out in more detail the demands of justice in specific contexts?

It is on this matter that Walzer's contribution to theorising justice is at its most original, and illuminating. According to him the problem with Rawls's principles is that they are derived through a process that requires abstraction from cultural particularity. This abstraction allows Rawls to

²³ "The Basic Liberties and their Priority", 44-45.

consider only the distribution of what he calls primary goods such as "rights and liberties, opportunities and powers, income and wealth."²⁴ These are the goods that are supposedly wanted by all individuals whatever else they want.²⁵ In other words the primary goods are not dependent on any one thick conception of the good. Furthermore the logic of distribution from the standpoint of the original position is of course the same with regard to all the primary goods. It is assumed that the parties "would prefer more primary goods rather than less."²⁶ This then is the only logic of distribution that enters into Rawls's considerations as to how best to guarantee the rights of equal citizenship.

Walzer rejects both the notion of a primary good, one that can be conceived of independently of a thick conception of the good, and also the reductive logic of distribution that such an idea entails. A primary good is necessarily too abstract to be of any use in working out particular just distributions. Even goods that are valued as necessities in almost all particular contexts have different social meanings from one culture to another.²⁷ Distributive principles are intrinsic to the meaning of the social goods that are to be distributed. In other words just social arrangements demand that goods get distributed for different reasons, depending on what reasons are relevant to the social meaning of a particular good in a

²⁴ *A Theory of Justice*, 92.

²⁵ *A Theory of Justice*, 433.

²⁶ *A Theory of Justice*, 142.

²⁷ *Spheres of Justice*, 8. Walzer's example here is bread, which he maintains can be given different "primary" meanings depending on the context ("the staff of life, the body of Christ, the symbol of the Sabbath, the means of hospitality and so on"). If this is a problem with bread as a social good then it will surely be even more so when we come to consider social goods such as liberties, powers, wealth etc.

particular cultural context. The details of what is involved in any dispute about justice will require empirical investigation since there is "no merely intuitive or speculative procedure for seizing upon relevant reasons."²⁸

The most significant feature of Walzer's approach is that it encourages us to think about substantive principles as being internal to a variety of spheres of justice. Each sphere has its own logic of distribution and each society has its own complex map of distributive spheres.²⁹ We can see how this enables Walzer to take us much further than Rawls could in elaborating what is involved in securing the rights of equal citizenship. Walzer's conception of citizenship conceives of politics as "only one (though it is probably the most important) among many spheres of social activity."³⁰ This pluralist conception demands that social goods be distributed not according to one reductive logic, but for reasons internal to their social meaning.³¹ Citizenship is therefore not to be conceived of as a political notion in a narrow sense but rather more broadly as membership of a community where the task of justice is to be thought of as a matter of allowing each social good to be distributed according to the logic intrinsic to its own sphere.³²

²⁸ *Spheres of Justice*, 10.

²⁹ I am not going to endorse fully the claim, implicit in the idea of complex equality, that there is a neat fit of spheres and principles in any given community. It seems to me that the demands of justice are even more complex than that. We will see why in the third chapter when I discuss the justification and the application of norms from the perspective of Habermas's discourse ethics. In this section I am merely underlining the contextual appeal of complex equality and its advantages over Rawls's principles in this regard.

³⁰ *Spheres of Justice*, 231.

³¹ For a discussion of the pluralism of Walzer's view of citizenship see Emily R. Gill "Walzer's Complex Equality: Constraints and the Right to be Wrong" *Polity*, 20 (1987), 32-56, here at 37-43.

From Simple to Complex Equality

In *Spheres of Justice* Walzer contrasts complex equality, which he advocates as the form that any particular substantive account of justice should take, with simple equality. Simple equality requires that the dominant good of a society be shared equally, or at least very widely, so that it cannot be monopolised, or nearly monopolised by one social group.³³ A dominant good is a good that can readily be converted into other social goods. It seems pretty clear that material wealth is the dominant good in contemporary capitalist societies. Material wealth can of course take the form of money and in this form it becomes a means to many other goods. Money enables those who have a lot of it to acquire goods such as political influence, social power, clean work with good conditions, a good education, better health care, free time, status and sex. All of these goods can be bought directly or indirectly as commodities. Money, as moveable wealth, is dominant in that it can be converted systematically into most, but not all, goods in Western capitalist societies.

A regime of simple equality where the dominant good is shared widely would certainly demand radical redistribution of wealth in these

³² In a recent article Walzer suggests that in *Spheres of Justice* he had underestimated the role of the state, the political sphere in a narrow sense, as an agent of just distribution, "Exclusion, Injustice and the Democratic State" *Dissent*, (Winter 1993), 55-64. This does not alter the fact that Walzer's central idea of the plurality of spheres of justice provides a more promising and contextually sensitive way of working out substantive principles of justice in concrete disputes than does Rawls's notion of primary goods. These substantive principles, each one from a different sphere of justice, can be taken together as a map of complex equality that are, I suggest, best understood as an elaboration of the requirements of equal citizenship.

³³ *Spheres of Justice*, 13-17.

societies. It would be a society where everybody had roughly the same amount of money. But it seems unavoidable that under such conditions new goods, perhaps intelligence or certain natural talents, of which one group has a near monopoly, will begin to dominate. The only conceivable way of neutralising any monopoly, or preventing any single good from becoming dominant, is to have political power itself as the dominant good. A strong highly interventionist state would be needed to constantly redistribute goods so as to constrain monopolies.³⁴

³⁴ Walzer's point here, *Spheres of Justice*, 14-17, echoes a certain aspect of Nozick's critique of Rawls. Nozick's claim is that liberty necessarily upsets patterns of distribution, *Anarchy, State and Utopia*, 160-164. While Walzer agrees that the application of the difference principle would require an excessively strong state he does not follow Nozick to his libertarian conclusions. Nozick ends up endorsing a rampant free market economy and so fails to question money's standing as a dominant good. Walzer on the other hand, as we will see, is primarily focussed on challenging this dominance. See for example the list of blocked exchanges, what money can't legitimately buy, in *Spheres of Justice*, 100-103. Nozick's point is reiterated in a slightly different way by Iris Young in *Justice and the Politics of Difference*, 15-38 here at 28. Young argues that end-state approaches are locked into a distributive paradigm which overlooks many important aspects of social justice. She maintains that theories of justice should be focussed more on the historical and social process and the structural constraints that lead to the reproduction of distributive patterns over time. My emphasis on proceduralism endorses this view. It seems to me that Walzer's critique of simple equality reveals that he too is interested in shifting the emphasis of a theory of justice away from end-state approaches in much the same way that Young is encouraging us to do. It is for this reason that Walzer can illuminate the task of working out what the rights of equal citizenship demand in a way that Rawls's principles could not. See also Walzer "Liberalism and the Art of Separation" *Political Theory*, 12 (1984), 315-330. Young appreciates the appeal of complex equality but we might note that she does criticise Walzer, rightly in my view, for continuing to use "the language of distribution to discuss social justice, in sometimes reifying and strange ways" *Justice and the Politics of Difference*, 18. It certainly is strange to discuss distributions of love, recognition or power in the way that Walzer does. For the purpose of clear exposition, in what follows, I will continue to use the language of distribution as Walzer does. I simply note here that Young is right to point out that the overextension of the distributive paradigm is misleading when the issue of justice at stake is better thought of in terms of structural relationships or social and cultural processes.

But of course one of the dangers of an excessively strong state is that political power can be monopolised by bureaucrats. This also brings with it the probability of rampant corruption. We could say that political office, and the party privileges that went with it, constituted the dominant good in the formerly existing socialist societies of Eastern Europe. In its turn this danger, of a repressive bureaucracy, can only be avoided if political power is shared very widely. But once this happens it becomes difficult to secure its dominance as the democratic process will tend to reflect prevailing distributions of social goods, with their particular privileges and monopolies. We seem to be caught in a dilemma where we must either tolerate inequalities caused by monopolies that would seem to emerge naturally or we must run the risk of institutionalising a strong state where political power could be monopolised by bureaucrats who are committed to the repression of anything that disrupts the regime of simple equality. This analysis seems to lead to the conclusion that there are no other options but the capitalism of the Western powers or the statism of the former Eastern regimes.

Walzer maintains that we do not have to give up the aspiration to egalitarianism in the face of the notorious difficulties involved in institutionalising a regime of simple equality. These difficulties come about if we treat "monopoly and not dominance as the central issue in distributive justice."³⁵ Complex equality involves the critique of the dominance of any one social good. As we have already seen justice for Walzer is a matter of protecting separate spheres of social goods from the imposition of principles that are not intrinsic to the meaning of those

³⁵ *Spheres of Justice*, 16.

goods. This concern leads him to formulate an open-ended distributive principle:

No social good x should be distributed to men and women who possess some other good y merely because they possess y and without regard to the meaning of x .³⁶

This principle reflects pluralism in two ways. First, each particular community will have its own map of substantive justice that will reflect its distinctive, culturally created social meanings. Second, there will be an indeterminate number of distributive principles in any given society, each of them being appropriate to a particular sphere of justice. Each distributive norm must operate with relative autonomy within its own sphere but it should have no direct bearing on the distributions in other spheres.

Complex equality is concerned with blocking exchanges between goods if the exchanges violate the social meaning of the goods involved. Thus if I hold political office I should not be able to convert that good into better health care than that available to other citizens. That would be to violate the social meaning of health care, at least in Western liberal societies. The meaning of health care in that context is that it is something which is provided to those in the community who are ill, and so its logic of distribution must be the criterion of need.³⁷ But this does not mean that I should not have certain political privileges. If I have been fairly elected to office then I have been entrusted with a certain amount of power because my constituents find me to be a capable representative of their political views. So while it is just for me to speak in parliament

³⁶ *Spheres of Justice*, 20.

³⁷ *Spheres of Justice*, 86.

say, it is certainly not just that I receive better health care on the basis of my success at being elected for political office.

It follows that while we may receive unequal shares within a particular sphere no group can convert this to their own advantage across all the spheres. The separation of spheres allows citizens to enjoy their own accomplishments without the threat of any one group constituting a ruling class.³⁸ In this way complex equality is concerned to challenge the dominance of any one good rather than a monopoly or a wide inequality within one sphere. In fact since just distribution depends on the social meaning of goods, inequality can be expected to be quite appropriate, in most spheres. Those who are gravely ill should get more health care than those who complain of a minor ailment. A willing and capable elected political representative is given greater access to speak on political matters than other citizens. A just community maintains the autonomy of the spheres of justice by protecting them from one another. "Good fences make just societies."³⁹

Justice is critical then in that the social meaning of goods informs us as to how they are to be distributed. This provides us with a criterion of what is a just and what is an unjust distribution. Health care is justly distributed on the basis of need, unjustly on the basis of political office, or money, or intelligence. When one good dominates, it violates the

³⁸ I cannot go into detail here about the full account of substantive justice that Walzer presents in *Spheres of Justice*. Throughout the book he draws on numerous historical illustrations to argue his case for an interpretation of a certain map of complex equality that best reflects the demands of justice in a Western democratic pluralist society. On his views of the substance of justice in this context see also "Liberalism and the Art of Separation" and "Justice Here and Now" in *Justice and Equality Here and Now*, Frank S. Lucash (ed.), Ithaca: Cornell University Press, 1986, 136-150.

³⁹ *Spheres of Justice*, 319.

social meanings of the other goods and hence allows for the disregard of the shared understandings of the community's members. The invasion of other spheres of justice by criteria internal to a dominant good is what Walzer calls tyranny.⁴⁰ In contemporary capitalist societies we are tyrannised by the dominance of money.⁴¹ To the extent that money can buy goods which have social meanings that demand different criteria of distribution (health care, education, political office, status for example) then it is unjustly dominant.

The autonomy of the spheres allows us to think of the citizens as ruling themselves without binding them as individuals too tightly to the community. This is due to the broadening of the conception of citizenship that we find in the notion of complex equality. What it requires is

not that citizens rule and are ruled in turn, but that they rule in one sphere and are ruled in another - where "rule" means not that they exercise power but that/enjoy a greater share than other people of whatever good is being distributed.⁴²

Walzer can claim to be an egalitarian in so far as complex equality can "spread the satisfaction of ruling more widely" thus ensuring the "compatibility of being ruled and respecting oneself."⁴³

His conception of a political community therefore does not depend on the active participation of all citizens in the narrowly defined political

⁴⁰ *Spheres of Justice*, 17-20.

⁴¹ Stephen Mulhall and Adam Swift *Liberals and Communitarians*, Oxford: Basil Blackwell, 1992, 147. The chapter on Walzer in this book, 127-156, offers a clearly written introduction to his thought in the context of the communitarian critique of Rawls.

⁴² *Spheres of Justice*, 321.

⁴³ *Spheres of Justice*, 321.

domain. It does however depend on citizens being active in one sphere of justice or another.⁴⁴ This involves a rejection of a strongly holist, Aristotelian or Rousseauian, conception of community. The limitation of the political to one dimension of citizenship and one sphere of justice is also implicitly a more liberal holism than the holism of Aristotle or Rousseau.⁴⁵ It is a decentred holism that does not tie the citizen too closely to the narrowly defined political aspects of community life. Rawls's vision of community as a social union of social unions has much in common with Walzer's view.⁴⁶ I am arguing here that this vision is better served by justice as complex equality than by the principles Rawls defends.

Complex equality is, for example, not vulnerable to the charge that has been made against the difference principle, that in treating natural talents as common assets it undermines Rawls's commitment to the distinctness of individuals.⁴⁷ From Walzer's point of view there is no need to ensure that all inequalities are to the greatest benefit of the least advantaged in any one sphere of justice. He therefore avoids advocating the type of state intervention that leads the attempt to maintain a regime

⁴⁴ For an early essay that points in the direction of this pluralist conception of citizenship see "A Day in the Life of a Socialist Citizen" in Walzer *Radical Principles: Reflections of an Unreconstructed Democrat*, New York: Basic Books, 1980, 128-138. See also Gill "Walzer's Complex Equality", 43.

⁴⁵ For a critique of Rousseau from a liberal holist perspective see Charles Taylor's *Multiculturalism and "The Politics of Recognition"*, Amy Gutmann (ed.), Princeton: Princeton University Press, 1992, here at 44-51 and note Walzer's general endorsement of Taylor's position in his "Comment" on Taylor's essay, 99-103.

⁴⁶ See *A Theory of Justice*, 563-565.

⁴⁷ *A Theory of Justice*, 101. This criticism is made from two very different perspectives by Nozick *Anarchy, State and Utopia*, 189-197 and Sandel *Liberalism and the Limits of Justice*, 66-103.

of simple equality into the type of dilemma discussed earlier. Once the autonomy of the spheres is protected there is good reason to believe that each citizen will be able to benefit from whatever individual talent they happen to have. If we get the map of complex equality right then nobody will be excluded or marginalised.⁴⁸ Complexity is our best defence against tyranny.

The move away from state intervention as a means of achieving justice obviously sits more easily with the critics of Rawls's work who draw attention to the fact that he fails to theorise adequately the idea of a public sphere or a realm of civil society. We might think of autonomous associations as groups of citizens who are actively concerned with the regulation of spheres of justice that are not political in a narrow sense. By defending the boundary of the sphere, they act as a check on the danger of state tyranny.⁴⁹ Walzer, unlike Rawls, does not treat intermediate, voluntary associations as marginal to the subject of justice.⁵⁰ Rather than depending on the active intervention of the welfare-state into civil society, the other spheres of justice play a vital role in defending us against tyranny. Since each of us could "rule" in one sphere or another, we can all participate in the achievement of just institutions without all of us being actively involved in the more narrowly defined institutional domain of politics. A complex map of justice allows for the political domain to be integrated with, rather than isolated from, the other

⁴⁸ Walzer argues against the idea that there might be a class of people without any talent in "Exclusion, Injustice and the Democratic State", 61-62.

⁴⁹ See the discussion in section 1.2 above, also Mouffe "Rawls: Political Philosophy without Politics", 230 and Baynes *The Normative Grounds of Social Criticism*, 161-2.

⁵⁰ "Exclusion, Injustice and the Democratic State", 59-61 and "The Communitarian Critique of Liberalism" *Political Theory*, 18 (1990), 6-23.

spheres of social activity. Furthermore this better facilitates resistance to the macrostrategy of bio-power that we discussed in the last chapter. This macrostrategy is exemplified in a bureaucratic welfare-state that administers and controls those who depend on it.⁵¹

It would appear then that Walzer's open-ended approach to substantive principles of justice overcomes some of the problems that Rawls encounters with his monologically derived principles. Rawls's principles are insensitive to the particular meanings of various social goods in particular contexts. He does not allow for the kind of complex map of justice that Walzer advocates. Before we go on to consider the philosophical implications of Walzer's rejection of proceduralism, I should indicate the ways that the advantages of Walzer's approach to substantive justice, over that of Rawls, would appeal to communitarians, post-structuralists and feminists.

Communitarians will appreciate the conception of social goods as being conceived of and created in particular cultural contexts.⁵² This

⁵¹ See the discussion of Foucault's work in section 1.3 above. For a detailed look at the ways in which the theorisation of civil society presents a challenge to traditional politics see Claus Offe "Challenging the Boundaries of Institutional Politics: Social Movements since the 1960s" in *Changing Boundaries of the Political*, Charles S. Maier (ed.), Cambridge, UK: Cambridge University Press, 1987, 63-105 and his "Bindings, Shackles, Brakes: On Self-Limitation Strategies" in *Cultural-Political Interventions in the Unfinished Project of Enlightenment*, Axel Honneth et al. (eds.), Cambridge, MA: The MIT Press, 1992, 63-94, also in this latter collection Jean Cohen and Andrew Arato "Politics and the Reconstruction of the Concept of Civil Society", 121-142 and their much more comprehensive *Civil Society and Political Theory*, Cambridge, MA: The MIT Press, 1992. Walzer himself relates his own concern for a pluralistic conception of citizenship to the theorisation of civil society in "The Civil Society Argument" in *Dimensions of Radical Democracy: Pluralism, Citizenship, Community*, Chantal Mouffe (ed.), London: Verso, 1992, 89-107.

⁵² On Walzer as a communitarian see the chapter on him in Mulhall and Swift *Liberals and Communitarians*.

conception of a social good tends to bring out more clearly the notion of citizen self-rule as an important source of the dignity of citizenship thus reflecting better the fact that the defence of just institutions must be conceived of holistically, as a communal project. Post-structuralists will welcome the shift away from a bureaucratic, administrative welfare-state towards the empowerment of diverse and localised associations who can autonomously regulate particular spheres of justice.⁵³ This represents a greater sensitivity to the danger of exclusion and marginalisation. Furthermore, justice is more concerned on this account with the recognition of difference, both between and within communities, rather than building on the assumption that everybody will reason in the same way regarding the choice of principles.⁵⁴ From a feminist point of view Walzer can, and does, include the family as a sphere of justice.⁵⁵ His particularist focus also indicates the significant role that solidarity with concrete others has to play in our reflections on justice. We must now focus our attention on the contextual form of justification that, from Walzer's anti-procedural perspective, is the only legitimate grounding that substantive principles of justice can be given.

⁵³ As I indicated earlier Walzer's critique of the welfare-state is totally different from the libertarian critique of a theorist like Nozick. Walzer does not want to minimise state resources but he would want to see political power used, not to prop up bureaucratic state authorities that administer welfare, but rather to redistribute resources in a way that will empower associations to more effectively represent themselves. The idea of this decentralising empowerment is to allow those at the margins to develop their talents in their own way, to give them the opportunity to "rule" in one sphere or another.

⁵⁴ See chapter 7 of *White Political Theory and Postmodernism*.

⁵⁵ *Spheres of Justice*, 227-242. Okin *Justice, Gender and the Family*, 111-117 acknowledges Walzer's contribution on this point although she does not agree fully with his interpretation of what justice in that sphere might require. My main point however is to show that complex equality facilitates very easily our consideration of the internal justice of the family.

2.2 HERMENEUTICS AND JUSTICE

Substantive principles of justice are obviously important as legitimate tools of social criticism. According to Walzer, these principles do not depend for their justification on any procedural conception of an impartial point of view. In order to engage legitimately in the practice of social criticism we must, he suggests, resist the philosophical urge to abstract from the particular commitments of the political community with which we identify. Critics do not stand outside of, but rather within, though a little to the side of the community. For Walzer, "critical distance is measured in inches."¹ The critic remains connected to the community and to the commonly created social meanings of its goods.

It seems to me that the explicitly interpretive, contextualist approach that Walzer takes regarding the derivation of substantive principles of justice, is superior to Rawls's monological proceduralism in at least one significant respect. I have already argued that a substantive account of justice can never be justified within the philosophical construction of one theorist but rather it must be the product of on-going public deliberation within actual historical contexts. By stressing the fact that the derivation of substantive principles is necessarily a common task, Walzer therefore avoids some of the problems associated with Rawls's monological abstraction that we discussed in the first chapter.

The stress that Walzer's interpretive approach puts on the active participation of citizens in the derivation of legitimate principles also makes a much clearer link between standards of justice and the particular identity of a political community. In other words, the holist view that the maintenance of just institutions and practices is constitutive of the

¹ *Interpretation and Social Criticism*, 61.

identity of individual citizens comes to the fore. The link between standards of justice and the shared identity of the members of a community reveals quite clearly why it is that citizens should care about the maintenance of just institutions. The extent to which our community has just institutions tells us, in one important respect, what kind of a community we are.

There are however a number of criticisms of Walzer's approach that must be considered. If legitimate substantive principles could not be worked out from an abstract procedure such as the original position, is social criticism in any meaningful sense possible at all? How can principles of justice derived within one tradition be used to criticise the institutions and practices of that same tradition? In this section I will defend Walzer's approach from these critical questions by indicating how we might understand the interpretation of substantive principles within particular traditions as a legitimate way of engaging in the practice of social criticism. The type of ethical reflection on the identity of the community that this type of social criticism requires, can indeed allow for self-criticism in highly significant ways.

On the other hand, it does seem that as a theory of justice, Walzer's interpretive social criticism is seriously flawed in at least one crucial respect. One of the main arguments of this thesis is that in a modern context some procedural conception of an impartial point of view is indispensable to an adequate understanding of how substantive principles of justice are to be justified. There is no alternative to such a procedure if we are to distinguish adequately between legitimate and illegitimate accounts of justice. I will not pursue this issue in the present section because the main aim here is to highlight the important ways in which hermeneutics can facilitate social criticism of a certain type. But it is important to point out at this stage that the type of criticism that is

facilitated is dangerously partial. For this reason it must be thought of as an important and necessary aspect of, and not an adequate substitute for, a philosophical conception of an impartial point of view. I can only begin to develop this argument in the next section of this chapter, when I present a critique of hermeneutics by exposing the weaknesses in Walzer's work. The argument will not be complete however until we consider Habermas's procedural conception of an impartial point of view in the following chapter.

In the analysis of hermeneutics as a form of social criticism in this section, I will first of all explain why Walzer, mistakenly as we will see later, rejects the Kantian project of philosophically justifying an impartial point of view. We will then examine his alternative notion of connected criticism. This will allow us to go on to explore the key role of interpretation in Walzer's understanding of the substance of justice by returning once again to consider arguments that could be offered in defence of complex equality. Having clarified what is involved in a hermeneutic interpretation of substantive principles of justice we can then place Rawls's recent work in this context. Finally we can see how further support can be added to the view that hermeneutics has critical potential by outlining some of the central ideas in the philosophical work of Hans-Georg Gadamer.

Justice without Procedures

For some time before he had developed fully his views on complex equality, Walzer was convinced that, in working out what justice demands, any quest for objectivity will be insufficiently sensitive to cultural differences between the creations of various communities.² To

that extent this quest has tendencies that run counter to the ideals of democracy. Justice must reflect the social meanings of the community even if this does not accord with the reflections of a philosopher who withdraws from the community, so as to be more objective. The democratic will has priority over the conclusions that a philosopher might come to with reference to a monological conception of an impartial point of view that is intended to inform us as to what is right.

For Walzer, justice depends not on philosophical knowledge but on political knowledge.³ While philosophical knowledge, as Walzer characterises it, comes from the outside as an attempt to articulate universal truth, political knowledge comes from within, from the shared historical experience of "negotiation, intrigue and struggle" that in an important sense constitutes a group of people as a political community.⁴ To impose philosophical knowledge on a community's choice of substantive principles would involve a failure to respect their own shared experience and their democratic will. Democracy is therefore prior to philosophy.⁵

² See "Philosophy and Democracy" which was published two years before *Spheres of Justice*.

³ "Philosophy and Democracy", 393.

⁴ "Philosophy and Democracy", 395. Walzer's characterisation of philosophy is actually more of a caricature. It is both controversial and crude. To think of philosophy as a straightforward matter of articulating universal truth reveals an ignorance of the current state of philosophy as a discipline. This raises many highly contentious issues about which there is no agreement among philosophers themselves. For samples of the work of some important voices in the conversation see *After Philosophy: End or Transformation?*, Kenneth Baynes et al. (eds.), Cambridge, MA: The MIT Press, 1987. A brief consideration of the work of Gadamer, for example, should make it clear that philosophical hermeneutics gives a subtle and convincing critique of the quest for universal truth in a way that supports Walzer much more effectively than he manages to do himself.

Any historical community whose members shape their own institutions and laws will necessarily produce a particular and not a universal way of life. That particularity can be overcome only from the outside and only by repressing internal political processes.⁶

The philosopher attempts to see beyond the particular, to leave the cave with its shadow images of reality, so as to see in the light of the sun.

This Platonist vision of philosophy involves a claim to the superior status of philosophical knowledge to the mere opinion of the citizens. If we are to respect the shared creations of political communities and the social meanings that constitute their common life then it is the opinion of the citizens and not the knowledge of the philosopher that matters.⁷

Walzer has since offered a more explicit rejection of proceduralism as idealised philosophical conversation.⁸ Procedures that claim to test the legitimacy of an account of justice are designed to represent a kind of

⁵ See also Richard Rorty's essay on Rawls "The Priority of Democracy to Philosophy" in *Reading Rorty*, Alan Malachowski (ed.), Oxford: Basil Blackwell, 1990, 279-302.

⁶ "Philosophy and Democracy", 395.

⁷ *Spheres of Justice*, 320 and Mulhall and Swift *Liberals and Communitarians*, 134-139. Whether or not anybody theorising about justice nowadays actually defends the strong Platonism that Walzer criticises here is pretty dubious. The strong Platonist looks like a straw man in the context of the contemporary debates that I am considering in this thesis.

⁸ "A Critique of Philosophical Conversation." In "Philosophy and Democracy", 389, Walzer is implicitly critical of proceduralists, including both Rawls and Habermas. In the more recent essay he mentions Rawls and Habermas explicitly, as well as Bruce Ackerman, as theorists who are guilty of philosophising in a way that is dangerous to democracy. I will show that at least in the cases of Rawls (later in this section) and Habermas (in the next chapter), Walzer is guilty of seriously misrepresenting both their understanding of proceduralism and their views on justice. These distorted readings are not excused by his acknowledgement early in the essay, 185, that his references "will not do justice to the complexity and sophistication of the theories involved." See Georgia Warnke "Rawls, Habermas and Real Talk: A Reply to Walzer" in *Hermeneutics and Critical Theory in Ethics and Politics*, Michael Kelly (ed.), 197-203.

hypothetical conversation "whose protagonists are protected against both bad agreements and bad disagreements."⁹ These hypothetical conversations press the protagonists towards a "preordained harmony"¹⁰ which has already been determined in the design of the conditions under which the imagined encounter takes place. In other words the agreement that is generated in these conversations merely articulates the views of the philosopher who designed them. "Once one has a conversational design, it is hardly necessary to have a conversation."¹¹

In contrast, Walzer suggests that critical assessments of our institutions should be based not on hypothetical conversations, but rather on what he refers to as "real talk." We can expect real talk in a modern pluralist society to reach democratic conclusions that are unpredictable and inconclusive. They will have no definitive full stop. This is because real conclusions must reflect the indeterminacy of any non-ideal conversation and these conversations have no moment of special philosophical authority.¹² Real talk then is our only protection from bad agreements. It is this that forms the "conscious and critical part of the processes that generate our received ideas and reigning theories -

⁹ "A Critique of Philosophical Conversation", 184.

¹⁰ "A Critique of Philosophical Conversation", 186.

¹¹ "A Critique of Philosophical Conversation", 184. While I do not propose to examine the fairness of this criticism in any depth at this point, it does seem that Ackerman's work is particularly vulnerable here. This is because he relies heavily on external conversational constraints that are designed to exclude from the discussion subjects about which agreement does not seem possible. Ackerman *Social Justice in the Liberal State*, New Haven: Yale University Press, 1980 and also his "What's Neutral about Neutrality?" *Ethics*, 93 (1983), 372-390. For an entertaining critique of his work that has much in common with Walzer's see Benjamin R. Barber "Unconstrained Conversations: A Play on Words, Neutral and Otherwise" *Ethics*, 93 (1983), 330-347.

¹² "A Critique of Philosophical Conversation", especially 189 and 194.

reflection become articulate."¹³ Its only constraints are those of everyday life, of time and circumstance, that demand some provisional and temporary conclusions if our institutional framework is to allow us to get on with the business of living anything close to an ordinary life in the modern world. But it has no constraints of a philosophical design.

It is clear that Walzer's rejection of the Kantian project is related to his own self-understanding as a committed democrat. As I have already indicated this rejection is a mistake, one that rests to a large extent on a misunderstanding of the proceduralist project. Rather than dwelling on this just now, I want to assess the merits of Walzer's alternative. We must examine in more detail how real talk relates to justice and the practice of social criticism.

One obvious problem with Walzer's interpretive approach to justice is whether or not he is simply uncritically affirming the beliefs and values that happen to dominate in a particular community at a given time. Is there any scope, inside the cave, for criticism of opinion as ideology? Walzer's response to this attack has been to emphasise the extent to which we, as members of one community, already inhabit a moral world that has its own critical standards. We can be more or less successful in our attempts to live up to these standards. Each other community also inhabits its own moral world that gives it internal standards.

It seems that from Walzer's point of view, any philosopher who is tempted to seek to discover or to invent moral principles from some external perspective is in danger of making two mistakes.¹⁴ First, this

¹³ "A Critique of Philosophical Conversation", 194-195.

¹⁴ The first chapter of *Interpretation and Social Criticism*, 3-32, is a defence of the path of interpretation over those of discovery and invention in moral philosophy. Walzer mentions divine revelation as the paradigmatic example of the path of

project does not adequately recognise the extent to which our morality, and our principles of justice, are constituted by the thick social meanings that reflect our self-understanding as a particular historical community. Criticism is a matter not of abstracting from this moral world but of interpreting those social meanings from within it. Second, moralities that are discovered or invented turn out to be "remarkably similar to the morality we already have."¹⁵ In other words this project fails to recognise the historical and cultural presuppositions that always frame its supposedly objective constructions, inventions and discoveries.¹⁶

Our shared moral world is authoritative for us as the only source that can inform our substantive account of justice. In engaging in real talk we argue about the meaning of this moral world, how it is best to be interpreted. A good interpretation can affirm, but it can also challenge, the institutions and practices of our community. Just as the best interpretation of a poem is the one that "illuminates" its meaning in the most "powerful and persuasive way,"¹⁷ so the social critic aims to articulate as authentically as possible the meaning of a shared moral world. A bad interpretation articulates poorly the critical standards that

discovery though he also considers the work of one contemporary liberal, Thomas Nagel, as well as Jeremy Bentham's utilitarian notion of felicific calculus in this context, *Interpretation and Social Criticism*, 3-8. With regard to the path of invention, Rawls is once more understood to offer the "best known and most elegant" solution, *Interpretation and Social Criticism*, 11. Again Walzer fails to deal adequately with the interpretive dimensions of Rawls's work. See Brian Barry "Social Criticism and Political Philosophy" in his *Liberty and Justice: Essay in Political Theory*, 2, Oxford: Clarendon Press, 1991, 9-22, here at 16.

¹⁵ *Interpretation and Social Criticism*, 21.

¹⁶ These points are made by Georgia Warnke in *Justice and Interpretation*, Cambridge, UK: Polity Press, 1992, 2-5. They reflect the most recent Hegelian response to Kantianism in ethics.

¹⁷ *Interpretation and Social Criticism*, 30.

are constitutive of us as a moral community. These bad interpretations might actually be embodied in our current institutions and practices.

To give an account of justice should be thought of, according to this interpretive approach, as the articulation of a central aspect of the identity of a community.¹⁸ For Walzer it would seem that the identity of the community is constituted by its particular shared social meanings. The social meanings we share with regard to justice are important aspects of our identity. We argue about them because it matters to us in clarifying who we are as a community. It matters if we have managed to live up to our own standards of justice or not because that says something significant about the type of human community we are. The social critic challenges us to live up to our deepest shared convictions, to be true to the moral commitments that, in part at least, constitutes our common life. Of course, each member of the community can take on the role of the social critic.

We can see more clearly now why reflection on the substance of justice must be, for Walzer, a common task, a project for the community as a whole. Since the identity of the community itself is at stake the lone philosopher can never be invited to take on the task of articulating for the

¹⁸ Charles Taylor's account of the identity of the self offers important insights on this subject. "To know who you are is to be oriented in moral space, a space in which questions arise about what is good or bad, what is worth doing and what not, what has meaning and importance for you and what is trivial and secondary" *Sources of the Self*, 28. We might consider deliberation about substantive justice as an attempt to answer, in one important respect at least, the question of our common identity. The articulation of our principles of justice defines our identity to the extent that it provides orientation for us when we are confronted by certain inescapable questions. In any modern collective form of human life, the question of what justice demands is not one that just happens to be asked. On the contrary it is a precondition of such a collective form of life. See more generally chapters 1-4 of *Sources of the Self* and also "Legitimation Crisis?" in Taylor's *Philosophical Papers, II*, 248-288.

community even very basic features of its own account of justice.¹⁹ Wide participation in the democratic process is central to this task and it is this that Walzer is clearly most concerned about in his suspicion of philosophy.

Furthermore, the task of working out the substance of justice, since it involves a question of identity, must not be thought of in a static manner but rather as an on-going matter of clarification and communal self-interpretation. In this sense, Walzer is right to insist that there can never be a definitive full stop at the end of such an account.²⁰ The substance of justice can only be interpreted dialogically, in a discursive encounter, and not monologically, in isolated reflection.²¹ The social critic makes a contribution to this on-going democratic task by attempting to convince fellow citizens of a particular interpretation of their shared social meanings that actually conflicts with current social practice.²² This interpretation may illuminate the community's self-understanding in radically new ways that not only conflict with current practice but that also challenge and undermine certain dominant beliefs.

¹⁹ In the first chapter I discussed this problem in detail in relation to Rawls's proceduralism.

²⁰ "A Critique of Philosophical Conversation", 194.

²¹ One of the central arguments of this work is to defend the view that the fact that Habermas's proceduralism accommodates this insight, while Rawls's does not, is of crucial significance in favouring the test of discourse ethics over that of the original position.

²² Walzer often takes the reading of a canonical text as an analogy for social criticism. Certain world religions often base their moral disputes on the interpretation of such texts, for example Judaism, Christianity, Islam. The social critic reads in our social meanings the moral principles that give us orientation in matters of justice. For the clearest example of the analogy see *Interpretation and Social Criticism*, 67-94.

Interpretation and Connected Criticism

Walzer illustrates how connected criticism operates with reference to Antonio Gramsci's critique of bourgeois morality.²³ According to Walzer's reconstruction of this critique, Gramsci offers a radical reinterpretation of values such as liberty and equality. Although these values are attached to the idea of citizenship in bourgeois conceptions of law, they are given an interpretation that serves to justify economic arrangements satisfying the interests of the bourgeoisie at the expense of the proletariat. These ideas of freedom and equality did however have a real attraction for the proletariat at that time since they reflected important aspects of the moral world they inhabited. They captured, for example, what was of significance in the rejection of aristocratic privilege.

What Gramsci sought to do was to argue that liberty and equality ought to be embodied differently in the economic and social structure than they had been up to that point. He interpreted these values to require substantive material egalitarianism and not simply formal equality before the law. This reinterpretation justified his rejection of the market relations of a capitalist economy. On Walzer's reading we should take Gramsci's argument to imply that capitalist market relations make it impossible for the democratic community with which he identifies to live up to the most coherent account of the moral standards by which it understands itself. This critique comes from within the particular moral world of the people to whom it is addressed and not from some supposedly objective, external standpoint.²⁴

²³ See especially *Interpretation and Social Criticism*, 43-44 and more generally for Walzer's view of Gramsci as a critic *The Company of Critics*, 80-100.

For Walzer, criticism articulates a common complaint in the ordinary language of the people.²⁵ Abstract theoretical language tends to alienate critics from the sentiments of their fellow citizens. We must recall that according to Walzer, it is not the search for philosophical knowledge or objective truth that motivates criticism but rather the political knowledge of citizens articulated through the democratic process. It is the failure of the community to be whatever it aspires to be, its failure to live up to its deepest convictions that generates the disappointment that drives criticism. In this way the critic can never be in total opposition to the community that is criticised.²⁶ Loyalty, though not blind loyalty to the status quo, is the prerequisite of connected criticism.

The issue at stake might be put in the form of a question; why should people take a critic seriously if that critic is not committed in any way to the good of the criticised community's form of life? Such an external voice has no standing in the community. It is the voice of a stranger, an enemy, a coloniser. The connected critic is, in contrast, committed not primarily to a philosophical theory but rather to a community and its own particular form of life. It is the moral sensitivity of a critic who cares about the good of the community who can inspire solidarity and resolve

²⁴ Of course at this point Walzer has to distance himself from Gramsci's own self-understanding. While his account of hegemonic struggle allows us to understand criticism democratically as a rearrangement of ideas that are already dominant, his own belief in objective and absolute knowledge leads him into contradiction as a "victim ... of Marxist teleology", *The Company of Critics*, 99. We might think of Walzer's Gramsci as offering not an objective, uniquely correct interpretation of the values of liberty and equality, but a reinterpretation that opens up the meaning of these values in new and liberating ways.

²⁵ *The Company of Critics*, 9-12. He argues that Herbert Marcuse's rejection of ordinary language leads him into an antidemocratic understanding of social criticism, *The Company of Critics*, 184-187.

²⁶ *The Company of Critics*, 233-238.

in the people to live up to their deepest convictions. This allows for a sensible flexibility towards theoretical commitments that can be revised in the light of historical events. Such revision is not an occasion for despair as it can invigorate rather than undermine the potential for connected criticism.²⁷ What matters is not so much theoretical correctness but the identification with a form of life that lives up to its own moral commitments.

Walzer invokes the image of a critic holding a mirror up to fellow citizens.²⁸ A look in the mirror can shatter any illusions as to the success with which the community has lived up to these commitments. While these can never be fully articulated, the critic's mirror is intended to help citizens to face up to the disparity between what the community is and what it aspires to be at any given time. The tasks of the critic are "to question relentlessly the platitudes and myths of his society and to express the aspirations of his people."²⁹ The critic also reminds the community of the particularity of both its aspirations and its failures. Each community has its own mirror telling its own story. Each mirror tells the story of one community's moral world, not the story of the entire world or of humanity as such.³⁰

²⁷ *The Company of Critics*, 229. It is according to criteria such as this that Walzer assess the lives of the eleven twentieth century critics he considers in this work. He uses biographical sketches of these eleven so as to illustrate his preferred model of the connected critic.

