

JUSTICE AND SENTIMENT FOR WOMEN AND CHILDREN IN THE FAMILY

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Rawls changed the landscape of political philosophy with *A Theory of Justice*. When the initial fervour died down – despite spotting problems – academic and political feminists, and other political philosophers have regarded the Justice as Fairness model as a gateway to stronger, normative explications of feminism. This was because it fit in with Rawls' liberal and egalitarian intentions (Collected Papers pp. 595 *58). However, logical analysis of Justice as Fairness highlighted structural deficits that would inviolably allow gender inequality in different forms, rather than proscribing it. Chief amongst them, are the conflicts between the essential liberty of all persons, and the purported acquiescence of many aspects of this liberty to the 'personal'¹ sphere of family life. There is a disjunction between the aggregate family unit and the separateness of persons; separateness as a quality of personhood Rawls needs to defend himself against utilitarian varieties of justice. This needs to be addressed if feminists are to have powerful, persuasive reasons for the adoption what Mackinnon calls 'substantive justice' in public *and* private life which itself might necessitate restructuring of the family. Of course, it's also necessary to figure out what exactly falls under the banners of public and private, and if those conceptions are unsatisfactory from the perspective of justice, or are incoherent.

The question this essay will address is whether the traditional family in its current state, is responsible for, or allows pervasive injustices towards women and children. If that's the case, then the family – political or not – should not be protected as a separate institution of, and by, the state. I contend that *if* injustices against women in families are contingent *solely* upon the form of the family, then the family itself must be unjust. However, this is all only applicable to the traditional family, and as Rawls perceives it – a priori 'just in some form.' I do not venture to claim that any and all *forms* of the family are inherently unjust.

¹ That is, sentiment and justice within the family should not be interfered with politically. Though Munoz-Dardé (1998) pp.336-337, questions why the 'social reasoning' (part of the 'background culture of society') is exempt from political deliberation.

Some assumptions must be provided. The first is that Rawls' overarching theory is the only acceptable theory of justice. I will not comment on the overall rectitude of Communitarianism or on forms of justice based on Utilitarianism. The second; 'Rawlsianism' includes revisions pertaining to the family in *'Political Liberalism'* and throughout *'Collected Papers'*. Third, I will take it as a given that Patriarchy² still manifests itself today, and has not been neutralised by law³ despite its intentions to end it. Patriarchy is evident when the norms of society (cultural or political) are structured so as to be to the benefit of men rather than women, in terms of social and economic freedom in offices and acquisition, unwittingly or otherwise. Finally, use of the term 'family' is to be taken as 'the traditional family' unless made explicit.

Before I describe the ways in which women and children get a poor deal under the current protection of the family, I will briefly introduce the core of Rawls' theory. In the original position, each actor⁴ is equal, both as agents who are ends in themselves, being ignorant of their potential economic, social situations. Under the veil of ignorance and by way of rational risk-aversion⁵ they deliberate how society should be structured, and come to the conclusion that – prior to the aggregate well-being of society, all should have an 'indefeasible claim to a fully adequate scheme of equal basic liberties'. Then, all offices and positions should be completely open under conditions of fair equality of opportunity. And crucially, social and economic inequalities are to be of the greatest benefit to the least advantaged; the difference principle. Thus fairness is the condition under which Justice is contractually founded and fairness remains a condition *for* justice.

Rawls' framed the family as an important institution, as one of its basic structures, because it is 'the basis of the orderly production and reproduction of society and its culture from one generation to the next' (Collected Papers pp.595). Within a family, we

² Here, shorthand for discrimination in the present generated by more obvious discrimination in the past.

³ S.Okin (1994) pp.39: 'Formal Equality'; laws stipulating freedom from discrimination. It is distinct from, and not sufficient for, 'equality of opportunity'.

⁴ S. Okin (1987) pp.46 points out that each actor is, rather tellingly, a 'He' in Rawls' original formulation.

