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Agonistic Justice:
Difference and Persuasion in Political
Theory

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Abstract

This paper is intended to engage the question of persuasion in a new way. Rather than isolating persuasion and examining its normative aspects independently, this paper situates persuasion alongside an understanding of difference. By understanding difference and persuasion together, the way we think of persuasion can be importantly transformed. If the conclusions of this paper are taken seriously, we will see that persuasion needs to be managed, rather than eliminated, yet not because of any external moral standard. Rather, the management of persuasion now follows from the necessity of persuasion as a supplement to impartial rationality. Normative questions about persuasion can now be understood as inextricably linked to the question of whether a theory understands and recognizes its own limitations; recognizes the difference within itself that precludes any chance of grounding questions in absolute answers. By recognizing that persuasion is a necessary structural feature of any rational theory, more meaningful conclusions about persuasion itself can be drawn.

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Introduction

Every attempt at a complete philosophical theory ought to confront the absolute limitations imposed by a confrontation with difference. What is difference? It is not to be confused with that which is unintelligible or simply trivially as that which is different in relation to something else. Difference, for the purpose of this paper, must be read as that which is irreducible. For something to be irreducible means for it to be beyond *absolute* reduction, explanation or definition from any dominant theoretical, objective *or* subjective viewpoint. As opposed to the notion of *the* right answer, *the* correct conclusion, etc. to be irreducible means to preclude an end to inquiry - to preclude any authoritative sense of finality. My ethical position throughout this paper will be that difference ought to be preserved *qua* difference; that it ought to be understood and affirmed as the hidden element that is nonetheless always present; the background specter that haunts and inconveniences the most seemingly perfect account of the object of analysis. Thus, I must repeat, it is not simply that difference resists assimilation into the self-identical, but that it ought to be preserved as such in any theoretical account. If any theory proposes to put forth a rational theory of justice, it needs to recognize 1.) that its seemingly self-sufficient rational element is not wholly rational or self-sufficient, and 2.) that its conclusions are not final by any rational necessity. Otherwise, it is a dishonest and manipulative theory whose persuasion is masquerading as pure rationality or an objective science.

The conception of “persuasion” being examined throughout this paper will be of a certain kind. Persuasion can be said to exist in at least two ways. There are, firstly, banal varieties of persuasion that are presupposed by any communicative speech act. If we plan to watch a movie together and I mention that the new film by Christopher Nolan has received good reviews, it can be said that I am persuading you at some level to take an interest in viewing that particular film. But this use of persuasion shall not interest us here because the potential implications aren’t typically of much importance. Morally relevant persuasion is our target. *This* kind of persuasion privileges its own ends such that it uses the subversion of another’s autonomy as the particular means to achieve them. This kind of persuasion operates through the inversion of self-interest. That is, it operates through the projection of a dominant power upon one’s agency, so that one accepts the dominant party’s interests as one’s own. Such persuasion allows the dominant party to thereby impose conditions that might be overtly harmful to those who accept them.

The preservation of difference in our theories can illuminate how we should approach the issue of persuasion as a means for establishing and maintaining social power relations. For

supposing that difference always will be a factor, that is to say always will be present as a hidden element, this should now pose serious ramifications for how we think about persuasion as a methodological approach. If difference means that limitations will always necessarily be imposed on a theory, persuasion now becomes a necessary component rather than a contingency that can be adequately theorized away. Persuasion cannot be eliminated in the name of a rational presentation of the truth. Persuasion is not merely a problem to be resolved or the symptom of a defective theory. Persuasion is here to stay. Difference now elevates persuasion to a necessity by virtue of opening a structural space that reason cannot fill. We cannot stop there though. We also need to recognize the other, perhaps subtler implication. That is, if difference opens a structural space that reason *cannot* fill, any theory that denies this structural opening-up by difference *is already using persuasion*. However, *this* use of persuasion is importantly different – the persuasion has now been masked and hidden, presented as necessary conclusions of a purely reason-based, impartial and rational approach. When a theory denies its use of persuasion, it becomes morally problematic and (when applied to a societal structure) unjust insofar as it becomes deceptive. Perhaps most disturbingly, such persuasion threatens to efface any possible counter-persuasion or resistance due to its lack of visibility as a technique. Persuasion that is not managed in the open dominates in the background where it is therefore most dangerous – this is the essence of our claim. Hence, a theory that recognizes difference will simultaneously be a theory that makes its use of persuasion overt and openly contestable; which thereby manages, rather than suppresses, its persuasive element.