²⁸ *The Company of Critics*, 229-233.

²⁹ *The Company of Critics*, 229.

³⁰ Walzer maintains that this is not inconsistent with a certain universalist moral code. Whether or not this is persuasive will be discussed in the next section.

Criticism facilitates the justification of our institutions and practices to each other. We engage in this critical activity as we seek recognition from each other. We understand our personal identity, at least in part, in relation to the political community with which we identify. In this sense it matters to each of us whether or not we can be whatever we aspire to be together. Our aspirations give us direction and a critical standard by which we can critically assess the historical reality of our common life. Walzer's work on connected criticism is intended to support the argument he makes in favour of complex equality. Our disputes about substantive justice are to be thought of as an aspect of the common task of articulating as fully as possible the social meanings that constitute us as a community.

Rival Interpretations

We noted at the end of the last section how the social pluralism involved in Walzer's work might appeal to both communitarians and post-structuralists. He recognises the culturally particular social meanings of goods and at the same time defends heterogeneity and the plurality of narratives of substantive justice from the repression of a forced metanarrative unity.³¹ We must respect both the boundaries that separate the spheres of justice within our own community and also the boundaries which separate our community from communities of others.

But a post-structuralist might worry, and with good reason, that Walzer tends to assume too much unity. While he may be sensitive to differences between communities, perhaps he forces a unity of

³¹ For a critique of metanarrative unity see Jean-François Lyotard *The Postmodern Condition: A Report on Knowledge*, Minneapolis: University of Minnesota Press, 1984. See also White *Political Theory and Postmodernism*, 118-119.

interpretation on to the citizens of one community. In other words while the external other is recognised there may be a blindness to the internal other.³² Of course one need not be a post-structuralist to share this concern. Many liberals argue that Walzer's assumption that justice must be based on shared understandings is simply inappropriate in the context of a modern democratic society.³³ The reality of pluralism seems to suggest that we simply do not share understandings of the meanings of social goods. For a liberal, we are not a moral community in the way that Walzer presupposes in his approach to substantive accounts of justice and in his understanding of social criticism.

Does Walzer's moral community dissolve if it is fractured by dissensus over shared meanings?³⁴ As we saw in the first chapter, Kantian liberalism is a response to the fact that in Western democratic societies we do not share comprehensive conceptions of the good. It is for this reason that we must settle for an agreement on some procedural framework of justice.³⁵ We are not one moral community but rather a fractured, multicultural, political community that needs justice in order to regulate fair terms of co-operation for mutual advantage. This view

³² Richard Bernstein gives a useful overview of the common concerns of Anglo-American and Continental philosophers with regard to the question of otherness, "Incommensurability and Otherness Revisited" in *The New Constellation*, 57-78.

³³ In the final section of the next chapter I will discuss the extent to which Walzer's approach to issues of justice could serve any critical purpose in the context of a society where pluralism is a deeply divisive problem. I will take the example of Northern Ireland where it would appear that there are two historical communities uneasily co-existing in the territory of one political entity.

³⁴ See Nancy Rosenblum "Moral Membership in a Post-Liberal State" *World Politics*, 36 (1984), 581-596, here at 586-590.

³⁵ This is Rawls's project but for this criticism of Walzer see William Galston "Community, Democracy, Philosophy: The Political Thought of Michael Walzer" *Political Theory*, 17 (1989), 119-130, here at 120-122.

stresses plurality and difference within rather than between communities.³⁶

Ronald Dworkin argues that the notion that justice is based on shared understandings represents a serious flaw in Walzer's defence of complex equality.³⁷ Let us take, for example, his interpretation of the meaning of health care in Western culture. As I indicated earlier Walzer argues that health and longevity are socially recognised needs and that in order to meet those needs we have provided a public health care system. Communal provision for needs in part constitutes and also sustains communities. The social meaning of health care then is that it is a good which should be distributed according to need. We should each receive it as citizens in proportion to our ill-health. The crucial claim of an account of complex equality is that this good should therefore not be distributed according to wealth, occupation, education or any other

³⁶ I have argued already, in section 1.3, that despite this intention, Rawls's own procedure is vulnerable to the post-structuralist charge that it is insufficiently sensitive to difference.

³⁷ "To Each His Own" *New York Review of Books*, 30, 6 (April 14, 1983), 4-6. A similar argument is made by Joshua Cohen "Review of *Spheres of Justice*" *Journal of Philosophy*, 83 (1986), 457-468. For the ensuing debate between Walzer and Dworkin see "Spheres of Justice: An Exchange" *New York Review of Books*, 30, 12 (July 21, 1983), 44-46. Interestingly enough while Dworkin's political philosophy contrasts with Walzer's because of its stress on abstract and general principles of equality, his legal theory is distinctively hermeneutic in orientation. See the three essays in "Law and Interpretation", part 2 of *A Matter of Principle*, Oxford: Clarendon Press, 1986, 117-177. This collection also contains "To Each His Own" but under the title "What Justice Isn't", 214-220. More generally for Dworkin's view of legal theory see *Law's Empire*, Cambridge, MA: Harvard University Press, 1986. The tension between the hermeneutic language of his approach to law and the appeal to abstract principles of justice is explored by Georgia Warnke *Justice and Interpretation*, 77-80.

criterion which is unrelated to the social meaning of health care as a need.³⁸

Of course this interpretation of health care does conflict with current practice in most Western democracies. Wealth is in fact often a criterion which can determine the quality of health care that is provided. Presumably some people are willing to argue in defence of this situation and so it would appear that Dworkin is right about the fact that not everyone is in agreement with Walzer about the social meaning of health care. Does this mean that we lack the shared meanings that are constitutive of a moral community? A liberal conclusion might be that we simply cannot find internal solutions to our disagreements about justice and we must therefore appeal to some general moral principle. But as our study of Rawls should confirm the problems involved in justifying such general substantive principles of justice are indeed onerous. Rather than abstracting from the particularity of social meanings, hermeneutics seeks to avoid these problems by digging more deeply into those meanings.³⁹

Walzer could be defended from Dworkin's critique if we bear in mind the fact that we could not even have a disagreement unless we shared common terms of reference, a common vocabulary.⁴⁰ The sharing is at a deeper level than the conflicting opinions about specific disputes about justice. In a moral disagreement about the merits of private medicine we

³⁸ *Spheres of Justice*, 86-91.

³⁹ For the best defence of Walzer in this debate see Georgia Warnke "Social Interpretation and Political Theory: Walzer and his Critics" in *Hermeneutics and Critical Theory in Ethics and Politics*, Michael Kelly (ed.), 204-226. More generally see Charles Taylor "Interpretation and the Sciences of Man" in his *Philosophical Papers, II*, 15-57.

⁴⁰ Note Walzer's comments in "A Critique of Philosophical Conversation", 191-192.

must draw on the resources made available to us in our shared moral vocabulary. We will use concepts such as needs, rights, welfare and so on which are for us shared meanings. While we may not be able to reach an explicit agreement we must assume that we all know what we are talking about or else the debate would be pointless. But these moral concepts do not just facilitate understanding between us. They are concepts that themselves express the shared moral commitments that are constitutive of our common way of life. These terms of reference that make up this common vocabulary are not primarily derived from explicit agreements among individuals. They are part of our tradition and they reflect moral assumptions which underlie our social practices and the language we use about them.

For example, the existence of a National Health Service of some description does in itself indicate a certain shared meaning of health care, no matter how much we might disagree about how it should be organised. This shared meaning involves a moral commitment. Even those who are completely opposed to the idea of such a service, as a waste of resources or whatever, cannot but debate within the context of a form of life where health care is now understood as a need for which communal provision has been made. The language used in current debates about health care, terms such as 'neglect', 'understaffing', 'unacceptably long-waiting lists', reflect deep common assumptions that direct the dispute in a particular way. Shared understandings are contextualised within a tradition and they certainly do not preclude intense disagreement among individuals. Social meaning is not "a matter of individual opinion but of the nexus of social values, norms and practices about which individuals have opinions."⁴¹ Despite the views of some of Walzer's critics, a debate such

as that about just health care will not be resolved by appealing externally to a general substantive principle of justice, but rather with reference to the moral resources that are constitutive of the community's shared way of life.

What Walzer does in *Spheres of Justice* is to present, as a connected critic, his interpretation of our shared understandings in relation to the various spheres of justice. He believes that we can mark off "deep and inclusive accounts of our social life from shallow and partisan accounts."⁴² The deeper accounts give a fuller and richer interpretation of the standards to which we aspire as a community. Walzer is not, unlike those in search of general principles, claiming to offer the one and only objectively right account of justice for us. If we understand his work in this way then we can see that the fact of moral disagreement does not imply that his emphasis on shared meaning is misguided. We can evaluate his interpretations of the social meaning of justice and test them against other interpretations. It is the attempt to offer the interpretation that best illuminates the moral commitments we already share that engages the connected critic.

This gives us an alternative view of what is at stake in the different substantive accounts of justice we find in the work of Rawls and Walzer. In the first chapter I mentioned that Rawls now presents his theory in a more hermeneutic way. His proceduralism is not driven by a philosophical urge for truth but rather by the practical purpose of constructing a workable conception of political justice. For this reason it draws upon "basic intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and the public traditions

⁴¹ Warnke "Social Interpretation and Political Theory", 209.

⁴² "Spheres of Justice: An Exchange", 43.

of their interpretation."⁴³ Furthermore, the original position itself is intended as a model for "what we regard as fair conditions under which the representatives of free and equal persons are to specify the terms of social co-operation."⁴⁴ The principles he believes the parties would adopt are intended to identify "the conception we regard *-here and now-* as fair and supported by the best reasons."⁴⁵

It would appear that Rawls too is seeking to provide a "deep and inclusive" account of justice that best illuminates the moral commitments that we already share, at least from a political point of view.⁴⁶ But this does not dissolve the differences between the two accounts. In the first place Rawls is concerned to construct his account in terms of an overlapping consensus since for him the fact of pluralism implies that we do not actually have very much shared meaning to work with.⁴⁷ This explains a number of features of his construction; first, the centrality of the notion of impartiality in his interpretation; second, the need to

⁴³ "Justice as Fairness: Political not Metaphysical", 225.

⁴⁴ "Justice as Fairness: Political not Metaphysical", 237-238.

⁴⁵ "Justice as Fairness: Political not Metaphysical", 238. I think this quotation supports the point I made earlier, that Walzer's critique of Rawls is based, to some extent at least, on a misinterpretation of his project.

⁴⁶ Since Rawls is concerned to defend certain substantive principles this hermeneutic turn was unavoidable. Habermas in contrast defends only a procedure. In the next chapter we will examine the extent to which this move allows him to resist the dangers of contextualism.

⁴⁷ It is for this reason that Rawls, unlike Walzer, believes it to be necessary to construct a substantive account of justice through an abstract monological conception of an impartial point of view. See *Political Liberalism*, 42-44. I have argued that we do need a conception of an impartial point of view but not Rawls's abstract monological one.

represent this through the abstraction of the original position; and third, the generality of the principles that are derived there.

In contrast, Walzer argues for a much more detailed account of the substantive principles that he identifies in a wide variety of spheres of justice. He is enabled to do this by the fact that he resists monological abstraction. But since he fails to see that we need not conceive of an impartial point of view in terms of monological abstraction, Walzer refuses to place the notion of impartiality at the centre of his interpretive account of our shared meaning. These aspects of Walzer's work will be assessed critically in the next section.

The question that must be answered now however is how a hermeneutic approach can deal adequately with rival interpretations of shared meaning. This is a matter of seeing how each interpretation coheres with a community's values, its self-understanding and its aspirations. Substantive justice in any society is always the subject of an on-going public debate. Such debate does strive to reach some conclusions, bearing in mind that these will be temporary and provisional, without any definitive full stop. In order to see how a hermeneutic approach might help us to see how these debates could be brought to a temporary but legitimate conclusion, I will follow the lead of Georgia Warnke in turning to the philosophical work of Hans-Georg Gadamer.⁴⁸

A Dialogical Understanding of Substantive Justice

Hermeneutics developed as a method for interpreting the meaning of authoritative texts, so as to apply that meaning in a new context.⁴⁹ It is

⁴⁸ Warnke "Walzer, Rawls and Gadamer: Hermeneutics and Political Theory" in *Festivals of Interpretation: Essays on Hans-Georg Gadamer's Work*, Kathleen Wright (ed.), Albany: State University of New York Press, 1990, 136-160.

not surprising that this field of study emerged in the context of theological and legal controversies about how to interpret texts correctly, to draw the proper normative conclusions for effective adherence to the authority of the text. If we want to understand a particular part of the Bible, or an aspect of the law, then we have to begin with an initial projection of its meaning that we derive from our interpretation of the whole of the scripture or our overall understanding of the law. Interpreting the part in question will require that we alter and revise in turn our understanding of the whole. Early hermeneutical theorists were concerned with the objective interpretation of meaning.⁵⁰ They thought of hermeneutics as a method or a skilful technique whereby the interplay within the hermeneutical circle between part and whole, could allow the interpreter eventually to master the meaning of the text by arriving at an objective and definitive interpretation of its meaning.

Gadamer argues that the idea of an objectivist hermeneutics is fundamentally misconceived.⁵¹ We can never give an objective

⁴⁹ For an introduction to early hermeneutic theories see Josef Bleicher *Contemporary Hermeneutics: Hermeneutics as Method, Philosophy and Critique*, London: Routledge and Kegan Paul, 1980, especially 1-26.

⁵⁰ These early theorists included F.D.E. Schleiermacher and Wilhelm Dilthey but for an example of the work of a more recent exponent of objectivist hermeneutics see Emilio Betti "Hermeneutics as the General Methodology of the *Geisteswissenschaften*" reprinted in Bleicher's *Contemporary Hermeneutics*, 51-94.

⁵¹ The classical statement of Gadamer's position is *Truth and Method*. His development of philosophical hermeneutics in this direction away from the quest for objectivity owes much to Heidegger's analysis of the forestructure of understanding in *Being and Time*, New York: Harper and Row, 1962. See *Truth and Method*, 265-271 and 291-300 and Bleicher *Contemporary Hermeneutics*, 97-127. For a good introduction to Gadamer's hermeneutics, Richard J. Bernstein *Beyond Objectivism and Relativism*, Oxford: Basil Blackwell, 1983, 34-44 and 109-169 and for a recent collection of essays dealing with critical encounters between Gadamer's work and a variety of contemporary

interpretation of any text, or any account of the substance of justice, because we always remain in a particular context of interpretation. This context is limited and constrained by the historically situated perspective that we might consider, following Gadamer, as the interpreter's horizon of understanding.⁵² There is no method that could possibly take us beyond the limited horizon of our own historicity. In this way the meaning of a text can never be tied to the notion of authorial intention. In the light of new circumstances and from the vantage point of a future reader who can interpret it in a wider perspective, the text may come to mean something that the author never intended.⁵³ Similarly there is no definitive and fixed meaning of substantive justice we are always moving within a limited horizon of understanding.

The quest for objectivity places the interpreter in the role of an observer who claims to understand the moral commitments of a community from a neutral standpoint. Gadamer insists that understanding is not a matter of neutral observation but rather one of participative interpretation. We always understand from the perspective of a tradition. I suggested earlier that even if we disagree about what just health care requires of us as a community, we already presuppose a deep common commitment to a particular form of life. This common commitment to that form of life is an aspect of the forestructure of our understanding, something presupposed by the very disagreement. It is what Gadamer refers to as a prejudice.

philosophical perspectives *Gadamer and Hermeneutics*, Hugh Silverman (ed.), London: Routledge, 1991.

⁵² *Truth and Method*, 302-307.

⁵³ For a discussion of Gadamer's critique of the idea that meaning is tied to authorial intention see Georgia Warnke *Gadamer: Hermeneutics, Tradition and Reason*, Cambridge, UK: Polity Press, 1987, 42-72.

Prejudices are not necessarily unjustified or erroneous, so that they inevitably distort the truth. In fact the historicity of our existence entails that prejudices, in the literal sense of the word, constitute the initial directedness of our whole ability to experience. Prejudices are biases of our openness to the world. They are simply conditions whereby we experience something - whereby what we encounter says something to us.⁵⁴

In the context of a disagreement about substantive principles of justice within Western democratic societies we can think of these prejudices as the weight of our tradition. This is a particular tradition that has, through the struggles of its history, come to place values like equality, liberty and citizenship at the centre of its deliberations about justice. These prejudices give us an initial direction in our attempts to work out what justice demands of us here and now.

Our awareness of the prejudices of our own tradition constitutes our historically effected consciousness.⁵⁵ This concept allows us to understand more clearly why the project of objectivist hermeneutics is misconceived. Take for example the way in which the law is applied by the Supreme Court in the USA. The judges interpret the Constitution with the historically effected consciousness of precedent.⁵⁶ The history

⁵⁴ Gadamer "The Universality of the Hermeneutical Problem" in his *Philosophical Hermeneutics*, 3-17, here at 9. This essay is also reprinted in Bleicher *Contemporary Hermeneutics*, 128-140.

⁵⁵ This notion is closely related to the idea of a horizon of understanding. Gadamer introduces it in *Truth and Method*, 300-307 but goes on to develop an explanation of what is involved at length, 341-379. This includes a highly illuminating analysis of the priority of the question in human understanding where Gadamer takes the Platonic dialogues as his model.

⁵⁶ See David Couzens Hoy "Legal Hermeneutics: Recent Debates" in *Festivals of Interpretation*, Kathleen Wright (ed.), 111-135. Hoy discusses the notion of historically effected consciousness in relation to debates surrounding Dworkin's legal hermeneutics. See also Gadamer on "The Exemplary Significance of Legal Hermeneutics" in *Truth and Method*, 324-341.

of previous interpretations of the Constitution as it was applied in various cases is the history of the Constitution itself. The requirements of the law in a new case cannot be tied to the original intention of the founding fathers but nor can they be understood as merely subjective interpretations on the part of the judges. What is expected of the judges is that they engage in a dialogical encounter whereby they can incorporate the context of the new case into their understanding of the law. They carry forward the tradition by testing its prejudices in new historical circumstances.

Georgia Warnke suggests that we understand the differences between the substantive accounts of justice offered by Rawls and Walzer as two interpretive accounts of our political tradition.⁵⁷ Neither of them can capture fully the meaning of that tradition and each of them stresses different aspects of it but we can take both to be making significant contributions to a public understanding of what justice requires of us. In so far as it seems clear that there are disagreements about the substance of justice, we must engage in a dialogical encounter whereby we test the various prejudices of our tradition in our attempts to come to terms with new circumstances.⁵⁸ This can take the form of a hermeneutic dialogue where each of us can test our differing interpretations of justice in an encounter where we seek to deepen our views by learning from one another. We are seeking a fusion of horizons with each other as partners in dialogue.⁵⁹

⁵⁷ "Walzer, Rawls and Gadamer", 152-153.

⁵⁸ New circumstances challenge the reasonableness of a tradition's prejudices. When a community attempts to come to terms with new circumstances in an openly dialogical way then the prejudices of the community's tradition may be revised or even repudiated. I will return to this in the next section.

In this interpretive dialogue our prejudices are tested by the encounter with the other. If the partners to this dialogue really listen to each other then they will not simply remain entrenched in the position they were in before the dialogue took place at all. A public dialogue about justice which is genuinely open will involve a process of self-transformation for each of the participants and also for the identity of the community as a whole. If we have listened then we will have taken the differences between us into account and while it is possible that none of us will change our minds to a significant degree, all of us will have benefited in terms of a deeper understanding of our own views on justice and a more adequately articulated account of the issues of justice that matter to us communally.⁶⁰

The interpretive accounts of substantive justice offered by theorists such as Walzer and Rawls draw very heavily on traditions that could be thought of as the dominant strands of modern Western political culture. These are the traditions of liberalism, socialism and republicanism. But there are other traditions within modern democratic societies that are rooted in minority cultures, such as immigrant cultures or perhaps new cultures that have developed through the progress of social movements, such as that of the gay and lesbian community. We have already considered, in our discussion of Foucault's work in the first chapter, how such minority cultures are in danger of being marginalised or even excluded from our deliberations about justice. On this dialogical account,

⁵⁹ On the fusion of horizons as a self-transformative moment see *Truth and Method*, 379. Gadamer thinks of this as an achievement of language, something which in part led to his debate with Habermas, as we will see in the next section.

⁶⁰ Warnke's recent book *Justice and Interpretation* provides the clearest available account of how hermeneutics relates to matters of justice. I will have certain criticisms to make of her argument when I discuss contextualist critics of Habermas in the next chapter.

these minority cultures must be included in these interpretive encounters that seek to carry forward the political tradition as a whole. The onus is on those who draw most heavily on dominant traditions to listen to the voices of these minority cultures.⁶¹ As members of our democratic community they can make important contributions to our self-understanding. The horizon of a minority culture is not simply incorporated into that of a dominant culture leaving the latter unchanged. Rather we can expect both cultures to be transformed in the fusion of their horizons.

This will not be the case only within one democratic community but communities can learn from one another. "We British" can learn something from "you Germans", and vice versa, if we really take seriously our cultural encounter as a potentially edifying and educational experience. We will deepen our understanding not only of the Germans, but of ourselves as well. In this way, as our self-interpretation changes, so we change ourselves. We can think of the cultural aspects of closer European co-operation as an attempt to engage various European cultures in a mutually enriching and self-transformative dialogue. Nor need this experience be limited to Western cultures learning from each other. In

⁶¹ See Charles Taylor's comments on the Rushdie affair in *Multiculturalism and "The Politics of Recognition"*, 62-63. Taylor defends a version of liberal holism in this essay that, as he mentions here, avoids the distinction between political and comprehensive moralities that makes it so difficult for Rawls's proceduralism to deal with politico-cultural controversies such as that sparked by the Rushdie affair. I made a similar argument in section 1.2. The hermeneutic account I am outlining here advocates a dialogue between the dominant liberal tradition and minority groups of citizens such as Moslem fundamentalist groups. While we must presume that these minorities can enrich our interpretive account of justice, there is no guarantee that this will lead to a significant shift in the moral standards that constitute in part our self-understanding as a democratic community. What we can expect is that through the encounter we will have deepened our interpretive account of justice by clarifying what it is that we cannot accept in the demands such minorities might make.

fact we might expect to learn more, on condition that we put in the more demanding efforts of listening required, from an encounter with non-Western cultures that aims at a genuine understanding, or a fusion of horizons.⁶²

In seeking to give the best interpretation of what the substance of justice is for us, through our own internal debates as well as external encounters, we are therefore enriching our own tradition. As each participant in these encounters seeks to incorporate the better insights of the other they are collectively striving to give the most adequate account of justice for them. This of course is always open to future revision and so is never given a definitive full stop. The fusion of horizons that we seek will enrich and develop our communal articulation of what justice demands of us. While this will not resolve all of our disagreements the encounter itself will constitute a vibrant public culture where a passionate concern for justice can be expressed collectively.

A hermeneutic understanding of justice requires of each of us that we be open to our deepest shared moral convictions. To engage in a serious attempt to answer the question "What is justice for us?" inevitably involves us in the common project of facing up to the questions; "Who are we?" and "What do we aspire to be?"⁶³ Our account of justice in part

⁶² Taylor *Multiculturalism and "The Politics of Recognition"*, 65-73. He actually invokes Gadamer's idea of a "fusion of horizons", 67.

⁶³ As well as the work of Gadamer and Taylor, especially *Sources of the Self*, Alasdair MacIntyre gives a comprehensive defence of the centrality of tradition in moral reflection in *Three Rival Versions of Moral Inquiry*, London: Duckworth, 1990. On the other hand, Richard Rorty, unlike any of these hermeneuticists, does not allow for any significant degree of communal rational self-criticism since he tends to endorse whatever self-understanding a community just happens to have. This amounts to the conflation of the questions "Who are we?" and "Who do we aspire to be?" If Rorty were right, then our deliberations about justice would not only lack direction but they would also be devoid of any

defines our identity as a community. In so far as we share a form of life at all, and this is surely not an option, these questions are inescapable.

A dialogical understanding of substantive justice can claim to have important advantages over an account of justice derived through a procedure of monological abstraction. It does not deny the significance of historical and cultural traditions and so it can respect the particularity of different communities. It also reflects better the communal aspect of democratic deliberation that is essential to the derivation of legitimate substantive principles of justice. This provides strong motivation for a common striving for the articulation of and adherence to such principles. I have argued in this section that hermeneutics does not undermine the possibility of social criticism. Hermeneutic critique is grounded on the fact that we can be more or less true to our deepest moral convictions.

This defence of the critical potential of Walzer's stress on interpretation adds to our understanding of the holist aspects of an adequate liberal holist approach to justice. We will recall that in the discussion of the communitarian critique of Rawls, I suggested that while Rawls is a liberal holist, his monological procedure that demands the isolation of the political sits rather uneasily with that commitment. In the last section I maintained that Walzer has a more contextually sensitive

internal critical standards. Nor can Rorty's "neo-pragmatism" accommodate very easily differing interpretations of what our shared moral commitments require. For Rorty's view on matters of justice see *Contingency, Irony and Solidarity*, Cambridge, UK: Cambridge University Press, 1989, "The Priority of Democracy to Philosophy" and also "Solidarity or Objectivity?" and "Postmodernist Bourgeois Liberalism" both collected in his *Objectivity, Relativism and Truth: Philosophical Papers, Volume 1*, Cambridge, UK: Cambridge University Press, 1991. For a contrast between Gadamer and Rorty, Warnke *Gadamer: Hermeneutics, Tradition and Reason*, 139-166 and for a sample of the numerous general criticisms of Rorty's political views, Richard Bernstein *The New Constellation*, 230-292 and Nancy Fraser "Solidarity or Singularity?: Richard Rorty between Romanticism and Technocracy" in *Reading Rorty*, Alan Malachowski (ed.), 303-321.

approach to substantive accounts of justice than Rawls and that this is due to his pluralist conception of citizenship. However I have maintained throughout that the attempt to provide a philosophical conception of an impartial point of view is indispensable to a theory of justice. In fact impartiality is a crucial aspect of the self-understanding of any pluralist political community that aspires to a just social reality. This should become clear now as we turn to the most serious weaknesses in Walzer's work. In the following section I will argue that his rejection of the Kantian project is seriously misguided. Walzer is left with a hermeneutic approach to justice that is dangerously partial in that it obscures what must be the key feature of a theory of justice that is to serve its critical task in a modern context.

2.3 THE LIMITS OF WALZER'S IMMANENT CRITIQUE

In the last section I argued that Walzer's defence of connected criticism should not be dismissed as an apology for the status quo. Our deepest moral commitments can be articulated in ways that conflict with current social and political practices. In this section I will look at the other side of the story by presenting a critique of Walzer's work. I will argue that despite the critical potential of a hermeneutic approach, the form of immanent critique that Walzer actually advocates represents at best one aspect of what is required of us with respect to our reflections on justice.¹ Its potential for social criticism is seriously undermined by Walzer's refusal to endorse the Kantian project. Without some philosophical articulation of an impartial point of view we are left without an adequate means of distinguishing between legitimate and illegitimate principles of justice. I will be suggesting that in a modern context the justification of legitimate principles of justice must presuppose some conception of an impartial point of view. Hermeneutics could never on its own act as a substitute for such a conception.

In the first part of this section I will question whether or not hermeneutics is sufficiently sensitive to the way that social power operates. Marxists will wonder how interpretation is expected to penetrate the ideological beliefs that serve to justify the power structure of capitalism's relations of production. Foucauldians will wonder how an interpretive account of justice can do anything but affirm, ever more deeply, the regime of truth that constitutes the configuration of power

¹ We will see precisely what aspect of our reflections on justice is involved here when I discuss the relation between moral and ethical employments of practical reason in the third section of the next chapter.

relations in any given modern society.² Can Walzer's hermeneutics adequately identify, explain and overcome the effects of power in democratic deliberation as it is currently carried out? In order to begin to find an answer to these questions we will first of return briefly to Walzer's rejection of Marxism, or indeed any critical theory, for the sake of what he takes to be a sufficiently connected approach to social criticism. I will argue that this betrays a naiveté on Walzer's part with regard to the possibilities of ideological distortion in actual processes of democratic deliberation.

In order to develop this issue further we will then consider, in the second part, Jürgen Habermas's critique of Gadamer's hermeneutics and his defence of a version ideology critique based on the model of psychoanalysis. This debate can be related quite straightforwardly to some of the problems associated with Walzer's defence of immanent critique. Even if the psychoanalytic model depends on certain untenable assumptions, there is no good reason to abandon the search for a theoretically grounded model of critique. This will take us beyond Walzer's anti-theoretical stance. Critical theory does not in itself offend our democratic sentiments, as Walzer seems to suggest. In fact only a critical theory of society, that is sensitive to democratic concerns while at the same time facilitating a critique of ideology, could actually be effective in the defence of legitimate and just institutions and practices.

² Thomas McCarthy gives a useful summary of the similarities and differences between the work of Foucault and the tradition of Marxian critical theory especially in relation to their reaction to hermeneutics. See "The Critique of Impure Reason: Foucault and the Frankfurt School" *Political Theory*, 18 (1990), 437-469, here at 439 and 441-442. The essay is included in McCarthy's *Ideals and Illusions*, 43-75.

In the third part I will turn to the relationship between universalist moral principles, ones that are justified independently of any one context or tradition, and substantive accounts of justice that are particular to one context or tradition. In order to theorise adequately the relationship between a minimal universalist moral code, that Walzer does affirm, and the substantive accounts of justice that constitute in part particular forms of life, again we need to look beyond Walzer's preferred form of immanent critique. The discussion will seek to provide further evidence in support of the view that philosophical theory plays an indispensable role in the legitimation of substantive principles of justice. This is related to the fact that if the practice of social criticism is not to be undermined, we will obviously need a clear moral-theoretical understanding of what is to count as rational deliberation about justice in a modern pluralist context. This is something that Walzer's hermeneutics does not provide.

Furthermore, as well as clarifying both the relation between the universal and the particular and the demands of rational deliberation, this alternative moral theory should also show, more convincingly than Walzer manages to, that individual rights and the democratic will are necessary and complementary aspects of a theory of justice. Walzer's hermeneutics tends to submerge the individual by stressing the common will in a way that is inappropriate in a modern context. It is inappropriate in that it does not reflect adequately the variety of perspectives that we could expect individuals to bring to disputes about justice in a modern pluralist society. In this way, despite its stress on real talk and on the importance of open democratic deliberation about the substance of justice, Walzer's approach is actually insufficiently dialogical.

Walzer's work is seriously flawed then for a number of reasons. First, he is unable to confront the possibilities of ideological distortion or the effects of power in democratic deliberation. Second, he does not

provide an adequate understanding of the relation between universalist and particularist aspects of the substance of justice. Third, he does not clarify the demands of rational democratic deliberation. Fourth, nor does he show convincingly how individual rights and the democratic will are to complement one another. I believe that all of these flaws point us back towards the Kantian project. We must be careful however to pursue this project in a way that avoids the problems of Rawls's monological procedure. This will lead us to our extensive discussion of Habermas's moral theory in the third chapter. I will be suggesting that by presenting us with a dialogical conception of an impartial point of view, discourse ethics manages to bring the best insights of hermeneutics into the concerns of the Kantian project.

Immanent Critique and Ideology

Marxism tends to be antagonistic towards hermeneutics since its stress on shared social meanings seems to obscure class conflict within capitalist societies. The locus of shared understandings for the Marxist is the social class and not the political community. The bourgeoisie of one political community share social meanings with the bourgeoisie of other communities and not with their own local proletariat and the same goes for the international proletarian movement. This is because social meaning will be determined by economic relations and interests. In fact it is the ideological claim that meanings are shared across a community that serves to institutionalise the rule of the dominant class. The task for the proletariat is to overcome their own false consciousness and to penetrate bourgeois prejudices by becoming aware of their own interests, which will inevitably conflict with the interests of their local bourgeoisie.

In the last section we saw that Walzer used Antonio Gramsci's critique of bourgeois ideology as an example of connected criticism.

This is controversial since we might expect a Marxist like Gramsci to deny that a political community could actually share social meanings across classes. As we saw, Walzer maintains that we should understand Gramsci's critique as a reinterpretation of the shared values of liberty and equality. The deeper interpretation he gives deprives the bourgeoisie of their privileges by showing that these values could only be institutionalised by destroying the capitalist economic system. The internal contradictions of bourgeois ideology provide the critical foothold for this challenge to bourgeois hegemony.³ In this way ideas that are used to establish class rule always provide grounds for resistance to that rule.⁴ This is the danger of using ideas that have a broad enough appeal to operate successfully as an ideology in the first place. Walzer maintains that Gramsci's social criticism presupposes the fact that political communities share social meanings, but that those meanings can be interpreted well or badly.

The next issue of course is how we distinguish between good and bad interpretations. I argued in the last section that a good interpretation will be one that gives a deep and inclusive account of the community's self-understanding. But what about the possibility of a false consciousness or ideological distortions in democratic deliberation, caused by the power relations which for a Marxist are always grounded in the economic base

³ *Interpretation and Social Criticism*, 41-43. Here Walzer also mentions Ignazio Silone, like Gramsci, a one-time member of the Italian Communist party. See also the chapter on Silone in *The Company of Critics*, 101-116. Silone is one of Walzer's favoured critics to a large extent because of his rejection of Communist party orthodoxy. Walzer characterises with approval Silone's later views, here at 115. "He is seized by a fear of abstractions; he is in retreat from world history; he is content to begin and end his narratives with the peasants of the Abruzzi ... Silone, we might say, is committed to his dialect, the party to its dialectics."

⁴ See also the footnote at *Spheres of Justice*, 9.

of the society? Is it not possible that power will distort our reflections on justice and more generally on our self-understanding in ways that the participants will not even be aware of? What if Gramsci's radical reinterpretation of bourgeois values is rejected by most workers? It might be possible, as Walzer puts it, that "the greater number of workers believe that the equality realized in capitalist society is genuine equality or equality enough."⁵

Unlike Gramsci, Walzer refuses to claim that workers could misinterpret their own objective interests, that they could be wrong about what would constitute "equality enough."⁶ In this way he seems to be giving the workers the last word on what counts as a good interpretation of the demands of justice. He does not consider it likely that any theory could provide a cogent explanation as to why the conditions of democratic deliberation involve structural biases that distort decision-making processes by repressing the interests of the workers. While he accepts that workers could be mistaken because of a lack of information, he seems to deny that they could be mistaken in interpreting their own moral standards.

⁵ *Interpretation and Social Criticism*, 44.

⁶ Note Walzer's critique of Gramsci's Marxism which I mentioned in a note in the last section. In fact Walzer's own interpretation of the demands of justice in modern complex societies suggests that workers would be wrong to believe that capitalism could realise "equality enough." He argues for a "decentralised democratic socialism", *Spheres of Justice*, 318 and he goes to some lengths to defend industrial democracy from the dangers of private government, *Spheres of Justice*, 291-303, "Justice Here and Now", 146-148 and "Liberalism and the Art of Separation", 328, where he notes that liberalism "passes definitively into democratic socialism when the map of society is socially determined." As we have seen his interpretation is not presented as a uniquely correct one but rather as the one that best discloses to us the moral commitments that constitute in part our common identity.

The workers can indeed be wrong about the facts of their case, such as the actual extent of income differentials or the real chances of upward mobility. But how can they be wrong about the value and significance of equality in their own lives? Here criticism depends less on true (or false) statements about the world than on evocative (or unevocative) renderings of a common idea. The argument is about meaning and experience; its terms are set by its cultural as well as its socio-economic setting.⁷

It seems clear therefore that Walzer's hermeneutics involves the rejection of any form of Marxian objectivism.⁸ If we must choose between our theory and our connectedness to the community we criticise, it is obvious which choice Walzer would see as the better one. This is not to say, as we have already seen, that the connected critic must be blindly loyal to current practices. Connectedness is humanising in that it ensures that the critic's theory continues to address the issues that really matter to fellow citizens.⁹

But the choice is not so straightforward if we do not follow Walzer in giving the last word on what counts as a good interpretation to the participants in democratic deliberation itself. He simply has not said

⁷ *Interpretation and Social Criticism*, 44.

⁸ Georgia Warnke notes that this rejection of Marxism implies that Walzer cannot but offer a subjectivist interpretation of principles of justice, *Justice and Interpretation*, 36. As noted in the last section, she sees Gadamer's stress on tradition as a means of defusing this problem of subjectivism, "Walzer, Rawls and Gadamer", 151-157 and *Justice and Interpretation*, especially 128-134.

⁹ Marxist-Leninism is clearly Walzer's main target here. There certainly would seem to be good grounds for believing Leninists to be guilty on this score but, as we have seen Walzer also finds non-Leninist Marxists, such as Gramsci and also Sartre and Marcuse, wanting here. Nor does he see this failing as one that is exclusive to Marxists, as is obvious from his discussion of Foucault. See *Interpretation and Social Criticism*, 62-64 on Lenin, 57-59 on Sartre, and the *The Company of Critics*, 170-190 on Marcuse and 191-209 on Foucault's "lonely politics."

enough about the ways in which structural biases can distort such deliberation and how critical theories might identify and explain such distortion. If a critic is convinced that such distortion is possible then the fact that a radical reinterpretation of shared meanings is rejected by most fellow citizens does not necessarily imply that the critic's views should be revised. Social criticism can lead to isolation despite the best intentions of a critic to remain connected. If this occurs then it is theoretical conviction, and perhaps the support of a few significant others, that for the most part sustains the lonely critic.¹⁰ Social critics often face a real dilemma where their theoretical convictions force them to sacrifice much of their sense of connectedness to their political community.

On the other hand, Walzer does seem to accept that the majority of citizens "might well misunderstand the logic of their own institutions or fail to apply consistently the principles they professed to hold."¹¹ This must allow for the possibility that the critic is right and the majority of citizens wrong. It is not clear however, from what Walzer has to say about this possibility, how the critic's claim might be legitimately justified. How we are to distinguish between an ideological and a non-ideological decision, a genuine and a pseudo-consensus, a fair and a warped conclusion, an impartial and a biased principle of justice, this remains something of a mystery.¹² While Leninist elitism is rejected by Walzer, and with good reason, he tends to assume that every critical

¹⁰ This point is made by Kerry Whiteside in "Review of *The Company of Critics*" *Political Theory*, 17 (1989), 689-692.

¹¹ *Spheres of Justice*, 99.

