

Law, Justice, Democracy,  
and the Clash of Cultures

A PLURALIST ACCOUNT

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CAMBRIDGE  
UNIVERSITY PRESS

## Reframing Comprehensive Pluralism

### *Hegel versus Rawls*

#### 1.1. THE PROBLEMATIC NEXUS BETWEEN UNITY AND PLURALITY

At a very basic level, pluralism is inevitable. So long as the “I” remains distinct from the “Thou,” the self from the other, perspectives must remain, in some meaningful sense, plural. The implications from this observation, however, are far from obvious. On the one hand, it follows from the fact that the relationship between self and other – be they two individuals, rival tribes or nations, or contending ideologies aspiring to universality such as liberal capitalism and Marxist communism – is irreducible, and that therefore pluralism can go “all the way down.” On the other hand, the fact of pluralism in this barest of all manifestations does not appear to carry any palpable normative implications. Does the fact that one is always confronted with a plurality of perspectives entail any moral, political, or legal “ought”? Arguably, not. Indeed, one can cogently argue that the differences between self and other are normatively irrelevant and that what counts is that they are both selves entitled to equal dignity. In that case, *normative* pluralism would be unjustified. Or, conversely, one can insist that overlooking the differences between self and other could only lead to injustice and subordination as one would inevitably end up favoring some over others, thus making normative pluralism the only legitimate alternative.

Viewing the matter from a normative perspective, pluralism – at least the fact of pluralism – must be taken into account when one encounters and interacts with a stranger. This is vividly illustrated by reference to the advent of the independent market for the exchange of goods. As Max Weber puts it, “the market was originally a consociation of persons who are not members of the same group and who are, therefore, ‘enemies’” (Weber 1968: 672). Because market transactions are among strangers, they cannot come within the purview of any one of the respective communal norms of those who have traveled away from home to exchange goods. I cannot impose my own customs and mores on a stranger with whom I wish to exchange goods, and I cannot subject that stranger to the authorities within my own community, should



something go wrong with the proposed exchange we are about to carry out. To fairly account for the plurality of unshared communal normative commitments spread among all the strangers involved, market transactions must therefore be subjected to norms that transcend those not shared by all those who have come to market. And, the normative regime laid out by modern contract law presumably fills that need and supposedly allows for market exchanges that are fair and efficient (Rosenfeld 1985: 811–14).<sup>1</sup>

Free markets and modern contract law are historically linked to the advent of the ideology of individualism, itself inextricably bound to the emergence of modern Western civilization (Dumont 1977: 4). Individualism contrasts sharply with the organicist and collectivist ideology that prevailed in the Middle Ages, according to which the individual did not live for her sake but to perform specific functions for the common good (Lukes 1973: 46). Medieval society was “one whole and was indivisible, and within it the individual was no more than a part” (Ullmann 1967: 42). Consistent with this distinction, medieval ideology was anti-pluralistic, and modern individualism is necessarily pluralistic (in fact). Indeed, within the perspective of individualism, every individual relates to others as a “stranger” inasmuch as each individual constitutes a world unto herself in that she is the master of her own desires, priorities, commitments, objectives, and, to use Rawls’s expression, “plan of life” (Rawls 1971: 92–4). Thus, every other individual’s aspirations and objectives are “alien” to me, and, conversely, I remain estranged from others to the extent that they cannot comprehend or appreciate my desires, commitments, goals, and aspirations as I do.

Whereas the ideology of the Middle Ages requires normative negation of plurality, that of individualism mandates a normative accounting and accommodation of plurality. An individual should be at a minimum allowed, and at best encouraged, to develop and pursue a plan of life of her own and differences among individual plans of life ought to be, in principle, respected. The difficult question is to find the appropriate normative framework that would best enable the plurality in question to flourish. Is monism as embodied in liberalism, in general, or in Kantian morality or utilitarianism, in particular, preferable? Or, is pluralism more likely ultimately to prove the normatively superior way to give plurality its due?

The answers to these questions are far from obvious, for unless one resorts systematically to relativism – which, as already stressed, would be highly undesirable –

<sup>1</sup> The market not only allows strangers to interact but also transforms into strangers all those who come to exchange. This is exemplified by the English doctrine of “sale in market overt.” According to this rule, all sales at an open market or fair are valid even if a merchant sells property he has stolen to a bona fide buyer. This creates an exception to the general rule under English property law that a victim of theft can recover her property from an innocent buyer who obtained the said property from the thief (Rosenfeld 1985: 887). Accordingly, communally grounded English property law gives ground to “stranger”-based contract law in every open market or fair on English soil.

accommodating plurality requires finding a plausible and legitimate way to reconcile and harmonize unity and diversity. This latter problem similarly confronts the free market economy as envisaged by Adam Smith, which goes hand in hand with the modern ideology of individualism, and with any normative framework that might offer the best available set of moral and legal precepts to properly sustain plurality and individual singularity.

In Adam Smith’s view, what sets the market in motion is the convergence of multiple atomistic would-be traders guided exclusively by self-interest to the utter disregard of the common good or public interest (Smith 1976: 18).<sup>2</sup> Moreover, at least initially, each individual comes to the market with his own subjective appraisal of what he seeks to obtain through a market exchange.<sup>3</sup> Accordingly, the market confronts two sets of divergences due to plurality among its participants; conflicting individual self-interests; and inconsistent attributions of use value to goods available for trade among various would-be traders.

In Smith’s vision, plurality must be preserved for the market to function, for if self-interest were replaced by altruism and differences in use value were erased, the impetus for exchange and competition would be destroyed. On the other hand, the plurality at the individual market participant level is complemented by unity at the level of the market as a whole. As Smith sees it, competition fueled by conflicting self-interests yields the common good as what he terms “an invisible hand” transforms a series of discrete contractual market exchanges fueled by a plurality of interests and aims into a maximization of wealth that inures to the benefit of all (Id.: 477). Moreover, the incommensurable plurality of subjective use values is translated in the course of contractual market exchanges, for Smith, into a common language of intersubjective exchange values (Id.: 32) or, to put it in contemporary terminology, the market functions by systematically transforming the plurality of inputs it encounters into a unified and fungible whole through monetarization. Moreover, what is crucial, for our purposes, is that the Smithian market needs to preserve at once both plurality, as expressed in use-values, and unity, as manifested in exchange values, in order to function.

The Smithian market preserves both plurality and unity in their full integrity in a harmonious whole that is held together by a constant dynamic that binds plurality to unity, in part, through the “invisible hand,” and, in part, through a nexus

<sup>2</sup> As Smith famously put it, “it is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interests. We address ourselves, not to their humanity but to their self-love” (Smith 1976: 18).