The most influential and ambitious complete political philosophical theory of the twentieth century remains that of John Rawls with his seminal work *A Theory of Justice* (1971). A key aspect of its importance is its attempt to overcome the problem of persuasion for the sake of realizing an ideal of justice. As such, the proceeding argument will comprise a critical response to the methodology employed by Rawls in his famous notion of the original position and its primary tool, the veil of ignorance. I maintain that Rawls provides a means of harmony amidst the different elements of society while unwittingly doing harm to the foundation upon which these elements can establish themselves as a meaningful community in the most unqualified sense. This approach by Rawls will be shown to be inadequate for the purpose of creating a just society. By drawing initially from a Derridean framework and then later locating the spirit of that framework in a critique of Rawls by G.A. Cohen, this paper will argue that the Rawlsian methodology suppresses and appropriates difference and, in so doing, utilizes persuasion that is unjust insofar as the extensive use of persuasion in Rawls is unacknowledged by the theory itself. The importance of such a claim will be better understood when I argue that difference is the differential element contained in a notion of justice predicated on fairness. This notion of justice rooted in fairness is what Rawls calls justice-as-fairness. If my argument is on the mark, it will follow that Rawls' theory of justice is necessarily unjust. I will conclude by presenting a notion found in Cohen that I call *agonistic justice*, as the genealogical element of difference. I argue that this notion of justice preserves difference more effectively in contrast to Rawls by managing persuasion rather than hopelessly attempting to eradicate it.

Difference in Derrida

One cannot appreciate difference unless one traces it to the root of any theory, and this means situating difference in language itself. In this regard, Jacques Derrida's work is of incomparable importance and constitutes a necessary starting point for our analysis.

Derrida has termed western philosophy since Plato 'the epoch of the logos' for the violent separation it makes between the signifier and signified, or in other words between the thing's supposed reality as a "thing-in-itself" and its reality as a linguistic sign (Derrida, 1976, pp. 12-13).

For Derrida, one cannot really speak with any certainty of a transcendental presence as have so many past philosophers Derrida is here critiquing. That is because presence, like anything, acquires intelligibility through difference. However, difference itself can only appear in a system of reference; “sister” in reference to “brother” and so forth. As this structure relates to presence, if one can only speak intelligibly of being in reference to becoming, this casts significant doubt upon the totality of metaphysics (Derrida, pp. 46-47). Derrida, though, has argued that everything in language has this structure; the structure of what he sometimes calls the trace. The trace is the generalized structure that no entity in language can possibly stand outside of. Whatever object we talk about must constantly be referenced to something else that acts as a supplement to our conscious understanding of that object. “Being” only makes sense, for instance, in reference to “becoming.” What is essential to understand, however, is that the trace is not a trace of a presence. Rather, it has *never been fully present* and is therefore self-occluding (Derrida, p. 47). What has consistently been thought by so many philosophers to be the absolutely real thing-in-itself, or that which transcends language, history, and everything finite, reveals itself to be infinite supplementarity that *produces the very thing it defers*. In other words, we can give sense to a term or theory (its initial meaning is produced), but we cannot hope to produce the final interpretation or meaning that can be had from it (its final meaning is forever deferred). Derrida has borrowed here from Saussure’s idea that words acquire intelligibility through differential references, but the vital contribution Derrida has made is that the final meaning is always necessarily postponed (Derrida, p. 157).

One may start to see now where we will be able to trace a differential element in a concept of justice. This should further become clear in virtue of Derrida's articulation of the sign. Derrida has explained to us how we cannot have pure being-in-itself because being (or presence) is always mediated by the sign (Derrida, p. 37). Thus, the sign brings being or presence to us only by keeping it at a certain distance. What this all means is that in everything we know, no matter how immediate it seems to us, there is a conceptual space for what I have referred to all throughout this paper as difference. That is, every sign always (structurally) contains difference, and it is through this difference which keeps being or presence in itself at bay that being or presence (in itself) can at all be spoken of. If the self-identical is always necessarily postponed, it therefore cannot exist independently of difference. There is always difference rooted in the very concepts themselves that reveals a certain *aporia*, a certain limit in reason, in virtue of the necessity of infinite supplementarity in language. Any one element requires its other, and that other requires *its* other *ad infinitum*; the full presence in each is forever postponed. It therefore follows that no one element can justifiably be declared the essential and reducible one – difference must be recognized as such.

