

2004

Gender, Justice and Gender: An Unfinished Debate

Susan Moller Okin

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Susan Moller Okin, *Gender, Justice and Gender: An Unfinished Debate*, 72 Fordham L. Rev. 1537 (2004).
Available at: <https://ir.lawnet.fordham.edu/flr/vol72/iss5/9>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

EQUAL CITIZENSHIP: GENDER

JUSTICE AND GENDER: AN UNFINISHED DEBATE

Susan Moller Okin*

INTRODUCTION

The revival of Anglo-American political theory and the revival of feminism in what came to be called its “second wave” both emerged early in the second half of the twentieth century. To situate both, consider the publication dates of some of the foundational works of each movement: Simone de Beauvoir’s *The Second Sex*¹ appeared in 1949 and was translated into English by 1952; Isaiah Berlin’s *Two Concepts of Liberty*² was published in 1958, as was John Rawls’s *Justice as Fairness*;³ Betty Friedan’s *The Feminine Mystique*⁴ appeared in 1963 and Kate Millett’s *Sexual Politics*⁵ in 1970; John Rawls’s complete *A Theory of Justice*⁶ came out in 1971. Yet despite the fact that these two revivals were contemporaneous, there was for a couple of decades very little dialogue between the participants in each of them. Feminist political theorists tended to turn their attention to the

* Marta Sutton Weeks Professor on Ethics in Society, Stanford University; Matina S. Horner Distinguished Visiting Research Professor, The Radcliffe Institute for Advanced Study, Harvard University 2003-2004. Special thanks to David Miller, Jerry Cohen, and other members of the All Souls’ Oxford Political Theory seminar (February 2002); to Cass Sunstein, Martha Nussbaum, David Strauss and other members of their seminar at the University of Chicago Law School (November 10, 2003), and to Linda McClain, Marion Smiley, Tracy Higgins and other participants in the Fordham University School of Law Conference “Rawls and the Law” (November 7-8, 2003) for their helpful comments on several different versions of this paper. An earlier version of the paper was translated into French by Patrick Savidan, and appeared as *Justice et identité genérique: un débat en cours*, in *2 Comprendre: Le Lien Familial* 67 (Francoise de Singly & Sylvie Mesure eds., 2001).

[*Editors’ Note:* Professor Okin died just as she was completing this Article. The *Fordham Law Review* recognizes her contribution to the field as a scholar, and is proud to publish her Article as part of this conference on “Rawls and the Law.”]

1. Simone de Beauvoir, *The Second Sex* (H.M. Parshley ed. & trans., Knopf 1953) (1949).

2. Isaiah Berlin, *Two Concepts of Liberty* (1958).

3. John Rawls, *Justice as Fairness* (1958), reprinted in John Rawls, *Collected Papers* 47 (Samuel Freeman ed., 1999).

4. Betty Friedan, *The Feminine Mystique* (1963).

5. Kate Millett, *Sexual Politics* (1970).

6. John Rawls, *A Theory of Justice* (1971).

historical canon of political thought, rather than to contemporary works.⁷ Feminist philosophers embarked on classifying and analyzing the theories of the feminist movement itself.⁸ And feminist activists, at least in the United States and Great Britain, concerned themselves to a large extent with consciousness raising and with urgent public policy issues such as reforming rape law, drawing attention to domestic violence, and trying to get the Equal Rights Amendment passed. On the other hand, the leaders of the newly re-burgeoning field of political philosophy—John Rawls, Ronald Dworkin, Brian Barry, and Steven Lukes, for example—paid no attention in their writings to the feminist movement and its ideas.⁹ They appeared to assume, as had most of those in the long tradition that preceded them, that inequalities between the sexes were “natural” rather than political, and were therefore not an appropriate concern for philosophical inquiry. By the end of the century, however, things had changed significantly, as a full-scale debate emerged between John Rawls and various feminist critics of his already classic work, *A Theory of Justice*.

Here, I shall give an account of this debate, and try to advance it a little further. I start by defining some of its key terms and pointing to some of the most relevant concepts of Rawls’s theory of justice. Next, I briefly address some feminist critiques of Rawls that have emerged as parts of feminist critiques of liberalism as a whole, together with feminist responses to such critiques. Then I give an account of the debate about gender and justice between John Rawls and those who have critiqued his theory from a feminist perspective but have also valued, and used in their own work, some of its central concepts and arguments. Finally, I give a brief response to Rawls’s recently published response to critics on the subject of gender, justice, and the family. I shall argue that, although Rawls eventually responded directly to those I term his “constructive” feminist critics, the distinction between comprehensive and political liberalism that he introduces in *Political Liberalism* severely diminishes the capacity of his theory of justice to answer feminist criticism. Only by allowing that his principles of justice apply directly to the internal life of families—which Rawls clearly resists—and by restricting “reasonable conceptions of the good” to those that are non-sexist, could one revise

7. See, e.g., *The Sexism of Social and Political Theory: Women and Reproduction from Plato to Nietzsche* (Lorenne M.G. Clark & Lynda Lange eds., 1979); Jean Bethke Elshtain, *Public Man, Private Woman: Women in Social and Political Thought* (1981); Susan Moller Okin, *Women in Western Political Thought* (1979).

8. See, e.g., Alison Jaggar, *Feminist Politics and Human Nature* (1983).

9. Michael Walzer was a partial exception. In *Spheres of Justice* (1974), he included a brief chapter on the family, which addressed issues of gender to some extent.

the theory so that it both includes women and has an effective and consistent account of moral development.

For clarification, let me first define “justice” and “gender,” as I use the terms in what follows. By “justice” I mean social justice or, more precisely, distributive justice—that is to say, the ways in which goods and benefits, burdens and responsibilities, should be allocated within society. Theories of justice are centrally concerned with which initial or acquired personal characteristics or positions in society should affect the social distribution.¹⁰ They are about whether, how, and to what extent, beginnings should affect outcomes. And yet, although a person’s sex is an initial personal characteristic that is frequently accorded great social significance and has a vast influence on many outcomes, contemporary theories of justice have by and large sidestepped the question of whether, or how, this should be so.

“Gender” is a more complicated term. It once applied mainly to language—in English as well as in languages in which far more words are gendered. In its new, much larger meaning, the word refers to the deeply entrenched social institutionalization of sexual difference. This new meaning, developed by feminist scholars in many disciplines, reflects the fact that we now think that so much of what has traditionally been thought of as innate, sexual difference is socially produced or constructed. A whole range of factors—from the almost exclusively female nurture of infants and small children and the toys given to girls and boys to our use of language and our cultural and religious systems of belief—contribute to making us into the women or men, the gendered persons, we become. Moreover, the structure of our societies assumes gender, at the same time helping to perpetuate it. Institutions, from workplaces and schools to legislatures, assume that persons are independent beings who neither need daily care nor give it to others, while they largely ignore the needs of those who in fact provide most of this daily care. Such gendered institutions and social structures contribute to the inclusion and privileging of men and the disproportionate burdening of women and their exclusion from positions of power, wealth and authority. A wide range of academic disciplines, especially in the social sciences (economics being the most resistant to the need for reconstruction), shore up these arrangements by making gendered assumptions that bear little or no relation to the real world, such as that unpaid work has no value, and that families are headed by benevolent altruists. Theories based on such assumptions help to legitimate and reproduce the gendered social institutions and structures that keep women, as a sex, relatively powerless, even in societies in which we have formal legal equality with men.

10. Some have criticized this distributive paradigm of justice, but I cannot address that issue here. See, e.g., Iris Marion Young, *Justice and the Politics of Difference* (1990).

Feminist scholars in many disciplines have explored the many dimensions of the social and psychological construction of our gendered identities and our gendered societies, and have uncovered the historical and cultural variability of gender.¹¹ The significance of late twentieth century work on sex, gender, and the relation between the two is vast. Feminist scholarship has undermined centuries of argument that started with the notion that not only the distinct differentiation of male and female, but also the division of labor by sex and the domination of women by men, is natural and inevitable. It has challenged theories that claim to be about individuals, but are actually about adult males (with unmentioned wives in the background), as well as theories based on the idea that families are benevolent despotisms. It thus opens up for discussion and debate many issues not previously thought of as political or economic, or even considered in discussions of justice. Not surprisingly, feminist theorists have raised many questions about both past and contemporary theories of social justice, including Rawls's prominent theory.

I. JUSTICE AS FAIRNESS AND THE BASIC STRUCTURE

Rawls states early on that his theory of justice is about "the basic structure" of society. This basic structure, he says, is "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation."¹² He makes clear from the start that the political constitution and the principal social and economic arrangements are such "major institutions" because

[t]aken together as one scheme, [they] define men's rights and duties and influence their life prospects, what they can expect to be and how well they can hope to do. The basic structure is the primary subject of justice because its effects are so profound and present from the start.¹³

Not surprisingly, given this definition, Rawls specifies that the family, or rather more precisely "the monogamous family" is one such major social institution.¹⁴ According to his initial, crucial, characterization of "the primary subject of justice," then, it seems that how families "distribute fundamental rights and duties and determine the division

11. Some important examples are Nancy Chodorow, *The Reproduction of Mothering* (1978); Dorothy Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements and Human Malaise* (1976); Linda J. Nicholson, *Gender and History: The Limits of Social Theory in the Age of the Family* (1986); Joan Wallach Scott, *Gender and the Politics of History* (1988); Michelle Z. Rosaldo, *The Use and Abuse of Anthropology*, 5 *Signs* 389 (1980).