⁵ Some Utilitarians claim these 'unencumbered selves' would not be so risk averse as to divest the greatest benefit of outcomes to the most disadvantaged. This is a question for rational choice theory only – there are no confident gamblers here. They are devoid of these predispositions in the Original Position.

have a form of reason different from that of the public, manifested as ‘social reason’; ‘required’ as the provider of decent moral education for children, so they can be productive and respectful citizens. The quality, above all else, that separates the family from other institutions such as businesses, and the law is the tie of sentiment. Sentiment is the felicitous, phenomenological character of closeness to other family. Rawls holds it to be good in itself, and it is manifested publicly as affection, favour, help, togetherness etc. This sentiment between family members constitutes the difference between social and public reason. What is not evident is why being the reproducing force of culture is an innate property of the family and not a contingent one. It is surely an historical legacy that the family occupies the privileged space it does – and it does not follow that other forms of the family are incapable of fulfilling this reproductive role. If sentimentality is a good in itself (which it *can* be) it must also be shown to be innate only to the family *and* always present for that privileged role. If not present, then it’s liable to be falsified and manipulated for unjust gain by more powerful members of the family – if sentiment is the agreed basis for the protection of the family from political interference, and prohibits justice within it.

Leaving aside whether the family can be the only method of reproducing a just society’, I’ll question sentiment as an *ever-present* good in itself. I will also investigate if sentiment, while *seeming* beneficial, could be of a corrupted form, breaching the liberty of individuals receiving it. *That* is something crucial for understanding injustices towards women and children in the family.

There is a tremendous amount of empirical research on the distribution of duties (Satz, D. 2011, 1.3) where women are unfairly or cripplingly overburdened with work that has no basis being theirs alone to bear, not to mention the great differences in (damaging) instances of violence between spouses. In addition, relegated as primary caregivers deprives them of many careers, even *attempting* to break through the glass ceiling, or reaching a level of economic self-sufficiency available to men (probably not be available to men in just society). It might seem a foregone conclusion then, to decry the injustices of the family. Yet what is demonstrated are injustices *within* the family only, which can extend outwards from the family to beget systemic social injustice. Leaving aside society wide discrimination against women in other situations, it is important to keep track of how society and the family unit can buttress each other in discriminating

against women. Formal equality is only a token of interest in their plight, and it must be substantive for it to be a real form of equality for men and women.

In S. Okin (1994), she takes issues with Rawls' explanations of the utility of congruence. People may 'hold views such as that there is a fixed natural order...' Now, by extolling the virtues of the family as the (sole viable) producer of society itself, he seems to be sacrificing to injustice those within the family, for the benefit of a lack of disturbance within society. This again tends to favour the balance of the cohesive plurality of conceptions of the good belonging to fathers⁶ as preferable to those of women. It essentially allows them to own and decide the course of their families for the benefit of an in-volatile cultural spread, under the auspices of protection of culture, or a conception of the good. This cannot be reconciled with the difference principle⁷, nor maintain the separateness of persons if a family is held to be an aggregate unit; the locus of utility hinges on *one parents* satisfaction.

The problems feminism has with the family are not merely the existence of asymmetric duties of the matriarch as an historical accident, or legacy. This is a problem which is, relatively speaking, easy to solve – in a fully just society, through procedural matters of compensation, positive discrimination and other projects. It is rather, how these injustices are allowed to pervade families as society develops despite these projects. There is an obstacle not explicitly mentioned. It hinges upon marriage⁸ being the invisible essential component of the family as thought by Rawls and his commentators⁹. The tie of marriage is assumed to automatically conjure a sentiment between husband and wife that super secedes (because of the phenomenological impact of sentiment) political reason. There is no reason to presume that marriage confers this sentiment more than already exists between friends. Friendship is not a private institution within any of Rawls theory, or post-Rawlsian theory. It is a promise, and a legally binding

⁶ Mill, J.S. 1869 *The Subjection of Women*: "...the care for the wife and children being only care for them as parts of the man's own interests and belongings, and their individual happiness being immolated in every shape to his smallest preferences."

⁷ The highest utility count of a system is not a fair desirability.

⁸ Munoz-Dardé (1999) pp.46.

