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Parity and Procedural Justice

Feminist critiques of John Rawls' *A Theory of Justice*, like feminist critiques of liberalism in general, take two broad forms. The more extreme critiques aim to show that liberalism in general, and Rawls' liberalism in particular, is incompatible with feminism.¹ A less extreme internal critique attempts to show, from within liberalism, that by liberalism's own lights, actual liberal practice ought to be reformed in order to bring it into line with feminism. The late Susan Moller Okin's critique of Rawls took the second form. Okin claimed that 'a consistent and wholehearted application of Rawls' liberal principles of justice can lead us to challenge fundamentally the gender system of our society.'² According to Okin the major obstacle to women's equal freedom and participation in liberal society is the pervasive gender system, which determines differential duties within the family and differential social roles in the public realm. She argued that since this gender system militates against the equal liberty of the sexes it ought to be dismantled. She also thought that it would be possible to remain committed to liberalism while at the same time dismantling both the ideological/representational and the practical aspects of the gender system.

In this paper I briefly set out Okin's position and then rehearse a number of criticisms of Okin which together suggest that dismantling the gender system and adopting the principle of androgyny would not be compatible with liberalism. This incompatibility appears to vindicate the extreme feminist critique of liberalism. I argue that nevertheless a liberal feminism is possible. The liberal feminist ought to adopt the principle of parity, that is, guaranteed equal representation of both sexes in parliament, rather than the requirement of androgyny. Parity follows from a conception of procedural justice, for it provides a mechanism which guarantees that the interests of both sexes are fairly represented in the legislature. Parity may also go some way to alleviating the tensions which exist between feminism and multiculturalism.

The argument that Okin developed began with the observation that the family is, according to Rawls, a major social institution. Hence the principles of justice should apply to it. Yet, as Okin points out, Rawls never raises the question of whether a traditional family structure would be chosen from behind the veil of ignorance.³ This leads her to speculate as to what kind of family structure would be chosen were it constructed according to the two principles of justice. She concludes that it would be an egalitarian one in which duties were not determined by sex but were shared equally between parents.⁴ She argues that Rawls' account of the family as the 'first school of justice' requires families to be just, since unless the family is structured in a just manner children will not 'develop a sufficiently ...well rounded moral psychology to enable them to engage in the kind of deliberation about justice that is exemplified in the original position.'⁵ Her conclusion is that 'the disappearance of gender is a prerequisite for the *complete* development of a non-sexist, fully human *theory* of justice.'⁶ By 'the disappearance of gender' she means the complete

disappearance of all gender stereotypes and all differences in the distribution of the sexes in all occupations. One can sum up Okin's argument by saying that it proposes that liberalism requires androgyny.

Although this argument is offered in the spirit of a reform of liberalism there are a number of reasons for thinking that the feminist implications that Okin draws are more destructive of liberalism than she thinks. Like many feminists of her generation, Okin assumed that gender difference is both socially constructed, and undesirable. She did not consider the possibility that the gender system might have arisen out of biological features of sexual difference which result in fundamental conflicts between the sexes, and fundamentally different strategies for survival.⁷ Nor does she consider the possibility that women may value the preservation of gender difference. The first of these observations leads to an argument against liberalism from a conservative perspective. If biological difference implies that androgyny is impossible, and androgyny is a prerequisite for the complete development of a non-sexist, fully human liberal theory of justice, then it would look as though such a theory of justice is impossible. The second observation leads to an argument against liberalism from the perspective of a radical feminism of difference. If liberalism requires the abolition of gender and sexual difference, but this amounts to the abolition of the female gender and its assimilation to the masculine, so much the worse for liberalism.