Most importantly, it is essential to understand the implication of Derrida's philosophy of language on the notion of persuasion. Derrida’s most important contribution to this end is his articulation of difference. The use of an “a” in the word “difference” is not a misspelling, but rather serves a purpose as a key term in Derrida’s thought. “Differance” is still pronounced as the English word “difference,” and thus the “a” is unpronounceable. Derrida does this on purpose to implicate the western philosophical tradition for privileging speech over writing. The genius of Derrida is that the privileging of speech over writing extends to the privileging of interiority over exteriority. This privileging has manifested in the recurring privileging of one term in a binary construction in western theories: presence over absence, being over becoming, and most importantly for our purposes, *the rational over the irrational*. If we take seriously Derrida's notion of meaningful terms in language (ex. rational, irrational, etc.) supplementing each other rather than standing on their own, it is impossible for any theory of justice to completely vitiate any elements that might compromise its fairness. Any seemingly opposing elements in a theory must still necessarily supplement each other. This means that even as a theory announces at the outset that it

will adhere only to that which is in and of itself purely rational, rationally necessary, universal and true *a priori*, this very announcement lacks a purely rational, or *a priori* necessary basis. It must, rather, persuade us to accept it as a starting point. That is, even the purely rational contains a persuasive element that is not itself purely rational or rationally necessary. Because there is no merely *a priori* rationality that can exist without its supplemental relation to persuasion, so too there is no such possible thing as recognition of difference that does not simultaneously recognize persuasion. To recognize difference means to recognize that no singular element, and that means not even rationality, can stand on its own. To recognize difference means to recognize that rationality is using persuasion to legitimate itself as a basis of inquiry, and that therefore a rational theory cannot justifiably denounce persuasion.

The Differential Element in Justice as Fairness

Once difference has been identified and recognized, its connection to a notion of justice as defined primarily by an insistence on *fairness* can begin to take a determinate shape. One might say it is not a connection that is without tremendous significance, as one would think fairness must likewise personify inclusion. However, this notion of a merely significant (external) connection is misleading and fails to capture the full picture I wish to illustrate. Difference itself is the response of irreducibility to the notion of absolute inclusion. Justice cannot *exclude*, or else it is not justice (that is, it would not be fair), yet difference is that which resists absolute inclusion. Because this means justice must be understood as containing a differential element within itself (that must resist totalization on any grounds if it is to remain justice), this paradoxically means that justice can be inclusive only by refusing total inclusion. From this it follows that difference also must now be understood as already containing *within itself* a question of justice; one is invoking justice in identifying and recognizing difference rather than drawing a connection to justice from the outside (and vice versa). But if difference has been tenuously defined here as that which necessarily resists total inclusion into a whole, and justice is consequently likewise implicated, we are faced with a tremendous task indeed. It is here we are faced with the issue of how to deal with difference in such a way that it remains consistent with its own internal question of justice – a justice that will postpone the very presence of *justice* it produces by virtue of its own differential element within itself - by virtue of its internal relation to irreducible difference. In other words, with the notion of justice-as-fairness we are confronted with an example of the difference we saw necessary in language. Justice seeks to express its fairness by being inclusive, but we have understood difference as irreducible (see page one). More specifically, through our examination of language in Derrida we have seen that there is no such thing as a singular term or element that can stand on its own; the irreducibility of difference is therefore *necessary* as a result of language. Hence, a theory of justice, if it is to remain fair, must not construct a totality that arbitrarily privileges any one element (such as Kantian rationality, for instance). For privileging one element will be both to deny and marginalize whatever falls outside the privileged element and to persuade us to accept this result as rationally necessary. Do not fret if this is still not entirely clear. For in the case of justice-as-fairness, we will explore the specific consequences of this move as we explore the theory of Rawls in-depth. Just as Derrida has placed difference within language, I will extend the Derridean idea to justice-as-fairness).

I will now be applying difference to the concept of justice under review here in the forthcoming analysis of Rawlsian justice. At such a juncture, we may very well feel uneasy, perhaps even embarrassed, by such an idea. Is not John Rawls, after all, a constructivist? He has not put forward systematizing transcendental arguments in the vein of a Hegel, so how can any of this apply to *A Theory of Justice*? Let us explore that now.