⁹ True, Rawls admits that a family need not be monogamous (Collected papers *60 p596), but he runs afoul by defining marriage away from the injustices that its institutionalisation – an important *family component* – causes.

agreement, but not an intrinsic bond like that between a child and their parent or siblings. Rising divorce rates mean lifelong monogamy, as a feature of our society, is dying. Children are obviously required for the traditional family, otherwise we have partners and no parents, and any asymmetrical division of duties or constriction of one partner's life choices becomes *starkly* unjust without much philosophical investigation. Our reservations about the justness of the family are mostly bound by the relation of these parents *to each other and also* to the children.

Next, we have requirements that children are cared for within the household – which is *prima facie* equivalent with being cared for by the parents. Yet it doesn't guarantee both parents care for them (if it weren't the case, there would be no nannies, or they would be provided by the state in the case of a single parent). This creates an opportunity for a relatively huge net gain for one parent and loss for the other, even with the beneficiary remaining in the family unit. The only time a single parent (of two) is held solely responsible for the children is when they are left alone with them. Thus, one parent can benefit from being negligent, as long as the workload of essential care is dumped onto the other partner. This can be achieved through threat, intimidation, emotional blackmail¹⁰, all of which can be done in private and in such a way as to discourage pleas for help from the authorities. On both counts, the state engenders the failure to protect its own citizens for inequality and unjust family situations by institutionalising marriage, by encasing it in a non-political shroud – *while legitimising and protecting it through a political institution*. These problems then become culpabilities of the state itself. Marriages are not recognised if not done by the dictum of the state. We might balk for thinking the state should be more invasive, even if indeed the family is the best possibility for the most disadvantaged. However, it does make the case that the politically encouraged family *either* allows injustices to be looked over or should not institutionalise marriage and hold parents to be equally responsible; unless a certain asymmetric division of duties is absolutely agreed to. This can be difficult to verify, unfortunately.

¹⁰ Conceivable excuses: “If a single parent can do it, why can't you?” – the work of the ‘breadwinner’ as more important, even though there is now no possible decision of *who*, if anyone, is to be the only breadwinner. The attitude may seem anachronistic, but is not dead by any means.

So, without wanting injustices to be ignored, marriage as it stands should not have an institutionalised blessing. Instead, as unromantic as it sounds, a pre-nuptial contract should be signed requiring a balanced division of labour or otherwise – but since it has been signed then we have *free, responsible agents*¹¹ entering in to it. That still, however, may carry the weight of patriarchal expectations’ and the ‘equal division of labour’ may in fact be an equal number of differently weighted tasks. This contract however, can be enforced like any other in society. At the same time, this explicitly paints a fundamental part of the family as political. As I have argued above, I think that it already is.

Many¹² will criticise Rawls because the original position is too hypothetical; the actors unrealistic and without value in conceiving any normative structures of society. Generally, it is the glossing over of the impact of society, history, and in the following case, biology which hypothetical actors devoid of philosophical utility. For some, evolutionary psychology is the kingmaker in the establishment of social rules. The political feminist, the critics say¹³ cannot evade the Darwinian control over their lives – they are bound to act emotionally, and women are better suited as housewives, subordinate to the wishes of the more lucid male¹⁴ partner¹⁵. With this framework in place, they act as if it’s hopeless to attempt to change the structure of society without reference to these ‘facts’. Their conclusions are not vindicated by their premises.

First, laws are not (always – unfortunately) set upon the rails of Darwinian determinisms. While theorists like Wright may not want this, they make tacit assumptions that society *should* be respectful of these determinist lines, while giving no reason for the utility of such a position. Wright claims that feminism is lagging behind developments in evolutionary psychology – that they politicise biology. If women *were* the primary care givers, what reason do we have to include this as a requirement in conceptions of society? Wright might protest that, in the past women

¹¹ Of course, a child has sentiment ‘forced’ upon them, and it develops with them.

¹² Chiefly, Communitarians.

¹³ Wright, R. ‘The Evolutionary Psychology of the Female mind: Feminists, Meet Mr. Darwin’, *New Republic*, 28 Nov. 1994: 34-46.

¹⁴ Green, K. (1993) “Reason and feeling: Resisting the Dichotomy”, *Australasian Journal of Philosophy*, Vol.71, No.4 pp.386.