<sup>3</sup> Once a market is well established, traders may only be concerned with maximizing wealth, becoming totally indifferent concerning what is traded in order to achieve that aim. Initially, in contrast, presumably one goes to market to trade apples for oranges because, as a matter of personal taste or need, one prefers oranges to apples.



between use value and exchange value.<sup>4</sup> The perfect Smithian market is, of course, a counterfactual ideal that no real-life market can closely approximate. As stressed over two hundred years after the formulation of Smith's economic theory, "there has never been and almost certainly there never will be a modern consolidated democracy in a pure market economy" (Linz & Stepan 1996: 11). More importantly, in the context of the present inquiry, even on the assumption of a perfect market economy, nothing homologous springs to mind in the realms of morals, law, and politics. Significantly, even Smith's own moral theory predicated on sympathy toward the other (Smith: 1976) is at odds with the "morals" of the Smithian market where replacing self-love and self-interest by sympathy would be disastrous (Rosenfeld 1985: 876). More generally, it is difficult to imagine, even counterfactually, a coherent equivalent to the "invisible hand" or to the seamless fluidity that binds use value to exchange value in Smith market economy applicable to the realms of morals, law or politics.

In the absence of a systematic construct akin to the Smithian market, two alternatives loom as plausible for purposes of developing the best possible normative framework for morals, law, and politics, consistent with individualism and with the project of the Enlightenment. The first alternative is predicated on monism, and it primes unity over plurality; the second, on pluralism, and it places greater emphasis on plurality than on unity as such. Both of these, however, must adequately account for that which they seem to relegate to the second position, namely plurality for monism, and unity for pluralism.

There are two predominant monistic approaches: the deontological one that emerges from the revolutionary theory of morals elaborated by Kant and the teleological one, most notoriously developed in the theory of utilitarianism. Kant's theory and utilitarianism will be briefly examined, respectively, in Sections 1.2 and 1.3. I will next briefly explore the version of pluralism that seems to best fit with individualism and liberalism, namely value pluralism as articulated by Isaiah Berlin, and I will assess how it manages to account for the nexus between unity and plurality (Section 1.4). After concluding that neither monism nor value pluralism is the optimal alternative, I will lay out the case for comprehensive pluralism and emphasize its Hegelian roots and allegiances (Section 1.5). After that, I will briefly revisit the distinction between the modern and the post-modern and between homogeneous and heterogeneous politics from the perspective of *participants* as opposed to *observers* (Section 1.6). I will then underscore the implications of comprehensive

<sup>4</sup> The precise relationship between use value and exchange value has remained rather elusive, and Adam Smith shed little light on it (Samuelson 1976: 438). What is important for our purposes, however, is that there would be no impulse to trade in the market in the absence of use value, and no rational unified and systematic market without exchange value.

pluralism's embrace of the good over the right and defend it against critics such as Habermas (Habermas 1998a: 405) and Michelman (2000) (Section 1.7). Finally, I will seek to demonstrate that, if properly understood in terms of its Hegelian dynamics, comprehensive pluralism remains distinct from, and more suited to contemporary needs than, Rawls's most pluralistic among his philosophical accounts, namely that concerning an "overlapping consensus" in his *Political Liberalism* (Rawls 1993) (Section 1.8).

## 1.2. THE KANTIAN REVOLUTION: SEVERING UNITY FROM PLURALITY

Kant proposes to dispel the normative conundrum posed by the confrontation between the need for unity and the fact of plurality, by sundering the realm of the right from that of the good, and by granting priority to the former over the latter (Kant 1969). What allows Kant systematically to keep separate the realm meant to be ruled by unity from that ruled by plurality is the deployment of the categorical imperative (Id.: 53–4), which allows for a counterfactual construction of normative links between self and other above and beyond any clash among a multiplicity of conceptions of the good that might otherwise divide those who share in common the same socio-political space.

Drawing on the distinction between morality (*Moralität*) and ethics (*Sittlichkeit*) steeped in the philosophies of Kant and Hegel, one may posit "morals" as encompassing universally valid rights, duties, and norms of justice that transcend all conceptions of the good. "Ethics," in contrast, refers, under this approach, to the mores, prudential maxims, and normative standards of a historically grounded community with its own conception of the good.<sup>5</sup> Furthermore, consistent with individualism, the postulation of the equal autonomy of all individuals and reliance on the rule of reason, Kant proposes universally applicable moral norms that are self-imposed. In the Kantian counterfactual construct, every autonomous individual freely assumes the duties flowing from the categorical imperative deduced from the axiom that individuals, being free, equal, and autonomous, ought to treat one another as ends-in-themselves and not as means (Kant 1969: 53–4). It is what is the same in every individual as a moral being that frames the realm of universal rights and duties and that guarantees unity throughout. At the level of

<sup>5</sup> These definitions of "morals" and "ethics" run somewhat counter to the understanding of these terms in Anglo-American philosophy. Nevertheless, the definitions in question are particularly useful in the present context, not only in terms of the discussion centering on Kant and Hegel, but also in terms of theories propounded by Rawls and Habermas.



Kantian morals, therefore, individuals, rights, duties, and criteria of justice commensurate with the conception of persons as ends-in-themselves transcend all competing conceptions of the good and remain, in principle, neutral as between all of the latter.<sup>6</sup>

Pursuant to Kant's theory, there is unity at the level of the right and plurality at that of the good. But given the priority of the right over the good, there ought to be also a significant measure of unity within the arena reserved for intersubjective dealings regarding the good, to the extent that the right is meant to restrict the bounds within which pursuit of the good can proceed legitimately. On closer examination, however, Kant's categorical imperative renders plurality incompatible with morals, and morals impossible as patently inconsistent with any intersubjective dealings in which real interests and conflicting conceptions of the good are at play. If the self must treat all others *only* as ends-in-themselves, then all market exchanges, employment relations, professional services, and the like would be immoral because they require treating the other, at least in part, as means. It would thus make no difference whether an employment contract were fair or unfair, humane or exploitative, for both employer and employee must per force relate to one another in some significant way as means. As Hegel has emphasized, Kant's morals are ultimately purely formal and empty (Hegel 1952: Para. 135, 135A), and that is because to achieve unity, each individual must be shorn of all attributes and of all individuality. Accordingly, Kantian morals reduces self and other to equivalent, and hence interchangeable, purely abstract egos. And as such, the pursuit of unity in a realm of ends ruled by universal duties ultimately boils down to solipsistic self-effacement and self-constraint.<sup>7</sup>

The conclusion that Kant's theory leads to the radical and revolutionary proposition that morals are both necessary to ground the normatively requisite unity and impossible in the real world imparts a very important negative lesson for the search for a normative bridge between unity and plurality. There can be no perfect or purely transcendent unity. At the same time, morals cannot be derived legitimately from any single contested conception of the good, or from any particular culturally grounded vision of ethics.