Difference in Rawls

In what may present itself as a surprise to the reader, many of Rawls' most avowed philosophical principles prior to his construction of the original position itself are in perfect accord with what has been said hitherto about difference. In particular, his explicit understanding that practical reason is historically conditioned, including the principles we hold about justice, creates the discursive space necessary for Rawls to claim, without fear of contradiction, that principles of justice may be revised in virtue of new empirical facts (Rawls, 1971/1999, p. 578). Insofar as Rawls aims merely for a "reflective equilibrium" between our most internalized moral principles and a theory that will purportedly stand to generate them (Rawls, p. 48), difference has not been suppressed at this juncture. Rawls has not here burdened us with a radically totalizing theory of what we ought to think and do, but rather has sought to schematize and clarify the thoughts and practices of a particular ethico-political context (in this case, the liberal democratic tradition of industrialized western societies) (Rawls, p. 49). Rawls offers a moral theory that limits its range to a purely political conception of the good; comprehensive views of what constitutes the good life for a person are unencumbered insofar as they do not infringe on the basic structure of a just society (Rawls, pp. 89-129). Rawls has not yet attempted to reduce his theoretical framework to the only plausible one. On the contrary, his framework here makes possible (in principle) an infinite number of moral viewpoints to be contested. Insofar as Rawls does not shy away from this lack of closure for such moral views but rather invites it, this means that persuasion is out in the open as a visible element. This visibility thereby at least makes it manageable in principle.

In limiting his theory to the liberal democratic tradition, the first principle of justice Rawls proposes is a modest one that captures the democratic freedoms liberal democracies in the west (at least to an extent) still enjoy; a right to the basic liberties of citizens (individual rights of free speech, conscience, and various other fundamental political liberties). The second principle of justice, the famous "difference principle" where Rawls stresses that social and economic inequalities must be to the greatest benefit of the least advantaged members of society, we will discuss later. For now, the living expressions of difference are allowed relatively free reign within the walls of these designated parameters. Rawls has not cast himself as a voice speaking from a Platonic heaven, but rather in a more deflationary role in trying to ensure cohesion among principles and justifications among living ideas, practices, and institutions. We can easily make sense of Rawls' view that a theory's superiority can be demonstrated best by its capacity to align with our normative judgements in reflective equilibrium. For Rawls, superiority may simply mean that the theory is "more reasonable" for us to hold (Rawls, p. 577).

With all of this in mind, Rawls invites us to imagine a non-historical, hypothetical original position as a means of generating principles of a just society (Ibid, p. 260ff.). Rawls contends that the principles generated will be just because of the impartiality maintained by the method itself: principles that it would be rational for us to subscribe to were we in such a position. Rawls also famously adds a qualification of rather great genius with his notion of the veil of ignorance. The veil of ignorance removes individuating characteristics from all parties concerned in the original position. As Rawls clearly states, each participant would be ignorant regarding "his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like" (Rawls, p. 137). Participants are stripped of everything but their rational self-interest *qua* human beings who will live together in the society that the original position establishes. Consequently, the removal of

partisan interests establishes each participant's rational self-interest as the basis for the negotiation of principles to live by in society. Each participant, so Rawls contends, would be able to rationally determine that they ought to judge proposed principles of justice on the basis of their *maximum minimorum*, or what he otherwise calls the maximin rule: that each participant study the worst possible outcome and determine its acceptability or unacceptability thereby (Rawls p. 152).

It is the veil of ignorance, I believe, that succeeds all past contractualist ideas in its capacity to meet the structural requirements contained in the very notion of a contract. By “contract” I mean to extend this also to forms that do not *necessarily* have legal codification, such as covenants, agreements, and promises. In all such cases, the structural requirements will hold. Above all else, the concept of a contract demands that the terms of the agreement issue forth from both parties on an equal level. At a merely conceptual level, this means that a contract presupposes a notion of fairness. For if any terms are issued forth as one-sided commands, the contract devolves into mere imposition. A contract likewise implies that neither participant is the final authority; their independent power is negated by the authority of the contract to which each must freely give their recognition. The agency of each participant cannot be violated lest the contract merely ape mutual recognition between the parties rather than genuinely reflect it. Most contracts can never fulfill this promise; most can never meet the structural requirements in their literal expression and realize absolute fairness. Certain of the participants will always possess certain bargaining advantages, certain talents and skills of persuasion that deny the contract its full presence as such. It seems that the veil of ignorance removes this problem. It fully realizes and liberates the concept of the contract; it lets it out of its proverbial cage to realize conditions of absolute fairness. This fairness allows for certain proposed principles and policies to be exposed as unjust by being placed under examination on nothing but their own coherence and merit, no longer constrained by bargaining advantages and less than scrupulous negotiating tactics. In Rawls, the contract seems to have become a contract proper.