¹⁵ Brison (2002) pp.46 details how philosophers are also guilty of this dichotomy, and how it forms their sense of self.

exhibited these behaviours because it allowed us to survive, develop – but that was only in the environment where these behaviours were *necessary* to procreate. We now have states, with safety nets, laws and regulations. There is no catastrophe forcing economically desperate decisions; it is plainly unfair to be blamed for a genetic heritage¹⁶.

There is only one reason for these ideas to inform the construction of society; efficiency. But efficiency can only be defined in relation to a teleological end. If we do impose them on women we subjugated them; and patriarchy decides these ends – concurrently removing the dignity and equality of women; not as ends in themselves. Arguments for a specific gender role in the family are unfair, unjust and *at the very least* temporarily ungrounded. Survival is not, or should not be, a day to day struggle – this is why we have the state. The efficiency argument is not even utilitarian, it is simply mistaken.

This is just one, albeit very strong objection. The assumptions that it plays with however, spill out into many other theories that would stymie the hopes of a change of the status quo – even a logical and fair critique of that status quo would not set one foot on the path of change, because it is a foregone conclusion that humans are resistant to change. This is a curious proposition. We have the power to change our environment, so why do we not have the capability to adapt to such a thing? Why deny what humans have done for aeons? Or is it that feminism as a political charge is powerless, because it cannot topple a form of patriarchy in less than a single generation? These questions are best left for those resistant to the idea of a procedural change; it may be, given the unstable nature of human societies in so many of its machinations, much harder to *assert* the family's entrenchment in humanity's narrative, rather than deny those who might think it fairer to have that form unstuck. Granted, there *may* be a case that a society as Rawl's (eventually) imagined it – a liberal egalitarian kind – might have incur resistance to a reorganisation of the family *if it is such that* the family as it stands

¹⁶ Wright mixes cause for effect when stating: "A woman may reinforce the double standard (men cheat, but expect women to remain faithful when she... forgive(s) a husband's sexual infidelity in order to head off...a mate's desertion, his withdrawal of resources." Perhaps it is a result of the unfair distribution of sources, duties, and availability of social offices for men that she is in the position of such *dependence*. If society had been structured otherwise (i.e. fairly) the prospect of poverty in such a situation would not be a rational concern.

is vital to that political ideal. However, neither Rawls nor any of the authors mentioned here think that would be the case, rather it is the exact opposite.

With a defence of the structure of the family out of the way, we can move on to the problems of affection. We cannot suppose that sentiment always exists – if it did, children would never be in danger from their own parents. Where it does exist, we do not know if it actually benefits children – young girls may receive the sentiment of love and affection, to *encourage* fulfilment of the expectation to follow in the mother’s footsteps in social roles and household duties. Sentiment itself can be a cause of injustice. So, if it is the tie that binds a family, it *can* do so unjustly and thus can only be a good in and of itself when it is from a social point of view *supererogatory*. What Rawls may have had in mind was that being part of a family allows one to self-actualise, yet again that might only be true in a society already composed of individual families.

It is perhaps helpful to redefine parents as ‘guardians with affection’ – though that makes them seem no different from adopted parents (and this too helps the case that affection may not be as brute as it seems or as impervious to state interference) because it should not be thought that these parents *own* their children. While they may be responsible for them, they should be responsible for raising children capable of becoming citizens with a respect for plurality. If they are to be raised for example ‘how *I* see fit, because they’re *mine*’ well you deny their personhood because they are not fully responsible and allow them to feedback their anti-justice leanings into society all because they were receptive of some sentimentality *even if* this sentimentality bore a rotten moral core. Thus sentimentality must itself be just, not just appreciable.

But does this mean we should abandon the family? No, not *necessarily* – this is what matters. Sentiment where felicitous and just is a patent gain for those who benefit from it, rather than children who receive just education¹⁷ *only*. But, it may again lead to the very troubling prospect of parental *tests* devised by the state (this scenario while potentially embarrassing, would be less traumatic for parents with real sentiment toward, and moral care for, their children than having them tossed into a state orphanage) in which the state determines what is adequately *moral* or *pluralistically inclined*. This test would also have to assess whether the child is becoming appropriately

¹⁷ Encouraging them to act reasonably, cooperatively; becoming self-actualized.

individuated (Munoz-Dardé 1998). This, apart from sounding unnatural¹⁸, would drastically reduce the chance of further improvements in the structure of society by negating the possibility of, and challenge from, different arrangements even of the family. But if we know some of these arrangements themselves can lead to injustice for the most disadvantaged a priori, then we have not lost anything by barring them from the acceptable pluralities in the first place.

