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DEMOCRATIC CITIZENSHIP V. PATRIARCHY: A FEMINIST PERSPECTIVE ON RAWLS

*Marion Smiley**

I. INTRODUCTION

While feminist scholars have devoted a great deal of energy during the past twenty years to showing what various canonical works in the history of political theory have had to say about women, they have not generally confined themselves to textual analysis as an end in itself. Nor have they generally restricted their critical attention to the sexist manner in which particular theories have characterized women or to questions about whether such sexism was intended by the particular theorists in question. Instead, they have, as a group, proceeded to ask two more fundamental sets of questions about the patriarchal content, as well as consequences, of these theories in an effort to assess how valuable—or damaging—they are to the lives of some, if not all, women.¹

The first set of questions takes as its subject matter the place of sexism in a particular theory and asks: How sexist or patriarchal is the theory?² Does the theory characterize women in demeaning ways and place them in subordinate positions to men? Does it do so as part of

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1. Unfortunately, not all feminist theorists have been as attentive as they should be to the lives of all women. Indeed, as Bell Hooks, Elizabeth Spelman and others have pointed out over the years, many feminist theorists have generalized about women's lives on the basis of a description of those women who are most privileged in society. *See, e.g.*, Bell Hooks, *Ain't I a Woman?* (1981); Bell Hooks, *Feminist Theory: From Margin to Center* (2000); Elizabeth V. Spelman, *Inessential Women* (1988). Feminists in the field of law have taken heed of these critiques in recent years, and in some cases have provided very helpful ways of avoiding the problem at hand. *See, e.g.*, *Black British Feminism: A Reader* (Heidi Safia Mirza ed., 1997); *Critical Race Feminism: A Reader* (Adrian Katherine Wing ed., 1997); *Feminist Legal Theory: An Anti-Essentialist Reader* (Nancy E. Dowds & Michelle S. Jacob eds., 2003); Martha Minow, *Making All the Difference* (1990).

2. While the terms "sexist" and "patriarchal" are frequently used interchangeably, I use the first here to denote unequal or differential treatment based on sex and the second to denote the various attributes—ideological, material, psychological, social, and political—of a general system of power that is based on the subordination of women to men, a system of power that can, and does, exist alongside and as part of other systems of power, whether they are economic, legal, racial, cultural, or religious, and is, as such, potentially pervasive without being the primary cause of all other kinds of oppression.

its general project, or simply because it has been thoughtless? Is the theory's methodology reflective of men's experiences only? Do all of the theory's major tenets require the subordination of women to men, or are there parts of the theory that are not patriarchal? Is there anything egalitarian about the theory? If so, what place does such egalitarianism have in the theory as a whole, and how, if at all, can it be sustained?

The second set of questions takes as its subject matter the actual treatment of women and asks: What consequences would a particular theory have for women if it were put into practice? Would the theory enhance or diminish the lives of women in any way? Help or harm them?³ If so, how? Would the theory's consequences be the same for all women, or would the theory affect different women in different ways? What is it about the theory that leads to such consequences? Are there particular parts of the theory that would, if translated into practice, prove to be especially harmful to women? Especially helpful to them?

I ask both kinds of questions below of John Rawls's theory of justice. I do not, by any stretch of the imagination, do so comprehensively. Instead, I place only a handful of feminist concerns at the center of my attention and focus on one aspect of Rawls's theory only, namely, the Original Position as Rawls develops it in both *A Theory of Justice*⁴ and *Political Liberalism*.⁵ I ask: Does Rawls's formulation of the Original Position in either of these works require a patriarchal family? Does it promote the subjugation of women to men by virtue of either its methodology or its content? Does it hold out any promise for combating those gender and race-based hierarchies of power that subordinate women in practice? If so, what is that promise and can it be realized within Rawls's theory?

I argue that while Rawls's Original Position is not without its shortcomings, it—or at least the version of it that Rawls develops in *Political Liberalism*—does have the potential to challenge patriarchy in both public and private life if it is interjected with a more robust and democratic notion of citizenship than Rawls now provides, and if Rawls's political liberalism is understood as distinctly *democratic* liberalism. I sketch what I take to be the required notion of

3. Feminist theorists do not, of course, always agree on what constitutes harm in this context. Indeed, almost all of the major disagreements among feminists in recent years—including those having to do with whether universal identities harm women, how damaging capitalism is to women, what constitutes sexual harassment, whether feminists should use the state to challenge patriarchy, and what place, if any, meritocracy has in the lives of women—come down in part to what constitutes both harm to women in general and harm that is by nature gender-based.

4. John Rawls, *A Theory of Justice* (1971). Because the feminist critics of Rawls whom I shall be evaluating refer to the text of the original edition of this work, I, too, refer to the 1971 edition in my analysis of their critiques.

5. John Rawls, *Political Liberalism* (rev. ed. 1996).

democratic citizenship—which is closely related to that put forward by contemporary feminist and critical race theorists—and interject it back into Rawls's Original Position. I then suggest very briefly why doing so is both compatible and incompatible with (different) parts of Rawls's general theory of justice.

I make clear throughout my argument that the interjection of this democratic notion of citizenship back into the Original Position is necessary for the sake not only of rendering Rawls's Original Position useful to feminists, but of defending his general theory of justice against what I take to be three of the most important claims made by feminists against Rawls's Original Position. These are, first, that the methodology underlying Rawls's Original Position—individuation and abstraction—privileges men over women by undermining the values of care and relationship;⁶ second, that individuals behind the Veil of Ignorance cannot produce principles of justice that are powerful enough to challenge the patriarchal family;⁷ and third, that Rawls's insistence on a Veil of Ignorance takes away from black women and other women of color in particular the racial and cultural identities necessary to both their moral agency and their personal integrity.⁸

I begin with a general critical assessment of each of these feminist claims in an effort to show both what is powerful about them and why they may not be as devastating to Rawls's general theory as those who make them frequently suggest that they are. I then show why, in light of what is right about these claims, Rawls had to go further than he did in placing the value of social and political equality—construed in terms of both freedom from hierarchical domination and the ability of individuals to share political power with other citizens—at the center of our attention. Finally, I suggest how Rawls might do as much by taking seriously his own characterization (in his later works) of individuals in the Original Position as democratic citizens.

II. MASCULINIST STARTING POINTS

The most frequently aired feminist complaint about Rawls is that his methodology—individuation and abstraction—both undermines the value of relational thinking and the ethics of care (those ways of knowing and behaving ethically that are frequently, although not uncontroversially, associated with women), and renders incompetent those who accept these ways of knowing and behaving ethically.⁹

6. See *infra* Part II.

7. See *infra* Part III.

8. See *infra* Part IV.

9. The number of feminists who have lodged this complaint over the years is considerable. For a representative sample of these complaints, see Christine Di Stefano, *Configurations of Masculinity: A Feminist Perspective on Modern Political Theory* (1991); Alison M. Jaggar, *Feminist Politics and Human Nature*

Here the focus is invariably on the Veil of Ignorance. How, feminists from Nel Noddings¹⁰ to Allison Jaggar¹¹ and Iris Young¹² ask, can Rawls's theory of justice possibly represent the experiences of women if individuals in the Original Position are expected to leave their caring selves, their relationships to others, and their context-bound ways of knowing behind?

Two related worries surface here. The first regards the content of the particular principles of justice developed behind the Veil of Ignorance and goes something like this: Individuals in the Original Position are obliged to think of themselves as discrete individuals rather than as mothers, caretakers, and participants in relationships of various kinds. Hence they will, by the very logic of the Rawls's contractarianism, not choose principles of justice that have anything to do with care and the value of relationships. Instead, they will choose principles of justice that build on what are sometimes viewed as the masculinist values of individual autonomy, means-ends rationality, and universality.¹³

The second worry addresses the negative consequences that will follow from these principles of justice once they are institutionalized, consequences that will in some cases extend to the entire community

(1983); Carole Pateman, *The Sexual Contract* (1988); *Revisioning the Political* (Christine Di Stefano & Nancy J. Hirschmann eds., 1996); Iris Marion Young, *Justice and the Politics of Difference* (1990); Virginia Held, *Mothering Versus Contract, in Beyond Self-Interest* 287 (Jane Mansbridge ed., 1990); Linda Hirshman, *Is the Original Position Inherently Male-Superior?*, 94 *Colum. L. Rev.* 1860 (1994); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 *Yale J.L. & Feminism* 7 (1989).