<sup>6</sup> Neutrality-in-principle, does not necessarily entail neutrality-in-fact. This might be for largely trivial reasons, as in a case in which some of those involved were to pick the categorical imperative as the overriding principle of their own conception of the good. In that case, we would seem to have, at most, a semantic quibble. Is the categorical imperative good because it is right? Or is it right because it looms as equally good for all? In other cases, however, there may be conceptions of the good that happen to fare better than others when subjected to the regime of rights and duties stemming from the categorical imperative. In the latter cases, formal impartiality may be preserved, but not substantive neutrality. This issue will be further explored in the course of the following discussion.

<sup>7</sup> It is noteworthy in this connection that Kant himself places pragmatism ahead of morals when it comes to evaluating law (Kant 1970: 118–19).

### 1.2.1. Adapting Kant: The Pure Social Contract Proceduralist Approach

One could remain consistent with the negative lesson deriving from Kant's theory, and yet remain in the deontological monistic camp, by embracing a procedural conception of morals. Such a procedural approach seems to present important advantages: It does not set the realm of unity above and beyond that of plurality; it does not seem to require the ego to shed its interests or conception of the good; and it presumably allows for fair substantive results, which would permit (re)integrating morals within the realm of the possible.

The procedural approach in question is that put forth by modern social contract theory, or more precisely by one of the two principal versions of it, namely *pure* social contract theory. The latter, which is to be distinguished from *derivative* social contract theory (Rosenfeld 1985: 857), holds in essence that given fair bargaining conditions, just and legitimate norms and institutions are those that are the product of a freely entered into, mutually agreed upon, pact among all those who will be subjected to the norms and institutions in question. In pure social contract theory, it is the contractual procedure and the fact of agreement that bestow normative validity. In derivative social contract theory, in contrast, the ultimate source of normative validity is not contractual, relegating the contractual device to a heuristic function. Of the four major modern social contract theorists, Hobbes and Rousseau are exponents of pure social contract theory, whereas Locke and Kant are advocates of derivative social contract theory (Id.). For Kant as we have seen, what makes norms binding is their universality, and hence in his invocation, the social contract, is largely rhetorical. Since every rational person should recognize universal norms as valid and binding, it follows that all rational persons would agree to be bound by such norms based on the dictates of reason (Gough 1957: 18).

For pure social contract theory, the relevant contract is supposed to operate in a way that is analogous to that in which contracts of exchange do in an economic market pursuant to modern contract law. The paradigmatic legal contract is one of exchange between two individuals, each with different interests and aims who must find common ground to advance their respective aims. If they reach a contractual agreement, then the terms of their contract embody their joint will in relation to the exchange at stake. That joint will differs, however, from the initial respective wills of the two (then) would-be contractors who set out to bargain for an exchange. A buyer wishes to pay the least possible for the good he covets while the seller seeks to charge as much as possible for it. As a consequence of fair bargaining between the two, the buyer will end up paying more than initially hoped for but less than what would have prompted him to walk away from the transaction; and, the seller will get less than initially sought, but more than what would have caused her to refuse to sell. In this setting, the contract provides unity and protects plurality, but only in



a somewhat restricted and redirected manner. Significantly, the unity embodied in the contract terms is parasitic on there being a plurality of interests among would-be contractors, and, conversely, the plurality that results from the consummation of the relevant contractual transaction is reprocessed through the unity embodied in the relevant contractual terms.

The social contract under pure social contract theory is supposed to operate analogously, the main differences being that it is a contract among all individuals who find themselves within the same polity – be it a city-state, a Westphalian nation-state, a supra-national entity such as the EU, or even an eventual global republic – and that the subject matter of that contract is norms and institutions rather than goods. In both cases, the contract device affords procedural means to reconcile unity and plurality “from within,” and the *fact* of agreement becomes the source of justice, legitimacy, and normative validity. Through market contracts, individuals acquire as many as possible of the material goods they covet in the pursuit of their conception of the good under the best possible terms they can bargain for with equally situated individuals seeking exchanges to further their own conception of the good. Through the social contract, on the other hand, individuals agree to be bound by the norms and institutions that would lend support to the pursuit of their conception of the good as best as possible under the best possible terms they can bargain for with similarly situated individuals who have a similar design and who are within the same polity.

There is a crucial dis-analogy between a legally binding contract and one associated with pure social contract theory insofar as the former involves an actual factual agreement among the contractors whereas the latter does not (Rosenfeld 1998a: 294). Pure social contract theory draws its procedural legitimacy from the *making* of the relevant contract, yet that crucial event turns out to be counterfactual. The social contractors envisaged by Hobbes do not actually conclude an agreement, but are imagined to produce one counterfactually given their stark choice between living in a state of war and finding peace and security in organized civil society (Hobbes 1973: 64–5; 1978: 184). Moreover, if that were not problematic enough, there is no equivalent to Adam Smith’s “invisible hand” or to the relationship between use value and exchange value, which ultimately renders arbitrary what is produced (albeit counterfactually) through deployment of the social contract procedure. For Hobbes, so great is the fear of the war of all against all that the social contract results in voluntary submission to an absolute monarch (Hobbes 1978: 189–90). For Rousseau, on the other hand, the focus is so much centered on self-government that individuals must greatly limit, if not abandon, their private pursuits to partake in the political implementation of the general will, which he characterizes as the sum of differences between all the individual wills, or as the “agreement of all interests” which “is produced by opposition to that of each” (Rousseau 1947: 26 & n.2). More generally,

given different conceptions of background conditions, actual interests and conceptions of the good represented, and the relative strength of each of the represented groups involved, any resulting agreement would be either purely contingent or arbitrary. Suppose a group that shares Hobbes’s vision tries to reach an agreement with a group that subscribes to Rousseau’s. Is there any reason to believe that either group would convince the other, or that some midpoint could be found between those who seek security above all and those who consider self-government paramount? And, even supposing an agreement, is there any reason to believe that the resulting institutional agreement could be regarded plausibly as equally fair to both groups?

Pure social contract theory does bring unity and plurality within the same plane, but even when it gives them both determinate content within a purely procedural framework, it fails to yield, except perhaps by pure happenstance, institutions that all social contractors would or should accept as just, legitimate or normatively valid. One possible way to overcome this difficulty while staying within the bounds of proceduralist contractarian deontological monism is to combine Kantian universalism with contractarianism. This is what Rawls sets out to achieve in his *A Theory of Justice* (Rawls 1971), and Habermas, in his discourse theoretical proceduralism, which though it exceeds the bounds of contractarianism (Rosenfeld 1998a: 33), also combines Kant with consensus-based legitimation.

### 1.2.2. Rawls’s Kantian Contractarianism in *A Theory of Justice*

Both Rawls and Habermas incorporate Kantian universalism as the source for the normative validation of the requisite pole of unity, but purport to make it of this world by refusing to sever morals from interests. Rawls’s contractarianism, based on a hypothetical social contract which contractors conclude behind “a veil of ignorance” (Rawls 1971: 11) allows for interests to be factored in, but holds back from its hypothetical contractors *which* particular interests they may actually have (Id.: 12). Habermas, for his part, though he embraces Kant’s universalism and split between morals and ethics, parts company with Kant by allowing consideration of all interests in the communicative process designed to determine the validity of norms (Habermas 1990: 195, 203–4).