In agreement with Munoz-Dardé (1999) I contend that institutionalisation of marriage is complicit with injustices in society as it exists now – *where* women get a raw deal, the traditional family is unjust¹⁹. Yet this is contingent upon patriarchy, so traditional families are not necessarily unjust, especially where real sentiment obtains. When the family maintains a position in society, politically defined as sentimental *in itself*, that advantage makes it difficult to break the ties that allow for injustices. Attitudes must be changed to end the romanticism²⁰ of marriage and family, but this need not preempt the natural proliferation of real sentiment.

If the family is to remain, we might need what *appear* to be blatantly unfair compensations, merited by substantive justice, needed for women and children (or perhaps doled out *effectively* to them) until the *formal ideal* in law aligns with reality. However, it would be more appropriate, and would undercut the need for compensation, if the duties of the family were doled out in an equal manner. Otherwise, to remove the family and create something like a state run orphanage would be *unfair* to those who would otherwise benefit from sentimental ties especially *where it does not confer other societal privileges*²¹. Because one or some do not benefit this, is cause for compensation for them (a very complicated question in itself) instead of removing that good from society as a whole. And since injustices do not fall solely upon the structure of the family²², and the possible goods of sentiments *within a family*, it need not be holistically unjust. We are left with a difficult problem – should state intervention (or intrusion) be encouraged to prevent the *need* for compensation when

¹⁸ That may actually be a good reason for it.

¹⁹ This promotes in culture and law these very injustices again.

²⁰ In the archaic sense.

²¹ Nepotism, or more disguised forms of reciprocity.

²² Especially within same-sex marriages.

just sentiment disappears, if we are to keep the family? I do not think that can be easily answered. I must reiterate however; since marriage does not confer these sentiments automatically²³ so it should not be protected for the very gender injustices it *helps* to generate.

BIBLIOGRAPHY

- Brison, S. J. (2002). *Aftermath: Violence and the remaking of a self*. Princeton, N.J: Princeton University Press.
- Fausto-Sterling, A. et al. (1997) "Review: Evolutionary Psychology and Darwinian Feminism." *Feminist Studies*, 23, 4-2-417.
- Mackinnon C. (2011) "Substantive Equality: A Perspective." *Minn. L. Rev.* 96, no. 2 pp. 1-27.
- Satz, D. (2011) "Feminist Perspectives on Reproduction and the Family", *The Stanford Encyclopedia of Philosophy*, Zalta E.N. (ed.), <http://plato.stanford.edu/archives/sum2011/entries/feminism-family>
- Munoz-Dardé, V. (1999) "Is the Family to Be Abolished Then?" *Proceedings of the Aristotelian Society* 99 (1) pp. 37-56.
- Munoz-Dardé, V. (1998) "Rawls, Justice in the Family and Justice of the Family", *Philosophical Quarterly* 48 (192) pp. 335-352.
- Okin, S.M. (1982) "Women and the Making of the Sentimental Family", *Philosophy & Public Affairs*, Vol.11, No.1 pp. 65-88
- Okin, S.M. (1987) "Justice and Gender", *Philosophy & Public Affairs*, Vol. 16, No. 1 pp. 42-72
- Okin, S.M. (1994) "Political Liberalism, Justice and Gender". *Ethics*, 105: pp. 23-43.
- Rawls, J. (1999) *A Theory of Justice*. Mass., Harvard University Press
- Rawls, J. (1999) *John Rawls: Collected Papers*. Samuel Freeman (ed.) Mass., Harvard University Press

²³ Or to the degree having (or even adopting) a child has.

Wenar, L. (2008) "John Rawls", *The Stanford Encyclopaedia of Philosophy*, Zalta E.N. (ed.), <http://plato.stanford.edu/archives/fall2008/entries/Rawls>