Linda C. McClain does a very nice job of critically analyzing and reconstructing several of the key arguments made in this literature in "*Atomistic Man*" *Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 *S. Cal. L. Rev.* 1171, 1171-218 (1992).

Interestingly, many feminist theorists have in recent years pulled back from making these claims in the extreme version found in, for example, Jennifer Nedelsky's work on autonomy as care, not because of their growing support for Rawls's theory, but because of their growing sense of frustration with both the overly simplistic "woman's voice" put forward by Carol Gilligan, and the overly romantic and depoliticized ethic of care developed by Nel Noddings and others, an ethic that might, if it is not placed in political context, disempower women by both burdening them with gender-based practices of care and depriving them of rights to autonomy. For a sophisticated corrective, see Jean Grimshaw, *Philosophy and Feminist Thinking* (1986).

10. Nel Noddings develops her central claims in *Women and Evil* (1989), and *Caring: A Feminine Approach to Ethics and Moral Education* (2003).

11. See Jaggar, *supra* note 9.

12. See Young, *supra* note 9.

13. The sense that these values are masculinist is found in many of the works cited *supra* in note 9. Carol Gilligan is perhaps best known for articulating them as such. See Carol Gilligan, *In a Different Voice* (rev. ed. 1993). For two more analytic discussions of these values as masculinist, see Genevieve Lloyd, *The Man of Reason*, *Metaphil.*, Jan. 1979, at 18, and Janna Thompson, *Women and the High Priests of Reason*, *Radical Phil.*, Summer 1983, at 10.

but that will in most cases fall primarily on the shoulders of women and others who place care and relationships at the centers of their lives. These consequences include the deeming of care and relationships as both outside the realm of justice and quintessentially non-political; the continued inattention to abuses that occur in areas where care and relationships are primary, e.g., in the family, as well as in other areas of life where a distributional model of justice is not appropriate; and the labeling of those who refuse to take on the trappings of self-interested rational actors as morally immature and incapable of full participation in the political and legal community.¹⁴

Are these two concerns warranted? If so, how serious are they as challenges to Rawls's general theory? Rawls's methodology clearly downplays the value of particular kinds of moral thinking, namely, those that insist on the importance of historical embeddedness at the epistemological, rather than the communal, level (e.g., Hegelian ways of thinking rather than contemporary communitarianism). Moreover, Rawls's theory does so, like all other theories, by fiat, rather than with a foundational argument. Hence, to the extent that it expects all individuals—and not just those who choose to be Rawlsians—to participate in the Original Position (which is open to interpretation),¹⁵ it excludes some individuals from participating in the development of those principles of justice that will presumably be imposed on them all as community members.

But things are not so clear-cut when it comes to gender. For, as feminist critics of Gilligan in particular have been quick to point out in the last few years, not all women are caregivers or contextual thinkers.¹⁶ Nor do women and men—especially after the age of thirty-

14. The question of whether the ethic of care has any place in legal institutions has proved to be particularly tricky. For a sense of the pitfalls associated with trying to incorporate an ethic of care into legal institutions, see Robin West, *Caring For Justice* (1997).

15. Whether or not all members of the community are expected as rational actors to participate in the Original Position depends on two things. The first is whether Rawls means to retain his characterization of the Original Position as deriving from conditions set down by the idea of freedom, or whether he is serious about presenting the Original Position as an idealization of liberal democracy. The second is whether Rawls's theory of justice is now *the* theory of justice—rather than *a* theory of justice—once placed back in the liberal democratic community out of which it has supposedly been crystallized. Rawls may be immune from accusations of exclusion here if he retains his purely Kantian starting points, since the exercise of the Original Position would then itself remain philosophical. But Rawls does not want—at least in *Political Liberalism*—to retain Kant's metaphysical trappings. Nor can he do so, as he acknowledges, and still derive principles of justice that have legitimacy. See Rawls, *Political Liberalism*, *supra* note 5, at 99-101. The problem is that once he puts forward his theory of justice as political, not metaphysical, he is faced with the requirement that all individuals in a liberal democratic community will have to accept the Original Position as a frame of reference—which may not be possible without excluding those individuals who have principled reasons, either philosophical, religious, or political, for not doing so.

16. For a set of diverse arguments on this question, see Linda K. Kerber et al., *On*

five—differ as much as Gilligan and her followers originally suggested they do in either moral or social life. Indeed, while women continue to be more closely associated than men do, both ideologically and in practice, with care, with the tending of relationships, and with contextual ways of knowing, these associations—and the gender differences that follow from them—are growing steadily less pronounced in North American society, and in any case have always been culturally and economically more grounded than Gilligan originally surmised.¹⁷

In the end, we might be better off asking, as Joan Tronto does,¹⁸ not whether liberal individualism writes women out of the picture by virtue of its methodology (as if there were only one methodology that liberals employ), but whether liberal individualism writes out of the picture those who value care, who concentrate on mending relationships, and/or who think contextually as a result of (in this case Rawlsian) methodological starting points. Does Rawls's methodology write these individuals out of the picture? Does it do so in any necessary fashion?

Two possible claims could be made in this context. The first is that women—or anyone else who could not in good faith or for cultural reasons separate themselves from others as part of a Rawlsian thought experiment without violating their sense of moral personality—would by necessity be excluded from the group that we consider to be capable of rational (and probably moral) choice. The second is that, in standing back from their relationships, individuals in the Original Position could or would develop principles of justice that, once institutionalized, could or would devalue practices of care and modes of contextual thinking, along with those individuals who embrace these things as valuable either in their own lives or in the lives of others.

Both claims are very serious. But neither can be made, as Jaggard and others have tried to do in their critiques of Rawls's methodology, on an a priori basis by pointing to Rawls's description of the Original Position.¹⁹ For, contrary to many of Rawls's feminist critics, the

In a Different Voice: *An Interdisciplinary Forum*, 11 Signs 304 (1986). For an excellent sense of the implications of this empirical evidence for the ethics of care, see Marilyn Friedman, *Beyond Caring: The De-Moralization of Gender*, 13 Can. J. Phil. 199 (1987), and Michele M. Moody-Adams, *Gender and the Complexity of Moral Voices*, in *Feminist Ethics* 195 (Claudia Card ed., 1991).

17. For a range of these arguments, see William J. Friedman et al., *Sex Differences in Moral Judgments? A Test of Gilligan's Theory*, 11 Psychol. Women Q. 37 (1987); Cressida J. Heyes, *Anti-Essentialism in Practice: Carol Gilligan and Feminist Philosophy*, *Hypatia*, Summer 1997, at 142; Alice Pitt, *The Expression of Experience: Code's Critique of Gilligan's Abortion Study*, 20 J. Moral Educ. 177 (1991).

18. See Joan C. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (1993).

19. Alison Jaggard writes that, from Rawls's perspective, human individuals could exist outside a social context; their essential characteristics, their needs and interests,

Original Position does not describe either moral agents in all aspects of their lives or the kind of polity that would necessarily exist once principles of justice were institutionalized. Instead, it describes a model for generating principles of justice. Rawls goes out of his way to make this clear when he defends the Original Position:

As a device of representation its abstractness invites misunderstanding. In particular, the description of the parties may seem to presuppose a particular metaphysical conception of the person; for example, that the essential nature of persons is independent of and prior to their contingent attributes, including their final ends and attachments, and indeed their conception of the good and character as a whole.

... I believe this to be an illusion caused by not seeing the original position as a device of representation.... It is important to distinguish three points of view: that of the parties in the original position, that of citizens in a well-ordered society, and finally, that of ourselves—of you and me who are elaborating justice as fairness and examining it as a political conception of justice.²⁰

Since the Original Position does not tell us about the whole moral and political life of individuals, it cannot—on an a priori basis—be thought to exclude those who fit Gilligan's model of care from either moral or political life. Indeed, it leaves us with three distinct possibilities that Rawls's feminist critics need to take into consideration. The first is that individuals who fit Gilligan's model of care might be fully capable of standing back from their own lives and of thinking hypothetically about justice without giving up who they are as caring individuals who value relationships highly. The second is that they might, as moral and political thinkers, actually want to stand back from their own lives and think about justice in this way. The third is that they, as well as other individuals in the Original Position, might choose principles of justice behind the Veil of Ignorance that are open to a community that is self-consciously interdependent.

Can Rawls's feminist critics sustain their two critical points against Rawls's methodology in light of these three possibilities? As things now stand, many women feel perfectly comfortable standing back from their own situations and thinking abstractly about general moral principles—even if they are extremely caring and contextual thinkers in social situations, i.e., even if they fit Gilligan's female model during most of their lives. Moreover, they do so in ways that are not at all inconsistent. For to think about the nature of morality and to think

their capacities and desires, are given independently of their social context and are not created or even fundamentally altered by that context. Jaggar, *supra* note 9, at 29.