12. Rawls, *A Theory of Justice*, *supra* note 6, § 2, at 7.

13. *Id.*

14. *See id.*

of advantages from social cooperation” should be part of it.¹⁵ Accordingly, a reader might expect that, among other issues concerning family justice, the traditional division of labor by sex and its many social, economic and political ramifications will constitute matters of concern in the ensuing theory.

As is well known, Rawls claims that the principles of justice chosen in the original position will be fair in the sense that, in arriving at them, persons *cannot be partial* to themselves, to their personal characteristics or their own conceptions of the good. Since in the original position “[n]o one knows his situation in society nor his natural assets, . . . therefore no one is in a position to tailor principles to his advantage.”¹⁶ The two principles that Rawls argues would be so chosen are the principle of equal basic liberty and the difference principle (to which is appended the condition of “fair equality of opportunity”). “[T]he first requires equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities . . . are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.”¹⁷ The only justifiable deviations from socioeconomic equality, according to the difference principle, are those that—indirectly, by providing incentives that increase the size of the economic “pie” that is to be divided—work so as to benefit the least advantaged.¹⁸ And the principle of fair equality of opportunity requires that persons of equal abilities and motivations have the same chance of attaining any position in the just society, regardless of their circumstances of origin.¹⁹

Much of Part II of *A Theory of Justice*, entitled “Institutions,” is devoted to explaining how the principles of justice would influence the design of the constitutional framework and the various institutions of a just society. In a great *mélange* of relatively “pure” theory and applied theory, Rawls discusses how rights-establishing constitutions, legislatures, legal systems, economic systems, systems of taxation, intergenerational considerations, constraints on majority rule, and the treatment of conscientious objectors might all operate so as to translate the principles of justice, which he has argued can be derived from the original position, into practice in a just or “well-ordered” society.

Significantly, though, Rawls does *not* discuss how the principles would influence either the internal structures and workings of the family, or their relations with the wider society. Families are

15. *Id.*

16. *Id.* § 24, at 139.

17. *Id.* § 3, at 14-15; *see also id.* § 26, at 150-61 (presenting a fairly brief account of how the two principles are arrived at in the original position).

18. *Id.* § 12, at 73.

19. *Id.* § 14, at 83-90.

mentioned only twice in this middle section of the book, in connection with the constraints they place on equality of opportunity, and in connection with intergenerational justice, for example as institutions that might play any role in either translating principles of justice into practice or in obstructing such translation, or that might be structured or organized with such roles in mind. Apart from this, they go unmentioned.

Subsequently, in Part III, Rawls gives a fairly detailed account of moral development. For he thinks that a just society, such as he argues for, is not easy either to achieve or to maintain. He warns that it will be difficult for people who, once the veil of ignorance is lifted, realize that they could benefit from a less egalitarian social distribution to sustain their commitment to the principles of justice they have chosen in the original position, when their impartiality was assured. Therefore, in order to try to increase the stability of the just society, he devotes considerable attention to the development of a sense of justice in the society's citizens. The family, otherwise largely unmentioned, features prominently as a participant in this process. But rather than discussing its suitability as a nurturing ground for justice, considering how justice might apply to the family, or exploring alternative forms of family, Rawls simply says of it: "given that family institutions are just."²⁰ As we shall see, even those feminists who value major aspects of the theory have serious problems with its lack of explicit discussion of the family and its facile assumption that families are just. But before I discuss their critiques, I wish first to look briefly at the ideas of feminist critics who find Rawls's whole liberal enterprise alien to what they regard as good feminist ways of thinking.

II. FEMINISM AND LIBERALISM: FRIENDS OR FOES?

Much feminist political theory has been critical of liberal political theory in general and of Rawls's theory in its entirety. Linda McClain and Martha Nussbaum have addressed such critiques in quite comprehensive and very illuminating papers.²¹ It is important, as we discuss these critiques of liberalism and responses to them, to distinguish between feminist critiques of liberal theories—including Rawls's theory—in their entirety, and feminist critiques of specific,

20. *Id.* § 75, at 490 (emphasis added).

21. Martha C. Nussbaum, *Sex & Social Justice* 55-80 (1999); Linda C. McClain, "Atomistic Man" Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 *S. Cal. L. Rev.* 1171 (1992). For an account and criticism of Iris Marion Young's and Seyla Benhabib's critiques of liberalism, from which I draw in what follows, see Susan Möller Okin, *Reason and Feeling in Thinking About Justice*, 99 *Ethics* 229 (1989). Neither McClain, Nussbaum, nor I address Bonnie Honig's postmodernist feminist critique of *A Theory of Justice in Political Theory and the Displacement of Politics* (1993), which focuses on a couple of pages of Rawls's 600-page book.

though sometimes very important, aspects of liberal theories, such as the public/private dichotomy and the (explicit or implicit) assumption that the subjects of liberalism are the male heads of households. The latter critiques, I contend, can be addressed without abandoning the central tenets of liberalism and liberal theory; the former, which I shall discuss first, cannot.

Liberal political theory, as well as liberal jurisprudence, has been found by many feminist theorists to be “male” or “masculine.” As Linda McClain writes, responding to such critiques, but first summarizing their essence:

A central theme of the critique has been that the law embodies a masculine perspective in emphasizing autonomy and the individual over interdependency and the community. Liberalism has been viewed as inextricably masculine in its model of separate, atomistic, competing individuals establishing a legal system to pursue their own interests and to protect them from others’ interference with their rights to do so. Hence, it is said that liberal, masculine jurisprudence has exalted rights over responsibilities, separateness over connection, and the individual over the community.²²

Many of these charges have been specifically aimed at Rawls’s *A Theory of Justice*. Related criticisms often brought against liberal theories, again including Rawls’s, are that they abstract overly from actual human beings and thus obscure, or render irrelevant, differences among them, and that they stress the importance of rationality, undermining the importance of the emotions both as definitive of human nature and as crucial for moral theorizing.²³ Those who characterize liberalism in these various ways are often termed “relational feminists” or “cultural feminists.” They often advocate alternative conceptions of the person and of social relations, more in line with those found in communitarian theories. When women’s experience of the world is taken into account, they argue, connection, responsibility, community, caring and attention to differences—neglected or deprecated in liberalism—will take their proper place in moral and political theorizing.

Relational feminism has its early roots in two influential theories of the early 1980s: Carol Gilligan’s famed theory about women’s “different voice,” and communitarianism, especially that of Michael Sandel. Gilligan’s feminist theory of moral development began as a critique of that of the Kohlberg school, which owes much to Rawls’s work and prioritizes justice, rights, and principles. Gilligan, pointing out that Kohlberg’s empirical work had dealt exclusively with male

22. McClain, *supra* note 21, at 1173-74 (citations omitted).

23. Examples of the former type of critique are Seyla Benhabib, *The Generalized and the Concrete Other* and Iris Marion Young, *Impartiality and the Civic Public*, both in *Feminism as Critique* (Seyla Benhabib & Drucilla Cornell eds., 1987). Examples of the latter are found in Jaggard, *supra* note 8, *passim*.

subjects, contrasts with it a morality built on care, contextuality, and concern for others, which she finds more characteristic of the female subjects she studies.²⁴ Sandel's critique of Rawls depends in part on an idealization of the traditional family—an institution Sandel claims is beyond the need for justice; but it is also based on a critique of the Rawlsian "self," which Sandel interprets as disembodied and unembedded in any social or cultural reality.²⁵

Two prominent feminist political philosophers, Iris Marion Young and Seyla Benhabib, developed critiques of Rawls's liberal theory of justice that resonate with themes central to Gilligan's and Sandel's work. Young argues against the ideals of impartiality and universality in moral reasoning, claiming that they attempt to eliminate difference and "otherness," and create a false dichotomy between reason and feeling—overvaluing the former and denigrating or devaluing the latter. She thus considers Rawls's theory to be as rationalist, monological, and abstracted from particularity as Kant's.²⁶ Benhabib argues, similarly, that in universalistic moral theories such as Rawls's and Kohlberg's, "ignoring the standpoint of the concrete other leads to epistemic incoherence."²⁷ In Rawls's original position, she claims, "the *other, as different from the self*, disappears. . . . Differences are not denied: they become irrelevant."²⁸ With only a "generalized other," Benhabib concludes, "what we are left with is an empty mask that is everyone and no one."²⁹

Such relational feminist critiques, however, often caricature or misunderstand liberal thought (as does much of the communitarian critique). They take as representative of liberalism ideas that do play some part in the liberal tradition; but they tend to misinterpret these ideas or their roles in the theories. For example, they treat the characteristics of parties in the original position as if the original position were less a heuristic device than a theory of the self or of human nature. They interpret "autonomy," a concept central to most liberal theory, as if it meant atomism rather than self-determination. And they tend to draw a sharp distinction between an "ethic of justice" and an "ethic of care," finding the latter absent from liberal thought.³⁰

I have argued that Rawls's liberal theory of justice can plausibly be

24. Carol Gilligan, *In a Different Voice* (1982). On Gilligan's theory, see Susan Moller Okin, *Thinking Like a Woman, in Theoretical Perspectives on Sexual Difference* 145-59 (Deborah Rhode ed., 1990).

25. Michael Sandel, *Liberalism and the Limits of Justice* (1982).

26. Iris Marion Young, *Toward a Critical Theory of Justice*, 7 *Soc. Theory & Prac.* 279 (1981); Young, *supra* note 23.