Upon first glance, the original position seems to replace subjectivity with the notion of difference we have been discussing. With the removal of individuating characteristics and partisan interests, we seem to arrive at a completely different understanding of what it is to speak for oneself. In speaking for myself in the consideration of a proposed principle of justice, it could be said that I am speaking for everyone in virtue of the fact that there *is* no absolute “me” under the veil of ignorance; no substantial “I” to speak of at this point. Under the veil of ignorance, if I cannot possibly know whether I would be the beneficiary of a particular principle due to any individuating features I will possess, it follows that all particular statements perish of their usefulness and meaning. In their place, the only plausible principles to consider would be those which are rationally universalizable. Consequently, the veil of ignorance perfects the Kantian deontological ethic by structuring the original position such that in representing no one in particular, it is free to represent everyone generally. Along this train of thought, in speaking for myself, I am simultaneously speaking for the other. In considering my own interests, I am simultaneously considering the interests of the other. We may feel compelled to go yet further in exploring these implications and conclude that insofar as each participant, in standing for himself simultaneously stands *for* the other, each such participant thus stands *as* the other in the original position. The original position so understood would now start to resemble a method by which subjectivity as such is transcended and difference is fully expressed.

Persuasion in the Suppression Of Difference

Such an understanding, however seductive, would be a grave mistake. The suppression of difference *does* in fact arise as we take a closer examination at the construction of the original

position. Particular proposed principles are to be judged in reference to the universalizing mechanism that the veil of ignorance acts as. But what about the two principles of justice? They were not created *ex nihilo*. They are certainly not empirical either. David Miller presents an empirical study of U.S. Citizens where a disproportionately large percentage of survey respondents didn't support the idea of a difference principle as was carefully explained (p. 578). Hence, Rawls has *chosen* a certain conception over others – persuasion has made its appearance, albeit quietly. Rawls' conception of the person, here the rationally self-interested legislator, would exclude comprehensive views of the Nietzschean, Humean, Hobbesian, and other varieties of individuals (Wenar, 1995, p. 50). We need not go into the complex ideas of all these thinkers. Rather, the point of invoking these philosophers is that not everyone conceives of an individual as rationally self-interested. Rawls chooses to privilege Kant's conception of the individual over others. This is not to deny that Rawls gives us a response. He is against appealing to comprehensive doctrines known “and being tailored to gain their allegiance” (Rawls, 1993, p. 250), but what has been accomplished is the insertion of a comprehensive doctrine into the methodology itself whereby there is no escape from it. It is a complete (abstract) totality, though a subtle one, that is presupposed in the original position. The participants who do not conform to this totality of the rational individual are not represented properly outside the original position. Rather, the Nietzschean, Humean, Hobbesian etc. has been persuaded to wear a Kantian mask at the outset as if it were an unobjectionable necessity. Such persuasion, in other words, has been concealed, as difference has been suppressed and now reconciled within Rawls' structurally imposed totality.

Similarly, while it may *appear* that subjectivity has been transcended under the veil of ignorance, it has actually been expressed along principles of its founding orthodoxy. The individual in Rawls contains presuppositions of the sort that comprise the preferred historical construction of the individual in much of the western philosophical tradition. As Genevieve Lloyd has shown through careful historical analysis, philosophy has traditionally been subsumed under a masculinist position. Femininity has been taken to represent the personal and particular while masculinity embodies that which is universal and impartial. Reason itself has been given a male character: disembodied and abstract, utterly cold, machine-like and set against the perceived warmth of feeling of femininity (Lloyd, 1993, p. 105). We should not then fully embrace the veil of ignorance wherein particularity has been effaced and universality is all that remains. Although it does indeed make a real contract possible, it also does so by suppressing difference; the original position has thereby performed explicitly that which much of philosophy has often performed in a concealed manner in its gender-neutral guise. Rawls' theory tries to persuade us to accept an historical contingency at the outset by abstracting from its historicity altogether *as if there was no such historicity from which to abstract*. This enables a certain historical construction of rationality, and hence of masculinity, to once more dominate without possible resistance – for how can one use counter-persuasion if the initial act of persuasion has been rendered invisible? Perhaps we should also then not react with great surprise when Rawls opts to refer to participants by the masculine possessive adjective form – I have intentionally done likewise up until now to underscore this point. While a “man” as such may not be participating in the original position, a certain form of masculinity certainly *is*.