Rawls places his hypothetical contractors in an original position behind a veil of ignorance to overcome the moral arbitrariness of Hobbesian contractarianism. In contrast to Hobbes’s contractors who seek the most advantageous terms to best further their own arbitrary will, Rawls’s contractors seek to agree on mutually acceptable principles of justice (Rawls 1971: 11–12). The veil of ignorance is supposed to preclude bargaining power advantages for any of the contractors. As Rawls specifies, none of the contractors “knows ... his class position or social status ... his fortune in the distribution of natural assets and abilities ... [his] conception [ ] of the good



or [his] special psychological propensities" (Id.: 12). Based on this, it is clear that each contractor is severed from his own interests, but not from interests in general, as Rawls attributes to each contractor an attitude of prudence and risk averseness in regard to what remains hidden behind the veil of ignorance. Rawls postulates that his contractors will embrace the "maximin rule," according to which each alternative will be considered from the standpoint of those who would be the worst off under it, and the maximin rule will compel the choice of the alternative in which the worst off are better off than would the worst off be in all other alternatives (Id.: 152–3). Consistent with all this, the contractors are led to settle on the following two principles of justice. The first principle, which is lexically prior to the second, is that all should be entitled to equal liberty (Id.: 60). The second principle, known as the "difference principle," in turn, postulates that inequalities in wealth and social status are only justified if they improve the lot of the worst off, and if they maintain fair equality of opportunity regarding access to positions of wealth and power (Id.: 302).

I have extensively examined the shortcomings stemming from Rawls's contractarian approach elsewhere (Rosenfeld 1991: 233–7; 1998: 126–8). For present purposes, I will only focus briefly on three problems that highlight Rawls's unwitting sacrifice of plurality in *A Theory of Justice* in his efforts to safeguard Kantian unity by fitting it within a contractarian framework. First, by putting on the veil of ignorance, Rawls's hypothetical contractors are reduced to abstract egos that are completely uprooted from any social, cultural, or ideological setting. The only thing they know about diversity or plurality is that it exists, but they do not know in what it consists, or how it would affect them. From this standpoint, there seems to be no significant difference between Rawls's and Kant's conceptions of the abstract ego.

Second, there is an important difference in how Rawls and Kant arrive at unity and universality, and that difference creates serious additional problems for Rawls. Unlike Kant, who casts unity as transcendent and otherworldly, Rawls is intent on situating unity within the bounds of the immanent world in which intersubjective dealings actually take place. Rawls does this by taking actual individuals and peeling off layer by layer what makes them different from others until he arrives at the abstract egos behind the veil of ignorance that are ready to agree on commonly shared principles of justice for their polity. The process of abstraction involved, however, is not neutral and it ends up favoring certain perspectives and certain conceptions of the good over others. Is the abstract ego that emerges at the end of the process of abstraction a man or a woman? Even assuming that one could imagine an individual without any sex identity whatsoever, there are gender-based differences that may not be transcended, forcing a choice, albeit an unconscious one, between a masculinist or feminist perspective. Some feminists have claimed that the social contract itself is full of bias as it establishes a "fraternal patriarchy" through which men rule over women (Pateman 1988: 2, 108). But even if one believes that

Rawlsian contractarianism in itself is not gender biased, the hypothetical contractors on which it relies cannot be genderless. And that means that the relevant process of abstraction cannot avoid preferring one gender-based perspective over others while projecting an image of gender-based neutrality. Moreover, the same goes for race, ethnicity, religion, culture and ideology to the extent that these raise identity-based issues.<sup>8</sup>

Finally, the third problem stems from Rawls's reliance on the maximin rule, which far from being neutral introduces two key biases that several actual, as opposed to hypothetical, social contractors would object to. First, risk averseness is hardly universally shared and many would-be contractors could well have conceptions of the good or plans of life according to which taking greater risks to achieve loftier aims would be normatively compelling. These normative perspectives would be excluded ex ante from the search for principles of justice. Second, maximin works in contexts in which quantification is relevant, but not in most others. Maximin is thus geared to social and economic policy as the difference principle attests. But what about would-be contractors for whom economic justice is of relatively minor concern as they focus above all on non-quantifiable concerns? For example, an individual who believes that the sanctity of life is absolute and that life begins at conception may well consider equal respect for all life as the paramount moral duty and the most important requirement of justice. For such an individual maximin is of little use, for even if as a prudential matter she would prefer a polity with fewer abortions over one with more, she could not agree to any principle of justice that would condone even one abortion as morally defensible.

It may be objected that an anti-abortion absolutist would not have concerns with Rawls's second principle of justice, but rather with the interpretation of equal liberty under his first principle. Even if this objection were valid, it would remain problematic for Rawls, by underscoring fundamental difficulties with his first principle of justice. Either equal liberty means the same for all, including those who hold abortion rights to be an essential component of women's equality and the anti-abortionists, or it may be open to so many different interpretations as to defy any meaningful agreement. In the former case, plurality would have to be suppressed; in the latter, unity dissipated. Finally, even if the links between maximin and the difference principle were considered plausible beyond the socio-economic sphere, it seems much more ill adapted to the needs and designs of those who place identity politics issues far above socio-economic well-being. Accordingly, at the very least, maximin and the

<sup>8</sup> For example, ideally race-based differences ought not factor in the determination of principles of justice, and one can imagine an abstract ego without any determinate skin pigmentation. But in a country like the United States with slavery and massive racial injustice in its past, is not ignoring different perspectives relating to racism and racial politics more likely to lead to injustice than properly factoring them in? For a more extended discussion of this point, see Rosenfeld 1991: 236–8.



difference principle fail the test of neutrality with respect to competing conceptions of the good, by blending much better with some of them than with others.

### 1.2.3. *Habermas's Dialogical Kantian Proceduralism*

In the last analysis, Rawls's contractarian proceduralism is purely derivative, and his principles of justice the product of a monological rather than a dialogical process. This conclusion is consistent with Habermas's assessment of Rawls's theory (Habermas 1990: 66). Habermas proposes to overcome both Kant's and Rawls's monological approaches and to allow all interests full access in the determination of valid moral and legal norms.<sup>9</sup> Kant's and Rawls's approaches are monological because the abstract egos they postulate as being all identical and interchangeable, any one of them is fully equipped to discover universal morality or fair principles of justice. Habermas overcomes this suppression of plurality by allowing every interest as is to be brought to the table without any filter or censorship (Id.: 122). Moreover, Habermas replaces contractarian proceduralism with discursive proceduralism. Everyone concerned can bring his or her full interests, aspirations, and concerns to bear in a counterfactual dialogue under ideal-speech conditions, which provides every participant an equal opportunity to be heard, with a view to achieving a reasoned consensus. In the case of determining legal validity, Habermas postulates a dialogue among strangers resulting in the adoption of norms that would qualify at once as self-imposed and universalizable, thus reconciling democracy and rights (Habermas 1996: 459–60).