27. Benhabib, *supra* note 23, at 89.

28. *Id.*

29. *Id.*

30. McClain, *supra* note 21, at 1174-75, 1203 & n.157. Again, the terms are Gilligan's.

read as combining both of these approaches. Thus read, it should confound such critics.³¹ The actors (or actor) at the crux of the theory—the parties in the “original position” who arrive at the principles of justice—are indeed said by Rawls to be “rational” and “mutually disinterested.” Thus they appear, superficially, to fit the relational feminist version of atomistic “liberal man.” The charge that difference and otherness are absent appears initially to be borne out by Rawls’s suggestion that those in the original position are identical.³² However, those who stress only the characteristics of rationality, mutual disinterest and sameness fail to note that the actors Rawls so describes have another, crucially important, characteristic, which gives his “veil of ignorance” its name. They do not know any of their personal attributes or attitudes, or the social position they will find themselves in, in the society whose principles of justice they are choosing.

Indeed, Rawls foresaw misperceptions of his theory that focus on the Rawlsian “self” as rational and disinterested, and warned that the theory is likely to be regarded as based on egoism if the mutual disinterest assumption about those in the original position is highlighted in isolation from the other specifications. Seen instead in their totality, he says, the combination of qualities ascribed to them “forces each person in the original position to take the good of others into account.”³³ As I have argued, those behind the Rawlsian veil of ignorance

can be perceived as thinking only for themselves, *only* because they do not know *which self* they will turn out to be and, therefore, must consider the interests of all possible selves equally. . . . In the absence of knowledge about their own particular characteristics . . . they must think from the position of *everybody*, in the sense of *each in turn*.³⁴

For actual persons (rather than participants in a heuristic device), who of course know who they are, to do this requires not rational egoism but, rather, strong empathy and a readiness to listen to the very different points of view of others. Rather than exemplifying an overly abstracted and rationalistic “ethic of justice,” Rawls’s liberal theory of justice is built to a large extent on an ethic of care; it is at least as concerned with certain important emotions as with rationality, and with human differences as with similarities. As McClain

31. See Okin, *supra* note 21.

32. See Rawls, *A Theory of Justice*, *supra* note 6, § 24, at 139 (“[S]ince the differences among the parties are unknown to them, and everyone is equally rational and similarly situated, each is convinced by the same arguments. Therefore, we can view the choice in the original position from the standpoint of one person selected at random.”).

33. *Id.* § 25, at 148.

34. Okin, *supra* note 21, at 244.

concludes, referring to Rawls's explicit rejection of indifference as a value for the just society, "Rawls's theory envisions not a disembodied individual, but a society where recognition of interdependency leads to mutual respect—and where mutual respect entails not the right to be let alone but an almost tender-hearted solicitude for one another."³⁵ For real persons to have the strong sense of justice Rawls expects of the citizens in his well-ordered society requires that those citizens have well-developed capacities for empathy, care, and concern for others—certainly not the self-interest and instrumental rationality that are but a part of his prescription for the party or parties in the original position.³⁶ However, the achievement of such qualities places a special burden on families, which Rawls's theory requires to be sources from which moral development originates. And, paradoxically, the families envisioned in both *A Theory of Justice* and *Political Liberalism* seem incapable of meeting this challenge.

McClain, Martha Nussbaum, I and others who have defended Rawls's version of liberalism against anti-liberal feminist critiques have done so in part because we think that liberalism properly understood, with its radical refusal to accept hierarchy and its focus on the freedom and equality of individuals, is crucial to feminism. While we agree that many liberal theorists, past and present, have failed to fulfill their commitment to the individual, in part by relegating women to "natural" subordination within families, in part by simply assuming—but then paying no attention to—all the work women do to produce and reproduce the supposedly "independent" male self, we argue that consistent and fully developed liberalism, quite radically revised so as to include women, has great potential for feminism. Indeed, as Nussbaum deftly puts it, most of liberalism's failing is not that it is too individualist, but that, in its views of the family it is not individualist enough.³⁷ Whatever the faults of past liberals, surely no contemporary liberal theory should be able to get away with ignoring more than half of human adults. Nussbaum relates how women in various parts of the world, where liberalism does not in general prevail, are appealing to liberal concepts such as autonomy, rights, and self-respect to make their case for women's equality, freedom, and even bodily integrity.³⁸ And McClain points out that, even in cases in which the ethic of care might be expected to yield better

35. McClain, *supra* note 21, at 1209.

36. To be sure, Rawls's construction of the original position is designed so as to eliminate from the formulation of the principles of justice biases that might result from particular attachments to others, as well as from particular facts about the self. But surely impartiality of this kind is a reasonable requirement of any theory of justice.

37. Nussbaum, *supra* note 21, at 65.

38. *Id.* at 55-56.

arguments for feminist-friendly positions, liberalism can both be more persuasive and yield better results.³⁹

Many feminists, as early as the seventeenth century, have appealed to the arguments of liberal or egalitarian theorists who themselves ignored or excluded women in order to make claims on behalf of women.⁴⁰ Similarly, in the late twentieth century, some feminist theorists have built feminist arguments on prominent liberal theories, once the latter have been subjected to the types of revision necessitated by feminist critique. This is especially true of Rawls's *A Theory of Justice*.

III. CONSTRUCTIVE FEMINIST CRITIQUES OF RAWLS'S *A THEORY OF JUSTICE*

In 1974, very soon after *A Theory of Justice* was published, philosopher Jane English pointed out an aspect of its theory-building unquestioned by other early commentators—the passing assumption that those in the original position are “heads of families” rather than all persons, or all adults. In a paper mainly concerned with the issue of justice between generations, she argued that “[b]y making the parties in the original position heads of families rather than individuals, Rawls makes the family opaque to claims of justice.”⁴¹ English noted briefly that, with respect to some issues, such as the division of labor between the sexes, this could well be a problem: “For example, suppose that, due to efficiency, all families gain significantly if the natural childbearers are universally appointed as child rearers.”⁴² Such a policy would be good from the point of view of Rawls’s “heads of families,” because it is good for families considered as single entities. However, it may be far from just or fair from the point of view of some individuals within those families, particularly if caring for children negatively affected their other personal, economic or political opportunities. For one thing, it would clearly violate Rawls’s fairly demanding standard of fair equality of opportunity. Surprisingly, however, given that the traditional division of labor was one of the main issues being raised and challenged by the burgeoning feminist movement at the time, English’s important critical insight about Rawls’s instantly famous theory lay fallow for

39. McClain shows that liberal arguments are stronger than relational feminist or ethic of care arguments in the case of the duty to rescue a stranger, while the application of arguments grounded in the ethic of care to such issues as abortion are fraught with problems. See McClain, *supra* note 21, at 1228-62.

40. For example, Mary Astell built on Locke’s liberalism, Mary Wollstonecraft built in part on inconsistencies in Rousseau’s egalitarianism, and John Stuart Mill, in *The Subjection of Women* (1869), extended some liberal and egalitarian utilitarian arguments to women.

41. Jane English, *Justice Between Generations*, 31 *Phil. Stud.* 91, 95 (1977).

42. *Id.*

nearly a decade, and a more developed feminist critique of Rawls was slower to emerge.⁴³

In 1983, however, Australian political theorist Deborah Kearns zeroed in on one of the problems—one that has preoccupied feminist scholars of Rawls since. The theory, despite its initial inclusion of the family as part of the basic structure of society to which the principles of justice were to apply, went on to treat women, the family, and love as outside of the realm of justice. But this very exclusion, in its failure to remark upon a gendered division of labor in the family that involved injustice, threatened to undermine the development of a sense of justice in the children who were to be the just society's future citizens. Kearns concluded that it was because Rawls *recognized* that "the family is not necessarily a just institution [that] . . . he effectively removes [it] from the scope of the principles of justice."⁴⁴

In 1987, focusing largely on Rawls's *A Theory of Justice*, I took up the argument that, although the social institution of gender seemed ripe for analysis in contemporary theories of justice, it was unaccountably absent from them. When raised, moreover, it caused significant problems.⁴⁵ While the relation between the other initial or acquired characteristics of persons and how they fared in social distributions was at the core of theories of justice, somehow discussion of the social differentiation between the sexes and the allocation of burdens and benefits along the lines of gender was missing. Most significantly, as Kearns pointed out, the sexual division of labor in the household, which was taken for granted by most families and affects every other aspect of our lives, was scarcely touched upon in any of the leading contemporary theories of justice.

I have argued that, in *A Theory of Justice*, Rawls not only almost completely ignores gender, but he almost completely ignores women. He omits sex from the list of personal characteristics that are veiled from those in the original position and, as English pointed out, (ominously) specifies that those who reason in the original position are the "heads of families."⁴⁶ Though he indicated several years later that sex *was* to be regarded as such a contingent characteristic, he gave no indication of recognizing that this required substantial revision of major aspects of his theory.⁴⁷ However, with this change,

43. Jane English herself died in a tragic accident within several years.

44. Deborah Kearns, *A Theory of Justice—and Love; Rawls on the Family*, 18 Pol. Australasian Pol. Stud. Ass'n J. 36 (1983).

45. See Susan Moller Okin, *Justice and Gender*, 16 Phil. & Pub. Aff. 42 (1987). I argue that Walzer's *Spheres of Justice* (1974) pays more attention to the division of labor than does Rawls's *A Theory of Justice*, but that the feminist aspects of Walzer's argument, taken seriously, undermine his book's defense of cultural relativism.

