

# Discovering Cultural Justice

Difference, Democracy and the Discursive Minimal State

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## Abstract

In this thesis a theory of cultural justice is developed from Hayekian premises. Importantly, and despite the virtual disappearance of the centralised economic institutions that Hayek was always keen to reject, it claims that it is possible to reconnect his thought to contemporary political theory and to both critically and normatively contribute to debates about multicultural justice. For what is most interesting about Hayek today are not the reasons why he defended liberalism but rather the conceptual tools that he deployed in doing so. It is these conceptual tools that can be shown to have a relevance to contemporary concerns with cultural diversity that is methodologically, critically and normatively both clear and compelling.

Part One of this thesis discusses Hayek's place in contemporary political theory. In Chapter One it is claimed that an interpretative reading of Hayek's social theory and of the conception of the self that underlies it not only clarifies his well-known economic arguments, but also enables us to appeal to his thought with respect to culture. Chapter Two builds upon this to address Hayek's normative argument for individual cultural liberty. Part Two is concerned to examine, from this Hayekian, the response to diversity of a range of theorists. In Chapter Three, the response of the difference democrats who endorse a group-differentiated account of deliberative democratic decision-making is assessed and, in Chapter Four, that of liberal egalitarian theory that both attempts and in a significant sense rejects the reconciliation of cultural difference with the institutions of the welfare state. Finally, Part Three is concerned with the account of cultural justice emergent from these discussions. Thus Chapter Five concerns itself with the articulation of the Discursive Minimal State and, in Chapter Six, with its defence against some important objections.



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## Introduction

### *1. Hayek, Postsocialism and Multiculturalism*

This thesis sets out to answer three questions that all relate to the contemporary status of Hayekian political theory. The first of these centres upon the programmatic issue of whether the thought of Hayek in any sense can be said to be relevant to contemporary debates about justice in culturally diverse societies. That is, can Hayekian political theory resonate in any telling way with discourses pertaining to the economic, cultural and legal positioning of the diverse members of contemporary societies? Second, if it is relevant, how adequate is its response to the challenge that diversity presents? More specifically, can Hayekian political theory serve as the basis for a critical and normative engagement with cultural diversity? Thirdly, and related to this, what, if anything, makes that critical and normative response preferable to other possible responses and the theories of justice they lend theoretical support to?

Answering these questions, of course, presupposes knowledge of just what the challenge of cultural diversity is and what it amounts to. A cursory look at recent historical events can help to make this clear. In the last ten years, the theory of justice has witnessed the emergence of the multicultural perspective as the principal rival to liberalism. In *Culture and Equality* Brian Barry has claimed that this development can be traced to the demise of communism in the late 1980's and the political vacuum created by its departing.<sup>1</sup> Similarly, John Dryzek locates the rise of multicultural or difference politics in the post-Communist crisis of the left.<sup>2</sup> In the countries where central planning failed - a failure for which, we may note, Hayek's work offers at least one powerful explanation - there has arisen the often-ugly politics of ethnic nationalism. By contrast, in the West this 'postsocialist' age has witnessed a less extreme form of this trend in the emergence of multiculturalism, or the politics of recognition. This emergence, as Seyla Benhabib, Nancy Fraser and Iris Marion Young have all pointed out, has often taken inspiration from what have come to be called the New Social Movements of the left that arose in the 1970's in defence of the claims of, among others, women, gays and ethnic and national minorities.<sup>3</sup> As such, multiculturalism should be construed in broad terms that comprehend but are not exhausted by specifically cultural claims.

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<sup>1</sup> Barry, B., *Culture and Equality*, Oxford, Oxford University Press, 2000, pp. 3-5.

<sup>2</sup> On this see Dryzek, J., *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, Oxford, Oxford University Press, 2000, p. 57.

<sup>3</sup> Benhabib, S., *Democracy and Difference: Contesting the Boundaries of the Political*, Princeton, Princeton University Press, 1996, p. 14; Fraser, N., 'From Redistribution to Recognition? Dilemmas of Justice in a "Postsocialist" Age' in Fraser, N., *Justice Interruptus: Critical reflections on the "Postsocialist" Condition*, New York, Routledge, 1996, pp. 11-39.

In academia, the increasing importance of cultural and social diversity to politics has been reflected in the attention devoted to issues of cultural difference and plurality in the theory of justice. Indeed, its significance can be seen in the fact that many, if not most, theorists accept as a starting point for discussion of such issues what John Rawls called ‘the fact of pluralism.’<sup>4</sup> That is, the fact that liberal democratic societies are and always stand to be marked by a diversity of conceptions of the good, each competing for the attention of the body politic and the benefits and burdens it confers.

The rise of multiculturalism, however, poses an important problem for a political theorist such as Hayek and for those whose work is implicitly or explicitly influenced by his thought. Most obvious here is the fact that Hayek is primarily considered as a contributor to debates concerning just distribution that now appear historically distant from and theoretically tangential to the contemporary theory of justice. John Gray, for instance, has argued that Hayek contributed in the main to debates concerning economic methodology, the possibility of centralised economic planning and for a post-war critique of social or distributive justice. The problem with this is that there is little scope for a significant Hayekian contribution to contemporary political philosophy precisely because it finds itself in a ‘postsocialist’ age preoccupied with notions of culture, community and difference or, if not with these, with the more economic specific task of defining which kind of post-socialist liberal market regime is preferable.<sup>5</sup> It is right, then, to consider Hayek as not only working from within what Iris Marion Young has called the ‘distributive paradigm’ but to be one of its archetypal representatives.<sup>6</sup> Hayek’s perspective may have something of interest to say about economic management in Soviet Russia, or the distributive implications of Rawls’s Difference Principle, but must remain silent, upon pain of irrelevance, with respect to issues such as female circumcision, same-sex adoption or the differential positioning of members of minority groups. What is perhaps ironic about all of this, as Gray has made clear, is that by deploying such incisive arguments against centralised economic planning that simultaneously offer powerful explanations for recent historical events, Hayek has not only become one of the principal victims of those arguments’ persuasiveness but has actually helped to make way for a contemporary concern with culture about which he has little, if anything, to say. This we may call Gray’s ‘marginality thesis’ concerning the contemporary status of Hayekian political theory. It is a thesis to which we will return during the course of this enquiry.

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<sup>4</sup> Rawls, J., *Political Liberalism*, New York, Columbia University Press, 1993, pp. xviii-ixx.

<sup>5</sup> Gray, J., ‘Postscript’, in *Hayek on Liberty*, London, Routledge, 1998. On Hayek’s contributions to these distributive debates, see Hayek, F. A. (ed.) *Collectivist Economic Planning*, London, George Routledge and Sons, 1935; *The Road to Serfdom*, Chicago, University of Chicago Press, 1944; *Individualism and Economic Order*, Chicago, University of Chicago Press, 1948; *The Mirage of Social Justice*, in Hayek, F. A., *Law, Legislation and Liberty*, vol. 2, London, Routledge, 1982.

<sup>6</sup> Young, I. M., *Justice and the Politics of Difference*, Princeton, Princeton University Press, 1990, Chapter 1, esp. pp. 15-19.

How, then, may one go about responding to this potentially fatal state of affairs? In the first instance, we may question the theoretical importance of culture itself upon which critical and normative discourses pertaining to multiculturalism and diversity are founded. Such a response, of course, would not be a new one for it is one of Barry's central claims in *Culture and Equality* that multicultural political theory, in all its hues, is but a distraction from other, more important concerns, more specifically from his perspective, distributive inequalities.<sup>7</sup> Similarly, in his various writings on the subject, Chandran Kukathas largely rejects the political importance of culture that is presupposed by multicultural theory. Although in sharp contrast to Barry, he does not go on to claim that politics should be in the main concerned with distributive inequality and inequality of opportunity but rather that politics should be concerned with much less than is often thought.<sup>8</sup>

Defending the distributive paradigm by rejecting the importance of culture, then, would by default be one way to reconnect Hayek's thought to contemporary concerns, for it would swiftly enable us to participate anew in debates about distributive justice that have so marked the post-war theory of justice. Yet, it seems that such a strategy may be as potentially ill advised, as it is unhelpful. Ill-advised because, superficially at least, one may end up ignoring a plethora of concerns - ranging from what one and others may do to one's body, to the legal status of particular sectors of the community - which probably should not be ignored.<sup>9</sup> Beyond this, moreover, it seems that attempting such a response may merely be to participate in an unhelpfully reductive discourse about the relative conceptual priority of the distributive and the cultural as the ultimate focus of the theory of justice. Establishing whether, for instance, economic inequality ultimately motivates unequal cultural outcomes, or that it is inequality of cultural or social status that motivates income inequality may prove to be an irresolvable and ultimately futile project.

Another way for a postsocialist Hayekian to respond to the challenge of cultural diversity involves shifting the focus from debate about the competing claims to theoretical priority of the distributive and the cultural to the altogether different question of the normative significance of diversity itself. As was briefly mentioned earlier, it is usual for theorists concerned with diversity to work from the fact of pluralism and then proceed to outline and defend theories of justice that adequately respond to it. Yet, there is an important sense in which such a starting point may be an inadequate one. Framing contemporary normative discourse in terms of the *adequacy* or otherwise of a particular tradition of political theory to come to terms with cultural plurality may well be politically contentious, if not inflammatory,

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<sup>7</sup> Barry, *Culture and Equality*. For a critical appraisal of this book, see Kelly, P. J. (ed.), *Multiculturalism Reconsidered: Culture and Equality and its critics*, Cambridge, Polity Press, 2002

<sup>8</sup> On this, see Kukathas, C., 'Are there any Cultural Rights?', *Political Theory*, vol. 20, no. 1 (1992), pp. 105 - 139.

<sup>9</sup> This is not to say, of course, that either Barry or Kukathas are guilty of this.

to some. Why after all, *should* diversity be publicly recognised and why, therefore, should normative political theory seek to come to terms with it? For many, to recognise diversity as of political significance may well be to do their own culture a disservice, or even to undermine that culture's public authority. Yet, such a complaint would be misconceived, for the question of the recognition of cultural diversity by *political theorists* is raised at an entirely different level of discussion. One may embark upon a research project, *à la* Barry or Kukathas for example, acknowledging the relevance of cultural diversity to the discipline and conclude that it is largely irrelevant insofar as politics and the justification of political institutions are concerned. (One may, of course, reach just the opposite conclusion.) Nevertheless, the very acceptance of diversity should itself be an important question for normative political theory. Indeed, that it is not probably says more about the deficiencies of the discipline than it does about the cogency of any anti-multicultural arguments that may be forthcoming.

The questioning of the desirability of cultural diversity itself, of course, gives rise to an entirely different debate. Here the principal task of normative theory is not to uncover institutions of justice that accommodate diversity *per se* but, rather, to balance the apparently irreconcilable claims of those who insist that cultural diversity should be recognised as publicly significant and those who insist that it should not. This we may call the challenge to critical and normative political theory of 'hyper-diversity.' It is a challenge that takes the notion of diversity 'all the way up' to acknowledge those who argue - in increasingly large and politically significant numbers, it may be added - not against the public significance of *culture* but, rather, against the public significance of cultural *diversity* by demanding the public recognition and preservation of their, usually majority, culture. Is there a theory that can accommodate the apparently irreconcilable claims of both diversity and hyper-diversity? A significant part of this thesis and in response to our second and third questions concerning the adequacy and attractiveness of Hayekian political theory will be to claim that, to its comparative critical and normative benefit, such a theory is capable of doing just this. Crucially, however, achieving these aims presupposes a positive answer to our first programmatic question concerning the possibility of a Hayekian account of cultural justice. To offer such an answer, moreover, is crucially dependent upon the success of reading Hayek's *corpus* in a new way.

## **2. Hayek and Interpretative Liberalism**

In his study, *Hayek's Social and Political Thought*, Roland Kley distinguishes Hayek from other recent Anglo-American political philosophers in two fundamental respects. Firstly, theorists such as Rawls, Dworkin, Raz and Gauthier, 'seek primarily to work out the foundations of liberal political morality and to justify on moral grounds what they regard as

liberalism's overriding concerns.<sup>10</sup> Unlike Hayek, such theorists do not consider political disagreement to be 'merely about the institutional means to universally shared ends but in the very ends and values themselves to which legitimate government must be committed.'<sup>11</sup> Secondly, for Kley and in contrast to Chandran Kukathas's argument in *Hayek and Modern Liberalism*, Hayek was in any case not concerned with moral argument at all when he sought to justify liberal institutions.<sup>12</sup> This, of course, marks him off very sharply from the mainstream for which, at least since Rawls's *A Theory of Justice*, 'moral justification has quickly become the dominant paradigm of what political philosophy is all about.'<sup>13</sup> If true, however, this has very serious implications for the status of Hayekian political theory and leads us back to Gray's marginality thesis. For the amoral nature of Hayek's research programme means that despite the historical significance of the distributive arguments he did make, his political theory is necessarily an incomplete one because it lacks the very moral argumentation needed to properly define the individual liberty and markets he defends or adequately engage with issues of identity, culture and difference.<sup>14</sup> Not only may it be claimed, then, that Hayekian political theory has been rendered largely tangential to contemporary concerns by the historical confirmation of some of its core insights. One may also add that it does not in any case possess the requisite philosophical resources to rehabilitate itself with respect to those mainstream 'postsocialist' research programmes that have arisen since the collapse of communism. In the present context, then, the veracity of the claim that Hayek's is an amoral, instrumental project means that the prospects for Hayekian account of cultural justice appear decidedly gloomy to say the least. Hayek's irrelevance is not only historical in character, it is an irredeemably philosophical irrelevance.

Two comments are apposite here, both of which are central to the concerns of this thesis. In opposition to Kley, I will show that Hayek's is not an instrumentalist political theory that is concerned with the most appropriate institutional means to the fulfilment of universally shared ends but, rather, is better understood as being concerned with justifying specifically liberal individualist institutions of justice that enable society to *discover* on a rational basis which ends to pursue. That is, for Hayek individual freedom is not to be valued because it and it alone is capable of serving as the foundation of liberal political morality, nor,

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<sup>10</sup> Kley, R., *Hayek's Social and Political Thought*, Oxford, Clarendon Press, 1994, p. 12.

<sup>11</sup> *ibid.* See also Sandel, M., *Liberalism and the Limits of Justice* (2<sup>nd</sup> ed.), Cambridge, Cambridge University Press, 1998, pp. 175-78.

<sup>12</sup> Kukathas, C., *Hayek and Modern Liberalism*, Oxford, Clarendon Press, 1989.

<sup>13</sup> Kley, *Hayek's Social and Political Thought*, p. 11. Rawls, J., *A Theory of Justice*, Oxford, Oxford University Press, 1971. Kley here cites the work of Nicolas Rescher as another "instrumentalist" political theorist.

<sup>14</sup> Gray, 'Postscript', *Hayek on Liberty*, *passim*.

therefore, because it is the supreme ethical value, but rather on epistemological grounds because it 'is the source and condition of most values.'<sup>15</sup>

Moreover, the arguments Hayek does deploy in support of this can also be appealed to with respect to Kley and Gray's other concern with Hayek's apparent inability to offer an account of the proper definition of markets and the domain of individual liberty that the importance of freedom is supposed to ground. For not only does Hayek's defence of individual liberty offer society a means of rationally discovering ends, it also enables us to answer questions concerning how the diverse and mutually ignorant members of the polity ought to respond in the course of their daily lives to the demands placed upon them by the ends that they pursue. That is, not only does Hayek defend institutions that enable us to discover the ends which we should pursue but also to discover the most appropriate means of pursuing them. For Hayek, we need liberal individualist institutions not only to discover what, for instance, autonomy, or tolerance, or the doctrinal demands of a particular religion requires of ourselves and of others, but also for discovering how material equality is best pursued, or for discovering the extent to which we may own property. From this starting point, then, I will defend a cultural as well as an economic reading of Hayek as being concerned with justifying an institutional framework for debates on important questions pertaining to distribution as well as cultural diversity, including the question of whether diversity itself ought to be respected and, if so, to what extent and how.

What features of Hayek's thought facilitate the articulation of such a liberal account of economic and cultural justice? The clue is to be found in our discussion of the relative importance and particular demands of the diverse values to be found in society and the relationship this issue has to the notion of interpretative dispute. The notion of interpretation, of course, plays an important part in many contemporary debates about justice and this has been discussed at length by Georgia Warnke with reference to the work of Charles Taylor, Michael Walzer, Ronald Dworkin and the post-*A Theory of Justice* work of Rawls in her discussion of the idea of an 'interpretative turn' in recent political theory.<sup>16</sup> Of these, the work of Taylor in particular is of special interest here in two important respects that relate to our concern to rehabilitate Hayekian political theory. In the first instance, we will see how Taylor works up a normative theory of justice that seeks to directly address the question of cultural diversity. Secondly, and similarly to Hayek, Taylor is also concerned to achieve this via a prior account of interpretative social science and the thoroughly embedded, or 'communitarian' conception of the self that it presupposes.

Of course, despite this important similarity and to the extent that he can be said to be an interpretative theorist, what one certainly cannot say of Hayek is that he was ever

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<sup>15</sup> Hayek, F. A., *The Constitution of Liberty*, London, Routledge, 1960, p. 6.



concerned in any significant way with interpretative diversity and dispute, least of all with respect to issues of culture and difference. However, where Hayek is unique is in his emphasis that at the root of such dispute is not the fact of the plurality of opinion arising from our membership of diverse cultural traditions, but the normative implications of the *epistemological* burdens that such membership places upon us. That is, in contrast to contemporary multicultural theorists of diversity such as Taylor who stress the importance of the fact of differentiated cultural membership to the articulation and defence of public institutions, for Hayek what is of singular significance is not cultural membership, social embeddedness or the fact of pluralism *per se*. Rather, it is the insight that regardless of which group or groups one happens to identify with, along with the fact of cultural membership comes the fact that much of the knowledge necessary for rational social decision-making is, *qua* cultural and hence tradition-bound knowledge, of a tacit and inarticulable nature. As such, it imposes sharp limits upon what can be achieved via the exploitation of conscious reason and discourse. Emergent from this, of course, is Hayek's unique normative claim that such knowledge is resistant to the kind of conscious articulation that is the prerequisite of efficacious *political* decision-making usually defended by theorists concerned with diversity. What makes Hayek particularly interesting, then, is that in contrast to Taylor and other multiculturalists who defend the politics of recognition as the institutional conclusion of a concern with identity and cultural embeddedness, Hayek derives strongly liberal individualist normative conclusions from very similar premises.<sup>17</sup>

Hayek's thesis concerning the normative implications of the fact of our embeddedness, of course, can be traced back to the earlier part of his career as an economist. As Kukathas explains, Hayek's argument for liberal individualist economic institutions arises more specifically from his extension of subjectivism beyond the calculational concerns of von Mises where he claimed that economists favouring command-economies incorrectly assumed that it was theoretically possible for all the knowledge in society to be given to a single (commanding) mind.<sup>18</sup> From this assumption it was but one step to envisaging the problem of achieving a 'rational economic order'<sup>19</sup> - one that could guarantee social justice, for example - as merely one of making use of that knowledge so as to achieve the desired politically-

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<sup>16</sup> Warnke, G., *Justice and Interpretation*, Cambridge, Ma., MIT Press, 1993.

<sup>17</sup> Of course, this argument is equally applicable to other theorists of a communitarian disposition such as MacIntyre and Walzer who, whilst not defending multicultural politics, derive in contrast to Hayek communitarian conclusions from communitarian premises.

<sup>18</sup> Mises, L. v., *Socialism: An Economic and Sociological Analysis*, Indianapolis, Liberty Classics, (1922) 1981; 'Economic Calculation in the Socialist Commonwealth', in Hayek, F. A. (ed.), *Collectivist Economic Planning: Critical Studies on the Possibility of Socialism*, London, George Routledge and Sons, 1935, pp. 87 - 130.

<sup>19</sup> Hayek, F. A., 'The Use of Knowledge in Society' (1945), *Individualism and Economic Order*, Chicago, University of Chicago Press, 1948, p. 77.

determined outcome. According to Hayek, however, this assumption, betrayed a profound misconception of the economic problem that society faces:

... The economic problem of society is ... not merely a problem of how to allocate “given” resources - if “given” is taken to mean given to a single mind which deliberately solves the problem set by these “data”. It is rather a problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know. Or, to put it briefly, *it is a problem of the utilization of knowledge which is not given to anyone in its totality.*<sup>20</sup>

Yet, it is not clear at this point in his intellectual development why knowledge is evasive, nor why it needs to be utilised in the way Hayek suggests. It is here, however, where our interpretative reading of Hayek makes its first significant contribution for the claim about the evasiveness of knowledge only gains substance when Hayek’s more explicitly interpretative texts on the methodology of the human sciences from the 1940s are considered. What these texts make clear are the reasons why Hayek thinks that mainstream economic theory has lost its way and how its task should be properly conceived of. This, of course, is intimately tied to his discussion of subjectivism that is the central concern of the papers on the human sciences.

Moreover, and with respect to the second major contribution of the interpretative reading, what these texts reveal is not only an account of ‘good’ social or human science - of which economics is one branch - but also an account of *the interpreting self* that is only ever implicit in the earlier economic texts. This is an account that presents the self as an embedded interpreter of the social world that presupposes not only those cultural traditions in virtue of which the world is meaningful but, more importantly for Hayek’s wider purposes, of the epistemological burdens upon the self’s reason that membership of a culture inescapably imposes. What is of singular importance here is that with an explicit account of the Hayekian self - rather than a few, albeit powerful, arguments about sound economic theory and policy - we may bridge the gap between distribution and culture in distinctively Hayekian terms. That is, we may elaborate more fully Chandran Kukathas’s claim that, for Hayek, ‘it is the *epistemological* rather than the calculational problem which characterizes not simply the production process but *the human condition generally.*’<sup>21</sup> Again, however, it is only if Hayek’s assumptions concerning the self are made clear that it is possible to transform his arguments for individual liberty as a co-ordinating device of tacit knowledge of economic resource needs and scarcities to arguments about the co-ordination of non-economic or cultural knowledge and the relative status of diverse cultural groups.

<sup>20</sup> *ibid.*, pp. 77-78, emphasis added.

<sup>21</sup> Kukathas, *Hayek and Modern Liberalism*, p. 101, emphasis added.

Indeed, and returning to the apparently irresolvable issue of the theoretical primacy of the distributive and the cultural, what makes an interpretative reading of Hayek particularly compelling here is that it not only allows his perspective to bridge the distributive-cultural divide that has opened up in recent normative political theory, but that it renders the divide largely otiose. The reason for this again takes us back to the emphasis Hayek places upon tacit knowledge. For to be free to dispose of one's property as one sees fit - that is, to enjoy distributive freedom - *just is*, for the Hayekian, to be free to make use of one's own and, crucially, *others'* local and often *culturally-differentiated* tacit knowledge so that answers to pressing questions of economic and cultural concern may be discovered. Of course, this does not mean that a proper definition of property rights would exhaust all that needs to be said about cultural justice. There are many issues - most obviously concerning who is to enjoy property rights including rights over one's body, as well as non-economic civil and political rights and issues concerning freedom of speech and expression - that are the fitting subjects of cultural, rather than distributive public discourse. Any complete, let alone adequate, account of Hayekian cultural justice, then, must also provide principled answers to such questions. It is for this reason, moreover, that this thesis should not be taken as a thesis on Hayek. It is, importantly, a thesis about the public management of difference that arises from and expands upon Hayekian thought.

### ***3. The Uses of a Hayekian Approach to Cultural Justice***

Given that offering an interpretative reading of Hayek's corpus is one way of connecting Hayekian political theory to contemporary concerns, how adequate is it? That is, to what uses may one put the interpretative variant of Hayekian political theory with regard to cultural diversity? I think that there are two such uses: one critical, the other normative. As we have seen, Hayek is famous for claiming that many economists and those in positions of political power who follow their lead incorrectly assume that it is in principle possible that all the knowledge in society necessary for the successful management of the economy could be given to a single (commanding) mind. Likewise, and building upon the development of a cultural variant of this argument, one of the principal claims of this thesis will be that many contemporary exponents of multicultural or difference-based justice base their defence of public institutions on an erroneous assumption that knowledge of the cultural, social and economic needs of the diverse members of society is unproblematically given. Related in a more fundamental way to this misrecognition of our epistemological predicament *qua* culturally embedded beings, and with respect to the problem of hyper-diversity, it will also be claimed that in an important sense much difference-based political theory fundamentally misconceives the very task of cultural justice. This is clear in its attempt to secure in advance a particular vision of the status of different cultural groupings and the diverse traditions,

rituals and practices that are said to be constitutive of their identities. That is, rather than offer an account of justice that facilitates the discovery of what the relative status of the diverse members of society should be, difference politics assumes that this issue has already been resolved.

Of course, it is not only the multiculturalists who it shall be claimed misconceive the task of justice in this way. Recent liberal egalitarian political theory is a particularly interesting case in point here because some of its defenders work from the assumption of the importance of culture and cultural difference whilst others do not. Will Kymlicka and Joseph Raz, for instance, both attempt to reconcile the claims of cultural difference with those concerning economic emancipation and participation whilst, as we have seen, Barry is sceptical of this enterprise. Nevertheless, an error similar to that of the difference democrats can be seen with regard to the evaluation of economic and cultural outcomes by theorists such as Kymlicka and Raz under liberal institutions as *underproviding* or *insufficiently* recognising the needs and preferences of disadvantaged groups. Our interpretative variant of Hayek's political theory, however, illuminates this type of criticism as itself highly problematic because it lacks a coherently derived standard of cultural optimality in virtue of which it can appraise these outcomes. The problem here, of course, is that claiming that good  $x$  is underprovided or that group  $y$  is insufficiently recognised as a pretext for invoking the state to enter the fray and provide the good or bestow appropriate recognition presupposes knowledge of what the relevant optimal level of provision or recognition should be. Moreover, despite the concerns he has with the 'culturalism' of theorists such as Kymlicka (concerns, we may add, that lead him to deny that Kymlicka even *is* a liberal), an important claim of this thesis will be that Barry too ultimately assumes a particular stance to culture, and hence to cultural diversity that begs the question of the relevant social optimum. This is most evident in his defence of economic and legal interventionism by the state as a response to social and economic inequality. This, it will be claimed, is tantamount not only to a socially irrational interventionism in the wider economic and cultural process but actually assumes a particular ethical claim concerning the need for *public* institutions to emancipate the less well off, that is not defended but, rather, postulated as a starting point for a politics of redistribution.

I stated at the outset of this introduction that we not only wanted to know if a Hayekian response to diversity was possible or whether it was capable of exerting critical leverage over other candidate theories of cultural justice but also whether it could be an adequate one on its own terms. What is there about Hayek, then, that could lend itself to finding solutions to our challenges? A Hayekian perspective recognises that the discussion of issues of central importance does not only take place in the face-to-face surroundings of democratic politics but also through the varied and often informal institutions of civil society. Indeed, the very kinds of institutions that are present in the extrapolitical arena of civil society

are in themselves evidence of the kinds of issue that contemporary society is concerned with. This is a notion that, if taken to its fullest extent, would include the claim that individual choices constitute an integral and perhaps the principal part of what it is to have a social discussion concerning the ends of life.

All of this, moreover, relates to the challenge of cultural diversity and our concern with Hayek's tangential position to contemporary theory. For, it would seem that attempting to offer any ethical justification of the ends and values to which legitimate government must be committed will unavoidably be a circular and, hence, philosophically inadequate enterprise if the diversity of the conceptions of the good to be found in that society, including those that do not celebrate diversity, is taken seriously. Because of this danger, Hayek's account of liberalism as a discovery procedure that is rooted not in an ethical conception of the self or of our most essential interests but, rather, in the normative implications of an interpretative insight concerning the permanent limits of our reason, gains another significance. That is, it is precisely because of the fundamental and profound challenge that the multicultural problematic represents - that is, precisely because of the possibility of permanent disagreement about ultimate ends and what they require - that an amoral conception of political association such as Hayek's could well be all the more attractive.

Consequently, I will argue that the amoral nature of Hayek's interpretative defence of liberalism is, *prima facie* at least, not a reason for rejecting him. Rather, it is a virtue for a theory addressed to the needs of a society that is culturally diverse and comprised of members who for the most part are mutually ignorant and unaware of the knowledge that they have, but who still need publicly justified institutions to which all, including those who have difficulties with diversity, may assent.<sup>22</sup>

#### ***4. The Plan of this Thesis***

The broad argument of this thesis, then, should now be apparent. Despite the postsocialist cultural turn and the virtual disappearance of the kind of centralised economic institutions that Hayek was always keen to reject, there is, after all, a way to reconnect his thought to contemporary political theory and to both critically and normatively contribute to the debates about multicultural justice that are so central to it. For what is most interesting about Hayek *today* are not the reasons why he defended liberalism - the debates from which they sprung are, for the most part, irrelevant today both to political theory and to political practice - but rather the conceptual tools that he deployed in defending liberalism. It is these conceptual tools that can be shown to have a relevance to contemporary concerns with cultural diversity that is methodologically, critically and normatively both clear and compelling.

This thesis will be divided into three parts. Part One will discuss Hayek's place in contemporary debates in normative political philosophy. In Chapter One I will claim that, despite his apparently marginal status to debates about justice and difference, an interpretative reading of Hayek's social theory and of the conception of the self that underlies it, not only clarifies the well-known economic arguments he did make, but also enables us to appeal to his thought anew with respect to the cultural. Chapter Two will build upon this to address Hayek's normative argument for individual economic liberty and extend it to the realm of culture, via our modelling of a Hayekian argument for individual interpretative liberty. In Part Two, I will be concerned to examine, from this Hayekian perspective, the responses to diversity of a range of theorists. In Chapter Four, I will examine the response of the difference democrats who endorse a group-differentiated account of deliberative democratic decision-making and, in Chapter Five, of liberal egalitarian political theorists who both attempt and in a significant sense reject the reconciliation of cultural difference with the institutions of the contemporary welfare state. Finally, in Part Three, I will be concerned with the account of multicultural justice emergent from our prior engagements with and modifications of both Hayekian and contemporary political theory. Thus, Chapter Five will concern itself with the articulation of the Discursive Minimal State and, in Chapter Six, with its defence.

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<sup>22</sup> Paradoxically, perhaps, this is not something to which Kley is blind. On this see Kley, *Hayek's Social and Political Thought*, p. 204.

***Part I: Hayek and Contemporary Political Theory***

# 1 'The Silliest of Common Misunderstandings: From Economics to a Hayekian Conception of the Self

## 1. Introduction

According to numerous political theorists, the demise of communism has been associated with an upsurge in the normative significance of notions of identity and difference. In the words of Jürgen Habermas, normative political theory has witnessed a shift 'from "issues of distribution" to a concern with "the grammar of forms of life".'<sup>23</sup> In addition, and writing with respect to the contemporary significance of Hayek's political theory, John Gray has argued that the central argument of Hayek's corpus - the epistemological critique of central planning and defence of free market institutions - has been rendered obsolete precisely by the fall of the Iron Curtain of which that critique offers at least one powerful explanation.<sup>24</sup> There are two difficulties, then, that the Hayekian theorist faces if he seeks to orient Hayekian political theory to issues of culture, identity and difference. Not only are the kinds of institutions most susceptible to Hayek's arguments largely no longer extant - our political choice now is largely between varieties of liberal order - the whole terrain of normative discourse has in any case shifted away from issues of distribution precisely, perhaps, because of the impact upon contemporary political thought wrought by the disappearance of those institutions.

Despite this, it will be the central concern of this chapter to show that the apparent significance for Hayekian political theory of both theses is illusory and that it is, after all, possible to reconnect the Hayekian perspective to contemporary debates concerning identity, difference and justice. One way to do so, of course, would be to follow egalitarian liberals such as Barry who reject the shift in the terrain of discourse and set out to show that, in any case, the consequences of this post-socialist, communitarian and feminist-inspired 'paradigm shift' towards identity and difference are not to be welcomed. As we shall see in Chapter 4, central to Barry's thesis is the claim that this shift is not only a distraction from more important distributive concerns, it actually plays into the hands of those wishing to perpetuate inequality by enticing the most vulnerable members of society into a wholly divisive and internecine politics.

Rather than following this approach, however, it will be argued that rehabilitating Hayekian political theory centres upon an interpretative reading of Hayek's economic and

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<sup>23</sup> Habermas quoted in Benhabib, *Democracy and Difference: contesting the boundaries of the political*, p. 4, n. 7.

<sup>24</sup> On this, see Gray, *Hayek on Liberty*, pp. 146-61.



social theories and, most importantly, an uncovering of the account of the culturally embedded self that underlies it. Such a reading, it will be argued, makes it possible for the Hayekian to straddle the analytical and normative divide implicit in the shift from the grammar of distribution to that of forms of life, rather than seek to assert the normative priority of one side over the other.

Of course, any such reading of Hayek is bound to be controversial. After all, he is most famous precisely for his contributions to debates concerning the possibility of centralised economic planning and economic methodology in the 1930s and '40s and for his post-war critique of social justice, given its most comprehensive statement in volume two of *Law, Legislation and Liberty, The Mirage of Social Justice*.<sup>25</sup> Clearly, all of these contributions pertain in one way or another to economic theory and just *distribution*; that is to debates located firmly within the distributive paradigm. It would be more useful, then, *contra* the reading proposed here, to consider Hayek as not only working from within the distributive paradigm but to be one of its principal exponents. Moreover, it is in any case more common to claim that the starting point of his research project is the notion of spontaneous order or, more specifically, of how such order is achieved without being consciously willed, rather than with a question concerning the nature of the self.<sup>26</sup>

However, I will argue with respect to the first objection that a purely distributive reading of Hayek is premised upon a fundamental, although explicable, misunderstanding of the breadth of his research project that is only made clear once the assumptions concerning the nature of the self underlying the overtly economic papers are brought to light.<sup>27</sup> The reason why this is not immediately clear is that these assumptions are only made explicit elsewhere, most clearly in papers such as 'The Facts of the Social Sciences' and 'Scientism and the Study of Society'.<sup>28</sup> Importantly, however, and with respect to the second objection, it is these papers on the human sciences that provide us not only with a fuller account of the

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<sup>25</sup> On the former see Hayek, F. A. (ed.) *Collectivist Economic Planning: Critical Studies on the Possibility of Socialism*, London, George Routledge and Sons, 1935. On the latter, see Hayek, F. A., *The Mirage of Social Justice*, vol. 2, *Law, Legislation and Liberty*, London, Routledge, 1982. We could perhaps include Hayek's earlier economic writings such as *Prices and Production*, London, Routledge and Kegan Paul, 1931; *Monetary Theory and the Trade Cycle* (1929), trans. Kaldor, N. and Croome, H., London, Jonathan Cape, 1933; *Profits, Interest and Investments, and other essays on the Theory of Industrial fluctuations*, London, Routledge and Kegan Paul, 1939 and *The Pure Theory of Capital*, London, Routledge and Kegan Paul, 1941. This, however, would be to expand the scope of this thesis beyond the competence of its author.

<sup>26</sup> Barry, N. P., 'Hayek on Liberty', in Pelczynski, Z., and Gray, J. (eds.), *Conceptions of Liberty in Political Philosophy*, London, Athlone Press, 1984, pp. 263 - 288; Kley, *Hayek's Social and Political Thought*, esp. Chapters 1 - 5.

<sup>27</sup> See also Gamble, A., *Hayek: The Iron Cage of Liberty*, Cambridge, Polity Press, 1996, p. 19.

<sup>28</sup> See also Cubeddu, R., *The Philosophy of the Austrian School*, London, Routledge, 1993, p. 75. One perhaps should take exception to Cubeddu's claim that the fact of social knowledge being dispersed across many minds is social science's only objective 'datum', as well as the claim that at this stage of his development Hayek was working with a conception of practical or tacit knowledge. On this, see Cubeddu, *The Philosophy of the Austrian School*, p. 74.

subjectivist, anti-scientistic perspective that serves as the philosophical foundation for the critical engagement with economic theory and practice. They also provide an account of a distinctively Hayekian conception of the interpreting self which, I will claim, is both logically and programmatically prior to the traditionally understood starting point of his research programme: the notion of spontaneous socio-economic order.<sup>29</sup> Contrary, then, to most philosophical accounts of Hayek's work the interpretative reading does not start with an account of the admittedly central notion of spontaneous socio-economic order.<sup>30</sup> Rather, it commences with the question of what is it that Hayek thinks about man that makes the socio-economic order he inhabits a spontaneous one and proceeds to offer an account of the Hayekian self - more specifically, the constitutional limits to its faculty of reason - as an answer. Thus, it is only because of the kinds of people that Hayek takes us to be that spontaneous orders can be said to be spontaneous at all. It is to Hayek's implicit conception of the self that attention must be paid, then, if we are to reconnect his perspective in a meaningful and compelling way to contemporary issues in normative political theory and multiculturalism in particular.

As such, the interpretative papers on the human sciences are pivotal in that not only do they retrospectively give philosophical substance to the earlier arguments about economic theory and central planning. They also make theoretically possible Hayek's move from economic theory towards more general socio-theoretical concerns that we shall see are in turn necessary for contemporary Hayekian political theory to resonate tellingly with concerns about culture and identity. Just because the self implicit in Hayek's economic and socio-theoretic papers interprets from within the economic and cultural nexus - and, as such, is to be seen in opposition to that 'celebrated figment' of atomised or 'economic' man - Hayek is able to occupy an important and unique place not only with respect to economic theory but also with respect to culture.<sup>31</sup> That is, because the Hayekian account of the nature and limits of individual reason is a general thesis that characterises a human predicament, it has major consequences for the articulation and justification of public institutions regardless of whether these are oriented toward the management of the economic or cultural life of society.

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<sup>29</sup> This is, of course, was something of which Hayek was aware. On this, see Hayek, F. A., *Rules and Order* (1973), *Law, Legislation and Liberty, Volume One*, London, Routledge, 1982, p. 13.

<sup>30</sup> Gray, *Hayek on Liberty*; Kukathas, C., *Hayek and Modern Liberalism*; Kley, R., *Hayek's Social and Political Thought*.

<sup>31</sup> *The Constitution of Liberty*, p. 61. This is, moreover, a Hayekian conception of the self that in many fundamental respects prefigures that of the more canonical "communitarian" critics of Rawls. On this, see MacIntyre, A., *After Virtue*, Notre Dame, University of Notre Dame Press, 1984; *Whose Justice? Which Rationality?*, London, Duckworth, 1988; Sandel, M., *Liberalism and the Limits of Justice*, Cambridge, Cambridge University Press, 1982; Taylor, C., *Sources of the Self*, Cambridge Ma., Harvard University Press, 1989. For a comprehensive overview of liberal-communitarian debate see Mulhall, S. and Swift, A., *Liberals and Communitarians* (2<sup>nd</sup> ed.), Oxford, Blackwell, 1996.

However, this is not to say that either aim is achieved without effort. Despite their necessity to any adequate reading of Hayek as a contributor to normative cultural discourse, we shall see that the interpretative papers on the human sciences alone are not sufficient for this task. Initially at least, the Hayekian interpreting self that emerges from them is but a shallow or weak self and this is only overcome once Hayek addresses the question of just what it is that endows man with the faculty to interpret the social world. That is, the question of the depth of Hayek's conception of the self can only be answered once he moves from a somewhat bald assertion that men *are* by nature social beings to an explanation of the *how* and *why* of their sociality. It is to such questions, moreover, that we must look beyond the interpretative papers and to his work including and after *The Constitution of Liberty*. It is only here where Hayek explicitly invokes the notion of a rule, tradition or practice that both embeds man and situates him within the cultural, as opposed to purely economic nexus and in which co-ordination is no longer just an economic affair but is also a matter of culture. Equally importantly, however, because the invocation of rules and practices issues in a deepening rather than a rejection of the account of the self that the economic papers presuppose, Hayek is able to deepen his account of the self and therefore make the transition from economic to cultural theory. Moreover, he is able to do so without relinquishing the key interpretative insights that so coloured those earlier economic arguments against the philosophy of interventionism that have turned out to be so telling.

In the section that follows, I will outline the most salient features of the notion of interpretation and the role that it plays in the distinction between the human and the natural sciences with reference to one contemporary interpretative social theorist who has engaged with issues of identity and difference in normative political theory, Charles Taylor. Subsequent to this, I will show how, on the basis of similar arguments, Hayek is to be considered as without doubt an interpretative social theorist. I will then claim that central to his interpretative critique of the 'scientism' of neo-classical economics and his more general writings on the social or human sciences upon which it rests is the emphasis upon our mutual ignorance and socially embedded nature and the consequent fact of our irremediably limited knowledge. This also gives rise to the first of two Hayekian conceptions of the self that shall be characterised respectively as 'weak' and 'robust.' This distinction is crucial for we shall see in Section 3. that it is at this point where the fundamental shallowness of Hayek's early, inadequately weak conception of the interpreting self is laid bare, thus threatening the achievement of a Hayekian participation in cultural as well as economic discourse. Thus, I will claim following writers such as Lawson and Fleetwood, that despite his success in critiquing the 'scientism' of neo-classical economics and reformulating the economic problem faced by society, the self upon which Hayek's achievement stands remains disassociated from the society of which it is a member, just as the rational, utility-maximising, *Homo economicus*

of the neo-classical economic theory he seeks to reject does.<sup>32</sup> Moreover, Hayek's own positive conception of procedural economic co-ordination is left incomplete, for in the absence of an adequate theorisation of culture he is forced into the untenable position that social order is maintained exclusively by the price mechanism of the market. In section 4, however, we will see that the later Hayek is able to overcome both problems by theorising a more profound conception of the self who is capable of interpretation in virtue of his being a follower of rules - that is, as a participant in communal traditions and practices. With the notion of rules or practices, Hayek is able to move beyond economics into the realm of the cultural and to offer a more convincing conception of the interpreting self. At the same time he is able to preserve the most important achievements of his interpretative perspective, more specifically, the anti-scientistic critique of economic theory and centralised economic planning as well as the reformulation of the economic problem that is faced by society; a reformulation that we will be concerned to extend and restate as the 'cultural problem.'

## 2. *Interpretative Social Science: Taylor and Hayek*

Firstly, then, just what do we mean by the notion of 'interpretation'? There are at least two ways to understand this term, one normative the other positive. In politics, for instance, we may follow theorists such as Walzer and Dworkin and invoke the notion of interpretation as part of a philosophical project to uncover and justify particular principles of justice and institutional arrangements.<sup>33</sup> Under this understanding, public principles of justice are recovered from the meanings of particular institutions and practices, rather than divined from *a priori* accounts of reason or of The Good for man. This, however, will largely be the concern of the next chapter. For now of central importance is the account of interpretation that emphasises the role of the notion of *meaning* in the explication of the nature and task of the social, moral or human sciences - of which politics is a part - and the role this notion plays in distinguishing these sciences from the natural or physical sciences.

An important contemporary exponent of this approach, of course, is Charles Taylor.<sup>34</sup> We will be concerned in particular with Taylor, principally because of the many parallels

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<sup>32</sup> Fleetwood, S., *Hayek's Political Economy: The socio-economics of order*, London, Routledge, 1995; 'Hayek III: The Necessity of Social Rules of Conduct', in Frowen, S. F. (ed.), *Hayek: Economist and Social Philosopher*, London, MacMillan, 1997, pp. 155 - 178; Lawson, T., 'Realism and Hayek: A Case of Continuous Transformation' (1994), in Colonna, M., Hagemann, H. and Hamouda, O. F. (eds.), *Capitalism, Socialism and Knowledge: The Economics of F. A. Hayek*, vol. 2, Aldershot, Edward Elgar, 1994, pp. 131- 159, 'Development in Hayek's Social Theorising' (1995), in Frowen, S. F. (ed.), *Hayek: Economist and Social Philosopher*, London, MacMillan, 1997, pp. 125 - 148.

<sup>33</sup> Michael Walzer, *Spheres of Justice*, New York: Basic Books, 1983; Ronald Dworkin, *Law's Empire*, Cambridge, Ma.: Harvard University Press, 1986. See also Warnke, J., *Justice and Interpretation*, Cambridge, Ma., MIT Press, 1993 for an assessment of this project.

<sup>34</sup> Taylor, C., 'Neutrality in Political Science' (1967), in Taylor, *Philosophical Papers, Volume Two, Philosophy and the Human Sciences*, Cambridge, Cambridge University Press, 1985, pp. 58 - 90; 'Interpretation and the Sciences of Man' (1971), in Taylor, *Philosophical Papers, Volume Two*,

between his work and Hayek and because of his more recent concern with multiculturalism and the politics of identity that is the ultimate object of our enquiry and with which we wish to engage on a Hayekian basis.

### *2.i Hermeneutic Social Science: Taylor*

Of central importance to Taylor, particularly in earlier papers such as 'Interpretation and the Sciences of Man', 'Social Theory as Practice' and 'Understanding and Ethnocentricity', is the centrality of the notion of meaning to our attempts to explicate human behaviour.<sup>35</sup> Mulhall and Swift make this clear in their discussion of the interpretative foundations of Taylor's political theory. For Taylor, they explain, 'human behaviour (which cannot be understood as action unless related to a background of desire, feeling, emotion and purpose) can only be characterized in terms of the meaning that the situation in which the action occurs possess for the agent concerned.'<sup>36</sup> That is, there is no independent or objective standard in terms of which human action can be explained but, rather, it is to the meaning of the actions for the actor that we must look in order to understand them. When we do so, moreover, we find that a particular meaning is never given to us but, rather, is to be grasped in virtue of its relationship to other meanings.<sup>37</sup> As such, our understanding of these meanings 'moves inescapably in a hermeneutical circle.'<sup>38</sup> 'An emotion like shame,' Taylor writes,

... can only be explained by reference to other concepts which in turn cannot be understood without reference to shame. To understand these concepts we have to be in on a certain experience, we have to understand a certain language, not just of words, but also a certain language of mutual action and communication, by which we blame, exhort, admire, esteem each other.<sup>39</sup>

This, of course, is why we may 'understand' those whose behaviour we seek to explicate, and why we are less able to do this when explicating the purposive behaviour of those from very

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*Philosophy and the Human Sciences*, pp. 21 - 28; 'Social Theory as Practice' (1981), in Taylor, *Philosophical Papers, Volume Two, Philosophy and the Human Sciences*, pp. 95 - 115; 'Understanding and Ethnocentricity' (1981), in Taylor, *Philosophical Papers, Volume Two, Philosophy and the Human Sciences*, pp. 116 - 133; 'Introduction', in Taylor, *Philosophical Papers, Volume Two, Philosophy and the Human Sciences*, pp. 1 - 12; Gadamer, H.-G., *Truth and Method* (1960), New York, The Continuum Publishing Company, 1989, *passim*..

<sup>35</sup> Taylor, 'Interpretation and the Sciences of Man', *passim*.; 'Social Theory as Practice', *passim*.; 'Understanding and Ethnocentricity', *passim*.. The views expressed here, of course, also loom large in *Sources of the Self*.

<sup>36</sup> Mulhall and Swift, *Liberals and Communitarians*, p. 109.

<sup>37</sup> Taylor, 'Interpretation and the Sciences of Man', pp. 22-23.

<sup>38</sup> Taylor, *ibid.*, p. 23.

<sup>39</sup> Taylor, *ibid.*, pp. 23-24.

different cultures to our own, something that Taylor discusses at length in 'Understanding and Ethnocentricity.'<sup>40</sup>

What makes this science different to natural science or 'the science of verification'?<sup>41</sup> Taylor gives three reasons for this. The first is the familiar 'open system' predicament that emphasises the impossibility of hermetically sealing the human sciences from external interference, although Taylor does not state what precise form such interference may take.<sup>42</sup> The second reason hinges upon the imprecision of the data of the human sciences; that is, the various interpretations that individuals have of the social world around them. 'The data of natural science,' writes Taylor, 'admit of measurement to virtually any degree of exactitude,' but the nuances, ambiguities and vagaries of interpretation mean that this is impossible in the human sciences. However, of most significance for present purposes is Taylor's third claim that our interpretations are internal to the very objects of the social world of which they are interpretations.<sup>43</sup> That is, unlike investigation in the natural sciences where our theories are always about something external to the theory itself, that is, the theory is always a theory *of* something (of the natural world, for example), in the human sciences our theories are made up of a similar kind of stuff to their object. For example, in a discussion of politics - although the thrust of the argument applies equally to the social sciences more generally - Taylor claims that '[p]olitical theories are not about independent objects in the way that theories are in natural science.' This is because in natural science 'one applies what one knows about causal powers to particular cases, but the truths about such causal powers that one banks on are thought to remain unchanged.' Indeed, he comments, '[t]hat is the point of saying that theory here is about an independent object.'<sup>44</sup> By contrast, in a social scientific field such as politics 'accepting a theory can itself transform what that theory bears on' because the nature of the object of our investigation - the political - is not indifferent to the results of acting upon the basis of any particular theory we may have of it. This is because whilst we say that

... natural science theory also transforms practice, the practice it transforms is not what the theory is about. It is in this sense external to the theory. We think of it as an 'application' of the theory. But in politics, the practice is the object of theory. Theory in this domain transforms its own object.<sup>45</sup>

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<sup>40</sup> Taylor, 'Understanding and Ethnocentricity', pp. 61-5.

<sup>41</sup> Taylor, 'Interpretation and the Sciences of Man', pp. 55-57; 'Social Theory as Practice', pp. 92-93, 101-104.

<sup>42</sup> Taylor, *ibid.*, p. 55.

<sup>43</sup> Taylor, *ibid.*

<sup>44</sup> Taylor, 'Social Theory as Practice', p. 101.

<sup>45</sup> Taylor, *ibid.*

It is in this sense, then, that Taylor claims that political theories are 'constitutive' of the practice that they bear upon.<sup>46</sup>

The self-transformational nature of the relationship of theory to practice in the social sciences, moreover, relates in a most fundamental and, ultimately, programmatic way to Taylor's discussion in 'Interpretation and the Sciences of Man' of man as a 'self-interpreting animal' and his later development of a hermeneutic conception of the self in *Sources of the Self*.<sup>47</sup> Briefly, for Taylor our very experience of the meaning of the objects and situations we encounter in our day-to-day lives is intimately bound up with and has a direct effect upon our sense of who we are. This is because such experience already presupposes an interpretation of those social objects and situations in terms of which that experience is made meaningful. Furthermore, it is here where the notion of community in Taylor's account becomes prominent for it is only in terms of a moral vocabulary that is shared and intersubjective that the interpretation of our experiences, feelings and desires is made possible. Without such a vocabulary, there would only be descriptions in terms of physical properties, similar to the descriptions we provide for reactions such as nausea or giddiness. Of course, when we do self-interpret in this way we may also transform the meaning to us of the object of interpretation - the experience, or feeling, or desire - because we may introduce new terms into that vocabulary, deploy the same term to characterise two different situations or revise the meaning of those terms already in our vocabulary. Given what we have said, doing this will result in our own understanding of who we are changing as well.

These are, then, the key features of Taylor's hermeneutic or interpretative approach to social science. The centrality of the notion of meaning to our attempts to explicate human action and behaviour, the correspondent dissimilarity between social science and natural science, or 'the science of verification' and finally the importance of community - more specifically, of an intersubjectively-constituted shared moral vocabulary - to the very faculty of interpretation in virtue of which the social world may be said to be meaningful.

## **2.ii Interpretative Social Science: Hayek**

How, if at all, then, does Taylor's interpretative social science relate to the work of Hayek? What we shall see is that in each of the three respects outlined above with regard to Taylor - meaning, science and community - Hayek too can be said in a non-trivial way to be an interpretative or hermeneutic social theorist. As has been noted by numerous scholars in the last decade, the most obvious starting point for any interpretative reading of Hayek are his

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<sup>46</sup> Taylor, *ibid.*

<sup>47</sup> Taylor, 'Interpretation and the Sciences of Man', p. 26; *Sources of the Self*.

writings on the methodology of the human sciences from the 1940s.<sup>48</sup> It is here where he is 'not concerned with the specific problems of economics, but with the common character of *all* disciplines which deal with the results of conscious human action.'<sup>49</sup>

Moreover, and in common with Taylor, one of the central themes to come out of Hayek's work here, most clearly in the essay 'Scientism and the Study of Society', is his emphasis upon the notion of meaning to sound social science. As Gary Madison explains in 'Hayek and the Interpretive Turn', for Hayek the study of discrete relations between men and men, and between men and physical objects can, in contrast to the natural sciences, only be carried out 'by means of a category which is totally foreign to "objective" science, namely that of *meaning*.'<sup>50</sup> That is, in the social sciences it is the meaning and use of objects or the meaning of actions for the actors, rather than the enumeration of the physical properties of either, that is central to our understanding of social behaviour. Indeed, and to anticipate another connection between Hayek and Taylor here, in stark contrast to the method of the natural sciences, tools and socially oriented acts - such as an act of production - are objects from which the social theorist abstracts away all physical properties for the purposes of social scientific classification and definition.<sup>51</sup> 'Whether a medicine is a medicine, *for the purposes of understanding a person's actions*,' Hayek writes, 'depends solely on whether the person believes it to be one, irrespective of whether we, the observers, agree or not.' 'In short,' he explains, 'in the social sciences the things are what people think they are,' independently of the beliefs of the observer.<sup>52</sup> Thus, if it is an explanation of social behaviour that we seek, we cannot do so with reference to any knowledge the observer may have about an object but, rather, must remain focused only on the knowledge the acting person has of it.<sup>53</sup> Importantly, Hayek should not be taken here to be defending a radically idealist claim concerning the ontological status of the external world but, rather, is seeking to relegate such questions to other fields of enquiry. His position in this regard, then, could be said to be one of ontological agnosticism; an agnosticism as part, as it were, of the method of sound social

<sup>48</sup> On this see Madison, G. B., 'Hayek and the Interpretive Turn', *Critical Review*, vol. 3, no. 2 (1989), pp. 169-185; 'How Individualistic is Methodological Individualism?', *Critical Review*, vol. 4, nos. 1 and 2 (1990); Buchanan, J. M. and Vanberg, V., 'The Market as a Creative Process', *Economics and Philosophy*, 7, (1991), pp. 167-86; Burczak, T., 'The Postmodern Moments of F. A. Hayek's Economics', *Economics and Philosophy*, 10 (1994), pp. 31-58. For an argument against a hermeneutic reading of Hayek, see Caldwell, B., 'Hayek's Scientific Subjectivism', *Economics and Philosophy*, 10 (1994), pp. 305 - 313.

<sup>49</sup> Hayek, 'Scientism and the Study of Society', p. 57, emphasis added. See also 'Introduction' to *Hayek, Co-Ordination and Evolution: His legacy in philosophy, politics, economics and the history of ideas*, Birner, J. and Van Zijp, R. (eds.), London, Routledge, 1994, pp. 1-21, esp. pp. 5-8.

<sup>50</sup> Madison, 'Hayek and the Interpretive Turn', p. 171.

<sup>51</sup> Hayek, 'The Facts of the Social Sciences', p. 59; 'Scientism and the Study of Society', pp. 50-3. This is made particularly clear, Hayek contends, when we consider the investigation of artefacts of cultures different to our own but is no less true of objects with which we are more familiar. On this, see Hayek, 'The Facts of the Social Sciences', p. 60. See also Gray, *Hayek on Liberty*, p. 17.

<sup>52</sup> Hayek, *ibid.*, p. 60, emphasis added; 'Scientism and the Study of Society', p. 51.



science which shares a certain affinity with phenomenological approaches to questions in epistemology and metaphysics.<sup>54</sup>

It is clear from the above, then, that similarly to Taylor, out of the emphasis upon the notion of meaning arises Hayek's insistence that one distinguish between the methods of the natural and human (or social) sciences.<sup>55</sup> At the heart of 'Scientism and the Study of Society' is the two-pronged critique of 'scientism', the appropriation or 'slavish imitation' by the human or social sciences of the methods of the physical sciences.<sup>56</sup> The first aspect of this was his critique of 'objectivism' with respect to the interpretation of individual objects and social acts and the second was the critique of 'collectivism', 'historicism' and 'purposiveness' with respect to the study of social wholes. Let us take each of these in turn.

For Hayek a 'scientific' approach to discrete social phenomena is inappropriate precisely because the objects of our enquiry are not the properties of the objects concerned but rather their imputed properties and our perceptions of their relationship to one another. In the physical or natural sciences, for example, the task is to overcome our innate and natural tendency to classify the external world simply in terms of its impact upon our senses, rather than to classify it in terms of its real or objective properties. 'While the naïve mind tends to assume that external events which our senses register in the same or in a different manner, must be similar or different in more respects than merely in the way in which they affect our senses', he writes, 'the systematic testing of Science shows that this is frequently not true.'<sup>57</sup> Science 'constantly shows,' Hayek continues, 'that the "facts" are different from "appearances"' in which what may appear to be two different objects actually turns out to be the same object experienced under different conditions and *vice versa*.<sup>58</sup> Thus, the task for the natural sciences is to continually revise and replace our initial classification of the phenomena of the external world with new classifications that do not take into account what we take their attributes to be. Science is not minded to take into consideration 'our given concepts or even sensations' of the external world. Rather, it is interested to offer an alternative classification

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<sup>53</sup> Hayek, *ibid.*, pp. 60-61.

<sup>54</sup> Hayek, *The Sensory Order: An Inquiry into the Foundations of Theoretical Psychology*, §§ 1.90 – 1.107. On this see also Crossley, N., *Intersubjectivity: The Fabric of Social Becoming*, London, Sage Publishing, 1996; Smith, M. J., *Situating Hayek: Phenomenology and the Neo-Liberal Project*, London, Routledge, forthcoming.

<sup>55</sup> On this, see Hayek, F. A., 'The Facts of the Social Sciences' (1943), 'Scientism and the Study of Society.' Hayek does mention in passing the distinction between the natural and human sciences in Hayek, 'Economic Calculation I: The Nature and History of the Problem' (*Individualism and Economic Order*, pp. 125-27) but does not treat it in any great depth or at any great length. See also Hayek, *The Sensory Order: An Inquiry into the Foundations of Theoretical Psychology*, London, Routledge and Kegan Paul, Chapter 1 and Chapter 8, §§ 8.87 - 8.98; Madison, 'Hayek and the Interpretive Turn', pp. 171-4; Steele, G. R., *The Economics of Friederich Hayek*, London, MacMillan, 1993, p. 83.

<sup>56</sup> Hayek, 'Scientism and the Study of Society', p. 24; Madison, 'Hayek and the Interpretive Turn', p. 171.

<sup>57</sup> Hayek, *ibid.*, p. 31.

that is ‘based on consciously established relations between classes of events.’<sup>59</sup> ‘When the scientist stresses that he studies objective facts,’ Hayek adds, ‘he means that he tries to study things independently of what men think or do about them.’<sup>60</sup>

Of course, Hayek certainly did not wish to deny that all of us, even professional scientists, actually do proceed to act upon the basis of our provisional and often erroneous beliefs about and classifications of the discrete objects of the external world and that this is of singular importance. Indeed, it is precisely of the consequences of our doing so that the human sciences are properly mindful. ‘While science is all the time busy revising the picture of the external world that man possesses, and while to it this picture is always provisional,’ he writes, ‘the fact that man *has* a definite picture, and that the picture of all beings whom we recognize as thinking men and whom we can understand is to some extent alike, is no less a reality of great consequence.’<sup>61</sup> Indeed, Hayek goes on to say here that fact that we do have a revisable picture or interpretation of the external world is itself ‘the *cause* of certain events’, a point to which we will return shortly.<sup>62</sup>

To sum up, because the principal task of the human sciences is to give an account of conscious, human action and of ‘the way in which man’s existing view of the world leads him to act,’<sup>63</sup> the social scientist must proceed in the opposite manner to the natural scientist insofar as our mental classifications of the external world are concerned. This follows, for Hayek, ‘from the fact that only what people know or believe can enter as a motive into their conscious action.’<sup>64</sup> Thus, rather than abstract away from our mental or subjective classifications of external objects in order to give an account of their real or objective properties and relations to one another, in the human sciences it is precisely to our mental classifications that attention must be paid. In contrast to the natural sciences where our mental classification of two apparently different objects (which are actually the same object classified under different conditions) is to be factored out of our investigation, in the human sciences it ‘must be regarded as a significant datum of experience’ and as ‘the starting point in any discussion.’<sup>65</sup> For Hayek, the question for the human sciences is not the extent to which our own picture of the external world matches, corresponds to, or is true of the facts but,

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<sup>58</sup> Hayek, *ibid.*, p. 31-2.

<sup>59</sup> Hayek, *ibid.*, pp. 32-3. See also Hayek, *The Sensory Order*, §§ 1.6- 1.14.

<sup>60</sup> Hayek, *ibid.*, p. 39.

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.*, emphasis added.

<sup>63</sup> *ibid.*

<sup>64</sup> Hayek, *ibid.*, p. 60.

<sup>65</sup> Hayek, *ibid.*, p. 37, emphasis added; Hayek, *The Sensory Order: An Inquiry into the Foundations of Theoretical Psychology*, §§ 1.18 – 1.21.

rather, 'how by his actions, determined by the views and concepts he possesses, man builds up another world of which the individual becomes a part.'<sup>66</sup>

Of course Hayek is sensitive to the question of the confidence with which we may make claims concerning the interpretations of the social world of any given individual.<sup>67</sup> Again, similarly to Taylor, for Hayek it is ultimately the existence of what we may term 'the meaning community' that enables us to interpret and classify individual facts in the social sciences.<sup>68</sup> That is, we are only able to interpret individual facts on the basis of what we ourselves know and this knowledge is held in common with those whose action we seek to interpret: '[w]e assume that the idea of a purpose or a tool, a weapon or food, is common to them with us, just as assume that they can see the difference between different colours or shapes as well as we.'<sup>69</sup> Crucially it is at this point where Hayek schematises what Taylor would call the hermeneutic circle of interpretation:

We know that the objects *a, b, c, ...*, which may be physically completely dissimilar and which we can never exhaustively enumerate, are objects of the same kind because the attitude of X toward them is similar. But the fact that X's attitude toward them is similar can again be defined only by saying that he will react to them by any one of the actions  $\alpha, \beta, \gamma, \dots$ , which again may be physically dissimilar, but which we just "know" to mean the same thing.<sup>70</sup>

That is, our understanding of the world is only ever given from within a pre-existing matrix of meaning. Again, similarly to Taylor, for Hayek the importance of the meaning community is made all the more clear when we attempt to analyse purposive behaviour in cultures different to our own. The more alien the practices of these cultures are to us, the less we are able to understand them in terms of our own particular interpretations of the social world and the more we must resort to more general concepts.<sup>71</sup> Indeed, if the gulf of understanding were too great, it would follow that there would be no space for interpretation at all but rather, there would only be 'physical facts which we can group and classify solely according to the physical properties which we observe.'<sup>72</sup>

Of course, for Hayek, we do not classify individual facts for their own sake. Ultimately, the reason why we classify them is to understand far more complex phenomena.<sup>73</sup>

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<sup>66</sup> Hayek, *ibid.*, p. 40; Hayek, *The Sensory Order: An Inquiry into the Foundations of Theoretical Psychology*, §§ 8.87 – 8.98.

<sup>67</sup> Hayek, 'The Facts of the Social Sciences', p. 63.

<sup>68</sup> Hayek, *ibid.*, pp. 62-3.

<sup>69</sup> Hayek, *ibid.*, p. 63.

<sup>70</sup> Hayek, *ibid.*, p. 62; 'Scientism and the Study of Society', p. 81. Compare with Taylor, 'Interpretation and the Sciences of Man', pp. 22-3.

<sup>71</sup> Hayek, *ibid.*, pp. 65-7; Taylor, 'Understanding and Ethnocentricity', *passim*.

<sup>72</sup> Hayek, *ibid.*, p. 66.

<sup>73</sup> Hayek, *ibid.*, pp. 67-9; 'Scientism and the Study of Society', pp. 61-76

Thus, the second kind of social facts Hayek discusses are social wholes that are ‘the unintended or undesigned results of the actions of many man.’<sup>74</sup> Entities such as ‘the economy’, ‘the moral code of seventeenth century New England’ or ‘The French Revolution’, of course, pose a particularly profound problem because they are ‘undesigned’ orders and, as such, present social science with its principal explanatory task. Indeed, Hayek claims that the explanation of the undesigned emergence of such orders just is the task of social science.<sup>75</sup>

In contrast to discrete social facts such as objects or actions, these facts are, for Hayek, not entities whose physical properties have been abstracted away by the social theorist for the purposes of explanation but rather are devoid of physical properties altogether. That is, they do not occupy any position in the physical order but rather only inhabit the interpretative order and are no other than the actors’ own ‘ideas about the undesigned results of their actions - popular theories about the various social structures or formations.’<sup>76</sup> This attitude towards social wholes, of course, is in contrast to those who appropriate the methods of the natural sciences and conceive them as if they were objects directly perceived by us.<sup>77</sup>

Of course, those who hold this second, ‘collectivist’ view would object to Hayek’s characterisation. Rather than being built up out of, or constituted by, our interpretations of the discrete actions of agents, it is these more complex facts that are causally determinant of our individual actions or, at least, that are the given context within which we act and, as such, should be explained as given prior to, rather than derived from, them. Yet Hayek argues against the idea that ‘when we turn from the action of the individual to the observations of social collectivities, we move from the realm of vague and subjective speculation to the realm of objective fact.’ Rather, “‘social facts’ are no more facts ... than are individual actions or their objects,”<sup>78</sup> because for Hayek terms such as ‘the economy’ do not refer to entities that are ‘*constitutive* of the phenomena we want to explain,’ but, rather, are ‘ideas which either we ourselves or the very people whose actions we have to explain have formed *about* these phenomena.’<sup>79</sup> ‘[W]e use the different kinds of individual behaviour thus classified,’ he continues ‘as elements from which we construct hypothetical models in an attempt to reproduce the patterns of social relationships, which we know in the world around us.’<sup>80</sup> Thus, any attempt to define a complex social fact such as the economy or a social system must be a ‘mental reconstruction’ on the part of the theorist or student of society ‘in which

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<sup>74</sup> Hayek, ‘Scientism and the Study of Society’, p. 41.

<sup>75</sup> Hayek, *ibid.*, p. 69.

<sup>76</sup> Hayek, *ibid.*, p. 62. See also Cubeddu, *The Philosophy of the Austrian School*, pp. 84-5.

<sup>77</sup> Hayek, *ibid.*, p. 94.

<sup>78</sup> Hayek, ‘The Facts of the Social Sciences’, p. 69; ‘Scientism and the Study of Society’, pp. 93-8

<sup>79</sup> Hayek, ‘Scientism and the Study of Society’, p. 62. See also Madison, ‘Hayek and the Interpretive Turn’, pp. 173-4.