I have extensively examined elsewhere Habermas's discourse theory of morals and law, noted its successes in overcoming certain of the previously mentioned problems with the theories of Kant and Rawls, and assessed its key shortcomings in its endeavors to reconcile unity and plurality (Rosenfeld 1998: ch. 5). Moreover, I will further address some of these issues in my discussion of Habermas's analysis of the challenges posed by global terrorism in Chapter 9. For the moment, therefore, I will limit myself to two brief observations. First, the requirement that laws be justified as self-imposed – meaning that those who are subjected to a law would have voted for its adoption, providing only that they adhere to a fair and principled approach to all intersubjective matters – does seem fit to fully accommodate pluralism-in-fact. The problem, however, is that whether all those subjected to a law would agree to consider it as self-imposed is, at best, purely contingent and dependent on the actual competing conceptions of the good at play, and, at worse, simply inconceivable. Absolute opponents of abortion and those who consider a right to it indispensable

<sup>9</sup> For Habermas's own account of the principal differences between his discourse theory of normative validity and Kant's moral theory, see Habermas 1990: 195, 203–4.

could thus never agree that any law on the subject should be deemed self-imposed by all those subjected to it.

Second, the dialogical process geared to universalization cannot ultimately stand the test of neutrality among all relevant conceptions of the good. Thus, metaphysical conceptions of the good, including religious ones, would effectively be excluded from the dialogue even if formally welcome to participate. This is because Habermas's conception of universalizability, as he readily acknowledges, entails acceptability of arguments that appeal to reason, but not those that appeal to faith. Furthermore, Habermas's dialogical proceduralism seems biased even as among non-metaphysical conceptions of the good. For example, the proceduralism in question is strongly oriented toward rights and justice, which are contested by some feminists as being male-oriented concerns that tend to drown their own aspiration to replace “the hierarchy of rights with a web of relationships” based above all on care and concern (Gilligan 1982: 57).<sup>10</sup>

In the end, none of the deontological or proceduralist theories discussed earlier successfully manage to properly reconcile unity and plurality. Kant's categorical imperative is certainly neutral, but it defies all practical implementation. Hobbesian contractarian proceduralism certainly includes all plurality *ex ante* but produces outcomes that are arbitrary and contingent. Rawls and Habermas, on the other hand, although to different extents, both exclude significant amounts of plurality and rely on procedures that yield rights and criteria of justice that fail *ex ante* to be neutral among all relevant competing conceptions of the good.

### 1.3. TELEOLOGICAL MONISM: THE UTILITARIAN ALTERNATIVE

Teleological or consequentialist normative theory need not be monistic as will become clear from the account of comprehensive pluralism provided in Section 1.7, but it does offer a monistic alternative to deontological theory that does not present the kinds of problems for the accommodation of plurality that the latter does. Teleological theories determine normative validity in terms of the consequences of actions, and monistic ones, in terms of their impact on advancing or realizing a universally applicable common conception of the good. Teleological theory does not place a wedge between the realm of rights and that of the good, and is thus poised to avoid the kind of suppression and distortion of plurality that deontological theory is bound to provoke. Teleological theory places the good above the right, and monistic teleological theory, a single integrated conception of the good above all else.

<sup>10</sup> For a more detailed account of the feminist case against Habermas's proceduralism, see Rosenfeld 1998: 138–44.



The most prominent monistic teleological normative theory consistent with modern individualism and the project of the Enlightenment is utilitarianism. Its most prominent classical exponents, Jeremy Bentham and John Stuart Mill, postulate pursuit of the greatest happiness of the greatest possible number of persons as *the* good and as the normative criterion for the evaluation of the consequences of all actions (Bentham 1970; Mill 1962). In other words, an action is good if it results in a net increase in happiness. Although utilitarianism is focused on the common good of humanity as a whole, it by no means loses sight of the individual. For utilitarianism, the common good is not a whole greater than the sum of its parts, but rather a mere aggregate of individual interests. As Mill states, "Each person's happiness is a good to that person, and the general happiness, therefore a good to the aggregate of all persons" (Mill 1962: 288–9). Similarly, Bentham emphasizes that it is "vain to talk of the interests of community, without understanding what is the interest of the individual" (Bentham 1970: 12). Moreover, both Bentham and Mill consider individuals to be fundamentally selfish (Pitkin 1967: 201–2).

As long as individuals know what would make them happy, and as long as one can count on a common denominator permitting to measure and compare amounts of happiness, utilitarianism would appear to foster both unity and plurality in a way that neither distorts nor suppresses them. Every individual's conception and measure of her own happiness is supposed to be taken as is, without filter, distortion, or suppression. Furthermore, individual happiness and the common good are presumably aligned so long as increases in an individual's happiness are not outweighed by a net decrease in the aggregate happiness of all other individuals. If an action or policy were to increase the happiness of everyone, then there would be a perfect harmony between unity and plurality. On the other hand, if the increase in one's happiness resulted in a net decrease in aggregate happiness, then the individual's interests would appear at odds with the common good,<sup>11</sup> but utilitarianism would still seem to provide the best possible blending of unity and plurality consistent with equal liberty for all individual happiness seekers. Finally, utilitarianism's concern for individuals to the exclusion of groups as such need not pose serious problems so long as individuals remain free to pursue greater happiness through the formation of groups and through participation in them with other like-minded individuals.

For all its apparent virtues in the context of reconciling unity and plurality, utilitarianism has long been under fierce attack for failing to account for differences among persons (Rawls 1971: 27). As one critic puts it, the main concern of utilitarianism is "to aggregate experiences of satisfaction or utility, no matter *whose* experiences they

<sup>11</sup> This may not be the case if the focus is on the individual's long-term or overall interests as opposed to her immediate ones. Indeed, it seems quite plausible that in the long run, the utilitarian common good will protect the individual who loses in happiness in the short run, by insuring against dramatic decreases in individual happiness due to the preferences or actions of others.

are: thus it is committed to 'atomism' applied to the individual person and need be no 'respector of person' in its computation of utilities and disutilities" (Lukes 1973: 48). In other words, utilitarianism emphasizes unmediated feelings of happiness and unhappiness, pleasure and pain, and discrete units of utility and disutility, without regard for the individuality of each person and of her concern for her identity as a meaning endowed and endowing being with genuine normative concerns. If Kantian deontology yields a completely detached abstract ego, utilitarian consequentialism disaggregates all plurality into raw interests and feelings unconnected to their owner's sense of herself as a purposive unified self. Ironically, therefore, by tackling plurality-in-fact in its most immediate and spontaneous manifestations, utilitarianism ends up obliterating all genuine diversity as that requires the self to possess the means to perceive herself as being distinct from her raw feelings and desires as much as being different from the other.