20. Rawls, *Political Liberalism*, *supra* note 5, at 27-28.

and act ethically in social, political, and legal situations is not the same thing. Indeed, they are significantly different enterprises.²¹

The second claim, namely, that the Original Position would give way to principles of justice that would either ignore or violate practices of care, as well as those individuals associated with them, is not one that we could evaluate in any definitive way without empirical inquiry into concrete applications, since presumably we would have to know something about how these principles are institutionalized—embodied within particular kinds of social, political, and legal institutions—in order to conclude whether particular kinds of thinking or behaving would be acceptable or not. In other words, it is the organization of our social, political, and legal polity, not our distributive principles, that makes a difference to the acceptability of Gilligan's "women's voices."²² Hence, it is to these organizational structures that feminists would presumably have to turn. I assume here that in doing so they would have to take the goal of non-patriarchy as key.

All of this is to suggest that Rawls's theory of justice is not self-evidently masculinist in its starting points and may turn out to be masculinist or not in particular cases depending on the particular institutional contexts in place. What, though, if anything, is there of positive value in Rawls's Original Position with respect to the feminist model of care and/or contextual thinking? Can it be used in any way either to legitimate Gilligan's model or to aid in its institutionalization?

In *Justice, Gender, and the Family* and elsewhere, Susan Okin suggests that Rawls's Original Position might be used to get individuals to think, not about their self-interest as rational actors, but about how others understand the world.²³ At one point, Okin goes as far as to contend that Rawls's Original Position not only works well as a model of empathy, but works better as a model of empathy than it does as a model of rational choice, because

[a]s Rawls himself says, the combination of conditions he imposes on them "forces each person in the original position to take the good of others into account." The parties can be presented as the "rational, mutually disinterested" agents characteristic of rational choice theory only because they do not know *which* self they will turn out to be. The veil of ignorance is such a demanding stipulation that it converts what would, without it, be self-interest into equal concern for others, including others who are very different from

21. Among other things, while thinking about the nature of morality requires abstraction from morality in particular contexts, acting and behaving ethically—and figuring out how to do so—in social, political and legal situations requires contextual thinking with the use of moral principles that may themselves have been derived in a very abstract fashion.

22. Gilligan, *supra* note 13, at 1-4.

23. See Susan Moller Okin, *Justice, Gender, and the Family* 98-101 (1989).

ourselves. Those in the original position cannot think from the position of *nobody*, as is suggested by those critics who then conclude that Rawls's theory depends on a "disembodied" concept of the self. They must, rather, think from the perspective of *everybody*, in the sense of *each in turn*. To do this requires, at the very least, both strong empathy and a preparedness to listen carefully to the very different points of view of others.²⁴

Okin is right here, I think, that Rawls's Original Position could be used as a model for empathy—or at least as a model for understanding the world from others' perspectives. Moreover, she herself succeeds in providing us with a very good sense of how this model might work to sustain other-regarding relationships. But she cannot place the model back into Rawls's own theory without doing two things that are very controversial, if not impossible. The first is to explain away Rawls's own rational choice vocabulary as a misrepresentation of his intentions. The second is to provide individuals within the Original Position with a motivation for using the Veil of Ignorance to be empathetic—or, in other words, to provide a reason for *taking turns* in a way that would enhance mutual understanding.

Okin tries to explain away Rawls's use of rational choice vocabulary by implying that Rawls uses the language of rational choice theory for the sake of convenience only, rather than for any well thought out reasons.²⁵ But Rawls does use this language extensively throughout virtually all of *A Theory of Justice* and develops various rational choice models on the basis of it.²⁶ Moreover, he never retracts his rational choice models or tells us that he has changed his mind about their value. Hence, we cannot assume that he does not take them seriously—even if they might not capture many of his other statements about the necessity of leaving one's self-interest behind and thinking about the good of others in the community.²⁷

Okin is also on shaky ground when she says that we can find in Rawls's work a motivation for the pursuit of empathy behind the Veil of Ignorance.²⁸ Admittedly, Rawls does say that the combination of conditions that he imposes on individuals in the Original Position

24. *Id.* at 100-01.

25. *See id.* at 100.

26. Rawls, *A Theory of Justice*, *supra* note 4.

27. In his later years, Rawls did soften his claims for rational choice, though. While he was adamant in *A Theory of Justice* that his theory of justice is "a part, perhaps the most significant part, of the theory of rational choice," *id.* at 16, he says in *Justice as Fairness: Political Not Metaphysical* that while rational choice is very important, "[t]here is no thought of trying to derive the content of justice within a framework that uses an idea of the rational as the sole normative idea." *See* John Rawls, *Justice as Fairness: Political Not Metaphysical*, in *Collected Papers* 401 n.20 (Samuel Freeman ed., 1999).

28. *See* Okin, *supra* note 23, at 101.

“forces each person in the original position to take the good of others into account.”²⁹ But the good of others is not the same thing as their perspective. Nor does it follow from Rawls’s statement that the combination of conditions in question “forces” individuals to take the good of others into account that they *can* take such a good into account within the Original Position. Rawls’s conditions might simply be unrealizable as so stated. As things now stand, it is fairly clear that individuals cannot know enough about each other in the Original Position to formulate a notion of others’ good that is particular enough to make empathy possible.

In any case, one cannot conclude from the impossibility of “think[ing] from the position of nobody”³⁰ that Rawls does not at points imply the necessity of thinking from such a position or that a view from everybody is itself necessary, valuable, and possible. Rawls clearly implies the necessity of thinking from the position of nobody in his claim for abstraction from particularity, and while a view from everybody might indeed be necessary, valuable, and possible, it needs to be defended as such on its own merits. Hence, while Okin’s own use of Rawls’s Original Position—taken out of the context of Rawls’s general theory—is very useful and important as a way of enhancing both the ethics of care and the practice of maintaining relationships, it is not, I suspect, as compatible with Rawls’s own theory as she contends.

III. FATHERLY CONTRACTORS/PATRIARCHAL FAMILIES

The second feminist critique of Rawls cited above, namely, that Rawls cannot challenge the patriarchal family and may even legitimize it as the norm, is more worrisome. For Rawls nowhere—even in his later works—distances himself from patriarchy as a system of power. His concessions to Susan Okin in *The Idea of Public Reason Revisited* are not very extensive and they come surprisingly late in his career.³¹ Indeed, if anything, Rawls seems even more intent in his later works to treat gender, not as part of a social and political system of power, but as yet another particular identity that individuals need to leave behind when they think rationally about justice.

In any case, Rawls makes perfectly clear in *A Theory of Justice* both that individuals in the Original Position are heads of household and that they contract for family members. According to Rawls, individuals in the Original Position are not to be thought of as “single individuals” but as “heads of families.”³² Likewise, as heads of

29. Rawls, *A Theory of Justice*, *supra* note 4, at 148.

30. Okin, *supra* note 23, at 101 (emphasis omitted).

31. See John Rawls, *The Idea of Public Reason Revisited*, in *Collected Papers* 573, 595-601 (Samuel Freeman ed., 1999).

32. Rawls, *A Theory of Justice*, *supra* note 4, at 128.

families, they are to be thought of as “representatives of families.”³³ Rawls does not exclude women in this context. But he does tell individuals in the Original Position to “imagin[e] themselves to be fathers” and “to ascertain how much they should set aside for their sons by noting what they would believe themselves entitled to claim of their fathers.”³⁴

Rawls’s characterization of individuals in the Original Position as male heads of household is problematic for at least two reasons. First of all, since the Original Position is, according to Rawls, both pre-political and necessarily prior to principles of justice, Rawls’s characterization of individuals in the Original Position as male heads of household leads Rawls, not only to present patriarchy as both natural and legitimate, but to render illegitimate any effort to scrutinize the justice—or even the morality—of family life. Indeed, as Jane English goes as far as to argue, “[b]y making the parties in the original position heads of families rather than individuals, Rawls makes the family opaque to claims of justice.”³⁵

Second, if individuals behind the Veil of Ignorance are male heads of household, they might well, in their efforts to generate rational principles of justice, generate principles of justice that are patriarchal to the core, since individuals in the Original Position are supposed to think about a polity that is rational for individuals like themselves, and they themselves are patriarchal. Admittedly, in cases where the male heads of household in question are understood primarily as caretakers, rather than as embodiments of total power in the domestic realm, they will probably generate principles of justice that are benevolent rather than disciplinarian. But these principles will still be patriarchal and hence a threat to the empowerment of women.