<sup>80</sup> Hayek, ‘The Facts of the Social Sciences’, p. 68.

intelligible individual attitudes [towards discrete objects and actions] form the elements.’<sup>81</sup> In keeping with the hermeneutic tone of his account, for Hayek social wholes are not the physical cause of, but rather, merely *theories about* social structures.<sup>82</sup> As such, the nature of these theories will have a significant impact upon the practice – economics, history and politics – which they are theories of. Thus, as Madison makes clear, Hayek’s enterprise here is not to reduce the whole to the sum of its parts but instead to emphasise that social wholes are not objects that are causally efficacious. Rather, social wholes in this sense are to be taken as ‘*meaning-objects* which are not understandable apart from the categories of human understanding and agency, apart, that is, from the “individual”.’<sup>83</sup> What the social theorist does, then, ‘is in a logical sense exactly the same thing as what we always do when we talk about a state or a community, a language or a market, only what we make explicit in everyday speech is concealed and vague.’<sup>84</sup> Most significantly, the ‘compositive method’ of reconstruction of social wholes from discrete objects and actions in sound human science is necessary because, for Hayek, ‘what we call a fact is either a recurrent process or a complex pattern of persistent relationships *which is not “given” to our observation.*’<sup>85</sup> The fact that social wholes such as ‘the economy’ are not given in this way may be called Hayek’s Limited Knowledge Thesis and it is to it that attention must now turn.

### 3. *The Limited Knowledge Thesis*

In what specific sense for Hayek are social wholes not given to our observation? It seems clear that the relevant sense is an epistemological one. As he claims in ‘Scientism and the Study of Society’, ‘the knowledge and beliefs of different people while possessing that common structure which makes communication possible, will yet be different and often conflicting in many respects.’<sup>86</sup> The reason for this, as we have seen, is precisely because the data to be studied and out of which the social wholes are composed by the student of society – that is, discrete beliefs and attitudes – are the subjective beliefs of individuals who are not spatio-temporally contiguous with one another. It follows from this, moreover, that knowledge of such data can never be given to any single observing mind. Of course, if we could assume the problem of the subjectivity and dispersal of knowledge away, that is ‘[i]f we could assume that all the knowledge and beliefs of different people were identical, or if we

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<sup>81</sup> Hayek, *ibid.*, p. 71.

<sup>82</sup> Hayek, ‘Scientism and the Study of Society’, p. 62, emphasis added; ‘The Facts of the Social Sciences’, p. 72.

<sup>83</sup> Madison, ‘How Individualistic is Methodological Individualism?’, pp. 49-50; Madison, G. M., ‘Getting Beyond Objectivism: The Philosophical Hermeneutics of Gadamer and Ricoeur’, in Lavoie, D. (ed.), *Economics and Hermeneutics*, London, Routledge, 1990, pp. 30-58; Cubeddu, *The Philosophy of the Austrian School*, p. 38.

<sup>84</sup> Hayek, ‘The Facts of the Social Sciences’, p. 69.

<sup>85</sup> Hayek, *ibid.*, emphasis added.

<sup>86</sup> Hayek, ‘Scientism and the Study of Society’, p. 49.

were concerned with a single mind' then it would not matter whether we considered social wholes to be a part of the objective or interpretative realms.<sup>87</sup> However, this is precisely the assumption we can never make because, for Hayek, such knowledge 'only exists in the dispersed, incomplete, and inconsistent form in which it appears in many individual minds' and, as such, is never given in its entirety to any individual.<sup>88</sup> As such, social wholes are themselves never given to but rather inferred by us.

Hayek's comments here prefigure Charles Taylor's later observations of the differences between the natural and social sciences and how knowledge in each discipline relates to practice. Similarly to Taylor, Hayek is keen to claim that the internality of the theory to the practice it explains imposes certain epistemological limitations. '[I]n those fields,' he writes 'where the object of our investigation, and our means of investigating and communicating the results, that is our thoughts, our language, and the whole mechanism of communication between men, are partly identical and where in consequence in discussing a system of events we must at the same time move within that system, there are probably definite limits to what we can know.'<sup>89</sup>

Yet, beyond all of this, the special problem here is that these aggregate orders are opaque to us if only described in terms of the physical properties of their constituents.<sup>90</sup> There would only be many different physical movements and uses of objects rather than, for example, different kinds of act of production. Therefore, for social wholes the same problem arises as it does for discrete actions and objects in that both only become salient via the notion of meaning and, therefore, of the community that meaning presupposes. 'Just as the existence of a common structure of thought is the condition of the possibility of our communicating with one another, of your understanding what I say,' Hayek concludes in 'The Facts of the Social Sciences', 'so it is also the basis on which we all interpret such complicated social

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<sup>87</sup> Hayek, *ibid.*, p. 49.

<sup>88</sup> Hayek, *ibid.*, p. 50, emphasis added.

<sup>89</sup> Hayek, F. A., 'Degrees of Explanation' (1955), in Hayek, F. A., *Studies in Philosophy, Politics and Economics*, London, Routledge and Kegan Paul, 1967, p. 21; 'The Facts of the Social Sciences', p. 76. Hayek's distinction, however, between 'constitutive' beliefs and opinions about social wholes and 'speculative' beliefs about wholes seems to be untenable. (Hayek, 'Scientism and the Study of Society', pp. 61-5) On the one hand, he says that constitutive beliefs are 'motivating' opinions which determine what people will do and as such actually contribute to the nature of the interpreted whole in question. On the other he claims that 'speculative' or 'explanatory' beliefs are merely ideas that people have 'about the undesigned results of their actions – popular theories about the various social structures or formations', and, as such, do not exert causal efficacy upon the actions of agents. Now, in a footnote Hayek does concede that such beliefs will often be an important component in explaining the politics of any given society. But these opinions are constitutive in the sense that Hayek describes because our views about communism or capitalism, for instance, will lead us to take particular actions - for example, alter our preference at the ballot box or instigate revolution - which may well fundamentally alter or even cause them to degenerate. On this, see also Cubeddu, *The Philosophy of the Austrian School*, p. 93.

<sup>90</sup> Hayek, *ibid.*, p. 69.

structures as those which we find in economic life or law, in language, and in customs.’<sup>91</sup> It is clear, then, that for Hayek as for Taylor, our very capacity to interpret the social world - rather than merely record the physical properties of meaningless external stimulæ - presupposes the existence of cultural communities and of our place within them.

### *3.i The Rejection of Equilibrium and Homo economicus*

It is clear, then, that Hayek’s work on the methodology of the social sciences places him firmly within the interpretative or hermeneutic tradition alongside present-day exponents such as Taylor. What, then, can be drawn out of Hayek’s interpretative approach to the human sciences? In contrast to Taylor, of significant interest in this regard is Hayek’s assumption of many of his later key interpretative insights into his work on economic theory. It is illuminating to compare at this point the quote from ‘Scientism and the Study of Society’ about the dispersal, incompleteness and inconsistency of social knowledge ‘in many individual minds’ with the passage below from an earlier seminal paper on economic theory ‘The Use of Knowledge in Society.’ Here, Hayek claims that

... the peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess.<sup>92</sup>

What this comparison makes clear is that, having included ‘the economy’ in his list of social wholes,<sup>93</sup> a version of Hayek’s critique of scientism was implicitly invoked to sharply restrict the usefulness - both theoretical and practical - of the neo-classical notion of general equilibrium where markets are conceived as attaining a state of perfect co-ordination of the plans of economic actors.<sup>94</sup> Hayek, then, was here concerned to claim for the human sciences the study of economics itself and, in so doing, rejects the notion of equilibrium which he claims presupposes a scientific and hence epistemologically fallacious account of economic interaction. What the notion of equilibrium does, of course, is ‘turn economics into a branch of pure logic [the Pure Logic of Choice], a set of self-evident propositions which like mathematics or geometry, are subject to no other test but internal consistency.’<sup>95</sup> Yet, as Fleetwood claims, Hayek rejects this because it assumes ‘that knowledge is objective and

<sup>91</sup> Hayek, ‘The Facts of the Social Sciences’, p. 76.

<sup>92</sup> Hayek, ‘The Use of Knowledge in Society’, p. 77.

<sup>93</sup> Hayek, ‘Scientism and the Study of Society’, pp. 91-2, Chapter 10; ‘The Facts of the Social Sciences’, pp. 69-72.

<sup>94</sup> Hayek, F. A., ‘The Meaning of Competition’, in Hayek, *Individualism and Economic Order*, Chicago, University of Chicago Press, 1948, pp. 92-106.

<sup>95</sup> Hayek, ‘Economics and Knowledge’, p. 35.

possessed in full by agents and observing economists - encapsulated in the expression 'given data.' Rather, knowledge of the discrete actions of countless individuals that taken together we understand as 'the economy' is subjectively held, dispersed and, therefore, is 'possessed by agents in varying quantities and qualities, and subject to continual change.'<sup>96</sup>

With this radically different assumption concerning knowledge the task of economic theory for Hayek is shifted away from the attempt to describe an end-state of equilibrium towards a procedural explanation of how it is possible that 'the combination of fragments of knowledge existing in different minds bring[s] about results which, if they were to be brought about deliberately, would require a knowledge on the part of the directing mind which no single person can possess.'<sup>97</sup> That is, theoretical attention is reoriented towards the *process* of how economic knowledge is actually communicated in the absence of it ever being given in objective terms. The concept of equilibrium here, then, never refers to a real state of affairs that is actually achievable but, rather, refers to an interpreted state towards which the plans of discrete economic actors tend.

Now, whilst 'Economics and Knowledge' is primarily a paper about the usefulness of the concept of equilibrium to economic *theory*, Hayek did not think that his interpretative social science only had important theoretical implications. This much is clear in 'The Use of Knowledge in Society', which is concerned with the *practical* possibility of centralised economic planning and the communication and acquisition of knowledge.<sup>98</sup> The practical importance of Hayek's interpretative reformulation of the economic problem that society faces is seen most clearly in the debates about economic calculation in which he participated in the 1930's. For with the reformulation of the economic problem Hayek extends Mises's original calculational critique of socialism into an epistemological one. That is, from the Misesian assumption that the dispersed knowledge required for economic calculation in the socialist commonwealth is, albeit with significant difficulty, available, Hayekian economic theory moves to the assumption that, in principle, it is not. As Kukathas explains in his discussion of Hayek's extension of Mises's argument, the principal problem to be solved is not how to *distribute* goods or resources according to some pre-arranged plan 'but how to *co-ordinate* their use so that their employment correctly reflects their relative value.'<sup>99</sup> The

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<sup>96</sup> Fleetwood, *Hayek's Political Economy: the socio-economics of order*, p. 58.

<sup>97</sup> Hayek, 'Economics and Knowledge', p. 54.

<sup>98</sup> Both papers, of course, do bear the imprint of his thought on the social sciences but 'The Use of Knowledge in Society' has more in common with the concluding chapters of 'Scientism and the Study of Society' in this regard than it does with 'Economics and Knowledge.'

<sup>99</sup> Kukathas, *Hayek and Modern Liberalism*, p. 58. On this see also Keizer, W., 'Hayek's Critique of Socialism', in Birner, J. and Van Zijp, R. (eds.), *Hayek, Co-Ordination and Evolution: his legacy in philosophy, politics, economics and the history of ideas*, London, Routledge, 1994, pp. 207-31, esp. pp. 214-216; Lavoie, D., *Rivalry and Central Planning*, Cambridge, Cambridge University Press, 1985. John O' Neill makes a similar survey of the early part of the Socialist calculation debate between



problem faced by planners, that is, 'is not a *calculational* problem' where they simply need to decide where to allocate resources on the basis of given knowledge, 'but an *epistemological* one' where an adequate account of how that knowledge is communicated through the economy must first be given.<sup>100</sup> No longer, that is, must economics 'just define an end state,' but, rather, must 'explain the competitive process at work.'<sup>101</sup>

However, and significantly for present purposes, it is not only in terms of economic theory that Hayek's reformulation is important. His interpretative anti-scientism also issues in a rejection of the conception of the self implicit in the scientific, neo-classical model of economic theory. This conception, of course is that of '*Homo economicus*' who rationally optimises in terms of given data. Indeed, as Hayek tellingly suggests in 'Economics and Knowledge', the assumption of the 'perfect market' in which 'all the members of the community, even if they are not supposed to be strictly omniscient, are at least supposed to know automatically all that is relevant for their decisions,' implies that 'that skeleton in our cupboard, the "economic man", whom we have exorcised with prayer and fasting, has returned through the back door in the form of a quasi-omniscient individual.'<sup>102</sup> Thus, Hayek's interpretative social science and the account of the self and the limits of its reason that underlies it would seem to place Hayekian thought in a good position to contribute tellingly to contemporary debates about culture and identity. This is precisely because at the root of Hayek's anti-scientific reclamation of economics for the human sciences and interpretative reformulation of the economic problem, is not a conception of 'economic man' but rather a conception of the self whose reason, it must be emphasised, is irremediably limited regardless of whether it participates in the economic or cultural nexus.

#### **4. Hayek's Problem: Meaning, the Market and the Depth of the Self**

Significantly, however, the transposition of Hayekian thought from economic and distributive discourse to the domain of culture is not anywhere nearly as straightforward as this account would have us believe. For, beyond the brief above comments concerning the relationship between an assumption of omniscience and the kind of selves we are understood to be, Hayek does not discuss at any compelling length *how* his interpretative subjectivism militates against the model of reason of *Homo economicus*. Nor, perhaps more importantly does he state what an appropriate conception of human reason and agency should be, if it is not to be that of

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Neurath and von Mises in O'Neill, J., 'Who won the Socialist Calculation Debate', *History of Political Thought*, Volume XVII, Number 3, Autumn 1996, pp. 431-442, p. 442.

<sup>100</sup> Kukathas, *Hayek and Modern Liberalism*, p. 57.

<sup>101</sup> Fleetwood, *Hayek's Political Economy: the socio-economics of order*, p.69; Cubeddu, *The Philosophy of the Austrian School*, pp. 74-5.

<sup>102</sup> Hayek, 'Economics and Knowledge', p. 46.

*Homo economicus*.<sup>103</sup> Of course, on numerous occasions in ‘Scientism and the Study of Society’, especially in the chapter on “‘Conscious’ Direction and the Growth of Reason’, Hayek is concerned to show that individual reason is socially constituted out of an intersubjective or ‘interindividual’ process that is contemporary terminology would be best described as communitarian.<sup>104</sup> This concern, moreover, is central to the paper ‘Individualism: True and False’ where Hayek distinguishes his own, thoroughly social ‘true’ account of the self from the ‘false’ conception of ‘atomistic’ or ‘economic’ man.<sup>105</sup> Yet, he does not go any further than this rather blunt claim and the reason for this should be clear - he does not have the conceptual resources to do so.<sup>106</sup> All he can claim at this stage is that individual reason *is* socially constituted and that we are thoroughly social beings. What he does not explain is *how* this is so. That is, Hayek makes a claim about the nature of the self, but does not offer any argument, let alone a convincing one, to back this claim up.

He faces a similar problem, furthermore, in his account of the relationship between the social scientist and those he observes. As we have seen, for Hayek one cannot separate the interpretative process of the observer from the observed because the theorist classifies the social facts ultimately in terms of the conjectures *he* makes regarding the opinions those whose actions he wishes to explain have of them. Clearly doing so immediately involves the idea of a necessary commonality of understanding between the theorist and the agents. That is, observers themselves make claims about the attitudes of acting people only in virtue of what the observers believe as similar, acting people to those they study. ‘Our procedure is based’, Hayek claims, ‘on the experience that other people as a rule (though not always - if they are colorblind or mad) classify their sense impressions as we do.’<sup>107</sup> Again, Hayek makes this clear with reference to our understanding of the actions of members of cultures very different from our own.<sup>108</sup> That is, we must presuppose a commonality of understanding, a communal matrix of shared meaning, if you will, in order to interpret effectively. Indeed, Hayek claims that where the ‘possibility of interpreting in terms of analogies from our own mind ceases, where we can no longer “understand”,’ he writes, ‘there is no sense in speaking about mind at all; there are then only physical facts which we can group and classify solely according to the physical properties which we observe.’<sup>109</sup> However, as is the case with his claim that our reason is communally, or intersubjectively, constituted it is equally important to note here is that at this stage Hayek only *claims* that we do in fact understand in this way.

<sup>103</sup> Fleetwood, *Hayek’s Political Economy: the socio-economics of order*, p.71.

<sup>104</sup> Hayek, ‘Scientism and the Study of Society’, pp. 152, 159-61; ‘Individualism: True and False’, pp. 1-33.

<sup>105</sup> Hayek, ‘Individualism: True and False’, pp. 1-32; Cubeddu, R., *The Philosophy of the Austrian School*, p. 39.

<sup>106</sup> See also Madison, ‘How Individualistic is Methodological Individualism?’, pp. 44-50.

<sup>107</sup> Hayek, ‘The Facts of the Social Sciences’, p. 60-3.

<sup>108</sup> Hayek, *ibid.*, p. 66.

That is, he gives no account of how it is that 'we just know' that two physically dissimilar social facts - for instance, where one agent fashions an object out of heated metal to produce a drinking vessel, whilst another operates a weaving machine to make a rug - are similarly meaningful as acts of production.

This, glaring hole in his theory, of course, is particularly damaging given that out of the distinction between 'true' and 'false' individualism Hayek not only wants to derive a thesis about the embedded nature of the self, but also a logically identical thesis about the epistemological limits faced by those who attempt study or determine the action of socially embedded agents as they make their way about the socio-economic nexus. The reason that this is so vital for Hayek is that out of it he derives his critique of planning and intervention in the economy, via his critique of the epistemological assumptions of the planner. These, we may remind ourselves, he equates with those of the economic theorist who assumes away the limitations to our knowledge, or of the over-zealous student of society who assumes he can safely ignore the subjective belief of those whose action he seeks to explain.<sup>110</sup> Thus, despite their importance to his critique of scientism, the interpretative papers do not provide Hayek with all the resources needed to complete his project. That is they do not enable him to give more than an economic account of order nor to offer a convincing account of man. Hayek's is a social theory, then, that can be said to start from the idea of 'men whose whole nature and character is determined by their existence in society' only in the most superficial and unsupported sense.<sup>111</sup>

This lacuna, of course, belies a significant problem with Hayek's conception of the interpreting self at this stage of the development of his social theory. As Fleetwood observes, the fact that Hayek does not discuss the nature of the self in any great detail is intimately tied to the largely negative character of his research project at this point. For he was primarily concerned to displace the epistemological foundation of the general equilibrium model of economics and its underlying conception of human agency and rationality without offering a positive statement of why men are thoroughly social beings in the communitarian sense. Moreover, Fleetwood points out, this gap in Hayek's thought also exposes a logically identical gap in his economic theory. Being more concerned to critique centralised economic planning on the basis of its epistemological difficulties, Hayek does not posit any institutions of his own beyond the exaggerated role he accords to the price mechanism of the market as the facilitator of the transmission of dispersed knowledge in society.<sup>112</sup> He is, of course, able to offer a telling epistemological critique of many of the most important assumptions of neo-classical economic theory but is unable at this time to offer his own positive account of how

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<sup>109</sup> Hayek, 'Scientism and the Study of Society', p. 43; 'The Facts of the Social Sciences', p. 66.

<sup>110</sup> Cubeddu, *The Philosophy of the Austrian School*, pp. 38-9.

<sup>111</sup> 'Hayek, 'Individualism: True and False', p. 6.

the problem of ‘the division of knowledge’ is overcome because he simply does not have the conceptual resources to do so.<sup>113</sup> For, despite emphasising the epistemological problem faced by the adequate theorisation of economic action, Hayek realises that the communication of knowledge upon which successful co-ordination is based is not exhausted by the price mechanism of the market. Yet, he is also unhelpfully vague about what does facilitate such communication when prices do not, merely claiming that ‘there must be *some* discernible regularity in the world’ which allows individuals ‘to predict events properly,’<sup>114</sup> and that it is ‘exceedingly difficult to say what exactly are the assumptions on the basis of which we assert that there will be a tendency toward equilibrium.’<sup>115</sup> ‘The dilemma for Hayek,’ concludes Fleetwood, is that at this stage ‘he can conceive of no institution other than the telecom system [that is, the price mechanism] that might facilitate the discovery, communication and storage of knowledge.’<sup>116</sup> In his eagerness to escape the scientism of neo-classical economics, Hayek offers an underdetermined account of just how the very communication of knowledge which neo-classical theory assumes away is actually achieved. That is, he is overly reliant upon the price mechanism of the market as the most important institution that facilitates the communication of knowledge and economic co-ordination.

This, of course, is of great significance for it means that Hayek’s interpretative social science is necessary but certainly not sufficient for the transposition of his perspective - and ultimately, of the politics that flows from it - to the domain of culture, identity and difference. We could, of course, jettison his early work here, yet this would be at the cost of the important conclusions he reached with respect to economics from that social science and the account of the self that it presupposes. Thus, given that the movement from economics to culture is precisely what we want to achieve in order to reconnect Hayek’s important epistemological concerns to contemporary debates, Hayek needs to offer a more convincing account of the self and community.

### ***5. Rules, Tradition and Hayek’s Conception of the Interpreting Self***

Hayek, of course, was himself not unaware of the gaps in his social theory. In ‘Kinds of Rationalism’ he claimed that in ‘Economics and Knowledge’ he examined ‘the central difficulties of pure economic theory’ and concluded that its main task was to explain how

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<sup>112</sup> Fleetwood, *Hayek’s Political Economy: the socio-economics of order*, pp. 71 – 75.

<sup>113</sup> Hayek, ‘Economics and Knowledge’, p. 50; Fleetwood, *Hayek’s Political Economy: the socio-economics of order*, p. 71.

<sup>114</sup> Hayek, *ibid.*, p. 49.

<sup>115</sup> Hayek, *ibid.*, p. 48.

<sup>116</sup> Fleetwood, *Hayek’s Political Economy: the socio-economic of order*, p. 57. See also Keizer, ‘Hayek’s Critique of Socialism’ p. 216 for the view that thus far Hayek’s arguments only relate to economic rather than cultural processes.

knowledge was acquired and communicated without ever being concentrated in a single mind.<sup>117</sup> Yet, he also conceded that it was still a great distance from this explanation

... to an adequate insight into the relations between the abstract rules which the individual follows in his actions, and the abstract overall order which is formed as a result of his responding, within the limits imposed upon him by those abstract rules, to the concrete particular circumstances which he encounters.<sup>118</sup>

Nonetheless, we are told that 'Economics and Knowledge' was 'the starting point' and the reason 'why though at one time a very pure and narrow economic theorist, [he] was led from technical economics into all kinds of questions usually regarded as philosophical.'<sup>119</sup> Similarly, and again referring to 'Economics and Knowledge' as well as to 'The Use of Knowledge in Society', Hayek comments in *Rules and Order*, that '[t]he insight into the significance of our institutional ignorance in the economic sphere, and into the methods by which we have learned to overcome this obstacle, was in fact the starting point for ... ideas ... systematically applied to a much wider field.'<sup>120</sup>

How, then, were these ideas generalised to other fields of enquiry? Similarly to both the economic and social scientific papers central to Hayek's later research programme was 'the fact of the necessary and irremediable ignorance of everyone's part of most of the particular facts which determine the actions of all the several members of human society.'<sup>121</sup> 'The sum of the knowledge of all the individuals,' he writes in *The Constitution of Liberty*, 'exists nowhere as an integrated whole' and because of this, the problem we must solve is 'how we can all profit from this knowledge, which exists only dispersed as the separate, partial, and sometimes conflicting beliefs of all men.'<sup>122</sup> Indeed, he goes on to claim in a manner logically identical to his discussion of the economic problem that '[a]ny examination of the *moral* or *legal* order which leaves this fact out of account misses the central problem.'<sup>123</sup> Thus, as with economics, the central problem of the human or social sciences in general was for Hayek the epistemological one of the (inter-)subjectivity of knowledge. Indeed, for the later Hayek, the 'problem' discussed is no longer just an economic problem

<sup>117</sup> Hayek, 'Kinds of Rationalism', p. 91.

<sup>118</sup> Hayek, *ibid.*, p. 92. Hayek goes on to say that it is only at this point that he has reached what seems to be 'a tolerably clear picture of the nature of the spontaneous order of which liberal economists have so long been talking.' ('Kinds of Rationalism', p. 92)

<sup>119</sup> Hayek, *ibid.*, p. 91.

<sup>120</sup> Hayek, *Rules and Order*, p. 13. See also Kley, *Hayek's Social and Political Thought*, p. 35, n. 13

<sup>121</sup> Hayek, *ibid.*, p. 12. Indeed, he continues that our irremediably limited knowledge is 'the reason why most social institutions have taken the form they actually have.'

<sup>122</sup> Hayek, *The Constitution of Liberty*, p. 25.

<sup>123</sup> Hayek, *The Mirage of Social Justice*, p. 8, emphasis added; *Rules and Order*, pp. 14-15.

but is no less than a general human predicament that emerges directly from our membership of traditions and adherences to traditional practices.

How, then, is this 'central problem' to be solved? For the later Hayek, and in sharp contrast to his earlier work, it is via the notion of the rule of conduct, or practice or tradition, and not just that of the price mechanism, that knowledge is communicated both beyond and, indeed, prior to the economic sphere. However, as was the case with his discussion of social wholes, we must be careful not to impute to Hayek here a naïve ontologically realist account of rules as being in some significant sense physically real. Similarly to Taylor, for Hayek rules and practices are not *things*, but rather are theorised by us in as much as they are manifested in the regularities of conduct that we observe in social agents.<sup>124</sup> Rules, moreover, are the facilitators of co-ordination and order in a world that can only ever be partially known because they enable our actions to be adapted not only to the facts that we do know, those in our immediate environment, but also to those that are located beyond it.<sup>125</sup> Rules and practices are indispensable to our acting successfully because they enable us to cope with the fact that we are only ever privy to a limited number of the facts in the social world around us.<sup>126</sup> Hayek claims in *The Mirage of Social Justice*

... we are guided in most of our plans for action by the knowledge not of concrete particular facts but by knowledge of what kinds of conduct are 'appropriate' in certain kinds of circumstances - not because they are means to a particular desired result, but because they are a restriction on that we may do without upsetting an order on whose existence we all count in deciding on our actions.<sup>127</sup>

Moreover, as guides to appropriate action, they transmit knowledge through time so that we may take advantage of the experience of previous generations.<sup>128</sup> That is, rules and practices are the bearers of tradition-bound or *tacit* knowledge. Our tacit knowledge, moreover, to an important extent delimits the kinds of actions that are acceptable to us without us knowing in any explicit sense why. Furthermore, and more significantly for present purposes, Hayek claims that, along with the price mechanism, rules and practices transmit knowledge among contemporaries. 'The successful combination of knowledge and aptitude,' he writes,

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<sup>124</sup> Hayek, 'Notes on the Evolution of Systems of Rules of Conduct' (1967), p. 67; *Rules and Order*, pp. 19, 75; Kukathas, *Hayek and Modern Liberalism*, p. 53, note 8; Taylor, C., 'To Follow a Rule', *Philosophical Arguments*, Cambridge, Ma., Harvard University Press, 1995, pp. 165-180, esp. 177-179

<sup>125</sup> Hayek, *Rules and Order*, pp. 11-12; *The Mirage of Social Justice*, p. 4; Crowley, *The Self, the Individual and the Community: Liberalism in the Political Thought of F. A. Hayek and Sidney and Beatrice Webb*, pp. 39, 45-6.

<sup>126</sup> Hayek, *ibid.*, p. 13; 'Kinds of Rationalism', p. 90.

<sup>127</sup> Hayek, *The Mirage of Social Justice*, p.11.

<sup>128</sup> Hayek, *The Constitution of Liberty*, Chapter 3.

... is not selected by common deliberation, by people seeking a solution to their problems through a joint effort; it is the product of individuals imitating those who have been more successful and from their being guided by signs or symbols, such as prices offered for their products or expressions of moral or aesthetic esteem for their having observed standards of conduct – in short, of their using the results of the experiences of others.<sup>129</sup>

Thus, with the notion of the rule, tradition or practice Hayek is at last able to offer a fuller, deeper account of economic co-ordination, although crucially one that does not do away with but rather deepens the earlier account of co-ordination in the economic papers. The notion of the rule also allows Hayek to give a more complete account of interpretation in the human sciences. In 'Rules, Perception and Intelligibility' he returned to one of the important themes of 'Scientism and the Study of Society', that of the relationship between the social theorist and those whose actions he studies. However, instead of just stating that social facts are interpreted in virtue of what the theorist conjectures the world means to the actors, he now provides an account of how the theorist is actually capable of doing this. That is, Hayek now discusses the *rules and traditions* that facilitate a commonality of understanding between the theorist and those whose action he seeks to explain. It is here, then, where Hayek does not just baldly claim that the actions of others are meaningful to us. Rather, he backs this up with the further claim that they are meaningful because 'some of the rules in terms of which we perceive and act are the same as those by which the conduct of those whose actions we interpret is guided.'<sup>130</sup> What Hayek invokes, then, is an account of meaning located within the matrix of community and thus emphasises the intersubjective preconditions for individual choice. Of course, given that both the theorist and the agent inhabit this matrix of meaning, the rules and practices that constitute it not only enable the former to interpret the actions of agents upon the basis of what the world means to the latter, they also explain how the world is meaningful to those agents whose actions are thus interpreted. It is with this conception of rules, then, that we may see Hayek's position as a fully hermeneutical one. Meaningfulness is no longer posited but is substantiated, although without relinquishment of the conclusions of the earlier, largely unsubstantiated, arguments.

Clearly, this reading of the significance of rules for Hayek militates against reading him as a crude conservative for whom tradition is to be valued in itself.<sup>131</sup> Any 'conservatism' here, then, is not in any sense political but, rather, socio-theoretic. That is, it manifests itself in a descriptive account of reason and its limits that comes *before* any

<sup>129</sup> Hayek, *The Constitution of Liberty*, pp. 28-9; 'Competition as a Discovery Procedure', pp. 181-2. See also Gray, *Hayek on Liberty*, pp. 15-6; Crossley, *Intersubjectivity: the fabric of social becoming*, p. 92.

<sup>130</sup> Hayek, 'Rules, Perception and Intelligibility', p. 59.

<sup>131</sup> Gray, *Hayek on Liberty*, p. ix.

normative deliberations on justice. It is in this regard that Hayek is echoing Hume whose defence of liberal justice, as Kukathas explains, 'is grounded in a 'conservative' acceptance of existing order as the framework for all moral and political thought.' Thus, far from it being the case that Hume's - or Hayek's - conservatism is political, these 'conservative' arguments about reason and its limits 'are significant because they show Hume's [and Hayek's] antipathy towards attempts to construct a rational philosophical foundation or justification of existing human practice'<sup>132</sup> regardless, one may venture to add, of which particular account of politics that practice affirms. Indeed, even this may be to concede too much. If this conservative element is ultimately constitutive of a set of claims about reason and not politics, it seems odd to claim that it is in any non-trivial sense conservative. To do so would be to presuppose an alternative 'progressive' account of reason that this account denies. Moreover, as Kenneth Minogue has noted, Hayek's emphasis upon tradition and inherited institutions is in any case

... based upon their consequences in promoting prosperity. The conservative support for what we have inherited arises from, by contrast, a concern with our own concrete identity, and this is a concern for which Hayek, whose strength lies in abstraction, cares little. The conservative view is that we ought not lightly to challenge religious, or patriotic, or habitual practices and loyalties, because these things reveal to us what we are, and no politics that ignores what we are, in all our historical concreteness, can be successful.<sup>133</sup>

Such a view of traditions - traditions and inherited practices as having an instrumental value - is stressed by Hayek himself in various places in *The Constitution of Liberty* although, to be sure, his own discussion suggests an understanding of 'prosperity' that is wider than Minogue's. For Hayek traditions are useful because they promote what could be called 'epistemic' rather than merely material prosperity. That is, they promote the maximisation of that practical wisdom in terms of which we make our way in a complex world that would otherwise be lost to us.

... We understand one another and get along with one another, are able to act successfully on our plans, because, most of the time, members of our civilization conform to unconscious patterns of conduct, show a regularity in their actions that is not the result of commands or coercion, often not even of a conscious adherence to known rules, but of firmly established habits and traditions. The general observance of these conventions is a necessary condition of the orderliness of the world in which we live, of our being able to find our way in it, though

<sup>132</sup> Kukathas, *Hayek and Modern Liberalism*, p. 23.

<sup>133</sup> Minogue, K., 'Hayek and Conservatism: Beatrice and Benedick?', in Butler, E. and Pirie, M. (eds.), *Hayek on the Fabric of Human Society*, London, Adam Smith Institute, 1987, pp. 127 - 145.



we do not know their significance and may not even be consciously aware of their existence.<sup>134</sup>

Thus, despite being correct in stopping short of labelling him as a conservative, it seems that Minogue misunderstands what Hayek achieves via the invocation of rules. For Hayek, rules and practices *are* intimately tied to our ‘concrete identities’ and, as such, also help to resolve the third problem we have claimed besets his earlier social theory: the problem of the shallowness of his conception of the self. For rules and practices not only serve to co-ordinate our action, in doing so they also constitute us and shape what actions we will actually take and which preferences we will form.<sup>135</sup> Crucially, as we have seen, they do this by embodying tacit or practical knowledge and, as such, delimit the choices we may conceivably make in any particular context.<sup>136</sup> That is, for Hayek we are the kinds of people that we are *qua* interpreters of the world precisely in response to the epistemological predicament that the social environment confronts us with.<sup>137</sup>

That his invocation of rules and practices falls short of a conservative politics does not mean that Hayek must not be concerned with identity and the nature of the self is made very clear by Anna Elisabetta Galeotti in ‘Individualism, Social Rules, Tradition: The Case of Friederich A. Hayek.’ Central to Galeotti’s account is the fact that for Hayek the identity of the self is constituted by the often-unconscious rules of action that it follows which simultaneously enable one to co-ordinate one’s behaviour and plans with others. As she explains, it is not simply the case that the social rules of conduct and traditional practices are ‘instruments for means-end rationality, working toward coordination or toward goals whose success requires coordination.’ To be sure, they do work in this way, but not exclusively so because individual actors ‘are not really aware of following rules and are not really able to spell them out.’<sup>138</sup> Rather, ‘the system of uncreated rules is something more than a mere instrument for the display of rationality, insofar as it is constitutive of social practices, shared meanings, common understanding, and personal identity.’<sup>139</sup> ‘The rules of conduct,’ she continues, ‘are not merely regulative rules of behaviour. Rather, they are *constitutive* rules,

<sup>134</sup> Hayek, *The Constitution of Liberty*, p. 62, pp. 66-67.

<sup>135</sup> See Crossley, *Intersubjectivity: the fabric of social becoming*, where tacit knowledge or ‘competencies’ is characterised as our pre-understanding and pre-judgment, the very ground on which we think or understand. Competencies are the necessary prejudices which make our thought and expression possible but which, for that reason, remain largely unthought about. *Intersubjectivity: the fabric of social becoming*, p. 93. Crossley also notes here a parallel between Alfred Schutz’s understanding of tacit knowledge and those of Gadamer and Wittgenstein.

<sup>136</sup> Hayek, *Rules and Order*, p. 19; *The Constitution of Liberty*, pp. 26-9.

<sup>137</sup> Hayek, *The Constitution of Liberty*, p. 24; ‘Kinds of Rationalism’, pp. 87 – 8.

<sup>138</sup> Galeotti, A. E., ‘Individualism, Social Rules, Tradition: The Case of Friederich A. Hayek’, *Political Theory*, volume 15, no. 2, May 1987, p. 171. ‘Indeed’, she concludes on the same page, ‘using the rules as means for rational action would imply control over the system of rules that individuals do not possess..’

defining the range of possible interactions in the various areas of human action, providing the actors with the resources for understanding and communication, and, finally bringing about social co-ordination. In this sense, the rules of conduct constitute social practices.<sup>140</sup> It is here where similarly to Minogue, Roland Kley also errs in his understanding of the role of practices in Hayek. Kley claims that Hayek's cardinal error is that he 'completely fails to realise' that social rules of conduct are constitutive of, as well as instrumentally conducive to, socio-economic co-ordination.<sup>141</sup> The cardinal error here, however, seems to be Kley's and not Hayek's,<sup>142</sup> for in his social thought

individuals do not appear as isolated entities, each one involved in the fulfilment of his or her goals, plans, and aims within their private spheres, protected from external interference, as they appear in Hayek's conception of the *state*. Hayek's *social philosophy* portrays individuals as living within a context of traditional rules, which constitutes the ground for individual identity, common understanding, and shared meaning. It is only within this social environment that the single individual can conceive of plans and goals in a meaningful way for her life and the lives of the people she cares for. In a word, Hayek's version of community is tradition.<sup>143</sup>

Given, moreover, that rules are constitutive of our identities and also themselves changeable, it follows for Hayek that our identities are similarly changeable.<sup>144</sup>

To recap, then, we have seen that it is via the notion of the rule, practice or tradition that Hayek is able to deepen his interpretative account of social science. In the first instance, the invocation of tradition enables him to offer a positive account of economic co-ordination that is not overly reliant upon the price mechanism of the market. Secondly, tradition provides him with a robust explanation of the notion of meaning that is so central to his subjectivism. Finally, the notion of tradition allows him to give a more complete account of our embedded natures that moves his thought clearly beyond the mere claim that we are thoroughly social beings to the explanation of why this is so.

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<sup>139</sup> *ibid.*

<sup>140</sup> Galeotti, *ibid.*, p. 172, emphasis added.

<sup>141</sup> Kley, *Hayek's Social and Political Thought*, p. 182 - 3. On the previous page, moreover, Kley incorrectly *equates* the Hayekian conception of the rules of just conduct with the rules of the market, but this is far too narrow. The rules of just conduct *include* commercial law, but they also include other bodies of law such as criminal law and tort law, and, most importantly, the informal, *moral law* of the culture within which codified law is found.

<sup>142</sup> Hayek, 'Scientism and the Study of Society', pp. 144 - 5, 160. Although Hayek does not explicitly talk about rules here but, rather, 'wholes', 'patterns' and 'structures of relationships.'

<sup>143</sup> Galeotti, 'Individualism, Social Rules, Tradition: The Case of Friederich A. Hayek', p. 173, emphasis added.

<sup>144</sup> Hayek, *The Constitution of Liberty*, pp. 23-5, 'The Errors of Constructivism', pp. 3 - 4, *Rules and Order*, p. 17, *The Political Order of a Free People*, pp. 155 - 8; Kukathas, *Hayek and Modern*

### 5.i The Epistemological Limitations of Tradition

Of course, it is not only the fact that Hayek is able to resolve some important problems in his social theory with the account of tradition. Perhaps more significantly for present purposes, he is able to posit a thesis concerning the limits of reason that, we will observe in the next chapter, allows him to derive distinctively liberal political conclusions from decidedly communitarian premises. For with the fact of our embeddedness within tradition comes an important implication for the notion of meaning in virtue of which we interpret the world and the action of others. In brief, it is that ‘if to have meaning’ is to have a place in an order which we share with other people,’ Hayek writes in ‘Rules, Perception and Intelligibility’

... this order itself cannot have meaning because it cannot have a place in itself. A point may have a distinct place in a network of lines which differentiates it from all other points in that network; and, similarly, a complex structure of relationships may be distinguished from all other similar structures by a place in a more comprehensive structure which gives each element of the first structure and its relations a distinct ‘place.’ But the distinguishing character of such an order could never be defined by its place in itself, and a mechanism possessing such an order, though it may be able to indicate meaning by reference to such a place, can never by its action so reproduce the set of relations which defines this place as to distinguish it from another such set of relations.<sup>145</sup>

Acceptance of what can be here called Hayek’s hermeneutic circle, provides ‘the framework within which the problem of meaning (intelligibility, significance, understanding) can be meaningfully discussed’ and, of course, also implies definite epistemological limits upon our powers of explanation.<sup>146</sup> It is interesting to compare how Hayek describes the rules that govern the workings of the mind and those that govern human action in *Rules and Order*. Since the system of rules that governs the operation of the mind, is itself embedded in a *social structure* that is also ‘constituted by rules of conduct, it is similarly impossible for the mind to step outside *society* and view its operation from beyond,<sup>147</sup> or ‘to articulate the rules upon which the operation of society depends.’<sup>148</sup> That is, Hayek denies the existence of an Archimedean standpoint from which it is possible to comprehend - and thus momentarily to pause to articulate in comprehensive fashion – either the workings of mind or of society. Thus, in ‘The Errors of Constructivism’ Hayek claims that ‘[t]he picture of man as a being who, thanks to his reason, can rise above the values of his civilisation, in order to judge it

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*Liberalism*, pp. 90 - 1, 97, 128 - 9. This, of course, ties in at a most fundamental level with Taylor’s ideas concerning man as a self-interpreting animal.

<sup>145</sup> Hayek, ‘Rules, Perception and Intelligibility’, pp. 61 – 62.

<sup>146</sup> Hayek, *ibid.*, p. 62.

<sup>147</sup> Kukathas, *Hayek and Modern Liberalism*, p. 180.

<sup>148</sup> Kukathas, *ibid.*, p. 54.

from the outside, or from a higher point of view, is an illusion.’ Rather, ‘[a]ll we can ever do is to confront one part with the other parts.’ ‘[S]udden complete reconstruction of the whole,’ he adds, ‘is not possible at any stage of the process, because we must always use the material that is available, and which itself is the integrated product of a process of evolution.’<sup>149</sup> This, of course, relates directly to his earlier distinction between ‘true’ and ‘false’ individualism and the constructivist rationalism the latter gives rise to.<sup>150</sup> The distinction Hayek has in mind is precisely that between the atomised, asocial individual of *Homo economicus* and the embedded individual, between ‘the individualism which sets man apart from society and ‘the liberalism which sees man’s individuality as an organic part of social life.’<sup>151</sup>

Moreover, the key aspect of this, writes Gray, ‘is the distinction [Hayek] finds in the different role allotted within each individualist tradition to the use of reason. In the one, reason has an architectonic and constructive role, whereas in the other it is critical, exploratory and only one aspect of the process of cultural evolution.’<sup>152</sup> Central here is the notion of tacit knowledge. Not only is it the case that we are incapable of surveying the total order of society, we are similarly incapable of articulating in any explicit way the knowledge that we do have because, as tradition-bound knowledge, it is tacitly held. Thus, writes Gray, Hayek claims that because the ‘false’ individualist neglects ‘the dependency of reason itself on spontaneous order in the life of the mind’, he inverts ‘the true relations of tacit with explicit knowledge and accords reason a prescriptive role it is wholly unfitted to perform in mind or society.’<sup>153</sup> Indeed, to think that some of us could either plan or offer an explanatory account of the total order of society would in the final analysis constitute a rather crude and groundless epistemological exceptionalism. At the forefront of this exceptionalism, of course, would be the assumption that rather than being thoroughly social beings, much of whose knowledge was tacitly-held, we - or at least some of us - would be extrasocial beings endowed with fully explicit knowledge of the preferences and desires of ourselves and others. Indeed, as Hayek somewhat facetiously comments in ‘Scientism and the Study of Society’, those who recognise the thoroughly social nature of man yet who do not recognise that at the same time this imposes limitations upon their *own* faculty of reason often have ‘some special theory which exempts their own views from the same sort of explanation and which credits them as a specially favored class, or simply as the “free-floating intelligentsia”, with the possession of absolute knowledge.’<sup>154</sup> Clearly, then, for the later Hayek we are thoroughly embedded in the social matrix of cultural rules and, as such, are far removed from the asocial,

<sup>149</sup> Hayek, ‘The Errors of Constructivism’ (1970), *New Studies in Philosophy, Politics, Economics and the History of Ideas*, London, Routledge and Kegan Paul, 1978, p. 20.

<sup>150</sup> On this, see Hayek, ‘Individualism: True and False’, pp.1-32.

<sup>151</sup> Gray, *Hayek on Liberty*, p. 130.

<sup>152</sup> *ibid.*

<sup>153</sup> Gray, *ibid.*, p. 30.

utility-maximising animal otherwise known as *Homo economicus*.<sup>155</sup> Indeed, he has little time for ‘the silliest of the common misunderstandings: the belief that individualism postulates (or bases its arguments on the assumption of) the existence of isolated or self-contained individuals, instead of starting from men whose whole nature and character is determined by their existence in society.’<sup>156</sup> With the account of rules, then, Hayek can not only make good on the then largely unsubstantiated claim that reason itself ‘does not exist in the singular, as given or available to any particular person ... but must be conceived as an interpersonal process in which anyone’s contribution is tested and corrected by others, he can also position himself with respect to debates about culture precisely because these rules, traditions and practices are cultural phenomena.’<sup>157</sup>

### 6. *The Theory of Cultural Evolution and Culturally Diverse Societies*

Perhaps the clearest example of Hayek’s later concern with culture lies in his claim that traditions themselves are subject to alteration precisely because we in turn constitute and are constituted by them. As such, and because we only ever act and interpret within the cultural matrix we are unable to determine *as an act of our conscious collective will* which rules, traditions and practices ought to be adhered to. Given this, the process of the selection of rules is passed on in Hayek to a process of cultural evolution rather than human choice.<sup>158</sup> For Hayek then, as Kley points out, there are actually two forms of spontaneous order at work. At the first, lower level, there is the spontaneous order yielded by the regular observance of rules and practices whilst at a higher level there is the body of rules and practices evolving spontaneously; that is, the process of cultural evolution.<sup>159</sup> Moreover, ‘[t]he structures formed

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<sup>154</sup> Hayek, ‘Scientism and the Study of Society’, p. 158.

<sup>155</sup> On this see Gray, *Hayek on Liberty*, p.130; Fleetwood, *Hayek: the socio-economics of order*, p. 148; Kukathas, *Hayek and Modern Liberalism*, p.97.

<sup>156</sup> Hayek, ‘Individualism: True and False’, p. 6; Kukathas, *Hayek and Modern Liberalism*, pp. 90-91; Fleetwood, *Hayek’s Political Economy: the socio-economics of order*, pp. 84-85.

<sup>157</sup> Hayek, *ibid.*, p. 15.

<sup>158</sup> Hayek, *Rules and Order*, pp. 18-19. Crowley develops Hayek’s conception here to contrast his selection of rules via the social process of cultural evolution with the contractarian hypothetical choice-situation of Rawls in *A Theory of Justice*. On this see Crowley, *The Self, the Individual, and the Community: Liberalism in the Political Thought of F. A. Hayek and Sidney and Beatrice Webb*, pp. 199-202; see also Cubeddu, *The Philosophy of the Austrian School*, p. 40. Consistent with this, Hayek critiques social contract theory as the appropriate methodology for the derivation of rules of justice. On this see Hayek, ‘Scientism and the Study of Society’ p. 142. An interesting field of research would be to investigate how far this critique would impact upon contemporary theories of the selection of moral rules, such as Thomas Scanlon’s. On this, see in Scanlon, T., *What We Owe One Another*, Cambridge, Mass., Harvard University Press, 1998.

<sup>159</sup> Hayek, *The Political Order of a Free People*, p. 156; Kley, *Hayek’s Social and Political Thought*, pp. 38-9. Kley also claims, erroneously, that Hayek ‘is led to put the spontaneous formation of order within given rules and the evolutionary development of rules in the same category (Kley, *Hayek’s Social and Political Thought*, p.39). However, the paper ‘Notes on the Evolution of Systems of Rules of Conduct’ (a paper which Kley strangely refers to at this part of his book) is devoted to the relationship between the two and where he claims that the two actually inform - via the notion of immanent criticism - each other. For Gray, moreover, the selection of competing cultural traditions

by traditional human practices,' he writes, 'are neither natural in the sense of being genetically determined, nor artificial in the sense of being the product of intelligent design, but the result of a process of winnowing or sifting.'<sup>160</sup>

What is of special importance to note at the outset, then, is that Hayek is keen to distance himself from the idea that by the evolution of culture he is drawing any strict analogy with the notion of natural selection in the natural sciences, most notably in biology. In *The Constitution of Liberty*, for example, he is quite explicit about this and states that rather than being a process of natural selection in which only the fittest survive, for cultural evolution 'the decisive factor is not the selection of the physical and inheritable properties of the individuals but the selection by *imitation* of successful institutions and habits.'<sup>161</sup> That is, it is via individual migration between norms that the wider body of social rules that shape our actions transforms itself over time.<sup>162</sup> This runs counter to Kukathas's reading in *Hayek and Modern Liberalism* who claims that the reason that unsuccessful traditions will not survive is because those who identify with them and who do *not* adapt will not survive.<sup>163</sup> The problem here is that Kukathas conflates physical survival with survival *qua* particular, culturally 'thick' person. The person actually does survive, regardless of whether or not they migrate from one tradition to another. Nevertheless, there is still a crucial question here for Hayek to answer: which rules survive and in virtue of what criterion do they survive? It seems that the criterion here is the persistence of different cultural groups and the individuals that comprise them.<sup>164</sup>

What is doubly significant about Hayek's theory of cultural evolution for present purposes is the two-fold relevance they have to culturally diverse societies and to our concern with justice within them. No longer does cultural evolution have to be understood to relate to a competitive process between *discrete* traditions, each with its own broadly identifiable territorial boundaries; that is, to a competitive process between states. Rather, the theory of

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constitutes the third element of Hayek's wider notion of spontaneous order. On this, see Gray, *Hayek on Liberty*, Chapter 2.

<sup>160</sup> Hayek, *The Political Order of a Free People*, p. 155.

<sup>161</sup> Hayek, *The Constitution of Liberty*, p. 59, emphasis added; *The Political Order of a Free People, Law, Legislation and Liberty*, volume three, p. 159; 'Nature v. Nurture Once Again' (1971), *New Studies in Philosophy, Politics, Economic sand the History of Ideas*, p. 291.

<sup>162</sup> Hayek, 'Nature v. Nurture Once Again' (1971), p. 292. Hayek discusses this process and the relationship between rules and the aggregate order of actions yielded by following them at greater length in Hayek, 'Notes on the Evolution of Systems of Rules of Conduct' (1967).

<sup>163</sup> Kukathas, *Hayek and Modern Liberalism*, p. 81. For Hayek, Gray writes, 'the evolution of culture may itself be fruitfully investigated in terms of the competition between different traditions or practices, with a natural selection among them occurring which is at least partly to be explained by their relative efficiency as bearers or embodiments of knowledge.' Gray, *Hayek on Liberty*, p. 41.

<sup>164</sup> Hayek, *Rules and Order*, pp. 18-19, *The Political Order of a Free People*, pp. 155-9, 'The Errors of Rules of Constructivism', pp. 19-20, 'Kinds of Rationalism', p. 86, 'Notes on the Evolution of Systems of Rules of Conduct', p. 69 for Hayek's non-naturalistic selection. See also Kley, *The Social and Political thought of Hayek*, pp. 161-5 and Witt, U., 'The Theory of Societal Evolution: Hayek's Unfinished Legacy', p. 183 for a reading of Hayek discussing the survival of groups rather than individuals.

cultural evolution may be reformulated to refer to the competition that occurs within states between differing cultural traditions, or more specifically between the norms those traditions endorse. What is important, then, is that Hayek's arguments concerning cultural evolution highlight the need to answer the question of how we should respond when a competitive process for adherents between traditions takes place not only between but also within societies. Moreover, the discovery process that Hayek's thought clearly endorses with respect to the resolution of economic issues does not merely concern itself with arbitrating between different viewpoints concerning diverse cultural issues, as if these were readily apparent to the arbitrating agent, but also facilitates the emergence of what these viewpoints actually are.

## 7. Conclusion

In this chapter, an argument has been made that achieves two things. Firstly, by offering an interpretative reading of Hayek's social theory, we have been able to read back onto his earlier reformulation of the economic problem facing society and critique of the key assumption of neo-classical economics an interpretative critique of 'scientism' in economic theory and in economic practice. We also saw, however, that Hayek runs into difficulties when trying to give an adequate account of just how the communication of the knowledge necessary for the achievement of economic order is made possible. This problem is in fact two-fold. On the one hand, his account of the interpreting self is a shallow one and therefore does not really achieve the displacement of *homo economicus* that he sought. Moreover, and because of this, he is led to over-exaggerate the role of the price mechanism of the market as the facilitator of economic co-ordination.

Ultimately, however, Hayek answers both problems by developing a more robust and explicit conception of the self via the notion of the rule, or practice. It is in virtue of rules, we may remind ourselves, that the preferences of diverse and mutually-ignorant actors are formed and reconciled and their disparate knowledges made use of. More significantly, for the purposes of the argument we wish to make here, we have seen that not only does Hayek's invocation of the rule or practice 'deepen' his account of the interpreting self without jeopardizing the important interpretative insights lying behind the reformulation of the economic problem. It also means that he is able to contribute to both economic and cultural discourse in a profound way because the traditions in virtue of which economic co-ordination takes place do not only co-ordinate economic knowledge but also cultural knowledge. More importantly still, the rules themselves are subject to change - although not via a process of conscious selection - and thus are constitutive of a wider process of cultural selection that relates in a most direct way to multiculturalism's contemporary concern with the relative status of the members of the diverse traditions of any given society.

With the introduction of the notion of tradition Hayek is able to extend his hitherto purely economic considerations into the domain of culture. Most importantly for present purposes, he is able to do so without relinquishing the important achievement of the reformulation of the economic problem facing society, or the interpretative account of the self that underlies it. This, of course, is of supreme importance because it means that Hayekian thought may contribute meaningfully to contemporary debates about culture and identity and, more importantly, contribute at the most profound level by questioning not only the significance of culture and cultural diversity to politics, but by actually reformulating what the ‘cultural question’ may in fact be.

Thus, Hayek’s reformulation of the economic problem facing society and our Hayekian extension of this to the domain of culture means that not only is it the case that the ‘post-socialist cultural turn’ has failed to marginalize his concerns. Rather, the extension of his concerns to culture has rendered that very turn normatively irrelevant. For the Hayekian perspective, it is a moot point as to whether the focus of our concerns is economic or cultural, distributive or constitutive. For, as he states in *The Constitution of Liberty*, ‘it is very questionable whether there are any actions which can be called merely “economic”.’<sup>165</sup> ‘Economic considerations,’ he continues, ‘are merely those by which we reconcile and adjust our different purposes, none of which, in the last resort, are economic (excepting those of the miser or the man for whom making money has become an end in itself).’<sup>166</sup> Whatever our concerns are, of primary importance is that practical decisions with respect to them have to be made under the assumption of the self’s practice-bound, embedded nature, its ignorance of its fellows and the epistemological burden both assumptions bring with it.

Before outlining the contours of a Hayekian account of cultural justice, however, we must further develop our Hayekian reformulation of the cultural and economic problems as we draw out the implications of his social thought - including his conception of the self - for *normative* political theory. It is to the account of Hayekian justice as an answer to society’s ‘cultural co-ordination problem’, then, that we will turn next.

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<sup>165</sup> Hayek, *The Constitution of Liberty*, p. 35.

<sup>166</sup> *ibid.*



## 2 Cultural Justice as a Co-ordination Problem

### 1. Introduction

We saw in the previous chapter that the Hayekian perspective is after all capable of addressing both distributive and cultural concerns via a re-reading of Hayek as an interpretative social theorist who assumes a radically embedded account of the self. We are now in a position to explore the implications of this interpretative reading of Hayek for his apparently tangential position to contemporary concerns in the theory of justice. What might these implications be? That is, what does the Hayekian positive account of the self as a socially embedded interpreter imply for normative political theory?

There seem to be at least two. Firstly, given the importance of the notion of interpretation to Hayek's account, it would seem clear that the settlement of public political questions concerning either just distribution or the relative status of the diverse members of society need in some sense to refer to the social meanings implicit in the traditions of that society. Of course, it is crucial here to remind ourselves of the fundamental epistemological timbre of the Hayekian account of interpretation and the questions it raises concerning the authority of any given interpretation of those meanings to which we are supposed to refer when deciding upon such questions. For, given the unique Hayekian emphasis upon the epistemological burdens that come with what today would be called a communitarian acknowledgement of our thoroughly social nature, it is clear that for Hayek these meanings are not to be revealed but rather discovered. Thus, building upon the Hayekian reformulation of the economic and cultural problems facing society, the interpretative reading issues in what I shall call the epistemological reformulation of economic and cultural justice.<sup>167</sup> In both cases, furthermore, the consequence of the interpretative reading of Hayek's social theory is a the normative argument for individual interpretation that privileges the public protection of individual interpretative domains - the exploitation of which constitutes the cultural and economic process - over and above the political achievement of an 'optimal' economic or cultural end-state. Optimal cultural and economic end-states, that is, are not to be understood as the ambition of public political decision-making but, rather, as the ever-changing results of the cultural and economic processes which the state is obliged to protect.

In this chapter, I will draw out the normative implications of the Hayekian account of the radically social interpreting self. In the first instance, Hayek's account will be seen to lead

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<sup>167</sup> For a critique of the association of libertarianism with hermeneutics more generally see Quinn, K., and Green, T. R., 'Hermeneutics and Libertarianism: An Odd Couple', *Critical Review*, vol. 12, no. 3 (1998), pp. 207-223.

to the claim that justice must be seen as an answer rather than as a question. That is, rather than defend a substantive account of the requirements of justice, such as the maximisation of the position of the least well-off, the achievement of material equality, or the satisfaction of the doctrinal demands of a particular religion, one must offer an account of how the demands of such substantive accounts may be reconciled with one another, given our mutual ignorance and thoroughly social natures. More specifically, just because for Hayek no individual is ever in a position authoritatively to claim what an optimal distributive or cultural outcome for society would be, nor what their achievement would practically require, we must view justice as an answer to this epistemological predicament, rather than as a question that we may answer in any substantive way. Because of this, what justice secures for us are the conditions for the social discovery and achievement of cultural optima. In the section that follows, I will briefly set out the implications the notion of interpretation has for politics and how our reading of Hayek as an interpretative theorist relates to them. In the light of this, in sections 3 and 4, I will claim that justice best answers the economic and a cultural co-ordination problems facing society when configured along individualist lines and that in the final analysis the very distinction between ‘economic’ and ‘cultural’ justice is at best a tenuous one. Finally, in section 5, we will proceed to further elucidate this conception of justice via Hayek’s account of the law of liberty and the delimitation and protection of individual domains that the arguments for individual economic and cultural interpretation demand. In doing so, I will also attempt to correct certain prevalent misconceptions within contemporary Hayekian scholarship about the proper foundational status of Hayek’s normative enterprise.

## ***2. Interpretation, Politics and The Epistemological Reformulation of Justice***

In *Justice and Interpretation*, Georgia Warnke contrasts the broad features of interpretative politics with the ‘Kantian’ approach to political theory that seeks to provide a ‘neutral procedure for a rational choice of political principles.’<sup>168</sup> One of the most salient characteristics of the interpretative method, she claims, is that it seeks to justify our principles of justice in terms of their being ‘appropriate for us because of our history and traditions, or social practices and the kind of community we are.’<sup>169</sup> Moreover, with this emphasis upon the particularity of those communal traditions and practices that are to be the ultimate source of the content and justification of public political principles of justice comes the centrality to the interpretative approach of the notion of the hermeneutic circle. Again, the contrast with the foundationalist or Kantian approach is clear. In this latter approach, the idea of an extra-communal foundation acts as a starting point, a point of theoretical departure if you will, for

<sup>168</sup> Warnke, *Justice and Interpretation*, p. 3.

<sup>169</sup> *ibid.*, p. vii. See also Walzer, M., *Spheres of Justice*, esp. chapter 1; Dworkin, R., *Laws Empire*, Cambridge, Ma., Harvard University Press, 1986.

the political theory to be outlined and justified. What the interpretative approach makes clear, by contrast, is that there is no such point of departure but, rather, only the circular appeal to and process of interpretation of the understandings that the community is said to share and in virtue of which the principles are to be justified.<sup>170</sup>

For now, however, it is important to note that it is at this point where the interpretative approach is beset by two particularly acute problems. Following Warnke, we may call these the problems of conventionalism and subjectivism.<sup>171</sup> The problem of conventionalism centres upon the doubt that we are able effectively to criticise the meanings that we share if we accept first that they define the field of meaning that is our reference point in assessing principles of justice. Secondly, if all we do have are differing and often conflicting sets of culturally-bounded shared meanings and yet no independent, non-subjective means of adjudicating the desirability of one set over an above the others, it remains unclear what normative purchase the appeal to traditions and conventions may have, regardless of how they are interpreted. As Warnke makes clear,

[h]ermeneutic political theorists calling for the most substantial reforms in our practices and institutions as well as hermeneutic theorists content with the way things are will all be able to claim that they are being conventionalistic in that they are simply being faithful to the real meanings of these practices and institutions. But since this phenomenon will mean that a hermeneutic political theory can go either the way of “contemporary German apologists for Nazism” or the way of Rawlsian liberals ... it might be asked whether a hermeneutic approach can help clarify issues of justice at all.<sup>172</sup>

What this suggests, then, is that it is not immediately apparent what specific normative conclusions, if any, one may come to from a methodological commitment to interpretivism. Related to this, of course, is Warnke’s concern with the idea that our shared social meanings are subject to an irreducible plurality of interpretations.<sup>173</sup> Ultimately, for Warnke such a concern means that the task of the theory of justice is reoriented from the project of the elucidation and adjudication of principles of justice whether from first principles or from culturally specific meanings - to the promotion of discussion.<sup>174</sup>

Similarly, for Hayek and similarly to the reformulation of the economic and cultural problems discussed in the previous chapter, the limits to individual knowledge leads one to

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<sup>170</sup> *ibid.*, p. 5.

<sup>171</sup> *ibid.*, pp. 6-11.

<sup>172</sup> *ibid.*, pp. 10-11.

<sup>173</sup> *ibid.*, p 11.

<sup>174</sup> *ibid.*, pp. 11-12, Chapters 7 and 8. On the relationship of the two parameters of the re-orientation in the political theory of Iris Marion Young, see Tebble, A. J., ‘What is the Politics of Difference?’, *Political Theory*, Volume 30, Number 2, April 2002, pp. 259-281.

radically reconsider the task that justice sets out to achieve. The reason why justice cannot be reflective of a substantive preference for a particular distributive or cultural outcome is twofold. Firstly, and similarly to Warnke, such an approach would factor out the plurality of interpretations of what justice would require and secondly because even if there were unanimity concerning this, it would presuppose the *epistemological* possibility of a) assuming knowledge of the outcome of the cultural process itself and b) of ordering the actions of discrete individuals so as to conform to what that assumption required. This provisional assumption of omniscience, of course, is itself all too often assumed to be of little consequence, to be an assumption ‘which can later be dropped without much effect on the conclusions’ arrived at upon its basis.<sup>175</sup>

For Hayek, however, this assumption is of central, if not supreme consequence because ultimately its falsity accounts for the possibility of justice itself.<sup>176</sup> ‘[T]he *possibility* of justice,’ he writes, ‘rests on [the] necessary *limitation* of our factual knowledge, and that insight into the nature of justice is therefore denied to all those constructivists who habitually argue on the assumption of omniscience.’<sup>177</sup> Clearly, this comment echoes precisely the argument he made in ‘Economics and Knowledge’ and ‘The Use of Knowledge in Society’ against neo-classical economic theory’s postulate of omniscience. Indeed, in *Rules and Order* Hayek acknowledges that the earlier forays into the implications of dispersed knowledge in economics were the starting point for his generalisation of the same thesis in *Law, Legislation and Liberty*. The assumption he describes in *Rules and Order* is logically identical to that critically examined in ‘The Use of Knowledge in Society.’ It is, no less, than the neo-classical assumption of economic equilibrium. It is interesting to compare how similar Hayek’s respective expressions of the synoptic delusion are. In *Rules and Order* he explains how the synoptic delusion of omniscience ‘assumes away the central problem which any effort towards the understanding or shaping of order in society raises: our incapacity to assemble as a surveyable whole all the data which enter into the social order.’<sup>178</sup> Similarly, in ‘The Use of Knowledge in Society’ he describes how the approach to economic theory that ‘starts from the assumption that people’s knowledge corresponds with the objective facts of the situation, systematically leaves out what is our main task to explain.’<sup>179</sup> Furthermore, he writes that ‘[t]o assume all the knowledge to be given to a single mind in the same manner in which to assume it to be given to us as explaining economists is to assume the problem away and to disregard everything that is important and significant in the real world.’<sup>180</sup> This, of

<sup>175</sup> Hayek, *Rules and Order*, p.12.

<sup>176</sup> *ibid.*, p.13.

<sup>177</sup> *ibid.*, emphasis added. See also *Hayek and Modern Liberalism*, p. 139.

<sup>178</sup> Hayek, *Rules and Order*, pp.14-15.

<sup>179</sup> Hayek, ‘The Use of Knowledge in Society’, p. 91.

<sup>180</sup> *ibid.*

course, is but a particular instance of the more general thesis concerning the requirement of rules and practices for omniscient people. Just as '[t]here would be no need for rules among omniscient people who were in agreement on the relative importance of all the different ends,' Hayek claims that '[a]ny examination of the moral or legal order which leaves this fact out of account misses the central problem.'<sup>181</sup> All of this leads Hayek to reconsider at the most fundamental level the problem that the theory of justice is supposed to address. As Kukathas comments 'rather than seeing justice as posing a question about the right distributive outcomes or distributive procedures, he regards justice as the answer to the question 'how do we co-ordinate individuals' actions in society given our limited epistemological powers?'<sup>182</sup> Thus, in their own ways, both Warnke and Hayek radically reformulate what the task of justice is. For Warnke, the task of justice is moved away from the elucidation and adjudication of principles of justice because of the fact of the plurality of interpretation, whilst for Hayek it is because of the fact of our irremediable ignorance that an interpretative account of the self presupposes.

Yet, it is here that Warnke and Hayek's accounts of the relationship between justice and interpretation begin to diverge. For Warnke, the conversation that arises as a result of the irreducible plurality of interpretations of social meanings needs to be a fair and inclusive one and, as such, 'will also involve promoting the social and economic conditions that can make it fair and inclusive.'<sup>183</sup> Yet, what Warnke fails to ask is why the question of the most appropriate social economic conditions for achieving this is itself not the subject of public discussion and, as such, equally subject to interpretative plurality? That is, what material equality, tradition, or inclusivity do and should mean and how each should be pursued is not 'given' to society but must be discovered by it on account of its members' mutual ignorance and embedded identities. This, furthermore, points us to another, deeper problem: that of the content and cultural controversy of the values upon which such promotion is defended. The problem, of course, is that the values of fairness and inclusivity cannot be coherently appealed to without falling foul of the very interpretative diversity the discourse that Warnke defends seeks to justly regulate. This, of course, raises a cultural problem all of its own - no less than the controversy of a *public* commitment to economic emancipation itself - that is perhaps fatal to what Warnke hopes to achieve.

By contrast, and in the light of our extension of Hayek's reformulation of the economic problem to the cultural, much the same argument can be made with respect to the discovery of answers to important cultural questions concerning the proper relationship between mutually ignorant social actors; for instance, the relationships between the genders,

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<sup>181</sup> Hayek, *The Mirage of Social Justice*, p. 8.