46. See, e.g., Rawls, *A Theory of Justice*, *supra* note 6, § 22, at 128.

47. In *Fairness to Goodness*, 84 Phil. Rev. 537 (1975), he writes: "That we have one conception of the good rather than another is not relevant from a moral standpoint. In acquiring it we are influenced by the same sort of contingencies that

considerable revision of the theory seemed called for. First, the “heads of families” assumption would have to be retracted or, at least, explained and justified. Second, if those in the original position, and in the two subsequent stages of Rawls’s four-stage “unveiling”—the constitutional convention and the legislative process—were not to know (among all the specifics about themselves) what sex they would be once the veil was completely raised, they would surely be deeply concerned about many aspects of social gendering and sex discrimination as well as matters affected by biological sex differences.⁴⁸ Third, families would certainly have to be taken seriously as part of the basic structure of society.

In *A Theory of Justice*, Rawls’s arguments alternate references to “men” and “his” with more neutral references to “persons” and “parties.” He shows no sign of recognition either that this terminology is problematic or that to assume that the individuals who reason about justice are the heads of families takes issues of justice *within* families right off the agenda. At the time he was writing, this kind of omission was only just beginning to be noticed in various academic disciplines. In the early 1970s, philosophers and political theorists still routinely used male pronouns and referred to people as “men.” Economists assumed—as Rawls appeared to—that the family could be treated as if it were a single individual, and as if only one of its members (its male head) counted as “a rational economic actor;” and sociologists cleaved to the structural functionalist view that rigid sex roles were necessitated by efficiency in the fulfillment of the essential functions that the family performs for society.⁴⁹ Even in this intellectual climate, however, especially given that Rawls himself listed the family as one of the basic social institutions to which the theory of justice was to apply, the “heads of families” assumption sounded immediate warning bells for any feminist reader. But when Rawls relates, in Part II of *A Theory of Justice*, how the two principles of justice are applied to the basic institutions of society, as I said

lead us to rule out a knowledge of our sex and class.” *Id.*

48. As for the fourth stage of the sequence, Rawls thought that, even ideally, judges and administrators applying the laws could know all the facts about themselves without prejudice to justice. Strongly doubting this, in *Justice, Gender, and the Family*, I evoked a cartoon in which three robed, male justices look down at their very pregnant bellies, as one says: “Perhaps we’d better re-consider that decision.” Susan Moller Okin, *Justice, Gender, and the Family* 102 (1989). Recent work by Nancy Crowe bears out my and the cartoonist’s concern. Crowe shows, for example, in work based on twenty years of evidence, that the probability that a Republican male judge on a three-judge federal court panel will vote in favor of a female plaintiff in a sex discrimination case is 28%, whereas the probability a Republican female will vote this way is 53%. Nancy Crowe, *Women in Black: The Effect of Judges’ Sex on Legal Decisions* (Oct. 20, 2003) (paper given at the Radcliffe Institute for Advanced Study).

49. See any philosophical journal of the late sixties, for this usage. The prevailing assumption in economics was argued in detail by Gary S. Becker, *A Treatise on the Family* (1981). Talcott Parsons & Robert F. Bales’s *Family, Socialization and Interaction Process* (1955) exemplifies the prevailing view in sociology.

earlier, he discusses at length their application to all of the previously named institutions of the basic structure—*except the family*. The questions of whether and how the family, in its traditional or any other form, is a just social institution and how or whether it translates the principles of justice into social practice are never raised.

In one significant passage, Rawls does address the issue of formal, legal sex discrimination. He states that inequalities in basic rights that are based on “fixed natural characteristics,” such as “[d]istinctions based on sex . . . race and culture” are acceptable only if “justified by the difference principle,” and that such “inequalities are seldom, if ever, to the advantage of the less favored.”⁵⁰ However, this reasoning is applied only to basic rights, such as freedom of speech, religion, and suffrage. In addition, it does not address the very real problem that formal equality between members of different races or sexes often bears little relation to actual equality. In the case of sex equality, this especially is so in the context of a long history of oppression and exclusion of women—a history in which all major social institutions have been constructed on the assumption that someone other than their participants is taking care of the young, the old, the sick, and even the participants’ own daily needs.⁵¹

The only place where *A Theory of Justice* says much about the family is in the section about moral development. Here, as I mentioned earlier, while acknowledging the significance of families for moral development, Rawls simply *assumes* that they are just. Given their prominent role in his theory of moral development, it is particularly striking that he would simply assume the justice of families, a presumption he affords no other part of the basic structure. Moreover, he writes very much as though he is thinking in terms of traditional, gendered family structure and roles.⁵² Thus I surmised, departing from Kearns’s interpretation, that Rawls omitted discussion of what justice would require in families not because he recognized that families were not just, but rather because he perceived no injustice in traditional, gendered family arrangements. I agreed, however, with Kearns’s conclusion that Rawls’s theory of justice

50. Rawls, *A Theory of Justice*, *supra* note 6, § 16, at 99. It is interesting that the difference principle is introduced here in qualifying a basic right, whereas in general the equality of basic rights takes precedence over the difference principle. It is also interesting that, in effect, Rawls’s suggestion is in line with the legislation that Congress felt obliged to pass when a federal appeals court bizarrely interpreted the Pregnancy Discrimination Act as meaning that no state legislation could *favor* pregnancy, by giving pregnant women any entitlements not shared by everyone.

51. One of the best explanations of this point is made by Catharine MacKinnon, *Difference and Dominance, in Feminism Unmodified* (1987).

52. See Rawls, *A Theory of Justice*, *supra* note 6, § 71, at 467-68. He says, for example, that the content of the ideals that one learns first within the family “is given by the various conceptions of a good wife and husband, a good friend and citizen, and so on.” *Id.* at 468; see also Okin, *supra* note 48, at 96 (providing a greater elaboration of this point).

contains serious problems, not only for any reader who was concerned with justice for women, but also for the coherence of his arguments about moral development.⁵³ Families are obviously, as Rawls recognized at the beginning of the book, an important part of the basic structure of society, strongly influencing the life chances of their members—especially women, when the families are gender-structured. And though Rawls relied heavily, in his account of the development of a sense of justice that he considered essential to the stability of a just society, on families that he assumed were just, he provided no reasons at all for this assumption, nor any discussion of changes in social structures or policies that might better justify it.

These problems with Rawls's theory of justice seemed in part due to the weight of the Western tradition of political thought, in which questions having to do with women and the division of labor between the sexes are so often ignored or, at best, attributed to "nature."⁵⁴ Even when issues of sex and gender preoccupied the great philosophers, as they did Rousseau, they tended until the 1970s to be virtually ignored by subsequent interpreters and teachers of the tradition.⁵⁵ Within the tradition (if that word is interpreted liberally), while rare feminists such as Mary Astell, Olympe de Gouges, Mary Wollstonecraft, John Stuart Mill, and George Bernard Shaw had challenged it, the norm was to assume, or to argue, that the division of labor between the sexes and the sexual hierarchy it was presumed to justify were natural, not political.⁵⁶ Thus, only men belonged in the realm of culture and political life, where they—unburdened by day-to-day preoccupations and freed from the partial, emotional ties associated with intimacy—could debate serious concerns such as justice amongst themselves, capable due to their superior rationality of following just principles. As Carole Pateman and Fran Olsen both brilliantly pointed out, the dichotomy between the "public" and the

53. One of the oddest rejections I ever received from a journal was in response to my submission of *Justice and Gender* to *Ethics*, in 1986. The rejection letter was accompanied by several readers' reports, the essence of one of which was that, although the paper succeeded in showing that Rawls's theory of justice excluded women from its subject-matter, the author had failed to say anything significant about "the theory itself." I wondered if this reason for rejection would have been given in response to a critique of a theory of social justice for not including men.

54. Two of the clearest examples of such thinking are in Book I of Aristotle's *Politics* and Book V of Rousseau's *Emile*.

55. The works mentioned in notes 1-6 *supra* had challenged this, but too recently to have had much effect on political theorists writing in the 1970s. The main exceptions to this interpretation of the canon were a few Straussians who, on the one hand, seized upon the arguments defending the subordination of women and, on the other, contended that those philosophers who argued for the equality of the sexes either did not mean what they wrote (for example Plato), or were not "great" (for example John Stuart Mill). Among the first general contemporary political theories to reflect on and critique aspects of gender were Michael Walzer's *Spheres of Justice* (1983) and Philip Green's *Retrieving Democracy: In Search of Civic Equality* (1985).

56. See also Okin, *supra* note 48, at 25-40.

“private” spheres of life had long served to separate out and to shape the sphere in which men, perceived as autonomous, independent, and often self-interested individuals, had rights and made contracts, from the sphere in which women took care of the daily needs of the supposedly autonomous men and of children—the sphere in which bonds were assumed to be naturally hierarchical and motivations altruistic. Olsen’s most brilliant point is that “[b]ecause the state is deeply implicated in the formation and functioning of families,” the notion that it can choose whether to intervene in the formation and functioning of families is nonsense; the only real question is *how* it intervenes.⁵⁷ Thus contemporary feminists were arguing powerfully, in the footsteps of predecessors such as Wollstonecraft and John Stuart Mill, that neither families nor the divisions of labor within them can be conceived of as natural, in the sense of unaffected by coercive laws.⁵⁸

While Rawls did not expressly spell out the public/private distinction in *A Theory of Justice*, his assumption that the parties who developed the principles of justice were “heads of households” relied heavily on it, as did his stated reason for the assumption—that heads of families, even if otherwise assumed to be motivated by rational self-interest, could be expected, altruistically, to take into account the interests of other members of their own families. Moreover, since Rawls’s just society requires its actual members (as opposed to the artificial construct that was the party in the original position) to be

57. Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. Mich. J. L. Reform 835, 837 (1985).