The most significant implication of the veil of ignorance remains the removal of the corporeal body. Lloyd has already specified the masculinist construction of rationality as including a disembodied element, but certainly a plethora of other feminists have been careful to point out the same. Again, what Rawls has done is taken a key element of the philosophical tradition's orthodoxy, Cartesian disembodied reason, and presented it explicitly in the original position. The Rawlsian methodology is so intent on securing impartiality for the sake of fairness that it effaces all discursive forms but the most historically privileged and dominant one. It is quite strange to

imagine participants negotiating a justly ordered society for all groups and genders concerned while limiting them to a discursive form that represents only one of them. This means that persuasion is still operative, but it can no longer be resisted by any other position that would likewise use persuasion to argue its case. Everything but this dominant historical conception of rationality has been sacrificed to a methodology of fairness. In seeking to abstract from persuasion, this dominant historical conception denies its own use of persuasion. To put it frankly, Rawls gets to use persuasion while appearing like he doesn't.

Undoubtedly, it will be objected that these so-called sacrifices are to ensure fairness. Rawls emphasizes that participants under the veil of ignorance cannot bargain in the same traditional sense (Rawls, pp. 139-41). Persuasion threatens the pure ideal of justice because in the real world it is never based solely on what is most logically and rationally defensible; Rawls has tried to make realizable the kind of pure exercise of reason that Socrates always exhibited in Platonic dialogues. Perhaps it will also be recalled that I recognized earlier that the veil of ignorance allows the contract to realize absolute fairness. While I did in fact say that this *seemed* to be so, now an even closer look shows otherwise. What is interesting is that while Rawls pushes the orthodoxy to the foreground (disembodied reason has been presented explicitly as disembodied rational participants, etc.), he now consequently places the unfair elements that prevented the full presence of fairness in the contract into the *background*; he does *not* eliminate them. Indeed he *cannot*, for the entire arrangement of principles is decided on only one side's terms; that of the dominant orthodoxy. The seemingly perfect construction of the contract, one that realizes absolute fairness, turns out to be that which hides its unfairness by concealing its own acts of persuasion.

Cohen's argument against Rawls's application of the difference principle stands as the greatest critique (found within Cohen's text) of Rawls' treatment of difference. Earlier I provided a basic definition of the difference principle in Rawls, but as promised there let us examine it more in-depth now. Rawls notes that because of factors beyond one's control, whether these factors are superior genetics or some other morally arbitrary circumstance of luck, certain people are capable of producing more than others. Rawls adds that this is acceptable if, and only if, the less fortunate are thereby caused to be better off (Rawls, pp. 15/13, 102/87, 151/130-1, 179/156). Cohen, however, notes an important ambiguity in the difference principle's formulation. Cohen first describes the difference principle as all and only those social and economic inequalities that are good for the worst off. In addition, Cohen provides a more generous interpretation where those inequalities are permitted insofar as they do not help but also do not hurt the worst off (Cohen, 2008, p. 29). In the following argument, Cohen attempts to refute the application of this generous interpretation of the difference principle (not the principle itself) in defense of special money incentives to talented people. Cohen's intention is to deny that it is fair for talented rich people to claim that they ought not to be taxed more on the grounds that if they *were* taxed more, they would produce less, and the poor would therefore be less materially well off.

Persuasion in Agonistic Justice

Cohen's exact strategy is what does so much to expose the suppression of difference. He displaces the usual justification for the argument from its impersonal form and relocates it in an agonistic framework: focusing on an utterance of the claim by a talented rich to a badly off person. As it will be shown, it is through this strategy that Cohen affirms a notion of what I call *agonistic justice* as the genealogical element of difference. Genealogical means genetic – it is difference which produces the justness or lack thereof through its expression in direct agonistic dialogue. The Cohenian strategy examines full justification from the perspective of all parties concerned rather than a privileged party. As Cohen articulates, “We should do *A* because they will do *B*” justifies