<sup>182</sup> Kukathas, *Hayek and Modern Liberalism*, p.58. Kukathas compares Hayek with Hume and Smith in this regard. On this see *Hayek and Modern Liberalism*, p. 54 .

sexualities, races and ethnicities. Again, cultural justice is here to be understood as an answer to the question of how we regulate our cultural lives, given our irremediably limited knowledge. Rather, then, than invoking a cultural optimum, or the notions of fairness and inclusivity so as to justly manage a public discourse that is supposed to be neutral, we need justice to enable us to discover just what such an optimum might be, or what fairness and inclusivity require, if they are required at all, given our particular traits, the practices we participate in and our local, tacit and culturally-differentiated knowledges.

### ***3. Whose Interpretative Justice? Hayek's Argument for Individual Economic Interpretation***

Given that for Hayek justice is the means by which answers to economic and cultural questions are discovered rather than the public institutionalisation of any particular answer itself, it becomes immediately necessary to ascertain just *who* is to do the discovering and on what defensible basis. At the beginning of the paper 'Individualism: True and False' Hayek claims that individualism 'is primarily a *theory* of society, an attempt to understand the forces which determine the social life of man, and only in the second instance a set of political maxims derived from this view of society.'<sup>184</sup> This notwithstanding, it is clear that from the Limited Knowledge Thesis Hayek also derives the maxims that constitute his normative political theory. What, then, might these maxims be? Answering this question is something to which he devotes his attention both in this paper and, more extensively, in *The Constitution of Liberty and Law, Legislation and Liberty*.<sup>185</sup> Ultimately, there appears to be just one maxim - which we will call the Individual Liberty Principle - that is intended to act as the master principle governing the character of public institutions. It consists, moreover, in the injunction to bestow upon individuals a clearly delimited and inviolable sphere of individual freedom in furtherance of the process of discovery of answers to distributive questions of public concern.<sup>186</sup>

Hayek offers three arguments for his Individual Liberty Principle, all of which are ultimately rooted in the Limited Knowledge Thesis and the peculiar socio-economic problematic that it presents. The first argument arises from the universal nature of the Limited Knowledge Thesis and echoes Hayek's earlier concern with the epistemological place of the social theorist in society. Because we are all equally limited in what we can

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<sup>183</sup> Warnke, *Justice and Interpretation*, p 12, Chapters 7 and 8.

<sup>184</sup> Hayek, 'Individualism: True and False', p. 6.

<sup>185</sup> See also Hayek, F. A., 'The Principles of a Liberal Social Order' (1966), *Studies in Philosophy, Politics and Economics*, London, Routledge and Kegan Paul, 1967, pp. 160-77; 'Liberalism' (1973), *New Studies in Philosophy, Politics, Economics and the History of Ideas*, London, Routledge and Kegan Paul, 1978, pp. 119-51.

<sup>186</sup> Hayek, 'The Principles of a Liberal Social Order', p. 166; *The Constitution of Liberty*, p. 31; *Rules and Order*, pp. 57, 61.

know the best that we can do is give each other an equal liberty to decide what to do for ourselves.<sup>187</sup> ‘We want the individual to have liberty,’ he writes in ‘The Moral Element in Free Enterprise’, ‘because only if he can decide what to do can he also use all his unique combination of information, skills and capacities which nobody else can fully appreciate.’<sup>188</sup>

The second, related, argument for individualism is that the bestowing of such freedom actually allows us to achieve *more*, not less, than would otherwise be the case because of the unique epistemological benefits such liberty confers. More specifically, the conferral of individual liberty and its converse, ‘the demand for a strict limitation of all coercive or exclusive power,’<sup>189</sup> enables us to make use of otherwise socially unavailable dispersed and tacit knowledge that is never given to any single agent in its entirety.<sup>190</sup> Claiming this, of course, does not mean that Hayek has committed himself to the knowability of one particular end state in virtue of which alternative institutional arrangements may be judged. Rather, his is a claim concerning the comparative effectiveness of such arrangements at making use of knowledge, whatever the outcome of the process is.

An important question here concerns the kinds of activity the individual freedom Hayek defends is supposed to protect. Clearly, and in line with standard accounts of cultural freedom, it protects freedom of thought, expression and conscience; that is, the expression of our interpretations concerning the optimal use and distribution of resources. However, need it protect anything else? Why, after all, could we not simply convene national and local deliberative fora where all would be free to put forward their interpretations concerning, for example, resource allocation in order to publicly decide which interpretation should be acknowledged and put into practice?

To be sure, Hayek believes that individual liberty most certainly encompasses freedom of thought, or liberty of conscience and expression.<sup>191</sup> Yet, such a liberty alone is but an empty and formal, if not impotent, privilege unless it is accompanied by freedom of *action*.

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<sup>187</sup> See also Crowley, *The Self, the Individual and the Community: Liberalism in the Political Thought of F. A. Hayek and Sidney and Beatrice Webb*, pp. 14-15 for a contrast here between Hayek and the Webbs. Precisely because of the Limited Knowledge Thesis that Hayek thinks the Individual Liberty Principle has a role to play in public affairs at all. Liberty as the master principle of justice would be unnecessary if we were omniscient. *The Constitution of Liberty*, p. 30.

<sup>188</sup> Hayek, F. A., ‘The Moral Element in Free Enterprise’ (1962), *Studies in Philosophy, Politics and Economics*, London, Routledge and Kegan Paul, 1967, p. 233.

<sup>189</sup> Hayek, ‘Individualism: True and False’, p. 16, emphasis added; Hayek, *The Constitution of Liberty*, pp. 29-38. This, of course, is a significant formulation of Hayek’s Individual Liberty Principle for it is not tantamount to a rejection of power as a factor in social decision-making *per se* but rather of *monopoly* power. On this see Hayek, ‘Individualism: True and False’, p. 16. Finally, the principle does not preclude the collective activity of groups, so long as the collaboration in question takes place voluntarily. On this see Hayek, ‘Individualism: True and False’, p. 16; *The Constitution of Liberty*, p. 37; *Rules and Order*, p. 56.

<sup>190</sup> Hayek, Individualism: True and False, pp. 10-11; *The Constitution of Liberty*, Chapter 2, *passim*; *Rules and Order*, pp. 106-110, 115-118; *The Principles of a Liberal Social Order*, p. 162; *Hayek and Modern Liberalism*, pp. 133-4; *Hayek’s Liberalism and Its Origins: His idea of spontaneous order and the Scottish Enlightenment*, pp. 6, 27-8.

Indeed, given the centrality he attaches to the exploitation of tacit knowledge in the economic discovery process, for Hayek, freedom of action is in a significant sense *prior to* freedom of thought or liberty of conscience. This is because only by allowing individuals to *act* upon the basis of their interpretations - as these are constituted by the traditions and practices they adhere to and that endow them with moral personality - is society as a whole able to make use of the total stock of socially-constituted knowledge that is potentially at its disposal for rational decision-making. Thus, whilst being of central importance, the exercise of liberty of conscience and freedom of expression are for Hayek 'only the *last* stage of the process in which new truths are discovered', and out of which arises the explicit, propositional knowledge that we are able to discuss.<sup>192</sup> Indeed, he continues, it is from the utilisation of such knowledge that the economic discovery process gains its creative potential: 'the flow of new ideas,' he writes, 'springs from the sphere in which action, often non-rational action, and material events impinge upon one another' and which, 'would dry up if freedom were confined to the intellectual sphere.'<sup>193</sup> It is for this reason that Hayek claims in *The Constitution of Liberty* that '[t]o extol the value of intellectual liberty at the expense of the value of liberty of doing things would be like treating the crowning part of an edifice as the whole.'<sup>194</sup> To only confer formal rather than, we may say, praxeological interpretative liberty concerning distribution would be to thoroughly impoverish the epistemological basis upon which any public decision would be arrived at. For Hayek, then, the freedom to dispose of and actively choose amongst means in the pursuit of our ends is how economic co-ordination is actually achieved and, as such, is a necessary condition for economic decision-making in society to be rational.<sup>195</sup> The absence of individual economic freedom, then, is *au fond*, the marker of irrational public economic decision-making.

This relates, moreover, directly to another argument that Hayek offers in favour of individual economic liberty. Given that it is our reason that chooses the ends that we seek to pursue, the realisation of those ends, he writes, 'depends on the availability of the required means.'<sup>196</sup> Because of this relationship of dependency of the realisation of ends upon our means to realise them, control of the means to our ends entails ultimate control over the ends that one may choose.<sup>197</sup> Without the freedom to dispose of the economic means as we see fit in the pursuit of our diverse, ultimately *cultural*, ends - that is, without the public institution

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<sup>191</sup> Hayek, *The Constitution of Liberty*, pp. 32-5; 'Liberalism', pp. 147-9.

<sup>192</sup> Hayek, *ibid.*, pp. 33, 110, emphasis added.

<sup>193</sup> Hayek, *ibid.*, p. 35.

<sup>194</sup> *ibid.*, p. 33. See also 'Liberalism', p. 149; *The Mirage of Social Justice*, pp. 8-9.

<sup>195</sup> Hayek, *The Mirage of Social Justice*, pp. 8-11; *The Constitution of Liberty*, pp. 30-1.

<sup>196</sup> Hayek, 'Liberalism', p. 149.

<sup>197</sup> *ibid.*, p. 147-9; *The Road to Serfdom*, p. 92; *The Philosophy of the Austrian School*, p. 216.



of the free market - the freedom to pursue ends is emptied of any significance and becomes a merely formal freedom.<sup>198</sup>

The converse of the conclusion of Hayek's epistemological arguments for individual liberty and the protection of individual domains, then, is that the role of the state should be sharply limited. The state's role should not be 'to determine particular results for particular individuals or groups' but rather only 'to provide certain generic conditions whose effects on the several individuals will be unpredictable.'<sup>199</sup> Of course, one may press Hayek here upon the issue of the status of these generic conditions and in doing so uncover a serious defect in his normative political theory. Could such conditions, for instance, include positive welfare rights for those on an appropriately low income? It would seem that Hayek's himself thinks so as he states in numerous places that the state *should* provide a minimum safety net below which nobody should fall, as well as provide various kinds of public goods as conducive to the proper functioning of the wider regime of liberty.<sup>200</sup> Yet, for Hayek, this is a fatal concession. Given the universal nature of the Limited Knowledge Thesis, it would seem that, even here, the free market endorsed by the Individual Liberty Principle should trump the state as the preferred method of provision. That is, given the Limited Knowledge Thesis, we are best served by ordering public institutions - including those concerned with the provision of social minima - in line with the Individual Liberty Principle. This is so that society's stock of dispersed and tacit, practice-bound knowledge may be made use of in order to discover properly social answers to questions about the nature and most appropriate minimum level of welfare, given the particular attachments of its diverse and mutually-ignorant members.

#### ***4. A Hayekian Argument for Individual Cultural Interpretation***

##### ***4. i The Market as necessary for the Discovery of The Good***

Hayek's epistemological arguments for economic liberty here are also significant insofar as they may be made anew with respect to cultural practices and norms. The observation that this is so is, despite being underdeveloped, not entirely new in Hayek scholarship. Kukathas has noted, for instance, Hayek argues

... that it is the *epistemological* rather than the calculational problem which characterizes not simply the production process but the human condition generally. The market, defined by the institutions of justice, is to be praised not merely for making production cheaper; for what is

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<sup>198</sup> This problem, of course is made all the more interesting precisely because the charge of the classical liberal regime protecting 'merely formal rights' is often raised against it by those who seek to defend a more expansive role for the state.

<sup>199</sup> Hayek, *The Mirage of Social Justice*, pp. 8, 2.

<sup>200</sup> Hayek, 'The Principles of a Liberal Social Order', pp. 165-6, 175; *The Mirage of Social Justice*, p. 87; *The Constitution of Liberty*, pp. 141-2; *The Political Order of a Free People*, pp. 41-46.

discovered in the market process is not only 'economic' knowledge, but knowledge of the world, of others, and even of oneself.<sup>201</sup>

Thus, despite taking place within the institutional auspices of the market, the discovery procedure it facilitates is not to be read as pertaining solely to the discovery of 'economic' information concerning the cost, degree of scarcity, or optimal distribution of goods, with other purely social and cultural questions being answered in the domain of the political. For Hayek, the market is also to be understood as pertaining to the discovery of precisely what things are to count as goods and how scarce and valuable they are.<sup>202</sup> Ultimately, then, the discovery procedure of the market is concerned with the discovery of the good itself and the corollary of this is that the optimal relationship between the diverse adherents to these conceptions is to be discovered, not assumed. Rather, then, than defend an account of public institutions that presupposes an account of what a optimal state of cultural affairs in society should be - whether, for instance, it is defined in terms of the degree to which society conforms to the doctrinal demands of a particular religion, or whether it is defined in terms of which members of society are said to be equal with one another - Hayekian political theory defends an account of such institutions that allow society to *discover* what is economically and culturally optimal. For Hayek, of course, this would mean that we allow individuals to make use of their own local and tacit cultural knowledge as well as their economic knowledge of means to this end. That is, public institutions should permit us to dispose of our property in such a way that is reflective of our diverse conceptions of the good and of our attitudes towards those of others, given our particular traits, attachments and knowledges. As Kukathas argues

... if the human good has to be identified, which individual or institution is to take up the task of evaluating, and choosing from among, the various conceptions of the good people favour? Any comparative evaluation will prove even more difficult than central planning for not only are views of the good life numerous but many may not emerge except in conditions which leave it open for competing views to be tried and tested.<sup>203</sup>

Thus, because knowledge of the good cannot be had independently of the economic process, for Hayek 'the emergence, and survival of the good society requires, not institutions which serve a shared or common understanding of the good for man but, rather, institutions which recognize that man in society is constantly engaged in the pursuit of that understanding.'<sup>204</sup>

<sup>201</sup> Kukathas, *Hayek and Modern Liberalism*, p. 101.

<sup>202</sup> Hayek, 'Competition as a Discovery Procedure', p. 181.

<sup>203</sup> Kukathas, *Hayek and Modern Liberalism*, p. 118.

<sup>204</sup> *ibid.*, p. 123.

Of course, equally central here is the importance he attaches to tacit, tradition- and practice-bound knowledge for it is precisely this kind of knowledge that is made socially available when individuals are left free to act and choose as they see fit. That is, when they enjoy rights to property, individuals - and ultimately society itself exploit their unique local and practice-bound tacit knowledge so that answers to questions of pressing public concern are discovered in a rational way. Kukathas concludes, then, that Hayek's 'defence of an individualist theory of justice rests on the argument that knowledge of the nature of the good is not 'given' to human understanding and, indeed, cannot be discovered without institutions of justice which leave people free to seek it.'<sup>205</sup> Of course, one may object here that this reading glosses Hayek's account as a procedural rather than substantive one that is not actually concerned with substantive outcomes. Yet, as Kukathas explains 'a concern for procedural justice does not mean indifference to, or unwillingness to consider, the nature of the good for man. The concern for procedures betrays a recognition that it is largely because of the rules of justice, which seek to preserve the freedom to pursue the good, that the good can be discovered.'<sup>206</sup>

#### ***4.ii The Market as a Necessary but not Sufficient device for the Discovery of The Good***

Granted that it may perhaps be through the institution of the market that we externalise or concretise some of our interpretations and thus make use of disparate, tacit and culturally diverse knowledge. that of itself does not go to show that it is via the market that we externalise all of them. This, of course, is something of which Hayek is aware when in *The Constitution of Liberty* Hayek claims that 'freedom of action is wider than the concept of "economic liberty".' Indeed, he questions whether restrictions upon liberty can be confined to the economic sphere at all because '[e]conomic considerations are merely those by which we reconcile and adjust our different purposes, none of which, in the last resort, are economic.'<sup>207</sup> The question this observation raises, then, is what other non-distributive questions could be answered by way of a Hayekian appeal to the Individual Liberty Principle?

To answer this, we may add extra detail to Hayek's arguments for the protection of individual domains by claiming that the individual freedom to act also implies the freedom to exploit and use one's body as one chooses including the freedom to allow *others* to exploit it as one chooses. Importantly, this extension of Hayek's concerns with our freedom to act as underpinning our freedom of expression has important implications for many issues pertaining to culturally diverse societies such as circumcision and other ritually-sanctioned body-affecting practices, the requirements of religiously-inspired dress-codes, abortion and

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<sup>205</sup> *ibid.*

<sup>206</sup> Kukathas, *Hayek and Modern Liberalism*, p. 118.

<sup>207</sup> Hayek, *The Constitution of Liberty*, p. 35.

the severity of the administration of parental discipline, much of which is intimately related to the proper legal status of minors.

This, furthermore, relates in an important way to questions concerning membership and status. At the most fundamental level our cultural discovery process that is guaranteed by a Hayekian commitment to individual liberty may also enable us to come to some public knowledge of which individuals actually belong to which groups, without at any stage of the process reifying the groups in question. That is, by conferring liberty upon individuals we may see to which groups they migrate or within which groups they opt to stay. The same, moreover, could be claimed with respect to the particular norms and values people adopt. Similarly, we would also be in a position to ascertain the status of people within groups and of groups within the wider society.

Of course, this all assumes a rather rosy outlook upon the prospects of Hayekian cultural justice that perhaps we should reconsider carefully. For, the questions of membership and status raise a serious problem for our Hayekian argument, a problem that is made particularly vivid by the multicultural problematic that is our primary concern. This problem centres, of course, upon the issue of just how far we are to allow this discovery process to extend. Do we confer individual liberty upon those who wish, in conformity with their traditions and practices, to participate in genital mutilation, marital rape, slavery, contract killing or the denial of education to some of their members or indeed, if their culture enjoined it, to the members of *other* groups they regard as objectionable or of an unworthy or inferior status? This problem is made all the more acute for an amoral, epistemological perspective such as Hayek's because it is obvious that he has no recourse to moral argument to rule them out without falling into serious self-contradiction.

Yet, one may appeal here in Hayekian terms to an epistemological concern with our capacity to interpret and accordingly participate in the wider social discourse concerning the nature of The Good and what it requires of us. Central to this, of course, would be our *physical* capacity - involving the use and exploitation of our bodies, minds and their associated faculties - to interpret the social meanings and adhere to the values that constitute us, some of which may involve the use and exploitation of our bodies in certain culturally-specific ways. Importantly for our present discussion of ritualistic practices involving the body, consistent with Hayek's emphasis in *The Constitution of Liberty* upon our freedom to act as authenticating our freedom to express and utilising tacit *economic* knowledge, we may extend his defence of corporeal freedom to include the authentication of our beliefs about particular ritualistic practices that involve the body itself. Without this physical capacity to interpret the meanings and requirements of a particular religion, the epistemological muscularity of the cultural discovery process would, of course, be undermined and thus be in

flat contradiction with the grounding of the process itself, just as Hayek claimed it would be if our freedom to act were curtailed in the economic sphere.

Moreover, intimately related to the notion of our physical capacity to interpret would be the notion of consent. The notion of consent here acts as the guarantor of the physical integrity of our interpretative capacity because it locates final authority for participation in ritual practices in the person of the individual who undergoes them, rather than in the office holders who perform the acts themselves. Moreover, on identical epistemological grounds, we may impose an additional requirement here upon office holders who carry out the rituals to show or, more weakly, publicly state that no coercion has been used in the gaining of consent. The foundation of such requirements, it is important to emphasize, is not to be found in an ethical account of the Good or our most essential interests but in the epistemological requirement that the cultural discovery process make maximal use of society's stock of social knowledge, including its tacitly-held knowledge.

Given the consent requirement and the requirement of proof of non-coercion, it is clear that practices such as genital mutilation would be illegal unless it could be shown that they had been voluntarily consented to. If either or both requirements are not met, then acts falling under such practices would be equivalent to assault, grievous bodily harm, false imprisonment and murder and would be treated as such. In the case of minors, moreover, we may add the further qualification that such practices would always be illegal, regardless of whether the minor consented to it or not, because they would be deemed to be unable to give their consent and therefore should be taken to be saying 'no'. In fact, just this precept lies behind the UK Government's recent Sexual Offences Bill concerning child prostitution.<sup>208</sup>

Equally problematically, however, would be the fact that consistent with this approach, consent could only be given in virtue of beliefs that the consenter already has. An objection to our argument, then, would be that consent in this context merely begs the question of the ethical value and rectitude of those traditions in virtue of which it is given. A person who knows nothing other than the culture in to which they were born and within which they were raised may indeed consent to practices that others find repugnant. However, such consent should impress us as little as it surprises us, if construed as a justification of the practice. For, in the absence of an *independent* criterion that confers authenticity upon the act of consent beyond the criterion of the act's mere *coherence* with a wider set of culturally-specific norms, the act of consent is of scant worth and does little, if anything at all, to guarantee the consenter's physical capacity freely to interpret the social world. Moreover, such an act would be equally oblivious to the structures of power and hierarchy that mark if not positively distort it and most, if not all, traditions and practices. Giving one's consent in

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<sup>208</sup> UK Government, Sexual Offences Bill (2002).

the light of such traditions, then, would be merely to accede to processes and hierarchies that serve only to distort the very cultural discovery process the Hayekian state is supposed to guarantee.

What can we say in response to this? It seems that all that can be said is that this is the case for *all* practices and traditions, including the liberal tradition and associated practices from the perspective of which such objections are often, although not necessarily, raised. Indeed, even from within liberal culture some do submit themselves to what most would consider as ritualistic physical abuse. Sado-masochistic sex clubs, of course, are a case in point here, as are some varieties of prostitution and violent contact sports such as boxing or kung-fu. It seems, then, that all cultures sanction such behaviour on the basis of already implicit values within them. An independent reason needs to be given, therefore, for the privileging of one culturally particular perspective over any other. Yet, it seems unlikely that such independence will be obtainable if we remain within the confines of specifically ethical reasoning here. Given this, it would seem that the objection fails in its own terms.

An antidote to this problem, of course, arises precisely from the amoral epistemological grounding of the consent requirement discussed above and of the wider cultural discovery process. Precisely because the requirement is an epistemological one and, as such, entirely divorced from any ethical and hence culturally particular justification, it is likely to be acceptable to all members of the polity.

Given this, we may translate two of Hayek's three arguments for economic liberty into two arguments for cultural liberty with respect to such questions. Firstly, given that we are all embedded in the cultural process, none of us has a privileged view of that process as a whole and thus does not have the epistemological authority to impose his conception of the good upon others. Importantly, imposition here is to be understood in terms of both the authority and content of the tradition of a particular cultural group within society and of the authority and content of a particular tradition when invoked as the foundation for the public management of relations between them diverse traditions in a single society. Given the epistemological impossibility of articulating and achieving a comprehensive vision of an optimal cultural outcome in the name of justice in either case, justice's task is to offer a procedural account of how culturally differentiated knowledge may be communicated and made use of within and between cultural traditions so that these optima may emerge and be discovered. The second Hayekian argument is that unlike rival accounts of justice that already presuppose a comprehensive ethical account of how cultural relations should be publicly managed and thus thwart the emergence and expression of other accounts, under the regime of cultural liberty the maximal amount of culturally-differentiated knowledge will be made use of, given our irremediable ignorance of all the particular facts that would need to be

known in order to achieve such an outcome. In the last resort, our Hayekian argument for individual interpretative freedom just is an argument for cultural freedom in a diverse society.

#### *4.iii The Dissolution of Hayekian Liberalism?*

Our cultural variant of Hayekian justice as a discovery procedure has profound implications for what we have called in the Introduction Gray's marginality thesis concerning the contemporary status of Hayek's political theory.<sup>209</sup> As we saw earlier central to Gray's argument is the claim that one of the core critical and normative features of Hayek's theory - the epistemological critique of centralised economic planning and the concomitant defence of the market - has been rendered irrelevant by the demise of Communism.<sup>210</sup> Given that such economic management is no longer prevalent - indeed, practically non-existent - there seems little to make Hayek's thought relevant, not least because it cannot help us to make the now primary political choice between the differing kinds of capitalism that remain after communism's departing; a choice that is so central to the politics of transition.<sup>211</sup> In addition, and related to this problem for Gray, is Hayek's failure to appreciate the importance of culture to the maintenance of a cohesive society. According to Gray, the cultural roots of that liberalism upon which the institution of the market rests are themselves undermined by the very market that Hayek seeks to defend.<sup>212</sup> Given this, the crucial question that political theory must answer - and it is one that for the above reasons Hayek's cannot answer - is how a State may 'reform capitalism so that it is consonant with its underlying cultural values and meets its enduring needs.'<sup>213</sup>

Yet, Gray's argument seems to trade upon the assumption that Hayek's thought is only capable of addressing specifically economic or distributive questions of public concern. What we have made clear here is that there are good reasons - offered both by Hayek himself and developed in this chapter in a Hayekian vein - that show this to be quite clearly not the case. Given the universal nature of the Limited Knowledge Thesis - that is, that whatever the question that is of pressing concern happens to be, the way we go about answering it and, after this, fulfilling the requirements of that answer in our daily lives will be fundamentally affected by the limits of our reason - such a perspective is equally capable of addressing specifically cultural concerns. Indeed, even if we concede for the sake of argument Gray's claim concerning capitalism's apparently suicidal tendencies, we need to ask ourselves what the underlying values and enduring needs that need to be protected and satisfied actually are and, once discovered, what we should do in the face of their discovery? It is here where

<sup>209</sup> Gray, *Hayek on Liberty*, pp. 146-61.

<sup>210</sup> *ibid.*, pp. 146-50.

<sup>211</sup> *ibid.*, pp. 150-1, 155-6.

<sup>212</sup> *ibid.*, pp. 154-61.

<sup>213</sup> *ibid.*, p. 155.

Hayek's thought is, *de novo*, of singular importance and relevance for what he offers is not an account of justice that presupposes an answer to such clearly cultural rather than distributive questions but, rather, offers one that is intended to help us find just such an answer.

### 5. *The Philosophical Foundations of Hayekian Political Theory*

To defend an amoral epistemological grounding of the economic and cultural process, however, is not to argue that for Hayek the Good is a merely subjective value, nor is it to imply that individuals will always pursue different conceptions of the good. Rather, as Kukathas points out, it shows that for Hayek the good is not 'given immediately to human perception but must be *discovered*.'<sup>214</sup> Of course, precisely the assumption of a value subjectivism underlies John O'Neill's account of Hayek's political theory in 'Polity, Economy, Neutrality.'<sup>215</sup> Yet, he is somewhat misleading when he discusses Hayek's political theory as a neutralist, although *non*-dialogical response to pluralism that assumes a subjectivism about value. For O'Neill social co-operation in the Hayekian market 'occurs without rational dialogue or conversation about ... ends.'<sup>216</sup> 'In exchange,' he writes, 'I do not engage in conversation. An actor informs others not by voice but by exit.'<sup>217</sup> Central, then, to O'Neill's understanding of the supposed priority of exit over voice in Hayek's theory are the claims that 'Austrian' economists such as Hayek are 'strongly non-cognitivist about value' and consequently that the market is not a form of dialogue.<sup>218</sup>

However, this misunderstands the Austrian case for the market order. Hayek's theory clearly *does* allow for voice, alongside exit. Members of the polity do directly engage with one another on important issues pertaining, for instance to the internal organisation of their communities and the internal distribution of benefits and burdens they sanction. Exit, then, is only part of the account. It is not that Austrians such as Hayek are non-cognitivist about value or that they subscribe to the view that '[b]eliefs about values do not answer to rational argument'<sup>219</sup> but, rather, that debates concerning values cannot be managed by political, that is, explicit, propositional and aggregative discourse where all the knowledge relevant to any public decision is assumed to be retrievable in a single discursive forum on a rational basis. Given this epistemological difficulty, it is the institutions of the liberal order that we must invoke as a public arbiter of the discourse about values. It is a discursive institution that, importantly, *factors in* and does not assume away our epistemological reliance upon practices

<sup>214</sup> Kukathas, *Hayek and Modern Liberalism*, pp. 117-118, emphasis added.

<sup>215</sup> O'Neill, J., 'Polity, Economy, Neutrality', *Political Studies*, vol. 43 (1995), pp. 414-431.

<sup>216</sup> *ibid.*, p. 417.

<sup>217</sup> *ibid.*

<sup>218</sup> *ibid.* Brian Crowley makes a similar point in describing Hayek's position in Crowley, *The Self, the Individual and the Community: Liberalism in the Political Thought of F. A. Hayek and Sidney and Beatrice Webb*, p. 14.

<sup>219</sup> O'Neill, 'Liberty, Neutrality, Polity', p. 417.



as the repositories of social knowledge in a way that politics does. As Kukathas explains, the process of discovery of the good for man ‘has to be one in which the search is *not confined by limits imposed by individual reason*.’<sup>220</sup> None of this, however, means that any particular viewpoint about the ultimate status of values or of the good is reflected in the defence of the discovery process endorsed by Hayek’s classical liberalism of the market for the simple reason that discussion of such matters is itself located *within* the process. The point here is not to affirm or deny the objectivity of values but rather to deny that even if values are objectively given, that ‘their source is knowable or can ever be satisfactorily articulated by anyone.’<sup>221</sup>

Given that it prioritises explicit deliberation as the method by which values are judged, politics is severely limited in its capacity to do so. It is for this reason, as Crowley explains, that it is the evolution of traditions and not reason that must act as the final arbiter between competing values. Crowley is concerned here to draw a contrast between Hayek on the one hand and the political thought of Sidney and Beatrice Webb on the other. Crowley’s central thesis, of course, is that despite the obvious normative differences between them, the Webbs and Hayek concur ‘that men and women cannot reach valid conclusions about the management of their collective affairs,’<sup>222</sup> and, as such, reject ‘politics as a desirable means of maintaining social order.’<sup>223</sup> Indeed, the normative differences between the Webbs and Hayek are ultimately premised on the extent to which both sides are prepared to take this postulate. As Crowley explains ‘[t]hey concur in rejecting the claim the average person is capable of managing the *res publica* in co-operation and consultation with his peers, but again different epistemological assumptions lead Hayek to conclude that *no one* is capable of ‘managing’ it and the Webbs to conclude that only social scientists can.’<sup>224</sup> For Hayek, then, it is precisely because the search for The Good is itself a thoroughly social affair that we need liberal individualist institutions to allow us to discover it. Moreover, there is the further difficulty that even if the Good *were* objective *and recognised as such by all* - that is, that we *could* assume a value cognitivism concerning what it is and what it requires of us and of society - that would still leave unanswered the question of what should be done to satisfy those requirements, given our necessarily limited reason and our mutual ignorance. It is upon the basis of tackling this problem that Hayek defends liberal individualist institutions. However, what is the philosophical basis of this defence? It is to this question that I now turn.

<sup>220</sup> Kukathas, *Hayek and Modern Liberalism*, pp. 117-118, emphasis added.

<sup>221</sup> Crowley, *The Self, the Individual and the Community: Liberalism in the Political Thought of F. A. Hayek and Sidney and Beatrice Webb*, p. 14.

<sup>222</sup> *ibid.*, pp. 14-15.

<sup>223</sup> *ibid.*, p. 15.

### 5.1 *Friederich Hayek, utilitarian*

If Hayek is not a value subjectivist then what is the foundation of the economic and cultural discovery process that we are claiming his social and normative theory lends support to? What strikes the reader of the secondary literature on Hayek is the wide range of readings of him that seems to stem in no small measure from the wide-ranging, multidisciplinary nature of his work. The first and perhaps most common reading of Hayek is as a utilitarian defender of the market<sup>225</sup> in which alternative actions are seen as means and assessed in consequentialist fashion 'entirely in terms of outcomes.'<sup>226</sup> In characterising this reading Kley claims that 'utilitarianism judges the alternatives available by the overall goodness of the states of affairs each of them would produce, such goodness being measured by a single general standard of evaluation, utility.'<sup>227</sup> Yet, he notes, there is ample textual evidence that Hayek himself would reject such a view as he explicitly rejects 'any comprehensive common denominator such as 'ends-utility.'<sup>228</sup> For Hayek conflict between alternative choices does not dissolve 'by calculating the overall sum of goodness, expressed in a single currency, which a course of action would bring about.'<sup>229</sup> Kukathas also notes this in his critique of Gray's reading of Hayek as a utilitarian because, he claims, Hayek 'offers no utilitarian criterion by which to evaluate social systems.'<sup>230</sup> This, then, would indicate 'that Hayek's arguments are consequentialist but not utilitarian, for they do not point to any welfarist end-state to be achieved.'<sup>231</sup> Yet, even here, Kukathas gives us reason for not reading Hayek as any kind of utilitarian defender of liberalism 'because no form of consequentialism is compatible with the dominant anti-rationalist strand of his thought.'<sup>232</sup>

Finally, we may adduce another reason to exclude a utilitarian or consequentialist reading lies in the disadvantages Hayek's discovery position suffers from. 'Since the value of

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<sup>224</sup> Crowley, *The Self, the Individual and the Community: Liberalism in the Political Thought of F. A. Hayek and Sidney and Beatrice Webb*, p. 15.

<sup>225</sup> Kley, *Hayek's Social and Political Thought*, p. 8.

<sup>226</sup> Roland Kley cites the following authors as offering utilitarian readings of Hayek: Barry, 'Hayek on Liberty', in Pelczynski, Z., and Gray, J., (Eds.) *Conceptions of Liberty [in Political Philosophy]*, London, Athlone Press, 1984; Yeager, L., 'Utility, Rights, and Contract: Some Reflections on Hayek's Work', in Leube, K. R. and Zlabinger, A. H., (eds.), *The Political Economy of Freedom: Essays in Honor of F. A., Hayek*, Munich, Philosophia Verlag, 1984; Gray, J., *Hayek on Liberty*, London, Routledge, 1984 and Hardin, R., *Morality within the Limits of Reason*, Chicago, University of Chicago Press, 1988.

<sup>227</sup> Kley, *Hayek's Social and Political Thought*, p. 8.

<sup>228</sup> Kley, *ibid.*, p. 9. Kley cites the section entitled 'The Constructivist Fallacy of Utilitarianism' in *The Mirage of Social Justice*, pp. 17-23 in this regard.

<sup>229</sup> *ibid.*

<sup>230</sup> Kukathas, *Hayek and Modern Liberalism*, p. 195.

<sup>231</sup> *ibid.*, p. 196. It is somewhat unfair to accord Gray this reading of Hayek. Given Hayek's emphasis upon 'the great partiality and fallibility of our own understanding' Gray shows correctly that if his thought is to be construed as utilitarian at all then it would be a utilitarianism of the second rather than first order variety in which appeal is made to socially accepted codes of behaviour to settle practical questions rather than utility itself. On this and other reasons why Hayek should, if at all, be regarded as an indirect or system utilitarian, see Gray, *Hayek on Liberty*, p. 59.

freedom rests on the opportunities it provides unforeseen and unpredictable actions', he writes, 'we will rarely know what we *lose* though a particular restriction of freedom.'<sup>233</sup> Thus, Hayek concludes, 'when we decide each issue solely on what appear to be its individual merits, we always over-estimate the advantages of central direction.'<sup>234</sup> This fact, of course makes the temptation to restrict liberty all the more great because we engage in that restriction upon the basis of the achievement of a 'foreseeable particular result' and do not, indeed cannot, take into account all the emergent costs associated with achieving it.<sup>235</sup> It is for this reason, then, that Hayek asserts that the epistemological benefits of individual freedom can be enjoyed only if we treat political liberty – that is, individual liberty - 'as a supreme principle which must not be sacrificed for particular advantages.'<sup>236</sup>

### 5.ii *A Kantian Defence of Individual Liberty?*

Given that it is difficult to maintain a utilitarian reading of Hayek, the next most common although multifaceted reading is of him as a quasi-Kantian defender of individual autonomy. In an important sense the Kantian reading can be viewed as a corrective to the problems found in the utilitarian reading and its reliance upon a unitary metric of resolution and evaluation. Kley cites Crowley as offering a Kantian reading of Hayek in which are recommended 'rules of justice which arbitrate among people's conflicting conceptions of the good life without themselves presupposing the validity of any such conception.'<sup>237</sup> 'The same deontological perspective,' Kley notes, 'Hayek seems to follow when he insists that liberty as defined by the rules of just conduct must be accepted as a value in itself, as a principle that must be respected without our asking whether the consequences in the particular instance will be beneficial.'<sup>238</sup> Yet, for Kley this Kantian reading is worthy of rejection because, ultimately 'the seemingly deontological primacy of the rules of just conduct over consequentialist considerations of expediency is contingent on the empirical assumption that the rules actually in force are the ones most conducive to the generation and maintenance of spontaneous economic order.'<sup>239</sup>

Before his shift away from classical liberalism<sup>240</sup> Gray offered from within his broadly utilitarian reading of Hayek a moralised Kantian reading that placed autonomy at its centre and also stressed the underlying unity of his thought; the Hayekian project as *system*

<sup>232</sup> *ibid.*, p. 199.

<sup>233</sup> Hayek, *Rules and Order*, p. 56, emphasis added.

<sup>234</sup> *ibid.*, p. 57.

<sup>235</sup> *ibid.*, pp. 57, 61.

<sup>236</sup> *ibid.*; *The Constitution of Liberty*, p. 31.

<sup>237</sup> Kley, *Hayek's Social and Political Thought*, p.9.

<sup>238</sup> *ibid.*, Hayek quoted from *The Constitution of Liberty*, p.68.

<sup>239</sup> *ibid.*

<sup>240</sup> See Gray, 'Postscript: Hayek and the dissolution of classical liberalism', *Hayek on Liberty*, pp.146-161.

‘as fully ambitious as the systems of Mill and Marx.’<sup>241</sup> In this book, Gray had offered a reading of Hayek which emphasised his Kantian heritage both in terms of his epistemology and his jurisprudence. As Kley remarks, ‘[f]or John Gray, Hayek’s political philosophy exhibits its Kantian inspiration most perspicuously in its reliance on Kant’s universalization test and its rejection of any natural law doctrine.’<sup>242</sup> Yet, once again, comments Kley, any adherence to a strict Kantian view is mitigated by the fact that for Hayek ‘Kant’s famous test comes down to examining the consistency of the rules of the market and improving the smoothness of the market’s co-ordinating function.’ ‘In short,’ he concludes, ‘much of Hayek’s Kantianism must ... be seen as part of an overall perspective in which consequentialist considerations are paramount.’<sup>243</sup>

### *5.iii A Synthesis of Humean and Kantian Ethical Concerns?*

Beyond this analysis of law, Gray discusses Hayek’s conception of *justice* as the attempted synthesis of Kantian and *Humean* concerns. It is Kantian in its minimalist or formalist strategy in which he works ‘with postulates or regulative ideas, epistemological or normative, which are as metaphysically neutral, and as uncommitted to specific conceptions of the good life, as he can reasonably make them.’<sup>244</sup> Moreover, it is Humean in its ‘account of the content and basis of the rules of justice.’<sup>245</sup> The evaluation of this attempted synthesis is the subject matter of Chandran Kukathas’s book *Hayek and Modern Liberalism* that ‘concentrates on Hayek’s attempt to combine Kantian and Humean ethical claims in a coherent moral theory of liberalism.’<sup>246</sup> Kukathas’s central claim, of course, is that this attempt ends in failure because on the one hand ‘[m]any of Hayek’s arguments are, like Hume’s, largely negative’ and share with him a ‘suspicion of all attempts to secure political values with abstract philosophical justifications,’<sup>247</sup> whilst on the other, he is keen to articulate the normative principles that would secure the classical liberal political order by turning ‘to a Kantian emphasis on the importance of freedom as the master principle of the Great Society.’<sup>248</sup> In short, Kukathas claims, Hayek invokes Hume to say what justice should *not* consist in and – out of a fear that this may be too conservative a justification of the liberal political order – he invokes Kant to say what it ought to be via ‘a *principle* delimiting

<sup>241</sup> Gray, *Hayek on Liberty*, p. ix. For a comparison of themes from Hayek and Marx as they specifically relate to the idea of utopianism in the theory of politics see Sciabarra, C. M., *Marx, Hayek and Utopia*, New York, State University of New York Press, 1995.

<sup>242</sup> Kley, *Hayek’s Social and Political Thought*, p. 9.

<sup>243</sup> *ibid.*, p. 10.

<sup>244</sup> Gray, *Hayek on Liberty*, p. 8.

<sup>245</sup> *ibid.*, pp. 8-9.

<sup>246</sup> Gamble, *Hayek: The Iron Cage of Liberty*, p. 197, note 33.

<sup>247</sup> Kukathas, *Hayek and Modern Liberalism*, p. 84. For a brief overview of Kukathas’s position see Bellamy, R., *Liberalism and Modern Society*, Cambridge, Polity Press, 1992, pp. 222-225.

<sup>248</sup> *ibid.*, p. 45.

individual domains.<sup>249</sup> The problem with such a venture, however, is not so much that one aspect of Hayek's moral enterprise assumes a priority over the other but, rather, in the fact that these arguments rest 'upon *inconsistent* claims rooted in conflicting philosophical assumptions.'<sup>250</sup> Thus, 'there remains,' writes Kukathas an 'unresolvable conflict in Hayek's thought between the search for a [Kantian] moral justification of the principles of a liberal social order, and a [Humean] moral epistemology which denies the possibility of such an undertaking.'<sup>251</sup>

#### *5.iv Instrumental Defender of Capitalism*

Given the difficulties inherent in any programme of synthesis of Humean and Kantian concerns, Kukathas claims that the most promising aspect of the ethical dimension of Hayek is that influenced by Hume's scepticism which delimits what is practicable given our knowledge of the workings of society. Thus he concludes *Hayek and Modern Liberalism* with the suggestion that 'while it will prove difficult to establish philosophical foundations for liberal rights, or a liberal theory of liberty, an understanding of the nature of social processes may offer a surer guide by telling us what kinds of rights and liberties *cannot* be adopted if the liberal ideal is to survive.'<sup>252</sup> Similarly, in conceiving of Hayek's social theory of spontaneous order as a negative, value-free explanatory scheme, Gray contends that, whilst not issuing in liberal normative conclusions, it does possess a liberal character in that it *precludes* certain kinds of socio-economic order.<sup>253</sup> Thus, Hayek's social theory 'strengthens the case for liberty' negatively 'by showing that constructivist planning is bound to be always limited in success and often self-defeating in social life.'<sup>254</sup>

Roland Kley, however argues against Gray and, more explicitly, against Kukathas, that all of this presupposes that a specifically moral defence of the classical liberal market order was of central concern to Hayek's research programme. Yet, it is reasonable to suggest that this was not Hayek's chief aim. Indeed, Kley tells us, even for Kukathas, to whom the ethical aspects of Hayek's corpus are paramount, 'moral justification was not Hayek's chief aim.'<sup>255</sup> Consequently, Kley defends an instrumental reading of Hayek in which issues of

<sup>249</sup> *ibid.*, p. 163, emphasis added. Kukathas notes that it is, perhaps, not only Hayek who suffers from this problem. Most famously of all, the project of Rawls is considered to rest precisely on such a programme of synthesis of Hume and Kant. On this, see Kukathas, *Hayek and Modern Liberalism*, p.16 and Sandel's *Liberalism and the Limits of Justice* pp.13-14 where Rawls's project is characterised as an attempt to secure 'deontology with a Humean face.'

<sup>250</sup> *ibid.*, p. 45, emphasis added.

<sup>251</sup> *ibid.*, pp. 201-202.

<sup>252</sup> *ibid.*, p.228. Ultimately it is to the theory of spontaneous order that lies at the heart of Hayek's Humean account of justice to which Kukathas suggests we must turn in order to unearth a "positive" Hayekian agenda. On this, see Kukathas, *Hayek and Modern Liberalism*, p. 228.

<sup>253</sup> Gray, *Hayek on Liberty*, p.122.

<sup>254</sup> *ibid.*

<sup>255</sup> Kley, *Hayek's Social and Political Thought*, p.11, footnote 12.

feasibility and practicality buttress the defence of individualist public institutions. It is, Kley contends, because of the *efficiency* of markets and wider liberal individualist institutions at utilising social knowledge that they are to be recommended, and not because they are the guarantors of individual liberty *per se* as is the case, for instance, in Nozick's more strictly libertarian theory. Moreover, and despite his criticism of the broad contours of Kukathas's assessment, Kley's instrumentalist argument would seem to tie in neatly with Kukathas's treatment of Hayek's Humean account of the limits of reason - what Kley calls Hayek's 'persistent claims that reason is unable to justify ultimate values and that liberalism's defence against socialism is a matter of scientific argument.'<sup>256</sup> 'Such an interpretation,' writes Kley, 'can make sense of his views about the limits to rational debate in ethics and about the scientific nature of the argument. In addition, it is able to grant his own social theory the central role he wants it to play.'<sup>257</sup>

Yet, for Kley, precisely because of its instrumental status, Hayek's theory is insufficient as a defence of the classical liberal order that he prefers: '[m]arkets must, as [Hayek] rightly insists, play an important role. Yet how far they should extend, how far they should be constrained and in what ways supplemented, and in what kind of political framework they should be embedded, cannot be decided on grounds of feasibility alone.'<sup>258</sup> Similarly, and whilst conceding that Hayek's arguments deliver a devastating blow to 'the most hubristic types of economic planning', Gray claims that they contain little if anything to aid us in choosing between different ways of organizing the market of which there are numerous examples.<sup>259</sup> Answering questions concerning the type of market that we desire Kley, Gray and Kukathas conclude is not something that Hayek can do because it, 'requires genuine *moral* reflection and falls in *the province of normative political philosophy*.'<sup>260</sup> Thus, despite claiming that Kukathas is unfair to concentrate solely on the moral aspects of Hayek's defence of liberalism, Kley himself argues that this moral dimension is precisely what Hayek needs and lacks. In this sense, then, one can take Kukathas's and the Gray/Kley thesis to be complimentary. Kley claims that Hayek lacks the moral arguments to complete his theory and Kukathas supplements this by investigating the moral arguments Hayek does deploy and finds that they are inconsistent with one another.

## ***6. Protecting Individual Domains: Interpretative Liberty Under the Rule of Law***

These problems, of course, are manifested in Hayek's account of the law. He accepts that any adequate account of justice must achieve more than the formal prioritisation of individual

<sup>256</sup> Kley, *ibid.*, p. 11.

<sup>257</sup> Kley, *ibid.*, p. 12.

<sup>258</sup> Kley, *ibid.*, pp. 228-229.

<sup>259</sup> Gray, *Hayek on Liberty*, pp. 150 – 5.

<sup>260</sup> Kley, *Hayek's Social and Political Thought*, p. 229, emphasis added.

freedom and the protection of individual domains that flows from it. It must give some specific content to that freedom.<sup>261</sup>

Yet, what has perhaps been overlooked by those who claim Hayek's corpus is not up to this task is that of primary importance is Hayek's concern to allow individuals *to define their own private domains*. As we have already seen, Hayek claims in *The Mirage of Social Justice* in logically identical terms to the earlier account of the economic problem facing society that any examination of the moral or legal order that leaves out the fact of our constitutional ignorance 'misses the central problem' that law or Nomos is supposed to address.<sup>262</sup> That is, just as general equilibrium theory's assumption of omniscience ignores the economic problem of dispersed and tacit knowledge and the need for markets that is its solution, so the assumption of omniscience misses what we may similarly describe as the 'legal problem' facing society.<sup>263</sup> Given our necessary ignorance, the primary function of the law, for Hayek, is 'to tell each what he can count upon, what material objects or services he can use for his purposes, and what is the range of actions open to him.'<sup>264</sup> As such, for Hayek, the laws of liberty 'constitute an adaptation of the whole of society to its environment.'<sup>265</sup> Hayek does not believe that it is desirable 'to have the particular contents of a man's private sphere fixed once and for all' for to do so would unnecessarily impinge upon any future chance he may have to make the best use of and hence contribute his own knowledge to the wider social process.<sup>266</sup> To adopt such a restrictive attitude, moreover, would run counter to the evolving nature of morality itself within whose context debates concerning the proper sphere of individual action take place. For this reason he claims that it is desirable for individuals '*themselves* to have some voice in the determination of what will be included in their personal protected sphere.'<sup>267</sup> The way this is done, moreover, is via the recognition of general rules governing the conditions under which material objects or permissible actions become part of the protected sphere of a person or persons.<sup>268</sup> Importantly, and in keeping with the priority accorded to the Individual Liberty Principle, the law of liberty is not one among many laws but, rather, is a rule concerning what may count as a law. It is 'a meta-legal doctrine or a political ideal', which stipulates what is sound law and, as such, facilitates the pursuit of many individual ends and projects.<sup>269</sup> As such, Kukathas

<sup>261</sup> Hayek, *The Constitution of Liberty*, p. 139; *Rules and Order*, p. 109.

<sup>262</sup> Hayek, *The Mirage of Social Justice*, p. 8.

<sup>263</sup> Hayek, *ibid.*, pp. 8, 39.

<sup>264</sup> Hayek, *ibid.*, p. 37; *The Constitution of Liberty*, p. 140.

<sup>265</sup> Hayek, *The Constitution of Liberty*, pp. 156-7, 48. See also *Rules and Order*, pp. 72-6; *The Mirage of Social Justice*, pp. 8-12.

<sup>266</sup> Hayek, *ibid.*, pp. 139-40.

<sup>267</sup> Hayek, *ibid.*, p. 140, emphasis added. See also Hayek, *The Mirage of Social Justice*, pp. 35-7.

<sup>268</sup> Hayek, *ibid.*

<sup>269</sup> Hayek, *ibid.*, p. 206, 218; 'The Principles of a Liberal Social Order', p. 163; *Rules and Order*, pp. 112-3; *The Mirage of Social Justice*, pp. 1-5.

observes, the theory of the rule of law occupies the same place as the Original Position in Rawls's account of justice insofar as both are theories about what laws ought to be.<sup>270</sup>

All of this offers a response to the concerns of Kley and Gray. For, we can read Hayek here as defending this conception of law as, on amoral, *epistemological* grounds, the answer to the question of how far, indeed *if at all*, should markets extend? For, even if we concede Kley and Gray's objections to the programmatic burden Hayek places upon the theory of spontaneous order, the question then arises as to *who* in that case is to decide upon the ethical values that are to determine the scope and extent of private property rights. Even more significantly, we must also ask from where these values in virtue of which we are to delineate individual domains are to appear? Yet, it seems difficult to have an adequate answer to this question without running into the kind of 'false' individualism discussed earlier. If the regime of individual liberty is to be preferred to politics because of the unique epistemic advantages it confers then it would also follow that it is to be favoured because it enables the values in virtue of which we ethically appraise and 'correct' the results of social interaction to emerge also. That is, the regime of liberty is the most rational institutional framework to allow for the evaluation and correction of its *own* outcomes.<sup>271</sup> What Kley mistakenly assumes is that moral values remain in some other domain and do not emerge out of the same kinds of interaction as do prices or other kinds of 'purely economic' information. Ultimately, then, what Kley's overly instrumentalist reading overlooks is that Hayek's theory rests on an amoral claim concerning the nature of man and the limits of his reason which issues in a normative argument for a particular institutional framework that maximises the social emergence of economic, cultural and, therefore, *moral* knowledge. Thus, if we appeal to 'other' considerations to determine the scope of individual domains, we still need liberal individual rights to elicit the content of these considerations as fully as possible, given the constitutional limitations upon the powers of individual reason that flow from our embedded natures and mutual ignorance.

Problematically, however, Hayek also claims that the notion of the rule of law forms part 'of the *moral* tradition of the community, a common ideal shared and unquestioningly accepted by the majority.'<sup>272</sup> At least two problems seem to arise from this. Firstly, if it ought indeed to form a part of our public life, then we may always ask whether it does so in

<sup>270</sup> On this, see Kukathas, *Hayek and Modern Liberalism*, pp. 154-5; Rawls, *A Theory of Justice*, Chapter 1, §§ 3 & 4. It is on the basis of this understanding, moreover, that Kukathas is critical of Raz's assessment of Hayek's account of law. On this see Kukathas, *Hayek and Modern Liberalism*, p. 155; Raz, J., 'The Rule of Law and Its Virtues', in Raz, J., *Law and Morality*, Oxford, Oxford University Press, 1983, pp. 210-232. Of course, an essential part of this process is the frustration of some individual projects. On this see Hayek, *The Mirage of Social Justice*, pp. 1-3; *Rules and Order*, pp. 102-106. The contribution that such failure makes to the wider social process is that it acts as a vital signal to others contemplating similar courses of action.

<sup>271</sup> Kukathas, *ibid.*, pp. 95-6, 98, 101.

<sup>272</sup> Hayek, *The Constitution of Liberty*, p. 206; *Rules and Order*, p. 61.



Kantian or Humean terms, a question which Kukathas has shown is fraught with difficulty for Hayek. Secondly, we may claim that it runs counter to the evolutionary aspect of the theory of the natural selection of competing cultural traditions. The question here, of course, is what happens if our moral tradition evolves *away* from the view that privileges the Individual Liberty Principle? Before he sets out in greater detail his conception of law, Hayek's spends considerable time giving a historical-evolutionary account of the development of the idea of the rule of law that is quite consonant with his evolutionary leanings.<sup>273</sup> Yet it also leaves him with a serious problem for, as we have just seen, his Individual Liberty Principle is supposed to be rooted in the moral convictions of the populace whose interactions it orders. It seems that all that can be said here is that, not for the first time, Hayek has flatly contradicted himself. There is no point asserting the specifically moral importance of the ideal of individual liberty in the minds of the members of the polity as this would be in conflict with his evolutionary tone. Hayek, rather, should have abandoned moral claims altogether and grounded the public acceptance of the ideal solely upon epistemological considerations.

So much for Hayek's arguments for the rule of law. What does he say that its characteristics should be? For Hayek, the way we determine the justice of a rule is via a Kantian test of universalizability, which, he observes, ultimately amounts to a test of its consistency with the wider body of rules of which it is a part.<sup>274</sup> This test, however, does more than merely preclude the law in question referring to particular individuals or groups. It also factors in requirements of impartiality between agents and of neutrality between diverging preferences and tastes.<sup>275</sup> Beyond this, the result of the universalization test is that law possesses 'three main attributes: (1) that its rules be general [universal, in the sense above] and abstract; (2) that they be known and certain; (3) that they respect individual equality before the law.'<sup>276</sup> Importantly, Kukathas claims that, as long as any law possesses these attributes then according to Hayek, that law is just.<sup>277</sup> What this fleshing out of the test of universalizability achieves, moreover, is a more robust definition of the individual domain that Kukathas and Kley believe. Admittedly, it is one that we arrive at by default for, as Gray points out, the test will preclude most if not all policies of economic intervention as prejudicial to the interests of some and will fell all policies of legal moralism', rather than positively say what the individual domain must be.<sup>278</sup>

### ***6.i The Adequacy of Hayek's Legal Conception***

<sup>273</sup> Hayek, *ibid.*, Chapters 11- 13; *Rules and Order*, Chapter 4, esp. pp.81 – 85.

<sup>274</sup> Hayek, 'The Principles of a Liberal Social Order', p. 168 check; *The Mirage of Social Justice*, pp. 27- 8.

<sup>275</sup> Hayek, 'The Principles of a Liberal Social Order', p. 168 check; *Hayek on Liberty*, pp. 63-4.

<sup>276</sup> Kukathas, *Hayek and Modern Liberalism*, p. 155.

<sup>277</sup> *ibid.* Kukathas quotes Hayek from *The Constitution of Liberty*, p. 210 here.

<sup>278</sup> Gray, *Hayek on Liberty*, p. 64.

Of course, the question naturally arises as to the stability of the three criteria that Hayek claims restrict what one may classify as good law. Kukathas outlines some defects with the account of law, the first of which is that it is not clear whether the criteria for good law actually rules out many of the principles of justice that Hayek and liberals more generally would want ruled out, a critique that Richard Bellamy has more recently rehearsed.<sup>279</sup> More importantly for present purposes, however, is that for Kukathas the absence of a *moral* theory to ground Hayek's account of law means that the criteria of good law that he does offer – universality (generality), certainty and equality – 'are not sufficient to define the scope of the individual's protected domain in any substantive way.'<sup>280</sup> This is because some laws which liberals would not consider just – such as those pertaining to religious conformity and, we may add, to gender relations within the family and the legal status of homosexuals – may be quite general and yet be uniquely felt as onerous by some groups. Hayek, of course, attempts to sidestep this problem by claiming that the very private nature of such relations means that such laws do not limit conduct towards others and, as such cannot be acceptable as rules of justice. The judge, he tells us, is only concerned with the effects of individual action upon others and not with 'private' behaviour where one only affects oneself.<sup>281</sup> Yet, as Kukathas makes clear, this response presupposes that we are clear as to what constitutes affecting others. We may, after all, be thoroughly annoyed by the fact that others practice religions different to our own and in such terms claim that their behaviour affects us adversely. Having found Hayek's account of law wanting, then, Kukathas investigates whether any other aspect of Hayek's political philosophy may provide the hitherto absent account of individual domains and, as we have seen, concludes that it cannot. It is unclear, then, whether Hayek is capable of offering 'any moral theory which would enable us to specify the kinds of rules of entitlement, or identify the rights, which should characterise the liberal order'<sup>282</sup> without recourse to Kantian, *a priori* reasoning which, given his account of the changing nature of the very categories of reason is not an option open to Hayek.<sup>283</sup>

#### **6.ii The Common Law and the Judge as Authoritative Public Interpreter**

Yet, it is here where the Common Law judge assumes a central role in Hayek's account of law as the corrector of disturbances in the spontaneous legal order that emerge in the form of

<sup>279</sup> On this see Kukathas, *Hayek and Modern Liberalism*, pp. 157-9, 163-4; Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise*, pp. 29-32.

<sup>280</sup> Kukathas, *Hayek and Modern Liberalism*, pp. 159-65, Chapters 5 and 6, *passim*..

<sup>281</sup> Hayek, *Rules and Order*, p. 101.

<sup>282</sup> Kukathas, *Hayek and Modern Liberalism*, p. 167. Richard Bellamy raises similar concerns, in particular with respect to the Kantian strain in Hayek's legal thought in *Liberalism and Pluralism: Towards a Politics of Compromise*, London, Routledge, 1999 pp. 30-34.

<sup>283</sup> Kukathas, *ibid.*, pp. 140, 90-1.

disputes between different social agents.<sup>284</sup> What the judge does is discover the laws that are already implicit in pre-existing practices so as to resolve such disputes and, in so doing, establish which actions are permissible.<sup>285</sup> It is this function, moreover, that makes the law different from the social practices of the culture in that it comes to be discovered and articulated.<sup>286</sup> The process of the evolution of the common law within which individual domains are constantly redefined is in effect, then, Hayek's third discovery procedure. However, rather than an economic or cultural discovery procedure it is a legal or juridical discovery procedure that both facilitates and encompasses the economic and cultural discovery procedures. Of course, given the Limited Knowledge Thesis, the judge contributes to the advancement of law in dealing with new conflicts – and hence to the evolution of law itself – via a process of immanent criticism.<sup>287</sup> In addition, of course, this process is just how individual domains are defined and given definite - although, temporary - content. The three criteria of good law, then, can be interpreted as criteria to be held in the mind of the *judge* when they come to articulate the laws already latent in the culture which explain the verdict he makes in the particular case they preside over.

One may object here that investing such interpretative authority in the person of the judge will simply give him a free reign in the determination of individual fates. Narrow self-interest will perhaps further distort the legal process as the judge seeks to impose adjudications that are consonant with his own unadmitted interests. Consequently, what is needed is the democratic appointment of judges so that they will be directly beholden to the public on whose behalf they are supposed to deliver justice.

Yet, this objection would seem to be defective on at least two counts. Firstly, it ignores the authority of tradition - in the form of judicial precedent - that is ultimately the judge's guiding hand. What precedent achieves is to delimit in advance the kinds of adjudication that the judge can make, given the fact of the particular case before him. Indeed, that is what is meant by the judge's being 'bound' by precedent. Moreover, it is at best unclear how subjecting the appointment of judges to democratic procedures would do much to address the problem of self-interest in any case. On this occasion, of course, the judge would be beholden to the promises he makes in his election campaign - say a commitment to hang more and more child killers - as well as the often short-term interests of an outraged public with whom he now has a formal, and accountable relationship. It is hard to see how such a process would do anything but distort the judicial process, with often deadly consequences for the innocent, on a far larger scale than does the system of unelected judges.

<sup>284</sup> Hayek, *Rules and Order*, pp. 94-5, 119.

<sup>285</sup> *ibid.*, p. 123.

<sup>286</sup> *ibid.*, p. 72.

<sup>287</sup> *ibid.*, p. 118; *The Mirage of Social Justice*, pp. 24-7.

Thus, it is via the institution of the Common Law, which is itself continually subject to change, that we arrive at a method of delimiting individual domains consistent with Hayek's fundamental interpretative position. Individual domains never are decided once and for all but, rather, are continually redefined in the light of ever changing social, economic and cultural circumstances by individuals and, where they disagree or are in conflict, by judges.<sup>288</sup> What Hayek offers, then, is not a once-and-for-all ethical account of the proper limits of individual action and, conversely, the proper sphere of state action. Rather, he offers a means by which, in the face of the Limited Knowledge Thesis, we may seek to discover what those limits actually are via our own efforts and via the person of the authoritatively interpreting judge. None of this, however, betrays a lack of 'genuine moral reflection' in the process of defining the proper scope of individual domains. All it says is that for strong epistemological reasons, such reflection should not take place within politics but rather within culture and the legal process the outcomes of which the culture helps to shape via the operation of precedent.

## 7. Conclusion

We have seen how a Hayekian reformulation of the cultural as well as the economic problem facing society ultimately issues in a normative argument for liberal individualist institutions. Thus, not only are we able to recommend a particular kind of institutional arrangement, we may do so in a more comprehensive way than Hayek himself did, for with the interpretative rereading of the foundations of his theory we may re-orient his perspective as much to the cultural as to the economic or distributive domain.

The reason that we are able to do this, moreover, is because of the radically new reading of Hayek that we have defended. By emphasising the ultimately interpretative character of his social scientific and economic theories and, more importantly still, the conception of tradition-bound and epistemologically limited man that is implicit in them, we may expand the horizon of Hayek's concerns into the domain of culture. This, of course, is both a striking and new development because culture is a domain with respect to which it is not commonly thought Hayek's perspective would have much to say. This, then, is the unique and original achievement of the first part of this thesis for this new account of Hayekian justice recasts Hayek's defence of liberal individualist institutions as not just a procedure for the discovery and co-ordination of knowledge in the economy but also for the discovery of the same with regard to culture.

Moreover, reading Hayek in this new way allows us to make an original contribution to Hayek scholarship that issues in a rejection of two important criticisms. Firstly, we may take issue with a line of argument manifested in the work of Kukathas, Kley, Gray and

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<sup>288</sup> Hayek, *Rules and Order*, p. 119.

Bellamy concerning the problem of adequately defining individual domains. We have seen that such a critique is only telling if Hayek is unable to give an account of law that is consistent with his interpretative premises - something that he clearly does do. Secondly, we may reject what we have called Gray's marginality thesis, which is sound only if Hayek is understood to be uniquely concerned with economic arguments and the politics of distribution. We have seen that there is little reason to assume this once the interpretative dimension of his work is considered.

Finally, with this interpretative reading of his theory, we may place Hayek's political theory upon a sound philosophical foundation. Far from being a utilitarian, Kantian or instrumental defender of liberalism, we have characterised Hayek's theory as an interpretative defence of liberal individualist public institutions that enable society to discover rather than presuppose answers to questions of pressing economic, cultural and, ultimately, moral concern. The reason that we bestow individual rights in the Hayekian state, then, is so that we may find out what morality requires, rather than presuppose what it requires.

Of course, discovery-based minimalist liberalism is not the only possible answer to the challenge of cultural diversity and we do not want to know only that there is a possible Hayekian response to diversity but, more importantly, how, if at all, compelling it is. Answering this would seem to depend on two issues. Firstly, the extent to which the Hayekian perspective may be invoked to critique other theories of cultural justice and secondly the adequacy of the normative account of cultural justice that flows from it. With respect to the former, we may claim for now that the test of the adequacy of a normative theory of economic or cultural justice is the degree to which the institutions it endorses are sensitive to this reformulation. Let us turn next to some of the protagonists of the cultural turn outlined in Chapter One to see what, if anything, Hayek's interpretative liberalism may say about their theories of politics as responses to the challenge presented by cultural diversity. The first of these will be the response of what we will call the difference democrats.

***Part II: The Mirage of Cultural Justice?***

### 3 Difference, Democracy and the Politics of Interpretative Inclusion

#### 1. *Multiculturalism in Context*

I have claimed thus far that if one pursues an interpretative reading of Hayek, it is possible to invoke his perspective with respect to contemporary debates in political theory about justice, identity and difference, without relinquishing the philosophical importance of his interpretative reformulation of the economic problem faced by society. Yet, ultimately it is necessary to consider whether what can be said from such a perspective is in any way critically or positively compelling. What I will do in the chapters that follow, therefore, is apply the Hayekian perspective to some of the key contributions in these debates. Let us start with that of what shall be called multicultural or difference democracy.

As we have seen, for theorists such as Taylor, it is a mistake to claim that our identities are or can properly be conceived as being given. Rather, what his interpretative human science makes clear is that identities are constituted by us in concert with others, most notably in the first instance our families and thereafter with other members of wider society. For theorists such as Taylor, personal identity is intersubjectively or dialogically constituted.<sup>289</sup> This, of course, arises out of Taylor's interpretative social science that emphasises our embedded or tradition-bound nature. Equally central to Taylor's political concerns, however, is that the dialogical process of identity formation often involves the *misrecognition* of our identities by those around us, often with terribly oppressive consequences, not least an inescapable disposition of externally imposed self-loathing. Moreover, the problem of misrecognition of our identities has, of course, been a central concern of much feminist political theory.<sup>290</sup> Because of the potential for serious harm implicit in the dynamics of misrecognition, for Taylor '[d]ue recognition is not just a courtesy we owe people. It is a vital human need.'<sup>291</sup> With the vital importance Taylor attaches to the recognition and misrecognition of identity, then, comes a demand for a *politics* of recognition that seeks to make good the deleterious consequences of the latter.<sup>292</sup>

This politics of recognition may be thought of in two ways. The first way, associated most famously perhaps with the Civil Rights movement in the post-war United States, aims at

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<sup>289</sup> Taylor, C., 'The Politics of Recognition', *Multiculturalism: Examining the Politics of Recognition* (2<sup>nd</sup> ed.), Princeton, Princeton University Press, 1994, pp. 32-34. See also Horton, J., 'Charles Taylor: Selfhood, Community and Democracy', Carter, A. & Stokes, G. (eds.), *Liberal Democracy and Its Critics*, Cambridge, Polity Press, 1998, pp.155-174, esp. 166-167.

<sup>290</sup> Taylor, 'The Politics of Recognition', pp. 25-26.