While Rawls explicitly refers to individuals in the Original Position as male heads of household,³⁶ he might not, of course, have had to do so within the confines of his theory. Indeed, he might have been able to get around the two problems cited above by replacing the term “male heads of household” with either that of “heads of household” or that of “individuals” in his characterization of the Original Position. Hence, we need to ask: Does Rawls need to characterize individuals in the Original Position as heads of household? Does he need to characterize heads of household as male? Is there anything about his theory that compels him to do so? Might he not simply talk about heads of household as both male and female or forget the domestic sphere altogether and go back to talking about “individuals”?

Rawls, as it turns out, had to be able to talk about heads of household in order to satisfy the conditions of intergenerational

33. *Id.*

34. *Id.* at 289.

35. Jane English, *Justice Between Generations*, 31 *Phil. Studies* 91, 95 (1977).

36. *See supra* notes 32-34 and accompanying text.

justice. While he said that to talk about heads of household is not necessary to the Original Position itself, he made clear that to talk about them as heads of household is necessary to ensure that “the whole strand is tied together” between generations³⁷ or, in other words, to ensure that each person in the Original Position cares about the well being of some persons in the next generation. Hence, Rawls could not simply move back to talking about individuals *qua* individuals in the Original Position. Instead, he had to talk about individuals there as heads of household. How, if at all, might Rawls have talked about these heads of household as being in some cases women?

Rawlsians needs to be able to do two things in order to talk about women as heads of households. The first is simply to make sure that the term “head of household” is not understood in terms that are biased towards men or associated with patriarchal institutions. The second is to characterize heads of household in the Original Position (if there are two of them) as *co-heads* of household—since otherwise women could not be heads of household in two-parent families without simply substituting matriarchy for patriarchy.

Rawls should be able to meet the first condition fairly easily. For even though patriarchy might have to be retained as part of the social and political knowledge deemed relevant to rational choice-making in the Original Position (which is not an insignificant matter), it does not need to be in the Original Position itself as long as it is not considered natural. In other words, there is no good reason why heads of household have to be male at the very beginning of the story, especially if individuals are construed as rational actors rather than as members of particular groups—even though conservatives might endeavor to show that a patriarchal society is in the end the most efficient.

Indeed, contrary to the view of many feminists, one of the most progressive features of Rawls’s theory is its insistence that we abstract from both particular identities and particular social and political institutions in the Original Position in order to avoid social biases. In the case of gender, the fact that individuals do not know their sex behind the Veil of Ignorance³⁸ might well prove to be a source of gender equality—and perhaps even a challenge to homophobia. So, too, might the fact that individuals in the Original Position are expected to leave their particular relationships, cultures, and institutions behind, since the latter are bound to be patriarchal in part, if not in whole.

Could Rawlsians, though, in an effort to include women (and men in same-sex couples) in the Original Position, talk about co-heads of

37. See Rawls, *A Theory of Justice*, *supra* note 4, at 129.

38. See Rawls, *Political Liberalism*, *supra* note 5, at 24-25.

household? Rawls would, I suspect, have had a difficult time doing so, because to talk about co-heads of household would create the need to define the relationship as between the two parties—and relationships are in general not supposed to be part of the Original Position. Not surprisingly, the challenge would become even more difficult if Rawls were obliged to specify the non-patriarchal nature of these relationships, because to do so would presuppose a theory of family justice prior to justice in the public sphere. What are Rawlsians to do?

Susan Okin provides an answer by suggesting that Rawls's own theory of justice, if read in a particular way, both requires a genderless, non-patriarchal society and helps us to sketch the normative basis of an egalitarian family. Okin begins with Rawls's own theory of agreement in the Original Position and argues from there. According to Okin, agreement by representative persons in a truly non-sexist or human conception of justice is only possible for persons who share a similar basic psychology and moral development, which in turn means that the Original Position must incorporate various anti-patriarchal measures, including the overturning of all gender-structured institutions, into itself, as these institutions reflect differences in psychology and moral development that will undermine agreement on justice.³⁹

For if principles of justice are to be adopted unanimously by representative human beings ignorant of their particular characteristics and positions in society, they must be persons whose psychological and moral development is in all essentials identical. This means that the social factors in influencing the differences presently found between the sexes—from female parenting to all the manifestations of female subordination and dependence—would have to be replaced by genderless institutions and customs.⁴⁰

Moreover, Rawls's theory does not just *require* a genderless society. Instead, according to Okin, it helps us to view such a society as just.⁴¹ Here, like Rawls, Okin invokes the Veil of Ignorance. But she uses it to make the following three feminist claims. First, parties behind the Veil of Ignorance who were ignorant of their sex would not divide up family duties in a way that encourages their economic dependence on one sex.⁴² Second, in order to have equality in the public sphere, which she says Rawls's theory of justice promotes, we will have to have complete equality among adults in the family with respect to, among other things, domestic work and childrearing.⁴³ Third, individuals in the Original Position, who do not know where they

39. See Okin, *supra* note 23, at 99, 105-07.

40. *Id.* at 107.

41. *See id.* at 102-03.

42. *Id.* at 103-04.

43. *Id.* at 104.

stand, would not allow social conditions that undermine self-respect and would thus emphasize gender-free socialization and "equal expectations of self-definition and development."⁴⁴

While questions of moral psychology and development are largely empirical questions, Okin is probably correct in asserting that men and women will, within a Rawlsian framework, have to share a basic psychology and moral development in order for a common point of view and agreement to be possible⁴⁵—unless, of course, it turns out that there are two different paths to the same moral point of view, which is empirically unlikely but logically possible. Hence, Okin is probably right that Rawls's Original Position requires the transcendence of gender and the assumption of a genderless society. (Is this true only in the Original Position, one has to wonder, or is it true also in a society based on Rawlsian principles?)

But to say that Rawls's theory requires the transcendence of gender is not to say that Rawls's general theory would accept the institutionalization of a genderless society. I suspect that Rawls's moral egalitarianism, if not Rawls himself as a theorist, would be quite open to many of Okin's suggestions about the need for a genderless society, as these suggestions can, I think, be defended with the use of straightforward egalitarian principles. But, with Josh Cohen and others,⁴⁶ I have to wonder whether those of Okin's suggestions that require state action in what Rawls would stubbornly call the private sphere—for example, Okin's policy that mandates payment of half a spouse's salary to his or her mate—are compatible with Rawls's liberal hands-off policy in personal life.

Moreover, while J.S. Russell and others may go too far in contending that "the feminist principles of justice that [Okin] advances are in no sense a product of the 'original position,'"⁴⁷ as distinct from Okin's own feminism, they are right to argue that these principles have to be in place before individuals in the Original Position can begin to deliberate about principles of justice. Okin can defend herself here. But she can do so only by assuming that there are two Original Positions, one that takes place necessarily before the other. In other words, she can proceed only by assuming that individuals make two contracts: one to develop principles of justice in the family; the other to develop justice in the public sphere. What is wrong with that?

Two potential difficulties arise here for Rawlsians, if not for Okin herself. First of all, if there is a contract prior to that which generates

44. *Id.* at 105.

45. *Id.* at 107.

46. See Joshua Cohen, *Okin on Justice, Gender, and Family*, 22 *Can. J. Phil.* 263 (1992).

47. J.S. Russell, *Okin's Rawlsian Feminism? Justice in the Family and Another Liberalism*, *Soc. Theory & Prac.*, Fall 1995, at 397, 404.

principles of justice in the public sphere, the fundamental principles of justice are no longer those associated with justice in the public sphere as Rawls understands that sphere. Instead, they are those associated with the prior contract, e.g., that which here establishes a just family. Okin may herself welcome such a prospect. But she cannot do so without leaving a great deal of Rawls's fundamental theory of justice behind and imposing on Rawls a two-part Original Position that goes against the logic of his foundational social contract.

Second, if Rawlsians wanted to retain both Okin's principles of gender justice and her characterization of these principles as grounded in the Original Position *without* falling back on such a two-contract system, they would have to go back to viewing these principles of family justice as a mere theoretical necessity of the Original Position that Rawls develops in *A Theory of Justice* rather than as principles that are important to pursue in their own right. The loss of Okin's own contract theory of family justice would, I think, be a shame here, since it both uses the Original Position in a much more interesting way than this latter approach and is a very strong tool for challenging patriarchy. Hence, I would have thought it worthwhile either to cut her theory loose from Rawls's altogether or to think about how else Rawls's Original Position might be used to support her genderless society as both legitimate and just.