58. Carole Pateman, *Feminist Critiques of the Public/Private Distinction*, in *The Disorder of Women* (1987); Olsen, *supra* note 57. Reading both these articles, but especially Olsen’s, was for me a “scales falling from my eyes” experience. See Okin, *supra* note 48, at ch. 6. Regardless of such work, Gerald Cohen, at the very moment of acknowledging the influence of feminist theory, falls prey to the notion that families are free from legal coercion. In *Where the Action Is: The Site of Distributive Justice*, he considers the idea that Rawls’s basic structure might consist only of the major social institutions that are “coercive (in the legal sense).” G.A. Cohen, *Where the Action Is: The Site of Distributive Justice*, 26 Phil. & Pub. Aff. 3, 18-20 (1997). His “signal example” of a major institution that “can depend far less on law than on convention, usage, and expectation” is *the family*. *Id.* But of course the law frequently extends its coercive arm to enforce familial responsibilities, and the threat that it may do so influences a great deal of apparently “uncoerced” family behavior. Millions of non-custodial parents are required by law to pay child support, have their wages garnished, and are sometimes imprisoned for failure to pay; millions of married and (especially) divorced individuals are required by law to support each other financially in various ways; at least hundreds of thousands of parents are charged with child abuse or with child neglect. In October 2003, a single mother in Connecticut, who was employed 60 hours a week, was convicted of felonious neglect of her home and family after her 12-year old son—bullied mercilessly at school—killed himself. Marc Santora, *After Son’s Suicide, Mother Is Convicted of Unsafe Home*, N.Y. Times, Oct. 7, 2003, at B1. Cohen’s apparent unawareness of the extent of use of coercive laws that lurk behind the “usages and expectations” of families is an astonishing example of both the power and the longevity of the notion that families are havens of privacy and voluntary action.

neither self-interested nor wholly altruistic, but instead to have well developed “senses of justice,” this reliance on the public/private dichotomy was a significant problem. It seemed to undermine rather drastically his theory of moral development, and therefore to reveal a rather serious internal problem for the theory. Whereas Kearns had asked: “[H]ow can a sense of justice develop in an unjust institution?”⁵⁹ I questioned strongly whether Rawls’s bald, unargued statement that the family was a just institution sufficed as a basis for his reliance on families at the heart of his theory of moral development.⁶⁰

In *Justice and Gender* and *Justice, Gender, and the Family*, I attempted to extend the argument beyond critique towards developing a feminist reading of Rawls’s theory of justice. I argue that, in spite of the problems noted, the feminist potential of Rawls’s method of thinking about justice and his conclusions is considerable. Once the veil of ignorance is understood as hiding from its participants their sex as well as their other particular characteristics and circumstances and the unjustified “heads of households” assumption is relinquished, the original position is a powerful concept for challenging the gender structure. Once we dispense with the traditional liberal assumptions about public versus private, political versus non-political spheres of life, we can use Rawls’s theory as a tool for feminist criticism with which to think about how to achieve justice between the sexes, both within the family and in society at large. As a result, the theory of justice would be improved. It would reflect the presence of women’s, as well as men’s, points of view in the original position. And it would no longer be weakened by its reliance, for the first stages of moral development, on a basic social institution that was either naively assumed to be just or to which the principles of justice were not considered to be applicable.

In *Justice, Gender, and the Family*, I venture to spell out some of the arguments that might be made, and the conclusions that might follow, from using this revised version of Rawls’s theory. I ask how a theory of justice that applied Rawls’s two principles to families as well as to the other institutions of the basic structure of society would change gendered assumptions and practices. In particular, how might representatives who did not know whether they were to be men or women in the society they were planning or legislating for employ law, education and other public policy to change the division of labor in families so as to promote equality of fair opportunity and the equal worth of political liberty for women? How might laws and other policy instruments apply to gender relations in families and workplaces, especially, the requirement that permissible inequalities

59. Kearns, *supra* note 44, at 41.

60. Okin, *supra* note 48, at 97 & n.28.

benefit the least advantaged? In the late-twentieth century era of significant transition in and disagreement about relations between the sexes, it seemed to me that two types of public policies, resulting mostly from application of the principle of equality of fair opportunity and the difference principle, could alleviate the injustices of gender. The first would encourage men and women to share the public and the domestic, the paid and the unpaid roles and responsibilities of family life, equally, so that both might participate on an equal footing in their various roles—at work, in civil society, and in politics—in the non-domestic spheres of life. Such policies, I argued, would need to include subsidized early child care and after-school care for children, flexible working hours for parents and other caregivers, gender-neutral parental and other family-related leave, and firmly enforced anti-discrimination law in all necessary areas. The second type of policies would protect those (perhaps mostly, but not exclusively, women) who choose to undertake the bulk of unpaid family work, from the vulnerabilities they now incur. Such policies would include equal division of the earner's paycheck between the earning and the non-earning spouse, and family law ensuring that, in the event of divorce, both post-divorce households would have the same standard of living.⁶¹

In his recently published response to feminist critics, Rawls agreed with most, if not all, of these specific suggestions. I will merely introduce this recently published response now, and summarize and discuss it in the last two sections of the paper. Meanwhile, I will turn to his previously published but post-*A Theory of Justice* work, especially *Political Liberalism*, in which Rawls's response to feminist criticism of *A Theory of Justice* was mostly *not* to respond. Moreover, his responses to other critics as well as certain other changes he made in his theory made his problems with feminism worse. To these I shall now turn.

IV. HOW *POLITICAL LIBERALISM* COMPOUNDED RAWLS'S PROBLEMS WITH FEMINISM

For some years before Rawls's *Political Liberalism* was published in 1993, elaborating further his theory of justice and responding to many of its critics, a manuscript authored by him entitled *Women and the Family* had been in circulation among his students and their students. In it, Rawls took up some of the feminist critique discussed above. However, to the surprise of some readers, this response was not included in the new book, though revised versions of parts of it have recently appeared in print, included in *The Idea of Public Reason*

61. For a fuller account of my argument, see *id.* at 170-86.

*Revisited*⁶² and in *Justice as Fairness: A Restatement*.⁶³ Thus, in *Political Liberalism*, Rawls addresses feminist critics only very briefly and obliquely, in his Introduction. He mentions that a number of “major matters” had been omitted from *A Theory of Justice*, including “the justice of and in the family”—though he reminds us that he did “assume that in some form the family is just.”⁶⁴ He remarks that since, in contemporary society, “among our most basic problems are those of race, ethnicity, and gender,” his chosen focus on toleration, in the new book, might seem dated.⁶⁵ Then, noting that *A Theory of Justice* had been criticized for not dealing with problems of gender and the family, he briefly notes that he thinks his conceptions and principles can be addressed to them. He does not attempt to do so, though, beyond stating tellingly that, “the equality of the Declaration of Independence which Lincoln invoked to condemn slavery can be invoked to condemn the inequality and oppression of women.”⁶⁶

Not only did *Political Liberalism* not respond, beyond this intriguing and elusive passage, to feminist critics. Certain aspects of the newly elaborated theory—notably Rawls’s determination to differentiate his political theory of justice from a more comprehensive theory—made his problems with feminism worse, despite the promising suggestion made at its outset. Not surprisingly, *Political Liberalism* was very soon critiqued by feminist theorists. The new framing of the theory, as a discussion about how a just society of citizens with diverse conceptions of the good can be stable over time, we argued, revealed even more clearly the internal problems caused for the theory by Rawls’s neglect of justice within families. Central aspects of the revised theory rendered even more problematic than before Rawls’s passing assumption that families are just institutions. For he now made it abundantly clear that in his just, pluralist society, “reasonable” conceptions of the good included religions that both preached and practiced highly sexist modes of life. “[E]xcept for certain kinds of fundamentalism,” he supposes, “all the main historical religions . . . may be seen as reasonable comprehensive doctrines.”⁶⁷

62. John Rawls, *The Idea of Public Reason Revisited* (1997), reprinted in *Collected Papers* 573, 595 (Samuel Freeman ed., 1999).

63. John Rawls, *Justice as Fairness: A Restatement* 162-68 (Erin Kelly ed., 2001).

64. John Rawls, *Political Liberalism* xxxi (1993).

65. *Id.* at xxx.

66. *Id.* at xxxi. See my two alternative interpretations of this passage in Susan Moller Okin, *Political Liberalism, Justice, and Gender*, 105 *Ethics* 23, 39-43 (1994).