<sup>291</sup> Taylor, *ibid.*, p. 25.

what we may call a universalist blindness towards our particular traits so that we may all enjoy equal rights and entitlements.<sup>293</sup> More recently, however, Taylor notes that the politics of recognition has come to be enunciated not in terms of the claim that public institutions ought to be blind towards our particular identities so that we may avoid drawing distinctions between first and second-class citizens. Rather it has been advanced in terms of the altogether different claim that it is precisely our particular identities that, for the sake of equality, should be afforded public recognition. This, Taylor explains, is a demand not for a politics of equal respect but for a politics of difference.<sup>294</sup> Moreover, more often than not, it is argued that the surest way of securing the equalisation of group identity is through a specifically democratic and discursive form of group-differentiated politics. In such a democratic politics, it is claimed, the diverse members of society may directly participate in discourses the outcomes of which have important consequences for their well-being.

In this chapter, I will claim that the account of difference democracy is inadequate in two important respects that the Hayekian reformulation of the cultural problem clarifies. In the first instance are the problems associated with group-differentiated representation and difference. The basic thrust of the argument here will be that difference democracy does not satisfy the ethical and epistemological claims often made on its behalf. In the first instance, this is because its commitment to group-differentiated decision-making leaves unanswered the ethical question of who is to represent the groups concerned. Moreover, the essentialisation that comes with any commitment to a group-differentiated public decision making procedure means that the difference democrats cannot keep pace with the ever-changing nature of the groups whose voices they seek to privilege. Rather than offering public institutions that enable us to answer the question of who belongs to which group and what the relative status of their members should be, the difference democrats rather assume that answers to such questions are already clear and uncontroversial. A similar Hayekian argument, of course, can be made with respect to the ethical and epistemological claims made on behalf of difference democracy as a specifically democratic form of public decision-making, for their privileging of a democratic discourse means that any public decision made with respect to resources or the positioning of the diverse members of society will be an irrational one.

Most fundamentally and in stark contrast to the Hayekian conception, however, the difference democrats' account of group-differentiated democratic institutions does not seek to answer the question of what is the proper relative standing of the diverse groups in society either in cultural terms (that is, which practices should be tolerated and what are the proper relationships between individuals from different communities) or economic terms (which

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<sup>292</sup> *ibid.*, p. 25.

<sup>293</sup> *ibid.*, pp. 37-38.

<sup>294</sup> *ibid.*, pp. 38-42. See also Horton, 'Charles Taylor: Selfhood, Community and Democracy', p. 167.



groups should enjoy what resources and in what quantities). Rather, it presupposes that a particular answer to this question has been given and that what that answer practically demands of us is readily apparent when the very fact of diversity, our mutual ignorance and the tacit nature of our cultural knowledge would suggest that this is never the case.<sup>295</sup> Consequently, and for the reasons set out above, it will be claimed that difference democracy is insincere with respect to its privileging of difference and diversity because it fundamentally misconceives the task of justice. That is, similarly to the neo-classical economic theory Hayek sought to reject on interpretative grounds, the cogency and persuasiveness of difference democracy's concern to equalise identities rests on an unfounded assumption of cultural equilibrium in which questions of culture are already assumed to have been answered. These problems, of course, are all the more surprising given the emphasis both Hayek and the difference democrats are keen to place upon the importance of identity.

I will start, then, by giving a brief overview of the difference democrats' position with respect to group-differentiated representation. In Section 3 I will criticize the difference democrats' account of representation and the ethical and instrumental claims made on its behalf. In section 4 I will consider the instrumental and ethical claims of the difference democrats' defence of a specifically discursive democratic form of decision-making. In the section following this, I will critically evaluate these claims and conclude that both in terms of group-differentiated representation and the deliberative account of democracy, both the ethical and instrumental claims of the difference democrats fail to hold and that this failure reveals the problematic account of the task of cultural justice that is at the heart of their theory.

## ***2. The Virtues of Group-Differentiated Representation***

For Iris Marion Young, the need for group-differentiated representation arises from a concern with the domination and oppression of marginalized social groups.<sup>296</sup> Young wishes to mitigate these problems by offering a politics predicated on difference that enables the dominated and the oppressed to have a say on the socio-economic processes that give rise to

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<sup>295</sup> This ties in with Phillips's comment about the difference democrats presupposing a radical redistribution of resources as a pre-condition on the discourse running properly. On this see Phillips, A., *The Politics of Presence*, Oxford, Oxford University Press, 1995, p. 154; 'Dealing with Difference: a politics of ideas or a politics of presence?' p. 144. See also Williams, M., 'The Uneasy Alliance of Group Representation and Deliberative Democracy', Kymlicka, W. and Norman, W. (eds.), *Citizenship in Diverse Societies*, Oxford, Oxford University Press, 2000, pp. 141-144; *Justice and the Politics of Difference*, p. 94.

<sup>296</sup> Following Mansbridge, I will assume a broad co-extensiveness between the terms 'group-differentiated representation', 'descriptive representation', 'politics of presence', 'mirror representation' and 'self-representation.' On this see Mansbridge, J., 'What does a Representative Do? Descriptive representation in Communicative Settings of Distrust, Uncrystallized Interests, and Historically Denigrated Status', Kymlicka, W. and Norman, W. (eds.), *Citizenship in Diverse Societies*, Oxford, Oxford University Press, 2000, pp. 99-123, p. 100.

their economic and culturally marginal status. She does so with recourse to the two important notions of her account of social understanding: mediated social relations and social groups as identity-conferrers.<sup>297</sup> The notion of mediated social relations, embodied in the ideal of city life, acts as the starting point for the construction of the Politics of Difference. For Young

... [t]he city consists in a great diversity of people and groups, with a multitude of sub-cultures and differentiated activities and functions, whose lives and movements mingle and overlap in public spaces. People belong to distinct groups or cultures, and interact in neighbourhoods and workplaces. They venture out from these locales, however, to public places of entertainment, consumption and politics. They witness one another's cultures and functions in such public interaction, without adopting them as their own.<sup>298</sup>

Thus, the inhabitants of the city 'are externally related, they experience each other as other, different, from different groups, histories, professions, cultures, which they do not understand.'<sup>299</sup> Furthermore, they 'live side by side in public places, giving to and receiving from one another social and aesthetic products, often mediated by a huge chain of interactions.'<sup>300</sup> The politics of difference, then, takes the structural features of urban social relations as an normative ideal conceived as 'a relationship of strangers who do not understand one another in a subjective and immediate sense' and who relate 'across time and distance'<sup>301</sup> but who nonetheless are capable of living together under conditions of justice. Mediated city life as a normative ideal is embodied at the level of public political deliberation by the notion of the group-differentiated heterogeneous public in which the social differences between the diverse members of society are publicly acknowledged as irreducible inasmuch as their group-differentiated histories and perspectives are to an important extent mutually incomprehensible.<sup>302</sup> Given this, for Young public political deliberation 'requires not principles that apply to all people in the same way, but a nuanced understanding of the particularities of the social context, and the needs particular people have and express within it.'<sup>303</sup> Given, moreover, the account of social groups as important identity-conferring entities, Young argues that the oppressed among them ought to have a specific voice within the

<sup>297</sup> For a critical evaluation of the role these notions play in Young's wider political theory, see Tebble, A. J., 'What is the Politics of Difference?', *Political Theory*, vol. 30, no. 2, (2002), pp. 259-281.

<sup>298</sup> Young, 'The Ideal of Community and the Politics of Difference', p.21.

<sup>299</sup> Young, 'The Ideal of Community and the Politics of Difference', p.21; see also Young, 'Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought', *Intersecting Voices: dilemmas of gender, political philosophy and policy*, Princeton, Princeton University Press, 1997, pp.38-59.

<sup>300</sup> Young, 'The Ideal of Community and the Politics of Difference', p.21.

<sup>301</sup> Young, *Justice and the Politics of Difference*, p.234.

<sup>302</sup> Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship', p. 258.

<sup>303</sup> Young, *Justice and the Politics of Difference*, p. 96.

heterogeneous public<sup>304</sup> and envisions that this will occur via the mechanism of group-differentiated public decision-making.<sup>305</sup>

In a similar although be no means identical vein, Anne Phillips hopes to remedy group exclusion by invoking a distinction between a politics of ideas and a politics of presence. Again, similarly to Young, Phillips traces the demand for a politics of presence from the emergence of new (left) social movements and their desires to rectify inequalities and relations of power in the agenda of a politics dominated by ideas.<sup>306</sup> The problem with a characterisation of public decision making as exclusively a politics of ideas - that is, a politics where public contestation is founded upon a diversity of beliefs, opinions, preferences and goals that are 'detachable' from those who hold them<sup>307</sup> - is that it 'does not deal adequately with the experiences of those groups who by virtue of their race, ethnicity, sexuality, religion or gender have felt themselves excluded from the democratic process.'<sup>308</sup> More problematically, for Phillips a focus solely upon a politics of ideas rather suggests that the range of ideas on offer itself will be curtailed or distorted by 'orthodoxies that rendered alternatives invisible.'<sup>309</sup>

Working along similar lines, Jane Mansbridge offers two arguments in favour of group-differentiated or 'descriptive' representation. Firstly, such representation enables members of hitherto marginalized groups to overcome their distrust of the political process and of politicians in general by virtue of the similarity of the representatives to themselves, an argument also made by Melissa Williams.<sup>310</sup> Secondly, and acknowledging the dynamic nature of public political discourse, she claims that descriptive representation enables the representative to represent interests that are as yet 'uncrystallized' on the public agenda because they are new to it.<sup>311</sup> The way, of course that this crystallization takes place is

<sup>304</sup> *ibid.*, p. 263; 'Polity and Group Difference: a critique of the ideal of universal citizenship', p. 262; *Inclusion and Democracy*, pp. 141-148.

<sup>305</sup> *ibid.*, p. 91.

<sup>306</sup> Phillips, *The Politics of Presence*, pp. 8 - 9, 167. Indeed, in a manner similar to Hayek's grounding of the need for justice upon our irremediable ignorance, for Phillips the very fact of difference is what makes politics - including a politics of difference - a necessity. 'If some freak of history or nature had delivered a polity based on unanimous agreement, then politics would be virtually redundant and the decisions would already be made.' *The Politics of Presence*, p. 151.

<sup>307</sup> Phillips, A., 'Dealing with Difference: A Politics of Ideas, or a Politics of Presence?', in Benhabib, S. (ed.), *Democracy and Difference: Contesting the Boundaries of the Political*, Princeton, Princeton University Press, 1996, p. 140.

<sup>308</sup> Phillips, 'Dealing with Difference: A Politics of Ideas, or a Politics of Presence?', p. 141; *The Politics of Presence*, p. 6.

<sup>309</sup> *ibid.*, p. 142.

<sup>310</sup> Mansbridge, 'What does a Representative Do? Descriptive Representation in Communicative Settings of Distrust, Uncrystallized Interests, and Historically Denigrated Status', pp. 111-113; 'Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"', *The Journal of Politics*, volume 61, number 3, August 1997, pp. 628-657; Williams, M., *Voice, Trust and Memory: Marginalized Groups and the Failure of Liberal Representation*, Princeton, Princeton University Press, 1998.

<sup>311</sup> *ibid.*, pp. 114-119.

through a process of what Mansbridge calls ‘introspective representation.’<sup>312</sup> Here a representative consults the opinion of his mirror group *in absentia* by consulting his own opinion with respect to a particular issue in the sure knowledge that any conclusion arrived at will be broadly congruent with those of the mirror group, due to the shared nature of their experience *qua* member of the group in question.

What, then, are the benefits of such decision-making? There appear to be at least two. In the first instance, for theorists such as Young, group-differentiated representation ‘better assures that all needs and interests in the public will be recognized in deliberations’ and, as such, will serve to legitimate any decisions arrived at.<sup>313</sup> Moreover, and in a more instrumental vein, the conveying of this new information from hitherto silenced or marginalized groups increases the amount of social knowledge - practical wisdom - as a whole.<sup>314</sup> For difference democrats ‘[a] public that makes use of all such knowledge in its differentiated plurality is most likely to make just and wise decisions.’<sup>315</sup> Thus, the difference democrats typically offer what can be construed as moral and instrumental arguments in favour of group-differentiated representation of the marginalized.

### 3. *The Adequacy of Group-Differentiated Representation*

As we have seen, the theorists we have considered are sensitive to the problem that essentialisation poses for group-differentiated representation. Consequently, in the main they conceive groups as fluid, relational, crosscutting and manifesting undecidable boundaries. Young, for example, asserts this anti-essentialist account to avoid a charge of chauvinism. ‘Oppression,’ she writes,

has often been perpetrated as a conceptualization of group difference in terms of unalterable essential natures that determine what group members deserve or are capable of, and that exclude groups so entirely from one another that they have no similarities or overlapping attributes. To assert that it is possible to have social group difference without oppression, it is necessary to conceptualize groups in a much more relational and fluid fashion.<sup>316</sup>

Indeed, she argues in *Inclusion and Democracy*, ‘[i]f a politics of difference requires such internal unity coupled with clear borders to the social group, then its critics are right to claim that such politics divides and fragments people, encouraging conflict and parochialism.’<sup>317</sup>

<sup>312</sup> *ibid.*,

<sup>313</sup> Young, *Justice and the Politics of Difference*, p. 185.

<sup>314</sup> Young, ‘Polity and Group Difference: A Critique of the Ideal of Universal Citizenship’, p.264. See also *Inclusion and Democracy*, pp. 83, 112-113.

<sup>315</sup> Young, *Justice and the Politics of Difference*, p.186.

<sup>316</sup> *ibid.*, p.47; see also ‘Difference as a Resource for Democratic Communication’, *passim*.

<sup>317</sup> Young, *Inclusion and Democracy*, p. 88.

Yet, Young offers no account to explain why social group-differentiated domination and oppression is normatively significant whilst the oppression of a sub-group from *within* a social group is not. It seems that sub-groups are just as important as social groups as objects of domination and oppression. This is because membership of more than one social group may be the source of oppressive and dominating relations for the same individual at any given time. Indeed, we have seen that Young explicitly associates multiple group membership with the complex nature of contemporary societies in which numerous groups coexist and define the self-understandings of any given individual in that society. One may, for instance, identify oneself as both black and gay and therefore identify oneself with others who do the same. Out of this process emerges a distinct grouping - black gays - that is exhaustively identified by neither the black nor the gay social group. Thus, one is led to postulate the existence of a distinct sub-group that may be oppressed not as either black or gay but as black and gay. Being black in a largely white society might be the main source of oppression and domination for some and yet, as black and gay a significant, perhaps the most significant, aspect of their identity may be underplayed if not completely marginalized within the black social group with which they also identify. This, clearly, would constitute an important source of oppression and domination given Young's own definitions.

Of course, Young does mention that the issue of subgroup oppression is significant to the extent that subgroup members may be marginalized, silenced, demonised, forced out of or effectively excluded from a wider social group<sup>318</sup> and claims that sub-groups should have specific representation in those institutions set up by oppressed social groups of which they are a part.<sup>319</sup> Nevertheless, this is not the same as direct representation at the wider level of the heterogeneous public. Given that sub-group members may, as Young acknowledges, be oppressed within their own social group they should deserve representation within the heterogeneous public. Young only says, however, that they should have say on the affairs internal to the wider group to which they belong. However, in the absence of *guaranteed* representation in the heterogeneous public this seems only to beg the question of their oppression within the social group. For if they are dominated or oppressed in this way it is hard to see how they would have any say at all, without that say being *specifically guaranteed* as it is for social groups. Moreover the same would seem to hold in the case of micro groups within the sub-group, leading ultimately to the social agent that, perhaps, admits of no further sub-division: the individual.<sup>320</sup> Once the fluid and crosscutting nature of social group membership is asserted it seems difficult to deny the importance of sub-sub-groups - black, Christian gays - and even ultimately of individual domination and oppression.

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<sup>318</sup> Young, 'The Ideal of Community and the Politics of Difference', p. 13; *Justice and the Politics of Difference*, p. 187; *Inclusion and Democracy*, pp. 87 - 89, 143.

<sup>319</sup> Young, *Justice and the Politics of Difference*, p.187.

Thus, Young needs to provide an account of why subgroups should be *denied* '(1) self-organization of [sub] group members so that they gain a sense of collective empowerment and a reflective understanding of their collective experience and interests in the context of the [group]';<sup>321</sup> (2) voicing a sub-group's 'analysis of how social policy proposals affect them, and generating policy proposals themselves, in institutionalised contexts where [group-level] decision makers are obliged to show that they have taken these perspectives into consideration'<sup>322</sup> and '(3) having veto power regarding specific policies [that affect a sub-group directly]'.<sup>323</sup> There seems, then, no principled way, given the anti-essentialist account of social groups that is necessary to forestall the same critique that she launches against the ideal of community, to avoid the slippery slope to individuals who would qualify, if dominated or oppressed, for specific representation. Yet, it is guarantees like these that Young is committed to withhold if the Politics of Difference is to preserve social group-differentiated representation in order to offer a politics distinct from standard liberal and communitarian accounts of justice. If Young were to prioritise the anti-essentialist account, the rationale for prioritising the group-differentiated nature of political representation would disappear and we would be left with a criterion of representation – oppressed individuals – that looks uncannily liberal. However, given the complexities that would arise with a formal public commitment to individual history, need and perspective – that is to *individual* particularity – the Politics of Difference would quickly become unworkable, unless, of course, one was prepared to commence the process of abstraction to a theory of a common human nature. This, however, would seem to have a good chance of issuing in liberal impartialist principles of justice in the shadows of which lurk the understandings of the privileged.<sup>324</sup> The difference democrats appear to be trapped by their desire to rehabilitate the marginalized voices of oppressed and dominated social groups and the need to advance a fluid, crosscutting conception of social groups to avoid such domination and oppression at the micro or group-specific level.

Phillips, of course, is not committed to any strong conception of group representation.<sup>325</sup> For despite any positive epistemological and ethical contributions a politics of presence may make to public discourse in the wider polity, Phillips is keenly aware of the problem of essentialising group-membership, or the common experience it is said to

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<sup>320</sup> Postmodernists may, of course, be unified in their desire to contest this.

<sup>321</sup> Young, 'Polity and Group Difference: A Critique of the deal of Universal Citizenship', p.261.

<sup>322</sup> *ibid.*, p.261-262.

<sup>323</sup> *ibid.*, p.262.

<sup>324</sup> Young does concede in *Inclusion and Democracy* that it is impossible to reduce politics to individual need interpretation/satisfaction but that this is a problem for all theories. On this, see p. 143, paragraph 3.

<sup>325</sup> Phillips, *The Politics of Presence*, p. 21, Chapter 2, *passim*.

represent.<sup>326</sup> In particular, she highlights the problem that even if we attempt to address the essentialisation of groups by pluralizing the representation of the diverse perspectives within them, ‘there is no way of knowing in advance whether diversity has been successfully acknowledged.’ ‘[E]ven if the boundaries are significantly pluralized,’ she writes, ‘they still define in advance what are the appropriate or relevant differences.’<sup>327</sup> Ultimately, however, Phillips contends that the groups concerned are themselves sufficiently dynamic and a constant hotbed of disputation for the problem of group-specific essentialisation not to be very acute. Of far more acute difficulty, is the problem the essentialisation of group identity presents public discourse in the wider polity. Here, Phillips invokes a range of responses from the strategic redrawing or redefining of constituency boundaries to the reform of party political election shortlists that favour candidates from certain groups.<sup>328</sup>

Similarly, both of Phillips’s responses to the problem of essentialisation do not address the epistemological problem of representation - that is, the problem of ‘epistocracy’ where epistemological and decision-making authority is conferred upon select members of the group - in any fundamental way. The problem of the epistocracy both within and between groups still remains.<sup>329</sup> If we redefine boundaries or instigate group-specific shortlists, we still do not address the ethical and epistemological problems of hierarchy within groups, despite obviously attempting to address them between groups.

Secondly, Phillips does not question whether the monopoly powers of the discursive democratic state are themselves either acceptable or necessary for adequate public decision-making. At this level of analysis, there is little to distinguish her position from one such as Young’s. Phillips, then, does not reject deliberative democracy despite being sympathetic to difference.<sup>330</sup> Dryzek, of course, sides with Phillips here in denying that deliberative democracy precludes or represses difference. Appealing to the concept of the ‘contest of discourse’ he claims that deliberative democracy may deal with the fact of difference because it does allow a variety of modes of communication to enter into the decision-making

<sup>326</sup> *ibid.*, pp. 9 - 10, 52 - 54, 155 - 160; ‘Dealing with Difference: A Politics of Ideas, or a Politics of Presence?’, pp. 144 - 146.

<sup>327</sup> Phillips, ‘Dealing with Difference: A Politics of Ideas, or a Politics of Presence?’, p. 146. She does note, of course, that this is not such a problem for political movements as they are already radically democratised. Yet, this does not address the theoretical problem.

<sup>328</sup> Phillips, *The Politics of Presence*, p. 7, Chapters 3 and 4; ‘Dealing with Difference: A Politics of Ideas, or a Politics of Presence?’, pp. 149-150.

<sup>329</sup> The term is Estlund’s. See Estlund, D., ‘Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority’, Bohman, D. and Rehg, W. (eds.), *Deliberative Democracy: Essays on Reason and Politics*, Cambridge, Mass., MIT Press, 1997, pp.173 - 204, p. 183. Yet, regardless of whether the specific recommendations Phillips discusses that are intended to address the lack of presence in politics are adequate to the task she sets them, there are other problems with her formulation of politics. First of all, it seems that ultimately the notion of presence is, at best, subservient to the notion of the idea in politics. For Phillips, it seems we need a politics of presence in order to make use of ideas that would otherwise be lost to political discourse.

<sup>330</sup> Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, p. 62.

process.<sup>331</sup> How, though, is his theory any different from Young's? It is different insofar as it attaches the conditions that the form of communication not bring with it coercion or the threat of coercion and that it does not fail to connect the particular to the general or, in other words, is not purely concerned with one individual's perspective or identity.<sup>332</sup> Furthermore, the core deliberative notion of (dispassionate, reasonable) argument is always present in the decision-making process in a way that other modes of communication – such as storytelling, testimony, greeting and rhetoric – do not have to be.<sup>333</sup> Yet, we may ask, precisely whose form of communication is being made present here and how is this selection itself not exclusionary, given that the only person represented by that communication is the communicator himself?

### *3.i Institutions and the Ontological Dynamism of Groups*

It is useful at this juncture to examine Chandran Kukathas's criticism of Will Kymlicka as assuming that groups are ontologically given. For despite Kymlicka's being an overtly liberal egalitarian theory - one that we will consider in detail in the next chapter – Kukathas's arguments are also telling against theorists such as Young.<sup>334</sup> 'The primary reason for rejecting the idea of group claims as the basis of moral and political settlements,' Kukathas writes, 'is that groups are not fixed in the moral and political universe.' Rather, they are 'constantly forming and dissolving in response to *political and institutional circumstances*.'<sup>335</sup> Neither, he remarks later on, are they internally homogenous.<sup>336</sup> What, I think, is most interesting about Kukathas's two-fold claim concerning the ontology of groups is that, despite their criticisms of liberal individualism as presupposing an untenable ontological atomism, the proponents of group rights are themselves group-level atomists who have to assert the givenness of groups in order that they may be clearly defined. Of course, in doing so they do not answer but rather merely transpose the problems of atomism to a new, group-differentiated level. This, of course, needs to be done so that we actually have something - the group - that can act as the bearers of the rights to be parcelled out.

What is interesting about Kukathas's critique, then, is that the proponents of group rights are usually highly critical of the ontological individualist 'atomism' of liberalism and it is with this concern in mind that they posit group-differentiated rights in the first place. 'Liberalism's individualist premises,' Kukathas argues, are for the multicultural theorist, 'unacceptable because any conception of an individual presupposes some view of society and

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<sup>331</sup> *ibid.*, pp. 74 – 80.

<sup>332</sup> *ibid.*, pp. 68 – 71.

<sup>333</sup> *ibid.*, pp. 71.

<sup>334</sup> Kukathas, C., 'Are there any Cultural Rights?', *Political Theory*, vol. 20, no. 1, (1992), pp. 105 – 139.

<sup>335</sup> *ibid.*, p. 110.

<sup>336</sup> *ibid.*, p. 113.



community since individuals are social beings.<sup>337</sup> Consequently, if we give priority to individuals and conceive of them as separable from their affiliations - their cultural groups as 'contexts of choice', as Kymlicka would say<sup>338</sup> - their argument goes, then by default any normative debate about justice is biased towards that culture to which the majority of these individuals adhere. Thus, in the liberal project, the importance of constitutive group-level attachments – particularly those of marginalized or dominated groups – are by definition left out of the picture because the emphasis upon individuality ignores them. Yet, in advocating group rights upon the basis of this concern the proponents of group rights merely repeat the errors of atomism they claim mark liberal individualism. Of course, as Kukathas points out, the proponents of group-differentiated rights can always claim that the fact that groups are dynamic in this sense certainly does not entail that presently-constituted groups ought not be accorded rights of their own, more specifically, rights to their protection so as to ensure continued survival.<sup>339</sup> Indeed, given at least Kymlicka's claim that the group-differentiated rights he argues for are distinctively *liberal* rights insofar as they are instrumental to providing a context of choice to *individuals*, denying groups these rights would be a public bad, rather than a public good.<sup>340</sup> Yet, Kukathas contends that to 'choose conservatively' in this manner and protect already-existent groups would merely be to reinforce current group-specific hierarchies, at the expense on the internal diversity of those groups.<sup>341</sup> The internal diversity of groups, then, is again precisely what advocates of group-differentiated rights tend to play down or ignore. If they were to pay it sufficient attention, it swiftly would become clear that the kind of entity to which these group-differentiated representative rights are supposed to adhere is not there to receive them. It is in this sense, then, that Kukathas claims that 'the divided nature of cultural communities strengthens the case for not thinking in terms of cultural rights.'<sup>342</sup>

Now, Kukathas's two aspects of the ontology of groups – their dynamism and internal diversity - actually run together in the sense that the fact of the latter to a large extent is both the precondition and explanation of the former. This becomes clearer when it is realised that their internal diversity is itself dynamic; that is, cultural groups are themselves internally diverse in continually new ways and it is this fact that cause the group to constantly change its character. This is something that Kukathas does not claim himself but we can make it is a supplementary claim that is of significance insofar as it relates to the development of the neo-Hayekian argument concerning the need for institutions and norms that allow this process to

<sup>337</sup> *ibid.*, p. 108.

<sup>338</sup> Kymlicka, *Liberalism, Community and Culture; Multicultural Citizenship, passim.*

<sup>339</sup> Kukathas, 'Are there any Cultural Rights?', p. 112.

<sup>340</sup> *ibid.*, p. 112.

<sup>341</sup> *ibid.*

<sup>342</sup> *ibid.*, p. 114.

occur. This is the need for institutions that do not second-guess the ‘content’ of the group’s character. Now, this all ties in with the third aspect of Kukathas’s ontological holist claim that groups are ‘constantly forming and dissolving in response to *political and institutional circumstances*.’<sup>343</sup> In politics how groups are important and to what extent they should feature in people’s lives are questions that can only be meaningfully answered by individuals. It is for this reason that the proponents of group-differentiated representation err when they advocate group-differentiated rather than liberal individualist institutional arrangement. Given this, the task is to outline a set of institutions that best reflects the fact of the dynamism of groups and what the neo-Hayekian argument points to is that the market is the most appropriate institution for the *eliciting* of their ever-unfolding character (on a free and equal basis) because it does not presupposes neither their ontological stasis nor their internal homogeneity. Yet, by according groups differentiated representation *now* as the difference democrats do precludes precisely this dynamic development.

Of course, in her most recent book, *Inclusion and Democracy*, Young has responded to three criticisms of her account of the social group as formulated in *Justice and the Politics of Difference* and elsewhere: that of neo-Republicans such as Jean Elshtain, liberal nationalists such as of David Miller and socialists such as Todd Gitlin and David Harvey.<sup>344</sup> Briefly, the neo-republican criticism is that a group-differentiated politics of difference destroys the common good around which the political participation of all, regardless of background, gender, sexuality, age, income or race should orient their participation in public deliberation. For the liberal nationalists such as Miller the problem is that it ‘endangers the national identity, which ought to be the primary focus of political debate,’<sup>345</sup> whilst for the socialists an identity-based, group-differentiated politics undermines class solidarity and ‘freezes different groups in opposition to one another.’<sup>346</sup> Despite the differing perspectives from which their criticisms arise Young claims that they are united in conceiving of the social group as premised upon an essentialist ‘logic of substance’ in which ‘the project of organizing in relation to group-based affiliation and experience requires identifying one or more personal or social attributes which make the group what it is.’<sup>347</sup> Yet, as we have seen, for Young this is to misunderstand the nature of the social group as she has set it out for it ‘freezes the experienced fluidity of social relations by setting up rigid inside-outside

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<sup>343</sup> *ibid.*, p. 110.

<sup>344</sup> The particular critiques that Young responds to can be found in Elshtain, J., *Democracy on Trial*, New York, Basic Books, 1995; Miller, D., *On Nationality*, Oxford, Oxford University Press, 1995; Gitlin, T., *Twilight of Common Dreams*, New York, Metropolitan Books, 1995 and Harvey, D., *Justice, Nature and the Geography of Difference*, Oxford, Blackwell, 1996.

<sup>345</sup> Young, *Inclusion and Democracy*, p. 85.

<sup>346</sup> *ibid.*, p. 86.

<sup>347</sup> *ibid.*, p. 87.

distinctions among [and, one may add, within] groups.’<sup>348</sup> This, of course, is politically significant, for it is only if one conceptualises the social group in terms of a substantive rather than relational logic that the charge of essentialisation or reification of the group at the level of ontology, and various other, normative criticisms such as that of antagonistic group self-interest, the denial of the perspective of those who view their identity as either unimportant or dangerous, the myth of group unity and the denial of difference within the group can arise.<sup>349</sup> Now, as we have seen, Young contends that if this were what she was attempting to do with the conception of social groups then critics of it ‘would be right to claim that such politics divides and fragments people, encouraging conflict and parochialism.’<sup>350</sup> Yet this is not, she maintains, what she has been trying to do in asserting the need for a group-differentiated politics. Rather, in contrast to the substantive approach, Young says that she has been offering a “structural” reading of the group where one retains ‘a description of social group differentiation, without fixing or reifying groups.’<sup>351</sup> At the level of politics, such structures, Young claims, all too often leave people in unequal positions with respect to power, the distribution of resources or the capacity to participate in and shape the agenda of public deliberation.<sup>352</sup> Consequently, she argues that ‘[c]laims of justice made from specific social group positions expose the consequences of such relations of power or opportunity’,<sup>353</sup> and it is this as opposed to the idea - predicated upon a substantive or essentialised understanding of group identity - that makes political demands for the recognition of disparate identity groups telling. For this reason, Young is keen in *Inclusion and Democracy* to disassociate the Politics of Difference from identity politics.<sup>354</sup>

How convincing is this defence? In fairness to Young, it is probably right to say that if her reading of their criticisms is correct her detractors have misunderstood in a rather fundamental way the purpose of the social group in Young’s political theory. Indeed, it may be considered fairly generous of Young to respond to these criticisms at all for at least since *Justice and the Politics of Difference*, any careful reading of her work would clearly show that hers has indeed *never* been an identity politics in the sense of ethnicity, culture or religion. The position of those on low wages, or of single mothers, or of the elderly and perhaps gays (if theirs is not to be considered, as it should not be, as a *cultural* grouping) have *always* assumed a prominence alongside more obviously cultural groupings such as North American

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<sup>348</sup> *ibid.*, p. 88.

<sup>349</sup> *ibid.*, pp. 88 - 9.

<sup>350</sup> *ibid.*, p. 88.

<sup>351</sup> *ibid.*,

<sup>352</sup> *ibid.*, p. 86-7.

<sup>353</sup> *ibid.*, p. 87.

<sup>354</sup> *ibid.*, Chapter 3, esp. pp. 87-92, 99-107.

ethnic and religious minorities and, more latterly, European immigrant minorities.<sup>355</sup> Significantly, in *Inclusion and Democracy*, Young claims that neither she, nor Kymlicka for that matter, advocate group-differentiated representation of the oppressed on the ‘simple grounds of diversity, recognition, or the assertion of group identity’ *per se*. “Groups,’ she writes, ‘do not deserve special representation in inclusive decision-making bodies ... just so they can express their culture in public discussion or be recognized in their distinctiveness.’<sup>356</sup> Rather, their representation is always grounded as a response to their domination and oppression. This, then, is a response to the false charge that Young seeks to celebrate difference for its own sake. Celebration in Young, rather, is functional to the rehabilitation of the voices of the oppressed and dominated and, as such, is conditional upon these two states of affairs being central to the experience of the group in question.

Yet, this does not resolve much at all, for the fact that Young’s is not a group-based identity politics is not the main problem with it. It is, rather, that *however* the unessentialised, collective entity is to be described at the ontological, social scientific level - whether as a social group, as a ‘serialised’ social group,<sup>357</sup> or as a ‘structural’ social group - that of itself does nothing to rebut the charge that, at the level of politics and political institutions, such groupings must by necessity be essentialised so that they may be the fitting subjects of politics. In Young’s case, this means groups as the bearers of discourse rights and/or veto powers in the heterogeneous public. It is here, not at the level of social ontology, where the essentialisation process begins and which so vitiates the earlier, ontological, characterisation of groups as relational, fluid and crosscutting with indeterminate borders. Moreover, and more importantly, what this means is that the very act of institutionalising such representation means that the ethical and instrumental claims of the difference democrats on behalf of group-differentiated representation are made immediately vulnerable. Miller *et al* may have missed the point, but so has Young, for it is irrelevant where the reification or essentialisation of groups begins, but, rather, if and *when* it begins.

Young’s response, then does nothing to address the epistemological problem of maximising the utilisation of dispersed and tacit knowledge in the efface of complexity nor the related moral problem of the silence of those represented by the representatives in these plural associations. Nor, for that matter, does it address the problem of the inevitable inequity of the system- or aggregate outcomes that are resultant from the relations between them, the solution to which is one of the principal rationales for deliberative democracy in the first place. Similarly, Mansbridge and Williams’s claims are overdrawn. In the case of the first

<sup>355</sup> The latter of which receive attention in the discussion of urban segregation processes in *Inclusion and Democracy*. On this see Young, *Inclusion and Democracy*, 201-4.

<sup>356</sup> Young, *Inclusion and Democracy*, p. 146.

<sup>357</sup> On this see Young, I. M. ‘Gender as Seriality’, *Intersecting Voices: dilemmas of gender, political philosophy and policy*, Princeton, Princeton University Press, 1997, pp. 12 - 37.

claim concerning trust, it seems to be just as likely that the representative comes to be associated in the minds of the mirror group with the political establishment that is the object of their distrust, given especially the fact that he must already be sufficiently different from them to be able to enter into and interact with the political class in the first place. That is, it does not attend in any significant way to the representatives' own position within the hierarchy of the group and the ways in which this positioning will colour the kinds of introspectively arrived-at conclusions he draws. In the case of the second claim concerning uncrystallized interests, it seems that introspective representation does not afford some privileged access to the opinion of the mirror group any more than it does.

One important sphere of discourse that is absent from Young's account is that of ideology. Ideology for Young is not a perspective but, rather, an interest and as such does not qualify for our attention when we attempt to decide which groups should be accorded special representation in politics. It is clear, furthermore, why this may be the case. Ideology is one sphere of discourse that is subversive of a politics that is configured along group-differentiated lines for it tends to be reflected in the diversity of viewpoints that is characteristic of any social group. Some women, for instance, will be socialists whilst others will be fascists; some gays may see themselves as anarchists whilst others will be traditionalists; some men will be Marxists whilst some blacks will be libertarians. Given this, even if we confer group-differentiated representation in the discourse it is unclear how doing so will alter its content. Participants may of course cite their cultural affiliation as the reason *why* they have come to have the views they do have but this does not alter the fact that they have a view that is transcendent of their particular background. Marxists, whether black or white, for instance, tend to recommend the same or similar policies and once this is accepted it calls into question the need for the discourse to be group-differentiated. If, that is, I am to argue for redistribution because, as a member of a hitherto marginalized race, I have suffered from distributive inequity, it is not at all clear how somebody else - say someone from a privileged race and an upper income level who has come to see that distributive inequality is generally a bad thing - cannot do the same. Group-differentiated representation, therefore, does not seem to add anything to the public discourse the difference democrats are so keen to defend.

#### ***4. From Group-Differentiated Representation to Deliberative Democracy***

What, then, of the relationship between multiculturalism and a specific endorsement of a deliberative democratic conception of politics? For Taylor, the link between a concern with the 'politics of recognition' and a deliberative democracy is a clear one. Given that we are actively involved in the constitution of our identities in terms of a reflection upon our own received traditions and engagement upon the basis of them with others from different

traditions, any public recognition of those identities must facilitate such reflection and engagement. In brief, 'a society that recognizes individual identity will be a deliberative, democratic society because individual identity is partly constituted by collective dialogues.'<sup>358</sup> Similarly to Taylor, in 'Asymmetrical Reciprocity: On Moral Respect, Wonder and Enlarged Thought' Young seeks to establish a necessary relationship between difference and democracy:

Just because social life consists of plural experiences and perspectives, a theory of communicative ethics must endorse a radically democratic conception of moral and political judgement. Normative judgement is best understood as the product of dialogue under conditions of equality and mutual respect. Ideally, the outcome of such dialogue and judgment is just and legitimate only if all the affected perspectives have a voice.<sup>359</sup>

In addition, of course, what makes *Inclusion and Democracy* such a different book to *Justice and the Politics of Difference* is that it is entirely premised upon the idea that democracy of some sort is the logical institutional conclusion of a concern for difference.<sup>360</sup> Similarly, following Young and Cohen, Benhabib believes that decisions are legitimate if they result 'from processes of collective deliberation conducted rationally and fairly among free and equal individuals.'<sup>361</sup> Importantly, and again similarly to Young, for Benhabib, not only do deliberative models of democratic politics bestow validity or legitimacy upon public decisions, they also confer what she calls 'practical rationality' upon them. That is, deliberative democratic decision-making facilitates the imparting of new and otherwise irretrievable information 'because 1) no single individual can anticipate and foresee all the variety of perspectives through which matters of ethics and politics would be perceived by different individuals; and 2) no single individual can possess all the information deemed relevant to a certain decision affecting all.'<sup>362</sup>

Another kind of argument for deliberative democracy focuses upon its difference from standard accounts of liberal justice concerning the formation and public appraisal of preferences. John Dryzek, for instance, contends that at the core of liberalism are the claims

<sup>358</sup> Gutmann, A., 'Introduction', in Gutmann, A. (ed.), *Multiculturalism: Examining the Politics of Recognition*, p. 7. However, at least in 'The Politics of Recognition', Taylor does not go into any specific detail about precisely what model of deliberative democratic decision-making would most adequately satisfy the demands of the multicultural politics of difference.

<sup>359</sup> Young, 'Asymmetrical Reciprocity: On Moral Respect, Wonder and Enlarged Thought', p.59.

<sup>360</sup> On this see Young, *Inclusion and Democracy*, pp. 3-4.

<sup>361</sup> Benhabib, S., 'Towards a Deliberative Model of Democratic Legitimacy', in Benhabib, S. (ed.), *Democracy and Difference: Contesting the Boundaries of the Political*, Princeton, Princeton University Press, 1996, pp. 67-94, p. 69; Cohen, J., 'Deliberation and Democratic Legitimacy', *The Good Polity*, Hamlin, A. and Pettit, P. (eds.), Cambridge, Basil Blackwell, 1989, pp. 17-34.

that individuals are in the main self-interested rather than oriented toward a conception of the common good, that they are the best judges of what their own interest requires and consequently that liberalism is mainly and properly 'about the reconciliation and aggregation of predetermined interests under the auspices of a neutral set of rules', or a constitution.<sup>363</sup> As such, it is insensitive to the idea that preferences can be dialogically transformed in the process of deliberation.<sup>364</sup> Similarly, for Benhabib, difference democracy corrects the 'fiction' that individuals have 'an ordered set of coherent preferences.'<sup>365</sup> Rather, the deliberative model actually enables this ordering process to occur because the individual is allowed to reflect anew upon his preferences. '[t]he formation of coherent preferences,' she writes, 'cannot precede deliberation; it can only succeed it.'<sup>366</sup> Finally, the intersubjective nature of the deliberative process enables our preferences to be transformed because we are encouraged to justify them before others. That is, Benhabib tells us invoking Arendt, such decision making leads to an 'enlarged mentality' on the part of the participants.<sup>367</sup>

Anne Phillips is also concerned to tie the politics of difference in with a specific form of public decision-making, deliberative democracy. Of course, this is a somewhat awkward task for, as Phillips notes, the relationship between the politics of presence and deliberative democracy is not necessarily an easy one. This is particularly so, given the deliberative theorists' concern that the politics of presence is but another, merely reformist, kind of interest-group politics that does nothing to critically appraise or transform the pre-given preferences of groups or their representatives.<sup>368</sup> Yet, ultimately Phillips contends that the politics of presence is reconcilable with deliberative democracy, so long as the representatives of marginalized groups are afforded some autonomy to revise the interests they represent in the light of the transformative nature of the discourse they are parties to and that this revision is done in turn in the light of consultation with the group in question.<sup>369</sup>

Yet, notwithstanding the fact that Dryzek's claim concerning self-interest may be true of some varieties of liberalism - although it is not clear which ones he has in mind - it is not at

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<sup>362</sup> Benhabib, 'Towards a Deliberative Model of Democratic Legitimacy', p. 71. Melissa Williams also makes a similar claim in Williams, 'The Uneasy Alliance of Group Representation and Deliberative Democracy', pp. 131-2 as does Young, of course.

<sup>363</sup> Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, p. 9; See also Elster, J., 'The Market and the Forum' (1986), in Bohman, J. & Rehg, W. (eds.), *Deliberative Democracy: Essays on Reason and Politics*, Cambridge, Mass., MIT Press, 1997, pp. 3-33; Moon, D. J., *Constructing Community: Moral Pluralism and Tragic Conflicts*, Princeton, Princeton University Press, 1993, pp. 87-97 who discuss a similar claim with respect to political applications of Habermasian discourse ethics.

<sup>364</sup> Dryzek, *ibid.*, pp. 11, 2. Taylor makes a similar point with respect to the dialogical formation of identity itself in 'The Politics of Recognition', p. 7

<sup>365</sup> Benhabib, 'Towards a Deliberative Model of Democratic Legitimacy', p. 71.

<sup>366</sup> *ibid.*, p. 71.

<sup>367</sup> *ibid.*, pp. 71 – 72.

<sup>368</sup> Phillips, *The Politics of Presence*, pp. 145 – 150.

<sup>369</sup> *ibid.*, pp. 155 – 160.

all true of Hayekian liberalism. The reason for this is that on the Hayekian account of liberalism it is, on epistemological grounds, irrelevant whether preferences are self- or other-regarding if what we seek to achieve is a satisfaction of their competing claims. What is crucial, rather, is that in whichever way they are oriented, we cannot *know* all that is needed to be known in order that they may be satisfied. We must, by necessity, rely on the local and tacit knowledges of others and it is for this reason that preferences must be taken as given.

Similarly to deliberative forms of democracy, under Hayekian liberalism, preferences need not be considered as pre-given or exogenous to the public discourse. What separates the Hayekian perspective from these is that the discursive process in which preferences are formed is not to be found within the province of politics but, rather, within the institutional confines of the market and the wider culture and Common Law. This, however, is a long way from the claim that the preferences are merely taken as given and not subject to critical and dialogical appraisal. Dryzek's complaint against "liberalism", then, does not go through.

#### *4.i The Varieties of Deliberative Democracy*

Dryzek locates the 'deliberative turn' in democratic theory in the recognition that democracy has come to be viewed in terms of 'the ability of all individuals subject to a collective decision to engage in authentic deliberation about that decision' rather than as an 'aggregation of preferences or interests into collective decisions through devices such as voting and representation.'<sup>370</sup> Importantly, however he seeks to distinguish a conception of deliberative democracy from his own preferred theory of 'discursive democracy', the former of which he views as wider than the latter and both of which reject the aggregative model of democratic decision-making alluded to above.<sup>371</sup> The problem with the term 'deliberative democracy', Dryzek claims, is not only that it invokes the idea that decision-making is a private rather than an intersubjective or dialogical affair, but also that it implies that the decisions we do make are made in a calm, dispassionate manner that is exclusive of other modes of communication and persuasion that may be more marginal and the preserve of certain groups.<sup>372</sup> It is upon the basis of this understanding of deliberative democracy that Dryzek seeks to defend his own model of 'discursive democracy' that, most importantly for present purposes, he claims in terms similar to Young's conception of public communication under conditions of diversity, is 'pluralistic in embracing the necessity to communicate across difference without erasing difference.'<sup>373</sup> It must be noted further, however, that Dryzek sees his conception as distinct

<sup>370</sup> Dryzek, J., *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, p. v; 1 – 2.

<sup>371</sup> *ibid.*, pp. v - vi, 3.

<sup>372</sup> *ibid.*, pp. vi, 1, Chapter 3 *passim*. See also Chapter 2 for Dryzek's account - and critique - of Social Choice theorists' anxiety that Deliberative Democracy will lead to chaos in public decision-making precisely because it admits of a plurality of voices.

<sup>373</sup> *ibid.*, p. 3, Chapter 3, *passim*.



from that of Young and other difference democrats, as well as that of what he calls the Liberal Constitutionalist deliberative democratic theories of Ackerman, Bohman, Joshua Cohen, the later Habermas, Rawls and Gutmann and Thompson.<sup>374</sup> For present purposes, however, we will consider Dryzek's Discursive Democracy alongside those of the difference theorists' but will not take into consideration that of the liberal constitutionalists.

#### 4.ii *The Critique of Interest-Group Pluralism*

Given the need for deliberative democratic decision-making, an important issue concerns the specific model of deliberative democracy that is required. It is important to note in this regard that Young's democratic conception has little in common with democracy as it is commonly conceived. Indeed, Young is critical of interest-group pluralism and in this regard at least they are both in the same camp as Hayek, albeit for different reasons. First of all Young is not in favour of 'interest-group pluralism'; the type of democratic decision-making that is more prevalent in contemporary societies in which interest and lobby groups compete with one another for favours along a dispersed costs/concentrated benefits model. She criticises this form of democratic decision-making at length in *Justice and the Politics of Difference* and in *Inclusion and Democracy* where it is called 'aggregative democracy.'<sup>375</sup> As she observes this particular form of decision-making does not address the problem of self-interest in any fundamental way because it merely begs the question of the self-interest of special interest groups.<sup>376</sup> These preferences and their formation, then, are not subject to moral

<sup>374</sup> *ibid.*, pp. 11-17, 27-28. Ackerman, B., *We the People*, volume i, *Foundations*, Cambridge, Mass., Harvard University Press, 1991; Bohman, J., 'The Coming of Age of Deliberative Democracy', *Journal of Political Philosophy*, 6, pp. 399-423; Cohen, J., 'Deliberation and Democratic Legitimacy', *The Good Polity*, Hamlin, A., and Pettit, P. (eds.), Cambridge, Basil Blackwell, 1989, pp. 17-34; 'Procedure and Substance in Deliberative Democracy', in Benhabib, S. (ed.), *Democracy and Difference: contesting the boundaries of the political*, Princeton, Princeton University Press, 1996, pp. 95-119; Habermas, J., *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, Mass., MIT Press, 1996; 'Three Normative Models of Democracy' in Benhabib, S. (ed.), *Democracy and Difference: contesting the boundaries of the political*, Princeton, Princeton University Press, 1996, pp. 22-30; Rawls, J., *Political Liberalism*, New York, Columbia University Press, 1993; 'The Idea of Public Reason Revisited' (1997), *Collected Papers*, Cambridge, MA., Harvard University Press, 1999, pp. 573-615. Gutmann, A. and Thompson, D. (eds.), *Democracy and Disagreement*, Cambridge, Mass. Harvard University Press, 1996. For a useful assessment of Gutmann and Thompson's theory, see Macedo, S. (ed.), *Deliberative Politics: Essays on 'Democracy and Disagreement'*, Oxford, Oxford University Press, 1999.

<sup>375</sup> Young, *Justice and the Politics of Difference* pp. 75-76, 118-119; *Inclusion and Democracy*, pp. 19-21. See also Barber, B., *Strong Democracy: Participatory Politics for a New Age*, Berkeley, CA., University of California Press, 1984; Benhabib, S., 'Toward a Deliberative Model of Democratic Legitimacy'; Miller, D., 'Deliberative Democracy and Social Choice', *Political Studies*, 40, 19??, pp. 54-67; Dryzek, J., *Discursive Democracy: Politics, Policy, and Political Science*, Cambridge, Cambridge University Press, 1990.

<sup>376</sup> See also Young, *Inclusion and Democracy*, pp. 20-21. In this regard, what Young says finds echoes in the work of Friederich Hayek. In 'The Political Order of a Free People' Hayek is chiefly concerned to deploy an interest-group based critique of the democratic process that is highly reminiscent of Young's critique of interest-group politics in Young, *Justice and the Politics of Difference*. On this see, Hayek, 'The Political Order of a Free People', in Hayek, *Law, Legislation and Liberty*, vol. 3, London, Routledge, 1982, chaps. 12 and 16.

scrutiny in public. Young describes the problem here as that the preferences are ‘exogenous to the political process.’<sup>377</sup> Many of these criticisms, of course, are shared by the deliberative and discursive democrats.<sup>378</sup> Under this model, Young explains,

... others test and challenge these proposals and arguments. Because they have not stood up to dialogic examination, the deliberating public rejects or refines some proposals. Participants arrive at a decision not by determining what preferences have greatest numerical support, but by determining which proposals the collective agrees are supported by the best reasons.<sup>379</sup>

Yet, since *Justice and the Politics of Difference*, Young has taken issue with the deliberative democrats’ response to diversity. In ‘Communication and the Other: Beyond Deliberative Democracy,’ ‘Justice and Communicative Democracy’ and *Inclusion and Democracy*,<sup>380</sup> Young extends the kinds of arguments deployed against the liberal ideal of impartiality and the communitarian ideal of community to the notion of deliberative democracy.<sup>381</sup>

In the first instance, and writing with specific reference to Joshua Cohen and, perhaps unfairly given the above, John Dryzek<sup>382</sup>, Young argues that the model of reason and discourse that figures in deliberative democracy is impartialist and, for the reasons cited against liberal impartiality, is difference denying.<sup>383</sup> ‘The concept of “deliberation” or “discourse” is too narrow,’ she writes, ‘to include all the forms of communication that legitimately persuade others in a situation of democratic decision making.’<sup>384</sup> This is not to say, of course, that Young is criticising these theorists’ wish to distinguish coerced consent from free agreement in which reason is prioritised over power, both political and economic. Young’s critique, rather, is centred upon the ideas that, even with these good intentions, the norm of rationality embodied in such free, equal and reasonable deliberative discussion itself presupposes and therefore perpetuates the conception of reason of one, dominant, group. ‘Claims about the rationality of speech,’ she writes, ‘can and often are used as a means of

<sup>377</sup> Young, *Inclusion and Democracy*, p. 20.

<sup>378</sup> *ibid.*, p. 22.

<sup>379</sup> *ibid.*, pp. 22-23. See also pp. 26, 30.

<sup>380</sup> Young, I. M., ‘Communication and the Other: Beyond Deliberative Democracy’ in Benhabib, S., (ed.) *Democracy and Difference: changing the boundaries of the political*, Princeton, Princeton University Press, 1995; ‘Justice and Communicative Democracy’ in Gottlieb, R. S., (ed.), *Radical Philosophy: Tradition, Counter-Tradition*, Politics, Philadelphia, Temple University Press, 1993; *Inclusion and Democracy*.

<sup>381</sup> Young’s engagement with deliberative and discursive political theories, particularly that of Habermas, is traceable at least back to ‘Impartiality and the Civic Public: some implications of feminist critiques of moral and political theory’ in Benhabib, S and Cornell, D. (Eds.) *Feminism as Critique*, Oxford/Minneapolis, Polity/University of Minnesota Press, 1987.

<sup>382</sup> Cohen, J., ‘Deliberation and Democratic Legitimacy’, *The Good Polity*, Hamlin, A., and Pettit, P. (eds.), Cambridge, Basil Blackwell, 1989; Dryzek, J., *Discursive Democracy*, Cambridge, Cambridge University Press, 1990.

<sup>383</sup> Young, *Inclusion and Democracy*, pp. 6 - 7, 37 - 40, 47 - 51.

<sup>384</sup> Young, ‘Justice and Communicative Democracy’, p. 127.

asserting power ... especially where there are cultural differences and implicit or explicit beliefs in cultural superiority.<sup>385</sup> This is a power, moreover, 'that silences those who give reasons or make pleas of the "wrong" form. In an open discussion,' Young concludes, 'what counts as "acceptable" speech must itself be understood as contestable.'<sup>386</sup>

In the second instance, Young argues that deliberative democracy presupposes or seeks discursive unity respectively as pre-discursive 'shared understandings' or common ends to which discussion aims.<sup>387</sup> 'A deliberative model of democratic discussion,' she writes, 'tends to presume that participants in the public already understand one another, that they share premises, cultural meanings, ways of speaking and evaluating.'<sup>388</sup> The problem with this presupposition, she notes, is twofold. Firstly, it ignores the contemporary fact of ethnic and cultural diversity.<sup>389</sup> Because of this, the deliberative model of democratic decision making 'tends to close off the alterity of others'<sup>390</sup> and marginalizes their contribution to debate. Secondly, it 'obviates the need for self-transcendence.'<sup>391</sup> As Young notes:

... if discussion succeeds primarily when it appeals to what discussants all share, then none need revise their opinions or viewpoints in order to take account of perspectives and experiences beyond them. Even if they need the others to see what they all share, each finds in the other only a mirror of him- or herself.<sup>392</sup>

In response to this problem, some theorists reconceptualise unity as the *end* to which discussion should aim.<sup>393</sup> 'On this view,' Young writes, 'participants transcend their subjective, self-regarding perspective on political issues by putting aside their particular interests and seeking the good of the whole.'<sup>394</sup> The problem with this strategy, Young notes in a manner akin to her critique of liberal impartiality, is that '[w]hen discussion participants aim at unity, the appeal to a common good in which they are all supposed to leave behind their particular experience and interests, the perspectives of the privileged are likely to dominate the definition of that common good.'<sup>395</sup>

As a logical extension of her concern in *Justice and the Politics of Difference* with mediation, Young claims in *Inclusion and Democracy* that many theorists of discursive

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<sup>385</sup> *ibid.*

<sup>386</sup> *ibid.*, pp. 127-128.

<sup>387</sup> See also Young, *Inclusion and Democracy*, pp. 40-44.

<sup>388</sup> Young, 'Justice and Communicative Democracy', p. 128.

<sup>389</sup> Young, 'Communication and the Other: Beyond Deliberative Democracy', p. 125.

<sup>390</sup> Young, 'Justice and Communicative Democracy', p. 128.

<sup>391</sup> Young, 'Communication and the Other: Beyond Deliberative Democracy', p. 125.

<sup>392</sup> *ibid.*,

<sup>393</sup> Young has Benjamin Barber in mind; see Barber, B., *Strong Democracy*, Berkeley and Los Angeles, University of California Press, 1984.

<sup>394</sup> Young, 'Communication and the Other: Beyond Deliberative Democracy', p.126.

<sup>395</sup> *ibid.*

democracy - such as Mansbridge, Barber, Dryzek and Fishkin<sup>396</sup> - implicitly assume that deliberations occur in a single forum where deliberators face each other directly.<sup>397</sup> In Hayekian vein, moreover, Young claims that the problem here is that this “centred”<sup>398</sup> model of democratic communication and decision-making assumes wrongly that it is possible to bring ‘large and complex social processes’ into the view of the deliberators so that just decision may be made and enforced.<sup>399</sup> ‘We cannot conceive the subject-matter of democracy,’ she adds, ‘as the organization of society as a whole.’<sup>400</sup>

#### 4.iii *Democracy: Communicative*

Instead, of the interest group and deliberative/discursive model Young has argued up until the publication of *Inclusion and Democracy* for a conception of ‘Communicative Democracy’ that is sensitive to difference. Young asks us to ‘consider just democratic decision-making as a politics of need interpretation’<sup>401</sup> and Young envisages that this democratic decision-making will take place ultimately at the local level. It is worth quoting her at length here:

Dismantling the bureaucratic hierarchies of governmental and corporate power and bringing decisions such as these under democratic control, however, does also mean that participation must become more immediate, accessible, and local. ... It does mean that there must be local institutions, right where people live and work, through which they participate in the making of regulations. Thus...I imagine neighborhood assemblies as a basic unit of democratic participation which might be composed of representatives from workplaces, block councils, local churches and clubs, and so on as well as individuals. ... Their purpose is to determine local priorities and policy opinions which their representatives should voice and defend in regional assemblies.<sup>402</sup>

Furthermore, the process of need interpretation will be open, accessible and, crucially, a process which ‘third parties may witness...within institutions that give these others opportunity to respond to the expression and enter a discussion, and through media that allow anyone in principle to enter the discussion.’<sup>403</sup> In response to economic inequality, the

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<sup>396</sup> Mansbridge, J., *Beyond Adversary Democracy*, New York, Basic Books, 1980; Barber, B., *Strong Democracy*; Dryzek, J., *Discursive Democracy*; Fishkin, J., *The Voice of the People*, New Haven, Yale University Press, 1995.

<sup>397</sup> Young, *Inclusion and Democracy*, pp. 44-45.

<sup>398</sup> Young claims in a footnote that she is explicitly following Habermas’s discussion of centred democratic processes in *Between Facts and Norms*, pp. 296-307. On this, see *Inclusion and Democracy*, p. 45.

<sup>399</sup> Young, *Inclusion and Democracy*, p. 46.

<sup>400</sup> *ibid.*,

<sup>401</sup> Young, *Justice and the Politics of Difference*, p. 185.

<sup>402</sup> *ibid.*, p. 252. See also Young, *Inclusion and Democracy*, pp. 228 – 235.

<sup>403</sup> Young, ‘Impartiality and the Civic Public: some implications of feminist critiques of moral and political theory’, p.73, emphasis added.

democratic division of labour will take as its object the results of socio-economic interaction in all areas of civil society<sup>404</sup> thus expanding ‘the range of decisions that are made through democratic processes.’<sup>405</sup> In effect, then, Young advocates the replacement of the division of labour/knowledge with what she calls the “democratic division of labour” in which the production and distribution of goods and services is subject to the endorsement of the democratic public.<sup>406</sup> Similarly, for Benhabib, legitimate deliberation has to take place between ‘all about matters of mutual concern’, regardless of whether these matters affect individuals who are mutually ignorant of one another.<sup>407</sup> In developing the notion of the democratic division of labour Young offers three criteria - the ‘modified Millian test,’<sup>408</sup> by which decisions are justified in the heterogeneous public.

Agents, whether individual or collective, have the right to sole authority over their actions only if the actions and their consequences (a) do not harm others, (b) do not inhibit the ability of individuals to develop and exercise their capacities within the limits of mutual respect and cooperation, and (c) do not determine conditions under which other agents are compelled to act. ... The principle is simple: wherever actions affect a plurality of agents in the ways I have specified, all those agents should participate in deciding the actions and their conditions.<sup>409</sup>

The witnessed, democratic division of labour has at least two advantages to it which map quite neatly onto Young’s two-pronged moral and instrumental justification of oppressed social group representation. Firstly, the democratic division of labour will be ‘more likely to result in rational and just distributive decisions ... than hundreds of autonomous public and private units attempting to maximize their perceived interests.’<sup>410</sup> Secondly, it will, like group-differentiated representation, maximise social and individual knowledge.<sup>411</sup>

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<sup>404</sup> Young, *Justice and the Politics of Difference*, p. 91.

<sup>405</sup> *ibid.*, p. 251.

<sup>406</sup> *ibid.*, pp. 222 – 225.

<sup>407</sup> Young, ‘Towards a Deliberative Model of Democratic Legitimacy’, pp. 68, 79 – 80.

<sup>408</sup> Young, *Justice and the Politics of Difference*, p. 250.

<sup>409</sup> *ibid.*, pp. 250-251.

<sup>410</sup> *ibid.*, p.254.

<sup>411</sup> On this see Young, ‘Polity and Group Difference: A Critique of the Ideal of Universal Citizenship’, p.264; ‘Asymmetrical reciprocity: On Moral Respect, Wonder, and Enlarged Thought’, pp.58-59; *Inclusion and Democracy*, pp. 7, 30-31, Chapter 3 passim. Of course, Young does concede that including hitherto marginalized voices may indeed be complicated and slow down the decision-making process due to the larger number of perspectives that have to be taken into consideration. Yet, she claims, if the principal aim of decision-making be that the decision is arrived at justly then this should take precedence. On this see Young, *Inclusion and Democracy*, p. 119.

### 5. *Problems with Democratic Decision-Making*

How compelling is the difference democrats' claim that a deliberative form of democratic decision-making maximises practical wisdom? Just as with the priority of the representation of oppressed social groups, Young's conception of democracy, despite modifications in *Inclusion and Democracy*, is at odds with both aspects of her understanding of contemporary society.

The first and most obvious objection to a specifically democratic conception of justice is the same one that arose with regard to the specific representation of dominated and oppressed social groups in the heterogeneous public. This is that it demands the clear definition of political subjects. Yet, this demand sits very uncomfortably with Young's conception of the structural social group.

Another of our earlier arguments against Young's privileging of oppressed social groups within the heterogeneous public can be usefully transformed into an argument against the democratic division of labour if we pause to examine of the key aspects of the notion of difference: the difficulty of coming to a full understanding of another's perspective due to the existence of social groups that imply 'different, though not necessarily exclusive, histories, experiences, and perspectives on social life.'<sup>412</sup> This irreducible particularity is that members of one group 'do not entirely understand the experience of other groups'<sup>413</sup> with the result that '[n]o one can claim to speak in the general interest, because no one of the groups can speak for another, and certainly no one can speak for them all.'<sup>414</sup> If this is indeed the case it should come as no surprise that the problem of speaking for others will arise within a heterogeneous public that is configured along democratic, that is, distinctly *representational*, lines. How would it be possible for representatives of social groups adequately to represent or interpret needs given the absence of a general perspective? If no one can claim to speak in the general interest then how would representatives be able to speak in the general interest of social groups let alone sub-groups or individuals? Without an account explaining why representatives of oppressed social groups are able to speak in the general interest of the social group – that is, why they are the inhabitants of a privileged position within the group – Young has not given any principled reason for the representative discourse she proposes. Moreover, under conditions of socio-economic mediation that are marked by irreducible spatio-temporal distancing it is just as likely that, due to the massive informational problems

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<sup>412</sup> Young, 'Polity and Group Difference: a critique of the ideal of universal citizenship', p.262-263.

<sup>413</sup> *ibid.*, p.263.

<sup>414</sup> Young, 'Polity and Group Difference: a critique of the ideal of universal citizenship', p.263. Indeed, Young goes so far as to say that even face-to-face relations – that is, relations between individuals – are mediated by tone, gesture or even the presence of third parties and, as such, the sources of potential misunderstanding. See Young, *Justice and the Politics of Difference*, p.233; 'Asymmetrical Reciprocity: On Moral Respect, Wonder and Enlarged Thought', p.51.

that come with it, representatives would and, indeed, *could* only be interested in representing and interpreting their *own* perspectives and interests.

Of course, in *Inclusion and Democracy*, Young does accept that there is a paradox involved in a specifically democratic, that is representational, form of politics. 'If we accept the argument that representation is necessary,' she writes,

... but we also accept an image of democratic decision-making as requiring a co-presence of citizens, and that representation is legitimate only if in some way the representative is identical with the constituency, then we have a paradox: representation is necessary but impossible.<sup>415</sup>

Young hopes to resolve this paradox and thus to differentiate her democratic theory from that of the deliberative democrats by way of appeal to the Derridaesque concept of *différance*,<sup>416</sup> so that the logic of identity implicit in the mainstream deliberative democratic ideal is replaced by one that leaves the many who are to be represented 'in their plurality without requiring their collection into a common identity,'<sup>417</sup> and which, moreover, avoids the charge made, for instance, by Benjamin Barber that authentic democracy is one in which 'imagines an ideal democratic decision-making situation as one in which the citizens are *co-present*.'<sup>418</sup> This reformulation of democratic representation clearly carries over Young's earlier claims regarding the ontological status of groups - that is, their fluidity and structural interrelationships - into the issue of how they are to be represented within the democratic decision-making process. The point behind this for Young, of course, is to avoid the charge that such representation carries with it epistemological demands that fly in the face of Young's earlier arguments about the problems of coming to know another's perspective. Thus in the light of the appeal to *différance* that acknowledges and affirms the 'separation between the representative and the constituents,'<sup>419</sup> Young distinguishes between the representative function being one of speaking *as* the oppressed and speaking *for* them.<sup>420</sup> With this distinction in hand, she is able to claim that 'it is no criticism of the representative that he or she is separate and distinct from the constituents.'<sup>421</sup> Thus, by conceiving of representation 'as a differentiated relationship among plural actors,' she hopes to overcome the difficulties of one person representing the perspective or voice of the many.<sup>422</sup> Of course,

<sup>415</sup> Young, *Inclusion and Democracy*, p.126.

<sup>416</sup> Young cites Derrida's paper 'Différance' in this regard. On this see Derrida, J., *Speech and Phenomena and other essays on Husserl's Theory of Signs*, Evanston, Ill., Northwestern University Press, 1973.

<sup>417</sup> Young, *Inclusion and Democracy*, p. 127.

<sup>418</sup> *ibid.*, p. 126.

<sup>419</sup> *ibid.*, p. 127.

<sup>420</sup> *ibid.*, pp. 127-128.

<sup>421</sup> *ibid.*, pp. 127, 133.

<sup>422</sup> *ibid.*, p. 127.

all of this raises the question of precisely what it is that the representative is supposed to represent. Here Young invokes a distinction between interests that reveal what it is that an individual or group wants and perspectives that typically represent their points of view.<sup>423</sup> For Young, the idea of perspective arises directly from the relational conception of social groups given in Chapter 3 in that just as a structural social group is not specifiable in terms of a determinate essence, 'a social perspective does not contain a determinate specific content.'<sup>424</sup> Moreover, she contends that 'the idea of social perspective suggests that agents who are 'close' in the social field have a similar point of view on the field and the occurrences within it, while those who are socially distant are not likely to see things differently.'<sup>425</sup> Indeed, Young specially offers the idea of perspective to combat the "individualist" idea 'that any talk of structured social positions and group-defined social location is wrong, incoherent, or useless'<sup>426</sup> for to talk of the vulnerabilities of certain disadvantaged groups as systematic and predictable does indeed capture a common-sense intuition. Thus, she concludes, '[t]he idea of perspective is meant to capture that sensibility of group-positioned experience without specifying unified content to what the perspective sees.'<sup>427</sup> Later on, in anticipation of the charge that in offering this account Young has not really resolved the problem of representation she puts forward the idea of plural representation - essentially committees of representatives rather than single representatives - as a way of reflecting the plurality and differentiatedness to be found within a social group's perspective.<sup>428</sup>

It would seem then that in attempting to offer an account of social group perspective as something to be represented in a democratic forum without committing herself to identifying any particular content to that perspective that Young has answered our concern. Yet, it seems that in emphasising 'representation of' and the pluralizing group representation is but window-dressing for it still begs the question of, in the first instance, who is to decide who is able to do the representing and how such a decision would not in the first instance immediately beg the question of the differential positioning of the members of the group and, consequent to this, how it would mean that any definition provided would lead to the reduction of the number of perspectives the polity could make use of. If this problem is surmountable then there is still the further question of the possibility of the *aggregation* of perspective on any given issue that is radically at odds with Young's earlier claims about the both the absence of a general perspective and the mediated nature of contemporary social relationships. Indeed, given these problems, one could say that, contrary to Young's claim,

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<sup>423</sup> *ibid.*, pp. 133-141.