¹² Many of Walzer's critics make this point. For a fairly typical example see Alessandro Ferrara "Universalisms: Procedural, Contextualist and Prudential" in *Universalism vs. Communitarianism*, David Rasmussen (ed.), 11-37, here at 23.

theory of society must involve anti-democratic implications. This leaves him ill-equipped to offer a sound test of legitimacy for democratically worked out norms of justice. I believe that only some more sophisticated account of power, integrated with a philosophical conception of an impartial point of view, could possibly enable him to deal with these challenges.¹³

The effects of power might be considered as the exclusion from the democratic process of those whose real interests could not be satisfied within its particular structure.¹⁴ This view of power allows us to think of

¹³ See White *Political Theory and Postmodernism*, 120-121 where Walzer's limitations in respect to the theorisation of power are effectively exposed. White shows how Walzer's approach to matters of justice is undermined by his failure to grapple with specifically modern forms of power with anything like the sophistication of Foucault or Habermas. We have already considered Foucault's work in the first chapter and we will begin to explore the work of Habermas later in this section. Walzer shows some awareness of this problem in "Exclusion, Injustice and the Democratic State", 56, where he acknowledges that "the convertibility of social goods and the dominance it makes possible take increasingly subtle and indirect forms in modern societies." His response is to argue that the state should play a more significant role in facilitating the "associations of civil society", 61, in trying to ensure that no social group is marginalised or excluded from social life as an underclass of second class citizens. While this greater sensitivity to the real dangers of social marginalisation is welcome, it does not seem to recognise the need to take theoretical steps beyond Walzer's preferred anti-philosophical, story-telling approach to social criticism. Furthermore, encouraging the state to greater intervention in civil society would seem to undermine some of the advantages of Walzer's pluralistic conception of citizenship through the variety of spheres of justice as against the overburdened welfare-state which Rawls's well-ordered society must presuppose. At best Walzer has moved in the direction of an interesting and original proposal that takes as the object of inquiry for a hermeneutic ethics, not the interpretation of the meaning of social goods, but rather of evil. See also Adi Ophir "Beyond Good - Evil: A Plea for a Hermeneutic Ethics" in *Hermeneutics and Critical Theory in Ethics and Politics*, Michael Kelly (ed.), 94-121. White also recommends a similar shift of focus, towards phenomena of injustice, *Political Theory and Postmodernism*, 122-126. I will not explore this shift here since, despite its more direct confrontation with power (as a source of injustice), it does not seem to move in any significant sense beyond the limits of Walzer's form of immanent critique.

the preferences and values of at least some of the participants, as they are expressed and acted upon in a democratic context, as products of a system which, behind their backs as it were, obscures their own real interests. Were they to experience a less repressive system they might well come to realise how their real interests had previously been obscured. This insight would therefore give them good reasons for acting differently. It seems to me that this would constitute a genuine achievement for them as it would give them a better self-understanding by enabling them to overcome illusions with regard to their own deepest aspirations.¹⁵

But if the people concerned were not to experience a less repressive system, thus leaving them blind to the ways that their interests are obscured, this does not make the critic's interpretation wrong. We might consider the claim Walzer makes in relation to the internal justness of a caste society.¹⁶ Such a society is just, according to him, if the social meaning of ritual purity is integrated with that of many other social goods and if those meanings are genuinely shared. But it is possible for an internal, connected critic to argue that these meanings are shared precisely because the interests of the lower caste members have been obscured. The critic might go on to point out that deliberation about the caste system has therefore been distorted and biased. Even if the

¹⁴ See Steven Lukes *Power: A Radical View*, London: Macmillan, 1974, especially 21-25.

¹⁵ While it seems that Walzer's anti-theoretical stance would make it difficult for him to endorse this view, hermeneutic criticism is, as suggested in the last section, generally concerned with deepening self-understanding. There is no reason why this should not be thought of in terms of overcoming illusions. See for example Taylor's essay "What's Wrong with Negative Liberty?" in *Philosophical Papers, II*, 211-229.

¹⁶ *Spheres of Justice*, 313-315.

majority are not convinced, the critic might support this claim empirically by indicating, for example, the level of conversions to other religions among lower caste members.¹⁷

Susan Okin argues that Walzer's defence of the internal justness of a caste society shows up the dangers involved in an approach which "depends heavily upon what people are persuaded of."¹⁸ She then argues that the gender system is in some sense analogous to a caste system. In both cases "an inborn characteristic determines dominant or subordinate status in relation to social goods over a whole range of spheres."¹⁹ It certainly seems to make good sense to consider the ways in which women have been expected traditionally to perform domestic duties, leaving political matters for men, as ideological distortions that led to the interests of women being systematically obscured. The gains that have been achieved by the feminist movement must be thought of as examples of an overcoming of the effects of power. It has been a matter of dispelling patriarchal illusions that repressed and constrained women's self-understanding. The fact that women of earlier generations, and many women today, fail to see the injustice of patriarchy must be explained with reference to certain structural features of society of which they themselves are not sufficiently aware.

What is at issue here is whether or not we can give theoretical justifications for critical interpretations of a community's principles of

¹⁷ Lukes *Power: A Radical View*, 49-50. The work of John Gaventa is mentioned by Lukes, 57 as offering a good example of an empirically based analysis of power in this respect, see Gaventa's *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley*, Urbana: University of Illinois Press, 1980.

¹⁸ *Justice, Gender and the Family*, 65.

¹⁹ *Justice, Gender and the Family*, 65.

justice even if that interpretation is rejected by a majority of citizens. Walzer's version of immanent critique is not helpful in this respect. I have been suggesting that one way of justifying this type of critical interpretation would be to provide a convincing explanation for the majority's rejection of the critic's interpretation. The explanation would attempt to reveal that rejection to be a mistake caused by some factor or other that the majority had failed to recognise at the time. In other words the justification of the critic's interpretation would depend on a successful explanation of an ideological distortion. This issue might be brought into a clearer focus if we consider Habermas's critique of Gadamer's hermeneutics.

Hermeneutics and Critical Theory

While Habermas accepted many of the insights of the philosophical hermeneutics elaborated by Gadamer, particularly regarding the impossibility of transcending completely an historically effected consciousness, he was alarmed by what he saw as a tendency to absolutise the authority of tradition. It is the proper balance between the authority of one's tradition and the capacity for critical reflection on the prejudices of that tradition that is at issue in the debate between hermeneutics and critical theory.²⁰ From Habermas's point of view, if we

²⁰ For Habermas's initial response to *Truth and Method*, see his *On the Logic of the Social Sciences*, Cambridge, UK: Polity Press, 1988, 151-170, especially at 168-170. Some of the better commentaries on the controversy between Gadamer and Habermas include Bleicher's *Contemporary Hermeneutics*, 153-158, Paul Ricouer "Hermeneutics and the Critique of Ideology" in his *Hermeneutics and the Human Sciences*, John B. Thompson (ed.), Cambridge, UK: Cambridge University Press, 1981, 63-100, Georgia Warnke *Gadamer: Hermeneutics, Tradition and Reason*, 107-138, Thomas McCarthy *The Critical Theory of Jürgen Habermas*, Cambridge, UK: Polity Press, 1984, 169-193, Robert C. Holub *Jürgen Habermas: Critic in the Public Sphere*, London: Routledge,

are to be capable of critical reflection at all, then we must appropriate our tradition selectively, which means that we will repudiate or reject certain aspects of it. Habermas seeks to undermine the authority of tradition in an attempt to avoid the possible conservative implications of Gadamer's critique of the Enlightenment's "prejudice against prejudices."²¹

Of course while we can acknowledge that some particular horizon of understanding is inescapable we must also recognise that all known historical traditions are repressive as well as enabling. Habermas stresses the power of critical reflection, our capacity to challenge what has been handed down through tradition and to replace dogmatism with rational insight. But how could critical reflection be grounded in a system of reference which is not context-dependent? Can any social theory guarantee a critical distance that facilitates a selective, and liberating, appropriation of tradition without taking certain unquestioned assumptions, or prejudices, for granted? If these assumptions actually underwrite repressive social practices then must we not accept that the promise of such a critical theory is in fact an illusory one?

The theoretical project that Habermas set for himself, against the claims of hermeneutics, was to detect and overcome systematic distortions in self-interpretations. For Gadamer all understanding is

1991, 49-77, Graeme Nicholson "Answers to Critical Theory" and Dieter Misgeld "Modernity and Hermeneutics: A Critical-Theoretical Rejoinder" both in *Gadamer and Hermeneutics*, Hugh Silverman (ed.), 151-162 and 163-177 and for a special journal issue on the dispute and its relation to methods in the social sciences, including a contribution from Gadamer, *Cultural Hermeneutics*, 2, 4 (February, 1975), David Rasmussen (ed.), 305-390. For an assessment of the implications of this dispute in relation to ethics, Michael Kelly "The Gadamer-Habermas Debate Revisited: The Question of Ethics" in *Universalism vs. Communitarianism*, David Rasmussen (ed.), 139-159.

²¹ *Truth and Method*, 271-277. This phrase is used at 272.

linguistic.²² Our language discloses to us the truth of our world and of ourselves. Language is the horizon that enables us to ask questions and to participate in a dialogical encounter with another (text, person, culture) that we previously had not been capable of comprehending. As we saw in the last section if we are to have any hope of understanding something unfamiliar we must be genuinely open in anticipating a fusion of horizons. This fusion enriches our language and discloses to us new aspects of the world, and of ourselves. But if, as Habermas claimed, language can be systematically distorted by power then it may represent not only the resources for an ever enriching self-understanding but also a force of domination and mystification. But what exactly had Habermas in mind when he spoke of systematically distorted communication?

A particular aspect of a tradition is systematically distorted if it is, in part, the result of non-dialogical factors, notably social processes of labour and domination.²³ In other words the language of our self-understanding, in modern Western capitalist societies, is not simply the result of an open dialogue, a series of fusions bringing us to our present horizon. Other factors, such as the innovative technological exploitation of external nature and consequent changes in the system of labour, have shaped our language in a non-dialogical manner.²⁴ Relations of power

²² This is the subject of part III of *Truth and Method*, 381-491. See for example 474 where he maintains that "being that can be understood is language." See also "The Universality of the Hermeneutical Problem", 15-17 and "To What Extent Does Language Perform Thought?", included as "Supplement II" to *Truth and Method*, 542-549. This piece constitutes in part a response to Habermas's critique.

²³ *On the Logic of the Social Sciences*, 172-174.

²⁴ See also Habermas "Technology and Science as Ideology" in *Toward a Rational Society: Student Protest, Science and Politics*, London: Heinemann, 1971, 81-122.

and authority have framed our dialogical encounters of understanding, without themselves being legitimated in an open dialogue where all participants are equally free to question the normative assumptions of those relations. In this way language serves as a medium in which organised force is legitimated.

Insofar as the legitimations do not articulate the power relationship whose institutionalization they make possible, insofar as that relationship is merely manifested in the legitimations, language is also ideological.²⁵

Gadamer's hermeneutics is, according to Habermas, insufficiently aware of the need for a critique of ideology. The intention of such a critique is to distinguish between aspects of our language that emerge from open dialogue and aspects that are distorted by the effects of systems of domination.

For Habermas, hermeneutics pays insufficient attention to the objective context, constituted by labour and domination as well as open dialogue, in which all social action takes place. It therefore makes a false claim to universality.²⁶ But the crucial question remains: how can we get beyond hermeneutics to a critical standpoint that is not context-bound? In response to Gadamer's work Habermas initially turned to psychoanalysis as an analogy for the critique of ideology. Psychoanalysis and the critique of ideology both deal with systematically distorted communication in a way which can be understood in terms of the general conditions of communication.²⁷ In both cases subjects fail to recognise

²⁵ *On the Logic of the Social Sciences*, 172.

²⁶ See Habermas "The Hermeneutic Claim to Universality" in Bleicher *Contemporary Hermeneutics*, 181-211.

the intentions that are actually guiding their expressive activity. This constitutes a distorted form of communication, one that cannot be fully comprehended by a purely hermeneutic inquiry since genuine understanding can only occur in these cases if the cause of the distortion is explained.²⁸

Habermas invokes Alfred Lorenzer's use of Freudian psychoanalysis in explaining neuroses or specifically incomprehensible symptomatic expressions.²⁹ The analyst tries to reconstruct an original scene from the patient's early childhood which might account for the particular neurosis. A certain form of interaction that occurred at that formative early stage may have given rise to such intolerable conflict that it was unconsciously repressed. This led to it being split off from its corresponding linguistic symbol. The rejected form of interaction may however continue to motivate action at a subconscious level. This, Lorenzer suggests, can be the cause of neurotic compulsive reactions to certain stimuli which it may eventually become impossible to conceal with public rationalisations. The analyst's aim is to reintroduce the repressed form of interaction into public language and thereby to resymbolise it. Subjects overcome their neuroses if they can accept the analyst's theoretically guided

²⁷ In *Knowledge and Human Interests*, Cambridge, UK: Polity Press, 1987, 214-300, Habermas discusses psychoanalysis in relation to a programme of critical social science that is to serve a human interest in emancipation, but his attempt to use it as a means of transcending the limits of Gadamer's hermeneutics is more explicitly dealt with in "The Hermeneutic Claim to Universality" and also "On Systematically Distorted Communication" *Inquiry*, 13 (1970), 205-218.

²⁸ The intention is to offer a model for how we might explain the acquiescence of those whose real interests are systematically obscured and repressed while at the same time dispelling the ideological illusions that act as pseudo-justifications for the continued repression. We might think of examples such as those discussed in the previous section; patriarchy and the caste system.

²⁹ "The Hermeneutic Claim to Universality", 192-195 and "On Systematically Distorted Communication", 207-209.

interpretation by coming to recognise the original unconscious repression.³⁰

In so far as this type of scenic understanding is guided by theoretical assumptions, it succeeds, at least from Habermas's perspective, in going beyond hermeneutics. The meaning of the systematically distorted use of language must be explained before it can be understood.³¹ In the case of scenic understanding, this occurs under experimental conditions and the analyst's pre-understanding is directed at a specific set of possible meanings regarding early childhood. The analyst's interpretation is not however imposed but rather it must be accepted by the subject as an enlightening account of previously incomprehensible aspects of her own behaviour. We could then say that the analyst's theory led to the emancipation of the subject from some or other force of repression.

But there are some obvious problems with the model of psychoanalysis when it comes to the practice of social criticism in terms of the legitimation of substantive principles of justice. Firstly as Gadamer, in his response to Habermas, points out, the social critic is not a doctor dealing with patients who need therapy but rather a partner in dialogue, just another member of a social community.³² The critic can claim no privileged vantage point in seeking to justify an interpretation of justice that is critical of current practice, perhaps against the view of the

³⁰ See Bleicher *Contemporary Hermeneutics*, 167.

³¹ Habermas rejects certain scientific assumptions in Freud's understanding of his own metapsychology, especially with regard to the relationship between causality and freedom, *Knowledge and Human Interests*, 246-273. See Jeffrey A. Abramson's comments on this issue in *Liberation and Its Limits*, Boston: Beacon Press, 1984, 114-119

³² "On the Scope and Function of Hermeneutical Reflection", in his *Philosophical Hermeneutics*, 18-44, here at 41-42.

majority of citizens. Unlike the relation between the analyst and the neurotic in need of therapy, the social critic is on an equal footing with every other citizen.

Secondly, if we rely too heavily on our theory we may begin to suffer under the illusion that we no longer depend on the authority of any tradition at all, that we see beyond all horizons. We may even begin to believe that our own theoretical analysis convincingly demonstrates that all who disagree with us hold such distorted self-understandings that they are incapable of recognising themselves in our (uniquely correct) explanatory account of the cause of their delusions. Of course this conflicts not only with any commitment to genuine democratic deliberation but with the most basic insight of hermeneutics, that we could not even engage in a dispute about justice if we did not do so in the context of some tradition or other, however broadly defined. The danger of showing contempt for fellow citizens is indeed a real one. It is this, as we have seen, that grounds Walzer's concern for connectedness and his suspicion of philosophy.³³

Thirdly, in the case of psychoanalysis, a precondition of successful therapy is that a patient has the desire and the determination to overcome and recover from whatever suffering the neurosis has caused. The patient must have a "passion for critique."³⁴ In a social context it seems that the analogy breaks down if a supposedly pathological social group are not sufficiently aware of their own suffering that has been caused by

³³ Walzer explicitly rejects Freudian models of social criticism in *Interpretation and Social Criticism*, 65. He maintains there that criticism is "less the practical offspring of scientific knowledge than the educated cousin of common complaint."

³⁴ *Knowledge and Human Interests*, 234

systematically distorted communication. Since it is behind their consciousness they may have no desire for any treatment and therefore it would appear that successful therapy is impossible.

Fourthly, resistance to therapy and a struggle to work through insights is to be expected of a willing and cooperative patient who both accepts the authority of the analyst's theory and displays a resolute "passion for critique." If this is so, then we can be certain then that the resistance that members of a political community, perhaps the majority, will offer to a social critic will be incomparably greater. This will be even more evident if the interpretation of justice that the critic rejects, as an effect of systematically distorted communication, is actually bolstered by institutional authority. In such a case we might imagine that the critic's interpretation is more likely to be dismissed by the majority as the result of a distorted personal self-understanding than to be embraced by them as a liberating explanatory account of their own collective pathology.³⁵

Finally, Gadamer maintained that neither the system of labour nor relations of power are themselves outside of language, as Habermas seemed to suggest, but they too can be objects of hermeneutic reflection. Indeed if we are to understand them at all we must do so linguistically. For this reason it is "absurd to regard the concrete factors of work and politics as outside the scope of hermeneutics."³⁶ If we are crudely to dismiss the authority of tradition, as always taking the form of dogmatic power, we will obviously be blind to the critical potential of hermeneutics. In this case, if we engage in social criticism at all, it must

³⁵ McCarthy *The Critical Theory of Jürgen Habermas*, 211-212.

³⁶ Gadamer "On the Scope and Function of Hermeneutical Reflection", 31 and "To What Extent Does Language Perform Thought?", 546.

be on the basis of an unsustainable conception of critical reason that assumes falsely that it has freed itself from the authority of all tradition. Reason and tradition must not be opposed in this vulgar fashion but rather we should think of critical reflection as the selective appropriation of tradition.³⁷

Now while many of these counterarguments do not do justice to Habermas's intentions, they do serve as salutary indications of the dangers involved in using psychoanalysis as a model for social criticism. But where has this discussion brought us? It may seem that we are back at our point of departure in our assessment of the dispute between Gadamer and Habermas. It is now clear that both of them are concerned with critical reflection as the selective appropriation of tradition. While Gadamer initially seemed to Habermas to overemphasise appropriation to the detriment of necessary critical selectivity, Habermas's use of psychoanalysis seemed to Gadamer to overemphasise selectivity to the detriment of inescapable appropriation. This still does not provide much in the way of a theoretical guide as to how we might engage, as social critics, in this selective appropriation, distinguishing as we must between legitimate and illegitimate aspects of our tradition.

If democratic deliberation can be distorted by the effects of power, and it would seem ridiculous to deny this, then the theoretical project in which Habermas was engaged in his initial response to Gadamer is one that is of crucial importance to an adequate understanding of what counts as a legitimate principle of justice. This raises questions which have simply never been at the centre of Gadamer's concerns.³⁸ Although there

³⁷ See "On the Scope and Function of Hermeneutical Reflection", 32-35.

³⁸ Dieter Misgeld gives a good summary of how the concerns of recent critical theory have been shaped in part by the encounter between Habermas and

are obvious problems with a straightforward application of the model of psychoanalysis, the need for some alternative theoretical basis for grounding criteria of legitimacy that can test substantive principles of justice has never been greater. What is clear is that such an alternative must take greater care in ensuring that it does not undermine a commitment to democratic deliberation. In his work since the debate with Gadamer, Habermas has set about constructing a critical social theory that is grounded in a theory of communication that is not so dependent on the analogy of analyst and patient.³⁹ This theory of communication allows him to integrate that critical theory with a moral-theoretical conception of an impartial point of view. The discourse ethics which emerged from this work will be the subject of the next chapter.

Critical theorists must certainly remain connected to the community that is criticised in some, not insignificant, sense, since they cannot expect to be taken seriously unless it matters to them personally that the community lives up to its own deepest moral convictions. But there can be sound theoretical reasons for doubting the views of most of our fellow

Gadamer. See "Modernity and Hermeneutics: A Critical-Theoretical Rejoinder", 175-177. We might suggest that while Gadamer would share many of Habermas's concerns he is not primarily interested in the grounds of a critical social theory but rather in the ontological preconditions of all forms of human understanding.

³⁹ The continuity between the notion of a critique of ideology and the theory of communicative action that is at the centre of Habermas's later work is effectively established by James F. Bohman in "Formal Pragmatics and Social Criticism: The Philosophy of Language and the Critique of Ideology in Habermas's Theory of Communicative Action" *Philosophy and Social Criticism*, 11 (1985), 331-353 and in his "Participating in Enlightenment: Habermas's Cognitivist Interpretation of Democracy" in *Knowledge and Politics*, Marcelo Dascal and Ora Gruengard (eds.), Boulder: Westview Press, 1989, 264-289, especially at 281-287. For an interesting view of the way in which Habermas's views on communication and the public sphere correct and improve on Marx's critique of certain ideological tendencies within liberal discourses, Mark Warren "Liberal Constitutionalism as Ideology: Marx and Habermas" *Political Theory*, 17 (1989), 511-534.

citizens. If those doubts are to be justified they will need to be supported by an explanation as to how these views are the result of the distorting effects of power on the self-understanding of democratic actors.

Within the context of a modern pluralist society the effects of power can be much more subtle and pervasive than the type of immanent critique that we find in Walzer's interpretation of Gramsci's social criticism could possibly confront.⁴⁰ This should be clear from our earlier discussion of Foucault and also from the examples of caste societies and patriarchy used above.⁴¹ Since Walzer is a theorist of justice, he cannot be satisfied, as Gadamer is, to treat the development of a philosophically grounded critical social theory as somebody else's agenda. Nor should he reject the project out of hand as a return to Leninist vanguardism and an inevitable danger to democracy.

Walzer's anti-theoretical stance leaves him incapable of distinguishing adequately between legitimate and illegitimate principles of justice. He

⁴⁰ Habermas maintains that the traditional ideologies, such as religious ones, that were criticised by Marx, no longer even appear convincing. This may well also be the case for the bourgeois interpretations of the values of liberty and equality that were the object of Gramsci's critique. The effects of power now are to be thought of more in terms of a "fragmentation of consciousness" in the way that various aspects of everyday life are separated from each other and "colonised" by different expert cultures. This fragmentation is now the "functional equivalent" of an ideology and it must be exposed and criticised as a block to rational deliberation about the legitimacy of norms and principles that currently regulate the institutional life of modern societies. See Habermas *The Theory of Communicative Action, Volume 2*, 354-356 and Steven White *The Recent Work of Jürgen Habermas: Reason, Justice and Modernity*, Cambridge, UK: Cambridge University Press, 1988, 116-118. But see the last footnote for references to work that stresses the fundamental continuity between the critique of ideology and Habermas's most recent social theory.

⁴¹ In the final section of the next chapter I will develop this criticism of Walzer by exposing the limits of his approach in the context of a deeply divided society. I will argue that Habermas's recent work allows us more effectively to adopt a critical stance with regard to the effects of power in the political dispute at the centre of the Northern Ireland conflict.

has not dealt in sufficient depth with the real danger of democratic deliberation being systematically distorted by power. If we are to be in a position to test currently dominant interpretations as potentially arising from the effects of power, we would be wise not to be so dismissive of philosophical theory. If it is possible that victims of injustice can acquiesce in their own suffering by failing to recognise the effects of power, then our need for critical theory seems to be beyond argument. A philosophical conception of impartiality would be a vital complement to such critical theory. This would act as a test to see whether or not some particular norm or institutional arrangement is biased in favour of some people's interests over those of some others. Before we return to assess Habermas's contribution on this point there are a number of other weaknesses in Walzer's approach that we must analyse.

Extending the Universalist Moral Code

While the stress in Walzer's work has been on defending the particularity of substantive principles relative to the shared understandings of historical communities, his conviction, that we must be tolerant of the cultural creativity of other communities, is supported by a universalist meta-ethical principle. Each community is to respect the internal norms of all other communities. The point has been made with admirable clarity by William Galston.

His [Walzer's] entire theory of justice is presented as a transcontextual metatheory, structurally valid for all communities (though substantively different for each). And the nerve of his relativism - the assertion that it is not possible to rank-order social worlds - is itself put forward, not as an interpretation of *our* experiences but as a universal truth.⁴²

So there is, after all, within Walzer's scheme, a way of objectively rank-ordering communities. We can do so by assessing the extent to which they allow other communities to be true to their own deepest convictions, and refrain from imposing their moral standards as cultural imperialists.⁴³ Even though Walzer does not consider this rank-ordering to be of great relevance to a theory of substantive justice we might bear in mind that, in modern pluralist societies, minorities are often culturally oppressed by a self-glorifying majority.⁴⁴ This rank ordering might therefore be of great significance as a defence of the cultural rights of minorities, a point we will consider in the next chapter.

This meta-ethical principle of cultural toleration is not however the only universalist principle that Walzer recognises. He accepts that there is a minimal moral code that can be considered to be universal valid since it seems to be adhered to in almost all known cultures. The content of the code must be, for him, an empirical matter, but it would appear that moral principles respecting the life and autonomy of human persons are to be included.⁴⁵ There are a number of important claims that Walzer

⁴² Galston *Liberal Purposes*, 46. See also *Spheres of Justice*, 312-316.

⁴³ Walzer develops this rank-ordering in his two lectures given under the title "Nation and Universe" in *The Tanner Lectures on Human Values*, XI, Grethe B. Peterson (ed.), Salt Lake City: University of Utah Press, 1990, 507-556. I will discuss this in more detail in the discussion of Northern Ireland towards the end of the next chapter.

⁴⁴ As we will see this is relevant in a case like that of Northern Ireland. It is also a common experience of immigrant cultures, especially in countries that were formerly colonial powers, where cultural imperialism almost always survives the end of colonial rule. Similar forms of cultural oppression occur in relation to minorities such as the disabled, lesbians and gays, the elderly etc. See Young *Justice and the Politics of Difference*, 58-61.

⁴⁵ In *Spheres of Justice*, xv, Walzer argues that the (human) rights to life and liberty are central to a theory of just war but they do not get us very far in determining the substance of distributive justice for a particular society. See his *Just and*

makes however, that seem to indicate that the moral code he considers to be universal in scope is not as minimal as he tends to suggest. Indeed within the context of modern pluralist societies, if we were to give a full account of all the aspects of social life that Walzer appears to treat as universally essential features of any just society, we may not have very much to add in determining the structural requirements of justice for any one community.

What I am suggesting is that all modern pluralist societies work out what the substance of justice is for them by interpreting the same (or at least a very similar) code of universalist moral principles. Their interpretations will differ in the details and in various stresses and nuances, given the particularity of each society's history and culture. There may of course also be some substantive principles of justice that are unique to one society, because they have some problem or other that, for whatever reason, is not shared by other communities, but which rather reflects an idiosyncratic characteristic of that society's history. Nonetheless it does seem to be the case that Walzer assumes that legitimate accounts of justice of all modern societies share certain fundamental structural features.

But what are the claims that suggest that Walzer is, despite his own self-understanding, committed to this more extensive moral universalism? First of all, we might note that Walzer assumes that every just society defends rights and liberties for its members that go far beyond a respect for life and a commitment to individual freedom. In fact he must

Unjust Wars: A Moral Argument with Historical Illustrations, Second Edition, New York: Basic Books, 1992. On the minimal code see *Interpretation and Social Criticism*, 24-25, 45 and on the prophet Jonah as a "minimalist critic", 76-78 and 89-90, *The Company of Critics*, 226-227. It is rather odd to treat the question of human rights as an empirical matter since the rights that Walzer includes in his minimal code are clearly not respected universally.

presuppose the inclusion within the universalist moral code, of liberties of conscience, critical thought and expression, and rights of participation in the democratic process of deliberating about the substantive principles of justice that are to regulate the life of the community. These must be included since all just societies are politically egalitarian for Walzer, in that it will be a necessary feature of them that "no one possesses or controls the means of domination."⁴⁶ This commitment to a universalist political egalitarianism, is grounded in his conception of human beings as culture-producing creatures who seek to justify to each other their interpretations of the principles of justice for their shared way of life.⁴⁷

Furthermore, in any society where social meanings of goods are distinct, and for Walzer that includes any modern society, "there is no alternative to democracy in the political sphere."⁴⁸ Democratic government depends on the outcome of deliberation among citizens and no social good (money, rank, status) that is irrelevant to the idea of deliberation is to have any influence within it.⁴⁹ We have already seen that Walzer's resistance to the use of philosophical theory for social criticism leads him into a position from which he seems ill-equipped to deal with the distorting effects of power on democratic deliberation. Yet it is clear from his discussion of democracy as the political sphere of

⁴⁶ *Spheres of Justice*, xiii.

⁴⁷ *Spheres of Justice*, 314 and *Interpretation and Social Criticism*, 46-48 where he draws on Thomas Scanlon's important ideas on justification, as argued in "Contractualism and Utilitarianism" in *Utilitarianism and Beyond*, Amartya Sen and Bernard Williams (eds.), 103-128.

⁴⁸ *Spheres of Justice*, 303.

⁴⁹ *Spheres of Justice*, 303-311.

justice that he is committed to an ideal of distortion-free deliberation himself.

What counts is argument among the citizens. Democracy puts a premium on speech, persuasion, rhetorical skill. Ideally the citizen who makes the most persuasive argument - that is the argument that actually persuades the largest number of citizens - gets his way. But he can't use force, or pull rank, or distribute money; he must talk about the issues at hand. And all the other citizens must talk, too, or at least have a chance to talk. It is not only the inclusiveness, however, that makes for democratic government. Equally important is what we might call the rule of reasons. Citizens come into the forum with nothing but their arguments. All non-political goods have to be deposited outside: weapons and wallets, titles and degrees.⁵⁰

While it is very obvious what Walzer considers to be the requirements of justice in the political sphere, he seems unwilling to offer the kind of theoretical support that this vision demands.

On the one hand, these two ideas, of human beings as culture-producers and a deliberative democratic form of government, do support Walzer's contention that morality is always potentially subversive of power.⁵¹ Any citizen can argue that our current institutions and practices are failing to do justice to our deeper aspirations as a particular community. On the other hand however, the structural features of democratic government are assumed by Walzer to have a universalist egalitarian thrust. This seems to demand a shift of focus from the particularity of substantive accounts of justice to the universality of the structural requirements of democracy for any modern society.

⁵⁰ *Spheres of Justice*, 304.

⁵¹ *Interpretation and Social Criticism*, 22.

If Walzer's work does reveal a commitment to a much more extensive universalist moral code than he is happy to admit to, and I think that it clearly does, then there is a serious tension between this implicit commitment and his explicit stress on interpretive accounts of justice as local narratives.⁵² Hermeneutics simply does not have the theoretical resources that are necessary to ground this more extensive universalist moral code. The important point here is that some of the main features of Walzer's own interpretation of the substance of justice for a modern democratic society appear to be grounded independently of the particular historical traditions of any one modern society. These are features of a universalist moral code that is far from minimalist, but rather is the articulation of the most significant aspects of an adequate substantive account of justice for any modern society. These features include; respect for human life and individual autonomy, liberties of thought and expression, rights of democratic participation for all as an expression of their human creativity, a politically egalitarian conception of deliberative democracy. We might also include toleration of the different cultural creations of other traditions on condition that those traditions include these other features in their accounts of justice. These features taken together represent the structural characteristics of all possible legitimate accounts of justice in a modern context.

While this suggests that Walzer's stress on local narratives is inappropriate, it does not imply that a social critic who invokes this moral

⁵² Walzer tends towards Rorty's position here in his apparent scepticism towards any substantive principles that could legitimately claim universal scope, except for a few empirical examples that just happen to be shared almost universally. See Rorty's "Postmodernist Bourgeois Liberalism" and Walzer *Interpretation and Social Criticism*, 24. See also Will Kymlicka's critique of Walzer and Rorty in "Liberalism and Communitarianism" *Canadian Journal of Philosophy*, 18 (1988), 181-203, here at 197-203.

code is disconnected from the community to which the criticism is addressed. There should still be genuine loyalty and commitment to the members of that community. More importantly the criticism is not derived from a totally abstract, ahistorical perspective, but rather from an open articulation of the demands of justice that must apply in any modern community. The criticism is situated in the context of any society that has shared the historical experience of an ever more expansive globalisation in terms of both economic markets and administrative bureaucracies. An appeal to this universalist moral code represents "situated criticism for a global community that does not shy away from knocking down the 'parish walls'."⁵³

To be situated as a social critic within a modern context will at times demand an appeal to moral principles that represent structural features of all modern societies that could claim to be just. At other times it will demand an appeal to a local narrative that speaks directly and uniquely to the historical traditions of a particular modern community. I will conclude this section by briefly illustrating four implications of this, each of them involving a criticism of Walzer's defence of immanent critique.

First, the practice of effective social criticism requires, as we have seen, an approach to justice that is connected to a social-theoretical understanding of the effects of power. But it also requires a moral-theoretical understanding of the way in which political communities are made up of widely divergent social groups all of whom are entitled to have their voice heard in any deliberation about the demands of justice. This means that we need a philosophical conception of an impartial point of view, something which Walzer's anti-theoretical stance rules out. This

⁵³ Seyla Benhabib *Situating the Self*, 228.

conception would be provide us with a way of working out in a particular dispute, which account of the demands of justice is right. Every modern society, in so far they share conditions of pluralism, also share this task. The task is to combine social-theoretical contributions and moral-theoretical insights in a way that gives us a critical understanding of the effects of power in a modern context.

Second, it seems quite likely that within the context of a modern pluralist society, a clash could emerge between the demands of the universalist moral code and the principles of justice that are legitimately accepted as, in part, constitutive of that particular form of life.⁵⁴ For example a Dutch social critic may argue that the Dutch people, and all citizens of other relatively wealthy countries, treat those who suffer and die because of famine, say in Somalia, unjustly. In other words she appeals to the fact that the failure to relieve famine when they have more than enough, violates for the Dutch people the universalist moral code they have come to respect. But others might object that if they were to relieve famine, by themselves or in alliance with other wealthy countries, their carefully worked out arrangements for the distribution of wealth among their own citizens would have to be disregarded.⁵⁵

⁵⁴ The following example is a version of one that is mentioned in Charles Taylor's discussion of this issue, see "The Nature and Scope of Distributive Justice" in *Justice and Equality Here and Now*, Frank S. Lucash (ed.), 34-67, here at 49.

⁵⁵ Of course this is a case of justice in an international context conflicting with national arrangements. It might also be the case that some aspect of the universalist code clashes internally with the traditions of a particular community. In fact this occurs whenever the traditions of a community fail to respect some or other human right that would be included as a structural feature of any legitimate account of justice. Again, Walzer's stress on local narratives, which obscures the extensiveness of the universalist code, explains the fact that he does not say enough to justify the claim that the human right should take precedence over the particular traditions of the community. We will see later how Habermas's moral theory deals much more effectively with this problem.

In practice of course those who object almost always win out. In fact it would appear that nothing short of a strongly coercive state could actually succeed in ensuring the redistribution of wealth from North to South that could prevent famine. Is that too high a price to pay? The dilemma is a very real one. We might acknowledge everybody's right to life without feeling that it would be right to sacrifice the advantages of a less coercive state than would be necessary to protect that right. The point is that some local principles of justice do clash with the universalist thrust of other principles. Again Walzer, by leaving the universalist code on the margins of his concern, does not say near enough about this possibility.⁵⁶

Third, the defence of the rule of reasons in the sphere of democratic politics is something that requires far greater attention than Walzer has given to it. Why should reason be privileged over other means of persuasion in the political sphere? Perhaps the rule of reasons is simply another regime of power/knowledge, as Foucault seems to indicate. It might even be suggested that to privilege reason is to endorse the repression and marginalisation of the "other" of reason, the emotional, the sexual, the irrational, or the zany.⁵⁷ Walzer does not say in detail what it

⁵⁶ See however *Interpretation and Social Criticism*, 45. The example used there relates to missionary activity and not to the kind of dilemma that most citizens of modern societies encounter with distressing regularity, as for example, whenever they are shocked by the fact that many human beings are in danger of starving to death.

⁵⁷ See the earlier discussion of the post-structuralist challenge to Rawls. I will not repeat the defence of reason I made at the end of that section. It is important to note however, that the privilege of reason in politics has, for better or worse, become a hotly contested issue. For some indication as to why this is so and for a useful critical discussion of the ideas involved see Richard Bernstein's essay "The Rage against Reason" in *The New Constellation*, 31-56. My point here is simply that Walzer says very little about this, nor does he justify any procedural rules of rational argumentation.

is that is required of us if we are to argue in a rational way. Nor does he mount a defence of the rule of reasons. We would surely want to know what constraints or procedural rules are to be adopted if the rule of reasons is to preside over the political sphere. More importantly we would want to know why these constraints are justified. This is, in part, the task of a moral theory that defends an impartial point of view.

Finally, I have already outlined how Walzer's stress on inclusivity ensures that nobody is prevented from participating in the democratic process. Indeed everybody is encouraged as a culture-producer to make their own unique contribution to the enrichment of the common life.⁵⁸

to / Despite this however his failure to endorse a theoretical conception of an impartial point of view is a cause for concern with regard to the rights of an individual who disagrees with the views of the majority on some fundamental principle of justice. What theoretical guarantee does Walzer provide that the process of democratic deliberation can afford to give that dissenting individual's say its due weight?⁵⁹

One problem that Walzer has here is the fact that there may be some serious tension between majority rule and the rule of reasons. Even if no coercion is used in democratic deliberation, it is far from self-evident that these will amount to the same thing. Again we would need to know

⁵⁸ For an account of the centrality of the notion of inclusivity to Walzer's social criticism see Robert B. Thigpen and Lyle A. Downing "Beyond Shared Understandings" *Political Theory*, 14 (1986), 451-472.

⁵⁹ Serious doubts are expressed on this score by William R. Lund in "Communitarian Politics, the Supreme Court and Privacy: The Continuing Need for Liberal Boundaries" *Social Theory and Practice*, 16 (1990), 191-215, on Walzer at 199-206. While Emily Gill shows how Walzer's defence of both non-discrimination and participative rights defuse the dangers involved here, it is still the case that the dissenting individual is not that central to Walzer's concerns. See Gill's "Walzer's Complex Equality: Constraints and the Right to be Wrong", here at 44-51.

much more about the procedural constraints involved if we were to accept that this is in fact so. Another problem is that there is a danger that the democratic authority will constantly interfere in the regulation of our lives to such an extent that the private space, sacred to the tradition of liberalism, will be so shrunk as to leave each of us uncomfortably exposed in our chosen way of life. We will begin to feel morally quite vulnerable to the will of the majority.⁶⁰

Of course Walzer might respond by arguing that these fears fail to take into account the fact that the political sphere is only one sphere among many. While politics is of crucial significance, it does not define the shared meanings within each sphere, but only regulates the boundaries. Democratic authority is decisive "at but not within the boundaries."⁶¹ This was the most important advantage of complex equality over simple equality. But what guarantees a limitation on the right of majority of citizens to decide that the political sphere is to include ever more aspects of social life?⁶² The rights of the individual seem to be insufficiently grounded in Walzer's work. This includes both rights in the negative sense, guaranteeing freedom from state interference, and in the positive sense, ensuring that each individual has a proper and fair political hearing. Again, some moral-theoretical account of the rules of democratic deliberation, incorporating a conception of an impartial point of view, would seem to offer the only effective route around these problems.

⁶⁰ Nancy Rosenblum "Moral Membership in a Post-Liberal State", 593.