Objections to egalitarianism and androgyny, and by implication to liberal egalitarianism, have been put forward by various French feminists who occasionally represent the attempt to abolish sexual difference as equivalent to genocide.⁸ And various forms of the celebration of female difference, and the positive aspects of a feminine standpoint, have been promoted by a raft of English speaking feminists.⁹ Near the end of one of her discussions Okin deferred consideration of 'the effect that the consideration of women's standpoint might have on Rawls' theory of justice.'¹⁰ Since standpoint theorists, like French feminists of difference, tend to emphasise the positive aspects of female difference this deferral threatens Okin's fundamental conclusion. In later articles she attempted both to question the existence of a different standpoint, and to show that Rawlsian liberalism is not fundamentally in conflict with issues of care and concern, but neither of these observations deflects the obvious point of the above objection, which is that women do not universally agree that androgyny is desirable.¹¹

A second reason for questioning whether Okin has really offered only an internal critique of liberalism is that the abolition of the gender system would imply radical interference in individual liberty, and so would be ultimately illiberal. G. A. Cohen argues that Okin fails to understand the force of the more extreme feminist critique of liberalism. Since abolishing the gender system would involve constraints on personal choice in order to achieve an ideal feminist state, policies that radically interfere with individual liberty would be inevitable.¹² A society that attempted to impose androgyny on all its members would both be imposing a conception of the good life on them, and interfering in an area of private life that classically belongs to the sphere of personal freedom. A liberal society would, surely, allow women the freedom to choose whether to be chaste or promiscuous. It would allow them to choose whether to be 'stay at home' mothers, equal working partners, bread-winners with male 'stay at home' husbands, mothers with lesbian partners, single mothers, or childless. How could liberalism be committed to one single form of the good reproductive life?

Up to a point the defender of Okin-style androgyny might have replied to this objection by pointing to systematic ambiguities in the notion of the private sphere. One notion of the private could be called the 'Rousseauist' private sphere. This is that portion of one's social group (family and friends) with whom one's relations are appropriately governed by love and partiality. The 'Millian' private sphere, by contrast, is defined in relation to the harm principle. According to Mill state interference in an individual's life is only warranted in order to prevent harm to others. From the Millian perspective, those elements of the family and the gender system which can be shown to cause harm to others (child abuse, violence against women, and perhaps pornography) can be legitimately controlled.¹³ So, one could argue that since the gender system harms women, interference with it is not incompatible with the liberal recognition of a private sphere defined as a sphere of individual liberty. Nevertheless, it is difficult to see how the harm of the gender system could count as sufficiently obvious to justify the degree of state interference in personal life that would be necessary in order to abolish it. Could one, for instance, still remain a liberal and believe that an intelligent woman should have her liberty curtailed, because, having considered different conceptions of the good life, she had decided that the gender stereotypical role of devoted mother and home-maker was the one for her?

Furthermore, although the Rousseauist public/private distinction has been associated with a model of liberalism that has excluded women from equal opportunity and power, there are various reasons for thinking that humans will not want to entirely abolish a private sphere governed by love and affection.¹⁴ There is also a danger in Okin's weakening of the prohibition on interference in the domestic sphere, which could have consequences that are inimical to women. Okin provisionally accepts the truth of psychological accounts of gender development that propose that equal parenting is important for the development of an androgynous and just character. She uses this to argue for equal parenting. Other psychological research suggests the importance of attachment to the mother, or a small number of primary care-givers, for the healthy psychological/moral development of the child. Since Okin accepts interference in the private sphere in order to prevent the harm of gender stereotyping, she leaves open the possibility that the harm principle could be used to force women to stay at home. The thought that working mothers may harm their children is already being used in Australia to justify offering tax incentives to stay at home mothers. But one might well wonder whether it is the business of the liberal state to advantage one form of family formation over others. In so far as it is the business of the state to require those who are responsible for children to give them the care necessary for them to develop into morally motivated citizens, the state has a right to interfere in family affairs. But there is little reason not to expect that quite a variety of family formations are satisfactory in this regard, and those who claim otherwise often appear to be doing no more than attempting to impose their conception of the good life on others.