67. Rawls, *Political Liberalism*, *supra* note 64, at 170. The reason he specifies for this is that these religions admit of “an account of free faith.” *Id.* But it is quite unclear what this has to do with these religions being “reasonable” by Rawls’s own explanation of the term. See *id.* at 48-54. Here, “reasonable persons . . . desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms all can accept” and “insist that reciprocity should hold within that world.” *Id.* at 50. One might think that “reasonable religions” should be held to the same standard, and also that “reasonable persons,” not knowing their own sex behind the full or the

Yet the basic texts of Judaism, Christianity, and Islam are rife with sexism: the Torah/Bible reverses the reality of reproduction so that the first woman is made from a man, tells a history of the Jews from which women are virtually absent, and advises wives to obey their husbands. The Qur'an explicitly advocates beating women "from whom you fear disobedience," and suggests that some barrier be placed between the sexes, which has been interpreted in a myriad of ways, including heavy compulsory veiling and the "seclusion," or socially enforced imprisonment, of women in their homes, in much of the history of Muslim peoples.⁶⁸ Reformed versions of all three dominant Western religions have, of course, acknowledged the equality of the sexes in numerous ways, including admitting women to their various ministries. However, the more orthodox (but by no means necessarily fundamentalist) versions of all three—including Orthodox Judaism, Catholicism and some Orthodox and Protestant branches of Christianity, and many variants of Islam—still discriminate against women and reinforce their subordination within religious practices, and within and outside the family, in numerous significant ways.⁶⁹

In addition to indicating Rawls's acceptance of such beliefs and associated practices as "reasonable" comprehensive conceptions of the good, acceptable even in the just, well-ordered society of ideal theory, *Political Liberalism* exacerbated the problem feminists had pointed out regarding whether or not the family is part of the basic structure of society. While Rawls more or less reiterates the position taken in *A Theory of Justice*, stating that "the nature of the family" belongs to the basic structure, he also, seemingly paradoxically, states that the political is "distinct from . . . the personal and the familial, which are affectional . . . in ways the political is not."⁷⁰ Philosopher John Exdell and I argued (in papers published at about the same time) that these aspects of *Political Liberalism* were not simply weaknesses and inconsistencies in its argument. They also endangered the very stability of the just society that the book aimed to ensure.⁷¹

It is clear that the even greater distinction between the political and the non-political that Rawls develops in *Political Liberalism* leads to

partial veils of ignorance, might insist on this.

68. The quotation is from Surah 4:34: "[A]s for those women from whom you fear disobedience: admonish them, put them aside in their beds, and beat them."

69. Of course, women often (and men sometimes) resist. For one very obvious example where it seems both resist in huge numbers, witness the paucity of very large Catholic families in the United States. The "rhythm method" of contraception is not at all reliable, yet it is the only method of birth control that is supposedly practiced by Catholics who take the holy sacraments.

70. Rawls, *Political Liberalism*, *supra* note 64, at 137.

71. John Exdell, *Feminism, Fundamentalism, and Liberal Legitimacy*, 24 *Can. J. Phil.* 441 (1994); *see also* Okin, *supra* note 66.

serious weaknesses or inconsistencies in the book's argument. As I have mentioned and will discuss further below, the unresolved problems about whether the family is part of the basic structure and whether and how the principles of justice are to apply to it are exacerbated. In addition, the political/non-political distinction, and the toleration of a wide range of religious and other cultural practices that it involves, lead Rawls to allow kinds of discrimination to be practiced against women that he disallows, if practiced against persons differentiated by racial or ethnic group.

Rawls states clearly in *Political Liberalism* that the priority of right limits permissible comprehensive conceptions of the good and permissible ways of life, in a just society. Moreover, he specifies how it limits them. While "justice cannot draw the limit too narrowly," just institutions must "permit[] but also sustain[] ways of life fully worthy of citizens' devoted allegiance."⁷² Admissible ideas of the good must "respect the limits of, and serve a role within, the political conception of justice."⁷³ Specifically, "conception[s] of the good requiring the repression or degradation of certain persons on, say, racial, or ethnic... grounds" are "in direct conflict with the principles of justice" and hence must be "discourage[d]... or even exclude[d]... altogether" in the just society.⁷⁴ Unfortunately, Rawls does not spell out what it means "to exclude" or "not to permit" a conception of the good. He suggests that the *discouraging* of discriminatory conceptions of the good should be done "in ways consistent with liberty of conscience and freedom of speech," but he refrains from saying whether, or how, the *exclusion* of any that are impermissible can be accomplished in such a manner.⁷⁵ This is somewhat puzzling. Could Rawls mean that groups within the just society are free to advocate or argue for racial or ethnic discrimination, though not to practice it? Whether or not this is his intention, what about sex discrimination? As I have mentioned, in seeming tension with the principles that appear to underlie his anti-discrimination stance, Rawls accepts as reasonable and therefore permissible all the main historical religions except for certain forms of fundamentalism. But many variants of these religions not only preach but also practice many forms of sex discrimination. As Exdell and I both asked, why are conceptions of the good that require the repression or degradation of women not susceptible to the same judgment and subject to the same treatment as those that are similarly racist or ethnically discriminatory?

There are two likely reasons for Rawls's not applying his anti-caste principle to sex as well as to race and ethnicity.⁷⁶ One is that applying

72. Rawls, *Political Liberalism*, *supra* note 64, at 174.

73. *Id.* at 176.

74. *Id.* at 195-96.

75. *Id.* at 195.

76. In a recent article, I show that several other prominent contemporary political

it would rule out many prominent religions as beyond the pale of reasonableness. But what kind of a reason is *that*? Why not instead argue that unless and until they reform themselves, as many variants of religion have already done, so as to accommodate sex equality, sexist religions too are to be discouraged or even excluded altogether from the just society, being no less inconsistent than racist or ethnically discriminatory ones are with the principles of justice? The other likely reason is that, in keeping with the long line of thinking about the public/private distinction that I briefly looked at above, he may have thought that the “affectional” nature of family life meant that women are less likely to be subjected to the degrees of degradation or repression that persons experience because of their race or ethnicity. But this way of thinking, too, has been exposed in the last few decades as largely based on myth. When beliefs about gender, marriage and family encourage the formation of families in which women, especially mothers, can easily be made vulnerable, oppressed and subordinated, many women do become vulnerable, oppressed and subordinated.

This problem, in turn, intensifies the stability problem. How? Surely the stability of Rawls’s just society must still rely on the moral development of its members—specifically, their development of a sense of justice—as well as on gaining the acceptance of its adult members? But whereas he, in *Political Liberalism*, seeks to render his just society more stable because more tolerant of a diversity of values, by reinforcing the distinction between the political and the non-political and applying the principles of justice only to the former sphere of life, by doing so he greatly reduces the potential for the development of a sense of justice in families. As Exdell and I have both argued, the reduced scope of justice specified by Rawls for the sake of stability of the just society also decreased social stability by tolerating—accepting as reasonable—unjust, sexist family forms for the sake of religious pluralism. How, we asked, might children acquire the sense of justice that was needed for the society’s stability within families that are not themselves regulated by the principles of justice, but might well instead become places where oppression is able to flourish.⁷⁷ In the account of moral development offered in *Political Liberalism*, Rawls completely omits the role of families as major influences during early childhood. But if the omission means that

philosophers, including Joseph Raz, William Galston, and Chandran Kukathas, share Rawls’s propensity to conceive of sex-based oppression as if it differs significantly in its seriousness from race-based oppression. See Susan Moller Okin, “*Mistresses of Their Own Destiny*”: *Group Rights, Gender, and Realistic Rights of Exit*, 112 *Ethics* 205 (2002). On the anti-caste principle in U.S. constitutional law and its implications when taken seriously, see Cass Sunstein, *The Partial Constitution* 338-45, *passim* (1993). For discussions of gender as caste that are strongly influenced by Sunstein’s ideas, see Okin, *supra* note 48, at 65-68, and Okin, *supra* note 66, at 39-43.

77. See Exdell, *supra* note 71; see also Okin, *supra* note 66.

these passages of *A Theory of Justice* are meant to stand unchanged, then they are rendered even more problematic by the problems that I have outlined here.⁷⁸

In a recent essay entitled *Rawls and Feminism*, in *The Cambridge Companion to Rawls*, Martha Nussbaum takes up such feminist criticisms of *Political Liberalism*, agreeing with some of them but taking issue with my claim that Rawls is inconsistent in restricting, discouraging, or even excluding comprehensive conceptions of the good that repress or degrade persons on ethnic or racist grounds, but at the same time allowing as acceptable and reasonable all of the major, frequently sexist, religions, excepting certain forms of fundamentalism. She claims that I am wrong about the fate of unreasonable comprehensive doctrines in a society based on Rawls's political liberalism. For Rawls, she claims, free speech protects the reasonable and the unreasonable alike, since "no political, religious, or philosophical speech can be censored, in Rawls's view, absent the existence of a grave constitutional crisis" in which free political institutions may be failing to preserve themselves. She also takes issue with my failure to "distinguish between doctrines holding that women should have unequal rights of citizenship and doctrines holding that they are metaphysically unequal or dissimilar in some other respect."⁷⁹ Thus, she defends Rawls's distinction between the political and the non-political, interpreting it to mean, in this context, that as long as women's equal political rights are not questioned, women's equality in other respects is fair game for question or attack since comprehensive doctrines that subordinate women must be tolerated.

It is unclear whence Nussbaum derives the extent and quasi-absolute status of freedom of speech she attributes to Rawls. As evidence for her statement about Rawls disallowing censorship of speech, she cites "p.343, etc." of *Political Liberalism*. The only passage on page 343 that seems pertinent is Rawls's statement that "[w]ithin our tradition there has been a consensus that the discussion of general political, religious, and philosophical doctrines can never be censored."⁸⁰ On the following page, too, he mentions the "agreement that all general discussion of doctrine . . . is fully protected."⁸¹ These statements, however, are statements about our political tradition, rather than direct statements by Rawls about his own beliefs. More importantly, they need to be understood in context; they are part of a

78. Rawls indicated to me in a conversation at Stanford in May 1993, that he intended his theory of early moral development in Part III of *A Theory of Justice* to be read as unchanged by the arguments of *Political Liberalism*.