⁶¹ *Spheres of Justice*, note at 15. See also his discussion of the blocked uses of political power in *Spheres of Justice*, 282-284.

⁶² Thomas Morawetz expresses some related concerns in "Tension in the 'Art of Separation'" *Political Theory*, 13 (1985), 599-606.

If we are to draw out the implications of the more extensive universalist moral code that Walzer seems to presuppose, then a number of problems in Walzer's approach to justice and social criticism rise to the surface. In the first place this code is not an empirical matter of certain rights that all political communities just happen to recognise but rather it outlines the structural features of any legitimate account of justice, at least under the conditions of modern pluralism. While Walzer assumes these features, he does not do near enough to justify them. As I have stressed throughout such a justification seems to point us back in the direction of a detailed philosophical defence of some procedure of legitimation that is to act as a test for our substantive principles of justice. It is the search for such a philosophical defence that will lead us to a more detailed consideration of Habermas's work.

2.4 CONCLUSION

In the three sections of this chapter we have examined various aspects of the work of Michael Walzer. Our purpose has been to assess the prospects of a theory of justice that abandons the attempt to justify a philosophical conception of an impartial point of view. Walzer maintains that substantive principles of justice are embedded in a community's shared understandings of the meaning of social goods in their own particular context. By stressing the fact that no lone theorist can articulate philosophically the substantive demands of justice, Walzer rejects the type of monological procedure of legitimation that Rawls advocates. From his perspective, that procedure violates the self-understandings of particular communities. Substantive principles of justice are necessarily justified in an open public encounters that respect historical particularity. Accounts of justice are presented as interpretations of shared meanings that are constitutive of the community's way of life.

As the argument of the first chapter would suggest, Walzer is right to reject monological proceduralism. However he fails to see that this rejection does not force us to abandon altogether the attempt to ground a philosophical conception of an impartial point of view. I hope to make it clear in the next chapter that the dialogical conception of impartiality that is at the core of Habermas's discourse ethics points us towards a theory of justice that transcends the weaknesses of both Rawls's monological proceduralism and Walzer's contextualist anti-proceduralism.

In the first section of this chapter, we saw how Walzer's avoidance of monological abstraction enabled him to present complex equality as an open-ended, indeterminate, flexible approach to substantive accounts of justice. The actual demands of a right to equal citizenship are to be

determined in particular historical contexts according to shared meanings of local communities and not according to general principles such as those that are derived from Rawls's original position. The pluralist conception of citizenship that is implied in the idea that politics is just one among an indeterminate number of spheres of justice, adds weight to the case against Rawls's principles as it would appear to present a decentred vision of a just modern society that would lighten somewhat the burden of an overextended welfare state.

In the second section we saw that Walzer's connected criticism need not amount to a conservative affirmation of current practices. The stress that his hermeneutic approach to social criticism places on shared meanings builds on the holist claim that just institutions are in part constitutive of the identity of individual citizens. Hermeneutic criticism highlights the community's failure to live up to its own deepest moral convictions. These convictions can be challenged and revised as the prejudices of tradition are carried forward into new historical circumstances. The identity of the community depends in part on these critical standards that it sets for itself and that define the type of community it wants to be. These critical standards can change and develop in dialogical encounters with other forms of life and so ethical reflection on identities can form an important aspect of any public deliberation about justice.

However, in the third section I argued that hermeneutics cannot by itself give us an adequate philosophical understanding of why it is that such an openness to other forms of life is a requirement of justice. This is better thought of in terms of a universalist moral code. There is an extensive universalist moral code at work in Walzer's approach to justice, despite his attempts to obscure it with an excessive and unwarranted stress on cultural particularity. The moral principles of justice that are to

be included in this universalist code cannot be justified in terms of the traditions of one particular form of life. In a modern context any community that is just must allow ethical reflection on its identity to be shaped and directed by the moral demands of this universalist code. Otherwise hermeneutically grounded social criticism will be dangerously partial. It is for this reason that I suggested that hermeneutics could never act as a substitute for the project of justifying a philosophical conception of an impartial point of view.

There are other good reasons for rejecting Walzer's hermeneutic approach to justice. It is ill-equipped to act as a challenge to the unjust effects of power in modern societies. It does not justify its apparent commitment to rational deliberation. Its stress on the common will leaves the individual with a vulnerable moral status that should cause serious concern. Philosophical theory is necessary to, and not as Walzer implies, a danger to our understanding of democratic deliberation. This theory must inform us as to how the legitimacy of substantive principles of justice is to be tested. It seems to me that Habermas's dialogical conception of impartiality provides the most fertile theoretical ground available for such a legitimacy test. We can now, finally, turn to an exploration of that fertile ground.

3 DISCOURSE ETHICS AS DIALOGICAL IMPARTIALITY

Jürgen Habermas has produced a highly impressive and comprehensive approach to philosophy and social theory. Few, if indeed any other contemporary theorists, have studied so thoroughly, with such diligence and imagination, the problems associated with the justification of social criticism in a modern context. From his earliest reformulations of critical theory through numerous wide-ranging and far-reaching scholarly disputes and political controversies, to his most recent contributions to contemporary thought, Habermas has worked through a systematic critical defence of the Enlightenment and its hope for emancipation based on human reason.¹ In this chapter I hope to show that in Habermas's work we find the most fruitful theoretical resource available to us in

¹ *Knowledge and Human Interests* represented Habermas's first attempt at a systematic reformulation of a critical social theory. The project reaches its culmination with the two volumes of *The Theory of Communicative Action*, Cambridge, UK: Polity Press, 1984 and 1987 and *The Philosophical Discourse of Modernity*, Cambridge, UK: Polity Press, 1987. In his work since then Habermas has focussed on the elaboration of discourse ethics, which can be thought of as an account of justice grounded in his critical understanding of modernity. Most recently he has drawn out the implications of his discourse theory for an understanding of the law and the constitutional principles of a democratic state, see *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt am Main: Suhrkamp Verlag, 1992. In this chapter I will be focusing on discourse ethics as a dialogical conception of an impartial point of view. Robert Holub's *Jürgen Habermas: Critic in the Public Sphere* gives an excellent overview of the debates, disputes and controversies that have characterised Habermas's career. The best introduction to his thought remains Thomas McCarthy's *The Critical Theory of Jürgen Habermas* but his work since the early eighties is considered in Stephen K. White's *The Recent Work of Jürgen Habermas* and in David M. Rasmussen's *Reading Habermas*, Cambridge, MA: Basil Blackwell, 1990.

dealing with the problems of justification that are central to our concerns in this thesis.

Habermas's discourse ethics represents a procedure of legitimation for substantive principles of justice that is built on a conception of dialogical impartiality. While Habermas shares with Rawls the Kantian project of justifying an impartial procedure that can act as a test for competing principles of justice, he rejects the monological character of the original position. This means that, for Habermas, norms are not valid unless they could be accepted by all affected by them as participants in a real discourse.² The discursive test must be thought of as a co-operative venture among the members of a community who are practically engaged in deliberation. Valid norms are grounded in a shared conviction that is collectively achieved and so these norms express a common will. They cannot therefore be justified by an aggregate of solitary individuals choosing principles in isolation from one another under theoretically designed conditions.

This enables Habermas to avoid the problems that Rawls encounters in insisting that we isolate political aspects of our morality from our more comprehensive moral commitments before we can consider impartial moral reflection to be even possible. More significantly, it allows for the participants in discourse to assess critically and if necessary to revise their moral intuitions in the light of the encounter with others. Within this procedure of legitimation the participants really do differ from one another, and the critical flexibility required of them ensures that there is a real possibility that they will experience the discourse as a moment of uncoerced self-transformation.

² See for example *Moral Consciousness and Communicative Action*, 67.

Habermas insists that it is not for the philosopher to derive or to justify substantive principles of justice.³ This must be left to the participants in real moral discourses. The principles and norms that are to be tested are thrown up in the context of the real disputes that arise in any shared form of life. By keeping the philosophical task of justifying an impartial point of view strictly separate from the political task of justifying substantive principles of justice, Habermas can address Walzer's concern that the democratic will should not be overridden by philosophical theory. The procedure that discourse ethics defends does not violate the self-understandings of historically particular communities. Habermas is every bit as concerned as Walzer is, that the justification of substantive principles of justice be characterised by a public encounter of co-operative deliberation. But what Habermas does provide, and Walzer does not, is a justification for specific rules of argumentation that act as procedural constraints on that deliberation. In this way he takes us far beyond Walzer in detecting the more subtle distorting effects of power on democratic deliberation.

The first task of this chapter will be to present an overview of Habermas's critical defence of the Enlightenment. With this in mind, I will explain how the theory of communicative action is to be understood, at least in part, as Habermas's response to the debate with Gadamer. This theory provides a basis for critique that makes it abundantly clear, in ways that the psychoanalytic model could not, that Habermas is not interested in any vanguardist form of elitism that is hostile to genuine democracy. Habermas now grounds his criteria of legitimacy for

³ See his critical comments in relation to Rawls's attempt to justify his two principles in *Autonomy and Solidarity: Interviews with Jürgen Habermas*, Revised Edition, Peter Dews (ed.), London: Verso, 1992, 200-201.

principles of justice in a theory of language and in the claim that communicative action has priority over strategic action. In the first section, we will see why this claim is fundamental to Habermas's defence of reason, modernity and Enlightenment and how it relates to the paradigm shift from the philosophy of consciousness to the philosophy of intersubjective understanding.⁴ This claim, of the priority of communicative action, grounds both Habermas's critical social theory, which will be considered very briefly in this first section, and his discourse ethics. The discussion of this section should therefore enable us to place discourse ethics in its proper context.

In the second section we will focus directly on the distinctive features of discourse ethics. Habermas presents this as a cognitivist ethic, in that the norms or principles of justice that are justified as valid according to its procedural test, have a status analogous to truth. This claim is defended against sceptics in a complex argument that I hope to clarify. In doing so I intend to show how, in conceiving of an impartial point of view dialogically, Habermas can make a much more convincing case for the Kantian project than Rawls could. Having stressed the advantages of this dialogical approach, it should then become clear that discourse ethics incorporates the better insights of communitarianism, post-structuralism and feminism without making Walzer's mistake of rejecting altogether the task of providing a philosophical justification for a procedural test of impartiality.

Habermas's encounter with contextualists will be dealt with more explicitly in the third section. While discourse ethics makes significant concessions to the concerns of a variety of contextualists, Habermas

⁴ On this paradigm shift see especially *The Philosophical Discourse of Modernity*, 294-326.

never succumbs to the temptation of abandoning his strong universalist moral claims. I will defend the universalist thrust of Habermas's discourse ethics by considering his moral theory in relation to three recent contributions to the on-going debate about universalism and contextualism. This critical analysis should throw further light on the ways in which discourse ethics is to function as a procedural test for substantive principles of justice in the context of a modern society.

Finally, in the fourth section, I will highlight the advantages of discourse ethics as a conception of dialogical impartiality, over the anti-procedural contextualism of Walzer, by looking in some detail at a particular dispute about justice. I will apply both Walzer's and Habermas's theory of justice to the question of the constitutional status of Northern Ireland. This case both exposes the limitations of Walzer's approach and also indicates how discourse ethics can take us much further in clarifying what justice demands in that particular situation.

3.1 THE PRIORITY OF COMMUNICATIVE ACTION

Habermas's work is best situated in the tradition of critical social theory that aspires to ground our hopes for an emancipated future on a real basis. That people want to be emancipated from whatever unnecessarily causes them to suffer is, for Habermas, not just a contingent fact. It is rather, as he puts it,

so profoundly ingrained in the structure of human societies - the calling into question, and deep-seated wish to throw off, relations which repress you without necessity - so intimately built into the reproduction of human life that I don't think it can be regarded as just a subjective attitude which may or may not guide this or that piece of scientific research.¹

While the idea of an emancipatory cognitive interest does not feature explicitly in his most recent substantive social theory, there can be no doubting that this critical attitude continues to constitute the dominant characteristic of his self-understanding as a theorist.² Habermas now grounds our emancipatory hope in a theory of communicative action. More specifically, his recent work suggests that the claim that communicative action is the original mode of language use provides us with a theoretical basis for social criticism that can help to sustain our hope in a better future.

Both Habermas's social theoretical diagnosis of modern society and his discourse ethics, are built on the theory of communicative action. While his social theory aims to identify and explain the repressive

¹ *Autonomy and Solidarity*, 194.

² The best account of this shift of emphasis in Habermas's work, from cognitive interests in *Knowledge and Human Interests* to communicative action, is given by Richard Bernstein in his "Introduction" to *Habermas and Modernity*, Richard J. Bernstein (ed.), Cambridge, UK: Polity Press, 1985, 1-32.

features of advanced capitalist societies by revealing the ways in which our communication can be distorted by power, his moral theory, or discourse ethics, articulates the criteria by which we can distinguish between valid and invalid moral norms or legitimate and illegitimate principles of justice. Discourse ethics facilitates constructive social criticism by articulating standards of legitimacy, while critical social theory helps us to realise the conditions of fulfilment for a legitimate social order.

In this section I will present a broad outline of Habermas's overall project so that we can then place discourse ethics in its proper context. The main aim of Habermas's project is to present a critical defence of reason, modernity and the Enlightenment. In this outline I will focus on Habermas's crucial claim that communicative action is the original mode of language usage. But first of all we will see why his theory of communicative action can be thought of as, in part at least, a response to the insufficiently critical stance of hermeneutics. This requires a brief discussion to introduce the idea of a reconstructive science.

Philosophy and Rational Reconstruction

In his social theory, Habermas accepts much of the hermeneutic critique of the unwarranted objectivist claims of positivist social science.

However, in building a framework for a critical theory, he is concerned to avoid the implied relativism of radical hermeneutics.³ While the role of

³ Gadamer's *Truth and Method*, in opposing "truth" to "method", offers the most thoroughgoing hermeneuticist critique of positivist social science. However, the implied relativism that Habermas is keen to avoid, from a social-theoretical perspective, is more clearly exemplified in the work of the neo-Wittgensteinian, Peter Winch *The Idea of a Social Science*, Second Edition, London: Routledge, 1990, and the neo-pragmatist, Richard Rorty *Philosophy and the Mirror of Nature*, Princeton: Princeton University Press, 1979.

the social theorist must indeed be thought of as that of a participative interpreter rather than that of neutral observer, the conclusion that we must therefore give up on the idea of objectivity altogether does not necessarily follow. We can certainly give up our privileged observer status and our pretensions to context-independence. We can also extend our inquiries beyond claims of propositional truth to include non-descriptive claims of normative rightness and sincere self-expression. But we can still derive objective standards of social criticism by drawing out and theoretically reconstructing the rational assumptions implicit in all possible interpretations of social actions and phenomena.⁴ What is at issue here is the possibility of making explicit the conditions of validity for expressions and actions which intuitively guide all social actors in distinguishing the valid from the invalid. It is an attempt to give a theoretical account of the intuitive know-how that we all take for granted in everyday communication.

Habermas seeks to support his theory of communicative action by turning to what he calls reconstructive scientific research. Reconstructive scientific procedures are distinguished from empirical-analytical procedures by the fact that they attempt to "systematically reconstruct the intuitive knowledge of competent subjects" rather than seeking to "develop nomological hypotheses about domains of observable events."⁵

⁴ Habermas "Interpretive Social Science Vs. Hermeneuticism" in *Social Science as Moral Inquiry*, Norma Haan et al. (eds.), New York: Columbia University Press, 1983, 251-269, especially 256-261. This article is reprinted as "Reconstruction and Interpretation in the Social Sciences" in *Moral Consciousness and Communicative Action*, 21-42.

⁵ Habermas "What is Universal Pragmatics?" in *Communication and the Evolution of Society*, London: Heinemann, 1979, 1-68, here at 9. The differences between reconstructive and empirical-analytical scientific methods are discussed in this essay, 15-20.

The rational reconstruction of communicative action is concerned with the deep structure of the symbolically structured reality of the social world.⁶ It seeks to render explicit the practical, pre-theoretical know-how of all communicatively competent subjects. The deep structure that it reconstructs is the implicit rule consciousness that underlies the possibility of competent subjects generating meaningful expressions within the context of the surface structure of a language. For the reconstructive scientist

the object of understanding is no longer the content of a symbolic expression or what specific authors meant by it in specific situations but the intuitive rule consciousness that a competent speaker has of his own language.⁷

What this type of analysis aims to uncover are the presumably universal standards of rationality that can be thought of as conditions for the validity of meaningful expressions.⁸

In this way rational reconstruction goes beyond the concerns of a hermeneutic approach that limits itself to the attempt to understand the content of expressions within the context of the surface structure of a language. In contrast Habermas is interested in defending a general

⁶ For a useful discussion of the idea of a reconstructive science see McCarthy *The Critical Theory of Jürgen Habermas*, 276-279. On Habermas's own views see "What is Universal Pragmatics?", 8-25 and "Interpretive Social Science Vs. Hermeneuticism", 258-261. For an exceptionally clear account of the relation between rational reconstruction and Habermas's critical social theory, Kenneth Baynes "Rational Reconstruction and Social Criticism: Habermas's Model of Interpretive Social Science" in *Hermeneutics and Critical Theory in Ethics and Politics*, Michael Kelly (ed.), 122-145.

⁷ "What is Universal Pragmatics?", 12.

⁸ "Interpretive Social Science Vs. Hermeneuticism", 260. See also "A Reply to my Critics" in *Habermas: Critical Debates*, John B. Thompson and David Held (eds.), London: The Macmillan Press, 1982, 219-283, here at 234.

theory, in so far as the know-how that is reconstructed expresses a universal capability or a "species competence."⁹ In clarifying the general conditions of the validity of a symbolic expression, Habermas hopes that his theory of communicative action will secure a critical foothold with regard to particular invalid expressions.

The theory maintains that making a statement which can be understood necessarily involves participation in processes of communication where all participants (speakers, hearers and observers) adopt a performative attitude. This attitude, as opposed to an objectivating attitude, enables "a mutual orientation toward validity claims ... designed for critical assessment so that an intersubjective recognition of a particular claim can serve as the basis for a rationally motivated consensus."¹⁰ Before examining this idea of communicative action in more detail we should note that Habermas sees rational reconstruction as a key feature of his critical defence of the Enlightenment.

Habermas argues that in the light of the prevalent critiques of foundationalism, philosophy must find a new role.¹¹ It must humbly

⁹ "What is Universal Pragmatics?", 14.

¹⁰ "Interpretive Social Science Vs. Hermeneuticism", 255.

¹¹ While many broad philosophical currents, including hermeneutics and post-structuralism as well as recent approaches to the history of science, are engaged in the critique of philosophical foundationalism, Rorty's *Philosophy and the Mirror of Nature* constitutes one of the most trenchant attacks on the idea that there could be any ultimate grounds for a philosophical justification of reason, independent of the contingencies of history and culture. Anti-foundationalism rejects in particular the autonomous rational subject that characterises the philosophy of consciousness in the work of Descartes and Kant. Subjects do not so much constitute the world but rather they are embodied within the context of a particular linguistic world. Habermas also rejects foundationalism and along with it any possibility of a pure conception of reason; "There is no pure reason that might don linguistic clothing only in the second place. Reason is by its very nature incarnated in contexts of communicative action and in structures of the

accept that it can no longer play the authoritative role which Kant had hoped for it, that of clarifying "the foundations of the sciences for once and for all, defining the limits of what can and what cannot be experienced."¹² This attempt by philosophy to usher the sciences to their proper place is, Habermas admits, unacceptable.¹³ The same can be said for philosophy's self-appointed role as judge of all cultural matters such as the differentiation of value spheres (science, morality, art), with its implicit claim to confer legitimacy on these spheres within their own limits. This represents a task which philosophy cannot achieve. The reason for this is because these structures of rationality do not need to be grounded or justified in a modern context, since the fact of their cultural generation is what characterises modernity itself. The task of giving these differentiated value spheres a philosophical justification is simply redundant.¹⁴

So even though philosophy can no longer claim the roles of usher and judge, it can still, despite the ironic laughter of its contemporary gravediggers, claim to function as the "guardian of rationality."¹⁵ If it is to do so, it must steer a course between the discredited tradition of

lifeworld." *The Philosophical Discourse of Modernity*, 322. Habermas however, by defending a situated reason, does not endorse Rorty's outright rejection of the philosophical project.

¹² "Philosophy as Stand-In and Interpreter" in *Moral Consciousness and Communicative Action*, 1-20, here at 2.

¹³ This is, in part, why he moved away from the epistemological project of *Knowledge and Human Interests* that set about establishing critical theory in terms of cognitive interests. He now admits that this does not take sufficient account of historical change and the socially constituted nature of theoretical-paradigms. See *Autonomy and Solidarity*, 192-3.

¹⁴ "Philosophy as Stand-In and Interpreter", 17.

¹⁵ "Philosophy as Stand-In and Interpreter", 3.

foundationalism on the one hand, and the flight to irrationality of a totalizing critique of reason on the other.¹⁶ This is where Habermas sees the importance of reconstructive science. Philosophy can enter into a cooperative relationship with certain research projects in the human sciences by playing the role of "stand-in" for "empirical theories with strong universalistic claims."¹⁷ In other words philosophy can furnish reconstructive hypotheses that are to be used in empirical settings. In turn the empirical research may offer indirect confirmation of the reconstructive hypothesis.

Philosophy then continues to make universalist claims, but ones that are fallibilistic in orientation. They are offered without any pretence to support them with a foundational grounding. Nor is there any attempt to provide ultimate justifications for these hypotheses independently of any empirical corroboration. The hypotheses involved would be used in empirical research that might, for example, seek to explain, from the intuitive knowledge of competent subjects, "the presumably universal bases of rational experience and judgement, as well as of action and linguistic communication."¹⁸ Habermas's own philosophical work is to be thought of in the context of this co-operation with the reconstructive human sciences.¹⁹

¹⁶ The whole argument of *The Philosophical Discourse of Modernity* can be thought of in these terms. For Habermas the paradigm of a philosophy of intersubjective understanding offers us a way out of this dilemma.

¹⁷ "Philosophy as Stand-In and Interpreter", 15. See also *Postmetaphysical Thinking: Philosophical Essays*, Cambridge, UK: Polity Press, 1992, 38.

¹⁸ "Philosophy as Stand-In and Interpreter", 16.

¹⁹ We will see in the next section how Habermas sees Kohlberg's empirical work in the field of moral developmental psychology in this cooperative relationship with his own philosophical defence of discourse ethics as a cognitivist moral theory.

Similarly, while philosophy can no longer set itself up as judge, above and beyond the value spheres of culture, it can take on the more modest task of helping us to find a balance between these separated moments of reason in communicative everyday life.²⁰ Philosophy can be the mediating interpreter between the spheres of science, morals and art so that, while the regional rationality of each sphere is respected, they are no longer isolated from each other. These spheres are conceptually distinct but yet they are constantly interpenetrating and overlapping. It is for this reason that Habermas sees a necessity for a general theory of communicative action that can thematise validity claims in each of these spheres, while at the same time fulfilling this role of interpreter on behalf of the lifeworld. As mediating interpreter, philosophy can help us to identify and to challenge the dominance of one of these spheres over the others.²¹

Habermas understands these new roles for philosophy as being characteristic of a paradigm shift from the philosophy of consciousness to the philosophy of intersubjective understanding. The philosophy of consciousness sought to secure its foundations in the lone, isolated, autonomous subject standing apart, rationally disengaged and disembodied, independent of all historical and social contingency.²² Even

²⁰ "Philosophy as Stand-In and Interpreter", 19.

²¹ As we will see below, Habermas is most concerned here with the ways in which the sphere of science and technology can encroach on the domains of morality and art. This has been a constant theme in his work from "Technology and Science as Ideology" in *Toward a Rational Society* through to the critique of functionalist reason in *The Theory of Communicative Action, Volume 2*.

²² While Habermas gives his most comprehensive account of this paradigm shift in *The Philosophical Discourse of Modernity*, the same theme is present in his early work, see "Labour and Interaction: Remarks on Hegel's Jena *Philosophy of Mind*" in *Theory and Practice*, London: Heinemann, 1974, 142-169.

though these foundations would seem to have crumbled under our feet, we need not be paralysed philosophically by accepting the contingency of our situatedness in real historical and cultural contexts. We can be rescued from the fate of such a paralysis by refusing to see reason as necessarily pure and disembodied, but rather by seeing reason as historically situated in the communicative practice of everyday life.

Habermas's philosophical project is the task of clarifying, with a fallibilistic consciousness, the pragmatic presuppositions of rationality in everyday processes of reaching understanding, presuppositions that he presumes to be universal in so far as they are unavoidable. He seeks confirmation for his hypothesis in a cooperative venture with empirical theories of universal competences. Within the contours of this project neither paralysing anxiety, nor ecstatic celebration, are appropriate responses to the demise of the ultimate foundations of a philosophy of consciousness. Philosophy as guardian of rationality has not ended but rather it has been transformed

so as to enable it to cope with the entire spectrum of aspects of rationality - and with the historical fate of a reason that has been arrested again and again, ideologically misused and distorted, but that also stubbornly raises its voice in every inconspicuous act of successful communication.²³

In the next section I hope to show how discourse ethics develops out of this paradigm shift to a philosophy of intersubjective understanding. In this way it can provide us with a dialogical conception of impartiality that constitutes, or so I will argue, the best guide available to us in seeking criteria of justification for legitimate principles of justice. But first we

²³ "Questions and Counterquestions" in *Habermas and Modernity*, Richard J. Bernstein (ed.), 192-216, here at 197.

need to examine more closely some of the main features of Habermas's theory of communicative action.

Communicative and Strategic Action

The theory of communicative action gives us an account of the pre-theoretic knowledge and the intuitive command of "rule systems by means of which competent subjects generate and evaluate valid expressions and performance."²⁴ What distinguishes Habermas's approach from the hermeneutics of Gadamer is the claim that whenever we seek to reach an understanding we must implicitly appeal to universal standards of rationality. He is not concerned only with the interpretation and explication of meaning but rather also with the rules of language use which are intuitively known to all communicatively competent subjects. The identification of universal conditions of validity which is the object of a process of rational reconstruction produces theoretical knowledge of the general structures of communication that transcends the limiting horizon of a particular tradition.

In communicative action validity claims, that are in principle criticisable, are raised. There are, according to Habermas, three separate validity claims that correspond to three different relations to the world; a claim to truth relates to an existing state of affairs in the objective world; a claim to normative rightness relates to the regulation of interpersonal relationships in the social world; a claim to truthfulness relates to the speakers lived experience in the subjective world.²⁵ Every speech act

²⁴ "Interpretive Social Science Vs. Hermeneuticism", 260.

²⁵ See for example "What is Universal Pragmatics?", 50-59, *Moral Consciousness and Communicative Action*, 59, 136-137, *The Theory of Communicative Action, Volume 1*, 305-319 and *Postmetaphysical Thinking*, 75-78. I cannot go into detail here about Habermas's argument in support of this separation of three, and

could therefore be criticised from three different perspectives, even though "only one of the three validity claims can be thematically emphasised in any explicit speech act."²⁶

What is distinctive about communicative action is the performative attitude that is adopted in any attempt to reach an understanding with somebody else about something in the world. The formal-pragmatic features of this attitude can be analysed in terms of speech acts, where one participant says something to which the other participant takes a yes or no position. This is the simplest form of communicative action but this attitude is not unique to speech acts and it can also characterise many forms of non-verbal action in everyday communicative practice.²⁷ This includes action that can easily be given a linguistic form, such as that involved in a game of charades, and action that cannot be given a verbal form at all, like certain gestures that an orator might use to emphasise a point. If we are to analyse what is involved in the process of two or more subjects reaching a mutual understanding however, then we must refer to

only three validity claims. Our main concern in this section is to lay the ground for an analysis of discourse ethics, which thematises the claim to normative rightness. For an illuminating critical exchange on the question as to whether or not Habermas can defend a procedural unity of reason in his notion of communicative action, while also maintaining this three way differentiation of validity claims and the corresponding separation of the specialist areas of science, morality and art, see Martin Seel "The Two Meanings of 'Communicative' Rationality: Remarks on Habermas's Critique of a Plural Concept of Reason" in *Communicative Action: Essays on Jürgen Habermas's "The Theory of Communicative Action"*, Axel Honneth and Hans Joas (eds.), Cambridge, UK: Polity Press, 1991, 36-48 and in the same collection Habermas's "A Reply", 214-264, here at 222-229. See also the essay "The Unity of Reason in the Diversity of Its Voices" in *Postmetaphysical Thinking*, 115-148.

²⁶ *Postmetaphysical Thinking*, 77.

²⁷ *The Theory of Communicative Action, Volume 1*, 287-288. See also "A Reply to my Critics", 270.

the model of speech. Habermas therefore reconstructs the formal-pragmatic presuppositions of communicative action through an analysis of speech acts.

When we engage in communicative action there are certain necessary and unavoidable presuppositions involved in our speech acts. If in communicating with you my attitude is solely oriented to reaching an understanding with you about something then I have to presuppose that you will be motivated to accept the validity claims I raise by nothing but the force of reason. In other words I presuppose that the understanding we seek will be rationally motivated. This can be contrasted with a mere *de facto* accord since any communicatively achieved agreement must be accepted or presupposed by the participants and not just imposed.²⁸

A *de facto* accord can be imposed by whichever participant is in a stronger bargaining position. We can differentiate between a communicatively achieved agreement and an imposed accord, as illustrated in the following examples. It seems clear that somebody looking for work in Britain today is, in normal circumstances, in a weaker position than is a prospective employer. In any negotiations which might arise in this context the person seeking employment might be inclined to come to an agreement or even to sign a contract not because of the force of reason alone but rather because it may represent the best offer available at the time. Getting off the dole is sufficient motivation for the employee not to question the normative claims entailed in the contract. While an employer may act benevolently the basic inequality in bargaining positions is not altered since the employer has the power to decide whether to be benevolent or not.

²⁸ This distinction is introduced in *The Theory of Communicative Action, Volume 1*, 287.

A rather different example which demonstrates that a mere *de facto* accord is not the same as a communicatively achieved agreement might arise on an occasion where I am having a quiet drink in a pub with one friend and a large and boisterous group wrongly accuse me of having spilt one of their drinks. I am not likely to engage in communicative action in order to come to a rationally motivated agreement with them about whether or not I did spill the drink. It seems much more likely that I would cut my losses and accept that buying them a drink is the best offer available to me at the time. The advantages of avoiding violence, which may implicitly or explicitly be threatened in the encounter, would prevent me from questioning their truth claim.

Habermas is clearly not claiming that all linguistically mediated interaction is communicative action. He is primarily concerned with distinguishing between communicative action and what he refers to as strategic action.²⁹ These represent two types of interaction that might be used in coordinating plans of action. It is of course true that we often engage in social action with an attitude which is not oriented to reaching understanding but rather with an objectivating attitude that is oriented to consequences, to the success of our private goals. For Habermas the latter constitutes strategic action. Linguistically mediated strategic action involves the use of speech acts to instrumentalise our fellow participants as we seek to succeed in our own individual goals.

It must be noted that communicative action often serves to link individual participants' teleologically structured instrumental plans of action. However a distinctive feature of communicative action, as a form

²⁹ See *The Theory of Communicative Action, Volume 1*, 286-296, "A Reply to my Critics", 264-267, and for a more recent overview *Postmetaphysical Thinking*, 78-84.

of coordinating interaction, is that it cannot be reduced to teleological action which could only be analysed by reference to the intentions and aims of the individual actors. Of course action oriented to reaching understanding does have a goal but it would be a mistake to think that this necessarily means that the distinction between the two models of action must breakdown. This is because the "medium of language and the telos of reaching understanding intrinsic to it reciprocally constitute one another. The relation between these is not one of means and ends."³⁰ While strategic action aims to intervene causally in the world, the aims of communicative action are situated at a different level. That level is the linguistically constituted lifeworld.

The telos of reaching understanding, inherent in linguistic structures, compels the communicative actors to alter their perspective; this finds expression in the necessity of going from the objectivating attitude of success-oriented action, which seeks to effect something in the world, over to the performative attitude of a speaker who seeks to reach an understanding with a second person about something.³¹

Communicatively achieved agreement always proceeds co-operatively "within the dimension of world-disclosing language itself" and is therefore never "at the disposal of an individual party to interaction."³² The end of communicative action is so interwoven with the intersubjective form of life which makes all linguistically mediated

³⁰ "A Reply", 241.

³¹ *Postmetaphysical Thinking*, 81.

³² "A Reply", 241. See also Habermas "Remarks on the Discussion" *Theory, Culture and Society*, 7 (1990), 127-132, here at 131.

interaction possible that it cannot be treated as a contingent end but rather, it is an end that cannot be bypassed.³³

Communicative action must therefore be analysed independently of the intentions and the purposive-activity of individual actors. Since in communicative action our speech acts are oriented to reaching understanding it must be possible to "clarify the structure of linguistic communication without reference to structures of purposive activity."³⁴ Of course, for Habermas, this is a central feature of the paradigm shift from a philosophy of consciousness to a philosophy of intersubjective understanding. In attempting to derive the general pragmatic presuppositions of communicative action from the structure of processes of reaching understanding, Habermas is hoping to provide a reconstructive theoretical account of the

pretheoretical knowledge of competent speakers, who can themselves distinguish situations in which they are causally exerting an influence upon others from those in which they are coming to an understanding with them, and who know when their attempts have failed.³⁵

While there are numerous important issues that would have to be addressed in any serious consideration of the notion of communicative action, it would take us too far from the central focus of this thesis to pursue many of them here.³⁶ For our purposes we need only address one question that bears directly on the justification of discourse ethics. Since

³³ *Moral Consciousness and Communicative Action*, 94-95. This point will be developed below.

³⁴ *The Theory of Communicative Action, Volume 1*, 293.

³⁵ *The Theory of Communicative Action, Volume 1*, 286.

³⁶ See for example the collection of essays *Communicative Action*, Axel Honneth and Hans Joas (eds.).

Habermas admits that linguistically mediated interaction could be communicative or strategic (as he defines them), then why is it that he takes speech acts to be a model for communicative and not strategic action? In other words, why should communicative action have priority over strategic action as a mode of language use? Habermas needs to justify this priority if the presuppositions of communicative action are to provide the basis for both his moral theory and his critical social theory. What is so special about the use of language with this orientation to reaching understanding?

Illocutions, Perlocutions and Communicative Action's Priority

At one point in his attempt to justify the priority of communicative action over strategic action as a mode of language usage, he puts the matter quite straightforwardly; "the use of language with an orientation to reaching understanding is the original mode of language use, upon which ... the instrumental use of language in general, [is] parasitic."³⁷ After making this strong claim he immediately goes on to assert that Austin's distinction between illocutions and perlocutions shows us that this is indeed so.

For Austin, to say something that expresses a state of affairs is a locutionary act, to perform an action in saying something is an illocutionary act, to bring about an effect on the hearer through saying something is a perlocutionary act. When we pursue only illocutionary aims in our speech acts then it can be considered to be self-sufficient in the sense that "the communicative intent of the speaker and the illocutionary aim he is pursuing follow from the manifest meaning of

³⁷ *The Theory of Communicative Action, Volume 1*, 288.

what is said."³⁸ On the other hand perlocutionary effects can result "whenever a speaker acts with an orientation to success and thereby instrumentalises speech acts for purposes that are only contingently related to the meaning of what is said."³⁹ We can only describe these effects in "a context of teleological action that goes beyond the speech act."⁴⁰ Furthermore while illocutionary aims have to be openly expressed to succeed, the opposite is true of perlocutionary aims which must be kept concealed in order to be successful.⁴¹

I might say to a student; "that essay is particularly difficult." I am pursuing the illocutionary aim of warning the student of problems which would lie ahead if she were to choose to write that essay. I may have no other aim except that of reaching an understanding with the student. However, in another case, I may say exactly the same thing but with the hope of putting the student off doing the essay because it would be more difficult for me to assess it than any of the other alternative essays. This desire to save myself work would represent a necessarily concealed perlocutionary aim that is obviously related to the meaning of what is said in a contingent and not a necessary sense. Success of the perlocutionary aim depends on the success of the illocutionary one. What this means in this case is that if I am successfully to save myself work then the student must understand the meaning of my speech act.

³⁸ *The Theory of Communicative Action, Volume 1*, 289.

³⁹ *The Theory of Communicative Action, Volume 1*, 289.

⁴⁰ *The Theory of Communicative Action, Volume 1*, 291.

⁴¹ The case of imperatives adds a serious complication here, one which will be considered below.

How does Austin's distinction help to justify Habermas's claim that strategic action is parasitic upon communicative action, and that the latter is the original mode of language usage? As in the example just given we could only use speech acts to pursue perlocutionary aims if they could achieve illocutionary aims.

If the hearer failed to understand what the speaker was saying, a strategically acting speaker would not be able to bring the hearer, by means of communicative acts to behave in the desired way. To this extent ... 'the use of language with an orientation to consequences' is not an original use of language but the subsumption of speech acts that serve illocutionary aims under conditions of action oriented to success.⁴²

What communicative action amounts to then is any linguistically mediated interaction where all participants pursue only illocutionary aims.

Austin's distinction does not give as neat a result as Habermas would have hoped for in making his claim for the originary nature of communicative action. He recognised himself that a simple imperative is a case where the speaker pursues unreservedly illocutionary aims and yet acts with an orientation to success rather than understanding. If I say "shut the door!" I do not conceal the perlocutionary aim involved, to get somebody else to close the door simply because I want it closed. In order to take imperatives into account Habermas argued that it is only illocutionary acts which raise criticisable validity claims that should be considered as constitutive of communicative action.⁴³

⁴² *The Theory of Communicative Action, Volume 1*, 293.

⁴³ *The Theory of Communicative Action, Volume 1*, 305.

It would appear therefore that since the distinction between illocutions and perlocutions is not the same as the distinction between communicative action and strategic action, then demonstrating the dependence of perlocutions on illocutions will not provide Habermas with the conclusion that communicative action is originary as a mode of language use while strategic action is parasitic. Astute critics have not been slow to point that out.⁴⁴ More recently however Habermas has modified his view on this point so as to defend his central claim that communicative action has priority over strategic action. He now argues that simple imperatives are also parasitic on the use of language with an orientation to understanding, in that they must refer to potential sanctions. This makes up for a deficit in illocutionary force but again this could not be understood if the hearer did not know what the demand would mean in a normatively authorised context. The validity claim to normative rightness is replaced by a power claim of threatened sanctions or perhaps violence.⁴⁵

Furthermore Habermas realises that, since the distinction between illocutions and perlocutions is not the same as that between communicative and strategic action, he will have to differentiate between perlocutionary effects that are strategically intended and those that are not. While strategically intended perlocutionary effects are undeclared, non-strategically intended effects arise in the context of an interactive success. The acceptance of a validity claim may well lead the hearer to "take on obligations which are relevant to the further sequence of

⁴⁴ See for example Jonathan Culler "Communicative Competence and Normative Force" *New German Critique*, 35 (1985), 133-144.

⁴⁵ "A Reply", 239, *Postmetaphysical Thinking*, 83-84.

interaction."⁴⁶ An interactive success therefore goes beyond the narrow sense of an illocutionary success which simply involves the hearer understanding the speaker's utterance. It also involves a success in the more far-reaching sense of achieving a consensus on a validity claim that can effect co-ordination of action. Such an effect would be a non-strategically intended perlocutionary effect of successful communicative interaction.