Even if one objects to the preceding criticism of utilitarianism for lacking respect for individual personhood as being overly harsh, it is difficult to escape the conclusion that utilitarianism cannot satisfactorily account for the requisite nexus between unity and plurality. For example, it seems most unlikely that one could come up with appropriate means to quantify and measure pleasure and pain, happiness and unhappiness, and utility and disutility.<sup>12</sup> Can one devise units of pain or pleasure? Are these to be subjective or objective? And even if one could, should pain caused by jealousy and envy be allowed to offset the pleasure caused by reward for hard work?

In the end, neither the monistic deontological approach nor its teleological counterpart can satisfactorily reconcile unity and plurality. The time has now come to inquire whether, and how, pluralism might provide a better alternative. There are different conceptions of pluralism, but what distinguishes them all is that they start from the many rather than from the one.

#### 1.4. THE ALLURE AND LIMITATIONS OF VALUE PLURALISM

For Isaiah Berlin, monism is both unpersuasive, as it defies experience, and dangerous, as it has been invoked throughout history to subjugate large numbers of persons in the name of a purportedly all encompassing single overarching ideal, including nationalism, fascism, and Marxism (Berlin 1997: 20–48). From an empirical standpoint, according to Berlin, human beings are guided in their intersubjective relationships by a plurality of values that can be neither logically ranked

<sup>12</sup> "Utility" and "disutility" may be quantifiable and comparable if understood in terms of "efficiency" and "inefficiency" as would be "maximizing utilities" if it were understood in terms of "maximizing wealth." But these terms are not necessarily equivalent. Maximizing wealth may not lead to maximizing pleasure or happiness and vice versa (Rosenfeld 1998: 166 n. 33).



nor fully harmonized into a coherent whole (Berlin 2002: 12). Moreover, although value pluralism may make many uneasy by dampening hopes of finding unity or harmony in the normative universe, it does have a major salutary effect, which might well result in considerable decreases in human cruelty and oppression. As Berlin puts it,

If pluralism is a valid view, and respect between systems of values which are not necessarily hostile to each other is possible, then toleration and liberal consequences follow, as they do not either from monism (only one set of values is true, all the others are false) or from relativism (my values are mine, yours are yours, and if we clash, too bad, neither of us can claim to be right) (Id.: 13).

As an empiricist and historian of ideas, Berlin does not provide a systematic philosophical account of value pluralism, but he has kindled a value pluralist movement in contemporary moral philosophy that has enlisted a broad range of prominent thinkers, including William Galston, Stuart Hampshire, Thomas Nagel, Martha Nussbaum, Joseph Raz, Charles Taylor, and Bernard Williams (Galston 2009: 803). These and other theorists provide a wide range of differing accounts of value pluralism and of its implications for moral and political philosophy. Given the present focus, however, I will limit my discussion to a brief examination of value pluralism and of its possible implications for the relationship between pluralism-in-fact and normative pluralism, by concentrating on salient aspects of Berlin's account, and in particular on his description of value pluralism in the context of the history of ideas as it evolved from the times of the French Enlightenment.

Value pluralism in Berlin's account emerges out of what may be characterized as mid-level theory. By empirically observing a person who endeavors to act in conformity with worthy moral values, one is bound to notice that such person will inevitably act over time pursuant to several such values, and that she will not be able to convincingly place such values within a hierarchy or coherent whole. For example, within the broad confines of liberalism, both liberty and equality constitute important moral and political values. However, the pursuit of one often results in frustration of the other. Great liberty may frustrate or limit achieving material equality or social welfare and vice versa. For Berlin, we are better-off accepting and living with the fact that liberty pursuits cannot be ultimately harmonized with equality pursuits, that some will be more inclined towards one or the other, and that the same person may switch her priorities back and forth over time. Furthermore, for Berlin, living with this plurality is far better for all than trying to subordinate one value to another, or fashioning an all encompassing unifying theory, as for example Marx did, and then seek to impose it on everyone (Berlin 1970: 167–9).

Although Berlin asserts that values vary both among different cultures and within any one of them, he insists, as we have seen, that his value pluralism does not veer

into relativism. Berlin asserts that “there is a world of objective values” by which he means “those ends that men pursue for their own sakes, to which other things are means” (Berlin 2002: 11). There are, therefore, according to Berlin, many different forms of life, ends, moral principles, and values associated with these, “but not infinitely many” (Id.).

Berlin's assertion that there are but a limited number of objective values raises a key question: by what criterion can we determine whether a value that we hold dear, and that we recognize is in competition with others, is actually an objective one? The answer to this question should reveal what binds Berlin's value pluralism together and whether, from the standpoint of deep level theory, Berlin is ultimately a pluralist. If the criterion in question is coherent and consistent, then it would endow Berlin's value pluralism with the unity it needs to ensure its remaining distinguishable from relativism. Moreover, depending on the criterion involved, it should be possible to determine whether or not Berlin is, in the last analysis, a deep level theory pluralist.

Before looking further into Berlin's own views relating to the question posed earlier, it should be stressed that there would be nothing inconsistent or contradictory with being a deep level theory monist while at the same time embracing Berlin's value pluralism from the standpoint of middle level theory. Thus, for example, a liberal committed to individualism, equal liberty for all, and adherence to the rule of reason would be ultimately be monistic at the deepest level, and would, for all essential purposes, agree at that level with Kant, Rawls, and John Stuart Mill. Unlike the latter who are monistic all the way up and all the way down – though they may leave room for limited pluralism that remains cabined within their monistic approach, as in the case in which a plurality of conceptions of the good is deemed legitimate so long as it remains consistent with the priority of the right over the good – the value pluralist in our example is not monistic all the way through. Whereas libertarian liberalism primes liberty over equality and egalitarian liberalism posits equality as prior to liberty, value pluralist liberalism prizes both liberty and equality, but seeks neither to place them in a hierarchy nor to reconcile their demands in the realm of normative interaction. By the same token, however, value pluralist liberalism unequivocally rejects slavery or a widespread ban on religious expression. Berlin himself is not all that clear about his criterion for discerning objective values or about his deep level commitments. He does unambiguously embrace liberalism (Id.: 47–8), and his preference for negative liberty over positive liberty (Berlin 1970: 171) is in line with commitment to liberal individualism and with rejection of deep level alternatives such as Rousseauian republicanism or Marxist class-based liberation. Be that as it may, from the standpoint of the potential of placing plurality above unity, it is Berlin's illustrative excursions into intellectual history that loom as most promising.