The last reason for thinking that Okin's opposition to the gender system results in an illiberal feminism is that it puts her on a collision course with multiculturalism, which has itself been argued for on liberal grounds.¹⁵ On the one hand, liberal societies seem committed to allowing people the freedom to develop different conceptions of the good life, and to preserve cultural traditions which are important for individual identity. Yet many cultures involve deeply entrenched gender systems. To mention only one example, Muslims in France, asserting the freedom to practice their faith and live according to their own traditions, want their daughters to cover their heads, and require that they do so particularly in the mixed environment of a public school. However, the French government, wanting children in school to be given an equal education, and perhaps suspecting that

girls who are taught from an early age that modesty is paramount will not compete equally in later life, has banned headscarves in school. This apparently trivial issue has generated extraordinary heat. The headscarf, represented by one side as a symbol of religious faith and liberty, symbolizes according to feminist opponents an oppressive regime of gender difference. For such feminists it is the outer sign of the submission of Muslim women to a perverse requirement of modesty, which restricts women's freedom, and results in unwanted sexual advances being blamed on the female victim, rather than on the male perpetrator.

Together these difficulties with Okin's attempt to make Rawls' liberalism compatible with feminism might make one feel that Cohen is correct and that Okin has not appreciated the force of the more extreme feminist critique which insists that feminism goes beyond liberalism. Feminism, as Okin conceives of it, is a substantive theory of the good and thus does not seem capable of trumping other conceptions of the good when they conflict with it.

In the remainder of this paper I will propose another way of developing an internal feminist critique of Rawls' conception of procedural justice. Although Rawls mentions 'the monogamous family' as a major social institution, it is possible that on reflection he should accept that what he said was misleading.¹⁶ Indeed, in his later *Political Liberalism* he excises reference to the 'monogamous family' and confesses that he has not dealt with 'the justice of and in the family' though he does assume that 'in some form the family is just.'¹⁷ He should perhaps have said that, in at least some of its forms, the family is just, for the family does not have a single form, and it is not at all clear that there is one family form that is required by liberalism, or that liberalism requires anything very like the traditional family. Fair equality of opportunity, for instance, conflicts with traditional family loyalty and partiality.¹⁸ And early Zionist experiments with the Kibbutz which attempted to expunge such family loyalties appear to have been compatible with liberalism.

In two provocative articles Véronique Munoz-Dardé explores an argument for abolishing the family in order to realise true equality of opportunity, and considers replacing it with 'well run orphanages.'¹⁹ Yet, too many humans place too great a store on the pleasures of producing and bringing up their own children for any such arrangement to be likely to be widely chosen. Justice is surely compatible with the continued existence of families, but even given that one has decided that biological families can be just voluntary associations, this leaves open the possibility of many family forms. If voluntary polygyny and polyandry are intrinsically illiberal, this needs to be argued for. It needs to be shown why it would not be just for women to exploit the liberty they have to give birth to children outside marriage in order to exclude men from parenthood. Or why it would be unjust for men to leave all the burdens of parenting to women.²⁰ It may be that the family is a major social institution in any society, but the forms of family that one would expect to find in liberal societies are surely not predetermined. Rawls' early assumption that 'monogamous marriage' was a just major social institution of liberalism needed justification, but so too does the assumption that monogamous marriage is illiberal.

It may well be that it is only a legacy of historical powerlessness which leads so many women to continue to aspire to marriage, a home in the suburbs, and 2.3 children. Yet it is not clear that differences in life-style choices between the sexes are always coerced. Indeed, Sarah Hrdy, examining marriage from a socio-biological perspective, has argued that monogamous marriage is the most harmonious solution to two problems which beset reproduction: the conflicting