It should be noted that these revisions do not in any sense undermine the distinction between communicative action and strategic action itself. As we will recall, these types of interaction are to be distinguished in terms of their structural characteristics.

In communicative action the structure of language usage oriented toward reaching understanding is superimposed on the underlying teleological structure of the action, and subjects the actors to precisely such constraints as compel them to adopt a performative attitude that is more laden with presuppositions than the objectivating stance of the strategic actor. Interaction mediated through acts of reaching understanding exhibits a both richer and more strictly limiting structure than does strategic action.⁴⁷

Austin's work undoubtedly provides Habermas with useful tools for a formal-pragmatic analysis of speech acts that allows him to study the structure of processes of reaching understanding without reference to purposive activity. We have seen however that it does not in itself justify the priority of communicative action. But just because Austin's distinction between illocutions and perlocutions does not ground this priority, it does not follow that it cannot be grounded.

⁴⁶ "A Reply", 240.

⁴⁷ "A Reply", 242.

Habermas might, for example, draw explicitly in this context on Wittgenstein's analysis of the concept of following a rule. He discusses this in his account of Mead's work on symbolic interaction. The basic point is that we can only learn to use language if we develop a rule-consciousness. As Wittgenstein noted, it is not possible to obey a rule privately. Rather he

emphasised the internal connection that holds between the competence to follow rules and the ability to respond with a 'yes' or 'no' to the question whether a symbol has been used correctly, that is, according to the rules. The two competences are equally constitutive for rule-consciousness.⁴⁸

If this is true of learning a language then the original mode of language use must have an orientation to intersubjective understanding among those who together become conscious of rules genetically. Before a language can be used with an orientation to success, rule-consciousness must already have been developed among its speaking subjects and this could only occur through action oriented to reaching understanding. It seems that communicative action could in this way be shown to be originary and strategic action parasitic as uses of language.⁴⁹

If we are to appreciate fully the strength of Habermas's case for the priority of communicative action however, we must shift our focus away from the formal-pragmatic analysis of speech acts so as to take into

⁴⁸ *The Theory of Communicative Action, Volume 2*, 22. See also *On the Logic of the Social Sciences*, 134-135 where Habermas discusses this point in the context of a critical analysis of Winch's linguistic approach to social studies. If communicative action were not the original mode of language use this would raise important questions about the possibility of learning a new language or translating from one language into another.

⁴⁹ See Nick Smith "Modernity, Crisis and Critique: An Examination of Rival Philosophical Conceptions in the Work of Jürgen Habermas and Charles Taylor", PhD Dissertation, Glasgow University, 1992, chapter 4.

account the fact that communicative action always takes place in the context of a concrete form of life, or a lifeworld.

The Reproduction of the Lifeworld and Critical Social Theory

The lifeworld is a background resource that represents a "culturally transmitted and linguistically organized stock of interpretive patterns."⁵⁰ This stock of interpretive patterns is the horizon within which communicative actors are always already moving. It represents the taken for granted background assumptions that shape the contexts of all processes of reaching understanding. The conception of the lifeworld, as the shared background knowledge of participants in everyday practices of communication, helps to explain how successful interaction is possible at all. In every act of communication the participants depend on the resources of a pre-reflexively known form of life over which they have no control. They always find themselves within a shared interpretive horizon that is taken for granted. Interactive success is therefore achieved autonomously in a rather superficial sense.⁵¹

Processes of reaching understanding in turn maintain and reproduce the symbolic structures of the lifeworld. As a resource the lifeworld is not merely "routed through" communicative action but it is "saddled on" the interpretive accomplishments of the actors.⁵² As Habermas puts it;

⁵⁰ *The Theory of Communicative Action, Volume 2*, 124. Habermas's most complete account of the lifeworld is given here at 119-152.

⁵¹ "A Reply", 244-245 and *The Theory of Communicative Action, Volume 2*, 130-135.

⁵² *The Philosophical Discourse of Modernity*, 342, *The Theory of Communicative Action, Volume 2*, 145 and Baynes "Rational Reconstruction and Social Criticism", 135. This makes it clear that we are not simply products of the lifeworld, but rather the lifeworld is reproduced by the interactive achievements of concrete individuals and groups.

"the network of communicative actions is nourished by resources of the lifeworld and is at the same time the medium by which concrete forms of life are reproduced."⁵³ The concepts of communicative action and the lifeworld are therefore complementary. Habermas supplements his analysis of action oriented toward reaching understanding with his analysis of the lifeworld. In communicative action participants stand in a cultural tradition that they simultaneously use and renew. The symbolic structures of the lifeworld are reproduced through the practices of communicative action.

Under the functional aspect of mutual understanding, communicative action serves to transmit and renew cultural knowledge; under the aspect of coordinating action, it serves social integration and the establishment of solidarity; finally under the aspect of socialization, communicative action serves the formation of personal identities.⁵⁴

The processes of cultural reproduction, social integration and socialisation constitute the reproduction of the symbolic structures of the lifeworld and communicative action is the medium through which this reproduction takes place.

This two-way relation between the lifeworld and communicative action provides Habermas with the basis for an alternative justification for the priority of communicative action. In fact he develops this argument in response to the claim that it might be possible to avoid the performative attitude oriented to reaching understanding altogether by consistently adopting the objectivating attitude of the strategic actor.⁵⁵

⁵³ *The Philosophical Discourse of Modernity*, 316.

⁵⁴ *The Theory of Communicative Action, Volume 2*, 137.

⁵⁵ This is a suggestion of Agnes Heller, "Habermas and Marxism" in *Habermas: Critical Debates*, John B. Thompson and David Held (eds.), 21-41.

Habermas claims that this would require the disengagement of the individual from the lifeworld.⁵⁶ As we have seen, the lifeworld can only be reproduced through the medium of communicative action and not in accord with the rational purposive activity of isolated individuals. The individual can only form her personal identity in the context of a web of mutual recognition and intersubjective understanding that is provided by the lifeworld.⁵⁷

Insofar as the actor's personal identity depends on the structures of the lifeworld then the option of consistent strategic action is only available in the abstract, in individual cases, and not as a long term disengagement from contexts of communicative action. Habermas maintains that

opting for a long-run withdrawal from contexts of action oriented to reaching understanding, and thus from communicatively structured spheres of life, means retreating into the monadic isolation of strategic action; in the long-run this is self-destructive.⁵⁸

Strategic action presupposes an identity of a self whose formation is dependent on the symbolic structures of the lifeworld. There is therefore no substitute for communicative action from the perspective of the lifeworld to which the individual belongs and on which her identity depends. There is a high price to be paid by the individual for long term withdrawal from this context, be it the self-destructive monadic isolation

⁵⁶ Habermas's thinking on personal identity is very much shaped by his reading of the work of Mead. See *The Theory of Communicative Action, Volume 2*, 96-106 and especially the essay "Individuation through Socialization: On George Herbert Mead's Theory of Subjectivity" in *Postmetaphysical Thinking*, 149-204. The conception of the self implicit in Habermas's work has much in common with the holist view I defended earlier.

⁵⁷ *Moral Consciousness and Communicative Action*, 199.

⁵⁸ "A Reply to My Critics", 227.

of the compulsive strategic actor, schizophrenia or suicide.⁵⁹ This conception of the lifeworld shows how the claim that communicative action is prior to strategic action is directly connected to the paradigm shift from the philosophy of consciousness to the philosophy of intersubjective understanding.

But it is still not clear how the priority of communicative action relates to the realm of politics. While we might accept, for example, that since our personal identity depends on the symbolic structures of the lifeworld and these are reproduced in a necessarily communicative way, communicative action certainly does have priority in the sphere of intimate relations, but what about matters of political and social policy? Why is strategic action not adequate as a medium of coordinating action in these realms?

We have already seen that the reproduction of the lifeworld is constituted not only by the socialisation of individuals but also by the transmission and renewal of cultural knowledge and processes of social integration and the establishment of forms of solidarity. The coordination of action through social and political institutions, no less than the socialisation of the individual, is anchored in the lifeworld. While strategic action may well play an ineliminable role in political and social life, our political and social institutions must also act in the service of social integration and solidarity formation. To this extent these institutions cannot be detached from communicatively structured domains of action. If the symbolic structures of the lifeworld are to survive the atomising effects of pervasive strategic action and its instrumental

⁵⁹ *Moral Consciousness and Communicative Action*, 101-102.

rationality, then communicative action must also have priority in the realm of politics.⁶⁰

It should now be clear how Habermas's theory of communicative action can be thought of as a reformulation of critical social theory. It is intended to facilitate both the explanation and the critical assessment of the institutional patterns of late capitalist societies. It is not strategic action as such, but rather the functionalist reason of social systems that promote it, that constitutes the greatest threat to the communicative structures of the lifeworld. In complex modern societies the material reproduction of the lifeworld becomes systematically organised through the development of economic markets and state bureaucracies. These systems and their corresponding non-linguistic steering media, money and power, have encroached into domains of the symbolic reproduction of the lifeworld. Functionalist reason, in the form of systemic mechanisms, has suppressed communicative reason, in the form of social integration.⁶¹

⁶⁰ For a similar argument see Tony Smith *The Role of Ethics in Social Theory: Essays from a Habermasian Perspective*, New York: State University of New York Press, 1991, 190-192. For an interesting attempt to show how an examination of rational choice theory can strengthen the claim that strategic action cannot adequately sustain political interaction, see James Johnson "Is Talk Really Cheap? Prompting Conversation between Critical Theory and Rational Choice" *American Political Science Review*, 87 (1993), 74-86.

⁶¹ *Autonomy and Solidarity*, 112-113. For a fuller account of this aspect of modernisation and for his use of the systems theory of Talcott Parsons in this respect see *The Theory of Communicative Action, Volume 2*, 153-197 and 199-299. Sympathetic commentators have criticised Habermas on the grounds that his appropriation of Parsonian systems theory undermines the emancipatory potential of his critical theory. See Thomas McCarthy "Complexity and Democracy, or the Seductions of Systems Theory" and Dieter Misgeld "Critical Hermeneutics Versus Neoparsonianism?" *New German Critique*, 35 (1985), 27-53 and 55-82 respectively, also David Rasmussen *Reading Habermas*, 37-55.

One of the effects of this one-sided process of rationalisation has been to promote rational purposive strategic action and its objectivating attitude in domains of social life where this type of interaction cannot perform the task required of it, that of the reproduction of the lifeworld.⁶² With his theory of communicative action, Habermas hopes to explain "why modern societies cannot be held together exclusively or even primarily through money and power."⁶³ Put slightly differently, it shows that "money and power can neither buy nor compel solidarity and meaning."⁶⁴ The suppression of communicative action constitutes a crisis, or a pathology for the lifeworld, one that can be diagnosed in terms of the colonisation of the lifeworld by systems.⁶⁵

Habermas's colonisation thesis recasts the notion of reification. His critical social theory is concerned to articulate the necessary conditions

⁶² Habermas draws heavily on Max Weber in his understanding of modernity and processes of rationalisation. Unlike Weber, Habermas sees the "iron cage" as a product, not of rationalisation as such, but of one-sided (instrumental) rationalisation. The idea of a communicatively rationalised lifeworld is offered as a corrective to the pessimism of Weber and the early critical theorists. See *The Theory of Communicative Action, Volume 1*, 143-271 and 339-399. More recently Habermas's own work has become increasingly pessimistic, for example "The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies" *Philosophy and Social Criticism*, 11 (1986), 1-18.

⁶³ *Autonomy and Solidarity*, 227.

⁶⁴ *The Philosophical Discourse of Modernity*, 363.

⁶⁵ For an earlier formulation of Habermas's conception of crisis, see *Legitimation Crisis*, London: Heinemann, 1976. The colonisation thesis is developed in *The Theory of Communicative Action, Volume 2*, 301-403. For a highly instructive critique of the distinction between system and lifeworld from a feminist perspective, Nancy Fraser "What's Critical about Critical Theory? The Case of Habermas and Gender" *New German Critique*, 35 (1985), 97-131 but see James Bohman's defence of Habermas's distinction "'System' and 'Lifeworld': Habermas and the Problem of Holism" *Philosophy and Social Criticism*, 15 (1989), 381-401.

for a communicatively rationalised society. It suggests that we need to reclaim for the public sphere those aspects of our politics that have been colonised by systemic imperatives.⁶⁶ The priority of communicative action both grounds a critical social theory and offers us a normative guide for political protest and resistance to the domination of the current configuration of power.⁶⁷ It is with the justification of his discourse ethics that Habermas makes the normative aspects of this theory explicit.

We have seen how the argument for the priority of communicative action is related to the task of rational reconstruction, the concept of the lifeworld and the elaboration of a critical social theory.⁶⁸ These are the

⁶⁶ Concern about the public sphere has been constant in Habermas's work. Although it has only recently been translated into English, his first major book was written on this subject, in 1962, *Structural Transformation of the Public Sphere*, Cambridge, UK: Polity Press, 1989. For a recent collection of essays on this theme, Craig Calhoun (ed.) *Habermas and the Public Sphere*, Cambridge, MA: The MIT Press, 1992. Habermas updates his own views here in "Further Reflections on the Public Sphere", 421-461. Habermas has been an important influence on recent theorists of civil society and the role of new social movements in protest politics, Jean Cohen "Discourse Ethics and Civil Society" in *Universalism Vs. Communitarianism*, David Rasmussen (ed.), 83-105, Cohen and Arato *Civil Society and Political Theory*. On new potentials for protest, *The Theory of Communicative Action, Volume 2*, 391-396. Baynes *The Normative Grounds of Social Criticism*, 172-181, and White *The Recent Work of Jürgen Habermas*, 107-127 also develop this theme.

⁶⁷ Habermas does not suffer from the deficit of normative insights that we encountered in the work of Foucault in section 1.3. This will become clearer later on in the discussion of discourse ethics but McCarthy's "The Critique of Impure Reason" makes the case more than adequately. Both Nancy Love "Foucault and Habermas on Discourse and Democracy" *Polity*, 22 (1989), 269-293 and Lois McNay *Foucault and Feminism: Power, Gender and the Self*, Cambridge, UK: Polity Press, 1992, while reluctant to side decisively with Habermas against Foucault, are obliged to accept this basic point.

⁶⁸ We might note that neither Rawls nor Walzer develops a critical social theory in conjunction with their normative theories. The fact that Habermas's work on justice forms a coherent whole with one of the most impressive contemporary social theories can only strengthen the claim that discourse ethics overcomes the inadequacies of these alternative theories of justice.

key features of the paradigm shift that Habermas claims his work to represent, from the philosophy of consciousness to the philosophy of intersubjective understanding. My intention in this section has been to lay the ground for my argument that Habermas's work enables us to theorise justice in a way that can overcome the weaknesses of both Rawls's monological proceduralism and Walzer's anti-procedural contextualism. It is to the elaboration of discourse ethics as a dialogical conception of impartiality that we must now turn.

3.2 DISCOURSE AND IMPARTIALITY

Habermas's contribution to current debates in moral theory constitutes the most compelling case for resisting the conclusion that the insights of communitarians, post-structuralists and feminists have, for once and for all, undermined the attempt to discover or construct a context-independent, impartial point of view. In defending a discourse ethics that claims to be valid universally, Habermas is swimming against the tide, stubbornly refusing to be carried away in the contemporary drift towards relativism.

Habermas sets about reconstructing an impartial point of view with two principal concerns in mind. First, he wants to refute the views of sceptics and relativists by using his theory of communicative action to argue that advocates of such views are inevitably enmeshed in a performative contradiction.¹ Second, he hopes to defend a modified version of Kant's categorical imperative from the contextualist criticisms that have dogged Kantian moral theory since Hegel's celebrated critique.² While discourse ethics follows Kant in its most significant features, Habermas draws on Hegel's distinction between morality (*Moralität*) and ethical life (*Sittlichkeit*) in his characterisation of moral discourse as a reflective form of everyday communicative action.³ Although morality is always embedded in ethical life, "the unrelenting moralizing gaze of the

¹ See for example *Moral Consciousness and Communicative Action*, 88-89.

² See especially the essay "Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?" in *Moral Consciousness and Communicative Action*, 195-215.

³ *Moral Consciousness and Communicative Action*, 201.

participant in discourse" weakens the power of norms that had previously enjoyed a naive social acceptance.⁴

Habermas's encounter with contextualism will be the subject of the next section but the aim here is to outline the way in which discourse ethics elaborates a dialogical conception of impartiality. Our concern is with the Kantian project of justifying an impartial procedure that can act as a test for competing substantive principles of justice. It is with regard to the question of democratic legitimacy, rather than moral theory in a wider sense, that we will evaluate Habermas's discourse ethics.⁵ First of all, we need to account for the distinctive features of discourse ethics. Secondly we will analyse, in some detail, Habermas's justification for the impartial procedure implicit in this approach to moral theory. Finally, I hope to make clear the advantages of a dialogical conception of impartiality over Rawls's monological view by showing how discourse ethics is not vulnerable to the criticisms, outlined in the first chapter, that undermine Rawls's project.

⁴ *Moral Consciousness and Communicative Action*, 108.

⁵ For criticisms of the view that discourse ethics can serve not merely as a test of democratic legitimacy but also as a procedure that could guide an individual's moral judgement and action, see Albrecht Wellmer "Ethics and Dialogue: Elements of Moral Judgement in Kant and Discourse Ethics" in *The Persistence of Modernity*, Cambridge, UK: Polity Press, 1991, Jean Cohen "Discourse Ethics and Civil Society", here at 86-91 and Grace Clement "Is the Moral Point of View Monological or Dialogical? The Kantian Background of Habermas' Discourse Ethics" *Philosophy Today*, 34 (1989), 159-173, here at 169-172. Seyla Benhabib rejects the view that discourse ethics should be limited to a model of political legitimacy, although her interpretation of discourse ethics differs in important ways from Habermas's, as we will see in the next section. See the first chapter of Benhabib *Situating the Self*. My only concern is with discourse ethics as a model of political legitimacy so when I speak of a morally valid norm, this can be taken to indicate a legitimate principle of justice. See also David Ingram "The Limits and Possibilities of Communicative Ethics for Democratic Theory" *Political Theory*, 21 (1993), 294-321, here at 298-300.

Discourse as Reflective Communicative Action

Discourse ethics is Kantian in the sense that it shares the following attributes with Kant's moral theory.⁶ Firstly, it is deontological, concerning itself with the validity of norms, which in providing a legitimate ordering for the satisfaction of interests, can act as a basis for the justification of our actions. It therefore limits itself to questions of moral rightness, rather than dealing with full conceptions of a good life. Habermas, like Rawls, affirms the priority of right but, as we will see, in a significantly different way. Secondly, it is cognitivist in that it treats normative rightness as a claim to validity that is analogous to a truth claim. Thirdly, it is formalist in that it defends a procedure of moral argumentation rather than any substantive moral principles. This procedure embodies a moral point of view that explains how competing substantive principles can be judged impartially, or in a way that expresses a common interest. The rules of argumentation that Habermas elaborates represent a dialogical procedure that can be contrasted with the monological procedures of Kant and Rawls. Furthermore Habermas, unlike Rawls, leaves the justification of substantive principles of justice to the participants in a real discourse. Finally, discourse ethics is universalist, in that it claims to justify its procedure of moral argumentation independently of the prejudices or biases of any particular tradition or culture.

Habermas grounds discourse ethics in his analysis of communicative action, or action oriented toward reaching understanding. As we saw in the last section, this involves at least two participants who seek to

⁶ For what follows, see *Moral Consciousness and Communicative Action*, 196-198.

harmonise their individual plans of action on the basis of a communicatively achieved agreement that is rationally motivated. An agreement is generated if all participants can affirm, at least implicitly, some criticisable validity claim that has been raised.⁷ The actors share as a background a lifeworld that forms the context for communication while at the same time providing the resources that the actors need to engage in this process.

In the context of a modern lifeworld, according to Habermas's reconstruction, all competent communicative actors can differentiate between three different relations to the world and three corresponding validity claims. As we will recall these are first, the objective world (existing states of affairs) and a claim to truth, second, the social world (regulation of interpersonal relationships) and a claim to normative rightness and third, the subjective world (the speaker's lived experience) and a claim to truthfulness.⁸ We can also differentiate between the unquestioned intersubjectively shared certitudes of the lifeworld and the content on which participants in communicative action reach agreement. Participants reach agreement about something in a world (objective,

⁷ *Moral Consciousness and Communicative Action*, 134.

⁸ *Moral Consciousness and Communicative Action*, 59, 136-138. More generally see *The Theory of Communicative Action, Volume 1*, 233-242, 305-319. According to Habermas we can further differentiate between three basic attitudes, each of which entails a different perspective on the world; an objectivating attitude (that concentrates on claims to truth), a norm-conformative attitude (that concentrates on claims to normative rightness, or justice) and an expressive attitude (that concentrates on claims to truthfulness, or personal taste). We can confront any of the three worlds with any of these three basic attitudes. Since our focus is on claims to normative rightness that relate to the regulation of interpersonal relations in the social world, we need not concern ourselves with the complex interplay between these differentiated relations to the world, claims to validity and basic attitudes. It is however important to note that this differentiation, according to Habermas, is itself characteristic of the process of rationalisation in a modern lifeworld.

social or subjective). This content has become detached from the diffuse background of the lifeworld and has taken on "the character of knowledge linked with a potential for reasoning, knowledge that claims validity and can be criticized, that is, knowledge that can be argued about on the basis of reasons."⁹ Our capacity to make these differentiations constitutes for Habermas a decentred understanding of the world.

With this decentred understanding of the world the lifeworld is put at a distance as the objective, social and subjective worlds are problematised.¹⁰ For example, the objective world is theorised in that propositions that had been unquestioned may now be true or false. Similarly, the social world is moralised in that norms that were previously taken for granted can now be valid or invalid. This means that the normativity of existing institutions becomes open to question. A hypothetical attitude has been introduced to the domain of social interaction that allows for a move to discourse, a more reflective form of communicative action.¹¹ These validity claims, to truth and to normative rightness, must be redeemed discursively, that is with the support of reasons, if the participants are to continue to orient themselves towards reaching mutual understanding.¹² If they do not resort to strategic action or to brute force, they will become involved in a discourse that anticipates a rationally motivated consensus. The participants will then

⁹ *Moral Consciousness and Communicative Action*, 138.

¹⁰ *Moral Consciousness and Communicative Action*, 107.

¹¹ *Moral Consciousness and Communicative Action*, 156.

¹² The claim to truthfulness is not redeemed discursively, that is by giving reasons in support of the claim, but rather through consistent behaviour on the part of the speaker who raises the claim, *Moral Consciousness and Communicative Action*, 59.

be engaged in a procedure of argumentation that tests a disputed validity claim's worthiness to be recognised.

The rationality proper to the communicative practice of everyday life points to the practice of argumentation as a court of appeal that makes it possible to continue communicative action with other means when disagreements can no longer be repaired with everyday routines and yet are not to be settled by the direct or strategic use of force.¹³

Discourse ethics relates specifically to the moralisation of the social world that occurs when the normativity of existing institutions is brought into question. These can no longer enjoy a naive social acceptance but are potential subjects of a practical discourse.

If a normative validity claim is called into question then the background consensus that plays an important action-coordinating function in everyday communicative practice is broken. Practical discourse is a procedure of moral argumentation in which "participants continue their communicative action in a reflexive attitude with the aim of restoring a consensus that has been disrupted."¹⁴ Agreement is produced if the participants collectively become convinced of something. This might involve the restoration of the intersubjective recognition of the old norm that had become controversial or its substitution with another claim that is newly recognised as valid.

Habermas's insistence that discourse ethics is cognitivist amounts to the claim that it represents a procedure of argumentation that satisfies the conditions for making impartial moral judgements. In other words, it maintains that norms can be given a rational justification. This is what it means to say that a claim to normative rightness is analogous to a claim

¹³ *The Theory of Communicative Action, Volume 1*, 17-18.

¹⁴ *Moral Consciousness and Communicative Action*, 67.

to truth. However this does not require us to deny the important differences between the two claims.¹⁵ While both can be redeemed discursively, there are no moral facts as such. Normative validity claims do not therefore reflect a moral "truth" in the same way that assertoric validity claims reflect propositional truth. We might also note that while the reality of nature does not depend on validity claims to truth, the social reality of an intersubjectively regulated form of life is dependent on the recognition of validity claims to normative rightness.

This asymmetry between claims to truth and normative rightness is highlighted if we contrast between the unequivocal relation between an existing states of affairs in the objective world and true propositions about them, and the relation between socially accepted norms and the question of their validity.

We must distinguish between the social fact that a norm is intersubjectively recognised and its worthiness to be recognised. There may be good reasons to consider the validity claim raised in a socially accepted norm to be unjustified. Conversely, a norm whose claim to validity is in fact redeemable does not necessarily meet with actual recognition or approval.¹⁶

The validity of a norm does not depend on its social currency but rather on the fact that it could rationally be justified in a practical discourse.

Finally, the differences between the validity claims to truth and to normative rightness reflect the fact that while both empirical knowledge of the objective world and moral knowledge of the social world are

¹⁵ *Moral Consciousness and Communicative Action*, 59-62, *Autonomy and Solidarity*, 256 and Thomas McCarthy *Ideals and Illusions*, 187-188. For an earlier formulation of the sense in which practical questions admit of truth, *Legitimation Crisis*, 102-110.

¹⁶ *Moral Consciousness and Communicative Action*, 61.

fallible, in that they acknowledge the "critical potential of superior future knowledge," our moral knowledge is provisional in a more far reaching sense.¹⁷ This is because of the intrinsic historicity of the social world. Social reality throws up unforeseen situations that then become objects of our moral knowledge. Unlike the objective world, the social world is constituted by historical and cultural processes that shape the interpretations we give to morally valid norms.¹⁸

By grounding discourse ethics in the theory of communicative action Habermas wants to make it clear that an impartial assessment of claims can only proceed dialogically, in terms of a real argumentation where the individuals concerned reach an agreement cooperatively. Norms are not justified through a rational procedure that an isolated individual could undertake in solitary reflection. It is not a matter of what an individual moral agent could will, without self-contradiction, to be a universal maxim. Nor is it a matter of representative parties in an original position choosing rationally principles of justice in isolation from each other behind a veil of ignorance. For Habermas, unlike Kant and Rawls, the justification of norms is necessarily a matter of whether or not a disputed norm is acceptable to the participants in a practical discourse that is actually carried out.

Real argumentation is required not only because it equalises power among the participants, though as we will see it does that, but because it is the only way in which a genuinely common will, generated by moral insight, could be expressed.¹⁹ In discourse we do not simply seek a fair

¹⁷ *Justification and Application*, 39.

¹⁸ We will return to this point in the next section when we discuss the relation between the justification of norms and their application.

compromise between participants, though we may often have to settle for a fair compromise if no norm that expresses a common will can be affirmed. What is highlighted in the shift from a monological to a dialogical moral point of view is the fact that the aim of a practical discourse goes well beyond the task of accommodating the initial moral intuitions of the participants. The aim is rather to clarify a common interest. Each of us involved in this real process of argumentation is called on to adopt the perspective of all the other participants.²⁰

To adopt an impartial point of view requires that we engage critically in a process of interpreting our individual needs and interests so as co-operatively to reach an agreement on norms that satisfy shared interests. Needs and interests are always interpreted in the light of cultural values and so this can only be undertaken dialogically, in an intersubjective, public encounter.²¹ This may well involve a moment of moral transformation for some, or perhaps all, of the participants, since the dialogical encounter engages them in a self-critical revision of their own need interpretations.²² Indeed such a moral transformation might also be necessary even if, while no norm is accepted as being in the common interest, the participants are to agree on a fair compromise. We can now

¹⁹ See especially Habermas's critique of Ernst Tugendhat in *Moral Consciousness and Communicative Action*, 68-76.

²⁰ See Habermas's comments on Mead in *The Theory of Communicative Action*, Volume 2, 94-96.

²¹ *Moral Consciousness and Communicative Action*, 68.

²² Seyla Benhabib *Critique, Norm and Utopia: A Study of the Foundations of Critical Theory*, New York: Columbia University Press, 1986, 313-316. For an interesting analysis of the political significance of need interpretation, Nancy Fraser "Women, Welfare and the Politics of Need Interpretation" and "Struggle over Needs: Outline of a Socialist-Feminist Critical Theory of Late Capitalist Political Culture", chapters 7 and 8 of her *Unruly Practices*.

see how the dialogical conception of impartiality in discourse ethics draws out the moral-theoretical implications of the paradigm shift from a philosophy of consciousness to a philosophy of intersubjective understanding. What we now need to assess is the argument that Habermas offers as a justification for this view of impartiality.

Justification of a Cognitivist Ethic

The justification of Habermas's procedure of moral argumentation as a universally valid impartial point of view takes as its starting point the unavoidable presuppositions of communicative action. In raising a validity claim a speaker takes on the obligation to support that claim with reasons if called on to do so.²³ By entering into a discourse about a disputed norm the participants must also presuppose rules of argumentation which guarantee that the only motivation driving the discourse is the rational force of the better argument.²⁴ Habermas suggests that the normative content of these rules ensures that no subject capable of speech and action is excluded from the discourse, that all participants are allowed to question any assertion, to introduce any assertion and to express their attitudes, desires and needs, and that the exercise of these rights is not to be prevented by coercion, whether

²³ This aspect of rational accountability is to be understood as an obligation that is immanent to speech acts. It is a distinguishing feature of communicative action. See "What is Universal Pragmatics?", especially at 59-65 and for useful comments, McCarthy *The Critical Theory of Jürgen Habermas*, 282-291 and White *The Recent Work of Jürgen Habermas*, 50-55. We have already discussed the structure of communicative action in the previous section.

²⁴ "A Reply to my Critics", 254-258 and *Moral Consciousness and Communicative Action*, 76-98, White *The Recent Work of Jürgen Habermas*, 55-58 and for a distinctive interpretation of these rules Benhabib *Situating the Self*, 29.

internal or external.²⁵ These presuppositions, expressed as rules, represent the general conditions of a co-operative search for a rationally motivated agreement.

These presuppositions have been characterised in terms of an "ideal speech situation."²⁶ It is more appropriate to speak of the idealising presuppositions that must be made by participants if they are communicatively to restore a disrupted normative consensus. They must assume that nothing but the force of the better argument is going to influence the outcome of the discourse.²⁷ This is how Habermas derives the rules of argumentation outlined above.

Every speaker knows intuitively that an alleged argument is not a serious one if the appropriate conditions are violated - for example if certain individuals are not allowed to participate, issues or

²⁵ *Moral Consciousness and Communicative Action*, 89.

²⁶ For a good discussion of this much misunderstood idea, McCarthy *The Critical Theory of Jürgen Habermas*, 306-310. Habermas now believes that the term "ideal speech situation" is misleading in that it seems to imply an ideal that we must realise in all discourses that are actually carried out. In fact the term was intended to describe the conditions under which claims to truth and normative rightness can be discursively redeemed, that is the general, unavoidable, idealising, communicative presuppositions that all participants must make if they are to engage in argumentation at all. See "A Reply to my Critics", 235-236, *The Philosophical Discourse of Modernity*, 322-323, *Moral Consciousness and Communicative Action*, 201-203, *Autonomy and Solidarity*, 160-161, 171 and note especially the tone of regret here at 260. For recent comments that provide a clear and detailed account of the role of these idealising presuppositions, *Justification and Application*, 54-60. For a typical misreading of Habermas on this issue see Walzer "A Critique of Philosophical Conversation." Steven Lukes gives a more incisive critical analysis in "Of Gods and Demons: Habermas and Practical Reason" in *Habermas: Critical Debates*, John B. Thompson and David Held (eds.), 134-148 but for Habermas's response, "A Reply to my Critics", 250-263 and *Justification and Application*, 57-58.

²⁷ Habermas had earlier discussed some of the implications of this approach for social criticism in terms of the suppression of generalisable interests, *Legitimation Crisis*, 111-117.

contributions are suppressed, agreement or disagreement is manipulated by insinuations or by threat of sanctions and the like.²⁸

Now, of course, when we actually engage in communicative action our idealising assumptions may not always be objectively correct. Indeed they may never be correct in a strict sense.²⁹ The point is that if we do not assume that the conditions under which we engage in argumentation at least approximate to a sufficient degree ideal conditions, that is conditions where these rules of argumentation are adhered to, then we could not be participating in a discourse at all. These presuppositions therefore make possible "the practice that participants understand as argumentation."³⁰ In cases where something other than the force of the better argument is actually in play, we will be acting under a counterfactual presupposition.³¹

²⁸ *Justification and Application*, 56. See also the discussion in *Moral Consciousness and Communicative Action*, 89-92.

²⁹ Habermas makes the point eloquently; "As little as we can do without the supposition of a purified discourse, we have equally to make do with 'unpurified' discourse", *The Philosophical Discourse of Modernity*, 323. On this tension between the actual and the ideal see also "A Reply to my Critics", 221, "Questions and Counterquestions", 197 and *Moral Consciousness and Communicative Action*, 203 where Habermas argues that the "factual force of counterfactual presuppositions" offers a bridge that Kant could not provide, between the realms of the intelligible and the empirical.

³⁰ *Justification and Application*, 31.

³¹ Habermas is not guilty of presupposing the possibility of a fully transparent, rationalistic, homogenised society. In fact he assumes that much of the background taken-for-grantedness of any intersubjectively shared lifeworld will remain opaque. He also assumes that modern societies will continue to be characterised by a plurality of interest positions (and indeed conceptions of the good in Rawls's sense). Discourse ethics is a response to pluralism and not an attempt to eradicate it. Our need for the justification of norms to regulate our social world actually increases with an ever greater diversity of lifestyles. This need "must be satisfied at higher and higher levels of abstraction. For this reason the consensual norms and principles become ever more general", *Autonomy and*

Rational discourses exist like "islands in the sea of everyday practice," serving as they do important social functions, not least of which is the legitimization of principles of justice.³² We must institutionalise such discourses in accordance with rules that regulate our public deliberations "with the goal of ensuring the probability of adequate fulfilment of demanding communicative presuppositions under temporal, social and practical limitations."³³ The institutionalisation of such

Solidarity, 171. We will discuss the implications of this increasing generality in the next section. See also McCarthy *Ideals and Illusions*, 188-190 and for an interesting discussion of this point, Brian Walker "Habermas and Pluralist Political Theory", *Philosophy and Social Criticism*, 18 (1992), 81-102. Habermas is also keen to point out that idealisation itself "leaves the identity of the participants and sources of conflict originating in the lifeworld untouched" so that "worldviews are not effaced but are given full play in discourse." This does not however preclude the possibility of moral transformation, discussed above, taking place in the course of a procedure of moral argumentation. The acceptance of the moral demands of justice will sometimes lead to ethical reflection that could transform collective identities. This point will be developed in section 3.4 when we will examine the case of Northern Ireland. Finally, we might also note here that, just as Habermas is not guilty of seeking to eradicate pluralism, neither is he guilty of assuming that any discourse could ever be completely free from the effects of power. The reconstruction of the pragmatic presuppositions of communicative action is intended to enable us to identify the use and abuse of power in discourse. We may come to realise how a discourse that had at the time seemed to approximate sufficiently ideal conditions, was in fact distorted by some subtle form of manipulation that had gone unnoticed. It is the reconstruction of the rules of argumentation that in this way enables us to be critical of the outcome of such a discourse. This is a condition of the possibility of distinguishing between more or less reasonable processes of deliberation. If this is not possible, and as I argued in section 1.3 above it does not seem to be possible within a Foucauldian perspective, then the whole project of legitimating principles of justice is fatally undermined.

³² *Justification and Application*, 56, also "A Reply to my Critics", 235.

³³ *Justification and Application*, 57. This is a matter for a discourse theory of law and politics which has been the subject of Habermas's most recent work. See especially *Faktizität und Geltung*, but for a brief statement of some of the themes of that major work "Three Normative Models of Democracy" *Constellations*, 1 (1994). An earlier work on this theme is "Law and Morality" in *The Tanner Lectures on Human Values, VIII*, Sterling M. McMurrin (ed.), Salt Lake City: University of Utah Press, 1988, 217-279. For a useful account of Habermas's

discourses, in the form of legal norms, is intended to facilitate an approximation to ideal conditions. Such an approximation would seem to be impossible, for reasons of the motivational and cognitive burdens involved, if argumentation were thought of simply in terms of the spontaneous outbursts of participants engaging in everyday communicative practice. It is the rule of law that allows the conditions of rational collective will-formation to take on a concrete institutional form.³⁴

In the next stage of the argument Habermas derives from these presuppositions, or rules of argumentation, a principle of universalization (U). This is to act as a bridging moral principle that will allow us to clarify the condition of normative validity.³⁵ Whether or not a norm could be discursively redeemed will depend on the satisfaction of (U), that

all affected can *freely* accept the consequences and the side effects that the *general* observance of a controversial norm can be expected to have for the satisfaction of the interests of *each individual*.³⁶

The justification of (U) as part of the logic of practical discourses is intended to refute the sceptic who maintains that norms cannot be rationally justified. This allows Habermas to introduce the principle of discourse ethics itself (D).

work on law prior to *Faktizität und Geltung*, Robert Shelly "Habermas and the Normative Foundations of a Radical Politics" *Thesis Eleven*, 35 (1993), 62-83.

³⁴ *Justification and Application*, 16.

³⁵ For a detailed reconstruction of this argument, William Rehg "Discourse and the Moral Point of View: Deriving a Dialogical Principle of Universalization" *Inquiry*, 34 (1991), 27-48.

³⁶ *Moral Consciousness and Communicative Action*, 93.

Only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse.³⁷

This is the test of justification that discourse ethics demands of any substantive principle of justice that is raised as a normative validity claim within the context of a particular form of life. So there are four layers here; first, there are the unavoidable presuppositions of argumentation expressed as rules; second, the moral principle (U) that is grounded in those presuppositions; third, the principle of discourse ethics (D); and fourth, substantive principles that are the subject matter of argumentation.

One important question that must be addressed is whether or not there are any substantive norms, or principles of justice, that could pass the universalizability test involved in discourse ethics. Perhaps there are no norms at all that would be equally good for all.³⁸ This has been the

³⁷ *Moral Consciousness and Communicative Action*, 93.