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Modern monism is rooted in the Enlightenment, and, as it emerges in Berlin's account, it displays distinct Janus-face-like characteristics. The monism in question is above all the product of the eighteenth-century French *Philosophes* who were convinced that through use of a methodology akin to that of Newtonian physics, which had brought rational order and unity to nature, one could achieve similar results in the realms of morals and politics (Berlin 2001: 1). The *Philosophes* replaced Christian revelation with reason and projected that the deployment of the latter "would sweep away irrational and oppressive legal systems and economic policies... would rescue men from political and moral injustice and misery and set them on the path of wisdom, happiness and virtue" (Id.: 2).

In his explorations into the history of ideas following the revolutionary conception of normative theory launched by the *Philosophes*, Berlin concentrates on, and sides with, critics of the French Enlightenment who reject the analogy between the unity of the realm of nature and that of morals (Id.; Berlin 2000). Prominent among these, in Berlin's account, is Vico, an eighteenth-century Italian thinker, who accepted the new scientific approach as applied to nature, but rejected its appropriateness for application to human interaction (Berlin 2000: 41–2). In Berlin's words, according to Vico,

we judge human activity in terms of purposes, motives, acts of will, decisions, doubts, hesitations, thoughts, hopes, fears, desires, and so forth; these are among the ways in which we distinguish human beings from the rest of nature. (Id.: 42)

Moreover, for Vico, human nature is not fixed, but evolves through history and accordingly the law, morals, and politics of one epoch are not likely to be suitable for another (Id.: 106–7).

By conceiving human nature and natural law as uniform and unchanging, the Enlightenment moralists paved the way for an oppressive monism bound to frustrate the rich and manifold potential for human self-expression and flourishing. When Berlin focuses on the contrast between this kind of Enlightenment monism and pluralists such as Vico, it is clear where his sympathies lie. Berlin is too subtle and nuanced an historian of ideas, however, not to also note that Enlightenment monism was engaged in a historical battle with other monisms as well as with pluralism. One of these battles is retrospective and is, as already noted, against Christian revelation; the other is prospective against one of the main currents of anti-Enlightenment ideology grounded in excessive expressions of romanticism, and leading to, among others, xenophobic nationalism and fascism (Berlin 2001: 17–24).

In his recounting of both these struggles against other forms of monism, Berlin's sympathies emerge as clearly aligned on the side of Enlightenment rationalism, and hence the French Enlightenment's Janus-face characteristic in Berlin's narrative. Though monistic, the Enlightenment approach is obviously preferable to the kind

of religious authoritarianism that it fought to replace, and to the dangerous irrationalist ideologies that were spread in reaction to it. At the same time, Enlightenment monism in morals looms as patently inferior to value pluralism grounded in reason and objectivity.

How might one reconcile unity and plurality in connection with Berlin's value pluralism as situated in the historical context briefly evoked previously? Perhaps, the best clue to what might qualify as a correct answer to this question is to be found in the views of Montesquieu as sympathetically summarized by Berlin (Id.: 130–61). Montesquieu's case is particularly telling because he was a contemporary of Voltaire and of the Encyclopedists, and because he was like the latter committed to the rule of reason, yet contrary to the spirit of the French Enlightenment, he believed that societies differ not only in relation to means but also to the ends that they each set to pursue. As a consequence, for Montesquieu, laws should be adapted to the particular social, economic, political, and ideological conditions that prevail in the actual polity for which they are meant. Just as the clothing suited for a cold climate is not fit for a warm one, the laws tailored for a country with certain physical conditions and mores would be unsuited for another country with very different characteristics and mores.

One might think that Montesquieu is at bottom a moral relativist, but Berlin assures us that he is not, that he is instead a pluralist (Id.: 143, 157). On the one hand, Montesquieu believes that law should be relative to the particular mores of the society concerned; on the other hand, he conceives justice, as Berlin puts it, to be "a transcendent eternal standard" (Id.: 155). Berlin goes on to observe that

There is a kind of continuous dialectic in all Montesquieu's writings between absolute values which seem to correspond to the permanent interests of men as such, and those which depend upon time and place in a concrete situation (Id.: 157)

which lead him to conclude that the contradiction inherent in Montesquieu's views remains unresolved (Id.).

From the standpoint of the relationship between unity and plurality, there seem to be two possible different implications that could be drawn from Montesquieu's theory. The first is that there is an inconsistency within the normative universe as conceived by Montesquieu much like the one noted earlier in the context of the dichotomy between Adam Smith's prescriptions for the morals of the market and those for morals outside the market.<sup>13</sup> The second possible implication is that Montesquieu is, contrary to Berlin's assertion (Id.), ultimately, at the deepest level, a monist. At the level of legitimate laws for a particular polity, pluralism is called for; in relation to whether these laws are just, however, there is only one universal standard.

<sup>13</sup> See *supra*, at 26.



I think the second alternative is much more convincing in the case of Montesquieu and also in that of Berlin himself. Otherwise, neither of the two could avoid ending up as a deep level relativist or as someone who purely arbitrarily sets limits to the scope of legitimate value pluralism. If I am right, at the deepest level, value pluralists are still monists though they be monists that are more open to, and more sympathetic toward, pluralism. Value pluralists may shift the focus to pluralism but they still, perhaps unwittingly, ultimately give priority to unity over plurality. To overcome the seemingly unavoidable fall into either monism or relativism that this conclusion entails requires, as I will argue in what follows, recasting the relationship between unity and plurality in terms of an ongoing dialectic.

### 1.5. THE HEGELIAN DIMENSION OF COMPREHENSIVE PLURALISM

Comprehensive pluralism is conceived and intended as being pluralistic all the way up and all the way down, placing plurality ahead of unity, but nonetheless reserving an indispensable role for the latter. Comprehensive pluralism concurs with two of Berlin's insights, namely that pluralism is good, preferable to monism because it is less likely to result in all manner of tyranny be it in the realm of ideas, of morals, or of politics; and, that pluralism does not, and should not, give unconditional normative imprimatur to the full panoply of existing conceptions of the good or to all asserted values. Comprehensive pluralism goes much farther, however, than does Berlin's value pluralism in implanting the normative foundations of pluralism deeper and more systematically. Moreover, the difference between the two is not merely a matter of abstract theory, but also leads to practical consequences as evinced by the fact that comprehensive pluralism does not establish any inbuilt preference for liberalism, individualism, or negative liberty as does Berlin.

As already mentioned in the Introduction, comprehensive pluralism was originally predicated on the proposition that in the presence of pluralism-in-fact, pluralism-as-norm provides the best means to the good. Upon further consideration, a strong argument can be mounted in favor of the broader claim that pluralism-as-norm is best in all circumstances, regardless of the presence of pluralism-in-fact. The minimum conditions for the prescription of pluralism-as-norm to make sense are satisfied so long as a *potential for pluralism* is present. Moreover, it suffices that there be one self and one other for there to be such a potential, given that the very notions of selfhood and otherness entail a minimum of difference and of plurality. Accordingly, even in the most homogeneous of polities, with no toleration for deviation from official ideology and policy, there is bound to be some potential for pluralism as not all individual perspectives would be exactly the same, and as the polity in question could not be hermetically sealed from any change of perspective over time.