I suggest in the final part of this paper that we might be able to use Rawls's Original Position to challenge patriarchy in both the public and private spheres if we could show that individuals in the Original Position were, as democratic citizens, necessarily free of the sort of patriarchal baggage that Okin herself rightfully rejects.⁴⁸ But let me first turn to the remaining—and perhaps most damaging—feminist critique of Rawls. I refer here to the critique of Rawls as incapable of developing a theory of justice that is both fair to and appropriate for members of oppressed or subordinate racial communities—including women of color.

IV. THE VEIL OF IGNORANCE: A RECIPE FOR RACIAL INEQUALITY?

In *The Political Significance of Social Identity: A Critique of Rawls's Theory of Agency*,⁴⁹ Kevin Graham makes the following argument about why Rawls is not able to deal adequately with the oppression that minority members of American society experience. Rawls's theory of justice, writes Graham, conceives of individuals in the Original Position both atomistically and egoistically.⁵⁰ It focuses

48. See *infra* Part V.

49. Kevin M. Graham, *The Political Significance of Social Identity: A Critique of Rawls's Theory of Agency*, Soc. Theory & Prac., Summer 2000, at 201.

50. See *id.* at 202, 209.

narrowly on the personal goods of individual rights and liberties, fair shares of social resources, and self-respect, rather than on socially conditioned and constructed goods, including those racial and cultural identities which are, according to Graham, extremely important both to the organization of the community in general and to the ability of minority members to exercise their autonomy as persons.⁵¹ Indeed, Graham claims, Rawls's theory of justice treats these identities as "politically irrelevant."⁵²

Interestingly, Graham does not, like Jaggard and others cited in Part II of this paper, assume that what happens in the Original Position is what would happen in a polity ruled by Rawlsian principles of justice. Indeed, he concedes that Rawls is correct to present the Original Position as a mere device of representation, rather than as a freestanding argument for Rawlsian principles of justice.⁵³ Moreover, he does not deny the value of Rawls's rational experimental method or treat it as racially, culturally, or gender biased in and of itself.⁵⁴ In other words, he does not deem the method biased by virtue of its abstractness *per se*. Instead, he zeroes in on Rawls's list of primary goods in the Original Position and argues that Rawls's failure to acknowledge cultural and racial identities in the Original Position is particularly bad for racial and cultural minorities, including women of color.⁵⁵

Graham's argument proceeds on the basis of three textually justifiable claims about the character of the Original Position with respect to Rawls's primary goods. The first is that Rawls assumes in his account of primary goods that the citizens of a well-ordered liberal democratic society would generally require the same means for moral development and human fulfillment.⁵⁶ Rawls, Graham acknowledges, makes clear that the well-ordered liberal democratic society that he has in mind is pluralistic with respect to citizens' differing conceptions of the good and the various comprehensive doctrines that they use to interpret these conceptions.⁵⁷ But Rawls, Graham points out, also conceives of this society as homogeneous with respect to the kinds of means that these citizens would require to pursue their conceptions of the good and to secure their higher order interests.⁵⁸

Second, Rawls's account of the primary goods "arbitrarily"—perhaps "without justification"—would be better here—limits the scope of the means to moral development and human fulfillment by treating

51. *See id.* at 209-10.

52. *Id.* at 213.

53. *Id.* at 202 (citation omitted).

54. *See id.* at 222.

55. *See id.* at 209-11.

56. *Id.* at 213.

57. *See id.*

58. *Id.* at 213-14.

them exclusively as objects of individuals' possession.⁵⁹ As Graham points out, only "[s]ome of these goods, including income and wealth, are paradigmatic examples of material possessions that individuals can own and control. But all of them, including the relevant rights, liberties, powers, and prerogatives, can be distributed among individuals who can possess and exercise them at their pleasure."⁶⁰ Hence, according to Graham, we can conclude both that Rawls's account of the primary goods assumes that social justice amounts to the equitable distribution of "*things* across society,"⁶¹ and "that "[i]f the primary goods could not be conceived of as things, at least in some abstract sense, we could not make sense of the idea that we can check to see how equitably they are distributed across society."⁶²

Third, even though Rawls claims that his views about individuals in the Original Position are neutral with respect to the metaphysical nature of persons, he does assume an "individualistic social ontology"⁶³ by virtue of both his account of the primary goods as containing "only goods that individuals can possess, exercise, or enjoy, including individual rights and liberties, income, and wealth,"⁶⁴ and his insistence that individuals' identification in the Original Position with various groups be understood as either "voluntarily formed or politically irrelevant."⁶⁵ Not surprisingly, this latter insistence becomes particularly important to anyone concerned about the importance of cultural and racial identity to moral agency and personal integrity. For it treats as irrelevant that which may be necessary to both moral agency and personal integrity in the case of racial and cultural minorities.

Rawls does not, of course, dismiss the importance of these identifications in general. Instead, he removes them from any definition of the "public, or institutional, identity" with which he is concerned.⁶⁶ According to Rawls, while a person's "noninstitutional or moral identity"⁶⁷ depends on voluntary associations, affections, and loyalties to others with whom an individual chooses to ally herself—on the particularities of her life—her public identity depends only on her having the two moral powers that he cites—a capacity for a sense of justice and for a conception of the good—as well as a determinate conception of that good.⁶⁸

Rawls makes clear that only an individual's public identity is

59. *Id.* at 210.

60. *Id.* at 208.

61. *Id.* at 208-09.

62. *Id.* at 209.

63. *Id.*

64. *Id.*

65. *Id.*

66. John Rawls, *Political Liberalism*, *supra* note 5, at 30.

67. *Id.* (citation omitted).

68. *Id.* at 19, 30-32.

present in the Original Position, since what a person requires in order to secure her higher order interests depends solely on her status as a "free and equal person" as Rawls understands that term.⁶⁹ Likewise, he makes clear that an individual's memberships in social groups defined by ethnicity, race, and gender, are not—and cannot be—part of her public identity, because they do not have anything to do with her status as moral agent.⁷⁰ Nor, according to Rawls, are these things even part of her moral identity, since they are not freely chosen and cannot be freely withdrawn.⁷¹

Graham argues in this context, contrary to Rawls, "that individuals' memberships in different social groups do affect their chances to develop their moral powers and to fulfill their conceptions of the good,"⁷² and hence must be taken into consideration at the level of public identity.⁷³ He does so on the basis of two very persuasive arguments. The first is that social groups are, contrary to the claims of Rawls and other liberals, non-chosen: "[A] social group is unlike an association insofar as one does not choose to become a member of such a group, but rather discovers oneself already to be a member."⁷⁴ The second is that moral agency presupposes a sense of personal identity, and that a sense of personal identity for many minority members of American society requires race and culture consciousness.

According to Graham,

[a] person's culture is the context in which he makes moral, religious, social, and lifestyle choices, and in which he has reasons for choosing some forms of life over others. Without the existence of culture as a context for choice, there would be no rational grounds for choice. Thus when a minority culture disappears, whether through assimilation, genocide, or whatever, many former members of that culture may no longer be able to make sense of their lives.⁷⁵

Because individuals' memberships in different groups affect their chances to develop their moral powers and to fulfill their conception of the good, Graham concludes that two things would have to be true of Rawls's Original Position in order for it to satisfy both the needs of minorities and the principle of fairness across racial groups. First, individuals in the Original Position would have to be able to know who they are as members of a racial community and to identify with

69. *Id.* at 18-19.

70. *See id.* at 24-25.

71. Rawls makes clear in *Political Liberalism* that the only kinds of human collective groups that his theory admits are voluntary associations, societies, and morally arbitrary collections. *Id.* at 40-43.

72. Graham, *supra* note 49, at 209-10.

73. *See id.*

74. *Id.* at 210.

75. *Id.* at 214.

others in this community.⁷⁶ Second, group identity (or the ability to identify with one's group in cases where group identity is necessary to the development of moral powers) would have to be considered a primary good.⁷⁷ Could Rawls possibly accept either of these two amendments?

Rawls acknowledges something like the first of these amendments in his response to his communitarian critics, and makes clear that he is not at all interested in accepting it. Indeed, he characterizes the acknowledgment of particular identities—whether group based or purely individual—in the formulation of principles of justice as both contrary to any theory of justice that aspires to moral legitimacy and unnecessary. He argues that such an acknowledgment is contrary to any theory of justice that aspires to moral legitimacy because it goes beyond the concept of a public person.⁷⁸ It is unnecessary, he argues, because all citizens can be said to require the same primary goods, although they might, he concedes, need more or less of these goods.⁷⁹

76. *See id.* at 209-13.