³⁸ In fact norms that can be equally good for all in a strict sense are not the only ones that could rationally be justified in a practical discourse. Such a norm (and "do not kill another human being" is an obvious candidate) is acceptable to all and would also seem to be equally good for all, but another norm that might be acceptable to all may be better for some than for others. For example the norm "everybody should receive from the state a basic income" may be acceptable to some, because it seems fair or the crime rate will go down or whatever, even though they will be worse off financially because they will have to pay higher taxes. On the other hand, this norm is acceptable to others in a more straightforward sense as they may not have to weigh the gain of the general observance of this norm against any significant loss. Now this norm, were it to be acceptable to all participants in a real practical discourse, may be said to articulate a shared interest without being equally good for all in a strict sense. See Maeve Cooke "Habermas and Consensus" *European Journal of Philosophy*, 1 (1993), 247-267, also McCarthy *Ideals and Illusions*, 189-190. This gives support to the criticism I made of Iris Young at the end of section 1.3. There I argued against Young, that impartiality may well require us to assert the differences between social groups, see *Justice and the Politics of Difference*, 96-121. This point also hopefully makes it clear that Habermas's concept of a generalisable (or shared) interest is more fluid and flexible than Rawls's list of primary goods. For brief but suggestive comments on how these two concepts

basis for much of the contextualist criticism that has been directed against Habermas, and we will confront it more directly in the next section. It is important to note here that Habermas differentiates between moral questions, which can in principle be decided rationally in terms of justice (which for him concerns the universalizability of interests), and evaluative questions, which are accessible to rational discussion only within the context of a concrete historical form of life, or a prior commitment to a particular conception of the good.³⁹ While evaluative, or ethical, questions, call for a distinctive use of practical reason, Habermas restricts the moral domain to matters of justice, or the generalisability of interests.⁴⁰

Our central concern here is whether or not Habermas has successfully defended a conception of impartiality that grounds a universally valid cognitivist ethic. Is his moral theory really built on inescapable presuppositions of argumentation or does it merely reflect his own view of an ideal form of communication? If this challenge, typical of the claims of contemporary sceptics, is convincingly to be deflected, much will depend on the arguments that have already been discussed. These

might be related, Baynes *The Normative Grounds of Social Criticism*, 151 and for a more extensive discussion Carol C. Gould "On the Conception of the Common Interest: Between Procedure and Substance" in *Hermeneutics and Critical Theory in Ethics and Politics*, Michael Kelly (ed.), 253-273. We might also note that a norm that is rationally justified from a dialogically impartial point of view may demand that some social groups give up certain privileges that they have come to recognise as being unjustifiable. This would also seem to suggest that an impartial norm is not necessarily equally good for all. The fact that justice benefits some social groups more than others should come as no surprise since it rectifies injustices that have clearly had consequences that have been to the advantage of some groups while causing others to suffer unnecessarily.

³⁹ *Moral Consciousness and Communicative Action*, 178, *Autonomy and Solidarity*, 248-249.

⁴⁰ See the essay "On the Pragmatic, the Ethical and the Moral Employments of Practical Reason" in *Justification and Application*, 1-18.

include Habermas's claim about the priority of communicative action and his reconstruction of the idealising presuppositions of communication as rules of argumentation that are intrinsic to the structure of language itself. But in defending his position against sceptical objections Habermas has also drawn on an argument first used by his colleague Karl-Otto Apel. If sceptics are to put forward their views as arguments, then they cannot avoid the pragmatic presuppositions of communicative action and these contradict, as a matter of fact, the content of their arguments.⁴¹

In order to convince, and not merely to cajole, manipulate or demand assent, the sceptic cannot escape the normative presuppositions of the practice of argumentation itself. Sceptics must presume that the position they defend is supported with the force of reason. This means that they will not convince their interlocutors by excluding certain people from the discussion, or by preventing certain claims from being discussed, or by using threats or sanctions to ensure that the discussion proceeds in the manner that they would favour. If the use of power is to be avoided, and it must be when we are considering matters of conviction, then the idealising presuppositions that Habermas reconstructs do indeed seem to be inescapable as rules of argumentation. The objections of sceptics therefore involve performative contradictions.⁴²

Habermas disagrees with Apel however with regard to the status of the transcendental-pragmatic argument they both use against sceptical

⁴¹ *Moral Consciousness and Communicative Action*, 79-82, 89-91.

⁴² The argument about performative contradiction runs through Habermas's critique of the philosophical heroes of contemporary critics of reason, especially in *The Philosophical Discourse of Modernity*. See Martin Jay "The Debate over Performative Contradiction: Habermas versus the Poststructuralists" in *Philosophical Interventions in the Unfinished Project of Enlightenment*, Axel Honneth et al. (eds.), Cambridge, MA: The MIT Press, 1992, 261-279.

objections. For Apel it counts as an ultimate justification (*Letztbegründung*) that is absolutely secure. For Habermas, however, the argument is fallible. According to him the identification of the inescapable pragmatic presuppositions of argumentation relies on a maieutic method that seeks to explicate the pre-theoretical intuitive know-how that the sceptic relies on even when denying it. What is required, as we have already noted, is a hypothetical reconstruction of presumably universal intuitions and competences.⁴³ This reconstruction, as opposed to the intuitive know-how itself, is fallible in the sense that we cannot dismiss *a priori* the possibility that the human life-form, within which the practice of argumentation is interwoven, will undergo future changes.⁴⁴ The reconstruction is also dependent on maieutic confirmation, that is on subjects coming to explicate their own pre-theoretical intuitive know-how for themselves. Within the paradigm of the philosophy of intersubjective understanding, an ultimate philosophical justification is neither warranted nor necessary. Habermas's moral theory is rather to be thought of as a reconstructive science that is susceptible to indirect corroboration.

In the last section we saw how reconstructive scientific research projects engage philosophy and the empirical sciences in a co-operative venture.⁴⁵ Empirical theories can use fallible philosophical reconstructions, of presumably universal bases of rational experience, in particular contexts of research. The success of the empirical theory can

⁴³ *Moral Consciousness and Communicative Action*, 95-98. For a more extended discussion of his differences with Apel, *Justification and Application*, 76-88.

⁴⁴ This is, however, an empty possibility, *Justification and Application*, 83-84.

⁴⁵ *Moral Consciousness and Communicative Action*, 15-16, 39, 116-119.

then safeguard the validity of the philosophical reconstruction. It is Lawrence Kohlberg's work on moral development that Habermas sees as the principal source of empirical corroboration for discourse ethics.⁴⁶

On the basis of his empirical research, Kohlberg claims to identify certain universal forms of moral reasoning which can be understood as a six stage sequence in the development of the individual's capacity for moral judgement.⁴⁷ The first two stages are at what Kohlberg calls the pre-conventional level, the next two at the conventional level and the two highest stages are at the post-conventional level. The moral judgement of a child at the pre-conventional level is oriented only to immediate consequences of action. At the first stage this is simply a matter of avoiding punishment while at the second stage it extends to a straightforwardly instrumentalist view of all human relations. An identification with others, such as family, social groups, the political community, takes priority over immediate consequences at the conventional level. At the third stage this is a matter of making judgements on the basis of what others approve of while at the fourth stage it is more particularly oriented towards the maintenance of the social order.

There is a shift in moral judgement at the post-conventional level towards moral principles that do not depend for their validity on the

⁴⁶ See "Moral Development and Ego Identity" in *Communication and the Evolution of Society*, 69-94, *Moral Consciousness and Communicative Action*, 33-41, 119-133, 171-188. Habermas outlines the differences between Kohlberg's moral-philosophical theory and discourse ethics in "Justice and Solidarity: On the Discussion Concerning 'Stage 6'" in *Hermeneutics and Critical Theory in Ethics and Politics*, Michael Kelly (ed.), 32-52.

⁴⁷ What follows, in this and the next paragraph, is an exceptionally brief sketch. A somewhat more detailed summary of the stage sequence is provided by Stephen White in *The Recent Work of Jürgen Habermas*, 66-68.

individual's identification with particular social groups. At the fifth stage this is a matter of adhering to a legal system that facilitates each individual's pursuit of their own personal values. At the highest stage, moral judgement is guided not so much by concrete legal norms but rather by universal principles of justice that affirm the equal rights of each individual. Legal norms would be judged in accordance with the demands of these universal principles. This can be thought of in terms of a procedural test of the legitimacy of substantive principles from an impartial point of view.

In constructing this account of moral development in terms of six successive stages, Kohlberg is guided by moral-theoretical assumptions as to the superior moral adequacy of a higher stage. For example a higher stage should be more adequate in taking the claims of others into account. But his empirical research provides indirect confirmation for those philosophical assumptions, since these assumptions would be called into question if they did not fit with the psychological facts of the moral development of the subjects of his empirical investigations. This is a good example, according to Habermas, of the way in which philosophy and empirical research can complement each other, since it shows us one way in which a reconstructive science can be indirectly corroborated through such a coherence test.⁴⁸

Habermas also believes that the theory of communicative action can add support to Kohlberg's theory by grounding his moral stages in a logic of development. Conceiving of discourse as a more reflexive continuation of communicative action involves reconstructing stages of interaction in terms of perspective structures. It is with the moralisation

⁴⁸ *Moral Consciousness and Communicative Action*, 37-39, 116-119.

of the social world that norms of action are subordinated to principles and eventually, at the highest stage of moral development, to procedures for testing substantive principles. This requires of the participants the higher-level cognitive structures involved in adopting a hypothetical attitude to socially accepted norms.⁴⁹ Such a progressively decentred understanding of the world accounts for the learning process involved in the shift from conventional to post-conventional levels in Kohlberg's theory.⁵⁰ At the post-conventional level socially current norms and expectations are brought into question and assessed from an impartial point of view. In this sense morality at the post-conventional level becomes autonomous from ethical life.

What if a sceptic were to refuse to engage in argumentation at all, anticipating the performative contradiction trap that Habermas has laid for all who are foolish enough to enter into his language game? I have already argued that Habermas quite convincingly maintains that the sceptic cannot withdraw entirely from the communicative practice of everyday life, at least not without embarking on a path of self-destruction.⁵¹ But while communicative action cannot be bypassed, is

⁴⁹ *Moral Consciousness and Communicative Action*, 168.

⁵⁰ Habermas maintains that the development of higher-level cognitive structures characterises the process of tradition becoming reflexive in general and should not be thought of in terms of the historical development of one particular tradition. If the members of any culture begin to take a hypothetical stance towards their own traditions, then the processes of learning and adaption required of them involve the same logic of development as they would in any other culture, *Autonomy and Solidarity*, 254. Habermas's arguments in relation to social evolution are developed in great detail in *Communication and the Evolution of Society* and especially in *The Theory of Communicative Action, Volume 1*.

⁵¹ This point was made in the discussion of the lifeworld towards the end of the last section. See especially *Moral Consciousness and Communicative Action*, 99-102.

there any reason why the sceptic must move beyond the certitudes of ethical life? Why shift from conventional moral reasoning to accept the abstract formalism of post-conventional morality?⁵²

It must be noted that it is only those norms that are called into question that become subjects of moral argumentation. This leaves many other aspects of our ethical life as taken for granted certitudes of the lifeworld. We need not, indeed we cannot, question all norms at once. Nonetheless any norm can be problematised, including Habermas's reconstruction of the normative content of the pragmatic presuppositions of argumentation. When a norm is questioned it would seem that the shift to discourse is inevitable. The refusal to adopt a hypothetical attitude towards such a norm (take any norm that discriminates on the basis of race or gender) endorses a conservative attachment to a discredited tradition that can no longer serve as a basis for rational agreement.⁵³ In so far as we seek to restore the background normative

⁵² An interesting exchange on this matter took place within the context of a symposium on Charles Taylor's *Sources of the Self in Inquiry*, 34 (1991). See Martin Löw-Beer "Living a Life and the Problem of Existential Impossibility", 217-236 and Taylor's response "Comments and Replies", 237-254, here at 251-253. Löw-Beer argues that since a principle of equal respect is a presupposition of communication, discourse ethics can explain why it is impossible to avoid a moral, or an impartial, point of view. Taylor, on the other hand, maintains that it is not the presuppositions of communicative action but rather the acknowledgement of a crucial human good ("the way in which human identity is formed through dialogue and recognition", 252) that makes the moral point of view inescapable. It seems to me that these arguments collapse into each other (as Taylor seems to suggest, 253) if we bear in mind that the socialisation of the individual depends on the reproduction of the lifeworld through the communicative achievements of its participants. The procedure for testing norms that discourse ethics justifies can also, as we will see, affirm certain structural features of any good life. The good that Taylor sees as crucial in this context would, it seems to me, have to be included as one of these structural features.

⁵³ See Benhabib's similar point, that inequality is either irrational or unjust, *Situating the Self*, 33.

consensus within a modern lifeworld, there is no alternative to post-conventional moral reasoning over disputed norms.

Justice and the Advantages of Dialogical Impartiality

I have been suggesting that it is the fact that discourse ethics conceives of an impartial point of view dialogically rather than monologically that supports the central argument of this thesis. Discourse ethics provides the most adequate moral philosophical basis available to us for the necessary task of justifying a procedural test for the legitimacy of substantive principles of justice in a modern society. On the basis of the paradigm shift from the philosophy of consciousness to the philosophy of intersubjective understanding, Habermas's version of the Kantian project is more successful than Rawls's in achieving its end.⁵⁴ Here I would like briefly to summarise the main reasons for favouring Habermas's approach over that of Rawls, as the best theoretical articulation of the demands of post-conventional moral reasoning.⁵⁵

Discourse ethics represents an attempt to redeem Hegel's aspiration to overcome both the abstract individualism of Kant's moral universalism and the concrete particularism of Aristotelian moral contextualism.⁵⁶

⁵⁴ The best available discussion of the work of Habermas and Rawls is Baynes *The Normative Grounds of Social Criticism*.

⁵⁵ Habermas makes the case for the superiority of discourse ethics as against Rawls's theory most explicitly in "Justice and Solidarity" but see also *Moral Consciousness and Communicative Action*, 66-67, 198, *Autonomy and Solidarity*, 158, 199-202, 271, *Justification and Application*, 25-30, 48-54, 92-96. In contrast with Habermas's encounter with scepticism, the contest between competing post-conventional moral theories cannot be based on arguments about a logic of development, but rather it must be decided on the basis of philosophical argument, "Justice and Solidarity", 32-35.

⁵⁶ *Moral Consciousness and Communicative Action*, 201.

Habermas achieves this to the extent that morality is grounded in the intersubjective understanding of participants in moral argumentation. This allows him to link justice with solidarity and concern for the common good by elaborating certain structural features of the good life. These are the social bonds of an intersubjectively shared web of mutual recognition that constitute the well-being of any community. The protection of these social bonds is a necessary condition of respect for the dignity of each individual.⁵⁷ As well as grounding the individual's equal right to respond freely to the offer of a normative validity claim, discourse ethics at the same time requires that each participant overcome an egocentric perspective by adopting the perspective of all the others. Solidarity and empathetic sensitivity among all participants is thereby built into an impartial point of view. One implication of this is that autonomy is reformulated in intersubjectivist terms since according to this account "the free actualization of the personality of one individual depends on the actualization of freedom of all."⁵⁸

By grounding his procedure in everyday communicative practices, Habermas sees no need to introduce a veil of ignorance into the description of an impartial point of view. The idealising presuppositions

⁵⁷ It is for this reason that the arguments of Taylor and Löw-Beer, as noted above, collapse into each other.

⁵⁸ *Moral Consciousness and Communicative Action*, 207. On the role of morality in protecting the vulnerable individual through the protection of the web of intersubjective recognition on which the individual's identity depends see also *Justification and Application*, 109. This should make clear the superiority of discourse ethics on this point as against Walzer's hermeneutics. Walzer's weakness in this regard was discussed at the end of section 2.3 above. An incisive discussion of Habermas's notion of autonomy, and how it can, with some modification, be defended from Foucauldian criticism, is given by Maeve Cooke "Habermas, Autonomy and the Identity of the Self" *Philosophy and Social Criticism*, 18 (1992), 269-292.

that participants actually do make already require them to adopt a hypothetical stance towards their own interpretations of their needs and interests. In argumentation, characterised as a real encounter with others, we adopt the perspective of all participants, or as Habermas puts it, we engage in the practice of ideal role taking.⁵⁹ The notion of an original position is therefore redundant.⁶⁰ The lifting of the veil of ignorance means that nothing is excluded as a potential subject of discourse. It also means that the participants can bring to the encounter knowledge of everything that particularises them.

Participants in argumentation do not choose principles of justice in isolation from each other by asking themselves what they would find acceptable if they did not know the position they were to occupy in society. Habermas's explanation of a moral point of view involves a much more radical break from an egocentric perspective than is achieved by the parties to Rawls's original position. Those parties choose principles on the basis of a calculation of private interests.⁶¹ In contrast,

⁵⁹ Habermas's discussion of ideal role taking draws on the work of Mead, although "practical discourse transforms what Mead viewed as *individual, privately enacted* role taking into a *public* affair, practiced intersubjectively by all involved", *Moral Consciousness and Communicative Action*, 198. See also "Justice and Solidarity", 38-41.

⁶⁰ I suggested at the end of section 1.4 that the original position can at best act as a test to clarify whether or not our public discourse has brought us to a rationally justified consensus on a principle of justice. Even though Okin's interpretation of the original position shows us that the parties must care about each other as much as they do about themselves, this does not address the real issue of how the participants are enabled to do this. By explaining an impartial point of view in terms of a real discourse, we can see how an encounter with collective concrete others facilitates and makes possible shared moral insight.

⁶¹ In "Contractualism and Utilitarianism", Thomas Scanlon maintains that in choosing principles of justice, the parties to a contract are moved by "the desire to be able to justify one's actions to others on grounds they could not reasonably reject", 116, and that this requires that they adopt the perspectives of other

a participant in discourse can only make a moral judgement socially, in a co-operative venture with all the others concerned. An impartial point of view must therefore be thought of as a reflective form of communicative action, where the presuppositions of argumentation constrain all the participants to ideal role taking.⁶²

It is clear in Rawls's most recent work that he understands the rationality of the choosing parties to be framed by the reasonableness of the conditions of choice that constitute the original position. These conditions are themselves justified in relation to a model conception of the citizen. This model conception of the citizen is however based on the deeply embedded convictions of a particular political tradition. It cannot therefore provide the grounds for a procedure of rational justification as such. Rawls's constructivism is rooted in a particular context in a way that Habermas's procedure of rational justification, being grounded in the

parties, 122. But the ideal role taking that Scanlon discusses is, according to Habermas, something that is always already taking place once we engage in discourse. Since this involves the unavoidable pragmatic presuppositions of communication it takes us beyond the perspective of contractualism altogether. See "Justice and Solidarity", 37-41 and Warnke *Justice and Interpretation*, 92-94. Kenneth Baynes points out that, unlike Habermas, Scanlon fails to distinguish adequately between social norms that regulate behaviour from the general rules for reaching agreement, or, in the terms that I have been using, substantive principles from procedures of justification, *The Normative Grounds of Social Criticism*, 117-118. It seems to me that this is linked to Scanlon's defence of a contractualist position, in that he begins with individuals who come together to find norms that will regulate their social world. Habermas of course takes as his starting point the necessary conditions for the communicative reproduction of the lifeworld. If we also consider the fact that in Scanlon's approach real argumentation does not necessarily have to take place, it seems reasonable to suggest that Scanlon's account of a moral, or an impartial, point of view only partially overcomes the problems associated with Rawls's monological procedure.

⁶² "Justice and Solidarity", 40.

rational reconstruction of the idealising presuppositions of communication as such, is not.⁶³

The context-dependence of Rawls's procedure is related to the fact that Rawls is not only clarifying the demands of impartiality, but he also wants to advocate particular substantive principles of justice. It should come as no surprise that substantive principles will be shaped by the deeply held convictions of particular traditions. But, as we have already seen, Habermas maintains that this task of advocating substantive principles must be kept strictly separate from the philosophical task of clarifying an impartial point of view. The latter task provides us with a procedure of rational justification that can test the legitimacy of substantive principles but it leaves the generation and the testing of those principles up to participants in particular contexts. Habermas could therefore agree with Walzer's critique of Rawls's substantive principles, that they are insufficiently sensitive to particular contexts. But he would add another criticism that Walzer could not endorse, that Rawls's procedure of justification is insufficiently independent of particular contexts.

Discourse ethics theorises impartiality in a way which can overcome the difficulties that Rawls's project encounters when faced with the challenges of communitarianism, post-structuralism and feminism. If we recall, in the first chapter I argued that Rawls's attempt to isolate political aspects of our morality from our more comprehensive moral views prior to reflection on principles of justice is untenable. Rawls is forced into this attempted isolation of the political because his monological understanding of an impartial point of view is designed to avoid moral

⁶³ *Justification and Application*, 28. See also Ingram "The Limits and Possibilities of Communicative Ethics for Democratic Theory", 305-306.

controversy. It seeks to do so by accommodating the moral intuitions of all parties to the overlapping consensus.

Rawls's strategy of avoidance implies that we must exclude from our public deliberations anything about which it is presumed that we will not agree. This precludes the possibility of a transformation of the initial moral intuitions of the parties and offers us a rather static model of the demands of impartiality. It also precludes the possibility of any genuinely collective insight in our public deliberations about justice. Without such collective insight it is difficult to see how any progress can be made in our attempts to provide a normative justification for principles of justice that are to regulate the institutions and practices of our society. Rawls's invitation to the citizens of a democratic society to enter the original position would certainly not lead to any significant political achievements without some such collective insight. Despite this, his own account of an impartial point of view does little to enlighten us as to how the real moral differences between us are fairly to be dealt with. As we saw in the first chapter, these differences may well lead us to question the conditions of choice as laid down in Rawls's description of the original position. If this is so then we will have at least one good reason for not taking up his invitation.

In the face of the communitarian challenge to the Kantian project, Habermas can affirm the priority of right by reconstructing the rules of moral argumentation. But this in no way restricts the potential subject matter of a discourse. There is no need to isolate in advance political aspects of morality and to attempt (in vain) to avoid moral controversy. We can only separate moral questions, that admit of a rational consensus in terms of common interests, from ethical questions through the

clarification of an actually carried out public discourse.⁶⁴ It is through on-going deliberation within a vibrant public sphere that we will be enabled to test and to reflect on each others' moral intuitions in a way that protects the social bonds of an intersubjective web of mutual recognition while respecting the dignity of each individual.⁶⁵

In response to the post-structuralist challenge, Habermas accepts that the lone theorist cannot clarify in isolation what is involved in adopting an impartial point of view. Rawls's model conception of the citizen would itself have to be subjected to the moralising gaze of all participants in a discourse about justice in a democratic society. Indeed Habermas's own reconstruction of the pragmatic presuppositions of moral argumentation is held to be fallible and to be susceptible to indirect empirical corroboration. With the demise of the philosophy of consciousness, the possibility of an ultimate philosophical justification must be rejected. The potential biases of the moral theorist therefore have nowhere left to hide as impartiality is reconceptualised in terms of a public dialogue.

With regard to the feminist challenge, there is no good reason for not considering the internal justice of the family to be a subject of discourse. Furthermore by stressing the intrinsic link between justice and solidarity, Habermas reiterates the need for actual discourses to take place if we are to achieve shared moral insights. These insights could not be generated by accommodating initial moral intuitions but only by putting those intuitions to the test in a real encounter with collective concrete others. Since discourse demands that we adopt a hypothetical stance towards our

⁶⁴ Baynes "The Liberal/Communitarian Controversy and Communicative Ethics", 74.

⁶⁵ Walker "Habermas and Pluralist Political Theory", 84-86.

interpretations of our needs and interests, each participant engages in argumentation in full awareness of the fact that the encounter itself could represent a moment of moral transformation.

It would appear then that there are a number of good reasons for taking discourse ethics to represent the most adequate articulation of the demands of post-conventional moral reasoning. With regard to questions of democratic legitimacy, it has clear advantages over Rawls's theory of justice. The extent to which it can incorporate the better insights of a variety of contextualist criticisms of the Kantian project gives sufficient evidence for that. But there a number of other contextualist criticisms that could be aimed more directly at Habermas's work. It is to a consideration of these remaining criticisms that we must now turn.

3.3 MORALITY AND ETHICAL LIFE

As we have noted, Habermas insists that discourse ethics is valid universally. Contextualists, from a variety of perspectives, argue that any attempt to defend moral universalism not only fails to fulfil its promise to provide impartial standards or a critical foothold beyond all particular perspectives, but that it conceals from itself its own cultural prejudices, totalising tendencies and male biases. In our current cultural climate the recognition of difference is undoubtedly a matter of real concern. We have already considered, in the first chapter, the ways in which this concern is articulated theoretically in the work of communitarians, post-structuralists and feminists. In such a climate, universalist moral claims appear so controversially strong that they carry with them a dauntingly onerous burden of proof. Habermas does not flinch from the challenge of carrying this burden, despite the perilous state of the theoretical terrain that must be traversed. His response is to ground discourse ethics in the pragmatic presuppositions of everyday practices of communication. I have argued that this grounding does justify an impartial point of view that can transcend the ethnocentric prejudices of a male, liberal, white, Western bourgeois worldview.

Habermas is able to overcome the contextualist challenge more effectively than Rawls because of the way in which he incorporates Hegelian insights into Kantian moral theory, most notably in his characterisation of moral discourse as a reflective form of communicative action. But since, according to Habermas, morality is indeed embedded in ethical life, this means that we must make a crucial distinction, one that I referred to briefly in the last section. This is the distinction between a moral employment of practical reason, one which deals with questions that can in principle be decided rationally in terms of the universalisability

of interests, and an ethical employment of practical reason, one which deals with evaluative questions that are accessible to rational discussion only within the context of a concrete historical form of life or a particular conception of the good.¹ Habermas restricts the scope of the moral domain by limiting it to questions concerning the universalisability of interests.

In this section I will focus directly on some of the issues at stake in the debate between Habermas and contemporary contextualists, an encounter that updates the agenda set by Hegel's critique of Kant.² In order to do so I will consider Habermas's distinction between the moral and the ethical employments of practical reason in relation to the arguments of three recent contributions to this debate. These arguments raise important questions for discourse ethics as a procedure that claims

¹ *Moral Consciousness and Communicative Action*, 178, also *Autonomy and Solidarity*, 266-268 and especially "On the Pragmatic, the Ethical and the Moral Employments of Practical Reason" in *Justification and Application*, 1-17. I will leave aside the pragmatic employment of practical reason. While this is certainly of some significance in the network of communicative processes which constitute the type of deliberative politics that Habermas advocates, it is not of direct relevance to our concerns here. For some of Habermas's recent reflections on that communicative network see "Three Normative Models of Democracy."

² The most impressive recent alternatives to Kantian moral theory have come from contemporary neo-Hegelian and neo-Aristotelian critics of proceduralism such as Charles Taylor *Sources of the Self* and *The Ethics of Authenticity*, Cambridge, MA: Harvard University Press, 1992, Alasdair MacIntyre *After Virtue, Whose Justice? Which Rationality?* and *Three Rival Versions of Moral Inquiry* and Bernard Williams *Ethics and the Limits of Philosophy*, London: Fontana, 1985. Habermas provides excellent critical commentary on these three alternatives in *Justification and Application*, on Williams, 21-25, on Taylor, 69-76, and on MacIntyre, 96-105. I will discuss an aspect of Taylor's work below but I have chosen to focus, in the earlier parts of this section, on the work of two theorists who do not claim to present strongly contextualist alternatives to Habermas's approach, but who rather make explicit attempts to mediate between the universalist and contextualist positions.

to test, in an impartial manner, the legitimacy of substantive principles of justice.

Seyla Benhabib advocates a "post-conventional *Sittlichkeit*", a vision of ethical life thought of from the standpoint of a universalist morality. This involves a rejection of Habermas's strict separation of moral and evaluative questions.³ Georgia Warnke advocates a hermeneutic conception of political philosophy, where an interpretive pluralism about appropriate principles of justice in any given society is thought to be inevitable. No procedure therefore, discourse ethics included, could possibly guarantee a consensus on any given principle.⁴ Charles Taylor advocates a "politics of recognition", where the importance of the cultural survival of certain, particular, collective goals can, at times, legitimately outweigh the importance of the state's uniform treatment of all its citizens. Taylor argues that Kantian proceduralism, in contrast to his own view, is insufficiently hospitable to cultural difference.⁵ We need to

³ See *Situating the Self* generally. The reference to a "post-conventional *Sittlichkeit*" is here at 11. Benhabib seeks to incorporate contextualist insights into a universalist position.

⁴ See *Justice and Interpretation* generally. On the inevitability of interpretive pluralism, see 11-12. Warnke, in contrast to Benhabib, can be thought of as a contextualist who seeks to incorporate universalist insights into that position.

⁵ See *Multiculturalism and "The Politics of Recognition"*, 25-73, especially 60-61. This essay represents an attempt by Taylor to draw out the implications of his own philosophical hermeneutics for political questions of cultural difference. That philosophical position is developed in *Philosophical Papers, I: Human Agency and Language*, Cambridge, UK: Cambridge University Press, 1985, *Philosophical Papers, II, Sources of the Self* and *The Ethics of Authenticity*. For a more direct challenge to Kantian proceduralism see his "The Motivation behind a Procedural Ethics" in *Kant and Political Philosophy: The Contemporary Legacy*, Ronald Beiner and William James Booth (eds.), New Haven: Yale University Press, 1993, 337-359. Two other essays in which Taylor explicitly distinguishes his philosophical position from that of Habermas are "Language and Society" in *Communicative Action*, Axel Honneth and Hans Joas (eds.), 23-35 and "Inwardness and the Culture of Modernity" in *Philosophical*

assess the extent to which these rival positions undermine the claim that Habermas's discourse ethics offers the best available theoretical resource for the necessary task of justifying substantive principles of justice in modern societies.

It would appear then, that despite the paradigm shift from the philosophy of consciousness to the philosophy of intersubjective understanding, many of Habermas's critics maintain that his universalist moral theory has not gone far enough in incorporating Hegelian insights into the Kantian project. There are at least two remaining sets of Hegelian objections that we must consider. The first set concerns the formalism of Kantian moral theory. Given its exclusive stress on proceduralism, is discourse ethics devoid of moral content? If it is to avoid this emptiness, must it make some substantive moral claims that are inconsistent with formalism? I will deal with these objections in relation to Benhabib's work. The second set, which I will consider in relation to Warnke's work, concerns the idealising abstraction from ethical life that is involved in moral discourse. Does this render it insensitive to the real context of particular moral disputes? Can discourse be practically effective given its separation of rationally motivated insight from empirical attitudes? Finally, in relation to Taylor's work, I will discuss the ways in which the moral and ethical employments of practical reason are best to complement each other in relation to the legitimacy of substantive principles of justice.

The Scope of the Moral Domain

The moral theory Seyla Benhabib develops in *Situating the Self* is a form of interactive universalism that draws heavily on Habermas's work.

Despite this, I think it will prove to be instructive to highlight the significance of the ways in which her version of discourse (or communicative) ethics differs from that of Habermas. Benhabib's project is a post-Enlightenment reconstruction of the modern ideals of moral and political universalism through a dialectical engagement with the sceptical concerns of communitarians, feminists and postmodernists.⁶

Benhabib interprets the objection to Kantian formalism as the claim that any procedural moral theory faces an unavoidable choice between triviality and inconsistency. She argues that as a testing procedure for moral norms communicative ethics can evade this dilemma.⁷ As we will recall, Habermas himself notes that norms are generated not by philosophy but by real life.⁸ He is however insistent that moral philosophy can explain and ground a procedure of moral argumentation that could allow us to test the intersubjective validity of disputed norms that are thrown at us in everyday communicative practice. According to Benhabib what this procedure achieves is the placing of substantive limitations on our moral intuitions. It yields standards of what is morally permissible or impermissible, without telling us what is the most morally meritorious norm of action in any given context.

Benhabib argues that Habermas unnecessarily relies on the idea of consensus as a guarantee of the validity of a norm. According to her

⁶ *Situating the Self*, 2.

⁷ *Situating the Self*, 34.

⁸ *Moral Consciousness and Communicative Action*, 204.

version of discourse ethics, the moral principle (U) is redundant. Its consequentialist formulation renders it too indeterminate to be of use even as an adequate universalizability test for negative duties. For example, given the existence of masochists, the principle "Do not inflict unnecessary suffering" could not be justified as a morally valid norm. She maintains that we could overcome such counter-intuitive outcomes if (U) were abandoned along with its guarantee of consensus. The norms of universal respect and egalitarian reciprocity, which can be established as the normative content of the rules governing discourse, along with the principle (D), are adequate in themselves as a moral test. The infliction of unnecessary suffering would then have to be ruled out if the procedure of moral argumentation is not to be undermined itself. This shifts the emphasis from consensus as an outcome of discourse to the moral relationships that could sustain the practice of reaching reasoned agreement as a way of life.

It is on this basis that Benhabib calls for a "post-conventional *Sittlichkeit*." One implication of this is that Habermas's distinction between a moral and an ethical use of practical reason can no longer be maintained. There is no longer the possibility of distinguishing between a moral norm that expresses a generalisable interest and an agreement that is premised on a prior commitment to the good of a shared way of life. In Benhabib's version of communicative ethics the scope of the moral domain is extended to include practical reasoning concerning particular conceptions of the good. While accepting that a universal, rational consensus is unattainable on such issues, we can, Benhabib maintains, allow for intersubjective moral debate and reflection on evaluative questions.⁹

The restriction of the moral domain to questions of justice in Habermas's sense, that is questions that admit of a rational consensus, is, from Benhabib's perspective, untenable. Unfortunately this overlooks an important and distinctive feature of valid moral claims. For Habermas these moral claims can be given a strong cognitive justification. They are not validated simply with regard to the procedure of argumentation but rather because of the fact that they express a common will. This reflects a communicatively achieved moral insight into a generalisable interest as all participants come to this conviction together. We know that any norm that passes (U)'s test is right because the grounds that support it are rationally justified. Benhabib claims to defend ethical cognitivism in that valid norms must be supported with reasons, but this claim is weakened since these norms need not express a common will.¹⁰ She must accept this consequence as the price to be paid for such an extensive moral domain.¹¹

Benhabib also suggests that her concern to distance herself from strictly formalist Kantianism leaves her less vulnerable than Habermas to the sting of contextualist criticism. Her weak deontological moral theory commits her to certain substantive presuppositions. She maintains that such a commitment is unavoidable.¹² Communicative ethics is justified as an "historically self-conscious universalism" that establishes the principles of universal respect and egalitarian reciprocity as "our philosophical clarification of the constituents of the moral point of view

⁹ *Situating the Self*, 75.

¹⁰ On ethical cognitivism see *Situating the Self*, 49-50.

¹¹ See also Maeve Cooke's critique of Benhabib in her "Habermas and Consensus".

¹² *Situating the Self*, 74.

from *within* the normative hermeneutic horizon of modernity."¹³ She presents this as an alternative to Habermas's strategy of reconstructing presumably universal competences of all communicative actors in the context of a modern lifeworld.

But in fact Benhabib's position is hardly distinguishable at all from Habermas's own views on this matter. Benhabib's defence of post-conventional morality and the conception of modernity that informs it depend very much on Habermas's reconstruction.¹⁴ While she maintains that other interpretations of the requirements of post-conventional moral competence cannot be ruled out in principle, this has also been conceded by Habermas. It was precisely this point that he was making in presenting his reconstruction as fallible while rejecting Apel's notion of an ultimate justification. Furthermore he has stressed the fact that his defence of discourse ethics as against other post-conventional moral theories, such as those of Rawls and Scanlon, is based on philosophical arguments that are "fuelled by historical experience" and not with reference to empirical science.¹⁵ As we have seen, these arguments turn on the shift from a monological to a dialogical conception of an impartial point of view. We will recall that if the individual's dignity is to be respected then the social bonds of the intersubjectively shared web of mutual recognition on which that individual's identity is dependent must also be protected.¹⁶ This elaboration of the structural features of a good

¹³ *Situating the Self*, 30.

¹⁴ Habermas's reconstruction is elaborated in the two volumes of *The Theory of Communicative Action*. For evidence of Benhabib's dependence on, what we might call this critical Weberian account of modernity, *Situating the Self*, 32-33, 40-42, 80-82, 86-87, 225-228.

¹⁵ *Moral Consciousness and Communicative Action*, 175.

life that Habermas includes in his deontological conception of justice can be thought of as the articulation of substantive presuppositions that take him, with Benhabib, beyond the strict formalism of Kant.

There is another important matter at issue between Benhabib and Habermas regarding the scope of the moral domain. This relates to the sensitivity of discourse ethics to particular moral contexts and to morally relevant differences between individual actors. According to Benhabib, Habermas's conception of an impartial point of view is too rationalistic and not situated enough in the context of gender and community.¹⁷ We saw in the first chapter how Benhabib, in presenting her criticisms of Rawls, draws on Carol Gilligan's feminist critique of moral theories that privilege justice and rights over care and concern for particular concrete others.¹⁸ Habermas is also accused of relegating care to the margins of a moral domain that is centred on issues of justice.¹⁹ The conception of moral maturity implied depends on a male bias that emphasises "our dignity and worth as moral subjects at the cost of forgetting and repressing our vulnerability and dependency as bodily selves."²⁰ While not wishing to underestimate the importance of our moral concern for justice in political and socio-economic arrangements, Benhabib maintains that the moral disputes most likely to preoccupy us relate to personal

¹⁶ "Justice and Solidarity", *Moral Consciousness and Communicative Action*, 200 and *Justification and Application*, 67-69.

¹⁷ *Situating the Self*, 8.

¹⁸ A revised version of the essay "The Generalized and the Concrete Other" in included in *Situating the Self*, 148-177.

¹⁹ *Situating the Self*, 183.

²⁰ *Situating the Self*, 189.

decisions demanded of us in relationships, at work, in the social interaction of our everyday lives.²¹

I have already outlined the way in which justice and solidarity are considered to be two sides of the one coin in Habermas's defence of discourse ethics. Our concern with both individual rights and the care of the other have the same root, the protection of the social bonds that constitute a web of intersubjective recognition. Moral reflection is impossible without empathetic sensitivity among the participants.²² Strangely enough Benhabib admits, quite rightly, that Habermas has incorporated this concern for the other into his conception of an impartial point of view, but without withdrawing her criticisms.²³ I suspect that her continuing unease is due to Habermas's restriction of the moral domain to questions that admit of rational justification in terms of generalisable interests. Benhabib could, I believe, relieve herself of this unease by considering the fact that, in Habermas's recent work, evaluative questions do admit of a rational solution although this will be arrived at through an ethical, and not a moral, employment of practical reason.

Evaluative questions do not yield an answer that is valid for everyone. In seeking rationally to answer the question "what is right for me?" or "what is right for us as a particular group sharing certain ideals?"

²¹ *Situating the Self*, 184-185.

²² *Moral Consciousness and Communicative Action*, 199-203. Habermas insists that this is simply a requirement of rational justification itself. It is not therefore to be thought of as a task of working out a proper balance for the roles of reason and emotion in moral discourse, "Justice and Solidarity", 40-41.

²³ *Situating the Self*, 189-190. Benhabib's criticisms of Rawls's monological proceduralism, which I upheld in section 1.4, remain valid. The criticism cannot however be pressed, even in a diluted form, against Habermas's dialogical conception of impartiality.

we must appeal to standards of authenticity. This involves a critical task of hermeneutic self-clarification. What is at stake is a matter of identity that depends on a prior commitment to a particular consciously pursued way of life. Moral questions on the other hand are not resolved in relation to any particular form of life but they are concerned with the justification of principles that could be acceptable to all.²⁴ We can only work out whether a question is moral or evaluative after we have engaged in argumentation.