79. Martha C. Nussbaum, *Rawls and Feminism*, in *The Cambridge Companion to Rawls* 488, 509 (Samuel Freeman ed., 2003).

80. Rawls, *Political Liberalism*, *supra* note 64, at 343.

81. *Id.* at 344.

lengthy section in which Rawls argues that it is inconsistent with liberal democracy to consider as crimes such speech as “seditious libel” or “defamation of the government,” or to censor doctrines calling for the overthrow of the government by force—except in cases of such imminent danger to democratic political institutions as he considers never to have existed in the United States, even during the Civil War. Rawls does not explicitly endorse the “consensus” of “our tradition” he reports. But even if he did, to endorse freedom of speech for “the discussion of general political, religious, and philosophical doctrines,” in the context of arguing against the criminalization of seditious libel against the government is hardly the same thing as to claim that “no political, religious, or philosophical speech can be censored,” as Nussbaum reports.⁸²

So what did Rawls himself think about freedom of speech, beyond ruling out the criminalization of “seditious libel” and like offenses against governments? What did he think about freedom of speech that defames or degrades some categories of persons, for example, which is considerably more pertinent than the case of seditious libel to the issue Nussbaum is discussing? Considering both *A Theory of Justice* and *Political Liberalism*, it is very clear that Rawls considers free speech to be one among a number of basic liberties, which, “it is important to recognize, must be assessed as a whole, as one system.”⁸³ Taken together, they constitute “a fully adequate scheme” of liberties.⁸⁴ While Rawls argues that liberty “can be limited only for the sake of liberty itself,” he also says that “[c]learly when the liberties are left unrestricted they collide with one another.”⁸⁵ He states clearly numerous times that *when* any of these liberties conflicts with any other, all of them need to be considered and they need to be balanced, limited and adjusted against one another.⁸⁶ Thus none of them has absolute protection. In a sentence familiar to all students of Rawls’s work, he states: “Taking the two principles [of justice] together, the basic structure is to be arranged to maximize *the worth to the least advantaged of the complete scheme of equal liberty shared by all.*”⁸⁷

In the same section of *Political Liberalism* on which Nussbaum seeks to base her near-absolutist interpretation of his views about free speech, Rawls makes clear his own nuanced position on the subject. He subjects to ridicule—an unusual tactic for Rawls—Justice Holmes’s case of someone’s falsely shouting “Fire!” in a crowded theater. This example is utterly “trivial,” Rawls says, since it works

82. Nussbaum, *supra* note 79, at 509 (emphasis added).

83. Rawls, *A Theory of Justice*, *supra* note 6, § 32, at 203.

84. Rawls, *Political Liberalism*, *supra* note 64, at 356.

85. *Id.*

86. See, e.g., Rawls, *A Theory of Justice*, *supra* note 6, §§ 32, 39, at 203, 205, 244; Rawls, *Political Liberalism*, *supra* note 64, at 356.

87. Rawls, *A Theory of Justice*, *supra* note 6, § 32, at 205.

only against “the view, defended by no one, that all speech of whatever kind is protected.”⁸⁸ This is very close to the “entrenched” position Nussbaum attributes to him. She states that he would rule proposals favoring serfdom or slavery off the political agenda in the sense that they would not be able to be voted on, but that he takes the position that “anyone who likes may make such proposals unconstrained.”⁸⁹ But Rawls makes it fairly clear that he holds no such view. Instead, he reminds us that the basic liberties are not absolute. They can be restricted in their content, though “only if this is necessary to prevent a greater and more significant loss . . . to these liberties.”⁹⁰ The standard to which delegates and legislators must appeal in such cases, he argues, is “what best advances the rational interest of the representative equal citizen in a fully adequate scheme of basic liberties.”⁹¹ He also argues in this same section that when any of the basic liberties comes into conflict with the fair value of political liberty, “here too the basic liberties must be considered together and weighed up against the threat their use might pose to this liberty, such that no one liberty can expect unconditional protection.”⁹²

This brings us to the second point Nussbaum seeks to make in defense of Rawls: that feminists such as myself have neglected the distinction political liberals make between challenges to women’s political equality and challenges to women’s equality in other respects—such as their metaphysical equality. The problem with this defense is twofold. First, Rawls’s own prioritization of the fair value of political liberty along with the other basic liberties means that he *must be* concerned to protect more than women’s formal political rights and legal equality. Indeed, anything, including any influential doctrine that contributes to women being represented politically far less than their proportion in the general population, becomes a matter of grave concern, since it endangers the basic liberties of women. Second, the whole point of my and Exdell’s critiques of the political/non-political distinction is that it is a false dichotomy. I argued, along the lines of Marx in *On the Jewish Question*, that there is no way of separating out and isolating women’s political equality

88. Rawls, *Political Liberalism*, *supra* note 64, at 345.

89. Nussbaum, *Rawls and Feminism*, *supra* note 79, at 509.

90. Rawls, *Political Liberalism*, *supra* note 64, at 356.

91. *Id.*

92. *Id.* Rawls’s main account of the fair value or equal worth of political liberty, which runs parallel to his concept of fair equality of opportunity, is in Section 36 of *A Theory of Justice*, titled “Political Justice and the Constitution.” It focuses on class inequality, but there is no reason why the standard it establishes should not apply to political inequality along race, ethnic or gender lines. Rawls says: “[I]deally, those similarly endowed and motivated should have roughly the same chance of attaining positions of political authority irrespective of their economic and social class.” Rawls, *A Theory of Justice*, *supra* note 6, § 36, at 225.

from all the other aspects in which women are unequal in a sexist society.⁹³

Thus, for example, were Rawls confronted with a situation in which a not insignificant religious group was promulgating the view that women have the souls of pigs (the kind of “metaphysical doctrine” about women’s inequality that Nussbaum appears to want to protect, in the interest of religious freedom, and to seek Rawls’s mantle of approval for so protecting), and in which such speech appeared to be distinctly affecting the fair value of women’s political liberty, by preventing them from being taken seriously as political candidates, it would seem that Rawls might well argue for the suppression of such religious speech in favor of women’s political liberty. Since he argues that “even in a well-ordered society under favorable circumstances liberty of thought and conscience is subject to reasonable regulations,”⁹⁴ one might surmise that he would find such regulation reasonable in the rather unfavorable circumstances spelled out in my example. Nussbaum apparently accepts the highly dubious distinction between the political and the non-political that so much is made of in *Political Liberalism*. But of course “metaphysical” attacks on the full humanity of women are not distinct from “political” attacks on their equal citizenship.⁹⁵ Both Rawls and Nussbaum are deluded on this score. But Rawls has the possible recourse of calling on his own earlier and clearer ideas about the need to balance and limit the various basic liberties from *A Theory of Justice*. Nussbaum has jumped to the conclusion that, as long as women’s formal political and legal equality were not being directly attacked, for Rawls, freedom of speech, thought or conscience would trump the fair value of political liberty for women. But this seems highly dubious. The fair value of political liberty and the priority Rawls has clearly given it seem to restrict the permissibility of sexist comprehensive doctrines far more than he might himself have realized. This may have far-reaching implications for political liberalism, which cannot be pursued further here.

93. Okin, *supra* note 66.

94. Rawls, *A Theory of Justice*, *supra* note 6, § 39, at 244.

95. Examples from all over the world seem to bear this out almost daily. Two examples reported on the same day in late 2003: When E.U. President Berlusconi jokes, at a meeting including European parliamentarians of both sexes, that since the discussion of the matter on the agenda is not progressing, those present should instead discuss “women and football,” is the political equality of the women present (and those they represent) preserved, or is it undermined? When male leaders in an Afghani *loya jirga* tell the female members of that council that they should moderate their demands because Islam considers a woman to be worth only half of a man, is their political equality threatened, or not?

V. RAWLS'S RECENTLY PUBLISHED RESPONSE TO FEMINIST CRITIQUES

Finally in 1997, in an essay entitled *The Idea of Public Reason Revisited*, Rawls first published his response to feminist critics, which is also included in *Justice as Fairness: A Restatement*.⁹⁶ In it, he calls it “a misconception” to think that “the principles of justice do not apply to the family and hence . . . do not secure equal justice for women and their children.”⁹⁷ He writes: “If the so-called private sphere is alleged to be a space exempt from justice, then there is no such thing.”⁹⁸ He also states plainly that “the family is part of the basic structure, since one of its main roles is to be the basis of the orderly production and reproduction of society and its culture from one generation to the next” and he acknowledges (for the first time) that “reproductive labor is socially necessary labor.”⁹⁹ It seems as if Rawls was finally to attend to the justice or injustice of the gender structure, at least within families. But then he seems to take most of this back again. He says that the principles of justice “are to apply directly to [the basic] structure, but are not to apply directly to the internal life of the many associations within it, the family among them.”¹⁰⁰ What could this mean? If we substitute, here (in single inverted commas), Rawls’s initial definition of the basic structure, it means that the principles of justice “are to apply directly to ‘the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation’, but are not to apply directly to the internal life of the many associations within [the basic structure], the family amongst them.”¹⁰¹ This is more than a little puzzling. It is rendered even more puzzling when taken in conjunction with Rawls’s statement that it is a misconception to think that the principles of justice do not apply to the family.¹⁰² First, Rawls has never previously suggested that the principles of justice are not, generally, to apply directly to the social institutions that make up the basic structure of society, as well as to the ways in which they distribute rights and duties and determine the division of advantages. But if the principles of justice are not to apply directly to institutions such as courts and constitutions, legislatures and laws, and even to duly regulated markets and systems of ownership, then one might well

96. Rawls, *The Idea of Public Reason Revisited*, *supra* note 62, at 595-601 (“On the Family as Part of the Basic Structure”). A similar section is included in Rawls, *Justice as Fairness: A Restatement*, *supra* note 63, at 162-69.