reproductive interests of men and women, and the conflicts of interest that exist between men. Monogamy is just to men, because with monogamy they each have an equal chance to reproduce. It benefits women and children, because when a male cares for children that he knows are his own, this relieves women of some of the burden of care, and helps ensure the survival of offspring.²¹ Although these speculations do suggest that, from behind the veil of ignorance, monogamy would be preferred, they still leave much in the air. Should monogamy be indissoluble, as early Christians believed?²² Is divorce just, and under what conditions? What women and men would choose with regard to the family, from behind the veil of ignorance, is difficult to determine, because this choice would itself depend on what they believed to be the case concerning their vulnerability to pregnancy, their desires as members of their sex, and their beliefs about how members of the opposite sex would be inclined to treat them. Indeed what appears to be needed is a just mechanism for determining issues concerning the justice of, and within, various family formations. A family court is one such mechanism, but what is more important is the process that determines the structure of the court and the character of the laws administered by it.

We should therefore tackle the issue of feminism and the family from the top down. Rawls' theory of justice as fairness is represented by him as using the idea of pure procedural justice.²³ 'Pure procedural justice obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair.'²⁴ Applying this to systems of gender difference and the family one should conclude that so long as a system of specific institutions and family law is the outcome of a just procedure it will count as just. What procedure for determining the appropriate family constitution would then be fair? Well, clearly, at a minimum, one in which men and women are equally represented. From this point of view the way to guarantee that the laws actually passed will take into account the differences in interest between the sexes is not to mandate equality in all things (androgyny) but rather to mandate equal representation in parliament and other elected legislative bodies (parity). Androgyny only seems to be required by feminism if one imagines women having to compete as equals with men in the public sphere in order to gain equal access to power, and in particular to political power. But if one thinks that the fundamental equality is political equality, one should conclude that only a procedure that mandates equal representation for both sexes could be chosen from behind the veil of ignorance. Once one has parity one can leave the choice between androgyny and gender difference to be determined by individuals within a framework of law that is informed as much by the voices of women as by those of men.

One might, nevertheless, wonder whether the demand for parity remains within the assumption of liberal equality. For the argument for parity has had greatest contemporary currency in France, where it is associated with feminisms of difference. It has been claimed, for instance, that 'parity interrogates universalism.'²⁵ And egalitarian feminists have voiced the suspicion that parity may merely entrench differences rather than remove them.²⁶ However, the assumption of innate sexual difference is not essential to the argument for parity. Nor is the assumption that gender differences are not natural. Parity can be argued for independently of whether one thinks that gender is merely socially constructed, and the means of imposing sexual inequality, or whether one thinks that it is grounded in valuable or ineliminable differences between the sexes. Either way, parity provides a just procedure.

Suppose that, despite the considerable socio-biological evidence to the contrary, there are no natural

or basic differences of interest between the sexes, but that the differences that appear are only the result of an unjustly imposed gender system. Then parity can be expected simply to speed up the disappearance of the gender system, which would have come about anyway under conditions of fair equality of opportunity. Suppose, on the other hand, that there are some fundamental differences in interest between the sexes. Then parity will possibly lead to significant changes in society, as it comes to reflect the interests of women to the same extent that it reflects the interests of men. So, parity is needed, in so far as humankind is sexed, but insofar as sexual difference does not amount to a difference in the nature of humanity, parity can stand in for universalism. The argument for parity goes through no matter whether one takes gender difference to be socially constructed, and to be ultimately eliminable, or whether one celebrates sexual difference.

Unlike androgyny, parity does not automatically result in an outright conflict between feminism and liberalism's commitment to a sphere of private liberty. Under a system of parity, legitimate and illegitimate interference in family affairs will be determined by a parliament in which men and women are equally represented. Given differences among women as to how they wish to organise their reproductive lives, as well as differences among men, it is likely that laws will allow various systems of family formation within a framework that protects children, diverts a generous proportion of the society's wealth towards their well-being, assures fathers' parental rights, and protects women from vulnerabilities that arise from their being those who become pregnant.