Take for example the issue of abortion. Despite the fact that this has been a subject of public debate for some time, it would appear that there is no prospect of reasonable agreement with regard to the rights involved in this debate. The question therefore demands an ethical employment of practical reason in so far as different answers are given depending on the different ethical contexts in which it might be asked. There is however a moral question involved, but it is on a different level. It is the issue as to how the forms of life that give different solutions to the question; "is abortion right for me / for us?" can co-exist under conditions of equal rights.²⁵ It is through our failure to resolve the dispute about abortion as a moral question in itself that leads us to accept first, that it actually requires an ethical solution and second, that this in turn gives rise to a new moral issue.²⁶ Of course many of the personal decisions that Benhabib is concerned to bring in from the margins of traditional moral

²⁴ See especially *Justification and Application*, 4-8.

²⁵ Habermas *Justification and Application*, 59-60.

²⁶ We might note that this requires the kind of open public debate that Rawls's strategy of avoidance seemed to preclude. Through argumentation we can work out whether a dispute admits of a moral or an ethical solution without deciding what is and what is not a matter of political morality in advance.

theory will admit of a rational solution, but often this solution would have an ethical, and not a moral, character.

It would appear then that Habermas and Benhabib agree that ethical questions, which by Habermas's definition do not admit of a normative consensus, can nonetheless be answered rationally. Furthermore, even though they define the moral in different ways, they also agree on the deontological point that moral norms constrain reasonable conceptions of the good.²⁷ Given this, it is not clear that Benhabib gains anything by abandoning the distinction between the moral and the ethical, nor indeed does it appear to be necessary. What remains to be seen however is whether or not Habermas gains very much by holding on to the distinction. We will return to this matter later in this section when we attempt to explore the ways in which the moral and the ethical are related to each other with respect to questions of democratic legitimacy. What is clear here is that Habermas, no less than Benhabib, has incorporated many of the better insights of contextualists into his account of discourse ethics. In doing so he has shown his moral theory to be premised on a more situated, and less pure, conception of reason than many critics suppose.

Hermeneutics and Discourse

In *Justice and Interpretation* Georgia Warnke stresses the self-interpretive dimension of mutually educational conversations about justice within the context of a particular tradition. Warnke traces the impulse for the recent interpretive turn in moral and political theory to a dissatisfaction with the abstract formalism of Kantianism.²⁸ She

²⁷ *Situating the Self*, 187.

maintains that while political philosophy can encourage these self-interpretive conversations in a democratic society, a certain interpretive pluralism about the principles of justice that would be appropriate to that particular society is unavoidable. This rules out the possibility of a consensus on any moral principle. Despite this apparent subordination of morality to ethical life, Warnke is aware of the possible dangers involved in the implied relativism of her position. She seeks to defuse these dangers by insisting that hermeneutic conversations presuppose conditions of fairness.²⁹ It seems to me that this cannot be done without a more explicit appeal to Kantianism than Warnke seems willing to make.

The interpretive understanding of principles of justice that has followed from this hermeneutic turn in recent political philosophy reflects a shift from Kant towards Hegel in its conception of a theory of justice as an "attempt to uncover and articulate the principles already embedded in or implied by a community's practices, institutions and norms of action."³⁰ From the perspective of hermeneutics, morality and justice do not have to be constructed or discovered independently of particular cultures since they themselves are embedded within the ethical context of historical communities. Moral principles must therefore be interpreted rather than derived from any abstract idealising procedure. We have already considered this position, and exposed its serious weaknesses, in our discussion of Walzer's work in the second chapter.

Warnke is concerned to provide theoretical resources that would defend the hermeneutic approach to matters of justice from the charge that it must inevitably yield either a conventionalist or a subjectivist

²⁸ *Justice and Interpretation*, 3-4.

²⁹ *Justice and Interpretation*, 157.

³⁰ *Justice and Interpretation*, 5.

reading of our ethical life. A conventionalist reading would lead to an uncritical, conservative attachment to tradition with the consequence that the moral protection of minority rights and individual autonomy become dangerously inadequate. A subjectivist reading would reflect the personal biases and preferences of an individual interpreter thus undermining any claim to justify moral principles for the whole community.³¹

Warnke considers whether or not there are rational standards of interpretation that might enable hermeneutics to escape from the shadows of conservative conventionalism and partisan subjectivism. Discourse ethics, with its claim to provide a context-independent procedural test for substantive norms, is an obvious starting point in the quest for such critical standards. Warnke shares Benhabib's doubts about the ideal of consensus that is so crucial to Habermas's procedure of justification for moral norms. She wonders whether (U)'s test is simply too strict for any

³¹ In the first half of the book Warnke works through a careful analysis of the contributions of Walzer, Rawls and Dworkin without managing to relieve herself of worries about conventionalism and subjectivism. As we have already seen, Walzer believes that hermeneutic interpretations of the shared understandings of a particular community can allow for an immanent critique of practices that deviate from that understanding. Warnke rightly points out that it is not clear how one critic's interpretation can guarantee agreement and so Walzer's account of the substance of justice for his own society remains a subjectivist one, *Justice and Interpretation*, 30. She also points out that Rawls's appeal to an overlapping consensus fails to resolve this problem since the model conceptions of moral personality and a well-ordered society on which it depends build on what Rawls's critics take to be a selective reading of our public political culture, *Justice and Interpretation*, 54-58. Dworkin's account of legal interpretation, see especially *A Matter of Principle* and *Law's Empire*, tends to deviate from its own hermeneutic implications, *Justice and Interpretation*, 78-80. Despite this however, it allows us to think of constrained legal judgement as an educational process of self-development where we learn something about ourselves in trying to understand the law in the context of a test case. But the value of such an education might be put in question if the constraints involved cannot in principle rule out even sexist or racist interpretations of the law, *Justice and Interpretation*, 88.

norm to pass or indeed whether there are any generalisable interests at all.³² Warnke notes Habermas's acceptance that under conditions of pluralism, and an ever greater diversity of lifestyles, morally justified norms become ever more general and abstract and that, furthermore, many disputes will turn out to reflect particular and not generalisable interests.³³ In such a case what is called for is a fair compromise and not a consensus, though this does of course require morally justified procedures for compromising.

Warnke responds to this by claiming that it is unlikely that we would even agree on what would constitute fair conditions of compromise. However it must be noted that, according to Habermas, moral theory itself can never guarantee a consensus, either on a norm or on a procedure of compromise. It can tell us what a morally justified procedure of justification involves but it does not inform us as to the content of that procedure nor, as we will see, could it ever ensure that the participants will act morally.³⁴ Warnke's criticism is not altogether convincing for another reason. In the case of reasonable yet conflicting particular interests, it seems plausible to argue that a fair compromise would constitute a generalisable interest, in protecting the conditions for a democratic form of life for example, on which a rational consensus could certainly not be ruled out in principle. This helps us to understand the nature of the moral question that is raised in the dispute about abortion.

³² *Justice and Interpretation*, 96-97.

³³ See for example, *Moral Consciousness and Communicative Action*, 205 and *Justification and Application*, 91.

³⁴ See for example "Lawrence Kohlberg and Neo-Aristotelianism" in *Justification and Application*, 113-132, here at 127-128.

With regard to Habermas's view, that moral norms become more abstract and general in modern societies, Warnke maintains that this occurs to such an extent that, if these norms are not to become entirely irrelevant, the concrete disputes in which they are brought to bear will enmesh us once again in the interpretive problems from which discourse ethics promised an escape. Habermas does however insist on a distinction between the justification of a moral norm and its application.³⁵ The application of a norm requires a hermeneutic effort to undo the decontextualisation that was necessary to give it a rationally grounded justification.

While justification does not depend on any particular ethical context, impartial application proceeds interpretively in the light of all information relevant to the context of the actual dispute. Nonetheless application, no less than justification, requires the use of practical reason and must be carried out from a moral point of view. The idea of impartiality expressed in justificatory discourses as a principle of universalization appears in a discourse of application as a principle of appropriateness.³⁶ The cognitive operation involved in applying the appropriate valid norm in a given case is integrated with empathetic concern for those affected in the particular circumstances of the situation. This further strengthens Habermas's claim to have given care for the concrete other its due in his interpretation of the moral point of view.

³⁵ *Moral Consciousness and Communicative Action*, 181-182, *Justification and Application*, 36-39. See also Klaus Günther "Impartial Application of Moral and Legal Norms: A Contribution to Discourse Ethics" in *Universalism Vs. Communitarianism*, David Rasmussen (ed.), 199-206.

³⁶ *Justification and Application*, 37.

But what norms could possibly be justified independently of any concrete context? What Habermas seems to have in mind here is a set of moral norms, the validity of which has been established in advance, that we must choose between in seeking to apply the appropriate norm in a concrete context. He mentions human rights as examples of such norms since they clearly embody generalisable interests.³⁷ These can, he maintains, be given a strong cognitive grounding, one that Benhabib has, perhaps inadvertently, given up on. For example, murder is wrong because the norm "do not kill" expresses a common will in protecting a generalisable interest in life. The justification of this norm is in no way dependent on a particular conception of a good life.³⁸ This is all that it means to say that justification is not context dependent.

Habermas assumes that there are a number of moral norms, for example those expressing negative duties such as "do not deceive" or positive duties such as "keep your promises", that have *prima facie* validity since they appear to represent norms that all could will. We might also include "do not inflict unnecessary suffering," to return to one of Benhabib's objections that Warnke endorses, and another norm "do not interfere in the sexual practices of consenting adults."³⁹ Now the existence of masochists no longer seems to invalidate the former norm, since in a discourse of application it might be decided that the latter and not the former is appropriate in a concrete case, say of a particular type

³⁷ *Moral Consciousness and Communicative Action*, 205.

³⁸ *Justification and Application*, 62.

³⁹ *Justice and Interpretation*, 97.

of sado-masochistic sex. The former norm retains its validity even if it is deemed to be inappropriate in this particular instance.⁴⁰

The fact that moral justification must be supplemented with a contextually-sensitive discourse of application further emphasises the fallibilism of Habermas's account. In acknowledging the critical potential of superior future knowledge Habermas admits that our interpretations of morally valid norms must be provisional as they can change in the light of new circumstances. This awareness of the historical nature of the social world reveals the extent to which Habermas has appropriated the insights of hermeneutics.⁴¹

We must return to the Hegelian objection that discourse ethics is practically ineffective because its abstraction from ethical life leaves it with a serious motivational deficit. Rationally motivated insight is separated from empirical attitudes. I already pointed out that Habermas limits moral theory to the justification of valid norms and so freely admits that it could never guarantee that participants will act morally.⁴² It must be borne in mind however that if it is successful in the former task then it will have achieved much. While his self-limiting conception of moral theory may be disappointing to some, the expectation that philosophy could provide sufficient motivation for moral action on its own would

⁴⁰ I think that this relationship between the justification and the application of moral norms allows for greater flexibility and complexity than does Walzer's approach to substantive principles of justice. The assumption that is fundamental to complex equality is that there will be a neat fit between spheres of justice and the principles that are intrinsic to each particular sphere. As I suggested in the second chapter, this is simply not complex enough.

⁴¹ *Justification and Application*, 39.

⁴² *Justification and Application*, 12-17, 33-35, 127-128.

seem to overburden philosophy with a task that, given the demise of metaphysical worldviews, it can no longer accomplish.⁴³

Habermas accepts that moral insight is compatible with a weakness of will and so its only motivating power is that an actor will have no good reason to act otherwise.⁴⁴ The gap between moral judgement and moral action must be compensated for with the anchoring of moral insight in the participants' internalisation of the authority of the abstract principles embodied in discourse ethics. Ultimately the internalisation of the authority of principles will depend on processes of socialisation that are constitutive of a form of life that can meet discourse ethics halfway. There must be a "modicum of congruence" between morality and practices of socialisation that could promote this internalisation as well as socio-political institutions that will embody to some extent post-conventional ideas about law and morality.⁴⁵

⁴³ *Justification and Application*, 74-76.

⁴⁴ *Justification and Application*, 33.

⁴⁵ *Moral Consciousness and Communicative Action*, 207-208. It is this theme that has occupied Habermas in his most recent writings, especially in *Faktizität und Geltung*. This point may give us some idea as to how discourse ethics might guide us with regard to the possible clash between certain human rights and local arrangements regarding principles of distributive justice. In section 2.3 above I mentioned the example of a controversy that might arise among citizens of a relatively wealthy country who realise that they will have to change their own patterns of distribution if they are to take sufficiently seriously the rights of people who are starving as a result of famine. If such a basic human right as the right not to die of starvation is to be taken seriously, we must seek to create global institutions that would have some legal right to draw on the resources of countries that can afford to make a contribution to the setting up a long-term project that could overcome effectively the causes of the suffering that people caught in such disastrous circumstances have to endure. The creation of such institutions will depend very much on the outcome of a political struggle that is barely under way. Of course ultimately these considerations point us in the direction of a world state but I cannot pursue any possible justifications for such an arrangement here.

These achievements are the result of an historical social struggle. It would be absurd to think that they were the tasks of the moral philosopher or the theorist of justice alone. This is the reason why Habermas refrains from advocating particular substantive principles of justice. Such concrete decisions must be left up to the participants in a particular form of life. The ethical use of practical reason can guide the action of those who seek to ensure that their particular form of life better supports a universalist morality. As we will see below, moral and ethical reflection are complementary and very often we will be required to use both in the context of a particular dispute about justice.

This discussion of the work of Benhabib, with her concern for personal decision making, and of Warnke, with her focus on the interpretation of substantive principles of justice in particular contexts, makes it clear that the ethical employment of practical reason is of great significance. Until recently Habermas had stressed moral discourse to such an extent in his work that the significance of ethical matters seemed to have been overlooked.⁴⁶ Both Warnke and Benhabib have however, in different ways, abandoned the distinction between moral and ethical questions. I have argued that they are unwise to do so. The relevance for modern ethical life of the distinctive form of moral discourse elaborated in Habermas's work has certainly not yet been exhausted.

It seems to me that the shortcomings of Warnke's proposal for a hermeneutic conversation can be drawn on to illustrate this point. Such a conversation foregoes the aspiration to a normative consensus but aims rather at an ongoing dialogue, one which does not attempt to overcome

⁴⁶ It is only with the essays collected in *Justification and Application* that Habermas began to turn his attention towards the ethical employment of practical reason in relation to questions of public discourse. His concern with ethico-political discourses is central to the arguments of *Faktizität und Geltung*.

interpretive pluralism. This dialogue will be mutually educational if we are to be genuinely open to other interpretations of the principles of justice that are to regulate our social interaction. Warnke is explicit in maintaining the need for some constraints on interpretation so that the conditions of the conversation are fair.⁴⁷ She turns to Habermas in elaborating the procedural rules of discourse ethics and also in pointing towards his social theory as a way of identifying and overcoming distortions in such conversations. She even invokes the idea of a reconstructive science as an empirical support for such a theory.⁴⁸ What she fails to recognise however is the extent to which this brings her away from Hegel back towards Kant. She stops short of accepting fully Habermas's conception of moral discourse, but it seems to me that if we are concerned to protect the conditions for a democratic form of life, then nothing less than this can finally save us from the dangers of conventionalism and subjectivism. While no substantive principles of justice are offered, discourse ethics retains its critical function as a fallible, yet universally valid, procedure of moral argumentation.

Recognition and Ethical Patterning

In his essay "The Politics of Recognition" Taylor raises the question of Kantian moral theory's sensitivity to cultural particularity. He begins with a clear and convincing holist account of personal identity. According to this account, the identity of an individual is constituted, at least in part, by relations with others.⁴⁹ We come to a self understanding dialogically,

⁴⁷ *Justice and Interpretation*, 155.

⁴⁸ *Justice and Interpretation*, 148.

dependent as we are on a web of intersubjective recognition. Modern politics is characterised by the fact that individual citizens demand equal recognition from the state. This demand has come to be articulated theoretically in at least two different ways. A politics of equal dignity, inspired by Kant, demands equal rights for all citizens by virtue of their all having the potential to live an autonomous life. On the other hand a politics of difference, inspired by post-structuralism, demands that we acknowledge the particular identity of an individual, group or culture. In its strongest versions this implies that we must acknowledge the equal value not just of each citizen's potential for autonomy but "the equal value of what they have made of this potential in fact."⁵⁰

Advocates of the politics of difference charge defenders of the politics of equal dignity with insensitivity to cultural particularity, a charge that Taylor supports. He finds Kantian moral theory, with its stress on equal individual rights, to be ill-equipped for the important task of safeguarding collective identities. Taylor gives two reasons for this. First, Kantianism tends to advocate a procedure of impartiality as a set of rules for defining individual rights. It insists that these rules must be applied in a uniform manner across all cultures. Second, this kind of proceduralism asserts a priority of right that is suspicious of collective goals.⁵¹ He presents an alternative "politics of recognition" that respects basic rights while also allowing for a liberal state to espouse a strong

⁴⁹ *Multiculturalism and "The Politics of Recognition"*, 32. It is this kind of account that I defended in section 1.2 above. It should be clear by now that Habermas also considers the identity of the self to be dialogically constituted.

⁵⁰ *Multiculturalism and "The Politics of Recognition"*, 42-43.

⁵¹ *Multiculturalism and "The Politics of Recognition"*, 60.

collective goal, such as the survival of its own distinctive cultural tradition.⁵²

But Taylor also seeks to maintain a scathingly critical distance from the "subjectivist, half-baked neo-Nietzschean" judgement that all cultures are of equal worth.⁵³ He finds this strong post-structuralist claim, that all cultures are of equal value not only in potential but in fact, to be somewhat ridiculous. He argues that we certainly must be open to the potential value of learning something new from a dialogical encounter with a different culture. We must respect other cultures by approaching them with an initial presumption of equal worth.⁵⁴ Indeed, in this way we actually acquire an enriched self understanding. However we must also accept that we do in fact learn more from some cultures than from others. What could be more homogenising than to demand that we must find all cultures to be of equal worth?⁵⁵ It is surely absurd to expect that encounters with each other culture would be equally significant in enriching our own self-understanding? Taylor suggests that if our

⁵² In *Multiculturalism and "The Politics of Recognition"*, 51-61, Taylor reaches his conclusion, that this alternative to Kantianism is necessary, from an examination of the argument made by some Quebeckers, that the state's legislation should reflect the fact that it is a "distinct society." He is keen to point out however that so long as diversity is respected and fundamental rights protected, this is still a liberal model of politics. It is, however, a model that is organised not around a procedure of impartiality, but rather a definition of the good life. The work of Axel Honneth presents a interesting alternative attempt to ground morality on the concept of recognition "Integrity and Disrespect: Principles of a Conception of Morality Based on a Theory of Recognition" *Political Theory*, 20 (1992), 187-201 and for a much more extensive discussion *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, Cambridge, UK: Polity Press, 1994.

⁵³ *Multiculturalism and "The Politics of Recognition"*, 70.

⁵⁴ *Multiculturalism and "The Politics of Recognition"*, 66-73.

⁵⁵ *Multiculturalism and "The Politics of Recognition"*, 71.

recognition of other cultures and collective identities were granted so cheaply, it could hardly count as the authentic expression of respect that is sought by groups and cultures who wish to have the particularity of their identities acknowledged.

There are a number of difficulties with Taylor's approach. He neither establishes the claim that Kantian moral theory is insensitive to cultural particularity nor can the alternative he presents successfully avoid facing some serious objections. While his criticisms of Kantianism may carry some weight with regard to the proposals of those liberals who conceive of impartiality in a monological way, they are not at all convincing when levelled at discourse ethics.

As we have seen, Taylor suggests that the safeguarding of collective identities competes with the uniform treatment of citizens in relation to equal individual rights. Certain basic rights, though not the most fundamental liberties, can be trumped for the sake of ensuring that a distinctive cultural form of life will be carried forward by future generations. This might for example legitimately restrict citizens to the use of a particular language in business or in relation to their children's education.⁵⁶

In response to Taylor, Habermas argues that collective rights could only be thought to be in competition with equal individual rights if the internal relation between private and civic autonomy were overlooked. According to him

private legal persons cannot even gain equal individual liberties unless they themselves, by jointly exercising their autonomy as citizens, arrive at a clear understanding of the legitimate interests and standards involved and reach agreement on those aspects and criteria

⁵⁶ These are the kinds of example that Taylor mentions in relation to the Quebec case, *Multiculturalism and "The Politics of Recognition"*, 55.

according to which equal things should be treated equally and unequal things unequally.⁵⁷

Any and every legitimate system of rights must be implemented by democratic means. Legal subjects have an intersubjectively constituted identity so any system of rights must protect both individual liberties and "the integrity of the individual in his or her identity forming life context."⁵⁸ For this reason cultural and social differences must be taken into account if rights are to be implemented democratically. This presupposes that the particular needs of distinctive cultures and social groups are articulated and justified in an open public discourse.⁵⁹ The democratic implementation of a system of rights must be sensitive to the different life contexts in which the identities of individual legal subjects are secured. Taylor is therefore wrong to claim that Kantian moral theory must ignore cultural and social differences in implementing equal individual rights. He is also mistaken in his implication that there is no internal relation between collective rights and the protection of individual liberties.⁶⁰

⁵⁷ "Struggles for Recognition in Constitutional States" *European Journal of Philosophy*, 1 (1993), 128-155, here at 131.

⁵⁸ "Struggles for Recognition in Constitutional States", 132.

⁵⁹ In this regard Habermas discusses the ways in which differences in the experiences of women and men must be taken into account in any attempt to guarantee equal opportunities to exercise equal individual liberties, "Struggles for Recognition in Constitutional States", 132-134 and for a detailed discussion *Faktizität und Geltung*, 493-515. Again this stress on the public articulation of particular needs enables him to evade the problems Rawls encounters in the face of the challenges of post-structuralism and feminism.

⁶⁰ Habermas "Struggles for Recognition in Constitutional States", 136-137 but see also Will Kymlicka *Liberalism, Community and Culture*, Oxford: Clarendon Press, 1991.

Taylor also suggests, in presenting his alternative, that policies which aim at the survival of a distinctive culture should not be seen as "just providing a facility to already existing people."⁶¹ These policies seek to ensure that the collective identity of that particular culture be carried forward in the future and so they are designed to actually create new members of a community. It is not enough to guarantee the protection of the life contexts in which the particular identities of existing persons are secured, but rather we must ensure that the distinctive culture survives through "indefinite future generations."⁶²

But why should this be so? Certainly there is a sense in which the protection of the life context in which the identities of existing persons are secured might involve the support of their attempts to impart to the next generation the value of keeping their distinctive culture alive. But it might be the case that the next generation do not share the same passion for maintaining that distinctiveness. In other words, the earlier generation might fail in its attempt to instil in its children the conviction that their distinctness should be cherished. In this case the particular culture may indeed fail to survive but surely this cannot be avoided. The protection of identity-forming life contexts is not to be thought of as "an administrative preservation of cultural species."⁶³

One further problem with Taylor's approach is that the right which each of us has to equal respect in our identity-forming context seems to depend, in his account, on the initial presumption that our distinctive

⁶¹ *Multiculturalism and "The Politics of Recognition"*, 59.

⁶² Note Taylor's criticism of Kymlicka, *Multiculturalism and "The Politics of Recognition"*, 40-41, n. 16.

⁶³ Habermas "Struggles for Recognition in Constitutional States", 142.

culture is of equal worth with other cultures. It is presumed to be of equal worth in relation to its having "something important to say to all human beings."⁶⁴ Why should the recognition and respect of our distinctive collective identity have anything to do with such a contribution? Again Taylor's difficulty here seems to be connected to his overlooking the way in which individual rights and the respect of collective identities are internally related. It is not because a particular culture might have something of value to say to all other cultures that the individuals who identify themselves with that culture should be treated equally by the state. It is simply because that culture represents the identity-forming life context of those individuals that we must recognise and respect the distinctiveness of that culture as a necessary requirement of the equal treatment of all citizens.⁶⁵ While his critique of post-structuralism is undoubtedly cogent, Taylor himself unwisely departs from Kantianism, at least of the kind espoused in discourse ethics, on this matter. The appeal to an initial presumption of equal worth is simply unnecessary to justify the recognition and protection of collective identities in modern constitutional states.⁶⁶

This issue of the recognition of collective identities clears up a number of questions regarding moral and ethical employments of practical reason in relation to democratic legitimacy. Habermas has now made it clear that he does not consider it possible for any constitutional

⁶⁴ *Multiculturalism and "The Politics of Recognition"*, 66.

⁶⁵ Habermas "Struggles for Recognition in Constitutional States", 141-142 and Susan Wolf "Comment" in *Multiculturalism and "The Politics of Recognition"*, 75-85, here at 78-81.

⁶⁶ This protection is of course subject to the particular culture's capacity to affirm the demands of justice.

state to be ethically neutral. The on-going democratic implementation of any system of rights depends on the incorporation of political goals "including those goals which are articulated in collective struggles for recognition."⁶⁷ In other words, the particular collective identities that are represented in any one state give a certain ethical shape to the political culture of that state. Legal norms always apply in a particular political form of life, to the citizens of a specific republic, within a certain geographically delimited territory. They must therefore depend on a particular society's networks of interaction.

Habermas argues that we can continue to maintain that impartiality is the core of justice, that ethical considerations are subordinate to moral questions, and that the right has priority over the good, while at the same time accepting that in the medium of law

setting normative rules for modes of behaviour is receptive to the goals set by the political will of a particular society. For this reason, every legal system is *also* the expression of a particular form of life and not merely a reflection of the universalist features of basic rights.⁶⁸

From this it seems clear that for Habermas ethico-political discourse, in the form of hermeneutical self-interpretive reflection, does play an important role in procedures of democratic legitimation. The citizens of any specific republic must clarify for themselves their own ethical self-understanding. Of course this will involve an on-going struggle for recognition of those groups that have been marginalised in the past. Immigrant cultures challenge the majority culture to broaden their horizon

⁶⁷ "Struggles for Recognition in Constitutional States", 138.

⁶⁸ "Struggles for Recognition in Constitutional States", 138. See also Habermas's "Citizenship and National Identity: Some Reflections on the Future of Europe" *Praxis International*, 12 (1992), 1-19, especially at 12.

of self-understanding.⁶⁹ Gay activists challenge citizens to see themselves not just as a collectivity of heterosexuals. National minorities challenge majorities to reinterpret their identities so as to allow for the equal treatment of all the state's citizens.⁷⁰

So while collective identities must be allowed to flourish in their particularity, the challenge to the citizens of any specific constitutional state is to engage in a critical process of hermeneutic self-clarification so as to achieve an integrated political culture.

This political integration of the citizens ensures loyalty to a shared political culture. The latter is rooted in an interpretation of the constitutional principles from the perspective of a nation's historical experience; thus, the interpretation cannot be ethically neutral.⁷¹

The self-understanding of a political community is disputed within a common horizon of interpretation, but according to Habermas, such disputes, in any particular constitutional state will

revolve around the best interpretation of *the same* basic rights and principles. These then provide the fixed point of reference for any constitutional patriotism which situates the system of rights in the historical context of a polity. The cognitive grasp of rights and principles must be linked to the citizens' motives and sentiments; for without such a motivational base, they cannot become the driving force for the project - understood here in a dynamic sense - of establishing an association of free and equal subjects. For this

⁶⁹ Habermas has discussed at length the implications of immigration in this regard, especially in the particularly volatile context that is of special interest to him, in post-Unification Germany, "Struggles for Recognition in Constitutional States", 145-153, "Citizenship and National Identity", 13-18 and see also his most recent biting critique of contemporary right-wing German nationalism in "The Second Life-Fiction of the Federal Republic: We Have Become 'Normal' Again" *New Left Review*, 197 (1993), 58-66.

⁷⁰ We will examine the case of Northern Ireland in detail in the next section.

⁷¹ "Struggles for Recognition in Constitutional States", 144.

reason, the common political culture in which the citizens identify themselves as members of their community is *ethically patterned*.⁷²

Habermas is advocating a form of constitutional patriotism which involves a commitment to the implementation in a particular political culture of universally valid norms that are justified through moral discourse. The ethical pattern of such a patriotism must be compatible with a consensus among diverse cultures on a procedure of democratic legitimation.⁷³

We have already explored in detail the way in which Habermas grounds the procedure of moral discourse in the pragmatic presuppositions of communicative action. Ethico-political discourse complements such a procedure by allowing legal principles that express generalisable interests and universally valid moral norms to be embedded in the context of a particular form of life. We can now, at last, see how Habermas's work presents us with that more adequate version of liberal holism that was anticipated in the discussion of the communitarian critique of Rawls. While moral discourse grounds the liberal concern with just institutions that guarantee individual rights, ethico-political discourse reflects the holist nature of a commitment to the historical embodiment of particular just institutions.⁷⁴ Ethico-political discourse

⁷² "Struggles for Recognition in Constitutional States", 144.

⁷³ This is not of course based on the isolation of the political domain that is required in the construction of Rawls's overlapping consensus. See also Kenneth Baynes "Liberal Neutrality, Pluralism and Deliberative Politics" *Praxis International*, 12 (1992), 50-69.

⁷⁴ This discussion should also justify the claim that I made in chapter 2, that hermeneutics is at best an important aspect of, but never an adequate substitute for, a philosophical conception of an impartial point of view. Hermeneutic self-clarification in the form of ethico-political discourse comes into play once moral norms, that make up the universalist code discussed in section 2.3, are institutionalised in historical contexts.

also takes into account the fact that deliberative democracy requires both the critical assessment of political identity and the articulation of particular needs that the post-structuralist and the feminist challenges to Rawls's procedure demanded.

Hermeneutic theories of justice are partial in that they limit themselves to reflecting on justice in purely ethical terms. I believe that the alternative discussed in this chapter effectively overcomes the weaknesses of such an approach. This is because Habermas's dialogical conception of impartiality presents moral and ethical reflection as complementary employments of practical reason in our attempts to resolve disputes about justice. Finally, I now want to show how discourse ethics is superior to Walzer's hermeneutics in helping us to clarify the demands of justice in the context of one particular deeply divided society; Northern Ireland.

3.4 THE CASE OF NORTHERN IRELAND

We have now seen how Habermas's theory of communicative action involves a paradigm shift to a philosophy of intersubjective understanding that enables him to ground and justify a dialogical conception of impartiality. We have looked in some detail at this justification and in the last section I argued that, for all its ambition, discourse ethics can draw on such a wealth of argumentative resources in its own defence that it is sufficiently well fortified to withstand the challenges of some of its most astute contextualist critics. In this final section I will examine a concrete dispute about justice in one particular Western society. This concrete issue is one that dominates the public agenda in that society. The discussion will, I hope, support my claim that Habermas's theory of justice has important advantages over the contextualist alternative that we have considered in most depth in this thesis, that of Walzer. The concrete issue I refer to is the question of the legitimacy of the constitutional status of Northern Ireland.

If we wish to tie justice to the traditions of particular communities, as Walzer does, then a divided society like Northern Ireland should prove a challenging test case. This is of course partly because the notion of community is particularly problematic in such a context. By trying to apply Walzer's hermeneutics to this case I want to highlight the limits of that approach as an interpretive guide in assessing actual demands for justice in Northern Ireland. The real test here is whether or not the theory enables us to clarify the conditions that must be satisfied if a normatively justified solution to the particular conflict being analysed is to be achieved. It seems to me that Habermas's discourse theory attains a considerably higher degree of success than Walzer in relation to this test. My claim is that an analysis of this particular dispute about justice

reveals that Habermas's discourse theory can both incorporate the best insights of Walzer's hermeneutics and also give some indication as to how its limits might be transcended.

While I will be emphasising the strengths and weaknesses of the theoretical contributions of Walzer and Habermas, I also hope to say something constructive about Northern Ireland. I will offer a critique of one argument for the maintenance of the Union which at first glance appears to have much in common with Habermas's approach. What emerges from this critique is the suggestion that the problem of justice in Northern Ireland can adequately be resolved only through the engagement of the members of each community in a critically-reflexive, self-transformative process of reinterpreting their identities. While this conclusion certainly promises no easy road ahead, it may provide some reasons for cautious optimism.

Justice and Pluralism in Northern Ireland

While liberalism has always stressed the plurality of individual plans of life, Walzer, as we will recall, draws our attention to the social dimensions of pluralism. It is the social meaning of goods which determines their just distribution. This meaning cannot be grasped outside of the concrete context of a particular historical tradition. There is, he argues, no ahistorical idealised perspective from which we could derive general substantive principles of justice. It is the plurality of communities in the present and through history that is central to Walzer's concerns. He is critical both of atomistic individualism and of the cultural imperialism involved in the claim to universal validity for substantive standards of justice which have been derived from particular perspectives. Both liberalism and Marxism have been guilty of generalising universally from assumptions that have a limited cultural

relevance.¹ For Walzer of course "every substantive account of distributive justice is a local account."² Standards of justice are embedded within the shared understandings of particular historical communities. Individuals still choose to pursue certain goods in their life plans but the meaning of those goods and the norms of distribution appropriate to them can only be interpreted and understood within the concrete social context in which the individual is embedded. From Walzer's perspective, demands for justice make no sense except within the context of a particular community which is constituted by the shared understandings of its members about the meaning of social goods.

We noted earlier that the merit of Walzer's pluralism, from the perspective of both hermeneutics and post-structuralism is its openness to otherness, its refusal to succumb to the temptation of seeking a closed and totalising system or a reductionist and abstract unifying principle of justice. Walzer respects the particularity of local communities and is hermeneutically sensitive to the context of other traditions and their moral worlds. He does not see pluralism as an unfortunate modern dilemma which we must learn to tolerate but rather as a cause for celebration as we contemplate the infinite multiplicity of possible cultures and possible human lives.³ This celebration of the plurality of cultures, each with their own norms of justice, makes us more sensitive to otherness and to the need for us to limit our own conception of what justice demands to its finite and limited context. We must respect both the boundaries which

¹ See for example "Philosophy and Democracy" and "A Critique of Philosophical Conversation."

² *Spheres of Justice*, 314.

³ *Spheres of Justice*, 313.

separate the spheres of justice within our own community and also the boundaries which separate our community from communities of others.

We also noted earlier how this particular form of respect for otherness leads Walzer into some serious difficulties. The idea of community which his theory of justice depends on is based on the notion of shared understandings of the meaning of social goods. This is a conception of a moral or an historical community bound together by shared cultural traditions and practices. The argument of *Spheres of Justice* however is set in the context of the political community.⁴ This raises problems wherever historical and political communities do not coincide. It is questionable whether or not Walzer's approach to issues of justice has much to say, for example, in a political setting where two or more distinct historical communities are intermingled. It is for this reason that it seems worthwhile to return to Walzer at this stage so as to assess in more detail the merits of his theory in the context of the Northern Ireland conflict.

Northern Ireland is a divided society in the sense that it is constituted by two fairly distinct historical traditions. In cases like this what is often at stake is not an interpretation of just distributive norms within a political community but rather the very legitimacy of the boundaries of that political community. If we think for a moment of the turbulent regions in the contemporary world of international politics we will realise that this is not an altogether unusual phenomenon. In the political entity of Northern Ireland there is no agreement on what the constitutional status should be, even indeed if it should constitute a separated political entity at all.⁵ While the Unionist majority defend the legitimacy of the

⁴ *Spheres of Justice*, 28.

link with Britain, the Irish Nationalist minority aspire to a United Ireland. It seems clear that there is not one historical community, nor is there one sense of national identity, nor one cultural tradition within Northern Ireland. There are two historical communities sharing the territory of one political entity.⁶ An added difficulty is the fact that the two communities do not live in neatly separable geographical regions. If they did then it might be possible for one community to secede leaving two separated culturally homogenous political communities. Given the intermingling of the population in Northern Ireland it is highly questionable that partition (or, in this case, re-partition) would be a desirable option.

So to what extent can Walzer's theory of justice be applied to a political entity like Northern Ireland where the very legitimacy of the entity is itself in question? One of the features of the conflict has to do with the fact that Nationalists do not feel themselves to be recognised as full members of the political community. They are denied equal rights to express their collective identity. They do not feel themselves to be British and yet they are subject to the rule of the British state. For them it is as if they were subject to the state institutions of another community. Unionists on the other hand, in so far as they think of themselves as British, consider the state institutions to be a legitimate political structure

⁵ See John Whyte *Interpreting Northern Ireland*, Oxford: Clarendon Press, 1991. Whyte gives a comprehensive survey of the intensive social scientific research on Northern Ireland. His survey will be my main source of empirical evidence to support my own interpretation of the problem.

⁶ This claim is a matter of some dispute. While I have crudely simplified the issue here, I do wish to defend the view that the conflict is primarily one between two separate historical communities. See Whyte *Interpreting Northern Ireland*, 14-18, 101-110, 194-201. It does not follow that the roles of either Britain or the Irish Republic should be excluded from an analysis of the conflict. See Joseph Ruane and Jennifer Todd "Diversity, Division and the Middle Ground in Northern Ireland" *Irish Political Studies*, 7 (1992), 73-98.

for their community. Does Walzer's contextualism deprive the minority of any plausible moral argument for equal rights to express their national identity and for this to be reflected in the political constitution and the institutions of the state? Can they make any claim to be unjustly denied those rights or are they dependent on the unlikely possibility of these political rights of national self-expression being granted willingly by the majority?⁷

Walzer does have some things to say about deeply divided societies in *Spheres of Justice*. He suggests that where political and historical communities do not coincide then decisions about distributive justice would have to be made in smaller more homogenous units rather than in the state as such.⁸ Of course a decision about what these smaller units should look like would have to be worked out politically, at state level. This then is not very useful in a society where the legitimacy of the state itself is in question and where the majority would be in a strong position to secure advantages for themselves in any decentralisation of power. Furthermore there would be serious geo-political difficulties involved in finding units of cultural homogeneity within Northern Ireland which would be of an appropriate size to offer a plausible forum for debate over issues of distributive justice. Walzer also asserts that in a community that "is so radically divided that a single citizenship is impossible then its territory must be divided."⁹ Again we have already seen that this is not a very attractive proposition in this case.

⁷ For an argument that Walzer's communitarian sensitivities ironically weaken the case for minority cultural rights see Kymlicka *Liberalism, Community and Culture*, 220-236.

⁸ *Spheres of Justice*, 29.

In general it seems that when Walzer deals with political problems arising from a plurality of historical communities he is thinking of American society. It seems reasonable that an American political theorist who is committed to a contextualist theory of justice would focus his attention on pluralism in a highly diverse political culture such as his own.¹⁰ Walzer's vision is of a state that promotes pluralism by supporting intermediate associations such as labour unions, churches, neighbourhood groups and so on. These groups foster communal ties in an otherwise atomised, fragmented society. They allow for a decentralised state to encourage participative citizens to take control of local affairs. The state acts as a "republic of republics."¹¹

This might well be a thought provoking response to problems of pluralism in the United States but it could be argued that in Northern Ireland the problem is not one of individual atomisation but rather that the two historical communities provide such strong communal ties that they make the division more difficult to bridge politically. Nor does this vision of a "republic of republics" have much chance of getting off the ground in a situation where the members of one community feel no

⁹ *Spheres of Justice*, 62. It is worth noting that Walzer's views on partition are most probably influenced by his liberal Jewish perspective on the Israel/Palestine question. See his *Exodus and Revolution*, New York: Basic Books, 1985 and for a sharp review from a Palestinian perspective, Edward W. Said "Michael Walzer's *Exodus and Revolution*: A Canaanite Reading" in *Blaming the Victims: Spurious Scholarship and the Palestinian Question*, Edward Said and Christopher Hitchens (eds.), London: Verso, 1988, 161-178.