77. *See id.*

78. Rawls continues to insist throughout his later works that while individuals can of course enjoy their particular identities as private persons, they cannot assert these identities in discussions of justice without violating the moral tenets of justice itself. As late as 1997, Rawls writes that, while we may value the identities that individuals have as “members of families and other associations,” in thinking about justice we don't view persons as socially situated or otherwise rooted, that is, as belonging to this or that social class, or in this or that property and income group, or as having this or that comprehensive doctrine. Nor are we appealing to each person's or each group's interests though at some point we must take these interests into account. Rather, we think of persons as reasonable and rational, as free and equal citizens, with the two moral powers.

Rawls, *The Idea of Public Reason Revisited*, *supra* note 31, at 607.

Graham's opposition to this notion of homogeneity is pronounced. He writes: [W]hile some social groups may merely need more of the same primary goods that everyone else has, others may need different kinds of primary goods. Consider the members of a threatened minority culture Because a person's culture is the context in which she develops and exercises her ability to have a conception of the good and a sense of justice, the continued existence of a person's culture is a necessary condition of that person's development and exercise of these moral powers.

Graham, *supra* note 49, at 213.

“Members of the dominant culture,” on the other hand, “do not need the same special protections for their own culture.” *Id.* at 214.

79. *See* Rawls, *Political Liberalism*, *supra* note 5, at 182-86. Rawls concedes here that persons whose physical capacities are reduced below a basic minimum level of functioning may need a greater index of primary goods than those with normal physical capacities. But he does not concede a need among disempowered groups in society for such a greater index—and certainly not for different primary needs. *See id.* Graham's major contention with Rawls is that he simply does not understand—or care about—the needs of minority groups that have been oppressed in society. According to Graham, “[i]f all the members of a threatened minority culture are to satisfy what Rawls calls their higher-order interests, they must have the chance to live out their lives as members of this culture, which significantly shapes their social identities.” Graham, *supra* note 49, at 214.

Moreover, Rawls goes so far in *Political Liberalism* as to say that even if the refusal to acknowledge group identities creates social and political conditions that lead to the death of particular cultures, this consequence, while “regrettable,” is “not unjust.”⁸⁰ According to Rawls, “[n]o society can include within itself all forms of life. We may indeed lament the limited space, as it were, for social worlds, and of ours in particular.”⁸¹ But the necessity of letting some cultures die out is “not to be taken for arbitrary bias or injustice.”⁸² Instead, it means that “[t]he nature of its culture . . . proves too uncongenial.”⁸³

The second amendment would appear equally unacceptable to Rawls, as it moves us beyond Rawls’s individualistic ontology and requires us to assume a group-based, if not a relational, view of individuals in the Original Position. Rawls needs his individualistic ontology in order to sustain his contract theory. All social contract theorists do. And while Rawls can, as I suggested in Part I, accept a relational view of individuals in society after principles of justice have been institutionalized, he cannot do so in the Original Position without sacrificing his whole rational choice methodology, because, as he makes clear, that methodology is based on the representation of discrete individuals.

In any case, Rawls would, I think, lose a lot if he chose to accept either amendment, since his “standing back” theory of justice, unlike theories of justice that are embedded, can supply us with two things that would seem to be especially important to the very kinds of movements against racism that Graham and other anti-racist activists want to see promoted. The first is a way of talking about justice across groups that is legitimate for all members of the community by virtue of its not being tied to the values of any one group. The second is a principle for ruling out of bounds modes of racial identification that violate others’ rights, for example, those associated with the Ku Klux Klan and other white supremacist groups, while promoting modes of racial identification that are necessary to personal integrity.

None of this is to suggest that we need to give up on the value of group identification in general. Nor is it to suggest that group identification is not crucial to racial minorities. It is. Instead, it is to suggest only that if individuals are asked to identify with their groups while formulating principles of fairness, as distinct from being asked to identify with their group when, say, developing their moral powers, they will not be able to formulate principles of fairness that are either legitimate in general or useful to those who want to combat racism.

Where does this leave us with respect to Rawls’s ability to counter racism? Rawls may not be able to allow individuals to have particular

80. Rawls, *Political Liberalism*, *supra* note 5, at 197-200.

81. *Id.* at 197.

82. *Id.*

83. *Id.*

group identities in the Original Position or to include group identity as a primary good. But he does not need to rule out group identity as something of value either. Nor does he need to remain tied to group identity as a mode of combating racism. Indeed, I suggest below, if Rawls were to begin with his own characterization of individuals in the Original Position as democratic citizens, he might be able both to retain the value of group identity without giving up on his “standing back” approach to justice in general, and to challenge racism as a system of power.

V. DEMOCRATIC CITIZENSHIP V. PATRIARCHY

Let me begin here by stressing two general points of importance that come out of the above discussion. The first is that while the feminist claim that Rawls’s theory of justice is antithetical to the values of care and relationship is fairly weak,⁸⁴ the other two feminist claims cited above, namely, that Rawls’s Original Position cannot be used to challenge the patriarchal family,⁸⁵ and that Rawls takes away from minority women the racial and cultural identities necessary to the sustenance of their moral agency and personal identity,⁸⁶ are much more worrisome. Indeed, they are potentially very damaging to Rawls’s general theory of justice.

The second is that if Rawlsians want to meet the challenges implicit in both critiques and to become more useful in undermining both patriarchy and systems of racism, they will have to find a way, not of endowing individuals with a particular or group identity behind the Veil of Ignorance or of giving up on the Veil of Ignorance altogether, but of thinking about individuals behind the Veil of Ignorance in such a way that these individuals would, in formulating principles of justice, naturally pursue the non-subordination of women and minorities as a goal. In other words, they will have to find a way of endowing individuals in the Original Position with a general identity that when acted upon leads them—without asserting their own particular group identities—to challenge both patriarchy and systems of racism. How might they do so?

Obviously, if Rawls’s theory of justice were itself patriarchal, then there would be no use in asking this question. But it is not. Rawlsian individuals behind the Veil of Ignorance do not think of themselves as superior or inferior to those beneath them in the social hierarchy. (How could they do so without knowing who they are?) Nor, if we are willing to leave Rawls’s extremely unfortunate remarks about individuals in the Original Position as male heads of household⁸⁷

84. See *supra* Part II.

85. See *supra* Part III.

86. See *supra* Part IV.

87. See *supra* notes 32-34 and accompanying text.

behind, which I suggested above we can do,⁸⁸ are Rawlsian individuals attached to particular social roles that would make them welcome members in any patriarchal community about which we are now aware. Hence, even if they were to know something about patriarchy—which depends on what counts as relevant background knowledge⁸⁹—they could not be construed as the source of patriarchy or as willing partners to the reproduction of patriarchy in practice.

Moreover, Rawlsian individuals in the Original Position are, according to Rawls, moral equals.⁹⁰ Hence, they might, as moral equals, be expected to value moral equality, i.e., treat it as a moral principle, in the Original Position and to develop principles of justice on the basis of such a valuation that challenge the kinds of institutions that, by virtue of their hierarchies of domination and subordination, lead to the moral disrespect of particular groups in practice. In other words, Rawlsian individuals might, by virtue of who they are as moral equals, naturally generate the kind of principles of justice that are required in this context.

Such a possibility is intriguing. But it falls apart fairly quickly for two closely related reasons. First of all, in Rawls's schema, moral principles are supposed to come out of, rather than precede, the contracting situation. Hence, individuals in the Original Position cannot associate themselves with moral equality as a moral principle. Nor can they, without such a principle, value moral equality or use it to develop principles of justice. Instead, they can only *be* moral equals—and then only if the Kantian association between rationality and moral worth holds up under scrutiny.⁹¹

88. See *supra* notes 36-45 and accompanying text.

89. Interestingly, Rawlsians might be able to recognize patriarchy and other hierarchical systems of domination in the Original Position if they could include knowledge about these systems in the basic psychological, social, economic, and political knowledge required of individuals behind the Veil of Ignorance. But they could not do so in any critical way. Instead, they could do so only by recognizing patriarchy as part of the necessary "background knowledge" that is supplied to rational agents in their choice of principles of justice. Moreover, in so recognizing patriarchy as such a relevant subject matter, they might be stuck having to accept the "laws" of patriarchy as part of the status quo (a situation which can only get worse for them if, as many socialist feminists have argued over the years, capitalism is itself patriarchal). This, I take it, is why feminists and other left-leaning critics of Rawls have been so adamant over the years about the conservative nature, not only of the particular psychological, social, economic, and political facts that Rawls allows his contractors to know, but of his inclusion of such background information in general.