97. Rawls, *The Idea of Public Reason Revisited*, *supra* note 62, at 596.

98. Rawls, *Justice as Fairness: A Restatement*, *supra* note 63, at 161.

99. Rawls, *The Idea of Public Reason Revisited*, *supra* note 62, at 595-96.

100. *Id.* at 596.

101. Rawls, *A Theory of Justice*, *supra* note 6, § 2, at 6.

102. Rawls, *The Idea of Public Reason Revisited*, *supra* note 62, at 596.

ask what is the point of having them at all? We need to proceed with Rawls's argument, to make out what he could mean.

Next, he repeats the argument, first made in *Political Liberalism*, that the family is similar in this respect to other associations such as churches and universities, business firms or labor unions. Like them, he says, it cannot violate the basic rights and freedoms of the equal citizens who are its members. But, like them, he implies, it is not itself subject to the principles of justice. Just as we do not require churches to be democratically governed, so we should not require families to be internally governed by the principles of justice; the family is "not peculiar in this respect." I think there is a lot of confusion here, which I have yet to completely sort out: Surely it is not as if families and universities should not be *internally regulated* by the principles of justice, but legislatures and courts should. Indeed it may make less sense to have these latter institutions directly ruled by such principles than to have families ruled by them. I can see no good reason, for example, to apply the difference principle to the property-holdings of the members of a legislative body. Nor, surely should the principle of equal "political liberty" or decision-making rights apply to all participants in a jury trial—where justice is better served if witnesses answer questions, judges sentence, and only jurors vote. On the other hand, neither can I see any good reason why decisions in families should *not* be made equally by their members (giving the same special treatment to children of different degrees of maturity as they are given regarding their public voting rights), or why the difference principle should not be applied within families.¹⁰³ Perhaps, ironically, we may conclude that families are the quintessential place for justice, rather than a place where it is not needed or is impossible to apply, as has been more commonly thought. Not that families should be *just* just, as I have argued in response to Sandel; rather that justice is their primary, basic virtue, and that "nobler virtues" such as generosity and the willingness to sacrifice one's interest for those of others are unreliable, and even dangerous to some family members, unless built upon it.¹⁰⁴

This is not the direction that Rawls takes, however. As in *Political Liberalism*, so in the last published works he draws a distinction between "the point of view of people as citizens and their point of

103. Robert Nozick cites what he regards as the inapplicability of the difference principle *even* within families as a *prima facie* reason for its rejection as a principle for the wider social sphere. He argues in *Anarchy, State, and Utopia* that it is reasonable for parents to devote more educational resources to their most talented than to their least talented children. Though I cannot do it here, I think justice demands the reverse, or at least demands equal expenditures on both, except in such cases (for example, severe deprivation or living in the context of a "winner take all" occupational structure) in which the whole family's future survival is likely to depend on the earnings of the most talented of its members.

104. Okin, *supra* note 48, at 26-28.

view as members of families and of other associations.”¹⁰⁵ He claims that, from the latter point of view, wanting “a free and flourishing internal life appropriate to the association in question . . . [w]e wouldn’t want political principles of justice—including principles of distributive justice—to apply directly to the internal life of the family. . . . Here those principles are out of place.”¹⁰⁶

What Rawls does insist on repeatedly, however, is that the principles of political justice impose external restraints on families, as on other associations. Thus, “[s]ince wives are equally citizens with their husbands, they have all the same basic rights, liberties, and opportunities as their husbands; and this, together with the correct application of the other principles of justice, suffices to secure their equality and independence.”¹⁰⁷ Later, Rawls spells out further what he refers to here as the correct application of the other principles of justice. He says: “A long and historic injustice to women is that they have borne, and continue to bear, an unjust share of the task of raising, nurturing, and caring for their children,”¹⁰⁸ which can render them particularly vulnerable in the event of divorce. He notes that, if a basic cause of women’s inequality as citizens is their greater share in nurturing and caring for children, “steps need to be taken either to equalize their share, or to compensate for it.”¹⁰⁹ In addition, while freedom of religion requires that “some traditional gendered division of labor within families” be allowed, it must be “fully voluntary and . . . not result from or lead to injustice.”¹¹⁰ While Rawls says that it is not for political philosophy to decide the specifics of this, he refers with seeming approval to the split paycheck idea, and to the equal sharing of assets in the event of divorce. He calls it “intolerably unjust” that a husband may leave his family taking his earning power with him. Given what Rawls had written earlier about the appropriateness of invoking “the same equality” invoked by Lincoln in his condemnation of slavery to the inequality and oppression of women, I have come to think of these suggestions of his as his version of “forty acres and a mule” for women.

VI. A BRIEF RESPONSE

It is gratifying to feminist critics of Rawls that he eventually responded to our concerns about his theory of justice in some detail. Moreover, in doing so, he affirmed some of the suggestions we had come up with as to how to make families more just social institutions. However, several aspects of his response are still either puzzling or

105. Rawls, *The Idea of Public Reason Revisited*, *supra* note 62, at 597.

106. *Id.* at 597-98.

107. *Id.* at 597.

108. *Id.* at 598.

109. *Id.* at 600.

110. *Id.* at 599.

unsatisfactory. First, he restates the idea that families are like other private associations, without addressing the trenchant critiques of this position that have been made. Families are *not* voluntary associations readily entered and exited. Families of origin are not entered at all voluntarily. And though families one forms are usually entered voluntarily, they are by no means always exited voluntarily; moreover, even when they are, typically such exit does not come without considerable struggle or loss. Divorce, even under the most favorable circumstances, could hardly be compared with graduating from college, or choosing to teach at a different university. Moreover families, unlike other private associations such as universities and churches belong, for excellent reasons, among the *basic* social institutions to which Rawls has said from the outset that his principles of justice are to apply. Indeed, there is no way of reconciling Rawls's latter-day position that families are like other, more voluntary associations with his own definition of the basic social institutions—those that affect their members' opportunities from birth, those that "have deep and long-term social effects and in fundamental ways shape citizens' character and aims, the kinds of persons they are and aspire to be."¹¹¹ How could social institutions so defined *not* include families, which would thereby be differentiated clearly from the other, more voluntary, associations? Again, if the unknowns in the original position include one's sex, as Rawls has indicated since 1975, how could Rawls's "parties" *not* be seriously concerned with issues of justice internal to families? Surely they would want to ensure that, in the just society, public policy and institutions strongly fostered the equal division of unpaid labor within the home, and that women and men actually pursued this equal division so as not to disadvantage women both at home and in most other spheres of life? Would one not want to see justice within families, albeit in many respects probably not directly legally enforced, given very high priority in the well-ordered society?

Moreover, Rawls has not responded to the important concern that has been raised repeatedly since Kearns's paper in 1983 about the internal inconsistency of a theory of justice that depends heavily for the moral development and socialization of its citizens on an institution that is not itself internally regulated by the principles of justice.¹¹² As I have asked frequently both here and elsewhere, how could the social institution in which, as Rawls acknowledges, small children's first inklings of justice emerge in the context of their love and trust for those who care for them, forming the basis for moral

111. Rawls, *Political Liberalism*, *supra* note 64, at 68.

112. See the response to this concern in S.A. Lloyd, *Situating a Feminist Criticism of John Rawls's Political Liberalism*, 28 *Loy. L.A. L. Rev.* 1319 (1995). Rawls cites this, among other feminist responses to his work, but does not indicate whether he concurs with its argument.

development, not itself be based on internal justice?¹¹³ While he refers several times in “The Idea of Public Reason Revisited” to the role of the family in nurturing and developing citizens with a sense of justice, his notion that families are not special (or “peculiar” as he puts it) but, rather, similar to other social associations such as universities and trade unions seems completely to neglect the crucial function of families in promoting a sense of justice in the young.¹¹⁴

Finally, a point that warrants further development than I can devote to it here: Rawls simply states, without argument, that “[w]e wouldn’t want” families to be regulated internally by principles of distributive justice. This view has also been voiced by some other very influential philosophers and political theorists, including Michael Sandel and Allan Bloom.¹¹⁵ But having spent much time thinking about justice and its applicability or lack of applicability to families, some of us are not sure that this is at all evident. We still ask: “Why not?”

113. My most sustained discussion of this is in *Political Liberalism, Justice, and Gender*, *supra* note 67, at 32-39, where I ask how the “political virtues” Rawls argues for in *Political Liberalism* can be acquired in unjust gender-structured families, bringing in some recent findings about moral development and about actual families of various types.

114. Gerald Cohen’s *Where the Action Is: The Site of Distributive Justice*, *supra* note 58, draws an interesting and important analogy between issues of justice within the family and other voluntary aspects of egalitarianism in a just society, but is not concerned with the special role of the family in moral education which, as feminists have argued, makes its internal justice particularly compelling. See also Andrew William’s response, *Incentives, Inequality, and Publicity*, 27 *Phil. & Pub. Aff.* 225 (1998).

115. Sandel’s claim that families are “better than just” is a pivotal piece of the argument he makes against Rawls’s claim that justice is the primary moral virtue, which he presents as a case against liberal accounts of justice in general. See Sandel, *supra* note 25, at 30-35. Bloom’s claims that families are unjust, but naturally and necessarily so, because of the respective “natures” of women and men (especially men), are heavily based on Rousseau’s anti-feminism, and are of considerable current influence because of the weight of neo-conservatism within the George W. Bush administration. See Allan Bloom, *The Closing of the American Mind* (1987); see also Jean Jacques Rousseau, *Introduction to Emile* (Allan Bloom trans., 1979). For a critique of both claims, see Okin, *supra* note 48, at ch. 2.

Notes & Observations