<sup>424</sup> *ibid.*, p.137.

<sup>425</sup> *ibid.*, p.136.

<sup>426</sup> *ibid.*, p.138.

<sup>427</sup> *ibid.*, pp. 138-139.

<sup>428</sup> *ibid.*, p.148.



practical wisdom would actually be decreased by a thickly representative decision making procedure in relation to its scope in the disaggregated forum of civil society. If so, then difference under democracy turns out to be a thoroughly unexploited resource in democratic communication.

### *5.i Impossible Aggregation: Utopianism, Democracy and the Thwarting of Practical Wisdom*

These considerations relate in a most fundamental sense to Young's claim that a discursive form of democracy promotes social knowledge or what is later called 'enlarged thought.'<sup>429</sup> Given democracy's representative nature, it is difficult to see how thought would be enlarged or practical wisdom maximised in the forum of deliberation beyond that of the representatives themselves. *Pace* the deliberative democrats and their idealized, unified conception of face-to-face democracy, Young points out that in highly mediated, complex modern societies

... the web of modern social life often ties the action of some people and institutions in one place to consequences in many other places and institutions. No person can be present at all the decisions or in all the decision-making bodies whose actions affect her life, because they are so many and so dispersed. <sup>430</sup>

It is for this reason, she maintains, that political decision-making procedures, if they are to be democratic, must be representative. On this, Young is surely right but what she does not consider is the possibility of going the other direction and advocating self-representation without democracy. She does, of course, claim that '[s]ome claim that individuals should relate directly to political institutions without the mediation of groups, and that districts aggregating individual votes to obtain one representative is the only way to implement such political individualism.'<sup>431</sup> To anticipate some of the claims in Chapters 5 and 6, a regime of liberal individual rights does allow us to precisely attend to individual particularity – to represent ourselves in our actions – whilst not doing violence to the mediated nature of society and the epistemological problems it brings forth. Indeed, acting on the market place is the response to this epistemological predicament. Any conception of democracy, on the other hand, including Young's, most sooner or later face the fact that it must in the end come up with a decisions in which there will be winners and losers, no matter how far it goes to answering the epistemological predicament.

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<sup>429</sup> Young, *Justice and the Politics of Difference*, p.93, 186; 'Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought', *passim*.

<sup>430</sup> Young, *Inclusion and Democracy*, p. 124.

<sup>431</sup> *ibid.*, p. 142.

### 5.ii *Tacit Knowledge, Conscious Control*

A further problem with difference democracy is that it by necessity demands conscious reason because its decision-making process is predicated upon face-to-face discussion. Yet, we have seen that at the heart of Hayek's critique of centralised decision-making is the tacit nature of much of our knowledge. Of course, both Dryzek and Young are concerned with the nature of communication. The argument here is that all too often deliberative political formations contain biases towards some forms of communication – principally those that assume a dispassionate mode of reason – over other forms and this in itself is a form of discrimination. Now, it would seem that in allowing more scope for differing forms of communication and the conveyance of perspective that this implies that difference democrats may safely avoid the Hayekian tacit knowledge argument.

Yet, is this really the case? For when it finally comes down to making a decision only those present have to any extent their particular knowledge of time and place and their skills taken into consideration. Among the ignored will be the vast multitudes who exist unbeknown to the participants in the discourse. As Horwitz explains in his discussion of the communicative functions of monetary exchange, the overtly rational task of deliberation and persuasion leaves out our tacit knowledge. 'Relying solely on articulate persuasion,' he writes, 'limits us to what can be communicated only through speech and texts and closes off other sources of knowledge.'<sup>432</sup> Indeed, he claims that the regime of liberty provides us with 'an extrasomatic sense, not built into our physiology, but allowing us to adapt ourselves to events which happen far beyond our vision,' where 'we are capable of serving people whom we do not know and even of whose existence we are ignorant' and where 'we in turn constantly live on the services of other people of whom we know nothing.'<sup>433</sup> Thus, Horwitz argues, we may think of there being two ways to learn, via speech and via imitation.<sup>434</sup> Over reliance upon 'the rule of reasons' leaves us with an epistemologically impoverished public decision-making procedure.

All of this relates, of course, to Young's criticisms of the ideal of community being utopian for it is also unclear if the replacement of the division of labour – founded as it is upon a matrix of mediated socio-economic processes – with a radically democratic division of labour in which decisions have to be made in local assemblies so that participants may witness the proceedings is any less utopian or destructive than the 'gargantuan overhaul' of society Young envisages would accompany the establishment of the ideal of community. That the democratic division of labour is a utopian decision-making procedure in a world of

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<sup>432</sup> Horwitz, S., 'Monetary exchange as an Extra-Linguistic Communication Process', *Review of Social Economy*, vol. 50, no. 2, 1992, p. 198.

<sup>433</sup> Hayek, F. A., 'Our Moral Heritage', *Knowledge, Evolution and Society*, London, Adam Smith Institute, 1983, pp. 45-6.

<sup>434</sup> Horwitz, 'Monetary exchange as an Extra-Linguistic Communication Process', pp. 197-8.

socio-economic mediation can also be seen if one considers that it can only take into account and make decisions about those aspects of social relations that are of a local face-to-face nature; that is, those within the city and its representative assemblies. This is made clear when one considers Young's 'modified Millian test' against which the decision-making procedure is to be judged. Taking inspiration from Gould's remarks on discursive forms of democracy in general there would simply be no way of knowing if an action was to violate any of conditions (a), (b) or (c) in Young's modified Millian test.<sup>435</sup> This problem would be even more acute once the global nature of mediation is taken into consideration. How, after all, would it be possible to know whether a decision made in London adversely effected others in, say, Bogotá?

### 5.iii *The Contextual Nature of Knowledge*

Hayek considers democratic decision-making in Chapter Seven of *The Constitution on Liberty*, in which he is concerned more to critique democratic decision-making from the perspective of his spontaneous order-based theory of social change, in particular as it relates to opinion formation in society.

What is the significance of this and why should it matter to the difference democrats? As we have seen in the last chapter, for Hayek to stifle the process of opinion formation is ultimately to put an end to the prospect of social advance for 'it is only because the majority opinion will always be opposed by some that our knowledge and understanding progress.'<sup>436</sup> That is, Hayek sees civil society as crucial to the sustainability of the cultural seedbed which yields the 'data' upon which we may later deliberate democratically. Just as disaggregated decision-making processes throw up outcomes both good and bad they also throw up the opinions we have of those outcomes. For this reason Hayek argues that it is imperative to ensure that the process of opinion formation be kept quite separate from democratic decision-making. For without doing so, there would be literally nothing to talk about except the results – both good and bad – of democratic decision-making.<sup>437</sup> Thus, he is moved to conclude with regard to the issue of opinion-formation in a very similar way to Young's conclusion that the ideal of community would, if ever applied, probably mean the wholesale destruction of present standards of living:

... The conception that the efforts of all should be directed by the opinion of the majority or that a society is better according as it conforms more to the standards of the majority is in fact

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<sup>435</sup> On this see Gould, C. C., 'Diversity and Democracy: Representing Differences', Benhabib, S., *Democracy and Difference: changing the boundaries of the political*, Princeton, Princeton University Press, 1995, pp.176 – 177.

<sup>436</sup> Hayek, *The Constitution of Liberty*, pp.109-110.

<sup>437</sup> *ibid.*, p.110, emphasis added.

a reversal of the principle by which civilization has grown. Its general adoption would probably mean the stagnation, if not decay, of civilization.<sup>438</sup>

Furthermore, this argument can be strengthened when the democratic theorist advocates, as Young does, the replacement of the division of labour/knowledge with a democratic division of labour. 'Such a process,' Hayek writes,

... should not be confused with those spontaneous processes which free communities have learned to regard as the source of much that is better than individual wisdom can contrive. If by "social process" we mean the gradual evolution which produces better solutions than deliberate design, the imposition of the will of the majority can hardly be regarded as such. The latter differs radically from that free growth from which custom and institutions emerge, because its coercive, monopolistic, and exclusive character destroys the self-correcting forces which bring it about in a free society that mistaken efforts will be abandoned and successful ones prevail.<sup>439</sup>

Given this difference democracy ends up in a state of affairs in which within the defined domain of application, the process of coming up with new ways to determine actions would come to a halt. Of course, in her rediscovery of civil society, Young emphasises just this.<sup>440</sup> It seems, then, that Young simply assumes that the data of deliberation is somehow given independently of the socio-economic process. Again, these considerations relate in a most fundamental sense to Young's claim that a group-differentiated difference democracy promotes practical wisdom. Because difference democracy is ultimately based on the face-to-face ideal, it does not maximise practical wisdom as much as may be possible under an alternative regime. Practical wisdom can only be maximised if one allows for a free interchange of opinion and a free, that is non-majoritarian, opinion formation process. However, this is precisely what difference democracy precludes.

In essence, these problems can be construed as a problem of the democratic glove being too tight for the invisible hand it is meant to guide. It seems inappropriate to advocate a decision-making procedure based on the face-to-face model of social interaction when the

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<sup>438</sup> *ibid.*, p. 110.

<sup>439</sup> *ibid.*, p. 111. Despite this, it would be misleading to follow Andrew Gamble in *Hayek: The Iron Cage of Liberty* and consider Hayek as an anti-democrat. His criticisms relate to the *scope* of democracy rather than to its worth and indeed he offers three arguments in favour of it in *The Constitution of Liberty* which are restated in *The Political Order of a Free People*. Nonetheless, for Hayek, democracy is a double-edged sword: it serves both to protect and menace liberty. He wants to resolve this conundrum via constitutional limitations on the extent to which collective decision-making can be made '[i]t is the price of democracy that the possibilities of conscious control are restricted to the fields where true agreement exists and that in some fields things must be left to chance.' Hayek, F. A., *The Road to Serfdom*, London, Routledge, 1944, p. 69.

<sup>440</sup> Young, *Inclusion and Democracy*, p.178.

subjects of that decision-making are the mediated socio-economic relations, the decision made in the light of those relations and their consequences. Furthermore, in advocating such a procedure as a replacement for the division of labour/knowledge, difference democrats such as Young not only stifle the very process of data-formation which is itself the subject of public political discourse but, in advocating difference democracy, merely devolves the philosophical question of the justice of Welfare-market outcomes to those of democratic outcomes. As Hayek has commented with regard to the idea of the state as an antidote to negative market outcomes: “[g]overnments ... start out with the proud claim that they will deliberately control all affairs and soon find themselves beset at each step by the necessities created by their former actions”.<sup>441</sup> In effect, Young’s avocation of the replacement of the division of labour/knowledge with wall-to-wall democracy adds nothing to the philosophical problem of rectifying inequalities in income or power, nor the dominating effects of bureaucracy. Indeed, in this regard it seems to beg all the important questions.

#### *5.iv From Wall-to-Wall Democracy to Civil Society, and back*

Yet, it is clear in *Inclusion and Democracy* that Young has changed her position here quite radically. Indeed, she claims in the introduction to this book that the second of the two principle questions she sets out to answer - an answer given in Chapters 4 and 5 – is that of ‘how to understand communicative democracy in the context of mass societies.’<sup>442</sup> Rather than a ‘centred’ conception of democratic decision-making, then, we may call it, following Michael Polanyi, ‘polycentric’ rather than ‘monocentric’ model.<sup>443</sup> ‘Democratic politics,’ she contends, ‘must respond to this scale, and thus must involve millions of people related to one another through democratic institutions. The challenge for the theory of discussion-based democracy,’ she continues, ‘is to explain how its norm and values can apply to mass polities where the relations among members are complexly mediated rather than direct and face to face.’<sup>444</sup> Indeed, out of this more recent concern which, as we have seen, arises quite naturally from Young’s earlier preoccupation with mediation in *Justice and the Politics of Difference*, comes what appears to be her scaling back of the remit of communicative

<sup>441</sup> Hayek, *The Constitution of Liberty*, p.111.

<sup>442</sup> Young, *Inclusion and Democracy*, p. 8.

<sup>443</sup> Polanyi, M., *The Logic of Liberty*, Indianapolis, Ind., Liberty Fund (1952), 1998. A distinction that Hayek was certainly aware of. See also Hayek, ‘Notes on the Evolution of Systems of Rules of Conduct, p.73; ‘The Mirage of Social Justice’, *Law, Legislation and Liberty: volume two*, London, Routledge, 1982, p.15. Furthermore, Young is sure to point out that claiming that democracy is decentred does not mean that it is the same as being decentralized for the latter is still likely to be centred. On this, see Young, *Inclusion and Democracy*, pp. 46-47. An example of this may be the British Government’s idea, since abandoned, of breaking up the NHS into Health Regions in order to gain from competitive processes without harming the universalist ethos that underlies the Service as a whole. The problem here, of course, is that breaking up one large monopoly into approximately ten smaller ones does not fundamentally address the problems attendant to “centred” decision-making at all but merely multiplies them ten-fold.

democracy, now reconfigured as ‘associative democracy’ to capture precisely the informal civic social aspect of society.<sup>445</sup> Indeed, she devotes an entire chapter to precisely this question in *Inclusion and Democracy*.<sup>446</sup>

Now, what Young says here is of great significance for she sees that putting forward the idea of civil society as a means to combating domination immediately raises the question of what counts as the Public Sphere. On the one hand deliberative democrats - and in this connection Young specifically mentions Gutmann and Thomson<sup>447</sup> - generally conceive of the discourse as occurring within the auspices of state institutions whilst theorists such as Fraser<sup>448</sup> widen the *locus* of political discourse to include the more informal institutions of civil society precisely the public sphere when considered as a single entity is all too often dominated by powerful groups with the result that public debate is reinterpreted as ‘mediated among people dispersed in place and time.’<sup>449</sup> The benefits of this ‘disaggregated’ conception of the public is that it is not founded upon a face-to-face model of social interaction and, consequently, allows for a diversity of modes of expression upon common problems.<sup>450</sup> As she claims in *Inclusion and Democracy*, the associational activity to be found in the informal institutions of civil society:

... promotes communicative interaction both in small groups and across large publics. It fosters democratic inclusion by enabling excluded or marginalized groups to find each other, develop counter-publics, and express their opinions and perspectives to a wider public. The public sphere arising from civic organization and communication both serves a crucial oppositional function and develops knowledge and ideas for political action. Civic organizing and public discussion enable individuals collectively to authorize modes and sites in which aspects of their lives are represented in political discussion. At the same time, such organizing and discussion provides one of the most effective ways of holding representatives accountable. civil society limits the ability of both state and economy to colonize the lifeworld, and fosters individual and collective self-determination.<sup>451</sup>

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<sup>444</sup> Young, *Inclusion and Democracy*, p.45.

<sup>445</sup> *ibid.*, pp. 188-195, 238, 245-246.

<sup>446</sup> *ibid.*, chapter 5. See also for an earlier statement Young, ‘State, Civil Society and Social Justice’, *Democracy’s Value*, Shapiro, I., and Calderon-Hacker, C. (Eds.), Cambridge, Cambridge University Press, 1999.

<sup>447</sup> Gutmann, A., and Thompson, D., *Democracy and Disagreement*, Cambridge, Mass., Harvard University Press, 1996.

<sup>448</sup> Fraser, N., ‘Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy’ *The Phantom Public Sphere*, Robbins, B., (Ed.), Minneapolis, University of Minnesota Press, 1993.

<sup>449</sup> Young, *Inclusion and Democracy*, p. 167; also pp. 168-173.

<sup>450</sup> *ibid.*, pp. 167-168.

<sup>451</sup> *ibid.*, pp. 188 – 89.

Most interestingly, Young discusses as among the virtues of civil society the idea of ‘intra-society change outside state institutions,’<sup>452</sup> or what I shall explain in the next chapter, as ‘auto-liberation’ in which change in society is effected from within the auspices of civil society as opposed to from without, that is from within the auspices of the managing state. Citing change effected by discussion of gender and environmental issues Young claims that ‘[p]ublic organizing and engagement ... can be thought of as processes by which society communicates *to itself* about its needs, problems, and create ideas for how to solve them.’<sup>453</sup> Furthermore, only in this way, claims Young can the idea of the public sphere can be helpful; ‘in describing how a diverse, complex, mass society can address social problems through public action.’<sup>454</sup> Young’s flirtation with civil society, it would seem, is set to be a serious and prolonged one.

Similarly to Young, Benhabib is sensitive to the problem that the scale of contemporary societies presents the rationality of decision made under the auspices of deliberative democracy.<sup>455</sup> Indeed, like Young she hopes to address this problem by privileging ‘a *plurality of modes of association* in which all affected can have the right to articulate their point of view.’<sup>456</sup> Benhabib also explicitly invokes here Dryzek’s earlier work on ‘the rules of discursive design.’<sup>457</sup> Such discursive designs facilitate the provision of public goods in a noncoercive and decentralized manner, ‘thus reversing the argument of the incompatibility of social complexity and deliberative democracy.’<sup>458</sup> Dryzek too notes that many deliberative democratic theorists have, following Habermas, emphasized deliberation as occurring outside of the state and within a diverse number of public spheres although may of these (he does not say which ones) narrowly conceive of it as being inhabited only by

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<sup>452</sup> *ibid.*, p. 179.

<sup>453</sup> *ibid.*, emphasis added.

<sup>454</sup> *ibid.*, p. 171.

<sup>455</sup> Benhabib, ‘Towards a Deliberative Model of Democratic Legitimacy’, pp. 73 - 74.

<sup>456</sup> *ibid.*, pp. 73 - 87.

<sup>457</sup> *ibid.*, pp. 86-7; Dryzek, J. *Discursive Democracy: Politics, Policy and Political Science*, Cambridge, Cambridge University Press, 1990, Chapters 1-3.

<sup>458</sup> Benhabib, ‘*ibid.*’, p. 87; *Discursive Democracy: Politics, Policy and Political Science*, Chapter 3, esp. pp. 57, 61 - 63. See also Kukathas’s discussion of Held’s claims concerning the complex problem-solving ability of Cosmopolitan Democracy in ‘Friederich Hayek: Elitism and Democracy’, Carter, A. & Stokes, G. (eds.), *Liberal Democracy and Its Critics*, Cambridge, Polity Press, 1998, pp. 31 - 37.

progressive movements.<sup>459</sup> In turn, following Dryzek these public spheres can be associated with the idea of civil society, as Young does in *Inclusion and Democracy*.<sup>460</sup>

Like Fraser and the later Young, Dryzek's view is that from the perspective of the social movements that represent the diversity of voices and perspectives in society, it is more in their interests to maintain an "oppositional" stance towards the state despite conceding that this may not always be the case.<sup>461</sup> At the outset of his argument and citing the example of the suffragette's Dryzek notes that more often than not the pressure for a more robust democracy emanates in the first instance from the public sphere/civil society rather than the state.<sup>462</sup> Moreover, in contrast to the state, the public sphere/civil society is 'relatively unconstrained' in the sense that the goals and interests that it reflects 'need not be compromised or subordinated to the pursuit of office or access,' nor, Dryzek adds, is there reason 'to repress the contributions to debate of embarrassing troublemakers.'<sup>463</sup>

### 5.v *The Limits of Civil Society*

Yet, despite all of this, Young at least wishes to claim that, due to their necessarily plural and diffuse nature, the institutions of civil society are unable to grapple with oppression. Young's principal reason for claiming this is intimately related to her dual definition of injustice. In the first instance, justice is defined as the absence of self-determination - domination - in which 'institutional conditions 'inhibit or prevent people from participation in decisions and processes that determine their actions and the conditions of their actions.'<sup>464</sup> Secondly, it is defined as the absence of self-development - oppression - where 'systematic institutional processes 'prevent some people from learning and using satisfying or expansive skills in socially recognized settings, or which inhibit people's ability to play and communicate with

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<sup>459</sup> Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, pp. 23, 100. This appears to be in contrast to Dryzek's earlier view in Dryzek, *Discursive Democracy: Politics, Policy and Political Science*, p. 49. The Habermasian theorists Dryzek has in mind are Bohman, J., *Public Deliberation: Pluralism, Complexity and Democracy*, Cambridge, Mass., MIT Press, 1996; Dryzek, J., *Discursive Democracy: Politics, Policy, and Political Science*, Cambridge, Cambridge University Press, 1990; Fraser, N., 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' *The Phantom Public Sphere*, Robbins, B., (Ed.), Minneapolis, University of Minnesota Press, 1993.

<sup>460</sup> Of course, Dryzek is sure to point out that a precise definition of either the state or the public sphere/civil society is not a simple matter as what each of these notions represents is itself a subject of contestation. *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, p. 82.

<sup>461</sup> Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, pp. 85 - 88, 82 - 83. He does, of course, offer two criteria by which social movements could enter into the state to achieve their aims. These are whether the movement's goals are more likely to be achieved by action within the state rather than the public sphere/civil society and whether the democratic gain had by the state outweigh the democratic loss suffered by the now 'less vital and authentically democratic' public sphere/civil society. On this see *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, p. 82.

<sup>462</sup> *ibid.*, pp. 87 - 88, 104.

<sup>463</sup> *ibid.*, p. 103.

<sup>464</sup> Young, *Inclusion and Democracy*, p. 156.



others of express their feelings and perspective on social life in contexts where others can listen.<sup>465</sup> Furthermore, Young emphasises the institutional plurality inherent in civil society<sup>466</sup> and claims that it is able to deal with domination because this plurality is a virtue,<sup>467</sup> civil society cannot come to terms with oppression. In this way, Young's rejection of civil society has some resemblance to Pettit's rejection of the efficacy of the decentralized pursuit of non-domination discussed earlier. For the overcoming of oppression, we need the state which, unlike the 'plurality and relative lack of co-ordination' of civil society, is able to promote self-development or, conversely, is able to limit oppression.<sup>468</sup> For Young, related to this claim is the fact that the mechanics of oppression takes place within the *economy*. Indeed Young is quite explicit in her desire to decouple civil society from economic processes because unlike the latter the former are not motivated by profit.<sup>469</sup> 'Because many of the structural injustices that produce oppression have their source in economic processes,' she writes, 'state institutions are necessary to undermine such oppression and promote self-development.'<sup>470</sup> Moreover, 'because profit- and market-oriented economic activities inhibit the self-development of many people, citizens must rely on state institutions to take positive action to undermine oppression and promote justice,<sup>471</sup> and only the state is able to do this because it can provide:

... socially directed investment decisions to meet needs, provide education and training, and create and maintain quality infrastructure, parks, pleasant and well-lighted streets, and other such public places; and, on the other hand, the organization of the necessary, useful, and creative work of the society so that everyone able to make social contributions has the opportunity to do so.<sup>472</sup>

Thus is in contrast to the informal institutions of civil society which, despite being able to respond to these failures it 'cannot do the major work of directing investment towards meeting needs and developing skills and usefully employing its members.'<sup>473</sup> For Young this is, paradoxically perhaps, precisely because of the plural and fragmented nature of civic social

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<sup>465</sup> *ibid.*,

<sup>466</sup> *ibid.*

<sup>467</sup> *ibid.*, pp 165-166.

<sup>468</sup> *ibid.*, p. 156.

<sup>469</sup> *ibid.*, pp. 157-158.

<sup>470</sup> *ibid.*, p. 156.

<sup>471</sup> *ibid.*, p. 180. See also p. 185.

<sup>472</sup> *ibid.*, p. 185. Young agrees with the ' "post-Marxist" critique of state socialism for its totalizing tendencies' and, in relation to this, is careful to acknowledge what Pettit calls the problem of *imperium* when she claims that 'state power must always be subject to vigilant scrutiny by citizens alert to dangers of corruption and domination' but fails to say how. On this see Young, *Inclusion and Democracy*, pp. 184, 180-181; Pettit, P., *Republicanism: A Theory of Freedom and Government*, Oxford, Oxford University Press, 1997.

<sup>473</sup> Young, *ibid.*, p. 186.

institutions. ‘Precisely the virtues of civil society however- voluntary association, decentralization, freedom to start new and unusual things,’ she writes, ‘mitigate against such co-ordination.’<sup>474</sup> ‘Indeed,’ she adds, ‘the activities of civil society may *exacerbate* problems of inequality, marginalization, and inhibition of the development of capabilities.’<sup>475</sup> Thus, it is to state institutions that we must turn to overcome oppression. However, the important question is, of course can any institutions mobilise the resources necessary? Clearly, Young thinks not only that they can, but that state institutions would do a better job of it.<sup>476</sup>

Now, Young does acknowledge the ‘libertarian’ objection to all of this, ‘that the use of the state to promote particular social outcomes wrongly interferes with the liberty of individuals, organizations and firms,’<sup>477</sup> but she does not acknowledge the Hayekian strand to this objection that does not assume rights as foundational. This, of course, is all the more curious because the Hayekian objection trades precisely on the epistemic problems that flow from the dispersal and tacit nature of knowledge in societies comprised of culturally embedded individuals who for the most part are mutually ignorant that theorists such as Young wish seriously to take into account.

## 6. *Cultural Difference and the Cultural Problem*

Yet, extending our investigation of Hayek’s interpretative critique of the concept of economic equilibrium in Chapter 1, perhaps the most fundamental problem with the difference democrats’ account of justice is that it makes an unwarranted, but as we shall soon see, necessary, epistemological assumption concerning what the optimal outcome of the cultural process should be. Moreover, this assumption is made despite their so clearly emphasising the importance of our embedded identities, the epistemological burdens of which are central to this thesis.

We may model this assumption as one of a ‘cultural’ equilibrium point where it is deemed possible to rise above the process of cultural interaction in order to see what the optimal outcome of that interaction would be. The unwarranted nature of this assumption, of course, relates to our reformulation of the cultural and economic problem that is emergent from an account of the self that is both culturally embedded and ignorant of the existence of those other selves with whom it is said to share membership of society. What that reformulation made clear is that, as mutually ignorant, embedded participants *in* the cultural process and not external observers *of* it, it seems far-fetched in the extreme to pretend that we may have some extra-cultural insight into the optimal outcome of that process.

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<sup>474</sup> *ibid.*,

<sup>475</sup> *ibid.*, emphasis added.

<sup>476</sup> *ibid.*,

<sup>477</sup> *ibid.*, p. 187.

In the case of difference democracy the knowable cultural optimum that needs to be assumed is one of the equal status of different groups. Yet it is here where serious theoretical problems set in, for the ultimate consequence of this is that difference democracy not only assumes away the very problems of the reconciliation of cultural difference and inequality that it sets out to address, but also the epistemological burdens that an emphasis upon culture and identity unavoidably draws to our attention.

The reason why cultural equality needs to be assumed relates to the difference democrats' primary concern with the unequal status of some groups in society. Because they find cultural inequality troubling they seek to justify institutions of justice that will remedy it. Yet, this is problematic because precisely for cultural reasons, the equalisation of the status of diverse groups is an aim that the very groups whose status is supposed to be equalised - let alone those who are perceived to be dominant - would themselves find hard to endorse. The very fact of the plurality of cultures and identities, that is, means that there is bound to be deep, culturally rooted disagreement about whose identity should gain equal status. For many if not all cultures the fact that members of other cultures - or, indeed, members of one's *own* culture that are traditionally-perceived as deviant or inferior - have a relatively low status is entirely consistent with the fundamental norms that shape them. Thus, any assertion that it is identities that need to be equalised will not only be perceived as culturally alien but also as invasive and in contravention of deeply and often unconsciously-held beliefs.

To get around the problem that cultural difference poses to what is in effect an egalitarian politics of difference many theorists simply assume group equality into the specification of the institutions that they defend - a point that both Phillips and Williams have recognised.<sup>478</sup> As Benhabib explains, on the one hand 'discourses, even to get started, presuppose the recognition of one another's moral rights among discourse participants,' yet, on the other, 'such rights are said to be specified as a result of this discursive situation.'<sup>479</sup> Yet, despite being necessary, this in itself is problematic. Indeed, and despite her clear recognition of the difficulty here, Benhabib ultimately assumes away the very problems of cultural inequality and misrecognition that her theory is supposed to address when claiming that the discourse ethic upon which deliberative accounts of politics are based presupposes 'the reciprocal moral recognition of one another's claims to be participants in the moral-political dialogue,'<sup>480</sup> and that the procedural nature of deliberative democracy 'is a rational answer to persisting value conflicts at the substantive level.'<sup>481</sup> This, of course, is highly

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<sup>478</sup> Phillips, *The Politics of Presence*, p. 154; 'Dealing with Difference: A Politics of Ideas, or a Politics of Presence?', p. 144; Williams, 'The Uneasy Alliance of Group Representation and Deliberative Democracy', pp. 141-144.

<sup>479</sup> Benhabib, 'Toward a Deliberative Model of Democratic Legitimacy', pp. 67 - 94, esp. p. 78.

<sup>480</sup> *ibid.*, p. 79.

<sup>481</sup> *ibid.*, p. 73.

contentious, not only because the characterisation of the participant in that procedure smuggles in a recognition across difference that contradicts the idea of the persistence of value conflict, but because it presupposes that mutual recognition and equality across difference is the proper outcome of the cultural process. This, however, is something that only someone who was privy to the unfolding of the cultural process as a whole - that is, a deracinated omniscient individual who had a privileged view of the way in which society's stock of culturally-differentiated tacitly-held beliefs shape the discrete interactions of its members - could authoritatively claim. Of course, the reason that no such claim could be made is precisely because, as culturally embedded mutually ignorant participants in the process, none of us ever finds him or herself in this position.

Surprisingly, given her recognition of this issue and of its logical similarity to problems in economic theory, even Phillips falls afoul of the assumption of a knowable cultural equilibrium point or optimal end state of the cultural process.<sup>482</sup> This is perhaps most clear in her failure to engage with the clearly cultural question of why marginalized groups *should* be rehabilitated. As has been claimed by Adam Tebble, the same problem plagues Young's account,<sup>483</sup> as it does Monique Deveaux's theory whose conception of 'deliberative liberalism' assumes - but does not defend - the culturally-laden claim that the integrity of diverse groups in society ought to be respected as a means of justly managing relations between them.<sup>484</sup>

The consequence of assuming an optimal state of cultural equilibrium is perhaps most explicitly manifested in the utopian character of difference democracy where, in order to be just, public decisions must not only be characterised by a *formal* equality between the participants, but must also presuppose an *already existent*, broadly equal, socio-economic relationship between them. This is so that any decisions made do not reflect pre-existing power inequalities which do not transform but, rather, perpetuate those socio-economic inequalities the forum is supposed to address. A particularly clear statement of the kind of reorganisation that would be needed here is to be found in Young where she claims that in the heterogeneous public the presence of the marginalized would be secured via

... institutional mechanisms and public resources supporting three activities: (1) self-organization of group members so that they gain a sense of collective empowerment and a reflective understanding of their collective experience and interests in the context of society; (2) voicing a group's analysis of how social policy proposals affect them, and generating

<sup>482</sup> Phillips, *The Politics of Presence*, p. 154

<sup>483</sup> On this see, Tebble, A. J., 'What is the Politics of Difference?', *Political Theory*, Volume 30, Number 2, April 2002, pp. 259-281.

<sup>484</sup> Deveaux, M., *Cultural Pluralism and Dilemmas of Justice*, Ithaca, NY., Cornell University Press, 2000, pp. 6-12, Chapters 6 and 7.

policy proposals themselves, in insitutionalized contexts where decision makers are obliged to show that they have taken these perspectives into consideration; (3) having veto power regarding specific policies that affect a group directly...<sup>485</sup>

In 'The Uneasy Alliance of Group Representation and Deliberative Democracy', moreover, Melissa Williams makes this clear when discussing the intimate relationship between group-differentiated political representation and deliberative democracy. On the one hand, theorists such as herself, Young, Phillips and Guinier have sought to link the need for democratic justice towards disadvantaged groups with their specific representation.<sup>486</sup> The argument behind this link is that in the absence of systematic over-representation of such groups in the democratic process that would afford them the opportunity to escape their perennially out-voted status, what minority groups need is a democratic process that is based not only upon majority voting but upon the giving of reasons. 'Thus,' concludes Williams, 'the defence of group representation depends importantly upon encouraging the deliberative features of democratic decision-making.'<sup>487</sup> By the same token, she writes that 'deliberative democrats have argued that a full account of just and legitimate deliberative processes must give some attention to the place of marginalized-group needs and identities in discursive exchange.'<sup>488</sup> Defenders of group representation and theorists of deliberative democracy, then, are 'natural allies.'<sup>489</sup>

Yet, Williams does not make this claim without reservation, for whilst the rehabilitation of the hitherto marginalized voices may serve to improve the soundness of public decisions, that of itself does not necessarily mean that it serves the end of the *justness* of those decisions.<sup>490</sup> There are two dimensions to this quandary. In the first instance, and similarly to Young, Williams casts doubts upon deliberative democracy's self-characterisation as a public decision-making process for which the notion of impartiality is central. The problem here is that the notion of impartiality may itself be oppressive of group difference.<sup>491</sup> Secondly, and more importantly for present purposes, Williams draws our attention to the fact that all too often theorists of deliberative democracy fail to acknowledge that in order to be an

<sup>485</sup> Young, 'Polity and Group Difference: a critique of the ideal of universal citizenship', pp. 261 - 262

<sup>486</sup> Williams, M. S., 'The Uneasy Alliance of Group Representation and Deliberative Democracy', Kymlicka, W. and Norman, W. (eds.), *Citizenship in Diverse Societies*, Oxford, oxford University Press, 2000, pp. 124-152, p. 124; Young, *Justice and the Politics of Difference*; Philips, *The Politics of Presence*; Guinier, L., *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy*, New York, Free Press, 1994.

<sup>487</sup> Williams, *ibid.*, p. 125.

<sup>488</sup> *ibid.*. Williams counts among the deliberative democrats who make this point Jürgen Habermas in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, Mass., MIT Press, 1996 and Sunstein, C., 'Beyond the Republican Revival', *Yale Law Review*, 97: 1539-90, 1988.

<sup>489</sup> Williams, *ibid.*, p. 125.

<sup>490</sup> Williams, *ibid.*, pp. 132-134.

effective procedure that alleviates the oppression, domination and marginalisation often felt by some groups, the deliberative process must itself be prefigured by some condition of socio-economic equality. This is needed lest difference democracy's own decisions do not transform but, rather, actually reproduce the very inequalities and unequal power relations it sets out to ameliorate.<sup>492</sup> Yet, she notes, one radical solution to this problem - that of reorganizing the terms on which members of the polity conduct deliberative decision-making before the actually start engaging in it so that it is a 'transformative' politics - seems to be 'naïvely utopian' as it presupposes the achievement of what much deliberative democratic theory takes as its aim rather than as its precondition.<sup>493</sup>

Williams attempts to resolve this difficulty by offering two reasons why privileged groups would be prepared to relinquish the power relationship they enjoy over the marginalized. Firstly, she claims invoking Scanlon's paper 'Contractualism and Utilitarianism', they may seek to do so because of their wish to perceive themselves and be perceived as just and fair.<sup>494</sup> Secondly, they may be moved to do so out self-interest in the face of the costs of social instability. The result of this, for Williams, is that we best conceive of politics as both a mixture of deliberation and interest rather than one or the other, and in this way she places herself in a similar position to Phillips.

However, leaving aside Williams's claims concerning the relationship between ideal and non-ideal theory,<sup>495</sup> this solution to the problem of utopianism seems inadequate for it presupposes a naïve understanding of powerful groups. More specifically, it seems that the kinds of groups she has in mind are not only powerful groups, but also *bourgeois* powerful groups for whom self-image and, perhaps, the fear of the destabilizing consequences of overt conflict loom large. This is not to say, of course that groups with such concerns do not exist. It is to say, however that these are by no means the only dominant groups to be found in society, nor that, when pressed, previously bourgeois groups would not revert to more primeval reactions. In brief, the bourgeois, conflict-avoiding nature of powerful groups is only a contingent aspect of their character and, as such, no principled way to a deliberative politics whose precondition, rather than aim, is broad social and economic equality between groups. The problems of naïve utopianism and the underlying assumption of a knowable state of cultural equilibrium of which it is symptomatic are left, then, unresolved in Williams's account. The claims that group-differentiated representation relieves the burdens of

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<sup>491</sup> Williams, *ibid.*, pp. 133-141.

<sup>492</sup> *ibid.*, pp. 134, 141-144.

<sup>493</sup> *ibid.*, pp. 142-143.

<sup>494</sup> *ibid.*, p. 143; Scanlon, T., 'Contractualism and Utilitarianism', Sen, A. and Williams, B. (eds.), *Utilitarianism and Beyond*, Cambridge, Cambridge University Press, 1982, pp. 103-128.

<sup>495</sup> Williams, *ibid.*, p. 144. Briefly, Williams seems to be referring here to the relationship between a theory of society or politics that is logically derived from a limited number of foundational premises and one that is worked up from the observation of empirical imperfections in the world.

marginalisation and contributes to the wisdom of the wider polity may, of course be factually true, although we have also offered arguments that show that they are not. However, regardless of whether such claims are true or not, that does not mean that in the world of political practice those in dominant positions would be any more predisposed to relieve those burdens or that the consequent epistemological losses from *not* institutionalising group-differentiated representation may be prices worth paying if it means they get to hold onto their dominant position. The problem of utopianism and the deeper problem of the assumption rather than the discovery of a cultural equilibrium that arises from our embeddedness and mutual ignorance of which that utopianism is symptomatic is left unresolved.

Instead of difference democracy, then, it is clear that justice requires principles that facilitate the discovery of the proper position of groups within society and of their internal hierarchies rather than second guess what answers to these fundamental questions will be. That is, rather than attempt to justify our traditions and practices to one another in politics, it is only by allowing us to act on the basis of those traditions and practices - warts and all - that society as a whole actually comes to see which of those traditions and the norms they endorse are socially optimal. The institutions needed to accomplish this, of course, cannot be those of the democratic forum because of its narrowly representative nature and over-reliance upon conscious reason as a condition for deciding what norms should and should not be endorsed.

## 7. *Conclusion*

In this chapter, we have argued that, in the light of the Hayekian reformulation of the cultural problem, difference democracy is an inadequate response to the challenge of cultural diversity in at least two ways. Firstly, and because of the specific voice it grants social groups rather than individuals, it begs the questions of group-specific hierarchy and membership, the wider relative cultural status of groups, as well as undermines the claim to practical wisdom. That is, rather than work from the Hayekian assumption that answers to such questions are precisely what need to be discovered by society, the difference democrats already assume that answers have been given. In this fundamentally Hayekian sense, then, we may claim that difference democracy makes an unfounded assumption concerning cultural optimality. This second problem is made particularly acute by the difference democrats' defence of not only a group-differentiated political discourse but also one that is of a specifically democratic form. More specifically, due to the representative nature of democratic decision-making, difference democracy makes little use of the culturally-differentiated knowledge available to society. Moreover, even when the commitment to democracy is weakened via the invocation of civil society and sub-altern counter publics this only marginally answers the epistemological problems such decision-making faces and, indeed, merely raises them elsewhere when

difference democrats also defend, as Young at least does, a robust economic co-ordinating role for the state as a means of combating oppression.

Of course, it is not only the difference democrats who defend an important role for the state in economic affairs. Liberal egalitarians, too, defend precisely this role in their diverse interpretations of the importance of the provision of welfare to individuals by the state. However, with respect to difference and cultural diversity it is not clear whether today liberal egalitarians speak with a unified voice. It is to their response to diversity, then, that we shall now turn and, in doing so, complete our examination of the question of whether the Hayekian perspective may be invoked as a critical tool for the appraisal of political theories that attempt to offer an account of justice under conditions of cultural diversity.



## 4 Liberalism and the Culture of Welfare

### 1. Introduction

As we have seen, the account of group-differentiated discursive democracy defended by the difference democrats is to be rejected on at least three grounds. Firstly, because its prioritisation of the political subjectivity of groups conflicts with their anti-essentialist social ontology and secondly because at the level of institutions it fails to overcome the challenge to discourse posed by the diffuse and tacit nature of social knowledge, a knowledge which the discursive democratic *fora* difference democrats endorse cannot replicate or make adequate use of. Thirdly and most importantly, difference democracy fundamentally misconceives the problematic of justice under conditions of cultural diversity by factoring out those epistemological concerns at the heart of our Hayekian reformulation of the cultural problem. In doing so, moreover, it undermines any claim to the rationality or sincerity of the multicultural politics it endorses. The rationality of the discourse is undermined because it does not make adequate use of socially available knowledge in public decision-making, whilst its sincerity is undermined because its commitment to democratic decision-making is in numerous senses necessarily selective of the kind of diversity it seeks to protect.

In this chapter, I wish to examine another response to diversity: that of the liberal egalitarians. What makes this a particularly challenging enterprise is the fact that in many significant respects, it is open to question whether some of these responses normally considered as liberal are any such thing at all.<sup>496</sup> This question, of course, has given rise to a fissure within contemporary liberal egalitarian political theory with respect to the question of diversity for it is with respect to our proper reaction to the fact of pluralism that one of the principal theorists to be considered in this chapter, Brian Barry, calls into question the liberal credentials of one of its other important contemporary defenders, Will Kymlicka. For Barry, Kymlicka's defence of group-differentiated rights is, like much political theory that attempts to accommodate difference, a distraction from more important distributive inequalities within society and at best silent on the issue of group-specific inequality.

To a certain extent, of course, we may empathise with Barry's concerns here for the emphasis upon groups to be found in Raz's and Kymlicka's culturalism is, for similar reasons to the difference democrats, incoherent. Yet, notwithstanding this important debate, my primary concern here will not be with the apparent ruptures within the body of liberal egalitarian theory but with what has and continues to unite it, regardless of whether or not the focus of its attentions are cultural or economic. For whilst agreeing with his general claims, I

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<sup>496</sup> Kymlicka thinks they are, whilst Barry thinks they are not. On this, see Kymlicka, *Liberalism, Community and Culture*, Chapters 9 and 10 and Barry, *Culture and Equality*, pp. 133 - 41.

will argue that Barry misdiagnoses the problematic underlying those distributive concerns he seeks to emphasise after rejecting liberal multiculturalism. Furthermore, I will claim that ironically, Barry's misdiagnosis is logically identical in any case to that Kymlicka and Raz make with respect to culture, thus undermining the importance of the divisions that are said to be evident between them. In both cases, there will be seen to lay a defective logic behind the foundational distinction to which all these theorists appeal, regardless of whether the focus of their concerns is distributive or cultural. This is the distinction between choice and circumstance and the assumption of cultural or distributive *optima* in virtue of which they claim circumstances need to be ameliorated by the state. Moreover, and similarly to the difference democrats, such theorists also misconstrue the task of justice by defending political interventions in the very social process that enables us to arrive at any reasonable idea of which cultural or economic decisions should be made, given the constitutional limitations of our knowledge. The fact that theorists such as Raz and Kymlicka have addressed their concerns on the basis of these distinctions and assumptions to issues of culture whilst Barry addresses distributive inequalities will then be seen to be ultimately beside the point. Justice, we will argue, is not predicated upon the protection of particular groups whether these groups are defined in cultural or economic terms but, rather, is a means by which we can discover which groups merit special treatment beyond the formal rights accorded to their individual members equally.

I will begin by outlining Kymlicka's theory and its fundamentally liberal egalitarian philosophical presuppositions. In the first instance, I will outline the foundational distinction Kymlicka makes between choice and circumstance, his critique of the regime of 'benign neglect' and his defence of group-differentiated rights as a liberal response to that critique. In both cases, it will become clear that implicit in Kymlicka's thought here is an undefended assumption concerning the knowability of cultural *optima* in virtue of which unchosen circumstances are said to be corrected in satisfaction of the requirement to cultivate cultural contexts conducive to autonomous individual choice.

Moreover, our discussion of Kymlicka here relates in a most fundamental way to the question of the proper limits of liberal egalitarian politics. This is made clear when we consider Kymlicka's critique of benign neglect in more detail and ask just what kind of regime he has in mind. Doing so is important because it will become clear in the course of my discussion that despite the institutionally minimalist reading of the phrase 'benign neglect' that one could make, Kymlicka's critique only has force when that regime is construed as a set of specifically liberal egalitarian public institutions. That is, in the section that follows I will claim that Kymlicka's critique of benign neglect is parasitic upon a wider set of distinctively liberal egalitarian claims about social well-being and as such holds, *if it holds at all*, only if one assumes a commitment to the public delivery of goods and services that these

claims endorse. If one does not assume this commitment, then in the first instance the critique of benign neglect can be seen to be telling only against a *version* of liberalism and not liberalism *per se*, regardless of whether it is a coherent critique or not. That is, Kymlicka only thinks his liberal egalitarian cultural thesis holds because he believes that the wider liberal egalitarian thesis within which it resides also holds. At no stage, however, does he question whether this latter thesis does hold or, indeed, is exhaustive of all that liberalism could say about such matters. Moreover, and given this, we may also claim that the 'neglect' inherent in benign neglect amounts to no such thing, once the fundamentally cultural presuppositions concerning individual well-being that lay behind liberal egalitarian interventionism are made explicit. I will then proceed to make similar arguments against Raz's 'liberal multiculturalism' as tending to beg in advance the political question of the proper status of the diverse social groups in society and to falsely assume that cultural integrity is a collective good.<sup>497</sup>

Of course, in sharp contrast to Kymlicka, Brian Barry does not appeal to a critique of benign neglect with regard to cultural difference to ground his politics, nor consequently does he defend group-differentiated public institutions as a means of correcting unchosen and unequal cultural circumstances. Rather, he seeks to defend a more distributivist liberal egalitarianism. In section 4, I will discuss Barry's rejection of Kymlicka's culturalist position and then proceed to set out his own theory. In the penultimate section, I will critically evaluate Barry's response to cultural diversity and claim that whilst not making the same error as Kymlicka and Raz - who do so explicitly with respect to the cultural and implicitly with the respect to the economic realm - he does do so with respect to the economic realm by defending an economic interventionism that is intended to address the inequalities suffered by the culturally marginalized. Moreover, and by way of our Hayekian emphasis upon the importance of the utilisation of tacit knowledge that is, *au fond*, cultural knowledge, it will ultimately be seen that, despite his rejection of culturalism, Barry's defence of interventionism in the economic process amounts to a species of cultural interventionism that is fraught with difficulty. First, it contradicts his stated concern with the distributive and shows him in the final analysis to make the same mistaken assumption of cultural optimality as Kymlicka and Raz. Secondly, his defence of cultural intervention violates his own claim to cultural neutrality and ultimately reveals a fundamental misconception of the task of justice. I will conclude by summarising our discussion of the 'mirage' of cultural justice as a prelude to

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<sup>497</sup> Raz, J., 'Multiculturalism: A Liberal Perspective', *Dissent*, Winter 1994, pp. 67-79. Raz also exhibits certain inconsistencies with respect to the status of immigrants. At one point he suggests, similarly to Kymlicka - that they do not properly belong within a multicultural politics (p. 69) and yet later cites the example of immigrants to the UK as showing how that country has become multicultural (p. 73).

offering a defence of the institutions of classical liberal justice under conditions of cultural diversity.

## 2. *Liberal Multiculturalism: Kymlicka*

### 2.i *Choice, Circumstance and the Foundations of Liberal Egalitarianism*

The philosophical basis upon which Kymlicka's liberal multiculturalism is founded is identical to the foundation of his liberal egalitarianism more generally, as evidenced by his appeal - in a manner akin to both Rawls and Dworkin - to the distinction between choice and circumstance.<sup>498</sup> Inequalities that arise as a result of our choices are for liberal egalitarians, as they are for liberals more generally, morally acceptable. Yet, Kymlicka adds, 'differences which arise from people's circumstances - their social environment or natural endowments - are clearly not their own responsibility.'<sup>499</sup> 'No one chooses,' he continues in *Liberalism, Community and Culture*, 'which class or race they are born into, or which natural talents they are born with, and no one deserves to be disadvantaged by these facts. They are, as Rawls famously put it, arbitrary from the moral point of view.'<sup>500</sup> Thus, in politics, Kymlicka contends, following Dworkin, liberal egalitarian theories of justice hope to capture the moral distinction between choice and circumstance by seeking 'to be endowment-insensitive' and 'ambition-sensitive.'<sup>501</sup> That is, they seek to guarantee that individuals are not disadvantaged by natural or social traits over which they have no control but that at the same time their personal destinies do vary according to their own personal choices.

It is at this point where Kymlicka applies this standard liberal egalitarian argument to the particular case of national minorities because, if the choice-circumstance argument is true, 'then it must be recognised that members of minority cultures can face inequalities which are the product of their circumstances or endowment, not their choices or ambitions.'<sup>502</sup> Central to Kymlicka's theory is that cultures are indispensable 'contexts of choice' for autonomous individuals that should be considered as primary goods in the Rawlsian sense.<sup>503</sup> Given this, Kymlicka defends group-differentiated rights as the institutional response to the moral requirement that those more vulnerable minority cultures be afforded external protections. To

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<sup>498</sup> Kymlicka, *Liberalism, Community and Culture*, Chapter 9 *passim*.. In *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Kymlicka refers to this liberal egalitarian argument as the 'equality argument.' See *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 108-115. Rawls, *A Theory of Justice*; Dworkin, R., 'What is Equality? Part I' *Philosophy and Public Affairs*, Volume 10, Number 3, 1981, pp. 185 - 246; 'What is Equality? Part II' *Philosophy and Public Affairs*, Volume 10, Number 4, 1981, pp. 283 - 345. See also Guest, S., *Ronald Dworkin* (2<sup>nd</sup> ed.), Edinburgh, Edinburgh University Press, 1997, Chapters 9 - 11.

<sup>499</sup> Kymlicka, *ibid.*, p. 186.

<sup>500</sup> *ibid.*,

<sup>501</sup> *ibid.*, p. 190, following Ronald Dworkin, 'What is Equality? Part II', p. 311.

<sup>502</sup> Kymlicka, *ibid.*, p. 190.

be sure, Kymlicka concedes that '[p]eople should have to pay for their choices, but special political rights are needed to remove inequalities in the context of choice which arise before people even make their choices.'<sup>504</sup> For Kymlicka, then, not only are such rights able to figure in any theory of justice that is recognisably liberal<sup>505</sup>, they ought to be a necessary condition for the *plausibility* of such theories.<sup>506</sup>

Moreover, Kymlicka is carefully discriminating with regard to the kinds of groups that may be the proper bearers of political rights. The most obvious instance of this is in the distinction he draws between national minorities and immigrant ethnic communities.<sup>507</sup> For Kymlicka it is the former and not the latter who are the proper bearers of such rights because the latter have voluntarily decided to enter the society in question<sup>508</sup> and because for them 'the context of choice ... primarily involves equal access to the mainstream culture(s).'<sup>509</sup> Thus, whilst members of national minorities may enjoy 'national' rights, those enjoyed by immigrant communities are 'polyethnic' rights which 'take the form of adapting the institutions and practices of the mainstream society so as to accommodate ethnic differences, not of setting up a separate societal culture based on the immigrants' mother tongue.'<sup>510</sup> Such adaptations include, for example, 'the right of Jews and Muslims to exemptions from Sunday closing legislation, or the right of Sikhs to exemptions from motorcycle helmet laws.'<sup>511</sup>

How plausible is Kymlicka's account? First of all, it is important to note from the outset that Kymlicka's is a liberal account of justice, rather than a multicultural theory with liberal characteristics. Despite it being a group-differentiated theory of justice, it still remains *au fond* a liberal theory of justice in which group rights are bestowed upon the basis of their being instrumental to autonomous *individual* choice. Having acknowledged this, it seems that an important part of answering the question of the plausibility of his theory will turn on the plausibility of the choice-circumstance distinction that lies at the heart of it.

It seems that this distinction is actually inadequate to the task Kymlicka sets it. One may claim, for instance, that our circumstances just are an unintended, aggregate consequence

<sup>503</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995), Chapter 5. On cultural context as a primary good see Kymlicka, *Liberalism, Community and Culture*, Chapter 8, esp. pp. 163 - 167 and pp. 177 - 8.

<sup>504</sup> Kymlicka, *Liberalism, Community and Culture*, p. 190. The kinds of rights Kymlicka has in mind are territorial autonomy, veto powers, guaranteed representation in central institutions, land claims, and language rights. These are all external rather than internal protections. On this, see Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 107. See also 'Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts' in Kymlicka, W. and Norman, W., (eds.), *Citizenship in Diverse Societies*, Oxford, Oxford University Press, 2000, pp. 1 - 41, esp. pp 25 - 30.

<sup>505</sup> Kymlicka, *ibid.*, p. 190.

<sup>506</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, p. 109.

<sup>507</sup> *ibid.*, p. 10 - 16. This is a distinction that is drawn inconsistently by Raz. On this, see Raz, 'Multiculturalism: A Liberal Perspective', esp. pp. 69, 73.

<sup>508</sup> Kymlicka, *ibid.*, pp. 63, 95-6, Chapter 5 *passim*..

<sup>509</sup> *ibid.*, p. 114, Chapter 5.

<sup>510</sup> *ibid.*, pp. 6 - 7, 96 - 7.

of individual choices and, as such, are in an important sense indistinguishable from them because they are actually constituted by them. That is, without choices, there are no circumstances. Thus, the objection continues, to claim that we should be compensated for our unchosen circumstances but not for our choices is actually and therefore incorrectly to claim that we must be compensated for choices because it is our choices that constitute our circumstances. However, great care must be taken here with our definition of 'our.' The whole point and indeed normative force of the distinction is that any individual selected at random should not be held responsible or be made to shoulder the burden of circumstances that are not of his choosing with the consequence that any over-catholic definition of 'our' will defeat just this purpose. 'Our', then, is not to be construed as 'each and every one of us' but, rather, as 'everyone, except any randomly-chosen individual.' We are being compensated, liberal egalitarians may respond, for the effect *other people's* choices have upon us, not those of *our own* choices. The whole point of the distinction, then, is that it draws our attention to the importantly unchosen nature of the personal circumstances into which we are born. Of course, those circumstances may have been chosen indirectly by those before us including, most obviously, our parents, but that is all by and by. The important point here is that we, as randomly-selected individuals, do not chose them because we are powerless to do so.

It seems, then, that this point should be conceded. However, it still remains to investigate the claims upon others that are said to flow from it. Even if the distinction were tenable - that is, even if we accept that it may be the case that some do not deserve the disadvantage brought about by circumstances they have not chosen - this does not of itself show that others should pick up the tab. They of course, may do so if they so please but Kymlicka's choice-circumstance defence of group-differentiated rights and exemptions ignores the question of why they should be (or need to be) made to. An analogy can be made here with Hayek's critique of the 'mirage' of social justice.<sup>512</sup> Indeed, the two mutually exclusive positions are actually two sides of the same coin. On the one hand, liberal egalitarians such as Kymlicka claim that individuals should not be penalised for the unchosen circumstances they find themselves in, precisely because they did not personally choose them, whilst in *The Mirage of Social Justice* Hayek claims that individuals should not be penalized for circumstances that were not chosen by anybody in particular. Let the cards lay where they land, without rearrangement, because nobody willed that they fall in that manner, claims the Hayekian classical liberal, whilst the liberal egalitarian makes the converse claim that rearrangement is necessary *just because* the individuals who end up at a disadvantage did not choose to do so. Despite both camps rejecting desert as a fundamental basis of justice, it

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<sup>511</sup> *ibid.*, p. 97.

seems difficult to resolve the sharp difference between the conclusions drawn from the rejection. One way of reconciling these positions is to provide institutions of justice that allow both interpretations so that we may find out which of them is more attractive, given the diffuse and tacit nature of our knowledge and this is an issue to which we will return in the next chapter.

Moreover, even if the choice-circumstance distinction were normatively significant and carried the force of a clinching argument, it is still not clear why, at the level of institutions, the state should perform the task of compensating for unchosen inequalities, as Kymlicka suggests. That is, even if the pursuit of the protection from the consequences of unchosen circumstances such as those under which cultural minorities exist were universally assented to - and this seems to be a rather tall order under those conditions of cultural diversity that Kymlicka's theory attempts to deal with - the Hayekian classical liberal could always argue that a regime of individual rights would do this better because of the unique epistemological advantages it confers with respect to the maximal use of social knowledge.

## 2.ii Incoherence

Of course, notwithstanding these objections, Kymlicka would reject such a regime of individual rights. His desire that multicultural justice be endowment insensitive and, as such, reflective of the normative force of the choice-circumstance distinction, ties in profoundly with his critique of the regime of liberal non-interference with the cultural market place as the traditional liberal response to 'the fact of pluralism,'<sup>513</sup> what Kymlicka calls the regime of 'benign neglect'. Kymlicka's criticism of benign neglect is twofold. Firstly, along similar lines to Taylor and Young, he claims that the idea itself, when cashed out in institutional terms, is incoherent and secondly, that it places intolerable burdens upon the members of minority cultures, precisely because its endowment-sensitivity means that one's (minority) cultural inheritance is ignored in the design of public political institutions.<sup>514</sup>

Similarly to theorists such as Taylor and Young for whom '[l]iberalism is not a possible meeting ground for all cultures, but is the political expression of one range of cultures, and quite incompatible with other ranges,'<sup>515</sup> for Kymlicka '[g]overnment decisions

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<sup>512</sup> Hayek, *The Mirage of Social Justice*, Chapter 9, esp., pp. 67 – 73.

<sup>513</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford, Oxford University Press, 1995, Chapter 6, esp. pp. 107-115. For an overview of Kymlicka's arguments against benign neglect see Kukathas, C., 'Multiculturalism as Fairness: Will Kymlicka's *Multicultural Citizenship*', *The Journal of Political Philosophy*, vol. 5, no. 4, 1997, pp. 411-12 and 422-4.

<sup>514</sup> Kymlicka, *ibid.*, pp. 110-115. Varieties of the first critique is also to be found in Taylor, C., 'The Politics of Recognition', pp. 25-73 and in Young, *Justice and the Politics of Difference*, pp. 96-121; 'Impartiality and the Civic Public: some implications of feminist critiques of moral and political theory', in Benhabib, S and Cornell, D. (eds.) *Feminism as Critique*, Oxford/Minneapolis, Polity/University of Minnesota Press, 1987, *passim*.

<sup>515</sup> Taylor, 'The Politics of Recognition', p. 62.

on languages, internal boundaries, public holidays, and state symbols avoidably involve recognizing, accommodating, and supporting the needs and identities of particular ethnic and national groups.<sup>516</sup> Consequently, the claim that benign neglect actually involves neglect in the substantive sense is mistaken. What we have is not benign neglect but selective - and unequal - cultural endorsement. The state, by necessity, must reflect the understandings of a particular, usually dominant, culture so that it may function with or without the additional burden of pursuing any collective goals. It is for this reason that group-differentiated rights and exemptions are needed to supplement formal individual rights because without them the state will be treating its individuals unequally.

Clearly, the important issue here is the degree to which the liberal state by necessity must act in the way that Kymlicka and others who make similar arguments charge. If we examine Kymlicka's list of examples of selective endorsement by the liberal state it becomes clear that the regime of benign neglect need not necessarily encourage any of these practices. This, of course, relates importantly to the range of liberal theories Kymlicka believes are incoherent in this way. To return to our earlier discussion of Kymlicka's liberal egalitarian presuppositions, the reason why he thinks it applies to liberalism in general is because he over determines the role played by the liberal state. In doing so, he implicitly argues only against the benign neglect of the liberal egalitarian rather than of the minimal or classical liberal state, the latter of which is far less, if at all, vulnerable to his objections and which, moreover, is closer to a regime of cultural and economic benign neglect than the position he actually rejects. More importantly, it means that at least the equality argument for group-differentiated rights and exemptions does not succeed.

The case of state symbols, such as flags, coats-of-arms and mottoes is particularly clear here for it can be claimed that Kymlicka's argument is as much an argument for their removal as much as it is for reconfiguring them along group-differentiated lines. Of course, what we may characterise as a 'full-blooded' classical liberal regime of benign neglect would not hesitate to remove them and, indeed, would probably as a matter of principle seek their removal. The case of internal boundaries bears the same kind of scrutiny. Would a full-blooded benign neglect regime even need internal boundaries, given that these are more often than not only the results of the administrative requirements of the state? Similarly, one may question the need for public holidays, rather than days off work that a critical mass of individuals simultaneously decide to take upon the basis of their personal cultural significance. Indeed, the whole notion of a public holiday is, like that of a national symbol, anathema to the full-blooded benign neglect regime. What of languages? This perhaps is the trickiest of Kymlicka's objections. After all, it is certainly true that no matter how impartial

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<sup>516</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, p. 108.



law may be in its content, it is always expressed in a language that, by its very nature, will be partial. Yet, even here, Kymlicka's objection is found wanting. Laws have to be framed in some language that unavoidably will most likely be the language of the majority.<sup>517</sup> However, no polity can avoid this without, of course, doing away with law altogether, by which measure it would cease to be a polity. Moreover, as Kukathas claims in response to the same objection, '[a]ll political institutions must have some character.'<sup>518</sup> 'Just as the framework of a building must have some colour (since nothing is colourless), he continues, so must all political institutions have some particular features that have more to do with the accidents of history and circumstance than with the point that the institutions serve.'<sup>519</sup> However, '[n]one of these things,' he continues, 'alters the character of the state as neutral, since in none of these matters is the state pursuing or promoting any particular ends.'<sup>520</sup> A 'benign neglect' view such as that presupposed by the strictly neutral and minimal politics of indifference, he writes, 'is characterised not by a failure to realise that neglect will have consequences, but rather by a willingness to accept the consequences of neglect.'<sup>521</sup> The list of instances of partiality that Kymlicka presents, then, have no serious impact upon full-blooded benign neglect even if they do against the half-hearted, liberal egalitarian variety Kymlicka implicitly critiques.

Moreover, it is here where discussion of the implications of the incoherence objection is of relevance. For even if one were to accept the objection - and one should not - it does nothing to endorse the group-differentiated rights and exemptions Kymlicka seeks. Indeed, Kymlicka gives the game away when he associates the failed neutrality thesis of the incoherence argument with the provision of specifically public services. '[O]ne of the most important determinants of whether a culture survives,' he writes,

... is whether its language is the language of government i.e. the language of public schooling, courts, legislatures, welfare agencies, health services, etc. When the government decides the language of public schooling, it is providing what is probably the most important form of support needed by societal cultures, since it guarantees the passing on of the language and its associated traditions and conventions to the next generation. Refusing to provide public schooling in a minority language, by contrast, is almost inevitably condemning that language to ever-increasing marginalization.<sup>522</sup>

<sup>517</sup> Kukathas makes much the same point in Kukathas, 'Multiculturalism as Fairness: Will Kymlicka's *Multicultural Citizenship*', p. 423.

<sup>518</sup> Kukathas, 'Liberalism and Multiculturalism: The Politics of Indifference', p. 697.

<sup>519</sup> *ibid.*,

<sup>520</sup> Kukathas, *ibid.*, p. 697; 'Multiculturalism as Fairness: Will Kymlicka's *Multicultural Citizenship*', pp. 422-424.

<sup>521</sup> Kukathas, 'Multiculturalism as Fairness: Will Kymlicka's *Multicultural Citizenship*', p. 423.

None of this, however, gives us reason to reconfigure public institutions along group-differentiated lines for an equally viable option would be to privatise those institutions. In fact, privatising them may be a preferred option for by taking them out of the public realm one would avoid the problem of partiality altogether. Kymlicka, of course, is blind to this and to the claim that liberalism is not incoherent because of his liberal egalitarian reference point that is, in turn, informed by the normative significance of the distinction between choice and circumstance.

Elsewhere, Kymlicka argues that in the case of immigrant ethnic minorities the same kind of argument against benign neglect holds.<sup>523</sup> Insofar as public holidays and uniforms for public sector jobs are concerned he claims that state decisions cannot but help to reflect, in the case of New World societies such as Canada, the United States and Australia, a bias towards a particular ethnic group or identity. The demands of immigrant communities, or at least their representatives, for redress on these issues, he claims, 'is simply a demand that their identity be given the same recognition as the original Anglo-Saxon settlers.'<sup>524</sup> One could of course argue that there is an exception to be made here on behalf of Kymlicka's Anglo-Saxons to which his use of the word 'original' is the clue. All subsequent migrants have arrived in these countries upon the basis of there already being a pre-established social, political and legal code, as represented by its symbols, language of public life, dress codes and administrative boundaries. Thus, in the first instance, this would seem to indicate that it is incumbent upon the immigrants to recognise those symbols as, among other things, at least partially representative of the presumably preferable conditions the expected enjoyment of which they decided to immigrate in the first place and to pass on the rectitude of such recognition to their descendants. Furthermore, one could hardly doubt that, historically, it was a part of the public discussion that these symbols would not be changed for such reasons. 'Let us immigrate and we will organise ourselves politically to seek group-differentiated exemptions and to change or multiply your national symbols' is hardly an attractive proposition to the already resident.<sup>525</sup> Indeed, the idea that immigrants would seek to alter or multiply national symbols, or seek exemptions from public sector dress codes and public holidays would not only raise the question of the rationality of their original decision to migrate, or of the sincerity of their commitment to understand the culture and customs of the country in which they intend to spend the rest of their lives. It would seem also to call into question the rectitude of immigration itself in the eyes of the already resident. In any case changing national symbols

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<sup>522</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, p. 111.

<sup>523</sup> *ibid.*, pp. 114-115.

<sup>524</sup> *ibid.*, p. 115.