only *A* rather than also justifying *B*” (Cohen, p. 41). It privileges *B* and therefore contains within itself a privileging of the party that stands to benefit from *B*. Cohen thus introduces us to what he formally calls *the interpersonal test*. This test, as Cohen says, “tests how robust a policy argument is by subjecting it to variation with respect to who is speaking and/or who is listening when the argument is presented” (Cohen, p. 42). Although he uses no such words to describe his argument, Cohen has inserted recognition of difference into the equation, so that one party is not *in principle* effaced, suppressed, or silenced by another more dominant one. Now it is context which matters, in which persuasion is exercised mutually, rather than a structural totality in which we have been persuaded only to accept certain elements as necessary and thus not open to persuasive resistance. For Cohen's purposes, such a device as the interpersonal test allows him to illustrate the structure of a proposal within a context where both parties are free to utilize persuasion. Persuasion has been managed by virtue of making its presence more explicit. In this way at least, persuasion has now been allowed to function on both sides, allowing for the greater possibility of genuine mutability.

Cohen's is a dialogical method that presupposes recognition by the speaker for the listener, and vice versa. I call Cohen's interpersonal test *agonistic justice* because it rejects abstracting from persuasion altogether for the sake of a methodological approach that privileges a choice set of terms and conditions..In the interpersonal test, one speaks directly *to* difference insofar as different contexts presuppose ever-changing persuasive methods and strategies to be invoked; persuasion follows directly from the method itself. Cohen's choice of a dramatic example of an argument that fails the interpersonal test is an important one for underscoring the point that what passed for a justified practice perhaps only did so because one side, the dominant side (whether we are understanding “side” here as personal or theoretical), had been allowed a voice. It is in this way that Cohen's interpersonal test serves to highlight the need for justification *between* relevant parties. Cohen's use of the kidnapper argument is most telling of what the device helps uncover. He invites us to imagine a kidnapper presenting an argument for why the parents of a kidnapped child ought to pay the kidnapper the desired ransom money (Cohen, p. 39). The kidnapper's argument, presented in its impersonal way, goes as such:

Children should be with their parents.
Unless they pay him, this kidnapper will not return this child to its parents.
So this child's parents should pay this kidnapper (Cohen, p. 39).

Because the argument is presented as if no one in particular is arguing for it, it calls attention only to the practical aspects of the situation. It leaves untouched, lost somewhere in the background, the fact that only one party's terms are being acknowledged; that only one party is being recognized and given a voice (the kidnapper) and the other side is forced to work within the parameters, within the totality, that the kidnapper has imposed. Pay careful attention to the personal way in which the argument is restructured by Cohen:

Children should be with their parents.
Unless you pay me, I shall not return your child.
So you should pay me. (Cohen, p. 39)

When written in this way, where it is made clear that the vile kidnapper is arguing it, it shows the unjustifiable nature of the behaviour ascribed to the relevant agent (here that is the kidnapper). Presented in this personalized way, we are able to determine a lack of community between the two sides (Cohen, p. 47), but also whether the persuasive element is being presented explicitly or

hidden between the speaker and listener, and vice versa. Where the persuasive element has been made explicit, every contingency has been revealed *as* a contingency. The interpersonal test lays bare contingencies in recognition of themselves and allows persuasion to function openly on both sides rather than discretely (and thus oppressively) on one. What follows is a persuasive agent recognizing oneself as such, and thus the possibility of an agonistic dialogue opening up whereby respective agents can also recognize each other as such.