What then of the conflict that arises between feminism and multi-culturalism? Would it still exist under liberal parity? Here the outcome is more ambiguous. Where minority cultures do discriminate against women, laws that were passed by a parliament in which men and women were equally represented might conflict quite sharply with the practices of those minority cultures. But there would be compensatory forces under a system of parity. Where minority cultures are repressive, the few representatives whose voices are heard are characteristically men. Muslim men assert that Islam treats women as equals, and that Islamic dress codes are in women's interests, but these arguments are unconvincing when they come from the mouths of men. They are far more convincing when argued by women, even if, as a Western feminist, one remains convinced that these women have mistaken their own best interests. Parity would increase the probability that women from minority cultures, as well as their men-folk, would achieve some level of representation in elected forums. This would engender more public debate among women, and between women and men, and would help in the determination of which differences in the treatment of the sexes amount to acceptable diversity of cultural forms, and which are merely legacies of past patriarchal domination.

Many cultural groups argue that they treat women differently to men for women's own sake. From the point of view of liberal parity these claims will ring hollow unless the cultural groups allow women the same participation in the formation of the rules governing the differential treatment of the sexes that they confer on men. But if, in any country, a gender system is the outcome of a process of deliberation in a legislative forum in which men and women are equally represented, their deliberations taken equally seriously, and their authority to read and interpret scripture equally recognised, the believer in parity will have to deem this system just, even when it conflicts with her own traditions and conception of the good life. Thus parity offers a challenge to other cultures whose practices appear to us to be unjust to women. Demonstrate that the women of your culture approve of these practices when they are given the freedom and power to determine, in partnership with men, the laws under which they live, and the practices will be acknowledged as just. But if the

procedure which determines the laws which govern women is one from which women are excluded, or in which they are only marginally represented, those laws cannot be judged, by any reliable criterion, to be in women's interests.

Given that the liberal feminist is convinced that parity rather than androgyny is what feminism requires of an internally reformed liberalism, the difficulties for feminism become practical. In countries with multimember electorates (such as France) a form of parity can be imposed by requiring that equal numbers of the sexes are preselected, and their names distributed fairly on lists of candidates. In Westminster systems it is more difficult to determine the exact nature of the reform required. One proposal has been that women should vote for women, men for men.²⁷ But this looks like a mistake which entrenches too deeply a conception of society as sexually divided. Another would be to give each single person two votes, one for a female one for a male candidate. Yet another possibility would be to require that parties preselect couples. This has some advantages. It would be less likely than the system of giving each person two votes to result in hung parliaments. It would also provide someone that each woman and man could identify as their representative with regard to those issues which involve sexual difference.

Perhaps the most practical and least radical reform would be simply to mandate that parties endorse as many female as male candidates. This will be represented by some as a questionable form of positive discrimination, and as going against fair equality of opportunity for men, but no doubt any system which undermines men's historical monopoly on political power will raise objections. From behind the veil of ignorance individuals will know that women have been historically largely excluded by men from the process of determining the structure of the family and the character of family law. Not wanting to live, should they happen to be women, by a law which is biased against them, they would rationally choose to be equally represented in the assemblies that determine this law.

Both liberalism and feminism are contested notions. Some liberals value freedom over equality of liberty. They are likely to consider parity illiberal, because it places restrictions on the freedom to compete for parliamentary places. Some feminists have very definite ideas about the nature of the good life required by feminism. They are likely to consider parity insufficient, since it would do nothing to ensure that the women elected to parliament are in favour of feminism as they conceive it. Nevertheless, parity, as proposed in this paper, conforms with Rawls' liberalism, and in particular with his conception of justice as fairness. For it requires a fair outcome in the competition for parliamentary places. It is also feminist, in that it requires that the sexes exercise equal political power. Thus it is parity, rather than androgyny, which is required by a liberalism that has been purified by an internal feminist critique.

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Notes

1. See for instance, Carole Pateman, "Feminist Critiques of the Public/Private Dichotomy," in *Public and Private in Social Life*, ed. S. I. Benn and G. F. Gaus (Kent: Croom Helm, 1983).