<sup>525</sup> Unfortunately, just this argument – one bad argument amongst many good ones – was put forward by republicans during the 1999 referendum campaign in Australia about replacement of the Monarchy

for the sake of immigrants does nothing to address the question of the continued foreignness to national minorities of the new, apparently inclusive, symbols where the two co-exist alongside the mainstream culture as they do for instance in Australia.<sup>526</sup> The argument for group-differentiated rights and exemptions or the alteration of national symbols to appease the feelings of immigrants, then, is just as much an argument to radically change public policy and halt immigration altogether, or at least to impose the relevant equivalent of an 'Anglo-conformity' model of assimilation, as it is to alter the symbols.<sup>527</sup>

Yet, such an argument merely trades on the same mistaken notion of publicity that Kymlicka's argument does for the anti-immigration argument only goes through if one assumes that such matters should be a matter of public *political* concern and decision-making. That is, all of this presumes that there should be such things as national symbols, public sector jobs, public holidays or the political management of immigration in the first place. Kymlicka's argument concerning the failed-neutrality thesis of the state under conditions of benign neglect can be just as easily taken as an argument for the *privatisation* of public services and policy formation as they can for the reconfiguration of those services along multicultural, group-differentiated lines, regardless of whether they are founded upon multicultural or liberal egalitarian lines. Kymlicka, then, implicitly argues against the welfare rather than the minimal state version of liberalism and, indeed, actually needs to do so in order for his argument to go through because the liberal egalitarian state, unlike the minimal state, is by necessity committed to the provision of public services. In fact, under a more full-blooded minimalist regime of benign neglect - one that Kymlicka does not allow conceptual space for in his critique - none of these instances of failed neutrality need occur at all. Only if one assumes an interventionist liberal state does the charge of incoherence, or the consequent claim for group-differentiated rights and exemptions, have any resonance. If one does not - as the classical or minimal State does not - then the criticism misses its target. Thus, *contra* Kymlicka, we do not need to reconfigure public services along group-differentiated lines because of the incoherence of not doing so but, rather, privatise them in order to confer equal individual interpretative rights where decisions on language, dress and symbols are taken on the basis of private conscience. Notwithstanding this, it would seem that in any case Kymlicka has scored something of an own goal here for his own group-differentiated liberalism would fail the incoherence test in any case because the groups the multicultural state recognises will always fall short of the actual diversity of groups in society as this always changes.

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with a President appointed by a two-thirds majority of parliament and dismissible by the Prime Minister.

<sup>526</sup> Kukathas discusses the tensions between national minorities and immigrant communities in Kukathas, 'Multiculturalism as Fairness: Will Kymlicka's *Multicultural Citizenship*', pp. 416-417.

<sup>527</sup> On 'Anglo-conformity' see Kymlicka, *Multicultural Citizenship*, pp. 14-15, 20, 30, 61, 78.

### 2.iii Intolerable Burdens

The other reason why Kymlicka would reject the strategy of privatisation that the regime of benign neglect demands is because implicit in his liberal egalitarian frame of reference is the idea that *without* public provision of so-called essential services, such services would be either under-provided or not provided at all and, as such, be woefully endowment sensitive. Thus, not only would cultural minorities be unfairly penalized under a benign neglect regime because they would not enjoy special cultural rights and exemptions, in fact all of us - save the affluent - would suffer because none of us would enjoy special economic rights or exemptions such as those conferred by the welfare state. This concern goes to the heart of Kymlicka's second argument against benign neglect; that it would significantly fail to provide members of vulnerable cultural minorities with the requisite conditions to ensure their flourishing or survival and as such would place intolerable burdens upon them<sup>528</sup> Without such protective rights and exemptions, Kymlicka maintains, 'the members of many minority cultures face the loss of their culture.'<sup>529</sup> That is, in some significant sense, the formal rights conferred by the regime of benign neglect are not *enough* because the regime leaves in those obligated by its laws the feeling that the state should be supplying something - usually resources but also opportunities and life-chances - that it is capable of supplying but which it unjustly and unfairly does not.<sup>530</sup> This vulnerability may arise in at least two ways: as a result of systematic oppressions or simply as a result of a group's failure to achieve critical mass within the wider society with the consequence that many of its preferences are unsatisfiable in a market in a way that those of large groups. In both instances, the remedy is the same: the conferring of special rights and exemptions by the state. Yet, as with the incoherence argument Kymlicka's intolerable burdens argument is similarly misplaced against the classical rather than the egalitarian variety of benign neglect.

The first counter-objection that could be made here is that the critique assumes that if the state does not do anything nothing will be done at all. Yet, there is good reason to question this assumption and Kymlicka's own distinction between state perfectionism and perfectionism in civil society drawn in a discussion of the debate between liberals and communitarians about the role of politics is of singular importance here. As he notes in *Contemporary Political Philosophy* both liberals and communitarians

... aim to secure the range of options from which individuals make their autonomous choices. What they disagree on is *where* perfectionist ideals should be invoked. Are good ways of life more likely to establish their greater worth when they are evaluated in the cultural marketplace of civil society, or when the preferability of different ways of life is made a matter of political

<sup>528</sup> See also Kukathas, 'Liberalism and Multiculturalism: The Politics of Indifference', p. 697.

<sup>529</sup> Kymlicka, *Multicultural Citizenship*, p. 109.

advocacy and state action? Hence, the dispute should perhaps be seen as a choice, not between perfectionism and neutrality, but between social perfectionism and state perfectionism – for the flip side of state neutrality is support for the role of perfectionist ideals in civil society.<sup>531</sup>

To illustrate this, take the flourishing and survival of homosexuals as an example. The survival and flourishing of homosexuals can be conceived of either as a matter of debate and action within civil society or as a matter of political advocacy and state action. Another way of characterising this is to say that their survival and flourishing is a matter of either endogenous or exogenous discourse and action. The possibility of exogenous discourse and action is made by those who advocate political discourse and state action. Those who deny the benefits of political debate, by contrast, assume the possibility of endogenous debate and action. Within both categories debate and action can be seen to take two directions: in exogenous action, the state can decide to act in the interests of a vulnerable minority group or assume a policy of active discrimination against it. Whatever it decides to do, however, it cannot do both simultaneously. At least, it cannot do both intentionally, as it only ever agrees upon and then enforces one policy at a time. Unlike exogenous action, by contrast, endogenous action can be *simultaneously* beneficent and hostile because the state's attitude is one of neutral permissiveness. What would the situation be like if the state did nothing?

In the United Kingdom, Australia, the United States and Canada at least, the picture does not look at all bad. During the last decade there has been a veritable explosion of for-profit and not-for-profit organisations seeking to offer all manner of products to the gay customer - from Travel Agencies, cafes and specialist stores to letting agencies, sexual health services and refuges. The right of exit here, of course, would be of paramount importance. Yet, in contrast to Kukathas in particular, the substantive bite of this right does not reside uniquely in an individual's formal ability to leave a community and upon the contingent fact of a wider liberal society in which to enter.<sup>532</sup> Central here would be the idea that those who have left their communities or even interested non-members concerned with the security of the recently rejected or escaped would have opportunities to go out and locate them. Again, this is precisely what happens today, here and now in our society, to many gay people. Hundreds, if not thousands, migrate each year from inhospitable families and communities to the anonymity of the big city and, increasingly, to smaller towns - thus reducing the need to move at all - where they find a support network of the already-resident gay community.

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<sup>530</sup> Kukathas, 'Liberalism and Multiculturalism: The Politics of Indifference', p. 697.

<sup>531</sup> Kymlicka, W., *Contemporary Political Philosophy*, Oxford, Clarendon Press, 1990, p. 219, emphasis added.

<sup>532</sup> Kukathas, 'Are there any Cultural Rights?', p. 134.

What for present purposes is noteworthy here is that all of this has taken place in the absence of group-differentiated rights and exemptions bestowed by the state (and, in the case of the UK at least, *despite* government legislation).<sup>533</sup> The flourishing of gays and lesbians, then, is representative not of the politicisation of the private but, rather, of the privatisation of the public. By relegating our views about others to the private sphere or, in Fraser's terms, by making 'subaltern counter-politics' almost the *only* politics - we not only afford to all the opportunity to express and actualise their interpretations (rather than voice them and wait for them to be outvoted in the majoritarian process of public policy formation) we avoid the risk of hitherto marginalized group-members being oppressed by majorities without suppressing the views the majorities hold. The idea that government inaction signals the death-knell for outcomes favourable to minority groups, therefore, is misplaced.

Thus, just as the charge of incoherence does not really apply to the regime of classical liberal benign neglect, one may question whether the charge of intolerable burdens is applicable either. The classical liberal state does not neglect but rather provide a framework by which the pursuit of the interests of minority cultures is devolved into civil society. Under such a framework neglect may, but also may not occur. All this model says is that the decision to do so should be taken by individuals. This discussion brings us to a point that is crucially important to understand: the minimal state does not involve any principled rejection of emancipatory policies if enacted from within the realm of civil society - or in Kymlicka's own terms, on not *whether* but rather *where* emancipatory action is to take place. On the contrary, state inaction means only inaction by the *state*, not inaction more generally. Yet, Kymlicka needs the latter rather than the former to be true for his criticism of benign neglect and his positive argument for group-differentiated rights and exemptions to be telling.

Of course, Kymlicka could always claim that this counter-objection is actually of no import at all. What he claims is that whatever occurs under the regime of benign neglect, it is not *enough*. Kymlicka thus need not deny that action on the basis of exclusively individual rights may be taken but rather asserts that even if it is, it will prove *insufficient* for the survival, let alone the flourishing of minority cultures. How coherent is this claim? It would all seem to depend upon the criterion of evaluation that is implicit in it. What is the nature of the standard by which Kymlicka judges benign neglect? The problem here is that it is not clear from where the criterion of well-being upon which any claim concerning sufficiency or insufficiency is made is supposed to come from. Criteria of well-being, that is, do not manifest themselves *ex nihilo*. Yet, without an account of this Kymlicka's claim looks arbitrary. To defend special rights and exemptions as a 'remedy' merely begs the epistemological question of the appropriate level of well-being.

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<sup>533</sup> Section 28 of the Thatcher administration's Local Government Act (1988) comes to mind here.

This, of course, all relates to our rereading of Hayekian liberalism in cultural terms in Chapter 2. We saw there that there were good reasons for claiming that Hayek's thesis concerning the constitutional limits upon human knowledge and the implications these have for political institutions are applicable to all social processes, regardless of whether they are economic or cultural. Indeed, we saw that for Hayek our economic freedom is in any case important because it allows both individuals and society to make use of otherwise unusable tacit, locally dispersed and, importantly, *culturally*-differentiated knowledges. Moreover, we saw that in the economic sphere, such critiques were premised upon the knowledge of a relevant level of economic well-being in virtue of which such outcomes are considered to be sub-optimal. The problem with this, of course is that it presupposes the knowledge of such *optima* when these are never given but rather must be discovered. It seems that this argument can without complication be made telling with respect to Kymlicka's intolerable burdens argument.

The critique of thinkers such as Kymlicka that endogenous debate and action is insufficient for the purposes of the flourishing or the survival of minority cultures, then, is founded like its sister notion of economic equilibrium upon an incoherent idea of a meta-cultural, Archimedean vantage point - a point of cultural equilibrium, if you will - from which the workings of society can be evaluated and corrected. Without an argument showing how such a vantage point is possible, the philosophical foundations of Kymlicka's critique appear to rest on shaky premises. Of course, Kymlicka could respond here that these Hayekian points may be to a certain degree telling against economic interventionism, but they are not telling against what he proposes, not least because he is not advocating the redistribution of physical resources, but rather, legal protections and exemptions for vulnerable cultures. No goods are being redistributed, nor is any money changing hands rather, all that is happening is that some people are having certain special protections conferred upon them due to their membership of vulnerable cultural communities. This, of course, is true enough but the important point about such protections and exemptions is that they are *interventions* in a cultural process, not that they are legal rather than physical restrictions. The conferring of group-differentiated rights and exemptions, as well as prohibitions upon the sale of indigenous land or the exclusion of non-members from community-level public decision-making processes are legal, but they are nonetheless interventions.

Given this, what is needed is a way in which such knowledge can be made use of so that a more rational criterion of cultural optimality may be invoked in our ethical evaluations of different kinds of political regime. Without an account of this any claim concerning the sufficiency or otherwise of a particular form of politics will appear to be based upon an irrational and arbitrary stipulation concerning what is culturally optimal. The only way we actually get any idea of the criterion is from within an institutional regime that enables us to

make use of both dispersed and tacit knowledge. Thus, we may object to Kymlicka that despite his claim to be privileging culture as a vital context of choice within liberal institutions he actually undermines this commitment by placing restrictions upon what one may legitimately do, most obviously but not exclusively with one's property. Doing this is undesirable, of course, because much of our tacit knowledge, as embodied in culturally differentiated traditions and practices, is only made use of when we are free to *act* and dispose of our property in accordance with them. As a result, we may make the further claim that Kymlicka's commitment to diversity, like the difference democrats, is largely a cosmetic one.

Moreover, and similarly to the difference democrats, Kymlicka assumes a static conception of culture at the level of ontology. For Kymlicka, cultures are the kinds of things that one can only ever lose. Yet, there is good reason to reject such an understanding of the cultural. Apposite here is Schumpeter's notion of 'creative destruction' for we may make similar claims about the cultural process under a regime of benign neglect.<sup>534</sup> In his discussion of 'additive' identity, Barry points out that under such a regime entire traditions do not appear or disappear *en masse* but, rather, undergo what is perhaps best described as a process of cultural osmosis in which norms are being continuously adopted and shed.<sup>535</sup> It is via this migratory or self-transformational process - of voluntary adoption rather than forced conversion - that traditions emerge, transform themselves and disappear. We are not here characterising the sudden extinction of entire traditions - that is, cultural catastrophes - but rather a gradual, almost imperceptible process of adjustment. Thus, to discuss these issues in terms of the 'loss' of a culture that leads to a culturally sub-optimal outcome or cultural disequilibrium and the attendant need to protect or guarantee them is a fallacy. It is, rather, that traditions and their constitutive norms are perpetually reborn. Kymlicka's error here, like the difference democrats' with regard to the groups to which special rights are supposed to attach themselves, is one of the reification of tradition. Of course, without such reification and stasis, Kymlicka would be unable to posit an entity - culture - upon which the occupier of the Archimedean vantage point could gaze.

Trading upon Hayek's arguments about competition as a discovery procedure we have claimed *contra* Kymlicka that if it is the prosperity or preservation of minority cultures that is desired then it is for the better that we allow these things to be pursued on the basis of individual rights, that is under the regime of classical liberal benign neglect so that society's stock of knowledge may be made adequate use of in determining which norms endure and which disappear. Moreover, if we are to factor in the fact of pluralism, then surely we also need some mechanism by which we can find out whether we should be pursuing such goals and, if so, to what degree? For instance, in *Multicultural Citizenship*, Kymlicka claims that

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<sup>534</sup> Schumpeter, J., *Capitalism, Socialism and Democracy*, London, Allan and Unwin, 1976.



whilst accepting that there is no strong basis for equating the cases of national minorities and immigrant groups, it is nonetheless important to accept that ‘if we reject the option of enabling immigrants to re-create their societal culture, then we must address the issue of how to ensure that the mainstream culture is hospitable to immigrants, and to the expression of their ethnic differences.’<sup>536</sup> Following Parekh, he claims that immigration is ‘a two-way process’ which requires both that immigrants adapt themselves to mainstream society and *vice versa*, although he does not say *why* this should be so.<sup>537</sup> At this level, we also need individual rights and nothing more to do just that. To sum up, then, Kymlicka charges that the regime of benign neglect is incoherent and impose intolerable burdens upon cultural minorities. In both instances we have seen that regardless of whether the charges resonate with liberal egalitarian theories of justice, they do not impact upon the classical liberal regime of benign neglect in any significant way and that Kymlicka’s solution to the problem is as unnecessary as it is inadequate.

### 3. *Liberal Multiculturalism: Raz*

Many of the above objections also apply to Joseph Raz who defends a similar position from similar premises to that of Kymlicka. Central to Raz’s position is the notion of the ‘social form’, which we may for present purposes liken both to Kymlicka’s notion of societal culture as an indispensable context of choice and to Hayek’s account of the importance of tradition to personal identity and choice.<sup>538</sup> Similarly to the case of Hayek, we may concur with Mulhall and Swift’s assessment that ‘Raz can hardly be accused of grounding his liberalism in an asocial individualism of the kind to which communitarians object.’<sup>539</sup> Again, similarly to Hayek, Raz is also keen to emphasize that the cultural rules and practices that are constitutive of individual choice are more often than not inarticulate. This, however, should not be taken as an unwelcome impediment, for it is precisely the tacit nature of much of our knowledge that enables us to negotiate the complex web of activities that are open to us. ‘It is impossible,’ Raz claims ‘to conduct one’s life on the basis of explicit and articulate rules’ and, as such, ‘a lot has to be done ... automatically.’<sup>540</sup> Yet, perhaps curiously in the light of our discussion thus far, despite this Raz asserts like Kymlicka the necessity of specifically public institutions out of the need to ensure the viability of the social forms that facilitate

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<sup>535</sup> Barry, *Culture and Equality*, pp. 81-90.

<sup>536</sup> Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, p. 96

<sup>537</sup> *ibid.*; Parekh, B., ‘The Rushdie Affair: Research Agenda for Political Philosophy’, *Political Studies*, vol. 38, (1990), pp. 695 - 709. See also Kymlicka, ‘Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts’, pp. 25, 29 -30.

<sup>538</sup> Raz, *The Morality of Freedom*, pp. 308-313.

<sup>539</sup> Mulhall and Swift, *Liberals and Communitarians*, p. 329.

<sup>540</sup> Kukathas, ‘Multiculturalism: A Liberal Perspective’, 70-1.

individual autonomous choice.<sup>541</sup> The reasoning behind Raz's claim as with Kymlicka's, is that a social form is a collective, or in the Rawlsian terms adopted by Kymlicka, 'primary' good.<sup>542</sup>

How, then, does the idea of a social form lead to liberal multiculturalism? Perhaps counter-intuitively, for Raz perfectionism is consistent with moral pluralism because 'there are many morally valuable forms of life which are incompatible with each other'.<sup>543</sup> *Prima facie* at least, this would seem to be a rather odd claim, especially given Raz's non-scepticism concerning value. Yet, this anti-sceptical claim, he contends, does not commit one to the view that there is *only one* form of life worth pursuing. Indeed, Raz is committed to the claim that autonomy is not only consistent with but actually *requires* moral pluralism, for one only chooses autonomously if one is able to choose from numerous morally acceptable and valuable options, not just numerous options, some of which may not be valuable.<sup>544</sup> Thus, at the foundation of his multicultural perfectionism Raz defends the importance of what he calls two 'evaluative judgements' to political action. The first of these has a decidedly Kymlickian tone to it, for the liberal multicultural society rests on the belief 'that individual freedom and prosperity depend on full and unimpeded membership in a respected and flourishing cultural group'.<sup>545</sup> The claim that a cultural group should be respected hints, moreover, at Raz's second evaluative judgment: 'the belief in value pluralism, and in particular in the validity of the diverse values embodied in the practices of different societies,' leads us 'to recognize the equal standing of all the stable and viable cultural communities existing in that society'<sup>546</sup> and hence the need for the state to supply the conditions necessary for their survival.<sup>547</sup>

This latter requirement, moreover, is clear in Raz's discussion of three liberal responses to diversity.<sup>548</sup> The first, the response of toleration - which we may equate broadly to benign neglect, or what Raz calls 'supermarket liberalism'<sup>549</sup> - was founded according to Raz upon the limits of coercion and for the securing of social peace.<sup>550</sup> This conception, however, was to be supplemented by the second liberal response that wished to secure the

<sup>541</sup> Raz, *The Morality of Freedom*, Oxford: Clarendon Press, 1986, 132-3, 162, 205.

<sup>542</sup> Raz, 'Multiculturalism: A Liberal Perspective', 70 - 2; 'National Self-Determination', in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Oxford: Clarendon Press, 1994, p. 130. On Kymlicka and cultural context as a primary good see Kymlicka, *Liberalism, Community and Culture*, p. 169. See also Monique Deveaux's slightly different discussion of Raz in Deveaux, *Cultural Pluralism and Dilemmas of Justice*, where she claims that his theory cannot provide a coherent answer to the question of which groups deserve State protection. She is, however, silent on whether the state should be offering this kind of protective service. On this see Deveaux, *Cultural Pluralism and Dilemmas of Justice*, Ithaca: Cornell University Press, 2000, 118 - 127.

<sup>543</sup> Raz, *The Morality of Freedom*, p. 161.

<sup>544</sup> *ibid.*, p. 399.

<sup>545</sup> Raz, 'Multiculturalism: A Liberal Perspective', pp. 69, 71 - 2.

<sup>546</sup> Raz, *ibid.*, p. 69.

<sup>547</sup> Raz, *ibid.*, pp. 78 - 9.

<sup>548</sup> Raz, *ibid.*, pp. 68 - 69.

<sup>549</sup> Raz, *ibid.*, p. 70.

individual's rights against discrimination.<sup>551</sup> Of course, even this regime extended certain latitude to individuals to discriminate in their 'private dealings', although Raz does not say more than this. More significantly, moreover, and again similarly to Kymlicka, Raz equates the legislative domain where classical liberal civil and political rights are supplemented with liberal egalitarian rights to 'a country's public services, its educational system, and its economic and political arenas' that 'are no longer the preserve of the majority, but common to all its members as individuals.'<sup>552</sup> In addition, Raz describes his 'liberal multicultural' approach as is founded upon the public affirmation of multiculturalism, yet qualifies this statement by limiting its defence to societies 'where there are several stable cultural communities both wishing and able to perpetuate themselves' and where the communities are not marked by geographical separation.<sup>553</sup>

One possible criticism of Raz here would be to focus upon the tensions between his perfectionist and multicultural commitments. Surely, his allowance of perfectionist ideals into politics means allowing the beliefs of some to override those of others? To neutralist liberals, of course, this is unacceptable because of the importance of the idea that we respect people's beliefs equally in politics. For neutralists, the only way to achieve this, moreover, is to keep such beliefs - all such beliefs - out of the domain of politics. Yet, for Raz, this objection in an important sense misses the point. Central to his perfectionism is a value-cognitivism implicit in the idea that we can be *mistaken* about what is of value and worthwhile. As he claims in *The Morality of Freedom* 'satisfaction of goals based on false reasons does not contribute to one's well-being.'<sup>554</sup> That is, for Raz perfectionist ideals do not come into the domain of politics because they are believed but, rather, because they are valid insofar as they are reflective of a valuable form of life. Yet, even if we concede this - which should not be overly problematic for, as Mulhall and Swift point out in their discussion of Raz, even *anti*-perfectionist liberals such as Rawls and Dworkin do not need to commit themselves to a sceptical stance with respect to the value of conceptions of the good - there still remains the important question of whether we should entrust to the *state* the duty of satisfying the demands that the valuable form of life in question places upon us.<sup>555</sup> This, of course, is not a point to which Raz is insensitive.<sup>556</sup>

A second criticism would be to take issue with the emphasis upon the role of the state in Raz's theory. Problematic for Raz here is the claim that that perfectionism invokes either a) coercion in the imposition of the lifestyles of some upon others and b) that these others are

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<sup>550</sup> *ibid.*, p. 68.

<sup>551</sup> *ibid.*, 68-9.

<sup>552</sup> *ibid.*, 69.

<sup>553</sup> *ibid.*,

<sup>554</sup> Raz, *The Morality of Freedom*, p. 301.

<sup>555</sup> Mulhall and Swift, *Liberals and Communitarians*, p. 315.

coerced. Raz, of course rejects this charge because the state can achieve many of its perfectionist aims without having to physically compel people to perform or not perform certain acts. It can use taxation to this effect, for example as it does for the public provision of goods and services.<sup>557</sup> Yet, the distinction between physical compulsion and taxation is a tenuous one and behind taxation is the threat to coerce. The same, moreover, applies to subsidy as it distorts the choices that would otherwise be made and is, in any case, raised through taxation.

Yet, it is here that Raz runs into similar problems as those encountered by Kymlicka. It does not automatically follow that just because we may accept that social forms are necessary preconditions for autonomous choice that, at the level of politics and public institutions, the social group should enjoy a prioritised status. Moreover, and again similar to Kymlicka and, for that matter, the difference democrats, the necessary definition of the groups to enjoy these rights would seem to preclude further development of a group's composition and identity as well as lock out other emergent groups from the political process. Indeed, by instituting political rights for groups in this manner, it would perhaps not be unreasonable to assume that those groups who already have rights would actively seek to preclude newly-emergent groups from enjoying them so as to reduce competition for public benefits.

Thirdly, the emphasis upon the indispensability of social forms provides no grounds for according epistemological authority to the leaders of such groups or their representatives on what is to count as the content of the form that the group is supposed to confer upon its individual members. This, of course is all the more surprising given what Raz, unlike Kymlicka, says of the epistemological burdens of being guided by tacitly-held social practices. That is, whilst wishing to emphasise the fact that having a cultural context in the form of unstated conventions and implicit social rules actually enables us to solve very complex social co-ordination problems - as well as to bestow upon us rich and comprehensive personal relations and our very identities<sup>558</sup> - he says nothing of the corollary that, *qua* social, no single individual has privileged access to what the social form means for its members in all particular cases. Yet, by seeking to seal a stamp of approval upon one given interpretation of the social form at the level of public institutions by conferring group rights, Raz actually presupposes that there is a single interpretation that is authoritative. Rather, then than attempt as Raz and Kymlicka do a reconciliation of individual freedom and the group as privileged political subject, liberals should outline and defend a regime of individual rights so that answers to questions concerning the membership and nature of groups as well as the content of the cultural context they provide may be discovered. Now, to be sure, Raz is not espousing

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<sup>556</sup> Raz, *The Morality of Freedom*, p. 427.

<sup>557</sup> *ibid.*, p. 161.

<sup>558</sup> Raz, 'Multiculturalism: A Liberal Perspective', p. 71.

some form of group-level subjectivism and conventionalism. His argument does not claim that 'whatever is practised with social approval is for that reason valuable.'<sup>559</sup> Nor, moreover, does it mean that an individual may not transcend the bonds of their social forms.<sup>560</sup> Yet, even if this is so, Raz does not distinguish between acceptable and unacceptable social forms, nor does he offer an account of the latitude of experimentation afforded to embedded individuals by the statist institutions that he endorses.

Finally, his argument from individual choice does not point us towards any specific culture that needs protection, let alone that the protection should be public. We may concede that in order to choose meaningfully we need social forms or cultural contexts of choice but this provides no answer as to which particular context that should be, or whether, indeed, there should or could only be one such context.<sup>561</sup> Indeed, as Raz is sure to point out, cultures are continually changing both in their own terms and as a consequence of their encountering other cultures.<sup>562</sup> Yet, in defending a special public status for cultural groups and the benefits and burdens they confer, he implies that one may safely answer which cultures and aspects of them merit protection. Of course, Raz is quick to qualify this by outlining a 'viability test' in which only those cultures whose members wish them to be preserved actually receive the helping hand of the state in achieving this and concedes that such protection will of course makes some cultures more viable than others. Secondly, beyond the public goods claim, Raz offers no argument for the institutions that are to serve the purposes of cultural protectionism being specifically public ones. It would seem that an answer to this is to be found in his considerations of cultural viability. Yet it is here where he runs into problems for he is keen to stress that his version of liberal multiculturalism is concerned neither with the preservation of cultures for their own sake nor with the ever-changing nature of cultures.<sup>563</sup> Yet, if this is so, then why must the institutions that are to protect those cultures deemed viable - that is, cultures whose members seek their protection - be public ones? In claiming this he is assuming that there is some threshold beyond which cultures may be deemed viable or not. If not, then why the reliance upon public institutions whose purpose is to guarantee certain protection or outcomes? It seems that if the cultures concerned are to be made viable by public institutions then they will become viable and their members, including their younger members - will seek their continued preservation. Raz too, then, is somewhat insincere in his commitment to diversity because of his liberal egalitarian sympathies. Defending such institutions, *qua* institutions of the state whose policies are enforceable, means that in many significant areas of life we are not free to do as we please with what we possess and, as such,

<sup>559</sup> Raz, *The Morality of Freedom*, p. 310.

<sup>560</sup> *ibid.*, pp. 312 – 313.

<sup>561</sup> I am indebted to Dr. Paul Kelly for this point.

<sup>562</sup> Raz, 'Multiculturalism: A Liberal Perspective', pp. 72-74.

<sup>563</sup> *ibid.*, pp. 74 – 5.

are unable to make use of the knowledges embodied in our inherited traditions and practices. This, of course is not only undesirable at the individual level but also at the level of the social because it means that society, too, is unable to make use of such knowledge. Thus, in a fundamentally significant sense, both Kymlicka and Raz presuppose a preferred outcome of the cultural process in their accounts of Liberal Multiculturalism rather than offer an account of justice that facilitates the process of discovery of what that outcome should be. Ironically, moreover, and contrary to their foundational emphasis upon the embedded nature of man, both theorists conclude by defending institutions that take some groups out of the cultural process altogether by insulating them against the costs they would otherwise incur by participating in social discourse on an equal basis with others who do not enjoy such rights and, in that process, reforming some aspects of their inherited traditions. For all their talk of our embedded nature, then, Kymlicka and Raz are, like the difference democrats, institutional atomists.

#### 4. *Culture versus Equality*

In *Culture and Equality* Brian Barry claims that the emergence of multiculturalism can be traced historically to the demise of communism in the late 1980's and the political vacuum created by its departing.<sup>564</sup> In the countries where central planning failed, Barry claims, there has arisen the often-violent politics of ethnic nationalism. By contrast, the West has witnessed a less extreme form of this same trend in the emergence of multicultural politics, or the politics of recognition, that in many cases has taken inspiration from the New Social Movements of the Left that arose in the 1970s in defence of the claims of, among others, women, gays and ethnic and national minorities. In marked contrast to our discussion so far, however, Barry squarely locates Kymlicka - although he is silent with respect to Raz - within the multicultural camp. For despite Kymlicka's claim concerning the importance of societal cultures as vital contexts of autonomous individual choice, central to Barry's critique is the argument that Kymlicka's defence of group-differentiated rights and exemptions to secure that choice ultimately issues in a cultural subjectivism that undermines any commitment he has to the value of individual autonomy. It is worth noting here that Barry's critique of subjectivism is mirrored in his discussion of Kukathas's critique of Kymlicka's cultural rights. That is, just as Kymlicka and other multicultural theorists are said to leave individuals at the mercy of unequal power relationships by delegating rights to culturally defined groups, so Barry claims that, despite the fact that so much of his theory is premised precisely upon the

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<sup>564</sup> Barry, *Culture and Equality*, pp. 3-4. For similar discussions, see also Fraser, N., 'Introduction', in Fraser, N., *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (London: Routledge, 1997, pp. 1 - 8 and Benhabib, S., 'The Democratic Moment and the Problem of Difference' in Benhabib, S., (ed.), *Democracy and Difference: Contesting the Boundaries of the Political*, Princeton, Princeton University Press, 1996, pp. 3 - 18.

rejection of positions such as Kymlicka's, Kukathas actually achieves the same result by denying the validity *all* such group-differentiated rights.<sup>565</sup> For, even if it is right that the liberal state cannot accommodate deep cultural diversity if that means bestowing rights to cultural groups that 'give the force of law to religious rules that contravene liberal principles of equal treatment,' this does not mean 'that there is an alternative understanding of liberalism that would accommodate 'deep cultural diversity' by withdrawing standard liberal protections for individuals or putting the force of the state behind practices that violate basic liberal tenets of freedom and equality.'<sup>566</sup> This, of course, would be to conflate libertarianism as anti-paternalism with liberty that is wholly silent on the use and abuse of the most crude forms of cultural power. Unfortunately, the latter is precisely what Barry claims Kukathas ends up doing, with the consequence that there is no 'significant difference between what he accepts and what he rejects.'<sup>567</sup>

However, Barry's core argument against multiculturalism is that it actually misdiagnoses the problems minorities face.<sup>568</sup> Far from them being rooted in cultural inequality, such problems ultimately arise from economic inequality. Moreover, the antidote to them - multiculturalism - actually undermines the politics of redistribution that would be central to their rectification because it 'diverts political effort away from universalistic goals' and 'may very well destroy the conditions for putting together a coalition in favour of across-the-board equalization of opportunities and resources.' This, of course lies at the heart of Barry's concern that multiculturalism 'struggles to change the *colour* of inequality'<sup>569</sup> without doing anything 'to change the structure of unequal opportunities and outcomes.'<sup>570</sup> Indeed, Barry goes further when he claims that multiculturalism 'actually entrenches [the structure of inequality] by embroiling those in the lower reaches of distribution in internecine warfare.'<sup>571</sup> Such a politics would amount to a 'free-for-all' in the allocation of social burdens and benefits that would harm both the unoppressed and those weaker members of the oppressed, and would, on the same basis, allow for anti-social behaviour to go uncurbed.<sup>572</sup>

Yet, despite his rejection of multiculturalism in both its Difference and liberal egalitarian varieties, Barry views his own liberal egalitarian politics as having a common

<sup>565</sup> On this see Kukathas, 'Multiculturalism as Fairness: Will Kymlicka's Multicultural Citizenship', *The Journal of Political Philosophy*, vol. 5, no. 4, 1997.

<sup>566</sup> Barry, *Culture and Equality*, p. 128.

<sup>567</sup> *ibid.*, p. 141.

<sup>568</sup> *ibid.*, pp. 305 - 6. He suggests that Kymlicka and Young are particularly guilty of the first charge. On this, see Barry, *Culture and Equality*, pp. 308 - 17 and 306 - 8 respectively.

<sup>569</sup> Barry, *ibid.*, p. 325. The phrase is Todd Gitlin's, quoted in Barry, *Culture and Equality*, p. 326, emphasis added.

<sup>570</sup> Barry, *ibid.*, p. 326. A similar point is made by Kymlicka with respect to affirmative action as ultimately reflective of an assimilationist ideal towards prevalent socio-economic structures. On this, see Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 67 - 68.

<sup>571</sup> Barry, *ibid.*, p. 326.

<sup>572</sup> *ibid.*, p. 326 - 8.

source with it - a concern with the plight of the disadvantaged. His concern, however, is with the largely distributive nature of such disadvantage and this extends to cultural membership only to the extent that such membership may be construed as involuntary. We must be careful, of course, not to read voluntariness here in the sense of a formal right to exit, *à la* Kukathas. For Barry, we actually need the dispositional wherewithal to make that formal right an effective one and he cites at least three ways in which we can make good on the requirement for cultural membership to be voluntary, all of which have clear distributive implications. In the first instance we need minimum economic protections and standards so that, upon deciding to leave a given group, we are not left destitute, the fear of which would clearly be an impediment to making any decision to leave. Secondly, we need the exit rights to be strengthened by the groups we actually leave behind so that they may not impose unfair penalties upon us for leaving and thirdly we need universal, guaranteed provision of education and culture. What is of particular interest for present purposes - and this relates clearly to his concerns about the structure rather than the colour of inequality - is the relationship these prescriptions have to Barry's other concerns about the politics of multiculturalism being but an unwelcome distraction from more important, distributive concerns for it is clear that each of them has a clear economic dimension. It is clear, then, that for Barry the project of securing the voluntariness of membership is as much an economic enterprise as it is a cultural one; that is that we must not attend to the colour of inequality but, rather to the structure of unequal opportunities and outcomes. In this way, he claims, we attend to both the inequalities that members of groups suffer relative to members of others and help to curb power inequalities within them.

The second aspect of his project in particular, moreover, goes to the heart of Barry's rejection of what he considers to be the tenuous distinction between the 'Reformation', 'tolerance' or 'diversity' variety of liberalism represented by Kymlicka and Galston (he does not mention Raz in this respect) and 'Enlightenment' or 'autonomy' liberalism.<sup>573</sup> The problem here is that the distinction represents a false choice. If one is to defend liberal institutions on the basis of the promotion of diversity or tolerance, one will quickly find oneself in the sorts of conceptual difficulties that Barry claims plague Kymlicka's and Kukathas's theories where, despite their superficial differences, the freedom and equality of members within groups is rendered subservient to that between them.<sup>574</sup> On the other hand, if one seeks to defend liberal institutions on the basis of the value and promotion of individual autonomy, it is difficult to see how this would be possible without flying in the face of the very problem of diversity concerning conceptions of the good that the theory is supposed to

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<sup>573</sup> *ibid.*, pp. 118 - 123, 146 - 47. See also, Galston, W. A., 'Two Concepts of Liberalism', *Ethics* 105 (1995), pp. 516 - 34.

<sup>574</sup> Barry, *ibid.*, pp. 132 - 3.



address. Of course, Barry thinks that this worry is to a large extent unfounded ‘because autonomous people can have any substantive beliefs they like.’<sup>575</sup> Therefore, in defending their autonomy, the state is not only desisting from the promotion of a *particular* conception of the good, it is desisting from the promotion of *any* particular conception of the good. ‘What we mean by saying that people are autonomous,’ he claims, ‘is simply that whatever beliefs they do have will have been subject to reflection: their beliefs will not merely be those that were drummed into them by their parents, community and schools.’<sup>576</sup> Let us take each of these in turn.

In order to ensure that no one is left destitute by their decision to leave a community the formal classical liberal citizenship rights of contract need to be supplemented with social and economic rights. ‘The defects of the primitive capitalist labour market,’ Barry writes,

... are better met by adding other rights to the right of contract: health and safety measures, maximum hours, protections against dismissal, trade union rights, rights to an income outside the labour market, and so on. Similarly, a system of legal rules that gives everyone formally equal rights needs to be supplemented by the provision of legal aid.<sup>577</sup>

In many ways, of course, Barry’s claims here can be seen to be reflective of a logically identical argument to Raz and Kymlicka although targeted only at the institutions of economic rather than both economic and cultural benign neglect. That is, for Barry, we need economic positive rights to supplement our formal rights to property in order to make the freedoms those formal rights endorse effective.<sup>578</sup> Without such rights, that is, without the state actively conferring positive economic rights upon its citizens, the well-being of the members of the polity may fall below what would reasonably be considered to be adequate.

The other sense in which Barry hopes to foster autonomy is via what we may call the fortification of exit rights. This, sharply distinguishes his position from that of Kukathas who appears to rely too heavily upon the value of formal exit rights and no more. In standard liberal fashion, Barry seeks to ensure the voluntariness of group-membership by fortifying the individual’s rights of exit and does so by ensuring that individuals are not only able to leave associations on terms that do not leave them destitute, but that associations are also legally bound to ensure that they exclude members on terms that do not leave them destitute, such as financial compensation in the case of individuals who are ejected and subsequently economically boycotted by the groups of which they were once members.<sup>579</sup> In both cases,

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<sup>575</sup> *ibid.*, p. 123.

<sup>576</sup> *ibid.*

<sup>577</sup> *ibid.*, p. 14. See also pp. 7, 12.

<sup>578</sup> *ibid.*, pp. 7, 195.

<sup>579</sup> *ibid.*, p. 153.

the principle task of the state here is 'to eliminate gratuitous barriers to exit from groups.'<sup>580</sup> In addition, of course, as Barry quite rightly points out, the availability of the right of exit does not mean that the internal affairs of various groups should not be the subjects of public, political interest in any case. 'Even if there are hostels for battered wives that provide a refuge from abusive marriages, and a system of income support that removes the threat of destitution', he writes, 'that is no reason for not making physical injury and marital rape criminal offences.'<sup>581</sup>

Of course, it would be false to claim that Barry does not believe in cultural rights or, at least, in a right *to* culture. His argument for this is that without the public provision of high art, it will not be supplied. 'The only possible rationale for subsidization,' he claims, 'is that there are some artistic endeavours that are of very high quality and need public support either to continue at all or to be accessible to more than a privileged elite.'<sup>582</sup> Of course, similarly to the question of why a *political* coalition should be assembled to combat inequality, one may object here that this does nothing to show why it should be supplied. Barry's answer here is that culture is central to ensuring that membership is voluntary.<sup>583</sup> Ordinarily, of course, we can leave the provision of many services to the market for 'markets have the advantage of leaving people to decide for themselves how they want their fair share of their society's resources to be spent.'<sup>584</sup> However, the problem with the market for egalitarian liberals such as Barry is that it only satisfies 'effective demand'; that is, demand that is backed up with money. 'The market,' he writes, 'will satisfy the frivolous desires of somebody with a hundred thousand pounds a year before it will satisfy even the urgent necessities of somebody on the minimum state benefit.'<sup>585</sup> It is for this reason, he concludes, that egalitarian liberals hold that 'the way in which goods and services are allocated by markets is fair only if the distribution of income and wealth is fair.'<sup>586</sup> This, then, would lead us in the first instance to simply redistribute resources so that we all have the effective demand to pay for the culture of our choice. Yet, as Barry explains, a simple redistribution of resources along egalitarian lines in order to ensure a fair starting point is not the end of our difficulties so far as culture and the arts are concerned. The root of the problem here is that the subsidization is carried out so as to satisfy demand, now rendered effective. However, if we do this, he reminds us, then there

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<sup>580</sup> *ibid.*, p. 148.

<sup>581</sup> *ibid.*, p. 149.

<sup>582</sup> *ibid.*, p. 198.

<sup>583</sup> *ibid.*, p. 212. The other reasons Barry cites are that culture is an essential prerequisite for living a full life and that it is in society's interest. On this, see Barry, *Culture and Equality*, Chapter 6, §§ 5 and 6.

<sup>584</sup> Barry, *ibid.*, p. 195.

<sup>585</sup> *ibid.*,

<sup>586</sup> *ibid.*,

is no reason why the money would not be spent on non-cultural items, such as groceries.<sup>587</sup> Ultimately, and because of the difficulty of avoiding the scenario where distributed cultural funds are spent, for instance on Kellogg's Cornflakes, Barry contends that public provision of culture should be on the basis of the excellence of the works thus supported. 'The only possible rationale for subsidization,' he writes, 'is that there are some artistic endeavours that are of very high quality and need public support either to continue at all or to be accessible to more than a privileged elite.'<sup>588</sup> This, of course, also explains why he is against the specific subsidization of minority cultural activities:

... If it is merely a matter of opinion that Beethoven is better than banjo-playing, then it is a mere matter of opinion that either is better than the monetary equivalent in groceries. And in that case there is no case for earmarking funds at all: let people spend the money on Beethoven, banjo-playing or groceries as they choose. On the same lines, if we say that the object of arts funding should be to spread the money among cultural groups in accordance with some implicit or explicit quota system, this undermines the rationale of having special arts funding at all. If we once withdraw from the position that the only criterion for funding should be excellence, why not really spread the money around by spreading it around the entire target population in the form of cash?<sup>589</sup>

Implicit here, then, is a perfectionist account of value in the arts that shares much with Raz's account of valuable social forms and that assumes that 'it makes sense to talk about 'real excellence' as something that is more than a matter of opinion.'<sup>590</sup>

Barry's arguments about the public stake in education are of a similar kind and take two forms. Firstly, he claims that the state needs to be involved in the provision of education so as to improve standards in education.<sup>591</sup> The other kind of argument for state interventionism has more to do with debates about the proper locus of decision-making and with issues concerning schooling ages and the content of education.<sup>592</sup> Barry, of course, wishes to sharply distinguish his position from the 'perversion' of the libertarian position - he has Kukathas in mind here - 'according to which parents should be able to deny their children education or medical care, inflict grievous physical injuries on them, force them into marriages against their will, and so on.'<sup>593</sup> This, of course, does not mean that the state should take control of all areas of the relationship between parents and children: '[j]ust as democracy

<sup>587</sup> Of course, in response to this we could perhaps defend 'cultural vouchers' which only allow us the opportunity to spend the thus distributed funds on officially recognised cultural activities.

<sup>588</sup> Barry, *Culture and Equality*, p. 198.

<sup>589</sup> *ibid.*, p. 199.

<sup>590</sup> *ibid.*

<sup>591</sup> *ibid.*,

<sup>592</sup> *ibid.*, pp. 199 – 249.

<sup>593</sup> *ibid.*, p. 201.

is the worst form of government except for all the others, so parents (whether natural or adoptive) are, for all their faults, better than any yet-discovered alternative for raising children.<sup>594</sup> Indeed, Barry rightly points out that in many instances the record of state-run institutions is 'generally depressing' in this respect.<sup>595</sup> Nevertheless, it does mean that in some cases the state ought to intervene.

One important case that Barry cites in defence of state intervention - and one which he thinks Kukathas would come down on the side of the parents with regard to - is that of the refusal by parents of blood-transfusions for their sick children.<sup>596</sup> Such a position, Barry writes, is justified because 'it assigns rights and responsibilities in a way that provides liberty where that is appropriate while at the same time attempting to limit the abuse of power.'<sup>597</sup> I think that Barry's argument here is to be preferred to Kukathas's, although importantly this does not mean that one need drop the libertarian approach. For we could arrive at the same kind of prohibition to Barry's on the basis of the epistemological discourse rights defended here. That is, one could claim that until they attain the age of majority, the child's potential as a contributor to the wider social discourse must be protected, regardless of whether the protection is from harmful actions or harmful omissions. Thus because children are considered incapable of articulating their views on the rights and wrongs of blood transfusions, they are likewise incapable of giving their consent to the refusal of the transfusion and, as such, should not be refused it. In short, the inability to say 'yes' or 'no', should be considered as a 'no,' a precept which we have noted has recently motivated the drafting of new sexual offences legislation in the United Kingdom with regard to child prostitution and, with regard to the debilitating effects of drunkenness, to date rape.<sup>598</sup>

## 5. *Liberty and the Culture of Welfare*

### 5.1 *Minimum Economic Protections and Standards*

Of course, even if we could claim uncontroversially that in some important sense each member of society ought to be dedicated to the task of helping the disadvantaged, there is still some way to show that we should invoke the state to do it. 'My concern' Barry explains at the beginning of his book, 'is with views that support the politicisation of group identities, where the basis of the common identity is claimed to be cultural'<sup>599</sup> and he contrasts this with the situation where the group identity is derived from non-cultural criteria, such as

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<sup>594</sup> *ibid.*, p. 202.

<sup>595</sup> *ibid.*,

<sup>596</sup> *ibid.*,

<sup>597</sup> *ibid.*, p. 203.

<sup>598</sup> UK Government, Sexual Offences Bill (2002).

<sup>599</sup> Barry, *ibid.*, p. 5.

relationship to the labour market. Unlike cultural identity, these group identities are of course important because they pertain to distributive inequalities.

Yet, it seems unclear why Barry's own criticisms of cultural group rights bestowed by the state should not be extended to this domain as well. There are good reasons, liberal reasons that Barry ought to endorse, for extending the strategy of privatisation to the economic. A brief but lucid discussion of these issues - although perhaps from an unexpected source - is to be found in an essay by Alan Greenspan, associate of Ayn Rand and long-time chairman of the United States Federal Reserve. He insightfully points out in his discussion of consumer rather than labour market protection that activity by the state drives out the protection both get through companies cultivating and defending their *reputations*. This is because it places all companies and employers on the same footing regardless of whether they do indeed have good reputations or whether they are recent entrants into the marketplace whose reputation is yet to emerge. In Greenspan's own words, the state enforcement of uniform protections 'declares in effect that all are equally suspect and that years of evidence to the contrary do not free a man from that suspicion.'<sup>600</sup> Moreover, such standards also undercut the *consumer or labourer's* ability to exercise his judgement because the minimum effectively says that there is need to discriminate between differing products or working conditions. In this way, the wider cultural process of judgement is cut short by a regulatory intervention. 'The government's "guarantee"', he claims, 'undermines this necessity; it declares to the consumers, in effect, that no choice or judgement is required - and that a company's record, its years of achievement, is irrelevant.'<sup>601</sup>

Of course, it may be surprising that a Hayekian approach would disapprove of such regulation. Surely, such interventions actually minimise the epistemological costs encountered when we act in the market place? By imposing uniform standards and relieving us of the need to exercise discrimination between goods and labour conditions, the state actually fosters co-ordination. Yet, this ignores the fact that the appropriate level is never given objectively but is only emergent from the process of competition between differing notions of what it should be. Greenspan is particularly erudite on this point and it is worth quoting him at length, in the context of his discussion of building standards:

... The minimum standards, which are the basis of regulation, gradually tend to become the maximums as well. If the building codes set minimum standards of construction, a builder does not get very much competitive advantage by exceeding those standards and, accordingly, he tends to meet only the minimums. If minimum specifications are set for vitamins, there is little profit in producing something of above-average quality. Gradually, even the attempt to

<sup>600</sup> Greenspan, 'The Assault on Integrity', p. 119.

<sup>601</sup> *ibid.*, p. 120.

maintain minimum standards becomes impossible, since the draining of incentives to improve quality ultimately undermines even the minimums.<sup>602</sup>

Worse still, the effect of such regulations is to subvert the very intent because 'by being forced to adhere to standards of construction long after they have been surpassed by new technological discoveries, builders divert their efforts to maintaining the old rather than adopting new and safer techniques of construction.'<sup>603</sup> The consequence of this, then, is that, the consumer and the labourer are afforded *less* protection relative to the standard that could be achieved via the non-political socio-economic process.

Similarly, one may argue that the state should not insulate individuals from the consequences of the externalisation of their own beliefs - not least in culturally diverse societies - via the institutionalisation of social minima. The reason for this is that doing so short-circuits the wider, cultural, process of adjudication between norms. Such adjudication cannot, for epistemological reasons relating to the fugacity and tacit nature of social knowledge, take place within politics because it is incapable of making as great a use of the wider stock of social knowledge relevant to any decision that liberal institutions can. Rather, it needs to take place socially, in which our diverse knowledges are allowed to play their part. The universal guarantee implicit in the state acting to achieve such a minimum, moreover, would seem to destroy the possibility of what we may call the negative cultural feedback by which we learn which actions to avoid and which is necessary to the rationality of the adjudication arrived at.<sup>604</sup>

The idea of negative cultural feedback, of course, relates in an important way to Barry's concern with multiculturalism's tendency to give too much latitude to anti-social behaviour for the same argument could be made with respect to the minimum standards and protections he defends.<sup>605</sup> This, of course is no 'New-Right' critique of the welfare state but a critique of its tendency to produce people whose behaviour is not anti-social for culturally specific reasons but because they are insulated from the consequences of bad behaviour by the universal and unconditional guarantees to income and well-being such a state provides.<sup>606</sup> We may add here that the guaranteed provision of such services to all regardless of their particular beliefs and practices - places unacceptable burdens upon the allegiance to the polity of others. It would be intolerable for a gay taxpayer, for instance, to be expected to acquiesce to money being paid out to a religious minority who as yet does not have an organised 'reform'

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<sup>602</sup> *ibid.*

<sup>603</sup> *ibid.*,

<sup>604</sup> Barry, *Culture and Equality*, pp. 270 – 271.

<sup>605</sup> *ibid.*, pp. 289 - 90, 328.

<sup>606</sup> For a brief overview of the different strands of the new right critique of the welfare state see West, D., 'Beyond Social Justice and Social democracy: positive freedom cultural rights' in Boucher, D. and Kelly, P. (eds.), *Social Justice from Hume to Walzer*, London, Routledge, 1998, pp. 232 – 252.

movement and who believe the most abhorrent things about gays. Not only would it be intolerable, it would smack of the same incoherence that Barry asserts plagues Young's Politics of Difference. Thus, just as the difference democrats and multicultural liberals misconceive the task of justice with respect to the cultural, so Barry misconceives it with respect to the economic. Given our embedded natures and mutual ignorance, social and economic minima are there to be discovered rather than assumed.

### *5.ii Culture and Education*

Barry's third means of securing the voluntariness of membership - the state provision of culture and education - is equally susceptible to the arguments above. By contrast, it is precisely because at the most general level we are insulated from the consequences of our decisions because of the existence of such guarantees that makes Barry's argument for strong limitations on parental and communal authority so compelling. However, they are only compelling because the wider welfare state framework makes the substandard education of children or taking them out of school altogether relatively costless. However, if one factors out such guarantees - or at least the *public, political* commitment to them, then the importance of such decisions is made clear. In the absence of guaranteed incomes etc., it would indeed be cripplingly costly to 'know less that is true and more that is false than an average well-educated and well-read northern European from the early eighteenth century.'<sup>607</sup> One would, furthermore have to assume an unreasonable degree of cultural brainwashing to accept the claim that even those brought up under very strict conditions have absolutely no inkling whatsoever of their situation - that is, were singularly incapable of recognising their own predicament - in order to do something about it. Indeed, the example of gays goes to show that despite all the education and social pressure to the contrary, we do have some inner motivation for changing our lot, often for reasons that we are not even cognisant of.

Similarly, it is difficult to ascertain just what would constitute an adequate defence against destitution upon exiting a community to which one formerly belonged. The baseline of adequacy, that is, just is what we must discover. Yet, by giving this task to the state it seems that we may just as well over determine or, indeed, *underdetermine* it than get it right. This is because most of the knowledge which one would need to make use of in order to arrive at an adequate determination would be lost, given that the task of determination would be largely in the hands of politicians, or, perhaps, independent government bodies or bureaucratic public consultation processes (which in any case are often non-binding upon the state). The problem here, of course, is that all of these seek to divine what the public interest is but are only ever representative of but a fraction of the population as a whole. Thus, the reason why Barry's liberal egalitarian institutions fail to do justice to the ambitions they seek

to serve is intimately related to our Hayekian concern with dispersed and tacit knowledge. In defending the institutions of the welfare state Barry fails in the first instance to acknowledge the role that culturally differentiated knowledge can play in achieving the kinds of outcomes it is publicly committed to achieving. By taking decisions with respect to education, the labour market and welfare away from individuals, the use of potentially valuable knowledge is denied.

### *5.iii Reformation, Enlightenment and the Foundations of Liberal Egalitarianism*

However, more fundamental than the question of whether we should leave to the state the role of ensuring the voluntariness of membership is the question of whether we should assemble a coalition to help the disadvantaged. For despite his theory not being vulnerable to the charge of ignoring the cultural because he is not formally committed to it in the way the difference democrats and the Multicultural Liberals are, this invocation unmasks Barry too as, in two important respects, a species of ‘culturalist.’ This is particularly clear in the first instance insofar as the traditions and practices in virtue of which we are capable of making economic decisions are in the last resort cultural phenomena and insofar as the adoption of the minimum standards, protections and guarantees that he defends are ultimately derived from particular, cultural, interpretations of what is socially optimal. Ultimately, then, behind the appeal to distributive considerations *is* an appeal to the cultural that, of course, must always only ever be but a partial and controversial one.

The question of culturalism and neutrality, of course goes to the heart of Barry’s programmatic desire to reject the distinction between ‘Reformation’ and ‘Enlightenment’ liberalism discussed earlier. Importantly, Barry does not address the question of the desirability of assembling such a coalition because this would inevitably lead him back to the comprehensive and ethically controversial account of the autonomous individual that he seeks to distance his theory from. That is, addressing it would undermine his claim

... that liberals are free to object to the notion that the job of the state is to promote autonomy without thereby being committed to endorsing the promotion of diversity. Vice versa, we do not have to concede that the only possible reason for objecting to policies for the promotion of diversity is that they are incompatible with the promotion of autonomy.<sup>608</sup>

When it comes to answering why we should be concerned to justify autonomy-enhancing institutions he invokes notions of ‘[a] rudimentary sense of humanity’ or ‘outrage’ or

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<sup>607</sup> Barry, *Culture and Equality*, p. 249.

<sup>608</sup> *ibid.*, p. 146.



‘perversion’ or a ‘gratuitous’ barrier to exit to do so.<sup>609</sup> To be sure, Barry concedes at the outset that his liberal egalitarianism is assumed in *Culture and Equality* - the assumption is, after all, central to the claim that a politics of difference undermines a politics of redistribution<sup>610</sup> - and he talks in various places about consistency with ‘standard liberal principles.’<sup>611</sup> However, is this sufficient? Perhaps we should refer to *Justice as Impartiality* to understand what underpins the commitment to economic emancipation in *Culture and Equality*?<sup>612</sup> Nonetheless it is incumbent upon Barry to offer at least some reasons why pursuit by the state of the kinds of measures he considers desirable from a liberal point of view do not fall afoul of the controversy that apparently plagues the ‘Enlightenment’ or ‘autonomy’ liberalism he seeks to distance himself from but ultimately remain compatible with. The same considerations, of course, would also apply to the philosophical foundation of his defence of minimum standards in education and adequate levels of compensation upon exit. Thus, despite his claim to the contrary, Barry does defend a species of cultural interventionism, once we assume that any infringement on one’s use of goods carries with it an infringement of the utilisation of his and also society’s tradition-bound and culturally-differentiated, tacitly-held knowledge

This failure, moreover, points us to an important argument about the supposed neutrality of Barry’s liberal egalitarian theory and ultimately about what he takes the fundamental task of justice to be. For, whilst not presupposing a commitment to autonomy, the assumption of omniscience implicit in Barry’s account does presuppose that it is possible to comprehensively know what The Good for man is, regardless of which particular good this may be. That is, implicit in the comprehensive ethical idea that the Good is, for example, an autonomous life is the corollary assumption concerning omniscience. In this case, of course, it is not an omniscience of the particular distributive preferences of the diverse individuals in society but rather omniscience concerning the telos of the wider cultural process within which our institutions of justice are embedded. All of this has grave consequences for the coherence of these theories, not least because they are supposed to satisfy the need for justice of the citizenry of culturally diverse societies. For, in the last resort, the assumption of omniscience makes clear the failure of neutrality. That is, without the assumption of omniscience regarding the cultural process, it would not be possible to postulate *any* ethical value or set of ethical values in virtue of which public institutions should be articulated, designed and justified. The assumption of cultural omniscience concerning the Good of the diverse and mutually ignorant members of society, therefore, is a necessary but not sufficient condition for the postulation of any ethical value as the ultimate foundation of our principles of justice.

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<sup>609</sup> *ibid.*, *passim*.

<sup>610</sup> *ibid.*, p. 8; Chapter 8, *passim*.

<sup>611</sup> *ibid.*, pp. 128, 148, 203.

That is, the only way that one can postulate any such value as the foundation of the institutions that justly govern the unfolding of the social process is to assume in a fundamentally problematic way what the optimal outcome of that process should be. With the assumption of omniscience, then, comes a necessary violation of neutrality between competing conceptions of the good. Thus, rather than offering an account of justice that enables us to discover to what extent we should alleviate suffering and also to determine how best we may, Barry rather presupposes that answers to these fundamentally ethical and, hence, cultural questions have already been given.

## 6. Conclusion

We have seen that liberal egalitarians appear to be divided over the most appropriate response to the challenge of diversity. Liberal Multiculturalists such as Kymlicka and Raz argue for group-differentiated politics from liberal - more specifically liberal perfectionist - premises whilst theorists such as Barry share with them a desire to foster individual autonomy but claim that a multicultural politics - whether or not it is one that holds itself up to be liberal - is both misguided and ultimately subversive of its own aims. Yet, despite our concurrence with Barry's claim here, we have also argued that, similarly to Kymlicka and Raz, he provides no sound reason for accepting that what we need instead of cultural interventions are economic ones by the state. We do not need either cultural or economic interventions. Firstly, because in both cases the critique of non-intervention which both presuppose has been found to be wanting. We have also seen that even if the critique of either cultural or economic benign neglect was not to be found wanting, then we still need on epistemological grounds, to bestow individual and only individual rights so as to discover precisely what best to do in the face of the results of benign neglect, regardless of whether it is construed as an economic or cultural regime. Without such rights, any interventions will issue in socially irrational economic and cultural outcomes in which social knowledge has not been made adequate use of. In the case of immigrants and contrary to what the difference democrats, Liberal Multiculturalists and liberal egalitarians such as Barry claim or implicitly assume, we also need principles of justice to allow us to discover what kind and quantity of immigration is in the best interests of the members of the polity, given their local and tacit culturally-differentiated knowledges. By contrast, the liberal egalitarians, like the difference democrats, fail both the sincerity and rationality tests of the adequacy of a theory of justice. Similarly, in *Culture and Equality* Barry states that we may assume that diversity - within which we may include the diversity brought about by immigration - is 'here to stay' if we rule out, as he does, mass expulsions or

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<sup>612</sup> Barry, B., *Justice as Impartiality*, Oxford, Oxford University Press, 1995.

the enforcement of cultural norms, or genocide as a means of reversing it.<sup>613</sup> Raz, too, makes similar comments with respect to the acceptance by indigenous populations of the changes that must necessarily come with concentrated if not large-scale immigration.<sup>614</sup> The problem with this however is that the idea of severe restrictions on immigration - or even of mass expulsion as a solution to it - is no longer but a glint in the eye of a few but a rather attractive option to significant numbers of people who are also politically organized. What this should prompt us to do, then, is to offer an argument in favour of immigration.

What, then, are the principal conclusions to be drawn from our Hayekian discussion of the 'mirage' of cultural justice. At the most fundamental level both the difference democratic and liberal egalitarian theorists that have been considered here misconceive the problematic of justice under conditions of cultural diversity. In the case of the difference democrats this is most clear in their desire to rectify the differential positioning of specific social groupings without addressing the issue of the cultural particularity and hence controversy of their desire to do so. Similarly, and despite, apparent disagreements between them, liberal egalitarian theorists attempt to rectify differential cultural and economic positioning without realising that such positioning is just what public institutions of justice are designed to help us discover, given our irremediable ignorance of all the facts needed in order to achieve just this.

The important question that our interpretative variant of Hayekian political theory places at the centre of contemporary debate about justice, then, is not whether the concern of justice should be cultural or economic but, rather, what we should be seeking to achieve when we attempt to theorise justice for culturally diverse societies. We do not need principles of justice to secure pre-given and supposedly optimal cultural or economic outcomes but, rather, to secure the conditions within which we may discover what outcomes we should be seeking to achieve – and, indeed, what coalitions we should be assembling - given the limited knowledge implied by our embedded natures and mutual ignorance. We need, that is, a set of public principles of justice that allow individuals to interpret on their own terms and given their own knowledge, what social meanings demand of them. Let us turn now examine the character of such institutions.

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<sup>613</sup> Barry, *Culture and Equality*, p. 21.

<sup>614</sup> Raz, 'Multiculturalism: A Liberal perspective', p.79.

***Part III: Discovering Cultural Justice***

## 5 The Privatisation of the Political and The Discursive Minimal State

### 1. Introduction

In the two previous chapters, I have discussed the inadequacies of both the difference democratic and liberal egalitarian responses to cultural pluralism. To recap, the difference democrats incoherently privilege cultural diversity as a regulative ideal in politics but ultimately thwart it at the level of institutions by advocating a group-differentiated discursive democracy. Liberal egalitarians such as Kymlicka and Raz, similarly, thwart any stated commitment to diversity that they have by advocating an economic interventionism which, in the final analysis, amounts to a species of cultural interventionism. Barry, by contrast, does not privilege ethical diversity, nor does he defend a group-differentiated politics, thickly democratic or otherwise. However, despite claims to the contrary he does espouse a form of culturalism at the level of institutions by defending positive welfare rights as the appropriate means both to protect us from and correct what are morally defective economic outcomes. Finally, we have seen that both traditions betray a fundamental misconception of the task of justice that has important consequences for the internal coherence of the theories they endorse. Rather than seeing the task of justice as providing a framework in virtue of which social answers to important distributive and cultural questions may be discovered, both difference democrats and liberal egalitarians assume that answers have already been given and that politics simply has to be reflective of those answers.

In this chapter I will give an account of the Discursive Minimal State that is the institutional conclusion of my application of Hayek's thought to the problematic of justice under conditions of cultural diversity. In the first section, I will focus upon two important characteristics of this account of justice. The first of these is that similarly to the difference democrats, Hayekian liberalism endorses a discursive form of public decision-making. In contrast to them, however, and because of the limits imposed by Hayekian social epistemology, the public discourse of the Discursive Minimal State is of a largely individualistic and, crucially, *disaggregated* form that issues in what we will call the privatisation of the political, rather than the politicisation of the private. A full and proper account of this discourse, moreover, leads to the second characteristic of neo-Hayekian cultural justice that sharply distinguishes it from the difference theorists' commitment to a deliberative form of democracy. This is that the bestowing upon *individuals* of socio-economic discourse rights - including the right to one's body and its faculties - issues in an individualistic politics of a minimally democratic, Discursive Minimal State. In introducing

the Discursive Minimal State in this manner, I will discuss various issues in Section 2 to illustrate just what the disaggregated discourse that follows from the privatisation of the political implies for various minority groups for whom only a politics of difference or a liberal egalitarian politics is said to be the best antidote to cultural and economic inequality and exclusion.

In doing so, it will become apparent that discourse and institutional minimalism are linked in the sense that just because the politics is discursive in nature, the state must have a decidedly minimal - although no less important - role to play. However, why must it have such a minimal role? Section 3 will be concerned to answer this by exploring more thoroughly the minimalist nature of the Discursive Minimal State and will defend the view that, unlike its difference democratic and liberal egalitarian rivals, it endorses a public discourse that is sincere with respect to cultural diversity. That is, it allows us to raise at least two important questions the answers to which need to be discovered rather than assumed: to what extent, if at all, we should celebrate or affirm or acknowledge difference and to what extent, if at all, we should attend to distributive inequality.

In the fourth section I will extend this argument to claim that not only is the discourse sanctioned by the Discursive Minimal State sincere with respect to diversity, it is also a *rational* discourse, in the sense that it enables us to discover rather than announce what the answers to pressing social issues are. That is, given the inherently diffuse, tacit and culturally-differentiated nature of knowledge, the degree of flourishing of any given group in the Discursive Minimal State is itself a more rational 'answer' to a question concerning its proper status in society than an 'answer' that arises from and is ultimately enforced by an epistemologically emaciated political discourse that occurs in a public space. Given that we cannot know in advance the outcome of such a debate – unless, of course we rig it by inviting only those who agree with a particular viewpoint to participate – the voluntary nature of the discourse will give us the most accurate, non question-begging answer precisely because it allows us to make use of our knowledge. I will conclude by summing up the argument before proceeding, in the following chapter, to defend it from some important objections.

## ***2. Disaggregated Public Discourse and the Privatisation of the Political***

### ***2.i Extension of the Scope of the Counter-Public & Expansion of the Domain of Discourse***

What would the character of justice be once interpretative rights had been accorded to individuals? As with the accounts of difference democracy discussed in Chapter 4, the politics of the Discursive Minimal State is a discursive form of public decision-making. Indeed, not only is it discursive but the discourse it sanctions, similarly to the later version of Young's Politics of Difference and Nancy Fraser's discussion of subaltern counter-politics, is

‘decentred.’<sup>615</sup> Under this conception, discourse not only occurs under the institutions of the public political forum but also in civil society, between diverse individuals and groups that are representative of a wide range of social identifications, interests and perspectives. Similarly to Fraser and Young’s conceptions, moreover, the Discursive Minimal State can be said to be at least in part an emancipatory conception of politics insofar as it offers members of these often marginalized groups the opportunity to address important social questions on their own terms by making use of their own knowledges and tacit understandings. For Fraser the counterpublics have a dual emancipatory function ‘as spaces of withdrawal and regroupment’ and ‘as bases and training grounds for agitational activities directed toward wider publics.’ ‘It is precisely in the dialectic between these two functions,’ Fraser reminds us, ‘that their emancipatory potential resides.’<sup>616</sup>

Yet, in a number of important respects the discourse of the Discursive Minimal State is radically different to and indeed ultimately incompatible with these difference democratic accounts. This is because it acknowledges that once the epistemological demands attendant to socio-economic mediation and the embedded nature of the self are taken seriously, it is necessary to extend the scope of the counter-public to the level of the individual. Doing this, moreover, leaves behind any political commitment to groups or democracy. However, this does not mean that groups have no voice in the discourse. Rather, they do so on the prior basis of individuals actively alienating their individual interpretative rights to a representative who enters debate on their behalf; for instance as part of a trade federation, an ethnic community organisation, or a gay rights or pro-life advocacy organisation. Moreover, we will see that groups do still participate on an emergent, self-selective basis in dialogue via the contributions the individuals who identify themselves as belonging to them make to the wider dialogue. The results of these individual contributions, then, dovetail to indicate what the group’s perspective on a given public question is. The upshot of this extension, moreover, is that the discourse is able to take on a disaggregated form in which contributions to public dialogue take place ‘between’ participants who for the most part do not come into face-to-face contact. In brief, with respect to the vast majority of issues and controversies the Discursive Minimal State follows Barry’s strategy of privatisation although, importantly, it does so on the basis of Hayekian social epistemology.<sup>617</sup>

The strategy of privatisation, of course, explains why unlike the difference democrats, Barry’s liberal egalitarian politics is not premised upon a commitment to group level

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<sup>615</sup> Young, *Inclusion and Democracy*, Chapter 5, *passim.*; Fraser, ‘Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy’, p. 14.