Community in the Appropriation of Difference

We have explored the manner in which Rawls' suppression of difference has allowed him to conceal his theory's persuasive elements. But what implications could this have on Rawls' idea of community? Now that difference has been suppressed in Rawls, Cohen's application of the interpersonal test to the incentives argument for inequalities will show exactly how Rawls has also *appropriated* difference with the difference principle specifically. Furthermore, I believe it also goes a long way toward answering the aforementioned question about community in Rawls. Cohen flatly rejects that the rich cannot work as hard at a higher tax rate as they can at a lower one. I believe Cohen is right that the rich *make* it true that they cannot work as hard under the specified conditions; that they are presenting their own bad faith as a fundamental truth (Cohen, p. 48, 63). To claim that the rich are literally unable to work as hard under the specified conditions presupposes a construction of the rich as feeble; it also slyly begs the question of the power of wealth as a determinate factor. Cohen includes amongst the discredited excuses for the rich, the idea that they cannot bring themselves to feel as enthusiastic about working given that they have been socialized into a highly unequal culture wherein they can expect a disproportionately high reward for their hard work. As Cohen tells us (and it should not be hard to see), mere habituation cannot serve as a comprehensive justification given that habits can (and do) change, as well as the fact that the expectation is premised on an unjustifiable belief in their own entitlement (Cohen, p. 51). Cohen also notes an illuminating objection by Samuel Scheffler (Cohen, p. 52). Scheffler challenges that perhaps incentives elicit motivations that it would otherwise be impossible for the rich to conjure. The problem with such an objection, which I believe Cohen has demonstrated through his application of the interpersonal test to the incentives argument, is that there is an ambiguity as regards the limits of the human will. This ambiguity has, in turn, been appropriated by defenders of the rich (often the rich themselves) and defenders of inequalities. I believe Rawls has done much the same; appropriated this ambiguity, and once more thereby masked his use of persuasion, by constructing a conception of both rich and poor that allows inequalities. Let us examine that a little bit further now in lieu of Cohen's analysis thus far.

It must be stressed again that Rawls constructs both rich *and* poor with his application of the difference principle. Rawls claims that a just society honours the worst off because they know they are as well off as they could be. Cohen rightly contests this particular claim, pointing out that the worst off are only as well off as they could be because of the "self-seekingness" of those who are better off than they (Cohen, 2008, p. 76). Although Cohen himself does not argue this, this means that Rawls has appropriated the aforementioned ambiguity by constructing a decidedly self-seeking conception of the rich individual. This does not match with what Rawls states elsewhere where he writes that "...by abstaining from the exploitation of the contingencies of nature and social circumstances within a framework of equal liberty, persons express their respect for one another in the very constitution of their society" (Rawls, 1971/1999, p. 179/156). The inconsistency has not eluded Cohen, who charges that Rawls' own words here imply that there cannot be "incentive seekers" (Cohen, p. 76) in the Rawlsian society if there is respect and a strong sense of community established. Rawls' appropriation of difference is inconsistent with the

community he wants to see established. Even worse, it acts to “other” the rich from themselves. By appropriating the ambiguity with a construction of self-seekingness, with a conception of the market maximizer, as if it were a banal fact, Rawls' theory tries to persuade us that a talented rich individual is either lacking in agency or alienated from it. Similarly, to presuppose that the poor would accept the inequalities present even with the difference principle (Rawls, 1971/1999, p. 151) is to *construct* the poor to his theory's advantage. Rawls is speaking for the poor rather than presenting, like I believe Cohen has, a means by which rich and poor can contest their different claims in an agonistic fashion by bringing their respective persuasive strategies to bear on the issue.

Conclusion

Rawls concludes the necessity of a complex method like the original position because he worries that fundamental disagreements in liberal societies are impassable due to the fact that different people and groups emphasize radically different aspects and use different methods of investigation and persuasion (Rawls, 1993, pp. 54-8). From the outset then, Rawls set out to minimize persuasion to the maximal extent possible. This is where he first went wrong. Because persuasion cannot be eliminated, the closest Rawls could come to eliminating persuasion was to conceal its presence. As a result, his chosen elements were privileged (Kantian rationality, disembodied agency, etc.). In this way, we were being persuaded all along. These chosen terms, these privileged elements, were granted the visage of rational necessity when, in fact, our examination of Derrida's insights into language show us that absolute rational necessity is a myth. If no one theory and its elements can stand on its own with authoritative final answers, the best that “fairness” can hope for is for different parties to use persuasive strategies more openly together. However, because Rawls' preferred viewpoint operates under a visage of rational necessity, there is no way for different parties to use their different persuasive strategies against each other. Instead, Rawls' use of persuasion was to win by default. This is what we have really been protesting all along. Cohen's interpersonal test engages the reality of persuasion. It invites parties to confront each other with their persuasive strategies. There is not one particular element that is declared the essential one in such an interpersonal test. There is naught but the confrontation itself. As such, difference is operating in the interpersonal test freely. The mythical notions of absolute certainty and stability are replaced by persuasion and agonism. I thus believe agonistic justice to be superior to justice-as-fairness. For difference and persuasion are inextricably linked in theory. A theory must first recognize its differential element and then take care to preserve it. A theory must likewise recognize that it *will* persuade and must not attempt to persuade *us* that it can do otherwise.

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