2. Susan Moller Okin, "John Rawls: Justice as Fairness- For Whom?" in *Feminist Interpretations and Political Theory*, ed. Carole Pateman and Mary Lyndon Shanley (University Park: Pennsylvania University Press, 1991), 182. See also, Susan Moller Okin, "Justice and Gender," *Philosophy and Public Affairs* 16 (1987), Susan Moller Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989).
3. Okin, "John Rawls: Justice as Fairness- For Whom?," 187.
4. A similar argument was developed in Karen Green, "Rawls, Women and the Priority of Liberty," *Australasian Journal of Philosophy* suppl. 64 (1986).
5. Okin, "John Rawls: Justice as Fairness- For Whom?," 190.
6. *Ibid.*, 193.
7. Recent feminist socio-biology, however, brings home the extent to which the choices facing women in the struggle to reproduce are quite different to those facing men. Sarah Hrdy, *Mother Nature* (London: Vintage, 2000).
8. Jean-Joseph Goux, "Irigaray vs. The Utopia of the Neutral Sex," in *Engaging with Irigaray*, ed. Carolyn Burke, Naomi Schor, and Margaret Whitford (New York: Columbia University Press, 1994), Luce Irigaray, "Equal or Different?," in *The Irigaray Reader*, ed. Margaret Whitford (Oxford: Basil Blackwell, 1991).
9. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1980), Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (Berkeley: University of California Press, 1984), Sara Ruddick, "From Maternal Thinking to Peace Politics," in *Explorations in Feminist Ethics*, ed. Eve Browning Cole and Susan Coultrap McQuin (Bloomington and Indianapolis: Indiana University Press, 1992).
10. Okin, "John Rawls: Justice as Fairness- For Whom?," 195.
11. Susan Moller Okin, "Reason and Feeling in Thinking about Justice," *Ethics* 99 (1989), Susan Moller Okin, "Thinking Like a Woman," in *Theoretical Perspectives on Sexual Difference*, ed. Deborah Rhode (New Haven, Conn.: Yale University Press, 1990).
12. G. A. Cohen, "Where the Action Is: On the Site of Distributive Justice," *Philosophy and Public Affairs* 26 (1997): 4.
13. The case with regard to pornography is put by David Dyzenhaus, "John Stuart Mill and the Harm of Pornography," *Ethics* 102 (1992).
14. For a discussion that follows from some comments by Rawls which suggest that differences among families are incompatible with fair equality of opportunity see Véronique Munoz-Dardé "Is the Family to be Abolished Then?," *Proceedings of the Aristotelian Society* 99 (1999). See also, Véronique Munoz-Dardé, "Rawls, Justice in the Family and Justice of the Family," *The Philosophical Quarterly* 48 (1998). While this is not perhaps her intention, Munoz-Dardé's speculations in these articles tend to reinforce one's sense of the desirability of the traditional

family.

15. Susan Moller Okin, "Feminism and Multiculturalism: Some Tensions," *Ethics*, 108 (1998).

16. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), 7.

17. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), xxxi.

18. Rawls, *A Theory of Justice*, 74, 511.

19. Munoz-Dardé, "Is the Family to be Abolished Then?," Munoz-Dardé, "Rawls, Justice in the Family and Justice of the Family."

20. Some reasons for thinking that this would be unjust are offered in Green, "Rawls, Women and the Priority of Liberty."

21. Hrdy, *Mother Nature*, 230-4.

22. Augustine, "The Excellence of Marriage," in *The Works of Saint Augustine*, ed. John Rotelle (Hyde Park, N.Y.: New City Press, 1999).

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

24. *Ibid.*, 86.

25. Joan W. Scott, "'La Querelle des Femmes' in the Late Twentieth Century," *differences: A Journal of Feminist Cultural Studies* 9 (1998): 77.

26. Michele Le Doeuff, "Problèmes d'investiture (de la parité, etc.)," *Nouvelles questions féministes* 16 (1996).

27. Green, 'Rawls, Women and the Priority of Liberty', 35.

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