<sup>616</sup> Fraser, N., ‘Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy’, p. 15. Fraser then asks how we should understand the discursive interactions among competing publics but she does not actually say *how* it will happen.

<sup>617</sup> Barry, *Culture and Equality*, Chapter 2.

difference or diversity *per se* but, rather, is concerned with the alleviation of *economic* inequality between individuals. Indeed, as we saw in the previous chapter, an important part of the argument of *Culture and Equality* is that the politicisation of group difference actually *obstructs* the alleviation of material inequality and may even exacerbate it. Yet, despite concurring with the thrust of Barry's claim, it is at this point where significant intramural differences *between* classical liberals and liberal egalitarians as well as extramural ones between liberals and difference democrats emerge. For emerging from our critique in Chapters 4 and 5 is the claim that Barry's own anti-multicultural argument for the strategy of privatisation of the cultural sphere is equally appropriate to and thus should be expanded to include the economic domain that he takes as primary. Again, and unlike Barry's own ethical argument for privatisation, the reasons for this are the same as those relating to Hayekian social epistemology discussed in Chapters 1 and 2 which have been appealed to above in order to extend the scope of the counter-public. Given that in the economic domain no individual can know all that is needed to be known in order to effect socially equitable outcomes or corrections of inequitable ones, we are best off privatising and therefore disaggregating economic decision-making in order that differentiated local and tacit knowledges may be made socially available to discover what should be done in response to the sometimes deleterious outcomes of social co-operation. Instead of Barry's liberal egalitarian welfare rights, then, the Discursive Minimal State enables the social management and correction of economic outcomes to take place in terms of individual decisions in which, importantly, the rectitude of the conferral of the benefits that positive welfare rights would otherwise achieve is *itself* a subject of the wider, disaggregated public discourse.

### **2.ii The Privatisation of the Political**

Most significantly, once we extend both Fraser's notion of 'subaltern counter-publics' to the level of the individual and expand Barry's strategy of privatisation from the cultural to the economic we radically reconfigure the normative significance of the public-private split in politics. Rather than make the private political or, in other words, politicise the private in the interests of the economic emancipation or cultural recognition of members of marginalized groups, the epistemologically-motivated extension of the counter-public and expansion of the domain of its 'discursive space'<sup>618</sup> means that ultimately we privatise the political.<sup>619</sup>

Two important clarifications need to be made here. Firstly, and acknowledging any concerns one may have about the disappearance of groups from public discourse, the

<sup>618</sup> Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy', p. 16.

<sup>619</sup> This is what Jonathan Wolff calls 'the enfeeblement of the political.' On this see Wolff, J., 'John Rawls: Liberal Democracy Restated', *Liberal Democracy and Its Critics*, Carter, A. and Stokes, G. (eds.) Cambridge, Polity Press, 1998, p. 123.



privatisation of the political does not mean that we take important issues off the public agenda and leave those to whom such concerns are of importance to fend for themselves in a invisible private domain that admits of all manner of insidious and unadmitted oppressive relations between interpreters.<sup>620</sup> That, clearly, would be a rather sorry state of affairs. Rather, the claim that all aspects of social cooperation are the fitting subjects of public discussion is one with which we concur. Furthermore, and in contrast both to Fraser's characterisation of subaltern counter-politics, that is, as precisely a *counter-politics* that is viewed as an alternative or corrective to more formal political decision making institutions and to Young's rediscovery of civil society in *Inclusion and Democracy*, the disaggregated discourse of the Discursive Minimal State is the norm throughout the polity and not the exception.<sup>621</sup> As such, it is not a discourse that addresses only certain kinds of issue that otherwise would be excluded from the public agenda - as if they were mere political afterthoughts - but, rather, is ultimately constitutive of public discussion itself.<sup>622</sup> In this sense the disaggregated discourse is not one in which the marginalized are permitted to play a complimentary but nonetheless second fiddle to others more centrally situated in society's discursive orchestra but, rather, one in which all play first violin. The extension of the counter-public and the expansion of the domain of the discourse that together are constitutive of the privatisation of the political, then, are institutional responses to Hayek's epistemic problematic that do not alter the content of public discourse but, rather, its *form*. Precisely because the place of the individual in society is taken seriously, the discourse is both all-encompassing and largely of a disaggregated character and as such is, on epistemological grounds, most appropriately institutionalised along individualist lines. In the discourse of the Discursive Minimal State, then, everything is up for discussion and everything is discussed on equal terms.

Moreover, and on the basis of the argument for individual interpretation of Chapter 2, the questioning of the rectitude of conferring public discourse rights to all on an equal basis could not be raised. That is, to deny that women, for example, should enjoy these political rights would be to beg the question of their very conferral. At the political level all need to enjoy these rights so as to find out the answer to such questions. A similar line of argument could be made, of course, with respect to slavery. We cannot buy or sell for good ourselves or other people in the Discursive Minimal State because this would be to deny the very interpretative rights that all are supposed to enjoy without recourse to reconsidering one's decision. Of course, one may, as is already the case in societies that permit prostitution, be

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<sup>620</sup> A concern which figures in Anna Elisabetta Galeotti's interesting and comprehensive critique of Hayekian political theory. See Galeotti, A. E., 'Individualism, Social Rules, Tradition: The Case of Friederich A. Hayek', *Political Theory*, vol. 15, no. 2, (1987), pp. 163 - 181, esp. pp. 173 - 179.

<sup>621</sup> Young, *Inclusion and Democracy*, Chapter 5.

able to sell oneself on a temporary basis. Furthermore, it is clear that the abuse of children would be ruled out for, as not being possessed of these public political rights until attainment of the age of majority, they would not be in a position to consent to the inflicting of harm upon them.

Before discussing the merits of such an arrangement, let us now take a self-consciously eclectic, although by no means exhaustive, list of issues in order to illustrate the character of public discourse when individuals rather than groups are accorded interpretative rights about all the results of social co-operation. The issues that will be discussed are: abortion and homosexual parenthood, employment practice and affirmative action, cultural rights and exemptions, immigration and the allocation of housing. In the first instance we will see that the privatisation of the political demands the libertarian option rather than prohibition or the rule-and-exemption approach whilst in the second, the privatisation of the political demands the regime of private property rights.<sup>623</sup>

*Abortion and Homosexual Parenthood* Abortion is perhaps the most useful issue upon which to begin explaining the character of the Discursive Minimal State as it is an often discussed topic in work on interpretative approaches to justice and is in many respects a paradigmatic example of the kind of cultural, as opposed to material or distributive, concern of the New Social Movements of the Left and Right.<sup>624</sup> Discussion of abortion is usually conducted in terms of two broad and mutually exclusive choices. Pro-choice advocates often ground their defence of abortion in the woman's right to control her body whilst pro-life advocates, by contrast, claim that the sanctity of life is paramount. To see what stance the Discursive Minimal State would take, let us take the example of an inhabitant of Anytown who wishes to have an abortion because she believes that it is irresponsible to bring new life into an already overcrowded and underfed world. Initially at least the approach taken towards the issue of abortion by the Discursive Minimal State may appear similar to what Ronald Dworkin has described as a 'checkerboard solution' in which competing, if not mutually exclusive interpretations are accommodated in legislation.<sup>625</sup> The strategy Dworkin discusses is one where abortions are legal - in order to placate pro-choice advocates - but are legal only for women born on odd years - to placate pro-life advocates. This strategy, Georgia Warnke tells us in *Justice and Interpretation*, means that pro-choice advocates are satisfied because 'at

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<sup>622</sup> Given that the state will oversee the passing of at least some laws with regard to law enforcement, national defence, voting and most importantly, *who is to qualify as a protected individual interpreter* this claim will need to be weakened in a later section.

<sup>623</sup> On this, see Barry, *Culture and Equality*, Chapter 2, *passim*.

<sup>624</sup> See Warnke, *Justice and Interpretation*, *passim*; Cohen, J. L., 'Democracy, Difference and the Right of Privacy', Benhabib, S. (ed.), *Democracy and Difference: Contesting the Boundaries of the Political*, Princeton, Princeton University Press, 1996, pp. 187 - 217.

<sup>625</sup> Dworkin, R., *Law's Empire*, Cambridge, Ma., Harvard University Press, 1986, pp. 178 - 184.

least some women were allowed the choice they thought just and pro-life advocates could similarly know that at least half the cases of injustice against foetuses had been stopped.<sup>626</sup>

The conferral of individual interpretative rights with regard to abortion, similarly, can *prima facie* be seen to be a checkerboard solution in that it allows both pro-choice and pro-life interpretations to be externalised. Of course, the way in which it does so is different because it involves the removal of the issue of abortion from the law altogether and, as such, has far more in common with Barry's notion of a 'libertarian option.'<sup>627</sup> Not only would one have the right to choose to have an abortion, others - including, of course, doctors - would have the right to choose whether or not to perform one or to work for hospitals or abortion clinics that do. The hospitals of Anytown, moreover, would be permitted to decide as a matter of in-house policy whether or not to perform abortions and, if they do, under what conditions. Moreover, Anytown's construction companies and suppliers of medical goods, as well as those based in other places, would be permitted to decide for themselves whether or not to accept contracts to build abortion clinics or supply them with essential goods. The extent to which our single mother may have an abortion, then, would not be set in advance by legislation but, rather, by the extent to which others, often unseen others, would be prepared to perform the wide range of tasks that facilitate it. Abortion, then, whilst being legal and permissible, would not be a matter of positive right.

Let us take as another very different example the debate concerning whether gay couples should be allowed to hire the services of a surrogate mother or a donor father, or make use of an adoption agency to have child. One such couple in Anytown, have decided to seek an adoption agency that will allow them to provide the love, commitment and care involved in bringing up a child. They have to date being relatively unsuccessful in their search as in Anytown one of the two adoption agencies has as a part of its charter the commitment to respect the wishes of donor parents who do not wish to see their soon-to-be adopted children brought up in same-sex households. This means that, at the moment, there are no children available for adoption. There is one other adoption agency in Anytown, although it is one that the couple have decided not to seek help from as it has no commitment to take on board the desires of donor parents at all, whether they are in favour of or against the idea of same-sex adoption. Despite not agreeing with those who are against same-sex adoption, the couple have decided that it is more important that donor parents are at least consulted on the issue.

In the case of homosexual parenthood, then, the response of the Discursive Minimal State is formally identical to that governing abortion in that the issue is not subject to legislation and, as such, is not a subject of the politics of recognition simply because it is not a

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<sup>626</sup> Warnke, *Justice and Interpretation*, p. 71.

subject of politics. The fact that a couple may merely want a child for what some would consider to be the wrong reasons - such as wanting to make a legal or political point or for the even more crass reason of wanting a child in the way one wants a new car - would, under the reading offered here, not have been reason enough to impose a ban. Rather, such factors would enter into the moral deliberations of those whose consent is needed in order for the couples concerned to have or adopt the child: the surrogate mother or donor father, the hospital, the adoption agency, the parents of children who will give them up for adoption to name just a few, all of whom participate in Anytown's disaggregated discourse about homosexual parenthood. Of course, the inhabitants of Anytown participate in discourses that are wider than this. The availability of abortion services would be derived in part upon the moral deliberations of other, unseen women, their husbands or partners who, together with the inhabitants of Anytown, transform and are transformed by the wider economic and cultural nexus. Unseen doctors, too, would contribute to this wider context of choice when deciding which hospitals to work for as would suppliers of medical goods when deciding to which institutions they should supply upon the basis of their own knowledges and often tacit understandings. In the case of homosexual parenthood, the choices available to couples will also be determined by hospitals and adoption agencies drawing up their own in-house policies on whether they provide surrogacy and adoption services to homosexual couples, the moral choices of the parents of soon-to-be adopted or surrogate children deciding whether they want to give them up to adoption agencies that allow for adoption or, indeed are *premised* as a niche service-provider upon adoption by gay couples. This wider, mediated discourse, then, sets the context within which women choose to have abortions and gay couples choose to adopt children and within which others, including other women and other gays, offer their services to help them do so. All the issues that are discussed within the political forum, then, are here relocated within the context of civic social relations.

***Employment Practice and Affirmative Action*** The libertarian option or the strategy of privatisation would also be adopted with regard to the issue of employment practice. The question here concerns the rectitude of employing and sacking workers upon the basis of the acceptability to the employer (and, indirectly, the employer's customers) of traits that are cultural, ethnic, racial or gender-based. Barry, of course, claims that to allow employers to cater to their own tastes or to the tastes of their customers in this way would be to allow them to 'drive a coach and horses through anti-discrimination legislation.'<sup>628</sup> The reason why Barry finds this objectionable, of course, is that more often than not the reasons cited for the refusal to hire or for sacking someone are irrelevant to the good performance of the job. Significantly, however, he does accept that deciding what inhibits the efficient discharge of

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<sup>627</sup> Barry, *Culture and Equality*, pp. 41 – 2.

the job 'leaves a lot of room for interpretation,' that is, that this notion is subject to interpretative dispute.<sup>629</sup> Yet, admitting this much without going on to say why this is so is not only problematic for his unhappiness with the idea of repealing of anti-discrimination legislation, but also for his positive argument for minimum standards. For money-making enterprises at least, efficient discharge of the tasks demanded by the job would be parasitic upon profitability. Indeed, this just is the way that the markets Barry, with obvious qualifications, endorses reconcile the diverse and often conflicting preferences that we have. The degree of profitability of a company just is the degree to which what it produces and how it produces it is acceptable to the people it hopes will buy the good in question, given their diverse traits and interests. If clients or customers do not find certain traits appealing, they will simply take their custom elsewhere for reasons which only they know. Indeed, the recent rise of fair trade coffee is an interesting case in point where the change in preference was not for a particular type of coffee *per se* but, rather, for the alternative production process that fair trade represents. What of not-for-profit ventures such as charities? Again, it seems that the problem here is that efficient discharge will be determined by factors many of which will be unknown to the employer or the beneficiaries of the organisation's services. Ultimately, then, we need freedom here - that is, the repeal of anti-discrimination legislation which rules out race, gender, sexuality and religion as ever significant factors for the performance of any job - to enable society to find out just what 'efficient discharge of the job' means.

Discussion of employment practice is often part of wider debates concerning affirmative action and the Discursive Minimal State would also allow an employer to decide whether or not he should employ on the basis of prior concerns about the social upliftment of particular groups. In the case of the Anytown Construction company, there is in place a policy of affirmative action that actively seeks to employ people from the Outcast minority group of Anytown, who along with Devout Believers have typically experienced higher levels of unemployment than other groups. The Outcasts, are differentiated from the majority community in terms of their race, as opposed to the Devout Believers who are differentiated from the majority in terms of their distinctive beliefs, practices and traditions.

Similarly, and as we have seen with regard to employment practice, the decision to selectively admit or, indeed, set up colleges, schools and universities that *only* admit particular groups because of their disadvantaged position in society, is protected. Beyond this, members of the wider community would be free to externalise their beliefs about admission policies by sending or not sending their children to such establishments or supplying or not supplying goods and services. What the libertarian option makes clear, then, is that the issue of affirmative action is itself a subject of contestation and, as such, is left as a

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<sup>628</sup> *ibid.*, p. 60.

matter of individual conscience. In the Discursive Minimal State, then, all would enjoy the freedom to employ, sack and admit whomsoever they - and their consciences - chose and others would be free to externalise their beliefs about those choices.

**Cultural Rights and Exemptions** The issue of affirmative action leads naturally to a consideration of the status of cultural rights in the Hayekian polity.<sup>630</sup> Similar to the position defended by Chandran Kukathas, it is clear that in the Discursive Minimal State neither the Outcasts nor the Devout Believers would enjoy, along with any other cultural grouping, cultural rights.<sup>631</sup> Yet, the prohibition of cultural rights by the Discursive Minimal State does not mean that the concentrated benefits derived from their enjoyment are lost. Rather, the rectitude of the conferral of the benefits that would be enjoyed by the possession of cultural rights would itself be one of the subjects of the disaggregated discourse. The members of the Anytown Housing Co-operative, for instance, are free to choose to divert some of their collectively owned resources to members belonging to the Outcast and Devout Believer minority communities. Thus, the Discursive Minimal State would offer principled constraints upon how such benefits are to be accorded. What is important here, then, is that the derivation of the group-differentiated benefit in question takes place upon the basis of the prior possession of individual rights. In this case, membership of the Co-op is voluntary and the procedures it has in place for the determination of in-house policy are left subject to a free, fair, although non-secret, vote. Thus, in the Discursive Minimal State group differentiated benefits are the kinds of thing that only individuals would accord by devoting the exploitation of their individual rights to those they deem in need of special treatment. Those who saw group-differentiated benefits as a good thing, for instance, would be free to persuade others of this and to back up their beliefs by devoting the exploitation of their individual rights to this end. Moreover, and contrary to the argument of Chapter 4, this may, of course, reflect the belief that the voice of a marginalized group - to gain expression via an elected representative or traditional authority figure - is an identifiable entity. Alternatively but not exclusively of this possibility, the institutionalisation of a group voice may simply reflect a desire for efficient decision making on the part of the individuals concerned. None of this, however, mitigates the argument being offered here, as the conferral of individual interpretative rights

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<sup>629</sup> *ibid.*,

<sup>630</sup> I am following Barry's use of 'positive' and 'negative multiculturalism to be coextensive with cultural or group rights and legal exemptions respectively. Barry, *Culture and Equality*, p. 17.

<sup>631</sup> Kukathas, 'Are there any Cultural Rights?', *Political Theory*, Volume 20, Number 1, February, 1992; 'Liberalism and Multiculturalism: The Politics of Indifference', *Political Theory*, vol. 26 no. 5, October 1998; *The Liberal Archipelago*, forthcoming. We will examine Kukathas's Politics of Indifference more closely in the next chapter. See also Kukathas, C., 'Cultural Toleration' in Kymlicka, W. and Shapiro, I. (eds.), *NOMOS 39: Ethnicity and Group Rights*, New York, New York University Press, 1997, pp. 69 - 104.

proceeds as much as a basis for answering questions concerning the truth of such beliefs as it does to discussing the rectitude of group-differentiated benefits themselves.

Similarly to group rights, neither the Outcasts, the Devout Believers nor any other group would enjoy group-differentiated *legal* exemptions in the Discursive Minimal State for the simple reason that there would be no item of legislation to which there would be an exemption. Of course, just because there are no legal exemptions does not mean that there will be no exemptions *per se*. Rather, it is to say that there is no special, group-differentiated case for a legal exemption as conferred by the state. Anytown Construction, for example, has recently accepted a contract to build a new abortion clinic. It has also needed to devise its own response to the presence of the large number of Devout Believer inhabitants who, as is well known locally, are highly experienced and skilled workers in this industry but whose religion forbids the removal of traditional headgear. Anytown Construction, however, runs a strict worker-safety employment policy and must decide whether employees who for religious reasons cannot wear construction helmets, should be employed by it under a special exemption. After lengthy deliberation they have decided not to offer this exemption as a part of the contracts they enter into with workers. Thus, only those Devout Believers who are secular and do not wear the headgear have the opportunity to work for Anytown Construction. Similarly, a rival construction company in Anytown that is actually owned and run by a well-established Devout Believer family must also decide whether or not to impose a helmet requirement on all of its employees *except* those of Devout Believer origin. Expecting that this may cause some resentment between employees of different communities, they have decided to pursue a libertarian option *within* the company and allow their workers to decide for themselves, provided of course that if they choose not to wear protective headgear they sign a document to the effect that the responsibility for any injuries that a helmet would have provided adequate protection against is theirs and theirs alone. Furthermore, and in keeping with the idea that these decisions are part of a wider set of decisions being simultaneously made in Anytown and beyond, the degree to which both companies' policies were acceptable would in turn be reflected in the choices of others, to work for them or hire their services. This is shown by the fact that two other companies that recently adopted a similar libertarian option policy had to reinstate compulsory headgear because of the drop in orders they experienced.

**Immigration** In the case of immigration the Discursive Minimal State would take a permissive stance and sanction free migration. Of course, under such a regime the point of control of immigration levels and the composition of immigrants is not removed altogether, but is rather relocated to a different, civic social level. Thus, it would be individual interpreters who would decide whether or not to offer immigrants jobs, housing, or any other of the myriad goods and services available. Newly arrived migrants to Anytown would,

conversely, be free to link up with already-established networks of immigrant communities, with those already-resident people and organisations whose business it is to help them, or to forgo this option and seek direct entry into the wider host community. Prospective immigrants who have not yet left their countries of origin, moreover, would themselves contribute to the process of the determination of immigrant numbers and composition by selecting countries on the basis of the reputation for hospitality they enjoy.

*Housing* Similarly to the issues considered above which all fall within the politics of recognition, the issue of housing may be a subject of interpretative diversity, despite it being at first glance located within the realm of the politics of distribution. However, unlike the cases above, interpretative diversity is not dealt with via the libertarian option of removing the issue from the province of law altogether. To do so, of course, would be to remove it from the province of contract and tort. Rather, the encounter between diverse interpretations concerning socially optimal levels and quality of housing is arbitrated via several property rights. The Anytown housing co-operative, for instance, is constituted by collective rather than individual decision-making. Under this collectivist interpretation decision-making proceeds under the auspices of democratic majority rule. Another interpretation may be of a co-operative nature but without such an emphasis upon democracy. This is the institution of the Anytown Housing Association where the property is jointly owned but decisions are made by a *representative* committee, either elected or employed by the householders. Thirdly, there is the individualist interpretation where housing is placed within a market along profit-oriented lines and individual buyers negotiate with individual sellers or by estate agents. Finally, a housing concern may be premised upon all of these ostensibly irreconcilable interpretations via a system of internal cross-subsidy in which, for instance, a proportion of properties owned were subject to collective decision-making and these, as an important experiment for the company as a whole, were subsidised through profits gained through a more strictly individualist approach. Many inhabitants of Anytown have opted for this because their jobs do not allow them the time to actively participate in altruistic endeavours, despite their moderately higher than average desire to do so. Finally, there is a housing company that designs and builds accommodation according to the principals of Feng Shui and what this makes immediately clear is that even apparently 'distributive' issues such as housing are ultimately as much cultural issues as they are economic. Under the auspices of the Discursive Minimal State, all five interpretations of good housing practice - and probably many others not considered here - compete for the allegiance of the members of the polity, given their interests, traits and other priorities.



### 3. *Institutional Minimalism and the Sincerity of Public Discourse*

What, then, makes this account of justice more attractive than those we have considered thus far? Over and above any other claims one may wish to make in its favour, there are at least two things in particular that are true of this liberal conception of politics - but not of the other conceptions I have investigated - that stem principally from its second fundamental characteristic. The first of these is that, unlike the difference democrats and the multicultural liberals, the minimalist account of justice that is the institutional conclusion of the Hayekian conception permits the externalisation of the diversity of interpretations, including those that are premised upon the disvaluation of diversity. That is,

I. *To the extent that it is committed to diversity, the Discursive Minimal State is sincere in its commitment*

The Discursive Minimal State satisfies the criterion of sincerity because the disaggregated discourse it endorses means that more than one interpretation can be acted upon at any given time as a part of a wider social process that determines, under conditions of resource and knowledge scarcity, the most beneficial response to the wide range of social questions it encounters – both concerning the distribution of resources without foreclosing debate via the passing of legislation.<sup>632</sup>

To make this clear, it is necessary to distinguish, after Michael Polanyi, between the monocentric character of the politics endorsed by the liberal egalitarian and difference democrat states and the polycentric character of the disaggregated discourse sanctioned by the Discursive Minimal State.<sup>633</sup> A monocentric order is characterised by the fact that there is *one and only one* centre of ultimate authoritative public decision-making from which one and only one policy is pursued at any given time because final decisions are made in a representative assembly or, as we have discussed in Chapter 3, in a discursive forum. By contrast, in a polycentric order final decision-making authority rests in *at least one* (and usually more than one) place and this has the consequence that at least one policy (and usually more than one) may be pursued at any given time. The fact that under the auspices of the monocentric political order only one policy may be pursued at a time, regardless of the popularity of the alternatives that happen to lose out in a vote, of course, does not mean that we may not change our minds at a later stage. Policies do become unfashionable. What it does mean,

<sup>632</sup> Quoted in Benhabib, *Democracy and Difference: Contesting the Boundaries of the Political*, p. 7

<sup>633</sup> Polanyi, M., *The Logic of Liberty*, Indianapolis, Liberty Fund, (1951) 1998. Hayek also claims that Michael Oakeshott's distinction in between a teleocratic and a nomocratic order is the same as Polanyi's. On this see, Hayek, 'The Confusion of Language in Political Thought' (1967), *New Studies in Philosophy, Politics, Economics and the History of Ideas*, London, Routledge and Kegan Paul, 1978, p. 89; *The Mirage of Social Justice*, in *Law, Legislation and Liberty, Volume Two*: London, Routledge, (1976) 1982, pp. 14 - 15.

however, is that even if we do change our minds this will only happen via a process in which the choice to change rules out the choice to keep the *status quo* and, as such, result in the previously endorsed policy being ruled out in spite of any residual popularity it may have amongst at least some members of the polity. Politics, then, no matter what it ends up deciding, is monocentric in terms of which courses of action are to be decided upon (and, subsequent to this, permissible) and, as such, its decisions will always be experienced as onerous by at least some members of the polity who end up being the political losers. Let us now cash out the distinction between monocentric legislation and polycentric permissiveness in terms of the policy areas discussed earlier. What will become clear in doing this will be that the Discursive Minimal State endorses what Barry calls the strategy of privatisation with respect to most of the issues raised<sup>634</sup>

***Abortion and Homosexual Parenthood*** In the case of abortion adherents to both the pro-life and pro-choice positions would be allowed to externalise their interpretation and, indeed, to work towards that interpretation being pervasive in society at large. It is here, moreover, where the difference between the Hayekian conception and Dworkin's checkerboard solution becomes clear.

Of course, it is important to note that Dworkin himself does not endorse these solutions on the grounds that they violate the idea that we cannot treat people differently 'where no principle can justify the distinction.'<sup>635</sup> This, for Dworkin would be a violation of one of the three political virtues, that of integrity. (The other two virtue being justice and fairness, neither of which could rule out checkerboard solutions as both parties to the abortion debate could view such a compromise as both just and fair.)<sup>636</sup> 'The state lacks integrity,' he writes, 'because it must endorse principles to justify part of what it has done that it must reject to justify the rest.'<sup>637</sup> Yet, beyond this, there are other good reasons for rejecting checkerboard solutions.

Whilst attempting to satisfy incompatible interpretative aspirations, the checkerboard solution still retains the idea that the issue it is intended to deal with remains within the province of legislation. In contrast, the strategy of privatisation sanctioned by the Discursive Minimal State means that abortion is removed from the province of law altogether. Stemming from this difference, moreover, is the ultimate incompatibility of the Hayekian and Dworkinian responses. In leaving abortion as a subject of legislation, the checkerboard solution leaves unanswered the interpretative authority of the legislature, more precisely of those who happen at any given moment to occupy its positions of authoritative public decision-making. In order to accept a checkerboard solution we would need an account of

<sup>634</sup> On libertarian options, see Barry, *Culture and Equality*, pp. 41 - 4; 142 - 46.

<sup>635</sup> Dworkin, *Law's Empire*, quoted in *Justice and Interpretation*, p. 71

<sup>636</sup> On this, see Warnke, *Justice and Interpretation*, p. 71.

why legislators gain the authority to foreclose debate. Of course, as we have seen, it is not the case that such an account is not forthcoming. Discursive forms of difference democracy answer this by way of appeal to the cultural groups the legislators represent. Yet, this still leaves unanswered the question of the epistemological authority of the singular, group-specific interpretations the legislators announce in the public political discourse. Moreover, and this problem notwithstanding, given that the checkerboard solution itself is but one possible answer to the issue of abortion, we would need to know on what grounds it should enjoy interpretative privilege in the law as an item of enforceable legislation over other possible answers. This issue becomes all the more important when one realises the contested nature of the checkerboard solution itself. The acceptability of making abortion legal in order to satisfy pro-choice advocates but only for women born in odd years in order to satisfy pro-life attitudes notwithstanding, it is not at all clear how women born in the wrong year would find this attractive or acceptable. This is so not least because the decision arrived at, despite pretensions toward the accommodation of interpretative diversity, is legally binding. The problem here, then, is that the solution is devised to placate organised political interests rather than individual members of the polity.

Of course, one important objection to the strategy of privatisation with regard to abortion is that it will satisfy nobody at all. Leaving it as a matter of choice for pro-life advocates is tantamount to leaving murder as a matter of choice in the Discursive Minimal State. Could the Discursive Minimal State, they may rightfully ask, really leave murder as a matter of individual choice so that society can make use of its stock of tacitly-held cultural knowledge to 'discover' if it is acceptable? If this were so, it is not at all clear how, in its own epistemological terms, this would not be contradictory to the consent requirement and the associated protection of the bodily sphere. The issue here, of course, centres on the idea of what is to count as a person. For pro-choice advocates the foetus is not a person whilst for pro-life advocates it is. Indeed, it is because the foetus is a person that its interpretative rights - which, we have argued, include in a fundamental way its bodily integrity - must be respected. Indeed, as was discussed in Chapter 2, the fact that this person is a minor means that it is incapable of giving consent and therefore should always be taken to be saying 'no' with respect to abortion. The Discursive Minimal State, then, in order to be consistent, let alone just and humane, must ban abortion as it would ban any non-medical, bodily-affecting practice to which a child cannot give its consent.

However, pro-choice advocates would then with equal consistency claim that the bodily integrity of expectant mothers is being violated as they are being forbidden to use them as they see fit. To ban abortion, therefore, constitutes the withholding from expectant

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<sup>637</sup> Dworkin, *Law's Empire*, p. 182, quoted in Warnke, *Justice and Interpretation*, p. 71

mothers the right to exploit their body and, crucially, externalise their interpretation of what morality requires with respect to abortion. In addition, we may argue again consistently with the epistemological premises of the Discursive Minimal State that given that it is our knowledge that ultimately both freedom of expression and freedom of action allows us and therefore society to make use of, it is of no consequence that the foetus is aborted as it does not have *any* knowledge. Once the foetus is born, of course it does begin to acquire knowledge as it begins to acquire a culture, a fact which we have seen rules out murder and child abuse.

Clearly, then, the issue of abortion is of particularly acute difficulty for the regime of individual interpretative rights defended here. Much of this difficulty, of course, is because the ultimate debate turns on what we should consider to be a human being. If this is the primary issue, however, that means that perhaps abortion would have to be one of those more fundamental issues - along with who is to count as an adult and who is entitled to vote - that we have already conceded the state and politics, not civil society, must decide. At the very least, then, the perspective being developed here would need to engage with these issues in more depth, something that we cannot do for now.

Nevertheless, a similar approach, it seems, could be taken towards homosexual parenthood. As in the case of abortion, the Discursive Minimal State would allow those both for and against homosexual parenthood to externalise their views on this matter and, as such, would not seek to impose a ban or make same sex adoption a matter of right. Of course, it is important to ground the permissive stance of the state on the correct footing. The reason that the state takes this stance is not because it endorses the preference for same sex parenthood *per se* but rather, because it endorses the view that such matters are best decided, on the grounds of interpretative sincerity, within civil society.

***Employment Practice & Affirmative Action*** Again, the strategy of privatisation may be chosen in the case of employment practice. With the exception of the employment of minors, by not making the conditions upon which employers hire and fire employees a subject of the law one allows the diverse interpretations of best employment practice to manifest themselves in civil society because the Discursive Minimal State affords the opportunity for differing practices to compete for social adherence without favouring any of them or short-circuiting debate about which among them is socially optimal. The repeal of anti-discrimination legislation, then, would not mean that the state endorses discrimination *per se* but rather, that it upholds the idea that civil society is the proper locus for debate and decision-making about discrimination.

An interesting case in point here is that of a Chinese take-away in the north of England that sacked an English employee on the grounds that she did not adequately perform her meal delivery duties. A local court found the business guilty of race discrimination on the

basis that the employee's race was irrelevant to the adequate performance of her job and consequently awarded her compensation. Clearly, given the law as it stood at the time, the court was absolutely right in reaching this verdict. Our argument, then, cannot be against the particular decision. However, it still seems debatable whether the case should have come before the court in the first place.

Of course if by 'efficient discharge' we mean the ability to safely drive a moped laden with hot food, to deliver the food to customers and to safely receive payment, then race would indeed appear to be an irrelevant factor. However, what if we consider efficient discharge of these tasks to include the ability to speak fluent Mandarin or Cantonese, to relate culturally to non-English-speaking customers of Chinese origin, or the requirement to be of Chinese appearance so as to make the culinary experience more authentic? Of course, if these were legitimate requirements then we may wish to fine the proprietors of the take-away on the grounds of foolishness for, in the first instance, failing to note at the interview stage that the English candidate did not possess the requisite skills and, in the second, for thinking that an ethnically homogenous Chinese take-away is a lively, let alone inoffensive, possibility in areas where the Chinese labour-market is bound to be small. The again, maybe there was a shortage of Chinese candidates at the time? The important point is that the criterion of efficient discharge is itself a matter of interpretative dispute and is resolvable only in terms of the largely tacit understandings that we all have. As such, it needs to be discovered by allowing individuals to discriminate rather than be foreclosed by the perhaps parochial and question-begging definition of efficient discharge that the anti-discrimination legislation Barry defends makes.

In fact, however, the Discursive Minimal State would permit *more* than discrimination, a point which Barry seems to miss in his admittedly brief discussion in *Culture and Equality* of freedom of association, employment practice and the reasonable rejectability of discrimination in a Scanlonian Original Position.<sup>638</sup> In contrast to the owners of the Chinese take-away, the owners of Anytown Construction do not have any objections to hiring applicants from a diverse number of backgrounds. However, they are not inclined to hire those who manifest what they perceive to be homophobic attitudes regardless of whether it is rooted in a set of wider, although culturally particular, understandings. They thus make a rejection of homophobic, racist and sexist attitudes and behaviours a contractual pre-requisite for hiring and the expression of any such attitudes at work grounds for instant dismissal.

Similarly, the Discursive Minimal State would protect the freedom of employers and educational establishments to adopt affirmative action programmes. That is, members of the polity would be free to discriminate in favour of individuals and groups as they would be to

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<sup>638</sup> Barry, *Culture and Equality*, pp. 211 – 212.

do so against them. Claims for affirmative action can be grounded in at least two ways. Firstly, they may be grounded in the claim that members of particular groups have suffered or still do suffer systematic oppression and injustice and have been or are over-represented in the lowest income percentiles of society. Of course, both of these claims are contestable. Some, for instance, may not deny that affirmative action is a decent and moral response to historical or contemporary systematic oppression but reject it because they deny that such oppression took place or, if it did, because it was too long ago to be morally significant today. Equally, affirmative action may be denied because its pursuit would be to assume that newly-arrived migrants are culpable in the past actions of a dominant community of which they are not members. This would seem to be particularly important with regard to recent immigrants to the United States, Canada, Australia and New Zealand.<sup>639</sup> Of course, others may well defend the view that such groups *deserved and still deserve* the treatment they get and make moral arguments in favour of this view grounded, for instance, in cultural practices they disapprove of. Others may hold the position that systematic oppression did indeed and still does take place and that this needs to be rectified in some appropriate manner but still deny on efficiency grounds, that affirmative action is the best way of doing so.

What this final objection makes clear is that the case of affirmative action differs from those discussed so far in its implicit invocation of an optimal end-state - in the form of an ideal number of representatives of a pre-selected group - that is supposed to be achieved. An important question here for those who support affirmative action, then, becomes who is to decide which groups need or merit special representation and how many of them do, either in absolute terms or relative to the wider population. Thus, just as was the case with respect to the pursuit of affirmative action itself, even if there were unanimity about *this* question, what such pursuit would actually require of us would itself be contestable. Yet, as with the case of abortion, homosexual parenthood and employment practice, it is not at all clear whence the legislature actually derives the epistemological authority to favour one view over the others. In contrast, by choosing a libertarian option with respect to the proper pursuit of affirmative action not only would those groups currently being aided be helped but, rather, others who do not currently enjoy the favour of those in political power will avoid falling through the affirmative action safety net due to the current configuration of political forces and the indifference, hostility or simple lack of knowledge of their existence it reflects. Thus, for those who do indeed think that there is a case for affirmative action, the Discursive Minimal State allows them the latitude to experiment with other, more effective, ways of dealing with such injustices which only those working 'on the ground' could conceive of because of some

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<sup>639</sup> Equally problematically, it may also be contrasted with the view that affirmative action programmes are ultimately reflective of an ideal of assimilation toward prevalent socio-economic structures. On this, see Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, pp. 67 - 68.

local fact about their organisation or circumstances. The benefits of the strategy of privatisation, then, are in this instance epistemological. Those who need hiring or admission into an educational establishment will be identified more readily than via a legislated affirmative action programme because the decision-making process is more readily able to take into consideration the particular circumstances of time and place as well as the tacitly-held knowledge of individuals. An objection to the libertarian option here would be to claim that the fact of interpretative diversity does nothing to shift the locus of decision-making away from the state because an employer or educational institution could always make representations to the state for an exemption to or introduction of an alternative item of legislation. Yet, and similarly to the enforcement of a checkerboard solution to abortion, doing this begs the question of the final interpretative authority of those who occupy positions of power in the legislature.

The view being propounded here is to be contrasted with that of Michael Walzer in *Spheres of Justice* who rejects affirmative action, for instance, as a temporary measure to remedy the historically systematic discrimination suffered by Black Americans.<sup>640</sup> For Walzer, affirmative action is problematic in two respects. Firstly, it violates current understandings of job allocation which are subsumed under a norm of jobs open to talents.<sup>641</sup> Secondly, the sphere of office under whose province policies such as affirmative action would fall is itself a dominant good along with the distribution of which comes honour, status, power, prerogative, wealth and comfort.<sup>642</sup> The problem here, then, is that any distribution of jobs is experienced not only as violating the norm of jobs open to talents but also as invasive of other spheres. It is for these reasons that Walzer contends that rather than defending affirmative action, complex equality would rather demand careers open to talents but with 'limits on the prerogatives of the talented.'<sup>643</sup> Yet, as we saw with regard to the difference democrats in Chapter 3, Walzer's problem here is that the norm of careers open to talents is left unquestioned and merely posited as the proper basis upon which to determine the allocation of jobs. When one questions this norm - and indeed, upon the basis of such questioning, comes to reject it as less important in certain circumstances than the recognition of historical injustice that is operative behind many claims for affirmative action - it is not at all clear why 'jobs open to talents' alone should determine the distribution of jobs across society as a whole. Doubtless, some, perhaps most, members of society do regard the norm of

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<sup>640</sup> Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, Chapter 5, *passim*.

<sup>641</sup> *ibid.*, p. 152.

<sup>642</sup> *ibid.*, p. 155.

<sup>643</sup> *ibid.*, p. 164.

jobs open to talents as of prior importance, but this does not mean that all do.<sup>644</sup> The job of public institutions, then, is not to favour one norm over the other but, rather, to afford the means of arbitrating between them in a manner that does not foreclose the arbitration procedure itself. Of course, the way in which this is made possible is by withdrawing the issue of who gets which job from public political deliberation.

A similar problem becomes evident for the defence of affirmative action either as a permanent feature of social institutions or as a temporary measure to redress historical inequalities that would be rescinded in favour of the restoration of the norm of equal consideration as soon as Blacks, for instance, 'escape from the trap that their blackness has become in a society with a long history of racism.'<sup>645</sup> The problem here is that the social resonance of the norm upon which affirmative action policies are justified is not questioned. In the case of Dworkin such a defence is grounded in a 'right to equal consideration when policies about office holding are worked out' rather than upon the right 'to equal consideration when offices are distributed.'<sup>646</sup> Affirmative action defended on these grounds would involve, as Walzer rightly points out, the violation of the right to equal consideration of other candidates who are not members of the target group.<sup>647</sup> However, why should we accept as any less controversial Dworkin's alternative grounding? That is, why is the rectitude of affirmative action itself not subject to debate regardless of the grounds upon which it is defended? Moreover, those who advocate affirmative action even as a temporary measure do not question that, for some, affirmative action may be conceived, on the grounds of cultural survival, as a *permanent* measure. In the Discursive Minimal State, of course, the duration of such policies would never be foreclosed in advance by a change in legislation because they would never be subject to political decision. Individual proprietors would be free to pursue a policy of affirmative action as long as they thought necessary as would others be free never to pursue it. The problem with both sides of the debate, then, is that because they assume the reasonableness of authoritative, political closure, they assume that a single policy must be decided upon, to the exclusion of all others.

***Cultural Rights and Exemptions*** As we have seen, the Discursive Minimal State would not confer cultural rights or grant cultural exemptions because to do so would be to render ineffectual the interpretation that the benefits derived from their exercise should not be enjoyed. Rather than doing this, the Discursive Minimal State recognises on a permanent

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<sup>644</sup> Equally problematically, it may also be contrasted with the view that affirmative action programmes are ultimately reflective of an ideal of assimilation toward prevalent socio-economic structures. On this, see Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, pp. 67-68.

<sup>645</sup> Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, p. 152. Also Kymlicka, *Liberalism, Community and Culture*, pp. 141-144; *Multicultural Citizenship: A Liberal Theory of Minority Rights*, pp. 4, 141-142; Moon, J. D., *Constructing Community: Moral Pluralism and Tragic Conflicts*, Princeton, Princeton University Press, 1993, p. 186.

<sup>646</sup> Walzer, *ibid.*, p. 152.



basis that the issue of cultural rights and exemptions may be subject to contestation and, as such, devolves debate concerning the rectitude of their conferral to civil society.<sup>648</sup> The problem, then, is that if such matters are made subjects of the law then, whatever is decided, doing so unavoidably determines in advance that the chosen policy should be enforced regardless of the reasons some may have for not doing so. This is not to say, of course that cultural rights and exemptions would be ruled out for that would be to commit the same error of (political) foreclosure. Rather, the Discursive Minimal State, recognises that such questions cannot, on epistemological grounds, be decided within the narrow confines of politics.

An interesting case in point here is that of the parents of a Sikh schoolboy who sought an exemption to his school's uniform rule in the United Kingdom on the grounds that the requirement to wear a school cap and to have hair sufficiently short so as not to touch the collar was discriminatory.<sup>649</sup> The problem here is that the exemption may be viewed as onerous, in the first instance, by other pupils at the school who to their own minds - and perhaps to those of their parents - have their own good reasons for seeking an exemption (say some want for cultural reasons to dye their hair pink whilst others wish to dispense with trousers and wear kilts) yet which do not merit such consideration by the school's board of governors on the grounds that they are, somehow, not sufficiently 'cultural' to merit an exemption. In response to this, the state may pass a law that extends the exemption to all the pupils by banning school uniforms. Yet, it is here where the problem that has been implicit all along - that of an overly narrow definition of culture - becomes clear for whether one respects the claim of the Sikh boy's family or grants an exemption to all pupils, what is being violated now is not the culture of any of the pupils and their families but, rather of the *school* which presumably has a uniform code as at least partially constitutive of its ethos.

We are thus lead into what appears to be an irresolvable problem. One way to resolve it, however, would be to claim that it is the *school's* claim that should be respected. The objection that this leaves the Sikhs (and punk rockers and Highland Scots) in no better position than before would be a non-starter because in the Discursive Minimal State such

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<sup>647</sup> *ibid.*,

<sup>648</sup> Now, as Barry reminds us in *Culture and Equality*, many rights that ostensibly look like group-level cultural rights are in actual fact no such things. Rights that select individuals because of their group membership but which only aid them, as individuals are not group or cultural rights as such. (Barry, *Culture and Equality*, pp. 112-113; also Kymlicka, W., *Liberalism, Community and Culture*, pp. 138-140.) Yet, even if we grant this, it does not mean that the enjoyment of such rights by some is experienced as any less onerous by others upon whom the cost of such enjoyment is spread via the public diversion of resources and opportunities yet for whom their enjoyment would never be a lively possibility.

<sup>649</sup> Barry, *Culture and Equality*, pp. 61-62; Poulter, S., 'Ethnic Minority Customs, English Law and Human Rights', *International and Comparative Law Quarterly*, 36 (1987), pp. 589-615.

groups would enjoy the freedom to set up their own schools and determine dress codes accordingly.

Another case here is that of the famous English department store Harrods which until recently refused entry to people wearing jeans on the grounds that it was not in conformity with the ethos of the store. The reason for the change was simply that of changing fashion as more and more wealthy people dress like the less wealthy. The important point here and for the Discursive Minimal State in general, of course was that the change occurred upon the prior possession of individual rights

**Immigration** Again, in the interests of interpretative sincerity, the issue of immigration is devolved down to civil society via the strategy of privatisation. Given this, there is no presumption by the state of what Kymlicka calls an ‘Anglo-conformity’ model of assimilation under which migrants are expected to adopt the norms of the host society or, to determine whether they should enter the sitting of language and points tests.<sup>650</sup> Conversely, there is no presumption in favour of political multiculturalism. In the Discursive Minimal State, then, it would be impossible, to advance a ‘White Australia’ or ‘England for the English’ policy or, for that matter, to mandate permissive immigration policies, simply because immigration is not a subject of legislation. Of course, this does not mean that there will be no micro level White Australias or their multicultural opposites.<sup>651</sup> Rather, both responses to immigration, as well as the response of indifference, are permitted to be externalised simultaneously.

**Housing** As was discussed earlier, issues with distributive implications such as housing cannot be removed from the province of law altogether via a pursuit of the strategy of privatisation without removing them from then province of property rights. Rather, the issue is dealt with via the facilitation under the rule of law of the externalisation of the diverse interpretations concerning socially optimal housing arrangements discussed in the previous section. The problem here, then, is not that pursuit of the collectivist interpretation of justice in housing rules out the others. The problem, rather is that *any* of the policies would rule out pursuit of the others *if they were enforced*, including pursuit of profit-oriented decision making in housing. Instead of this, if a particular group understands the requirements that ethics places upon the nature and distribution of housing in a way that is not widely shared, this understanding can be externalised without having to exclude or, indeed, be excluded by the expression/enactment of other interpretations. Of course, one may respond that we may legislate for and thus enforce a mixed market in housing in which subsidised accommodation is set alongside private and other methods of provision. Yet, this, merely begs the question of the sincerity of the commitment to diversity.

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<sup>650</sup> Kymlicka, *Multicultural Citizenship*, pp. 14 – 15.

### 3.i *The Publicity Requirement and the Epistemological Role of the State*

The account of the sincere, disaggregated discourse should not be taken to mean that there would be absolutely no room at all for the state in the Discursive Minimal State. We may assume that the state would be responsible for the defence of the external borders of the polity and, within it, for the passing and, perhaps, the enforcement of its laws. Moreover, it seems that there would still be many important debates, for example, over *who* is to enjoy individual discourse rights, that would occur within the auspices of the state and its legislature.

Beyond this, and in keeping with its neo-Hayekian emphasis upon the coordinative and informational role that voluntary interaction plays, the Discursive Minimal State would also impose a Publicity Requirement upon the diverse associations to be found in society. This would serve to lower the cost of obtaining information about the communities the members of the polity may be considering living in or trading with or with whom they currently live and trade. The Publicity Requirement would legally bind the diverse communities of the polity - including commercial communities - to disclose on an annual basis what practices and policies they tolerate or endorse in a manner similar to how present-day firms have to disclose their constitutions to a public authority that makes the information publicly accessible. Indeed, such disclosure would, in the context of a culturally diverse society, take a robust form. The questions that would have to be answered on an annual basis would relate, for instance, to each of the issues we have so far discussed and many others about which we have been silent. If a company or cultural organisation hires or refuses to hire people of a particular ethnicity or sexual orientation or who endorse a particular practice, this would be precisely the kind of information that would be made publicly available via the Publicity Requirement. To back the Publicity Requirement up, the state would also have the power to ensure compliance and, if a community does comply, to verify any response made.<sup>652</sup>

Importantly, the Publicity Requirement would not be operative for the purposes of that explicit, propositional justification that is constitutive of the deliberative process of a public forum in virtue of which some policy options are endorsed and enforced whilst others are rejected. Rather, it is intended to contribute, in a more Hayekian vein, to the provision of that information that facilitates informed individual choice and the judgement that goes with it. The aggregate outcome of this, we will see in the following section, is constitutive of the wider social process of public justification that, like the discussion itself, takes place at the disaggregated level. With such information at hand, the citizens of Anytown would decide whether or not a practice is acceptable and take appropriate action to externalise that belief. Of course, there is no strong reason to suppose that in the Discursive Minimal State the

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<sup>651</sup> On White Australia, see Walzer, *Spheres of Justice*, pp. 46-8.

<sup>652</sup> On this see also Barry, *Culture and Equality*, 41-2.

majority of people would be members of such communities. It is, perhaps, more likely that individuals will operate solely as individuals and members of families. Here the discursive justification of behaviour will take place in much the same way as it always has; via informal and local social pressures. It would be a rather dark State that forced its members to fill out a personal statement of belief every year.

Of course, the information gathered by the state under the terms of the Publicity Requirement is certainly not exhaustive of all that needs to be or can be known about the diverse communities and firms of the polity. In addition to the Publicity Requirement, there would in any case be an incentive in civil society for the evaluation of communities and, as a consequence, for some to step in and seek this and other information on behalf of the members of the polity for whom search costs would be too high. Investigation here, for instance, would be about the way communities are organised and about the values upon which that organisation is based and, crucially, the degree to which the communities are true to them. It should be emphasised, however, that such investigative action in civil society is not the same as that embarked upon by the state in satisfaction of the legal requirements of the Publicity Requirement. What the state does here is ensure that the members of the public have some baseline of information upon which to base their judgements but, crucially, it is not a participant in but a rather a facilitator of the judgement process itself. Thus, in the absence at the aggregate social level of a judging, choosing subject, the task of government is to provide the framework that allows that judging and choosing that is constitutive of the disaggregated social discourse about the nature of the good to occur. This, then, is a discourse ‘that is not *articulated* in philosophical terms’ but rather, as Kukathas tells us, one that ‘takes place not only in verbal discourse, but also in practice as individuals adopt or reject ways of living according to their own experiments and their observations of the successes and failures of others.’<sup>653</sup>

#### ***4. Institutional Minimalism and the Rationality of Public Discourse***

The second, more profound, benefit of the Discursive Minimal State is represented by the second claim of this chapter that relates to our concern with the ultimate task of justice. Not only does the disaggregated discourse sanctioned by the Discursive Minimal State permit the externalisation of the diversity of interpretations, doing so means that it maximally affords the opportunity to see under conditions of resource and knowledge scarcity which interpretations ought indeed to be externalised in society as a whole rather than second-guessing what these will be. That is,

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<sup>653</sup> Kukathas, *Hayek and Modern Liberalism*, p. 117.

II. *The Discursive Minimal State is rational in its arbitration between interpretations.*

The truth of this second claim, moreover, is dependent upon the truth of Claim I.. That is, only if we have an institutional framework that allows the diversity of interpretations to be externalised will we discover which among them prove to be most socially beneficial, given the dispersed and tacit nature of social knowledge. The rationality of public discourse, then, is intimately related to institutional shape.

There are two ways in which we may defend this claim. Firstly, we may assert that the cultural liberty endorsed by the Discursive Minimal State is necessary to allow people to act upon the basis of their own traditions and practices as part of a wider process of economic and cultural co-ordination in which dispersed and tacit knowledge is made use of and answers to important social questions are discussed. This argument clearly invokes Hayek's ideas about traditions - and the tacit knowledge they embody - as being not only instrumental to but, more strongly, *constitutive* of the economic co-ordination process.<sup>654</sup> Without cultural liberty, economic co-ordination would be minimal and its results socially disastrous not because we would not be able to adequately collect the available economic knowledge necessary for co-ordination but, rather, because we would have no means of discovering what that knowledge is.

Thus traditions are not to be valued for themselves but, rather, for the coordinative role they play in enabling us to find our way in a world that is only ever partially known.<sup>655</sup> It is for this reason, moreover, that John Gray claims that Hayek's defence of tradition rests on similar grounds to the epistemological arguments in favour of the market process as the most useful means of transmitting knowledge, much of which is tacit and refractory to articulation.<sup>656</sup>

The problem with this first argument for cultural liberty as subservient to economic co-ordination, however, is that it makes the cultural instrumental to the economic by claiming that practices are beneficial only insofar as they enable the co-ordination necessary for rational *resource* allocation.<sup>657</sup> We must therefore defend the discovery process sanctioned by

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<sup>654</sup> For Hayek on tradition see Hayek, *The Constitution of Liberty*, Chapter 4; 'Notes on the Evolution of Systems of Rules of Conduct', *Studies in Philosophy, Politics and Economics*, London, Routledge, (1967); 'Rules and Order', *Law, Legislation & Liberty, Volume One*, London, Routledge, 1982, chapter 1; 'Our Moral Heritage', *Knowledge Evolution and Society*, London, Adam Smith Institute, 1983, pp.45-57.

<sup>655</sup> See also, Hayek, F. A., 'Why I am not a Conservative', postscript to *The Constitution of Liberty*, pp. 397-410.

<sup>656</sup> Gray, *Hayek on Liberty*, p. 41.

<sup>657</sup> Furthermore, there would seem to be a clear argument here on the part of difference democrats and liberal egalitarians that, this problem notwithstanding, in order to make maximal use of the diverse

the Discursive Minimal State as a cultural and not merely economic process. This relates to the second of our arguments in favour of cultural liberty which, as Gray notes, is the third aspect of Hayek's theory of spontaneous order: the natural selection of competing cultural traditions. For Hayek, Gray writes, 'the evolution of culture may itself be fruitfully investigated in terms of the competition between different traditions or practices, with a natural selection among them occurring which is at least partly to be explained by their relative efficiency as bearers or embodiments of knowledge.'<sup>658</sup> Thus, in order to avoid the problem of reducing the cultural to the economic we may claim that we need cultural liberty rather than the politics of culture or a political culture of welfare in order to see which of those practices that facilitate co-ordination are indeed socially optimal.<sup>659</sup>

One of the most important, specifically normative, implications of the Hayekian approach to justice under conditions of diversity comes precisely from Hayek's later work from which is emergent an explication of the Discursive Minimal State as the arbitrating framework of the cultural marketplace. What is normatively significant about Hayek's ideas here for present purposes, furthermore, is the relevance they have to culturally diverse societies. No longer are his arguments about cultural selection to be understood to relate to a competitive process between discrete traditions each with its own broadly identifiable territorial boundaries but, rather, to the process of competition for adherents that occurs between traditions, or more specifically between the norms they endorse, *within one society*. It is not just our identities that exhibit 'undecidable boundaries' in modern, mediated societies. In such societies, so do the overarching traditions that bestow content upon those identities. What is politically important, then, is that Hayek's arguments concerning cultural selection also provide us with a further argument against the political arbitration of cultural justice and an argument for the non-political yet still social management of culture. Thus, given the dispersed and tacit nature of social knowledge - knowledge that is not given in its entirety to any individual or agency - Hayekian cultural liberty not only facilitates the economic discovery process, it also facilitates the cultural process of the discovery of which norms best serve economic co-ordination and, beyond this, of which norms are most desirable. An objection here would be to question the criterion of optimality invoked in by the preference for Hayekian liberty over and above politics. Yet, as we have seen, the

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cultural knowledge available in society, the state needs to step in to ensure a minimum baseline for certain more marginal cultural groupings to actually act out the requirements of their specific norms.

<sup>658</sup> Gray, *Hayek on Liberty*, p. 41. For Gray, the selection of competing cultural traditions constitutes the third element of Hayek's wider notion of spontaneous order. On this, see Gray, *Hayek on Liberty*, Chapter 2. The issue of the appropriate critical stance towards them will be taken up in the following chapter.

<sup>659</sup> Because the process of the selection of norms is one largely of migration, macro outcomes cannot be selected but must be waited for and allowed to unfold. Clearly, each instance of migration is a conscious choice yet, in the first instance, its motivation is due at least in part to unconsciously held beliefs.

Hayekian need not invoke any specific criterion of optimality to get this rationality claim through. All he need claim is that, whatever the relevant optimum actually turns out to be, it is to liberty rather than politics - to law, rather than legislation - that we must turn in order to discover it. Under conditions of the division of knowledge, moreover, the discovery process does not merely concern itself with arbitrating between different viewpoints or socially pressing issues, as if these were readily apparent to the arbitrating agent, but facilitate the discovery of what these viewpoints actually are.

Thus, the reason we make *Abortion* legal although not a subject of right is that its degree of social acceptability is precisely what we want to discover. On this view the reason why abortion should be legal is not because it is desirable to kill newly conceived human beings or because a woman's right to choose is paramount. Rather, given our particular traits, attachments and local and tacit knowledges, it is only by taking a permissive stance that we are uniquely positioned to see to what extent abortion is a morally attractive or dubious enterprise and, to the extent that it is attractive, how and on what terms it is performed. Only by allowing people to externalise their moral interpretations on this issue can we have any reasonable, non-question-begging idea about the moral rectitude of abortion as we watch discrete choices dovetail into an aggregate pattern for the society as a whole. Similarly, the result of disaggregated decision-making at the aggregate level just is the acceptability of the idea of *Homosexual Parenthood* to society. It is as a result of all these decisions that we would have a better idea on whether the otherwise short-circuiting political judgement to ban gay parenthood would be made clear. What we do not want, on the other hand, is for the debate to be short-circuited by way of an advance judgement in politics, that unavoidably, must make a choice of some kind and in doing so exclude alternative avenues of action. In the case of *Employment Practice*, the Discursive Minimal State adopts a similarly sincere attitude towards the diversity of interpretations for in doing so, it allows for local and tacit knowledges to be utilised. Given this, we are able to get a reasonable idea of the rectitude of hiring and firing on the basis of culturally derived characteristics that does not beg the question of the outcome of the debate itself. Similarly, by adopting a permissive attitude and removing the issue from the province of law altogether, the Discursive Minimal State also allows the rectitude of *Affirmative Action* to be discussed and subjected to social scrutiny in a way that makes use of local circumstances, knowledges and traditions in a way that its rivals cannot. Indeed, with the institutionalisation of freedom with regard to both of them, it is just as possible that in some instances society would discover the need for an *over*representative number of members of particular groups in certain professions and industries than would have been brought about by strict adherence to a population proportionality criterion by the statute. Similarly for *Cultural Rights and Legal Exemptions*. The degree to which the benefits cultural rights and legal exemptions confer should be enjoyed is a matter that only civil

society can resolve in a rational way, given that the reasons we may have for bestowing or withholding the benefits in question are only partially visible to the gaze of conscious reason.

**Immigration** Again, as in the case of homosexual parenthood, the aggregate result of such discrete decision-making would be the degree of acceptability of immigration for the society and its constituent communities as a whole not because it defends permissiveness for permissiveness' sake but, rather, because doing so affords a more reasonable means of actually finding out how many, or few, immigrants each society can bear. Also, the framework allows for hitherto untried approaches to **Housing** emerge without having to be sanctioned by the asocial, individual reason of the state. Thus, whether the question concerns the pros and cons of affirmative action, cultural rights, housing, subsidised entry to national monuments, immigration or the rights and wrongs of homosexual parenthood or abortion, individual discourse rights help us elicit answers that can be genuinely informative because the socio-economic process by which they come to be given take on board the fugacity and tacit nature of much of our knowledge without requiring us to leave behind the essential attributes of our identities and understandings.

## 5. Conclusion

In this chapter, we have offered a Hayekian account of the Discursive Minimal State. This discourse builds upon the work of theorists such as Iris Marion Young and Nancy Fraser but is unique in two ways. Firstly, it extends the scope of the counter-public from the level of the group to the level of the individual so that adequate use is made of social knowledge. Secondly, it expands the domain of the discourse to a point where it is no longer an alternative to but, rather, largely constitutive of public discourse. The discourse of the Discursive Minimal State, then, is a public, albeit non-political, discourse that endorses the strategy of interpretative privatisation as the most sincere and rational form of public discourse for culturally diverse societies. The discourse sanctioned by the Discursive Minimal State is sincere because it allows the diversity of interpretations to be voiced in a fully expanded discursive space. Moreover, not only does it allow these interpretations to be voiced, by taking them out of the forum - that is, by privatising the political - it also allows the full diversity of society's interpretations to be acted upon. No longer is discourse just talk, it is constituted by both talk and action, that is, by action as tacit speech. Unlike liberal egalitarianism, moreover, the Discursive Minimal State allows for a sincere discourse to occur with regard to the economic realm as well where the ideal of welfarism is publicly acknowledged as one but not the only account of how society's benefits and burdens are distributed.

As a consequence of its interpretative sincerity, the discourse of the Discursive Minimal State actually affords the most rational means for us to see how economic and



cultural issues are resolved and, indeed, how the diverse views concerning them actually arise. This is because by our public institutions allowing us to be free to act, society is able to make use of the full range of dispersed, differentiated and crucially, tacit knowledge that is potentially at its disposal. Finally, I have sought to link these two virtues of the Discursive Minimal State with the fact that it endorses a specifically Minimal account of the role of the state. Because the state's role is a minimal one, any opportunities it may present members of the polity to publicly impose their interpretations over those of others, are minimised. Again, unlike difference democracy that postulates the ethical priority of diversity itself upon the polity or liberal egalitarianism that imposes a particular, culturally specific view of the requirements of economic justice upon a society for whom there is no given understanding of it, the Discursive Minimal State does not beg the question of the outcome of the conclusions of any of these debates concerning cultural diversity or economic justice because it does not involve itself in any of them. Let us now turn to some important objections to the account of the Discursive Minimal State.

## 6 Permissiveness, Plurality and Disaggregated Discourse: A Defence of The Discursive Minimal State

### 1. Introduction

Having given an account of the character of the Discursive Minimal State in the previous chapter, it is time now to defend it against some important objections. In doing so, I will contrast the Discursive Minimal State with other recent work that endorses classical liberal institutions. The work of two theorists is of particular significance here. In the first instance, I will critically compare the Discursive Minimal State to Jeremy Shearmur's 'Liberal Metautopia' as discussed in *Hayek and After: Hayekian liberalism as a research programme*.<sup>660</sup> What makes this comparison important is that, like the Discursive Minimal State, Shearmur's framework for politics is discursive in form and, as the title of his book suggests, is drawn explicitly from the work of Hayek. Differentiating the two approaches, then, will be important as part of a wider positive argument in favour of the Discursive Minimal State. Of course, judging them based on their success in coming to terms with cultural diversity would be a somewhat unfair enterprise especially since the Liberal Metautopia is not explicitly intended as a theoretical answer to the challenge cultural diversity poses to the theory of justice. Success here, rather, is measured in terms of the Discursive Minimal State and the Liberal Metautopia's Hayekian *pedigree*. Nonetheless, critical leverage will be gained in terms of the relative success of the Liberal Metautopia's answers to objections to classical liberal theories of justice.

By contrast, much of Chandran Kukathas's work *is* aimed precisely at answering the challenge of cultural diversity. Yet, in contrast to Shearmur or the neo-Hayekian account of the Discursive Minimal State, he does not do so with recourse to an explicit invocation of Hayek's corpus.<sup>661</sup> Furthermore, unlike the Discursive Minimal State and the Liberal Metautopia, Kukathas's strictly neutralist Politics of Indifference is not discursive in form. In contrast, then, to our examination of the Discursive Minimal State and the Liberal Metautopia, examination of the Politics of Indifference will not focus upon the Hayekian pedigree of its supporting arguments but will largely be in terms of a second criterion of evaluation. That is, it will focus upon the comparative ability of both the Discursive Minimal

<sup>660</sup> Shearmur, J., *Hayek and After: Hayekian liberalism as a research programme*, London, Routledge, 1996, chapters 6 and 7.

<sup>661</sup> Kukathas, C., 'Are there any Cultural Rights?', *Political Theory*, vol. 20, no. 1, (1992), pp. 105 - 139; 'Liberalism, Communitarianism, and Political Community', *Social Philosophy and Policy*, vol. 13 no. 1, (1996), pp. 80 - 104; 'Multiculturalism as Fairness: Will Kymlicka's *Multicultural Citizenship*',

State and the Politics of indifference to supply answers to common criticisms of classical liberal or so-called ‘benign neglect’ approaches to justice for culturally diverse societies. Taken together, then, the work of Shearmur and Kukathas is resonant with our concerns in two fundamental respects that serve both to further clarify just what the Discursive Minimal State is as well as to show how attractive a normative political theory it is. In the first instance, it will be resonant with regard to the advancement of an explicitly post- or neo-Hayekian agenda in contemporary political theory and, in the second, with regard to offering an adequate, distinctively classical liberal, response to cultural diversity. In both cases, I will claim that the Liberal Metautopia and the Politics of Indifference are inadequate. Of course, given that the principal aim of this thesis is to offer a specifically Hayekian approach to cultural diversity that is more attractive than either the difference democratic or liberal egalitarian responses, this chapter will be a two-fold affair insofar as intimate to the rejection of the Liberal Metautopia and the Politics of Indifference will be the defence of the Discursive Minimal State and the politics of it endorses as the best set of institutions to come to terms with the challenge presented by diversity.

In the following section, I will outline Shearmur’s Hayekian Liberal Metautopia and Kukathas’s Politics of Indifference. In the sections that follow, I will return to and defend these and the theory of the Discursive Minimal State from objections to what is called the political theory of Benign neglect and will defend the Discursive Minimal State from the objection that it endorses an ethical subjectivism and relativism that culminates in an unsavoury segregation between communities and a decidedly uncritical stance towards the diverse norms they endorse. Emergent from this defence will be the claim that of the three it is the Discursive Minimal State that is to be preferred in terms of its Hayekian pedigree, its internal coherence and insofar as it offers a compelling response to the challenge that cultural diversity poses to the adequate theorisation of justice.