¹⁰ See for example "Pluralism in Political Perspective" in Michael Walzer et al. *The Politics of Ethnicity*, Cambridge, MA: The Belknap Press, 1982, 1-28.

¹¹ See "The Communitarian Critique of Liberalism" and also Walzer's "Comment" in Taylor *Multiculturalism and "The Politics of Recognition"*, 99-103, where he argues that, given the peculiarity of its political culture, citizens of an immigrant society, like the United States, might well choose to have a liberal neutral state, not for its own sake, but as the best political expression of its own distinctive collective goals.

loyalty to what they see as an illegitimate state. Perhaps we are expecting too much from Walzer here? We must recall however that there is, despite his emphasis on pluralism, an affirmation of a universalist code in his work. As we noted in section 2.3, the claim that all communities have their own norms of justice involves some minimal form of moral universalism. How might this relate to the very basic matter of justice that is at issue in Northern Ireland, the justness of the state boundary?

There is a hint of something more promising in Walzer's discussion about quota systems or the reservation of offices for members of particular groups within society. He claims that

this sort of thing might be acceptable in a bi-national state, where the members of the two nations stand, in fact, as foreigners to one another. What is required between them is mutual accommodation, not justice in any positive sense; and accommodation may best be achieved in a federal system where both groups have some guaranteed representation.¹²

This would be a case of politics acting "as a substitute for justice."¹³ It amounts to a proposal for a form of consociational democracy.¹⁴ This system is based on the idea of an executive government formed as a grand coalition of political leaders from the different communities. It is supported by a number of other structural features such as a mutual veto, proportionality in key positions (perhaps even in all occupations throughout the society) and segmental autonomy for each community.

¹² *Spheres of Justice*, 149.

¹³ He uses this formulation in his encounter with Dworkin, "Spheres of Justice: An Exchange", 44.

¹⁴ See Arend Lijphardt *Democracy in Plural Societies: A Comparative Exploration*, New Haven: Yale University Press, 1977.

These features combine to give an internal federalist system of government. Some of the features of consociational democracy have helped to provide a high degree of stable government in certain plural societies. Countries such as the Netherlands and Belgium or regions such as the Italian South Tyrol have all been successful in their efforts to find such political solutions to the problems of cultural pluralism. The idea of a "balanced ticket" for elections in some of the more culturally heterogeneous states in the USA is a case where the general idea has also been beneficial in more loosely pluralist societies.

Unfortunately Northern Ireland does not enjoy many of the favourable conditions for such a political solution to its problem of cultural plurality. The most crucial ingredient in working such a system is that both communities are willing to compromise. It is the attitudes of the members of the divided communities rather than the institutions themselves which make the system workable. The reluctance of the Unionist community to enter power sharing arrangements, up to the present at least, undermines any hope for a straightforward consociational solution.¹⁵ Not only is there no tradition of accommodation among the leaders of the communities but it is not all that clear, given for example the vehemence of Unionist resistance to the Anglo-Irish Agreement, that they are committed to the idea of a plural democracy at all. Furthermore the relative absence of cross-cutting cleavages or overarching loyalties exacerbate the divisions.

The consociational model does not offer much hope because of the relative size and strength of the communities. An analysis of the history of the origins of the Northern Ireland state and the way in which its

¹⁵ See Whyte *Interpreting Northern Ireland*, 224-225.

politics were conducted in the first fifty years of its existence reveals that the members of the Unionist community in general have not perceived it to be in their interests to engage openly with the claims of Nationalists regarding the question of the constitutional status.¹⁶ The fact that they are the majority community and their relative strength, based on the guarantees of successive British governments, have acted as obstacles, though not necessarily the only ones, to the emergence of any significant degree of flexibility among political actors on the fundamental issue of Northern Irish politics.

It would appear that what is needed in terms of a theory of justice adequate to the problems of a political entity like Northern Ireland is some standard which will enable us to move beyond pluralism. We want to do this without falling back into the difficulties involved in deriving substantive universalist principles of justice. These difficulties have already been considered at length in earlier sections of this thesis. It is clear however that the main weakness of Walzer's theory of justice with respect to Northern Ireland is that it seems to assume that each community has an equal and legitimate right to cultural and political self-expression. Is this assumption warranted? It seems to me that it is not. It leaves us bereft of any universalist standard by which we might evaluate, in a critical manner, opposed traditions or identities. How are we otherwise to assess the extent to which the claims of either community are legitimate? Without some such standard we cannot even explain why it is that consociational democracy, or indeed any looser form of pluralism, does not seem to work in Northern Ireland.

¹⁶ Whyte *Interpreting Northern Ireland*, 163-169 and Jennifer Todd "Unionist Political Thought" in *A History of Irish Political Thought*, R. Eccleshall, V. Geoghegan, G. Boyce (eds.), London: Routledge, 1993, 190-211.

From Communitarianism to Constitutional Patriotism

Since writing *Spheres of Justice*, Walzer has gone much further in clarifying how some such standard might be justified. In two lectures given under the title "Nation and Universe" he argues for a minimal universalist rank ordering of nations.¹⁷ He focuses on the nation as the paradigm example of a moral community since he maintains that "it is probably true that the greatest evils in human history have occurred and continue to occur between nations."¹⁸ Although the evils of Northern Ireland may seem relatively insignificant in such a context, his choice of the nation is somewhat fortunate for our purposes here. What Walzer is seeking to do in these lectures is to justify a critical standard by which we can judge morally national communities in their relations with each other.

He begins by distinguishing between two kinds of moral universalism. Firstly, what he calls "covering-law universalism" assumes that a certain substantive morality, which is at present only adhered to by the select few, is the true morality for all peoples. Most monotheistic religions, various forms of revolutionary Marxism and any supposedly liberal form of imperialism that takes as its mission the task of "civilizing" other cultures, fall into this category. Secondly there is "reiterative universalism" which is the kind that Walzer is interested in defending. This is characterised, not surprisingly, by "its particularist focus and its pluralizing tendency." It accepts that each community has its own morality and should enjoy the tolerance and respect of other communities. At the same time it is rooted in particular historical

¹⁷ "Nation and Universe" in *The Tanner Lectures on Human Values, XI*, Grethe B. Peterson (ed.), Salt Lake City: University of Utah Press, 1990, 507-556.

¹⁸ "Nation and Universe", 536.

experiences which lead to respect for the particularity of the experience of others and so is less likely to inspire confidence in any one substantive morality. This gives a positive foundation for tolerance of difference and respect for otherness.¹⁹ Essentially reiterative universalism demands that each nation respect the creativity and particularity of all other nations and with it their right to self-determination.²⁰ Some nations do well according to this standard, others not so well.

The nations that do badly are those that tend to disregard other nations' "spontaneous and natural forms of self-expression". This disregard may come naturally to them. Covering-law universalist doctrines are most often invoked as justifications for such an attitude.²¹ This denies the reiterative rights to creative self-determination of other nations. Furthermore such denial assumes a loss of agency on the part of the victim nationals and an implicit claim to inherent cultural superiority.²² Walzer notes that for any nation which is under threat, or perhaps in the case of a newly independent nation, there is often a tendency for a new imperialism to emerge which forces a crude uniformity on the self-consciousness of the dominant community. This will often be premised on a claim to cultural superiority and it will often

¹⁹ All of the brief quotations in this paragraph are from "Nation and Universe", 510-515.

²⁰ Presumably Walzer would maintain that this differs from conventional liberalism in at least three ways. First, it rejects substantive universalist principles of justice. Second, the emphasis here is on cultural pluralism and not just a plurality of individual plans of life. Third, this approach involves a much more positive view of the enriching effects of being open to cultural, and not just individual, otherness.

²¹ "Nation and Universe", 546-547.

²² "Nation and Universe", 543.

result in the corollary of such a claim, the oppression of minorities. In this sense "the test of every nationalism is the 'nation' that comes next."²³ Walzer's reiterative universalism can acknowledge the strength and meaning of nationalism while at the same time confronting this form of nationalist blindness. He also argues that it can help us to understand and to justify state boundaries, or intra-state boundaries (as in consociationalism). While admitting that there is no sure way of getting them right his claim is that boundaries should be drawn in such a way as to prevent the disregard and repression of cultural creativity.²⁴

Does this attempt by Walzer to transcend pluralism in this minimalist way get us any further in an understanding of what justice might demand in Northern Ireland? There are clearly some ideas worth pursuing in terms of an interpretation of the relationship between the two communities. We might suggest that Unionist disregard for some "spontaneous and natural forms" of (Irish nationalist) self-expression such as the Irish language, Gaelic sports, traditional Irish music and dancing, reveals an implicit sense of superiority in their own identity. Most importantly of course this disregard involves the oppression of the Nationalist minority by denying them, as human agents, their reiterative rights to creative political self-determination. This is often rationalised with a version of covering-law moral universalism that purports to be enlightened, progressive and liberal.²⁵ We might be able to explain this

²³ "Nation and Universe", 544.

²⁴ "Nation and Universe", 554-555.

²⁵ I will argue below that arguments for Unionism that invoke liberal principles are often blind to the real grievances of the Nationalist community. For two pertinent examples see Arthur Aughey *Under Siege: Ulster Unionism and the Anglo-Irish Agreement*, Belfast: The Blackstaff Press, 1989 and R. L. McCartney *Liberty and Authority in Ireland*, Derry: Field Day Pamphlets, 1985.

denial of Nationalist rights in relation to Unionist insecurities. The Unionist community occupies a rather precarious position. They are of course dependent on British guarantees while at the same time they feel under threat from the territorial claims of the Irish Republic as well as the violent campaign of the IRA. These insecurities might help to explain why there has been an apparently crude uniformity forced on Unionist self-consciousness since the formation of the Northern Irish state.²⁶

Walzer's reiterative universalist standard can then give us some interpretive guide as to why the Northern Irish problem of plurality has been so difficult to resolve. However it does not help us to move beyond this towards a view which could throw some light on the fundamental question of the constitutional status of Northern Ireland. The standard Walzer invokes appears to lead us fairly straightforwardly to the conclusion that the present boundary is unjustified since it permits the disregard and repression of (Irish nationalist) cultural creativity. This is all very well but it does nothing to address Unionist reiterative claims nor does it give us any indication as to how Unionists might accept that they have an inherent sense of cultural superiority and a tendency to dominate and disregard the self-expression of the Nationalist identity. I believe that a strong case can be made for the view that the main obstacle to progress towards a normatively justified solution to the Northern Ireland conflict is indeed a certain aspect of the Unionist identity that fails to respect the otherness of Irish Nationalists.²⁷ This would allow us to

²⁶ See Terence Brown *The Whole Protestant Community: The Making of a Historical Myth*, Derry: Field Day Pamphlets, 1985.

²⁷ Jennifer Todd "Unionist Political Thought" and also "The Limits of Britishness" *The Irish Review*, 5 (1989), 11-16. For further references that support this interpretation see Whyte *Interpreting Northern Ireland*, 162-169.

explain that the Unionist community's unwillingness to compromise is rooted in certain dominating tendencies that are partly constitutive of their very identity. As it stands however, the analysis does not offer us any real hope for a just pluralism in Northern Ireland.

In order to overcome their blindness to Nationalist reiterative rights Unionists would have to engage in a self-critical process of reinterpreting their own identity. A workable and justifiable solution will depend on any surviving vestiges of an imperialistic attitude being overcome and discarded. Unionists, in so far as they think of themselves as inherently the cultural superiors of Nationalists, must be expected to reinterpret both their own identity and their understanding to the identity of the other. In other words the Unionist identity would itself have to be transformed if it were to achieve the required openness to otherness that justice demands. We need some idea as to what would motivate such a radical reinterpretation. Walzer's pluralist approach to justice leaves us pretty much in the dark here. What is clear is that if a blindness to otherness in the Unionist identity is the main obstacle to progress towards a political solution to the Northern Ireland problem, then a simple appeal to the value of cultural pluralism is far from adequate.

It would appear then that, as a theoretical guide towards a normatively justified solution to the Northern Ireland conflict, Walzer's hermeneutic approach to justice does not get us very far. What is missing is any grounds for the belief that Unionist blindness to otherness might be overcome. It seems to me that we might be able to address this problem more effectively by turning to the less ambiguous version of moral universalism that is defended by Habermas. Since moral discourse is concerned with the search for generalisable interests it might help us to discover what could motivate Unionists to call the constitutional status quo into question. It seems to me that if they are genuinely to be open to

alternative constitutional arrangements then Unionists must inevitably be drawn into the type of critical self-questioning that discourse requires. Engagement in this potentially self-transformative process of identity reinterpretation is a necessary prerequisite to any political discourse that could possibly unearth a constitutional arrangement which would satisfy a generalisable interest in this case. Nothing short of this could, I suggest, provide a stable basis for social unity, harmony and peace among all the people of Northern Ireland.

As we have already seen, Walzer does provide a general principle which protects pluralism. However this is simply too vague to yield any specific guidelines in a situation where two historical communities disagree about very basic norms, such as the dispute about the Irish border. The main problem with Walzer's account is that it cannot get beyond this disagreement, despite the fact that it can be critical of less tolerant, imperialistic cultures. Specifically in this case it cannot reveal what legitimate rights of cultural expression Unionists do have, nor could it persuade them to overcome and discard the aspects of their identity that are at the root of the political stalemate. Habermas's procedural universalism endorses Walzer's rejection of substantive, determinate principles of justice which claim universal scope. At the same time he offers us a way of conceiving how a discourse about such disputes such as the one we are considering here might proceed in a normatively justified manner.

We will recall that the central claim of discourse ethics is that if we wish to come to a rational agreement with each other about the justness of a certain norm, then there are legitimate procedural constraints on the arguments that we can make.²⁸ These constraints constitute rules of

discourse that are universally valid since they are grounded in the intuitive knowledge of all communicatively competent individuals in modern societies. When we are engaged in communicative action we presuppose a certain reciprocal accountability, that we can justify the claims we make if called upon to do so. If a certain validity claim is called into question, then in order to continue the quest for understanding we must engage in a process of argumentation that has as its goal a rationally motivated agreement.

Within a modern context, when we participate in a discourse we make certain necessary and unavoidable pragmatic presuppositions. As we have seen, Habermas expresses these in terms of rules of argumentation. Insofar as we seek a rational agreement over a disputed norm we accept the following rules; that no subject capable of speech and action is excluded from the discourse, that all participants are allowed to question any assertion, to introduce any assertion or to express their attitudes, desires and needs, and that the exercise of these rights is not to be prevented by coercion, whether internal or external.²⁹ From these presuppositions Habermas grounds his universalist moral theory. What we must assess now is whether or not this particular defence of moral universalism throws more light on the problem of justice at hand, than our critical analysis examination of Walzer's work managed to do?

Before developing the argument in this direction it is important to stress once more some implications of the fact that Habermas's moral-theoretical claims are based on the universally valid presuppositions of

²⁸ We went into the details of Habermas's justification for this claim in section 3.2 above.

²⁹ Habermas *Moral Consciousness and Communicative Action*, 89.

argumentation rather than the particular context of a historical community. It would be wrong, for at least two reasons, to think of this theory as a version of covering-law universalism which fails to respect otherness. Firstly the principles of discourse ethics are formal and offer nothing more than a procedural test for substantive principles within concrete contexts. Secondly it does not have any on-going moral agenda as such itself but rather it only comes into play whenever a normative dispute arises in a particular context. Discourse ethics provides a procedure for normatively justified argumentation whenever that is needed. With regard to the case of Northern Ireland, discourse ethics does not claim to offer us the solution that has eluded everyone else. The point is that a moral theory cannot itself provide a substantive solution to a normative dispute. This is a matter for the relevant political actors. All a theory can do (and it should do it!) is to elaborate the procedural conditions under which a normatively justified solution could emerge.

Not surprisingly, Habermas brings a rather different perspective to bear on problems of national identity than that of Walzer's contextualism. Habermas argues that in Western societies an unquestioning and naive identification with the traditions of a particular nation has been shattered, by the experiences of the threat of nuclear war, the shrinking of the world through mass communication, mass immigration, but primarily through our collective experience of the horrors of Auschwitz.³⁰ A more abstract constitutional patriotism now sets limits to "the imperatives of the self-

³⁰ Habermas developed his thinking in this regard in the context of the recent German *Historikerstreit* (Historian's controversy) about the legacy of the Third Reich. See "A Kind of Settling of Damages" and "Historical Consciousness and Post-Traditional Identity: The Federal Republic's Orientation to the West" in the collection of Habermas's writing on this and related themes, *The New Conservatism*, Cambridge, MA: The MIT Press, 1989, 207-248 and 249-267.

assertion of national forms of life."³¹ This involves a shift in the balance between the two key elements of national consciousness, the universalist value orientations of democracy and the particularism of a nation which distinguishes itself from others.

The abstract idea of the universalization of democracy and human rights forms the hard substance through which the rays of national tradition - the language, literature and history of one's own nation - are refracted.³²

Becoming conscious of the ambivalence of our own tradition gives us a more critically reflexive stance. This allows us some distance to take a more flexible attitude in deciding which aspects of our traditions we want to carry forward and which we want to discard.

Constitutional patriotism can set its own limits by listening to and engaging with the claims of others. It is this precisely that characterises for Habermas what moral universalism means today.

Relativizing one's own form of existence to the legitimate claims of other forms of life, according equal rights to aliens and others ... not sticking doggedly to the universalization of one's own identity, not marginalizing that which deviates from one's own identity.³³

As we saw in the last section, Habermas allows for the fact that each constitutional state will have its own ethical pattern, one that expresses

³¹ *The New Conservatism*, 256. The notion of constitutional patriotism was introduced briefly in the last section. Habermas has developed this idea at much greater length in *Faktizität und Geltung*, but see also "Citizenship and National Identity" and "Struggles for Recognition in Constitutional States" for recent comments on this theme.

³² *The New Conservatism*, 262.

³³ "Jürgen Habermas: An Interview on Ethics, Politics and History by Jean-Marc Ferry" *Universalism Vs. Communitarianism*, David Rasmussen (ed.), 207-213, here at 210.

its particular identity. Impartiality must however remain at the core of justice if the equal rights of all are to be guaranteed within the framework of a constitutional state. The ethical employment of practical reason will have an important role to play in the networks of communication around which a legitimate political discourse can be grounded. But it remains constrained and shaped by moral principles that are not justified in the context of a particular form of life but that rather claim to be valid universally.

Discursive Legitimation and Northern Ireland's Constitutional Status

The notion of constitutional patriotism captures appropriately the way in which Habermas's relates his moral theory to questions of national identity. Is it legitimate however to expect actors engaged in a discourse about a disputed norm to adopt the sort of flexible attitude towards tradition that constitutional patriotism demands? There is a necessary link for Habermas between this attitude and the rationality of the actors involved. This demand is not imposed externally but rather it is presupposed internally in the rules of discourse. A rational defence of a given norm must seek to show that a justification of the norm could meet with the approval of all those affected by it. It must be underpinned by a generalisable interest. It should be clear from our earlier discussion of discourse ethics that this quest for generalisable interests is only possible if the actors involved adopt a critically flexible attitude towards their need interpretations and towards their own identities.

If there is no agreement on any particular norm, as has clearly been the case up to now in the politics of Northern Ireland, then the participants will have to resort to some compromise. We can distinguish between a legitimate compromise that is rationally-motivated, and which

could be justified according to discursive conditions, and an illegitimate compromise that is a function of a power relationship, and so is only acceptable to the participants on prudential grounds under conditions of unequal bargaining. It has been argued that an acceptable compromise in Northern Ireland would be equal citizenship for all, integrated within a culturally heterogeneous British state.³⁴ It seems plausible that this argument does not transgress, in any obvious way, Walzer's principle of cultural tolerance. Unionism it is claimed here does not seek to be the dominant nation or culture, since this compromise would be justified not in terms of nationalist self-determination but rather in terms of the liberal principles underpinning the modern constitutional democratic (and culturally plural) state. However, despite initial appearances, this particular appeal to modern constitutional principles fails the legitimacy test that discourse ethics offers. This compromise can, I believe, be shown to be premised on an assumption of initially unequal bargaining positions.

The existence of the Irish border is itself a structure of inequality in the context of the dispute about the constitutional status of Northern Ireland. It privileges the Unionist majority politically and allows them to express their national identity through the institutions of the state. I think it is clear that the interests of the Nationalist community have not been and cannot be satisfied if the assumption is unquestioningly made that Northern Ireland is legitimately British. Offering equal British citizenship to Nationalists suppresses the vital issue of whether or not the border itself can be justified, leaving it off the liberal Unionist agenda entirely. This clearly cannot satisfy one of the rules of argumentation, that each

³⁴ See the first chapter of Aughey *Under Siege*.

participant can call any norm into question. Nor does it address the fact that the structures of power under present arrangements prevent Nationalists from expressing their own national identity in any meaningful way. The compromise advocated by liberal Unionists is therefore, according to this standard, illegitimate. They naively assume that a British state could act as a neutral arbiter between the conflicting parties in the dispute. This view incredibly presupposes that the real source of conflict, whether Northern Ireland should be British or not, is not at issue at all. Historically of course since they have failed to provide Nationalists with a moral justification for the border, they have had to rely on coercion to uphold their unequal status. The Union with Britain has been defended not with reasons but with power.

This leaves us with the question as to what reasons we have for believing that Unionists would be motivated to enter into an open discourse about the legitimacy of the constitutional status quo. As we have seen, it is at this stage that Walzer's reiterative universalism runs out of steam entirely. The attitude of critical flexibility which is required in any sincere quest for generalisable interests involves the type of self-transformative reinterpretation of Unionist identity that I have argued is required if blindness to the claims of Irish Nationalism is to be overcome. Naturally any identity resists such radical questioning. However it must be kept in mind that discourse ethics does not bring the very identity of Unionism itself as a whole into question. It is only the aspects of the Unionist identity that act as an obstacle to the recognition of Nationalist rights that must be reinterpreted. This would be sufficient for the question of the constitutional status to become a subject of discourse.

It may well be argued that any political discourse on Northern Ireland would also require Nationalists to reinterpret aspects of their identity. This is certain to be the case should the question of the constitutional

status actually become a subject of discourse. However, critical flexibility on the part of Unionists is of much greater immediate concern. This is because Nationalists as things stand readily predisposed to adopt a critical attitude towards the current constitutional arrangements. Their interests remain unsatisfied in very obvious ways. In contrast, given the structure of power at present, the reinterpretation of aspects of the Unionist identity is more problematic. For one thing the Unionist community may not feel that it is necessary to engage in an open discourse in order to have what it takes to be its best interests satisfied. Furthermore the reinterpretation of the Unionist identity is a necessary prerequisite to any possible discourse about the constitutional status getting under way at all.

This is certainly not to suggest however that the political responsibility for the creation of conditions under which a real discourse could take place lies entirely with the Unionist community. On the contrary, that responsibility must be shared by the British government, the government of the Irish Republic and all strands of the Nationalist community in Northern Ireland, along with all strands of the Unionist community. It might even be shared more widely to include European and even UN institutions. Every political actor must be judged according to the extent to which they contribute to the creation of favourable conditions for real discourse. This will presumably involve building up an atmosphere of trust that will assure the Unionist community that their identity as a whole is not in question. The critical reflection on identities involved in discourse can only be achieved co-operatively and never by one of the parties in isolation from the other relevant actors. A spirit of co-operation can be either fostered or undermined by any political action. But while the creation of favourable conditions for discourse is a task that all parties share, the actual reinterpretation of the Unionist identity that

would allow them to enter such a discourse can only be achieved by Unionists themselves. They can be helped or hindered by others but ultimately it is how they act that will determine whether or not they adopt the critical attitude that would allow a discourse about the constitutional status to take place.

I believe that motivation for such reinterpretation of the Unionist identity exists in the concrete context of Northern Ireland at present. We have already alluded to the particular insecurities of Unionist identity. First of all there is the relationship with Britain, which is at best uneasy. While Unionists depend on Britain to uphold their privileges they realise that public opinion in Britain (and beyond) does not look altogether favourably on their cause. For this reason alone the threat of a British withdrawal can never be discounted. Secondly, there is constant questioning of the status quo by Nationalists. This is supported by the claims of the Irish Republic and is publicised by the activities of the IRA. All of this uncertainty leads to self-questioning. These distressing circumstances might be described as disequilibrium-inducing phenomena for the Unionist identity.³⁵ They loosen the particularist strand of the identity which distinguishes Unionism from others and point towards the kind of moral universalism (implicit in constitutional patriotism) which is open to the legitimate claims of other identities. In so far as the Unionist community seeks a normatively justified solution to the problem of pluralism in Northern Ireland, they must engage in a process of critically reinterpreting their needs, their interests and their own collective identity in ways which open them to the claims of Nationalists. Of course I have already indicated that they can be assisted in this by assurances from the

³⁵ See White *The Recent Work of Jürgen Habermas*, 77-83 for a relevant discussion.

other relevant actors that neither their identity as such, nor their own legitimate reiterative rights, are under threat. Ultimately however they can only overcome their own insecurities when they can recognise the equal and legitimate rights of other forms of life.

As I have already argued discourse ethics offers us the basis for a critique of the liberal Unionist case for equal citizenship and full integration with the UK. It does not yield any alternative concrete norm as a solution to the problem. Rather it limits itself strictly to advocating a procedure which provides a test for competing norms. It might however allow us to project tentatively how a discourse might proceed. Such a projection would have no special claim to validity as norms can only be justified if they could be freely accepted by all those affected by them in a real (and not an idealised) discourse. At the same time it can make a contribution to a rethinking of the interests of the actors in relation to possible norms. I have suggested that the constitutional status quo is itself a structure of inequality which renders it normatively illegitimate under present conditions. Other possible solutions could be analysed in the context of discourse theory with the hope of stimulating critical reflection on the part of the relevant actors. It might also be possible to assess the extent to which each projected solution could satisfy substantive generalisable interests. I cannot hope to offer such an analysis of the various possible constitutional arrangements that have been proposed with regard to Northern Ireland.³⁶ What I am proposing is that such assessments be made in the light of Habermas's discourse theory as this provides the most adequate normative basis for the critical task involved. It must be stressed however that concrete questions as to

³⁶ See Whyte *Interpreting Northern Ireland*, 209-243.

how such political discourse should actually be brought about, and as to how it should proceed, must be left up to the actors themselves.

One thing we can say is that the upshot of a real discourse should have certain clear advantages over the status quo. It should more adequately satisfy generalisable interests. The legitimate claims of both communities would be recognised and this would necessarily involve a gain for Irish Nationalists in terms of the self-expression of their national identity. Both communities would gain in the new pluralist context by being better able to relativise their own form of existence by "not sticking doggedly to the universalization of [their] own identity". The emergence of this form of constitutional patriotism would bring further liberating gains. Nationalists would no longer suffer the indignity of oppression as a dominated minority. Unionists would overcome both their inability to come to terms with the disequilibrium-inducing phenomena that strain their identity under present circumstances and also their blindness to others which deprives them of a rational justification for the status quo. No Unionist denies that it is in their interest to have normatively justified political institutions. This fact alone can provide some hope that the present stalemate in the politics of Northern Ireland will not be interminable.

How these features of an alternative framework for the politics of Northern Ireland are best to be institutionalised would become a pressing matter for participants in a real discourse.³⁷ I mention them here only to

³⁷ While I have alluded to alternative arrangements, solutions and frameworks, I am not assuming that the entity of Northern Ireland would continue in some form or other after a real discourse. There are many other possibilities (repartition, a United Ireland, fuller integration with the UK, new European arrangements) which would alter the geo-political structure of the territory under consideration. Nothing is ruled out nor is anything guaranteed, least of all the boundaries, or indeed the existence, of the political entity of Northern Ireland.

briefly elaborate some necessary features of any concrete norm that could emerge from the type of procedure that I have been advocating. Whether or not anything approaching a real discourse will take place depends very much on the actors involved. There are obviously no guarantees. If a theory of justice can help at all in this respect, then it should be made to do so. As I have suggested above, all political action should be evaluated according to the extent to which it encourages the form of critical reflection on identities that real discourse requires. I believe that cautious optimism can be justified as it is clear that many interests of the actors involved (including the Unionist community) remain unsatisfied at present. An alternative framework, based on the principles of constitutional patriotism, promises greater satisfaction of generalisable interests, not least of which would be a constitutional arrangement that is both rationally motivated and normatively justified. If we are to give an adequate account of what justice demands in a deeply divided society, such as Northern Ireland, then Walzer's concern with pluralism must be supplemented with the sharper normative bite that discourse ethics provides.

3.5 CONCLUSION

In this chapter we have assessed the work of Jürgen Habermas in relation to the problem that has been the central focus of this thesis. In Habermas's work we find a procedural approach to the justification of substantive principles of justice in modern societies which avoids the most important weaknesses that we found in the work of both Rawls and Walzer. Rawls's procedural test for substantive principles is flawed because it represents a monological point of view which attempts to eliminate all that differentiates one person from another in its conception of impartiality. Furthermore, this conception of impartiality is built on an implausible claim that political morality can be treated in isolation from other comprehensive moral commitments. Walzer on the other hand, in giving up completely on the philosophical project of justifying an impartial point of view is left with an approach to justice that is dependent on the identities and traditions of particular communities. Within a modern context this hermeneutic conception of justice represents an insufficiently sharp critical tool for effective and legitimate social criticism. The dialogical conception of impartiality that is implicit in Habermas's discourse ethics enables us to move beyond the limits of both Rawls's monological proceduralism and Walzer's contextualist anti-proceduralism.

In the first section we explored Habermas's broad philosophical project in terms of its concern with the defence of reason, modernity and the Enlightenment. Habermas advocates a shift from the philosophy of consciousness to the philosophy of intersubjective understanding. It is through a reconstructive analysis of the structure of everyday communication in human language as such that this defence of reason is to be elaborated. The priority of communicative action as the original

mode of language use determines the fundamental contours of a critical social theory of advanced capitalist societies. It is the structures of communicative rationality that facilitate the reproduction of a lifeworld on which human identities depend. If these identities are not to be damaged then the lifeworld must not be colonised by the systemic imperatives of economic markets and administrative bureaucracies.

These same structures of communication are the grounds on which Habermas's justification of a philosophical conception of an impartial point of view is built. As we saw in the second section, the dialogical nature of the impartial procedure according to which moral principles are normatively justified reflects the pragmatic presuppositions that are necessary and unavoidable for all human actors who seek to reach a reasoned agreement with one another whenever a matter of justice is in dispute. There is no need for monological abstraction since these presuppositions are internal to everyday communication itself. Nor is there any need to eliminate differences in adopting an impartial point of view since this in itself requires the actors to take a hypothetical attitude towards their interpretations of their own needs, interests and identities. The procedure represents a genuinely intersubjective, open encounter between real participants, each of whom are entitled to speak in the discourse from their own particular point of view on condition that they are also willing to adopt the points of view of all other participants who are affected by the norm in question. A discourse can represent a self-transformative moment for any or all of the participants involved.

Moral norms or principles of justice do not depend, from this theoretical perspective, on the traditions of any one particular culture. They are rather justified in terms of their representing a generalisable interest. This dialogical view of impartiality reflects a learning process that is a necessary development for any culture that wants to deal in a

communicatively rational way with the fact that norms which were once taken for granted have now been called into question. In this sense the practice of moral discourse is a necessary, and not a contingent, aspect of modernity. Discourse ethics is a cognitivist moral theory which regards claims to normative rightness to be analogous to claims to truth.

In a modern context the demands of morality constrain particular communities in their ethical reflections on their own collective identities. In the third section we saw how Habermas reformulates the Kantian claim that the right is prior to the good in terms of the distinction between a moral and an ethical employment of practical reason. While morality constrains hermeneutic reflection on identities, it remains embedded in ethical life to the extent that moral norms are always institutionalised in ways that are marked by the ethical patterns of particular traditions. Discourse ethics therefore represents a liberal holist approach to matters of justice in that the rights of the individual can only be respected if the intersubjective bonds of solidarity that constitute their identity-forming context are also protected. Its liberalism is reflected in its affirmation of the priority of right. At the same time, Habermas maintains that the ethical pattern of a constitutional state represents a holist commitment to the embodiment of just institutions in the context of a particular tradition. These institutions are in part constitutive of the identity of those individuals whose rights they guarantee.

Finally, in the fourth section, we examined one particular dispute about justice in order to show in detail how the demands of justice necessarily open particular traditions to the legitimate claims of other forms of life. Any possible moral discourse about a just constitutional solution in Northern Ireland will depend on the parties involved becoming engaged in ethical reflection on their own identities in ways that allow them to adopt the perspective of all other participants affected

by the norm in dispute. I argued that this applies most particularly to the Unionist community. The discussion of this case again highlighted the partiality of Walzer's hermeneutics in that his minimalist universalism is insufficiently dialogical to provide us with a theoretical understanding as to how the participants are rationally to respond to the actual demands of justice in this context. The dialogical nature of Habermas's procedure, built as it is on the rational structures of everyday communication, makes it clear that no generalisable interest could be satisfied in this case unless the parties involved were to adopt the hypothetical attitude towards their identities that a genuinely impartial point of view requires.

CONCLUSION

Philosophers do not have any special qualification that would allow them to determine the content of a substantive account of justice for a modern society. They can however, and indeed they should, seek to ground rationally a philosophical conception of an impartial point of view. An impartial procedure that is justified philosophically can then act as a test for the legitimacy of substantive claims that are raised about justice in a modern political context. This legitimacy test is however not to be carried out by philosophers themselves but by all the members of the community who are to be affected by the norms and principles about which these claims are made.

Modernity is characterised by a proliferation of comprehensive moral commitments and reasonable conceptions of a good human life. Under these conditions, we have no option but to theorise justice in terms of a procedural framework that treats each individual person as a subject of justice in an impartial way. This is what I mean by endorsing the Kantian project. Habermas's procedure of impartiality is superior to that of Rawls because of its dialogical nature. The rules of argumentation that characterise an impartial point of view represent the pragmatic presuppositions that no communicatively competent participant can avoid if a genuine attempt is being made to achieve a rationally justified consensus on a disputed moral norm. Anything and everything can be brought into question in a moral discourse that is regulated according to these procedural rules. Participants can even call into question Habermas's fallible reconstruction of the rules themselves. This procedure, unlike the monological view from the original position, is dynamic rather than static. It facilitates the generation of collective

insights since, in the encounter, all participants adopt a hypothetical attitude towards their own initial moral intuitions as well as their interpretations of needs, interests and identities.

Endorsing the Kantian project involves an affirmation of the priority of right. Walzer is justified in maintaining that a substantive account of justice will reflect, to some degree, the historical context and the cultural traditions of particular communities. He is also justified in indicating the fact that these substantive principles are constitutive, at least in part, of the identities of these communities and further, that this collective identity is constitutive, in part, of the identities of individual citizens. The priority of right is not incompatible with these holist views. However, Walzer's rejection of the Kantian project makes it impossible for him to show how his holism could allow for an adequate defence of the priority of right. This leads to serious problems in his approach to justice and social criticism in a modern context. Without a philosophically justified conception of an impartial point of view, Walzer gives us an insufficient basis for an effective defence of reason from the effects of power in processes of democratic deliberation about principles of justice.

By providing us with a dialogical conception of an impartial point of view, Habermas shows us how such a philosophically justified procedure is necessary for, and not in any way a threat to, democracy. At the same time, his distinction between morality and ethical life allows him to affirm the priority of right in a way that is compatible with the holist view that the substance of justice is constitutive of the identities of particular communities. Universalist moral norms and principles of justice are justified according to this discursive procedure which is not dependent on any one historical tradition. Under modern conditions these universalist principles penetrate into any form of ethical life that could claim to be just. In this way, Habermas overcomes the partiality of hermeneutics.

But these universalist principles must be applied in particular contexts and so they will be ethically patterned. To this extent, Habermas presents us with a liberal holist approach to justice.

It is the intersubjective basis of Habermas's procedure that sets it apart from Rawls's, allowing for the shift from a monological to a dialogical conception of impartiality. Of course, Habermas also avoids the atomistic conception of the person that has been at the foundation of many traditional liberal attempts to ground an account of justice in certain (natural) individual rights. Nor does he rely on a strongly communitarian conception of democracy that ties individuals too tightly to the common will. This is one of the dangers involved in Walzer's rejection of the Kantian project. If we treat the community as a macro-subject in this way, then we do not allow the real differences between individuals and social groups of modern societies to be expressed in democratic deliberation. Neither atomistic liberalism nor a holism that is insufficiently liberal could account for a genuinely intersubjective basis for the generation of shared insights. Habermas's liberal holism is superior to other approaches to justice since it stresses the fact that justice and solidarity, which facilitates these shared insights, are two sides of the one coin. If the lifeworld is to be reproduced communicatively, as it must be, then this inextricable link between justice and solidarity must not be overlooked.

It is important to note that from Habermas's perspective, and in contrast to Walzer's, there are no moral communities as such in the modern world. While every modern community is ethically unique, morally the demands of justice, in terms of a universalist code, are the same for each of them. Justice demands that in modern societies this universalist code becomes embedded in the political culture of each ethically unique community. The universalist principles of justice

involved then become internal moral resources that can be drawn on in an attempt to resolve disputes about justice in each particular context.

While each community is challenged by the requirement that norms be justified in terms of a conception of an impartial point of view, each retains its ethical pattern in the application of norms. There will of course be certain disputes within each society that are peculiar to that society and these can be resolved ethically on the basis of an interpretive account of what it is that the community wants to strive towards. Despite their limited scope, even these ethico-political discourses, if they are to be legitimate, must follow the procedural rules of argumentation that are justified in Habermas's discourse ethics.

It would appear then that much of the normative content of substantive accounts of justice in modern societies will be universal in scope. The principles involved will be justified in terms of generalisable interests and not in terms of the traditions of one particular form of life. The procedure of justification is of course internally grounded in the necessary and unavoidable pragmatic presuppositions of communicative action. These universalist principles of justice are constitutive of the identities of all just political communities. They reflect not a contingent historical development but the outcome of a rational process of modernisation. If the people of any society are to learn rightly how to deal with the facts of modern pluralism then they will have to institutionalise forms of discourse that reflect, at least in some approximate way, the philosophical conception of an impartial point of view that Habermas outlines. It is in this sense that discourse ethics is cognitivist, treating normative validity claims and truth claims in an analogous manner.

Ultimately this analysis may point us in the direction of a world state, or at least towards global political institutions that can implement

effectively some normatively justified universalist code. Whether or not we take this direction will depend on the historical struggles that will be carried out within each unique modern ethical context.

The challenge that each modern political community certainly does now face is to institutionalise discursive procedures that will allow for invigorated public spheres to engage in a critical analysis of substantive principles of justice. These institutions must facilitate a complex network of interaction where moral, ethico-political, pragmatic and legal discourses can all flourish. This network of interaction is the only guarantee we have that substantive principles of justice will be legitimated both democratically and in an impartial manner. The content of a substantive account of justice must be the outcome of open and inclusive democratic encounters. Philosophers can participate, just like all other citizens, in these encounters. But the discursive practices involved must be guided and tested by a philosophically justified conception of an impartial point of view. Our hopes for a just future must be grounded in the successful institutionalisation of some such discursive practices.

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