90. See, e.g., John Rawls, *A Kantian Conception of Equality*, in *Collected Papers* 255 (Samuel Freeman ed., 1999). Rawls, of course, expresses their moral equality in a number of Kantian ways. These range from his restatement in *A Theory of Justice* of Kant's claim that morality itself has its source in rationality, and that all individuals qua rational beings in the noumenal realm are thus moral equals, Rawls, *supra* note 4, at 251-52, to his treatment of them in *Political Liberalism*, *A Theory of Justice*, and elsewhere as moral equals by virtue of their various moral powers to both pursue their own goods and formulate principles of justice rationally.

91. I argue in *Moral Responsibility and the Boundaries of Community* (1992) that

Second, while individuals in the Original Position can legitimately be endowed with the identity “moral equal”—a label no more particular than that of “rational actor” or “head of household”—they cannot generate principles of justice out of the expression of that identity (as distinct from a principle of moral equality). For the identity “moral equal” constitutes a moral status, rather than a normative perspective. Likewise, to be a moral equal is to express one’s moral equality to others rather than to value moral equality. Hence, while one might, in acting out one’s identity as a moral equal, assert that one is a morally equal member of the community, one cannot develop principles of justice based on the value of moral equality.

Moreover, it is not clear how far moral, as distinct from social or political, equality can take us in this context anyway. Moral equality is, contrary to Iris Young and other postmodern critics of Enlightenment liberalism,⁹² very important to any movement that hopes to de-legitimize natural hierarchies. But it is not, as Young and others correctly point out, sufficient to challenging patriarchy or any other system of hierarchical domination, since it does not focus our attention on the power relationships that exist between individuals as group members and that lie at the root of almost all of those various kinds of gender-based domination and subordination that have harmed women (and others) over the years.

Indeed, as Kant himself makes clear in *The Metaphysical Elements of Justice*⁹³ and other works, individuals can, from a Kantian perspective, be treated as moral equals within all sorts of hierarchical relationships of domination and subordination, because to treat individuals as moral agents (and hence morally equal) is to recognize something about their moral wills rather than something about their social and political lives or their material well-being.⁹⁴ Not surprisingly, the seeming disjuncture between moral equality, on the one hand, and social and political equality, on the other, becomes even less problematic within the Kantian system once the hierarchies of domination and subordination in question are construed as natural—which they are, uncannily, by Kant himself, although not by Rawls.

All of this suggests two things in general. First of all, if individuals in the Original Position are to be helpful in combating patriarchy, they

such an association does not in fact hold up and in the end needs various cultural assumptions to work.

92. Young argues this position most fully in *Justice and the Politics of Difference* (1990). See also Linda J. Nicholson, *Feminism/Postmodernism* (1990). I refute this view at great length in *Gender Justice Without Foundations*, 89 Mich. L. Rev. 1574 (1991).

93. Immanuel Kant, *The Metaphysical Elements of Justice: Part I of the Metaphysics of Morals* (John Ladd trans., 1965).

94. *Id.* §§ B-E, at 34-37.

will have to value each other as equals in both public and private life, rather than just value the principle of moral equality. (Susan Okin is surely right here that without combating patriarchy in the family, as well as in the polis, the whole project falls flat.)⁹⁵ Second, they cannot value each other in this way simply as a matter of principle abstracted from who they are as persons. Instead, they have to value each other in this way because that is who they are as, in this case, participants in the Original Position. How, if at all, might these conditions be met within Rawls's own work?

Two possibilities come to mind here. The first involves turning to the conditions of public reason that Rawls develops in *Political Liberalism*⁹⁶ and *The Idea of Public Reason Revisited*⁹⁷ in an effort to tease out of them principled constraints on the domination of women and minorities within the public sphere.⁹⁸ The second involves sticking with a focus on identity but moving from Rawls's identification of individuals in *A Theory of Justice* as rational actors⁹⁹ to his identification of them as political citizens (who are also rational actors) in *Political Liberalism*.¹⁰⁰

I resist the first turn for two reasons. First of all, while Rawls's discussion of public reason in his later works may help us to place constraints on sexism and racism within the public sphere (which is itself questionable), it does not help us to get at domination in personal, family, and social life, where a great deal of oppression takes place. Second, as Rawls himself makes explicit, the conditions of public reason exclude the giving of particular kinds of religiously (and hence also culturally) based reasons, including, interestingly enough, many which are patriarchal. Hence, those women (and men) who would, by virtue of their religious and cultural identities, find it appropriate to give such reasons would be excluded from public deliberation.

Rawls's re-identification of individuals as democratic citizens, on the other hand—which is, contrary to several of Rawls's own statements, a genuine re-identification—would seem to be much more useful in this context. For the identity of “democratic citizen,” as I will define it shortly, unlike that of “moral equal,” requires non-hierarchical social and political relationships of the sort that would appear not only to challenge patriarchy in the public sphere, but to lay the foundations of a non-patriarchal family. The identity of

95. See Okin, *supra* note 23, at 104.

96. Rawls, *Political Liberalism*, *supra* note 5.

97. Rawls, *The Idea of Public Reason Revisited*, *supra* note 31, at 573.

98. I have in mind here the kind of effort that S.A. Lloyd put forward in *Situating a Feminist Criticism of John Rawls's Political Liberalism*, 28 Loy. L.A. L. Rev. 1319 (1995).

99. Rawls, *A Theory of Justice*, *supra* note 4, at 142.

100. Rawls, *Political Liberalism*, *supra* note 5, at 29-35, 72-77.

“democratic citizen” does not get ruled out by the logic of Rawls’s Original Position in the way that, say, either a particular identity or a principle of democracy or of moral equality would get ruled out. Let me then turn briefly to Rawls’s notion of democratic citizenship.

Rawls asserts in *Political Liberalism* that a person in the Original Position is both “someone who can be a citizen”¹⁰¹ and someone who can be a citizen within liberal democratic life.¹⁰² Likewise, he makes clear, not only that individuals in the Original Position are, as democratic citizens, both free and equal, but that freedom and equality, rather than, say, membership in a community in which all competent adults share power, are the hallmarks of democracy. Here he says outright: “Since we start within the tradition of democratic thought, we also think of citizens as free and equal persons.”¹⁰³

But Rawls does not want to paint a full picture of democratic citizens qua democratic citizens. Nor does he want to leave democratic citizens enmeshed in the democratic culture out of which he supposedly crystallizes their identities as liberal democrats. For, to do so would, from Rawls’s theoretical perspective, weigh down individuals in the Original Position with too much culturally particular baggage. Hence, he hones his definition of a democratic citizen and presents us with a conception of an idealized democratic citizen.¹⁰⁴ “Thus,” he writes, “while we begin with an idea of the person implicit in the public political culture, we idealize and simplify this idea in various ways.”¹⁰⁵

What does democratic citizenship as freedom and equality come to mean for Rawls? Rawls makes clear that, while he is talking about democratic citizens, whom he refers to as political persons, he is still talking about moral agents:

The basic idea is that in virtue of their two moral powers (a capacity for a sense of justice and for a conception of the good) and the powers of reason (of judgment, thought, and inference connected with these powers), persons are free. Their having these powers to the requisite minimum degree to be fully cooperating members of society makes persons equal.¹⁰⁶

101. *Id.* at 18.

102. Rawls writes that “[w]hen we describe the way in which citizens regard themselves as free, we describe how citizens think of themselves in a democratic society when questions of political justice arise.” *Id.* at 33.

103. *Id.* at 18-19.

104. Rawls makes clear throughout his later work that he is speaking of idealized democratic citizens. In *The Idea of Public Reason Revisited*, he claims that “ideally citizens are to think of themselves ‘as if’ they were legislators and ask themselves what statutes, supported by what reasons satisfying the criterion of reciprocity, they would think it most reasonable to enact.” Rawls, *The Idea of Public Reason Revisited*, *supra* note 31, at 577.

105. Rawls, *Political Liberalism*, *supra* note 5, at 20.

106. *Id.* at 19 (citation omitted).