## **2. Family Resemblances: Shearmur’s Liberal Metautopia**

Central to Shearmur’s concerns in Chapters 6 and 7 of *Hayek and After: Hayekian liberalism as a research programme* is the problem of trying to derive a political theory that prioritises individual liberty out of a concern for general welfare or, in Shearmur’s own terms, the difficulty faced when we try to accord rights - what he calls ‘dialogue rights’ - that allow individuals a ‘cognitive contribution’ to the overall well-being of society.<sup>662</sup> Trying to do so

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*The Journal of Political Philosophy*, vol. 5, no. 4, (1997), pp. 406 - 427; ‘Liberalism and Multiculturalism: The Politics of Indifference’, *Political Theory*, vol. 26 no. 5, (1998), pp. 686 - 699.

<sup>662</sup> Chapter 6 of Shearmur’s book *Hayek and After: Hayekian liberalism as a research programme* can be read, its author notes, as in part a response to the philosophical problematic explored in Kukathas’s *Hayek and Modern Liberalism*. Briefly, the problematic of the earlier book centred upon the tension that exists between Hayek’s Kantian and Humean inheritances. More specifically, upon the dilemma

upon the basis of utility, he writes, is problematic at least insofar as it is ‘competing with *other* contributions that the individual might make - most radically as an object to be consumed by others.’<sup>663</sup>

Shearmur’s response to this problem is to postulate an epistemological rather than utilitarian basis of these rights. More specifically he contends that individuals ought to be accorded discourse rights - ultimately convertible into inviolable private property rights - ‘*qua* participants in factual and, finally, normative dialogue’ in which each and every participant has a unique contribution to make and that includes on its agenda the attractiveness of utilitarianism itself as opposed to some other value system.<sup>664</sup> Yet, an immediate objection to this strategy concerns precisely the uniqueness and consequent value of our own contributions and thereafter, of others. For, whilst

... [e]verything that the first person had to contribute was, it might seem, a result of his occupying the role that he did; it is not clear that a second person would have anything to add, even on issues concerning which he had an intimate knowledge. Accordingly, if we have, here, a theory of rights generated from epistemological considerations, it would seem to be very limited in its scope.<sup>665</sup>

Ultimately, for Shearmur, what saves the second person and others like him is precisely his participation in – and contribution towards - that culture from which the first person’s interesting and potentially valuable perspective is drawn.

The step from these epistemologically grounded dialogue rights to property rights is slightly different.<sup>666</sup> The problem here is related to the kind of society, more specifically its size, in which the discourse rights are supposed to be operative. That is, Shearmur accepts, one could claim that ‘in political terms, it must generate a variant of the polis-sized democratic ideal,’ in which decisions are arrived at democratically rather than via markets.<sup>667</sup> Furthermore, it seems quite reasonable to assume that democracy just is what the rights would lead to for, as Shearmur explains, ‘actual dialogue has its limitations as a model for politics.’<sup>668</sup> Is this the end of the story for a non-democratic discursive form of politics that is emergent from Hayekian considerations? For Shearmur it is not for in response to this he

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encountered when Hayek seeks to offer an enduring and *principled* philosophical account of the liberal rules of justice that clearly delineate individual domains on an equal basis whilst at the same time subscribing to a Humean epistemology that emphasises the strict limits of the capabilities of reason for the successful pursuit of such an enterprise.

<sup>663</sup> Shearmur, *Hayek and After: Hayekian liberalism as a research programme*, p. 196.

<sup>664</sup> *ibid.*, p. 193.

<sup>665</sup> *ibid.*, p. 192.

<sup>666</sup> *ibid.*, pp. 193 – 195.

<sup>667</sup> *ibid.*, p. 193. This, he notes further, would be somewhat ironic given that the kind of society Hayek favours – and, for that matter, Adam Smith before him - is the ‘Great,’ or abstract, Society.

advocates a ‘simulated’ dialogue in which individuals are accorded rights ‘on epistemological grounds.’<sup>669</sup> The model Shearmur uses for this is that of Nozick’s utopia in Part Three of *Anarchy, State and Utopia*.<sup>670</sup> Interestingly, and unlike their foundational role in the first two sections of Nozick’s book, Shearmur notes (as indeed does Nozick) that rights here ‘are being accorded as a means to an end: the pursuit of the good (as in our dialogue about ethics), utility (where there is consensus about this) and truth.’<sup>671</sup> This, Shearmur notes, is a ‘utilitarianism of rights.’<sup>672</sup> Thus, ‘[i]n our liberal metautopia,’ he writes,

... experimentation and learning take place via the activities of individuals. Individuals back their own judgement with their own resources in the membership of some society, organization, club or, more radically, experimental community. Learning takes place via these individuals deciding they had made a mistake and pulling out; or staying and making whatever changes are allowed by the particular constitution of the small-scale organization which they have joined; or by their being joined by, or imitated by others.<sup>673</sup>

Moreover, it is here where the state has an important role to play for it ‘preserves individuals (and voluntary communities and associations) from aggression and overspill effects, and ... also prevents individuals from being held prisoner by some community or association that they have joined.’<sup>674</sup> Indeed, Shearmur goes further in this regard by claiming that the state ought to take particular care that second-generation members are able to choose between alternative communities.<sup>675</sup> Moreover, in a fashion related to but not exhausted by this concern, the Liberal Metautopia will perhaps diverge from the traditional picture of socio-political interaction painted by classical liberal economics insofar as it may impose a ban – on epistemological grounds – upon the use of private property rights for the construction of social formations that ‘protect people’s judgements from critical scrutiny.’ A ban, that is, upon what Shearmur calls ‘conventionalist strategies.’<sup>676</sup> Moreover, Shearmur argues that central to the avoidance of conventionalist strategies would be the existence of a public forum that serves ‘both as the place within which the rules of the system are legitimated to its inhabitants, and also within which different specific forms of life must give an account of themselves.’<sup>677</sup> Ultimately, then, discourse in the Liberal Metautopia takes place at two

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<sup>668</sup> *ibid.*, p. 194.

<sup>669</sup> *ibid.*

<sup>670</sup> Nozick, R., *Anarchy, State and Utopia*, London, Basil Blackwell, 1974.

<sup>671</sup> Shearmur, *Hayek and After: Hayekian liberalism as a research programme* pp. 195 – 196.

<sup>672</sup> *ibid.*, p. 177. The phrase is Nozick’s. On this, see Nozick, *Anarchy, State and Utopia*, p. 28- 9.

<sup>673</sup> Shearmur, *ibid.*, p. 196.

<sup>674</sup> *ibid.*

<sup>675</sup> *ibid.*

<sup>676</sup> *ibid.*

<sup>677</sup> *ibid.*

levels: at the level of civil society - the disaggregated, surrogate discourse and also at the aggregate political level of the public forum.

### 3. *Family Resemblances: Kukathas's Politics of Indifference*

In 'Liberalism and Multiculturalism: The Politics of Indifference' and elsewhere Chandran Kukathas sets out a strict neutralist conception of the liberal polity - more specifically a 'liberalism of the limited state'<sup>678</sup> - that, in contrast to Shearmur's Liberal Metautopia, is specifically intended to deal with the challenge posed to justice by cultural plurality. The Politics of Indifference, moreover, is explicitly offered in opposition to Taylor's multicultural response to the challenge known as The Politics of Recognition.<sup>679</sup> Kukathas reminds us that under an institutional regime of strictly neutralist liberalism individuals are free to form groups or associations, or to continue their association with groups that they have joined or to which they may have been born.<sup>680</sup> Yet, by the same token it remains uninterested in the

... interests or attachments - cultural, religious, ethnic, linguistic, or otherwise - that people might have. It takes no interest in the character or identity of individuals; nor is it concerned directly to promote human flourishing: it has no collective projects, it expresses no group preferences, and it promotes no particular individuals or individual interests. Its only concern is with upholding the framework of law within which individuals and groups can function peacefully.<sup>681</sup>

It is for this reason, moreover, that Kukathas does not endorse group-differentiated rights for cultural or ethnic minorities as this would amount to political interference in the cultural process that involves both the emergence and disappearance of the cultural formations that constitute it.<sup>682</sup> Similarly, to Shearmur's Liberal Metautopia, this, of course, does not mean that the Politics of Indifference would *preclude* the members of such groups ensuring on their own terms that their particular cultural affiliation endures and flourishes. What the neutral state will not do, though, is either help them or hinder them in their attempts to do so because 'cultural survival cannot be guaranteed and cannot be claimed as a right.'<sup>683</sup> This liberalism –

<sup>678</sup> Kukathas, *Liberalism and Multiculturalism: The Politics of Indifference*, p. 696.

<sup>679</sup> For Taylor's view see Taylor, 'The Politics of Recognition', *Multiculturalism: Examining the Politics of Recognition*, Gutmann, A. (Ed.), Princeton, Princeton University Press, 1995.

<sup>680</sup> Kukathas, 'Liberalism and Multiculturalism: The Politics of Indifference', p. 691.

<sup>681</sup> *ibid.*; 'Liberalism, Communitarianism, and Political Community', pp. 103 – 4.

<sup>682</sup> Kukathas, 'Are there any Cultural Rights?', *passim*.

<sup>683</sup> Kukathas, 'Liberalism and Multiculturalism: The Politics of Indifference', p. 694.

the 'Politics of Indifference,'<sup>684</sup> then, can be summed up by 'a refusal to be guided by such goals as fairness of outcome in social policy or institutional design.'<sup>685</sup>

Kukathas, of course, also rejects intervention by the state, in the first instance negatively, by denying that it is capable of achieving the aims that intervention is supposed to achieve and that, in any case, its pursuit has often not been benign.<sup>686</sup> Thus, not only does state action in the cultural realm often issue in a tendency to standardise a diverse population but also because the criterion of fairness in terms of which the outcome should be judged is itself a 'subject of contestation and dispute' in a culturally diverse society.<sup>687</sup> Consequently, Kukathas continues, 'the appeal to fairness to settle disputes will be, at best, unlikely to succeed, and possibly aggravating.'<sup>688</sup> It is for this reason that Kukathas suggests that it is better to allow cultural outcomes to be the results of the accidents of history or geography than the results of the political pursuit of particular ends.

In making this claim, Kukathas also locates a significant positive basis of the Politics of Indifference in the need for order. 'To tell a group, which has fared less well than it would like out of a distributive settlement, that the outcome is fair or just,' he argues, 'may not mollify it but add insult to injury.'<sup>689</sup> He is keen to argue, then, that in trying to recognise the claims of minority cultures - or, for that matter, to bolster the majority culture - politics will always fail. In doing so, moreover, it will inevitably sow the seeds of discord between groups and thus within society at large.<sup>690</sup> Thus, if the state does choose to involve itself in the 'cultural constitution of the nation', it is highly likely - and, indeed, reasonable - that minorities would demand a say in the process. Far from leading to order this, Kukathas claims, 'will only cause dissension.'<sup>691</sup> Thus, for Kukathas, the state must in the interests of harmony withdraw from its role of arbitrator between cultures and, instead, be strictly neutral in its dealings with them, thus countenancing the idea that some cultures will flourish whilst others will die out.

Kukathas does admit, of course, that in denying the appropriateness of cultural rights and exemptions to minority groups as a means of combating inequality between groups the Politics of Indifference is simultaneously vulnerable to the claim, made in the first instance by Kymlicka and, most recently by Barry, that this would equally allow them to tyrannise their *own* members and lead to the tolerance of what liberals at least would consider to be unjust behaviour: restrictions upon freedom of worship and expression, ritual scarring, as well as the

<sup>684</sup> *ibid.*, p. 691.

<sup>685</sup> Kukathas, 'Multiculturalism as Fairness: Will Kymlicka's *Multicultural Citizenship*', *The Journal of Political Philosophy*, Volume 5, Number 4, 1997, pp. 406 - 427, p. 423.

<sup>686</sup> *ibid.*, p. 423; Liberalism and Multiculturalism: The Politics of Indifference', p. 697.

<sup>687</sup> Kukathas, 'Multiculturalism as Fairness: Will Kymlicka's *Multicultural Citizenship*', *ibid.*

<sup>688</sup> *ibid.*

<sup>689</sup> *ibid.*, p. 424.

<sup>690</sup> Kukathas, 'Liberalism and Multiculturalism: The Politics of Indifference', p. 693.

curtailment of opportunities for sub-group members such as women,<sup>692</sup> not to mention the active, if subtle, persecution of gays. The problem here, of course, is that in removing culture and almost everything else from public political debate the Politics of Indifference appears to give *carte blanche* to all manner of insidious practices, the public acceptance of which can lead to so many private hells.<sup>693</sup> It is at this point, where Kukathas offers two responses, one largely empirical, and the other principled to allay any fears the liberal may have. In the first instance, he reminds us, it is necessary to always bear in mind that the kind of society within which the several communities are nested is itself a liberal society. The pressure to broadly conform to the precepts that underlie its organisation, then, would be quite great.<sup>694</sup> Secondly, and similarly to Shearmur, the right of association – which comprehends both entry and exit – would be upheld as a kind of safety valve for those who no longer experienced the demands of their respective communities as anything but onerous.<sup>695</sup> Thus, the Politics of Indifference would afford one the opportunity to flee into a wider, liberal, society.<sup>696</sup>

#### 4. *Objections: relations between communities*

##### 4.i *The critique of benign neglect*

The question as to whether the regimes similar to the Discursive Minimal State are adequate as responses to the demands of justice under conditions of cultural pluralism lies at the heart of Will Kymlicka's critique of State non-interference with the cultural market-place or 'Benign neglect' in *Multicultural Citizenship*.<sup>697</sup> To be sure, Kymlicka's criticisms are, not entirely new or unique nor are they explicitly targeted at classical liberal theories of justice *per se*. Yet, given that classical liberal theories are liberal theories, Kymlicka's criticisms are the kind of objection that institutional regimes such as the Discursive Minimal State, the Liberal Metautopia and the Politics of Indifference should seek answers to. For this purpose our attention will not be focused upon his first objection that the regime of Benign neglect is

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<sup>691</sup> *ibid.*, p. 697.

<sup>692</sup> Kukathas, 'Are there any Cultural Rights?', pp. 132 - 3. For the criticisms see Kymlicka, 'The Rights of Minority Cultures: Reply to Kukathas', pp. 142 - 143; Barry, *Culture and Equality*, pp. 143 - 146.

<sup>693</sup> Barry, *Culture and Equality*, pp. 141-146.

<sup>694</sup> Kukathas, 'Are there any Cultural Rights?', p. 133.

<sup>695</sup> *ibid.* pp. 133 - 134.

<sup>696</sup> Significantly, at the very end of 'Are there any Cultural Rights?' Kukathas acknowledges that making the right of exit substantive would depend upon the wider society's conforming to the norms of liberal political culture; that is, it would need to be one that invokes, amongst other values, liberal autonomy. We shall return to this issue at a later stage of this chapter.

<sup>697</sup> Kymlicka, *Multicultural Citizenship*, Chapter 6, esp. pp. 107 - 115. For an overview of Kymlicka's arguments against benign neglect see Kukathas, C., 'Multiculturalism as Fairness: Will Kymlicka's *Multicultural Citizenship*', *The Journal of Political Philosophy*, pp. 411 - 412 and pp. 422 - 424.



incoherent but, rather on the second objection pertaining to the intolerable burdens it is said to impose upon members of vulnerable minority cultures.<sup>698</sup>

A variant of the intolerable burdens argument is acknowledged by Shearmur in his discussion of what he calls 'Plant's Trap' after Raymond Plant.<sup>699</sup> Briefly, Plant's argument is that even if an individual is accorded rights upon the epistemological basis of his contribution to a surrogate public dialogue, then why not accord him positive welfare rights so as to 'enable him to play a full role as an active civic participant'?<sup>700</sup> Without such rights, it is claimed, vulnerable individuals - which includes individuals who are members of vulnerable cultural groups - will all too readily be left behind, their perspectives remaining forever off the political agenda. Moreover, it seems that a similar argument can be made against the Politics of Indifference. If the state is to be indifferent between different cultural communities how are the weaker ones supposed to flourish or even survive and thus continue to play the indispensable role of providing a context of meaningful choice for their members? 'At the very least,' Kukathas writes, originators of this objection claim that the liberal state 'ought to pursue the task of creating a harmonious and cohesive society - one that makes for a stable social unity that will endure over a substantial period of time.'<sup>701</sup>

Shearmur's answer to this objection is to reassert the Hayekian instrumental argument that serves as the foundation for the Liberal Metautopia. That is, because the rights in question are accorded upon the basis of epistemological considerations in which resource allocation will be publicly decided by the options which represent their 'best' or most efficient use, 'we are not committed,' he writes, 'to saying that resources must be used come what may to give someone a voice in the dialogue if the opportunity cost of so doing would be high.'<sup>702</sup> Of course, this does not mean that in the Liberal Metautopia we would be *precluded* from doing so. Clearly, to at least some it would be *very* important to utilise resources to do just this.<sup>703</sup> The Liberal Metautopia, then, involves as much a commitment to institutions such as charity to enable culturally vulnerable groups a voice in the surrogate dialogue as it does to those that are run for profit. Indeed, some institutions which are predicated upon combating the contingencies of life - such as insurance - are themselves

<sup>698</sup> Kymlicka, *Multicultural Citizenship*, pp. 110 - 115. The first critique is also to be found in Taylor, C., 'The Politics of Recognition', pp. 25- 73 and in Young, *Justice and the Politics of Difference*, pp. 96 - 121; 'Impartiality and the Civic Public', *passim*.

<sup>699</sup> Unfortunately, Shearmur does not identify the source of this argument in Raymond Plant's writings but he may have in mind papers such as Plant, R., 'Autonomy, Social Rights and Distributive Justice', *The Moral Foundation of Market Institutions*, London, Institute of Economic Affairs, 1992, pp. 119-141; 'Hayek on Social Justice: A Critique', Birner, J. and van Zijp, R. (Eds.), *Hayek, Co-Ordination and Evolution: His legacy in philosophy, politics, economics and the history of ideas*, London, Routledge, 1994, pp. 164-177 and 'Why Social Justice?', *Social Justice from Hume to Walzer*, Boucher, D. and Kelly, P. J. (eds.), London, Routledge, 1998, pp. 267-281.

<sup>700</sup> Shearmur, *Hayek and After: Hayekian liberalism as a research programme*, p. 189.

<sup>701</sup> Kukathas, 'Liberalism and Multiculturalism: The Politics of Indifference', p. 697.

<sup>702</sup> Shearmur, *Hayek and After: Hayekian liberalism as a research programme*, p. 196.

based on profit and there is no reason why entire communities could not take out policies of this sort thus protecting their voice from the silencing forces of economic marginalisation. Similarly, Kukathas's emphasis upon freedom of association weakens the intolerable burdens objection for an intimate part of that freedom for group members – and, indeed, sympathetic *non*-members - to concern themselves with the well-being of cultural minorities. The charge of intolerable burdens, then, is misplaced.

However, it is at this point where decisive arguments against the Liberal Metautopia and the Politics of Indifference become clear. Particularly in view of Shearmur's earlier programmatic claim that a telling argument is not represented by 'the construction of philosophical foundations, so much as considerations that other people, coming from wherever they do, will find telling,'<sup>704</sup> it seems somewhat odd to claim that if the opportunity cost of giving vulnerable and marginalized group members a voice in the surrogate dialogue is too high then we should not be compelled to do so. How the handicapped, for instance, let alone their able friends and political allies (unless all were already starkly libertarian) would not be positively troubled by such an explanation rather than merely not find it telling is unanswered. It seems that the only way of convincing everyone is to give an argument that actually does resonate in a positive way with everyone, including most importantly the disadvantaged. Similarly, the Politics of Indifference's strong emphasis upon rights of association - including exit rights - and the empirical assumption that the kind of society into which recently parted members of closed communities enter into is, thankfully, a liberal one may rebut the charge of intolerable burdens but it does not give us any reason to actively *prefer* the Politics of Indifference to other candidate theories such as multiculturalism or liberal egalitarianism. What both the Politics of Indifference and the Liberal Metautopia would need in order for this to be so is a *supplementary* argument that claims that if it is aiding vulnerable and marginalized members of society that you want to do then you are *best* served by according them, and everybody else, private property rights as the most sincere and rational means of giving them succour. This more robust counter-objection to the intolerable burdens argument, then, is not only that it is not necessary to involve the state in cultural justice but that to do so is indeed to *underdetermine* the scope for aid to minority cultures as it does not make as full use of local knowledges - both propositional and tacit - and circumstances to this end.

Furthermore, the example of endogenous gay survival and flourishing fits in precisely with Hayek's writings on the abstract society. Subjecting the discourse about the status of homosexuals to the strictures of aggregative, individual reason in the public sphere could just as easily mean that gays would not have been afforded the means to flourish, especially if the

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<sup>703</sup> *ibid.* p. 195.

majority view were a hostile one. By contrast, because it takes no particular stance with regard to this, the Discursive Minimal State allows for marginal communities to flourish without being subject to the power of a hostile government. Again, Milton Friedman has made just this point very succinctly with regard to minority groups of all kinds in *Capitalism and Freedom*. ‘No one who buys bread,’ he writes,

... knows whether the wheat from which it is made was grown by a Communist or a republican, by a constitutionalist or a Fascist, or, for that matter, by a Negro or a white. This illustrates how an impersonal market separates economic activities from political views and protects men from being discriminated against in their economic activities for reasons that are irrelevant to their productivity – whether these reasons are associated with their views or with their color.<sup>705</sup>

Thus, the benefit of the abstract society to gays and other minority groups is twofold. In the first instance - and we may invoke Fraser’s subaltern counter-publics here<sup>706</sup> - gays are afforded the opportunity to organise in ways that *they* regard as maximally conducive to their well-being, precisely because social decision making is privatised. Under this arrangement, gays and their allies are able to take advantage of their own local, particular knowledges and circumstances to further their own ends as sincerely and rationally as possible. Moreover, they will do so without being subject to the enmity of those hostile to them for the simple reason that they have little or no face-to-face contact whilst all the while participating in the wider socio-economic context.<sup>707</sup> Secondly, the degree of flourishing of a homosexual lifestyle on these disaggregate terms in the Discursive Minimal State is itself a more accurate indication of its degree of acceptance than that to be had out of a debate in a public political space. Given that we cannot know in advance the outcome of such a debate – unless, of course we rig it by selecting only those who agree with a particular viewpoint to participate in the political discourse – the voluntary nature of the discourse, a discourse where conclusions are reached, as it were, by voluntary steps rather than by politics will give us the most accurate, non question-begging answer. Moreover, precisely because it is arrived at via

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<sup>704</sup> *ibid.* p. 178.

<sup>705</sup> Friedman, *Capitalism and Freedom*, p. 21.

<sup>706</sup> Fraser, ‘Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy’, Robbins, B. (Ed.), *The Phantom Public Sphere*, Minneapolis, University of Minnesota Press, 1993, pp. 1-32.

<sup>707</sup> Even more interesting than this, is that the abstract society permits even those who find homosexuals a decidedly disagreeable group to help them in this quest. Tracing the flow of goods and services through the economy is often far too costly as to make it practically impossible to see whom you have indirectly helped. In the great Society of the Discursive Minimal State, then, one person’s negative unintended consequences may be another’s unintended benefit. On this see, O’Neill, J, ‘Liberty, Polity, Neutrality’, p. 417; Hayek, *The Mirage of Social Justice*, in *Law Legislation and Liberty, Volume Two*, London, Routledge, 1982, pp. 109-110.

voluntary steps it will be seen to be both just and fair. As such, the answer yielded by the disaggregated discourse of the Discursive Minimal State is the most sincere, rational and fair answer to the question of to what extent should gays flourish in society.

We are now in a position to assess the Discursive Minimal State by comparing it to the Liberal Metautopia and the Politics of Indifference's response to the charge that they all impose intolerable burdens upon the members of cultural minorities. Like Shearmur, the basis of the argument for the Discursive Minimal State is derived from Hayekian considerations but it goes one step further to offer reasons that even the marginalized would find compelling. What the Discursive Minimal State assumes is that, whatever your objective, its achievement is most sincerely and rationally satisfied via individual rights on the grounds of interpretative sincerity and rationality. The upshot of this claim, then, is that if we *do* want all the voices of the polity included in the dialogue, the best way of doing this under conditions of social disagreement and resource and knowledge scarcity is to institute a set of individual discourse rights as the most interpretatively sincere and rational means of attaining it. Unlike Shearmur, then, we invoke Hayek not only to rule out the political pursuit of public objectives but also to positively recommend the Discursive Minimal State on the grounds of sincerity and rationality. Similarly, the positive argument for the Discursive Minimal State does more work than an emphasis upon the rights of association in the Politics of Indifference. Rights of association, of course, are indispensable to secure protection from cultural tyranny. However, unlike their defence in the Liberal Metautopia, we may add further that they also enable us to respond *better* to it than would be the case otherwise. This, however, is something that Kukathas who is more concerned to rebut the charge of intolerable burdens does not make clear. Thus, following Hayek's arguments about competition as a discovery procedure, we have claimed that, *contra* Kymlicka and Taylor, if it is the prosperity or preservation of minority cultures that is desired, then it is for the better that we allow these things to be pursued on the basis of the individual rights protected by the Discursive Minimal State. To sum up, what separates the Discursive Minimal State from the Liberal Metautopia and the Politics of Indifference is not just its rebuttal of Kymlicka's argument, but also its ability to offer a positive argument in favour of this kind of institutional regime.

#### ***4.ii Segregation and the Geography of Interpretation***

Another aspect of the charge that theories of justice such as the Discursive Minimal State impose intolerable burdens upon cultural minorities relates to the second species of objection that is loosely collected around the idea of ethical subjectivism and relativism. The two particular criticisms that shall be dealt with here are those of segregation and the possibility of social criticism. Given that under the Discursive Minimal State interpretative sovereignty is centred upon the private rather than the public sphere, the first critique is that this would lead

to the segregation of different of groups and as a consequence only serve to promote those misunderstandings that all too often lead to distrust, enmity and, ultimately, conflict out of which, one may add, the minorities always fare less well. Given the account of cultural outcomes by voluntary steps that the Discursive Minimal State sanctions, there is nothing to stop entire segments of the population choosing to relocate away from other segments they find unappealing or even repulsive. At worst because there is no public political sphere in which members of the polity have to justify their views to one another this may lead to a Civic Social apartheid - an apartheid by stealth, as opposed to by the state - as an emergent characteristic of social institutions. Interpretative liberty has decidedly unpleasant foreseeable consequences.

However, do we have good reason to assume that apartheid by stealth will be emergent in this way? The objection, of course, depends upon the assumption that people's interpretations on matters such as religion, ethnicity, race, gender and sexuality figure so highly upon their list of priorities that they would be the first things they would think of when choosing a place to live, a company to work for or an employee to work for them. For some – a small minority – such things *would* figure very highly upon their list of priorities but for the vast majority of people they would probably figure somewhat lower down upon the scale. The resulting aggregate picture of all of this – the geography of interpretation, if you will – would indeed be characterized by a certain degree of segregation: racists would live only among themselves, religious fundamentalists would have no social intercourse with gays or women interested in careers, gays would have no social intercourse with fundamentalists. Yet, for the vast majority of places the geography of interpretation would be mixed. Indeed, one of the largest, if not the largest, of the so-called ghettos allowed for by the Discursive Minimal State would be one where only those who actively want, do not mind or are too busy to care about living among others very different from themselves is emergent. Let us assume, then, that there would be some but not total segregation. We have, then, to consider the force of the segregation by stealth objection in terms of the cost to all concerned.

It seems that one counter-objection is that it is unclear why such segregation would be worse than a situation where mutually antagonistic groups for whom the cost of contact is far too high, find themselves in direct, face-to-face and hostile contact with one another. What perhaps blinds us to this is that all too often we conceive of the problem of segregation as one in which some are metaphorically 'left behind' by others and that they do not want to be left behind. It is upon the basis of this sentiment, moreover, that we then proceed to question the indifference of the state to such processes. Is it right, we ask, that the state does nothing to stop such abhorrent social tendencies? In truth, however, often the minority in question is quite pleased that such segregation takes place and its members do not perceive themselves to have been left behind but, rather, is at last able to get on with life on their own terms. This

author at least does not know of *any* gays who would find particularly attractive the idea of living side by side with Islamic fundamentalists or of any blacks that would positively enjoy the company of Ku Klux Klan members. Indeed, it is because the neo-Hayekian framework of the Discursive Minimal State and, for that matter, the theories of Kukathas and Shearmur would lead precisely to this kind of segregation that it is to be *welcomed*. This, of course, is in stark contrast to the multicultural perspective. Here the problem of hostility in the forum and as a consequence political discourse is made too demanding. Moreover, and related to this, it merely begs the question of the rectitude - let alone the partiality - of the politics of integration that presumably would be the remedy of segregation. Similarly, liberal egalitarianism makes too many demands because of its intimate relationship to democratic decision-making. Under such a procedure, there will always be winners and losers, a feature of the process that will inevitably leave a bitter taste in the mouth of the latter.

Yet, the counter-objection may be taken further than this by way of the distinction between the face-to-face and the mediated. Clearly, the segregation by stealth objection is operative at the face-to-face level and we have found it wanting. Yet it is also clear that despite this there would be social co-operation in any case as all members of the polity would still occupy the abstract, mediated economic and cultural space regardless of their background, interests and affiliations. As a consequence of this, individual communities would still make indirect contributions to the surrogate, disaggregated discourse for the simple fact that they trade with those they do not see and do not know. Thus, there still would be discourse and co-operation although it would be at the indirect, abstract level. What the segregation by stealth objection conflates, then, is the idea of integration and that of the face-to-face. The former is not parasitic upon the latter for one may have integration at the abstract level even if it not always is in evidence at the face-to-face level.

## **5. *Objections: relations within communities***

### **5.i *Subjectivism, Conventionalism and the Authenticity of Minimalist Discourse***

Hitherto, our objections have been centred upon the inequalities *between* communities rather than within them that, *prima facie* at least, theories of justice such as the Discursive Minimal State are vulnerable to. Yet, inequalities within communities are of equally pressing importance and are brought into stark relief when many of the claims made by or on behalf of cultural minorities are expressed in the vocabulary of equality and marginalisation. Related, then, at a more profound philosophical level to the problem of segregation is the threat of ethical subjectivism to the Discursive Minimal State and the uncritical stance towards the content of the particular traditions sanctioned by it. How, after all, is the Discursive Minimal State, the Liberal Metautopia or the Politics of Indifference to rule out some practices rather than others without fatally floundering upon the rocks of ethical controversy which they are

programmatically committed to avoiding? This, of course, is especially important given the importance the neo-Hayekian perspective attaches to tradition as conducive to co-ordination.

The problem here, however, is that if we accept such an emphasis upon tradition and local practices, even if that acceptance is on an instrumental basis, it is difficult to see how we can subject them to critical appraisal. Anna Elisabetta Galeotti touches upon this in ‘Individual, Social Rules, Tradition: The Case of Friederich A. Hayek.’<sup>708</sup> In the first instance, Galeotti claims - correctly - that for Hayek ‘the political order is thoroughly parasitic vis-à-vis the social order’ in the sense that the political order relies upon the traditions that constitute the social order to ensure social cohesiveness.<sup>709</sup> It is for this reason, crucially, that Hayek’s State can be a minimal one whose unique task is the enforcement of the law.<sup>710</sup> Thus, all politics should, indeed *can* do, is enforce the law because ‘the social order, which the state is meant to protect is a very complex, self-regulating mechanism that has already solved in its own way, the fundamental issues of living together.’<sup>711</sup> However, Galeotti continues, ‘the fixing of political boundaries that exclude tradition results in the exclusion of a crucial part of collective life from public discussion and political consideration.’<sup>712</sup> Tradition and spontaneity, then, ‘not being matters of politics are simply facts that can be explained but not questioned.’<sup>713</sup> But once it is accepted that many aspects of our traditions (Galeotti discusses them in the context of their functionality to the formation of the identities of the sexes) perhaps need to be subjected precisely to such critical scrutiny, it is hard to see where the theoretical momentum for this can come from. ‘We know only too well from historical records,’ she adds, ‘that traditions have typically embodied privileges and partialities.’<sup>714</sup> Similarly, as Gray notes, in a political theory such as Hayek’s the instrumental benefit of traditions should not be considered in terms of their being ‘means to antecedently chosen ends,’ but, rather, ‘their functional usefulness depends on their being observed as it were uncritically.’<sup>715</sup> To a significant extent, it is not only that traditions ought not be observed critically but, rather, that they cannot be so observed precisely from the fact that they are the carriers of tacit knowledge that is ‘inaccessible to critical statement’<sup>716</sup> and that there exists ‘[n]o Archimedean point of critical leverage ... for the assessment of entire moral codes.’<sup>717</sup>

<sup>708</sup> Galeotti, ‘Individual, Social Rules, Tradition: The Case of Friederich A. Hayek’, pp.163 – 181.

<sup>709</sup> *ibid.* p. 173.

<sup>710</sup> Included in which, presumably, is the protection of the framework of law from extra-judicial, typically international, threat.

<sup>711</sup> Galeotti, *ibid.*

<sup>712</sup> *ibid.*.

<sup>713</sup> *ibid.*

<sup>714</sup> *ibid.* p. 174.

<sup>715</sup> Gray, *Hayek on Liberty*, p. 42; Kukathas, *Hayek and Modern Liberalism*, p. 114.

<sup>716</sup> Gray, *ibid.* p. 42.

<sup>717</sup> *ibid.*

Two points are worth making here. Firstly, it seems difficult to use this concern as the basis for the political settlement of such issues once the doctrine of the Privileged Position is taken into consideration. This, in essence, is the same problem that we encountered with regard to the identification and correction of defective economic outcomes. We saw there that the problem was that the apparent defect is ultimately based upon the ascription of one interpretation of the value of economic interaction that is itself only ever partial. Thus, the only way to fairly arbitrate between rival interpretations of what would constitute a beneficial economic outcome is to allow the interpreters to go about correcting, or not correcting, on their own terms. Similarly, Galeotti's attitude towards tradition is but one interpretation of its ethical status. Traditionalists, obviously, would wish to disagree that the privileges inherent in tradition of ethically troubling. Yet, whether or not these are useful responses they do not give us an argument *for* the minimal state. Answering this will, again, enable us to see how each of these three classical liberal conceptions rises to this challenge and to ultimately make the claim that the Discursive Minimal State is the preferred option.

Shearmur proposes a public discussion forum in which representatives of diverse communities will come together to justify their traditions and practices to one another.<sup>718</sup> In this way, it is claimed, only those practices that are morally legitimate in the eyes of the wider society - and not just within one of its constituent communities - are said to be justifiable. However, this seems to open up a whole range of new difficulties. How, after all, are such justifications to take place and, more importantly, by what justifiable criteria? Two problems arise here. Firstly, is the problem of pedigree for Shearmur's proposal ultimately leaves too much room for precisely the kind of aggregative discursive formation that his Hayekian emphasis upon disaggregated discourse would appear to rule out because it would make precisely the kind of epistemological demands that his defence of the surrogate, disaggregated discourse would deny. Secondly, appealing to an ethical postulate as a tie-breaker between conflicting values would, in any case, violate the sanctity of the experimental and educational aspects of the Liberal Metautopia that are at its heart.

The same argument, it seems, arises, in Shearmur's discussion of the danger to the Liberal Metautopia of 'conventionalist strategies'.<sup>719</sup> Conventionalist strategies are the construction upon the basis of the private property rights enjoyed under the auspices of the Liberal Metautopia of 'certain kinds of social formation which protect people's judgements from critical scrutiny'.<sup>720</sup> Presumably what Shearmur has in mind here would be communities that are closed to the outside world – such as religious cults. Because of the possibility of such protection, Shearmur argues that it may be necessary to have certain restrictions upon

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<sup>718</sup> Shearmur, *Hayek and After: Hayekian liberalism as a research programme*, pp. 217 – 218.

<sup>719</sup> *ibid.* p. 196.

<sup>720</sup> *ibid.*



property rights that would not normally be countenanced by the free market economist. Unfortunately, he does not say what the restrictions might be and actually adds to the confusion by saying that practices are placed within a public forum that ‘serves both as the place within which the rules of the system are legitimated to its inhabitants, and also within which different specific forms of life must give an account of themselves.’<sup>721</sup> Yet, again, it is unclear what kind of forum this is supposed to be. Given his concerns about the difficulties of the face-to-face forum, it seems likely that what Shearmur does not have in mind is the forum of deliberative democratic theory discussed and rejected in Chapter 4.<sup>722</sup> Yet, at the same time, the fact that diverse forms of life of the Liberal Metautopia must give an account of themselves here it seems, after all, that this aggregative, political discourse is precisely what the Liberal Metautopia would demand. Of course, Shearmur is careful to note that his line of argument is merely suggested by Hayek’s work. His task, then, ‘is not to show that there is an argument in Hayek’s work ... but to offer an argument which it would be possible for him to accept.’<sup>723</sup> Yet, even if we grant this, an argument in favour of a public forum is not one of those arguments. Of course Shearmur does argue for the need for the right of exit and this, as we have seen, can be understood as going hand in hand with the wider learning and experimentation process that can be understood as constitutive of the process of justification.<sup>724</sup> By voting with their feet, which includes deciding to stay as much as it does deciding to leave, individual interpreters give rise to a wider, disaggregated, social, justificatory process. ‘In our liberal metautopia,’ he writes,

... experimentation and learning take place via the activities of individuals. Individuals back their own judgement with their own resources in the membership of some society, organization, club or, more radically, experimental community. Learning takes place via these individuals deciding they had made a mistake and pulling out; or staying and making whatever changes are allowed by the particular constitution of the small-scale organization which they have joined; or by their being joined by, or imitated by others.<sup>725</sup>

Moreover, it is here where the state has an important role to play for it ‘preserves individuals (and voluntary communities and associations) from aggression and overspill effects, and which also prevents individuals from being held prisoner by some community or association that they have joined.’<sup>726</sup> Indeed, Shearmur goes further in this regard by claiming that the state ought to take particular care that such second-generation members ‘have the opportunity

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<sup>721</sup> *ibid.*, pp. 196, 218.

<sup>722</sup> *ibid.*, p. 194.

<sup>723</sup> *ibid.*, p. 179.

<sup>724</sup> *ibid.*, p. 196.

<sup>725</sup> *ibid.*

<sup>726</sup> *ibid.*

to exercise choice between alternatives.<sup>727</sup> The problem here, of course, is that this sounds perilously close to the positive welfare rights he rejected in our discussion of the intolerable burdens critique. Of course, the solution to this is merely the authorisation on the part of the state of the police to investigate the communities concerned for evidence of malpractice such as enslavement or forced membership both of which would violate the sanctity of the private property rights the state is supposed to protect. Moreover, there would also be an incentive in civil society for individuals to investigate communities of which they are not members and, as a consequence, for others to step in and seek that information on their behalf. Investigation here would be about the way communities are organised and about the values upon which that organisation is based. Again, the extent to which this takes place is the extent to which such information is deemed important in people's lives other things considered. Given, in addition, that the choice of the form of life is of incredibly high importance to the vast majority of people it would seem that such a market for social criticism would only ever be a robust one. Who would doubt that taking pride of place amongst less serious publications such as *Which Computer?* and *Which Car?* would be *Which Community?* For those who doubt this it needs to be pointed out that magazines and other privately provided sources of information *already do* feature in our daily lives with regard to the most important things: insurance, life assurance, banking, household security and many other products and services. There is, then, *contra* Shearmur the possibility of turning to civil society rather than the state for this kind of judgement.

What of the Politics of Indifference? In section IV of 'Liberalism and Multiculturalism: The Politics of Indifference' Kukathas gives us an indication of the underlying philosophical assumption of his own strictly neutralist liberal perspective. It is a perspective, he writes, that

... does not lie in any view of human dignity - as is suggested, for example, by Taylor's analysis of liberal thinking. Nor does it lie in any kind of emphasis on the importance of individual autonomy. Under the institutions of liberal society, in this view, ways of life that disvalue autonomy or individuality may still flourish. The foundation of this liberalism lies, rather, in a particular view of freedom: the freedom of individuals to associate or dissociate from others in pursuit of their diverse although often shared ends.<sup>728</sup>

Clearly, then, in the Politics of Indifference it is the right of association that is critical. Given that many of the groups of which we are members - particularly cultural groups - we are not members of voluntarily (because, for instance, we are born into them) Kukathas claims that

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<sup>727</sup> *ibid.* Inexplicably, however, he only extends this right to children or older second-generation members and not to those first generation members who may change their minds.

what is paramount is ‘that members recognize as legitimate the terms of association and the authority that upholds them.’<sup>729</sup> Moreover, ‘all that is necessary as evidence of such recognition,’ he writes, ‘is the fact that the members choose not to leave.’<sup>730</sup> Thus, the right to exit has, for Kukathas to be fundamental and we must respect a minority’s wish to live according to their own practices ‘not because the culture has the right to be preserved but because individuals should be free to associate: to form communities and to live by the terms of those associations.’<sup>731</sup> Moreover, when this right is respected and individuals come and go as their interests and conscience’s dictate, we have the judgement process at work. This right of association, then, would seem to supply the Politics of Indifference with the critical clout it needs to avoid the problem of unreflective conventionalism. Unlike the Liberal Metautopia, the Politics of Indifference has no forum. Yet, another question arises here. At the level of justification, how is even this right of exit, thin as it may be, not reflective of a deeper liberal commitment to autonomy that is itself controversial and hence programmatically contrary to Kukathas’s aims? One may readily accept that a particular conception of liberty is doing the foundational work here but still question the perhaps comprehensive basis of this, clearly ethical, conception.

This, clearly, is an important question, not the least because of the multicultural problematic the Politics of Indifference is intended to solve. Why should those for whom autonomy is not culturally operative accept its incorporation into the political institutions that regulate their behaviour? What do we say to those who claim that, epistemological considerations apart, I hold *my* way of life to be true and do not wish to see it relegated to some private interpretative sphere – not least one where, under this politics, there is *only* a private sphere. In any case, whether the grounding of this politic is ethical or scientific is beside the point for it is its *comprehensiveness* that is the problem. After all, it is my doctrine that is comprehensive, true for all, and not this one. Thus, despite the fact that Kukathas’s approach does indeed give ‘a great deal of authority to cultural communities,’<sup>732</sup> (which, he says, Will Kymlicka’s group-differentiated perspective is ambiguous about in ‘Multiculturalism as Fairness’) his approach does nonetheless presuppose a commitment to individual autonomy that many of the groups governed by the Politics of Indifference would find onerous.<sup>733</sup> Later on Kukathas seeks to show that the right of exit is not merely a formal

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<sup>728</sup> Kukathas, ‘Liberalism and Multiculturalism: The Politics of Indifference’, pp. 696 – 697.

<sup>729</sup> Kukathas, ‘Are there any Cultural Rights?’, p. 116.

<sup>730</sup> *ibid.*

<sup>731</sup> *ibid.*

<sup>732</sup> *ibid.*, p. 117.

<sup>733</sup> There is, furthermore, the question of whether such a conception of liberty - liberty of entry and exit - is viable or meaningful in a society whose political institutions, Kukathas himself is ready to admit, would allow for the disvaluation of individual autonomy and hence the very freedom to exit amongst at least some groups.

right but one with 'substantive bite',<sup>734</sup> one of the most important guarantees of which is the existence of a wider society - as there is in most if not all liberal societies - willing to accept defectors or at least allow them to reassociate on new terms.<sup>735</sup> Of course, Kymlicka objects at this point in his reply to Kukathas in 'The Rights of Minority Cultures',<sup>736</sup> on the grounds that a woman who has been denied an education as well as association with the outside world 'does not have the substantial freedom to leave because she lacks the preconditions for making a meaningful choice.'<sup>737</sup> Thus, he concludes 'any system of minority rights which gives cultural communities that much power over their individual members is seriously deficient from a liberal point of view.'<sup>738</sup> The problem, however, with Kymlicka's response and to a certain extent with Kukathas's argument is this. Surely under Kukathas's schema such a state of affairs - the denial of education and the freedom to associate at all with the wider world - would be precisely that 'cruel, inhuman or degrading treatment'<sup>739</sup> that is ruled out? This may be an adequate response to *Kymlicka* but the further problem with it is that it is not a response that I think Kukathas can adequately make without recourse to the theoretical resources of liberal autonomy that he has made unavailable to himself. How, then, does the Discursive Minimal State grapple with the problem of conventionalism?

Given the difficulties with which the liberal Metautopia and the Politics of Indifference, the task facing the Discursive Minimal State is to provide a means of avoiding the charge of conventionalism that its emphasis upon tradition makes it vulnerable to. At the same time, however, it must do so without invoking an aggregative discursive forum that would run against other aspects of its Hayekian inheritance nor to a controversial ethical postulate that would fall afoul of its profession to neutrality and its fundamentally different conceptualisation of the task of justice. It is to this task that we now turn.

As we have seen, like the Liberal Metautopia, the Discursive Minimal State would impose a Publicity Requirement. However, unlike Shearmur's theory, the requirement is not operative for the purposes of explicit, propositional justification in a public forum but, rather, for the purposes - surely more Hayekian - of conveying information for individual choice. In this way, public justification, like the discussion itself, takes place at the disaggregated level. With such information at hand one would decide whether or not a particular practice is

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<sup>734</sup> Kukathas, 'Are there any Cultural Rights?', p. 129. Another argument you may wish to deploy against the proponents of group rights who wish to deny the right of exit is to claim that this is only the same right which they themselves wish to enjoy as members of a wider society extended to their own members. If they think that it would be reprehensible to be forced to stay within certain boundaries or held in bondage why would the same not be true of their members?

<sup>735</sup> *ibid.*, p. 135.

<sup>736</sup> Kymlicka, 'The Rights of Minority Cultures: Reply to Kukathas', *Political Theory*, Vol. 20, No. 1, February 1992, pp. 140-146.

<sup>737</sup> *ibid.*, p. 143.

<sup>738</sup> *ibid.*

acceptable and take appropriate action to externalise that belief. Over the medium to long term the practices which survive are those which ought to have survived because they have proved acceptable to the mind of a sufficient number of people, all things considered. Perhaps the moral rectitude of voluntary female circumcision will be an enduring value around which we all will congregate in the future pluralist communities of Sydney, London or Los Angeles (although, here and now, it seems somewhat doubtful)? Yet, the only way of finding out if it will endure is to test it against other norms and to see to what extent those that endorse it flourish.<sup>740</sup> Given, furthermore, that the actualisation of interpretations and not just their voicing is central to interpretative liberalism, the state would have a crucial role to play insofar as it would legitimately intervene in cases of forced membership. This, then, is the justificatory process at work in the Discursive Minimal State but, unlike the aggregated process of justification of the Liberal Metautopia where practices must be acceptable to the occupiers of a public political space, it works at the Civic Social, disaggregated level.

The selection of competing cultural traditions, then, is an aggregate term for the micro-level process of the migration between norms in civil society. Yet, this appears to imply that in a neo-Hayekian disaggregated discursive forum no criticism takes place at all. For, as we have seen earlier this emphasis upon the co-ordinatory role of traditions also implies a 'paradigm shift' from 'the criticism and evaluation of social institutions by reference to preferred principles of morality to an assessment of them in terms of their capacity to generate, transmit and use knowledge including tacit knowledge.'<sup>741</sup> Yet, the fact that we are both unable and consequently ill advised to readily subject the diverse traditions of the pluralist polity to critical assessment should not trouble us and, moreover, the metaphor with Hayek's other economic arguments concerning the epistemological role of markets can be extended to make this clear. It is not that the traditions are not critically assessed but, rather, how and perhaps most importantly, *where* they are so assessed. The Discursive Minimal State does not mean that no criticism takes place at all. Rather, following Gray's analysis of the relationship of social criticism to tradition in Hayek, we can say that such criticism 'consists in the detection and removal of incoherences' and takes place imminently 'as a result of innumerable small variations upon and deviations from established rules and practices, undertaken by countless anonymous individuals in unconnected but similar

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<sup>739</sup> Quoted in Poulter, S, 'Ethnic Minority Customs, English Law and Human Rights', *International and Comparative Law Quarterly*, 36 (1987), pp. 589-615, at pp. 600-1.

<sup>740</sup> Importantly, if those who endorse female circumcision do not flourish then this should not be taken to mean that some form of ethnic cleansing has taken place. Rather, it should be taken to mean that they either have done away with the norm or have migrated elsewhere.

<sup>741</sup> Gray, *Hayek on Liberty*, p. 41. See also Hayek, *Hayek and Modern Liberalism*, pp. 175 - 177 where Kukathas makes a similar point in a discussion of Hayek and Rawls with regard to the former's opinion of reason's capacity to 'set out a justification of right action independent of the tradition(s) he shares' (p. 177).

circumstances.<sup>742</sup> The natural selection process - as evidenced in the myriad migration between norms discussed earlier - *just is* the critical process in operation. Like the correction of morally dubious market outcomes, ensuring the well-being of minority groups or the rescuing of the recently rejected or escaped, cultural critique takes place at the disaggregated, Civic Social, level in which discrete decisions by citizens to migrate from one norm to another dovetail to give an overall picture that, despite always being inaccessible to individual reason, represents at any given time the comparative preferability of norms. Indeed, in pluralist societies one is uniquely placed to critique quite effectively. Unlike a relatively homogenous state where the overwhelming majority may be said to be internal to the traditions of their communities, in pluralistic societies there are many norms - say those endorsed by members of a religion different to our own - that we are external to. It is here, in the interaction between communities themselves, where such critical leverage may be gained.

Yet, again, just how neutral is this? Why is not the problem Kukathas faced relevant here? One possible response to those who subscribe to comprehensive doctrines is that they actually have nothing to worry about. Even if their conception of the good is *true* then all the framework of the Discursive Minimal State does is allow the rest of us, who are clearly in error because we are not believers or, more appropriately, *recognisers*, to *discover* it. The good here is discovered by voluntary steps, not revealed by involuntary ones, and the foundation of the public institutions that allow us to take these steps and prevent us from being frog-marched to a proper understanding of the Good does not rest upon the denial of the *truth* of any particular conception simply because it is agnostic about the veracity of all of them. In the eyes of the faithful what the Discursive Minimal State allows, then, is a sincere and rational path out of the darkness of infidelity for the unbeliever as much as it allows individuals to find their own way.

Again, what is important here is the ultimate foundation of the process. It is from this epistemological foundation - rather than from an assertion concerning the true good for man - that the Hayekian position is derived. It is because not every individual can know the good for man that the good requires an institutional framework that allows it to be discovered socially and that does not issue in favouritism between the competitors on the grounds of interpretative sincerity and rationality. Moreover, those espousing comprehensive doctrines would have an interest in the establishment of such a politics because they would know that hitherto lost souls would have been redeemed sincerely and rationally. Moreover, they would also be able to take comfort from the fact that this politics presupposes no covert comprehensive ethical doctrine because it is not ethical at all. Of course, whilst not indeed being founded upon a comprehensive moral doctrine - such as autonomy, or freedom, or

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<sup>742</sup> Gray, *Hayek on Liberty*, p. 42.

equality - it does presuppose a comprehensive epistemological doctrine. Yet this should not concern us for the key issue here is not that the foundation be moral (as that would get us into all sorts of difficulties when theorising justice for plural societies) but, rather that it merely be comprehensive and, as such, applicable to all transculturally and transhistorically. Kymlicka makes a very similar point although his claim, problematically, is that one's life goes no *better* if it is lead 'from then outside'. The claim here, of course, is that it is not sincere or rational for one's life to be lead from the outside.<sup>743</sup> In this way, then, we may secure universal rights without violating the neutrality of the state. Unlike Kukathas's account, then, the Discursive Minimal State does not ground those rights in an ethically controversial account of individual autonomy, which would diminish any prospect it had of resolving the problematic of justice for culturally plural societies.

#### **6. Foundational Values and Diversity, Neutrality and Institutions**

Of course, in opposition to the claim that the Discursive Minimal State is neutral between values and sincere about interpretative diversity one could claim that, similarly to the liberal egalitarian or difference democratic State, the Discursive Minimal State already assumes a single value around which its public institutions are justified and subsequently oriented. Thus, just as the liberal egalitarian State may assume autonomy, the Discursive Minimal State, like the difference democratic state, *wantonly* celebrates the value of diversity precisely because it endorses a disaggregated individualistic public decision-making process. What about those who, either because of indifference or hostility, do *not* value diversity? Why should *they*, (a working class English community from South or East London, for example), accept that their public institutions be modelled on the celebration of diversity and how could such a model be experienced as anything but onerous and invasive by them? Alternatively, but with a value monism no less subversive of the claim to interpretative sincerity, one may characterise the Discursive Minimal State as being premised upon the value of self-interest in which public institutions are geared towards the satisfaction of private, perhaps selfish, wants and desires. Rather than being representative of a fundamentally different mode of public decision-making, then, the Discursive Minimal State, like the liberal egalitarian or difference democrat State can be thought to enforce the requirements of a single ethical value at the levels of justification and institutional shape.

Yet, the foundation of the Discursive Minimal State and the individual interpretative rights it protects is not to be found within the province of ethical enquiry at all but, rather, is located within the Hayekian social epistemology and the amoral conception of the self that informs it. As such, the Discursive Minimal State can claim to be neutral between differing

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<sup>743</sup> On this see Kymlicka, *Liberalism, Community and Culture*, p. 12.

conceptions of the good that are the subjects of our explicit and tacit deliberations in the public political discourse it sanctions for the simple reason that it is not justified in terms of any of them, nor do its constituent institutions reflect any subsequent public commitment to them. In this way, and unlike the difference democrat State, the Discursive Minimal State also affords those of us who do not value diversity, autonomy or narrow self-interest the opportunity to live lives that are meaningful on an equal public footing with those that do, in the knowledge that the public institutions that regulate our social interaction are not skewed in favour of one value rather than another. This, moreover, explains why the criterion of evaluation of the Discursive Minimal State is couched in terms of sincerity rather than diversity. In opposition to diversity, sincerity leaves open the possibility that more often than not, the *unanimity* of opinion that renders a public commitment to the celebration of diversity is rare. Within the context of the problematic of this thesis, then, the Discursive Minimal State is to be recommended because it answers a more profound question than the somewhat platitudinous and unreflective one of how public institutions best reflect the fact of diversity? Rather, it asks how our institutions may accommodate those who do and do not value diversity in a society that is nonetheless diverse.

Of course, we have already recognised that Barry's liberal egalitarian response to the multicultural problematic is not vulnerable to this charge because it does not pretend to celebrate or institutionalise diversity or difference. As such, it cannot be said to fall short of a professed commitment to diversity. Yet, the serious issue of the controversy of autonomy as a foundational value for the public institutions of a diverse society notwithstanding, it seems that he makes the same error with regard to autonomy as the difference democrats do with respect to the value of diversity *at the level of institutions*. For, even if there were the requisite unanimity of opinion concerning, for example, the value of individual autonomy or diversity to adequately ground and justify a public commitment to a particular view of ethical life - and there is no reason why this assumption should be waved through in any case - that would still be no reason to invoke politics *per se* to answer the question of how either of these values is best satisfied in the daily lives of the members of the polity whose institutions these values govern. Thus, whilst being subject to the demands of a State that prioritises autonomy, the subjects of the liberal egalitarian State will not be afforded much *institutional* autonomy in determining what this requires of them in their daily lives. Similarly, whilst being subject to the demands of a State whose public institutions pretend to satisfy the requirements of diversity, the subjects of the difference democratic State will not enjoy diversity in determining what the ethical value of diversity actually requires of them in their daily lives.



## 7. Conclusion

In this chapter we have offered a convincing response to common criticisms of the political theory of benign neglect. In doing so, we have seen that whilst the criticisms that benign neglect is incoherent and that it imposes intolerable burdens upon members of minority cultures may be reasonable complaints against liberal egalitarian varieties of liberalism, they are not with regard to classical liberal ones. However, we have claimed further that, of the classical liberal theories examined and defended here, it is the Discursive Minimal State that is able to proceed from a mere rebuttal of the critique to offer compelling arguments in favour of the politics that it endorses, arguments that, crucially, are couched in terms of the interests of the most marginal.

Moreover, we have responded in a broadly similar way to the related problems of subjectivism, segregation and the possibility of effective social criticism arguing that in both cases the criticisms concerned miss their intended target. Significantly, and again similarly to the charge of benign neglect, out of our defence has arisen an important difference between the Discursive Minimal State and the other minimalist liberalisms of the Politics of Indifference and the Liberal Metautopia. With regard to Shearmur's Liberal Metautopia it seems that the Hayekian inspiration is unnecessarily weak and, at times, even violated. The postulation of a public forum where individuals and groups come together to explain and justify their practices to one another would seem in the first instance to fall short of the Hayekian, disaggregated discourse - Shearmur's 'surrogate dialogue' - that is placed quite rightly at the heart of the Liberal Metautopia. However, more problematically, the defence of a public forum to serve this purpose would seem to be entirely contrary to the spirit of the Hayekian insights that lay at the foundation of Shearmur's theory. In the case of Kukathas's Politics of Indifference, it appears the main problem - again lying behind the problem of relativism and the possibility of effective social criticism that we have discussed - is the comprehensive ethical basis that the Politics of Indifference needs. Given that Kukathas's is ultimately an ethical project of politics, without an appeal to the value of individual autonomy it would seem that the Politics of Indifference cannot offer an effective answer to these problems. Yet, this is precisely what Kukathas is precluded from doing because of his programmatic rejection of an appeal to controversial values upon which to found *any* politics designed to respond to the challenge of cultural diversity. In response to this, we have seen that the Discursive Minimal State needs no such basis as its foundation is an epistemological one.

## Conclusion

We started out by asking whether or not Hayek's perspective is capable today of supplying an answer to the challenge that cultural diversity poses to the theory of justice. It is safe to say, conclusively, that it does. By commencing with an interpretative reading of Hayek's social-theoretic, economic and political doctrines and by making explicit the conception of the self that informs them, we have seen that it is possible to offer a coherent account of cultural justice from Hayekian premises. We have achieved this by uncovering the interpretative assumptions behind the embedded conception of the Hayekian self which in turn enables the Hayekian perspective to straddle and indeed render largely irrelevant the apparent divide between the distributive and the cultural that has come to mark so much post-socialist discourse in the theory of justice. More specifically, we have clarified with reference to and further development of Hayek's thought the unique epistemological burdens a recognition of our embedded, tradition-bound nature imposes upon us and what implications this recognition has for the nature of public institutions.

The broad argument of this thesis, then, can now be summed up. Despite the postsocialist cultural turn and the virtual disappearance of the kind of centralised economic institutions that Hayek was always keen to reject, it remains possible to reconnect his thought to contemporary political theory and to both critically and normatively contribute to the debates about multicultural justice that are so central to it. What is most interesting about Hayek *today* are not the reasons why he defended liberalism but rather the conceptual tools that he deployed in defending liberalism. It is these conceptual tools that can be shown to have a relevance to contemporary concerns with cultural diversity that is methodologically, critically and normatively both clear and compelling.

In Part One we saw that, despite his apparently marginal status to debates about justice and difference, a specifically interpretative reading of Hayek's social theory and of the conception of the self that underlies it, not only unlock the underlying assumptions inherent in the well-known economic arguments he did make, but also enables us to appeal to his thought anew with respect to the culture. Moreover, we also claimed that central to this reading of Hayek's radical reformulation of the economic problem which we in turn transposed upon the basis of the universal nature of his Limited Knowledge Thesis is a reformulation of the cultural problem that is faced by society. In Chapter Two we built upon these arguments to address Hayek's normative argument for individual economic liberty and ultimately to extend it to the realm of culture, via our modelling of a Hayekian argument for individual interpretative liberty as a response to the economic and cultural problems.

In Part Two, I was concerned to examine, from this Hayekian perspective, the responses to diversity of a range of theorists. In Chapter Four, I will examine the response of the difference democrats who endorse a group-differentiated account of deliberative democratic decision-making and, in Chapter Five, of liberal egalitarian political theorists who both attempt and in a significant sense reject the reconciliation of cultural difference with the institutions of the contemporary welfare state. In both cases, we found these theories to be inadequate. In the case of the difference democrats this was due to the incoherent privileging of cultural diversity itself as a regulative ideal in politics when an important aspect of that diversity is the fact that many if not all groups in society do not wish to celebrate the difference of at least one of the other groups. At the level of institutions, moreover, we claimed that the difference democrat's defence of a group-differentiated democratic discourse ultimately thwarts the aspiration to diversity they seek to uphold because it cannot make adequate use of the tacitly-held and culturally-differentiated knowledge at society's disposal.

In the case of liberal egalitarianism we saw that despite their apparent differences both multicultural liberals such as Kymlicka and Raz as well as more traditional egalitarians such as Barry all ultimately subscribe to a cultural thesis concerning the good for man which, in the case of the former, undermines the commitment to diversity and, in the latter, the claim to neutrality. Lastly, both schools of thought ultimately conceive the task of justice as one of reflecting pre-given answers to society's economic and cultural problems rather than defending institutions that enable society to discover what these answers may be by making adequate use of the knowledge of the embedded individuals who comprise it.

In response to this, in Part Three an account of cultural justice emergent from our prior engagements with and modifications of both Hayekian and contemporary political theory was offered and defended as on epistemological grounds the most sincere and rational response to the challenge cultural diversity poses the theory of justice. We did also note that this account does have some shortcomings and, as such, potential for development as a future research project. More specifically, this is the case with regard to the issue of abortion.

Nevertheless, what has been particularly original about this approach is the new interpretative reading of Hayek that it presupposes. No longer is Hayek to be read as a utilitarian or a purely instrumental or, if not this, a Kantian or Humean defender of liberal institutions - nor, indeed, as some hybrid amalgam of the latter two. Rather, he is to be viewed as an interpretative political theorist who, despite removing the task of the justification of public institutions from the realm of the ethical altogether, nonetheless derives distinctively liberal normative conclusions. Moreover, the very fact that decidedly liberal conclusions have been reached from an understanding of the self that is embedded in the most thoroughly communitarian sense should also serve as a unique achievement in its own right.

It is an achievement that I hope reinforces the point that so much of the discussion between so-called 'wholists' and 'atomists' has been, at best, misplaced.

Thirdly, special mention should be made of the new disaggregated account of public discourse that our Hayekian variant of cultural justice has set out. What is of special interest here, of course, is that it continues in its own way the work of theorists such as Young and Fraser, despite the clear normative differences in the conclusions these and Hayek's perspectives respectively endorse.

Of course, to leave off with the claim that there is a Hayekian account of justice under conditions of cultural diversity would be hardly adequate. What is of greater importance is the degree to which such an account is an adequate one. Ascertaining this depends upon its strengths relative to other candidate theories. I have claimed that in virtue of at least two criteria - rationality and sincerity - the Discursive Minimal State is preferable to difference democratic and liberal egalitarian accounts of multicultural justice, not least because it takes seriously the claims of those whose projects do not include the celebration of difference itself. Insofar as other classical liberal or libertarian theories are concerned, we have also seen that the Hayekian perspective defended here has distinct advantages, more specifically in terms of its Hayekian pedigree in comparison to Shearmur's *Liberal Metautopia* and in terms of its internal consistency with respect to Kukathas's *Politics of Indifference*.

In many ways however, and despite any advantages it may have, it is clear that in two important respects this thesis represents but a first step. As such, one of the achievements of this thesis has been to outline two ways in which Hayekian political theory may be carried forward as a research programme. In the first instance, it is plain that our Hayekian account of justice for culturally diverse societies has not dealt in any systematic or detailed way with another perspective upon the challenge of cultural diversity: that of the political, conservative Right. This is, I believe, a very important issue for the post-socialist era has witnessed in Western societies at least a rise in the popularity and political organisation of what we may call New Right Social Movements. Perhaps in response to the emergence of the New Social Movements of the Left, there have arisen, and continue to arise, all over the Western world political movements that address many of the same issues through the very appeals to identity (usually national or ethnic identity), the 'ravages' of globalisation and the destruction of cultural values that have in recent times been considered to be the preserve of the Old Left. Significantly, these Hard and Far Right groupings are often more effectively organised at both the Civic Social and party political levels than their counterparts on the Left to which, perhaps complacently, the majority of attention has been given in academia. From the Christian Coalition, the Buchananite 'Cultural Warriors' and the multiracial supporters of California's Proposition 187 denying all but essential public services to illegal immigrants in the United States, to the emergence of Hard and Far Right movements and political parties in Continental

Europe, North America and Australasia, the New Social Movements of the Right may in fact prove to present a far more serious challenge to the political establishment than those of the Left whose concern seems to have been one more of reform than replacement.<sup>744</sup> Indeed, whilst in countries such as France, Switzerland, Australia and Denmark, such parties have had a significant impact in the electorate or in policy formation. In others such as Austria, the Netherlands, Norway and Italy they have actually achieved government. Most interestingly, perhaps, the multicultural problematic is opening up all sorts of totally unexpected fissures in political engagement. The meteoric rise of the openly gay but multiculturally-sceptical Pim Fortuyn in the Netherlands was perhaps just the first of many such figures that will emerge to destabilise in a most fundamental way received notions of identity and toleration. Moreover, what the atrocities of September the 11<sup>th</sup> 2001 and the Federal Election in Australia that took place two months later suggest is that it would only take one minor or major event to tip the balance of popular rather than fringe opinion still further in the Cultural Right's favour. This thesis, then, is as much a beginning as it is a definitive answer to the question of justice and cultural diversity and should be considered as but a first step until these concerns are addressed in a systematic way.

Ultimately, however, there must remain an important question concerning the epistemological, amoral nature of the defence of the Discursive Minimal State. Granted that such a defence appears *prima facie* to hold out the prospect of persuading a diversity of interests as to its benefits precisely because of its amoral and, therefore, unavoidably neutralist foundation, it would seem at least on these terms to be quite an attractive theory. It would, indeed, be hard to fault the Discursive Minimal State in terms of a failure of neutrality in the management of public discourse between competing conceptions of the good for the simple reason that the ethical reasoning upon which such discourse is founded is not a part of its justificatory procedure. Yet, in an important respect this is a two-edged sword for it may well just as easily be the case that the arguments here persuade nobody at all, precisely because they are devoid of any moral and hence motivational content at the level of public justification. The Hayekian State, as much as the state Hayek conceived of, ultimately appeals to our reason and not to our attachments, to the fact of our embeddedness and not to what our embeddedness demands of us and demands we demand of others. Whether this will be seen as persuasive to those caught up in the midst of their deep and indeed often tacitly-held beliefs is another matter. It promises also to be a further extension of the Hayekian research project.

Despite the postsocialist cultural turn and the virtual disappearance of the kind of centralised economic institutions that Hayek was always keen to reject, there is, after all, a

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<sup>744</sup> On this see Dryzek, *Deliberative Democracy and Beyond*; Barry, *Culture and Equality*, p. 277

way to reconnect his thought to contemporary political theory and to both critically and normatively contribute to the debates about multicultural justice that are so central to it. For what is most interesting about Hayek *today* are not the reasons why he defended liberalism - the debates from which they sprung are, for the most part, irrelevant today both to political theory and to political practice - but rather the conceptual tools that he deployed in defending liberalism. It is these conceptual tools that can be shown to have a relevance to contemporary concerns with cultural diversity that is methodologically, critically and normatively both clear and compelling.

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