Rawls's new version of individuals in the Original Position does take him some distance in challenging, not just unequal rights, but abusive relationships. Rawls himself makes this explicit: In particular, these conditions must situate free and equal persons fairly and must not allow some persons greater bargaining advantages than others. Further, such things as threats of force and coercion, deception and fraud must be excluded.¹⁰⁷

But the kinds of coercion that are excluded are only those that will allow individuals in the Original Position, who are now supposed to be democratic citizens, to exercise the two moral powers cited above—those having to do with the ability to formulate principles of justice and notions of the good, on the one hand, and those having to do with the pursuit of rationality, on the other. In other words, Rawls's notion of the democratic citizen is not extensive enough to exclude those kinds of relationships that might prohibit citizens from participating in social and political life as equals. Indeed, as long as Rawls is serious about not acknowledging the importance of racial, cultural, and gender differences among his "political persons," he, unlike Okin, has no choice but to leave these damaging hierarchical relationships in place.

The problem here is not, as some feminists, such as Iris Young, argue, that Rawls has excluded the identity of women in the Original Position and hence cannot take patriarchy into consideration.¹⁰⁸ Nor is it, as Graham and others who are concerned about racial and cultural subordination have argued, that Rawls has excluded cultural and racial identities in the Original Position and hence cannot talk about racial hierarchies that disempower minorities.¹⁰⁹ Instead, it is that Rawls has not included in his definition of "political persons" the need of these individuals both to have their particular identities taken seriously by others, and to accept the particular identities of other members of the community as valuable.

How, if at all, might Rawls do so? At the very least, he would have to take seriously his own contention that individuals in the Original Position are *political* persons with a "public part" to their identities.¹¹⁰ As things now stand, Rawls *refers* to individuals in the Original Position as political primarily as a way of distancing himself from the metaphysical underpinnings of the Original Position that he relies upon in *A Theory of Justice* and that he wants to move away from in *Political Liberalism*. But he does not *describe* individuals in the Original Position as political by, say, recognizing their membership in a political community of which they are necessarily a part. Instead, he

107. *Id.* at 23.

108. See Young, *supra* note 9, at 104-05.

109. See *supra* notes 49-55 and accompanying text.

110. See Rawls, *Political Liberalism*, *supra* note 5, at 29-35.

continues to describe them primarily as moral agents whose public identity is a matter of their “moral powers” as rational actors.

Moreover, while Rawls does identify them as democratic citizens, rather than just as political persons, he uses their identity as democratic citizens, not to tell us what principles of justice those who are genuinely democratic might hone behind the Veil of Ignorance, but rather to legitimize the Original Position itself. According to Rawls in *Political Liberalism*, the Original Position does not have its source in rationality per se.¹¹¹ Instead, it has its source in the culture of a liberal democratic community that embraces a constitutionally structured set of laws and policies that are themselves embodiments of liberal democratic principles.¹¹²

Rawls does not, as we might expect, go on to tell us what those who adhere to a liberal democratic culture, as distinct from rational actors who embrace primary goods that include freedom, demand of their principles of justice. Nor does he make explicit exactly what the connections are between liberal democratic culture and the two principles of justice that he contends have such a culture as their “backdrop.” Instead, he associates being a democratic citizen with essentially the same two moral powers that he originally presented in *A Theory of Justice* in primarily Kantian terms, and demonstrates the important role that these moral powers play in deriving his two principles of justice.¹¹³

But democratic citizens, even in an idealized form, are more than just a bundle of moral powers. Instead, they are both democrats and citizens. As democrats, they do not just insist on their own rights and follow rules of justice that provide for the realization of their primary goods. Nor do they press for the realization of others’ primary goods simply because, if they did not, they might lose out themselves given the structure of the Veil of Ignorance that they place themselves behind as part of what I take to be a very honorable moral endeavor. Instead, they acknowledge that they belong to a community that (ideally) accepts all adult members of the community as equals in the sharing of power.

As citizens, they do not just manifest or idealize the community of which they are a part. Instead, they act out the idealized nature of this community; they work to realize its goals, values and principles. In the case of democratic citizens, among these goals is the inclusion of all adult members of the community as co-governors. Hence, in acting out the idealized nature of their community, democratic citizens qua democratic citizens work, among other things, to include all adult members of the community in the governance of that community and

111. *See id.* at 24-27.

112. *Id.* at 13-14.

113. *Id.* at 81-86.

to pursue other democratic ends in the process. What might this entail and how might it help us in this context?

As things now stand, democratic theorists differ greatly about the required purview of inclusion in both the public and private sphere, as well as about what is required of such inclusion.¹¹⁴ Hence, we cannot hope to put forward *the* theory of democratic identity. Nor can we insist that all interpretations of democratic citizenship take racism and sexism seriously to the extent of requiring their elimination. But we can put forward *a* definition of democratic identity that allows us to assume that those who think and act on the basis of this identity challenge patriarchy and other hierarchical structures of domination.

Two things are required here if this identity is going to be helpful to us. The first is a sense that democracy can—and has to—exist in both the public and private spheres, rather than in just the public sphere alone. For, otherwise, we will, as Carole Pateman, Susan Okin and many others have pointed out over the years, never be able to get rid of patriarchy as a general system of power.¹¹⁵ Nor will we, given both the pervasiveness of patriarchy and the relationship between our private and public lives, be able to realize democracy in the public sphere. In other words, we will defeat ourselves as democrats if we limit our call for democracy.

Second, democracy itself cannot be understood here simply in terms of equal rights or fair distributions of goods—even if the goods to be distributed are respect and dignity. Nor can it be construed in purely individualistic terms. Instead, it has to be construed at least partly in terms of the power relationships that exist between community members. Otherwise, it could not guarantee the full inclusion of women and minorities in either the private or the public spheres as co-governors.

Neither of these conditions is impossible, or even difficult, to meet. Indeed, as democratic theorists, we can, as Ian Shapiro and others now do, include the absence of non-hierarchical relationships of domination in our definition of democracy itself.¹¹⁶ Likewise, we can, without moving too far outside of the mainstream of contemporary, if not traditional, democratic thought, go on to insist that both patriarchy and systems of racial subordination violate democracy understood as such. In other words, we can in a relatively uncontroversial way—although not in a way that all democratic theorists would accept—stipulate that democratic citizenship requires

114. Three of the most widely read opponents of placing social inclusion at the center of democracy are Benjamin Barber, *Jihad vs. McWorld* (1995); Brian Barry, *Culture and Equality* (2001); and Arthur M. Schlesinger, Jr., *The Disuniting of America* (1991).

115. For one of the most comprehensive statements of this argument, see Pateman, *supra* note 9.

116. See Ian Shapiro, *Democratic Justice* (1999).

actively challenging the two systems of power that now result in the subordination of women and minorities in our society and elsewhere.¹¹⁷

Moreover, we might—in a much more controversial way—write such a notion of democratic citizenship back into Rawls’s Original Position in the guise of his “political persons” and in doing so allow ourselves to stipulate that the principles of justice that such “political persons,” whom Rawls himself characterizes as democratic citizens,¹¹⁸ choose in the Original Position take into consideration the need to challenge patriarchy and other systems of hierarchical domination. In other words, we might in this context hope for the generation of principles of justice within at least the formal structure of Rawls’s Original Position that capture the kinds of normative positions that Susan Okin, Kevin Graham and all others who are concerned with combating sexism and racism insist upon.

Could Rawls possibly accept such an amendment? Rawls could accept this amendment with respect to what he says in *Political Liberalism* about individuals in the Original Position as both citizens and democrats. Moreover, he *must* accept this amendment if he wants to continue using his references to the culture of liberal democracy as the (partial) source of his principles of justice. But, in accepting this amendment, he would clearly challenge, if not violate, some of his more purely liberal tenets—those having to do with both toleration and limits to state action, as well as the role of rational choice in his general theory of justice.

While he might, like other liberal democrats, be able to fashion some sort of compromise between democracy, as understood above, and these liberal tenets, and do so on the basis of a Rawlsian calculation about how much we could get of these two things together, he could not get around the dual-motivation problem. Indeed, he would of necessity have to choose between the two motivations in question, namely, those associated with rational actors and democratic citizens respectively. Moreover, the necessity of making such a choice is not, as we might think, new to Rawls. Instead, it captures the very deep tension that has always existed in his theory between the needs of his rational choice model, on the one hand, and his call for inclusion, on the other.

117. I argue this position more fully in *Re-thinking “Paternalism” for a Democratic Welfare State*, Soc. Theory & Prac. (unpublished manuscript, on file with author).

118. Rawls, *Political Liberalism*, *supra* note 5, at 29-35.

Notes & Observations