The allure of pluralism in terms of pursuit of the good is essentially threefold: It promotes enrichment of the self, a superior normative aesthetics, and the greatest possible mutual accommodation among proponents of different perspectives and conceptions of the good. These three goods, moreover, are complementary and mutually reinforcing. I have already argued at length elsewhere about the superiority of comprehensive pluralism for purposes of fostering mutual accommodation (Rosenfeld 1998: 213–24). Suffice it here, therefore, to return briefly to the core of the argument. Comprehensive pluralism considers all perspectives and conceptions of the good on their own terms and commands that empathy be deployed toward each of these to approximate as much as possible an understanding and appreciation of each of the contending perspectives from the “internal point of view” of its proponents. This allows comprehensive pluralism to grasp the uniqueness of the other and of the differences that make it other than the self far better than any of the monistic theories previously discussed. Indeed, as we have seen, Kant and Rawls treat persons as having perspectives but separate them from their particular perspectives in the course of devising moral norms and principles of justice for them. Habermas, on the other had, accounts for some perspectives but excludes others *ex ante*, while utilitarianism largely suppresses or ignores actual perspectives by accounting for feelings with scarce concerns for the identity of their owners. Furthermore, because of its greater openness and sensitivity to different perspectives, comprehensive pluralism clearly seems better suited than its rivals to furnish preferable normative standards to polities that are pluralistic-in-fact.

The remaining two goods identified, self-enrichment and the aesthetic of the normative, are the ones that most strongly lend support to the conviction that comprehensive pluralism should extend to all polities, not just those that are pluralistic-in-fact. As will be discussed shortly, Hegel has emphatically underscored, in his famous account of the struggle for recognition between the lord and the bondsman (Hegel 1977: paras. 178–96), that the self can only be defined in terms of the other, or, in other words, that selfhood only makes sense in relation to, and, as set against, the other. At the most abstract level, the Hegelian self cannot conceive itself as such before it realizes that the other is also a self, but that it itself is a self that is other than the other. That means that the self defines itself not only in terms of differences from, but also of similarities to, the other. Moving beyond the image of the atomistic individual portrayed in certain liberal visions, in Hegel's account, the concrete individual becomes who she is as a distinct self, by processing the rich diversity she encounters in dealing with other selves – beginning with the imprint made by her family and immediate community in childhood – in order to incorporate, modify, and adapt some of this diversity and to differentiate and distance herself from the remainder in order to fashion her own self-identity. Also, this process of self-identification is a dynamic and continuous one, starting in childhood and evolving throughout life.



This conception of the formation and evolution of self-identity is equally applicable to individual persons and to all purposive collective units capable of projecting a self-identity, such as nations, religions, cultures, ideologies, non-governmental organizations, transnational groupings including the likes of human rights activists and environmentalists. Moreover, individual identities are inextricably tied to group identities. Groups just like other individuals offer poles of identification and of differentiation while providing another layer and dimension of self-identification. The "I" cannot subsist in isolation and must thus be integrated into one "we" or several of them. The "I" does not thereby fully merge into the "we" but commits her allegiance to it while remaining to some degree differentiated from it. One can, for example, identify with one's nation and fully merge into the national "we" when the nation is threatened in war. At some other time, however, without forswearing one's national allegiance, one can, as a matter of individual conscience, object to national policy and even oppose it with the hope of eventually prompting a change.

At present, self-identities tend to be complex, varied, and plural. Think, for instance, of a German woman who is a Catholic and a feminist. She is German as opposed to French or Italian, but with the French and the Italian, and as contrasted to Americans and Chinese, she is a citizen of the European Union and is afforded protection under the ECHR. She is a Catholic as opposed to a Protestant, the other dominant religion in Germany, and as opposed to a Jew or a Muslim who belong to minority religions within her country. She is also a committed feminist, which sets her apart from those who embrace ideologies that incorporate or condone male dominance.

Although the woman in question has all these group allegiances, she is herself more than the sum of these (and of the many other allegiances that any flesh and blood person is bound to have), if for no other reason that she processes and combines these in her own unique way. Furthermore, these group allegiances combine and interrelate in dynamic ways, sometimes being in relative harmony, and sometimes in downright tension. Thus, this woman may strongly feel German as opposed to French in the context of a dispute between the two nations regarding EU policy. On another occasion, she may feel above all European, as she asserts that Europeans are morally and constitutionally superior to Americans for having abolished the death penalty whereas the latter have not. In another facet of her life, her feminism may come in conflict with her commitment to Catholicism because of the Church's stance against women priests. In short, this woman has a plurality of evolving, interacting, and shifting allegiances to different "we" groups with whom she identifies. Her own sense of self depends on how she manages, negotiates, and integrates all the group affiliations in play. And that entails not only finding harmony among a

plurality of group affiliations but also learning to live with, and making room within one's self-identity for, a fair amount of dissonance, as for example, feminism and the Catholic Church's policy seem at present impossible fully to reconcile.

Consistent with these observations, the claim that a pluralist vision leads to self-enrichment boils down to the following. Because self-identity is constructed and adjusted throughout one's lifetime; and since it inescapably involves reprocessing and incorporating elements originating in the other; a pluralist openness and endeavor to empathize with what is cast as worthy from the other's perspective allows for greater choice, enhanced options, and better opportunities for orchestrating a more satisfactory and more rewarding path to self-realization and self-fulfillment. Anti-pluralistic stances militate against those self-enriching potentials whereas non-pluralistic ones are only likely to open avenues to partial fulfillment.

The pluralist aesthetic of the normative stands as a corollary to pluralist self-enrichment. The individual benefits from the availability of a plurality of sources from which she can draw for purposes of constructing her self-identity, and humanity is enriched by the spread of a large panoply of diverse conceptions of the good. Just as the arts seem bound to be benefited by the coexistence of a multiplicity of varied aesthetic approaches and styles, so too the normative universe would appear to gain from the development of manifold diverse conceptions of the good. Thus, different religions and different secular ideologies can each in its own way contribute to mapping out multiple constructive paths to intersubjective cooperation and individual self-realization. Some religions may emphasize the importance of charity; others, that of self-reliance; some may encourage our hopes; others quell our fears; some religions may provide comfort by evoking the beauties of an afterlife; others may insist that the good must be sought exclusively on this earth, and so on. Similarly, secular ideologies may offer worthy alternatives for doing good to others and to ourselves with an urgency and sobriety that may not equally motivate some of those who feel comfortable entrusting their fate to a divine or transcendent presence.

It bears emphasizing that the pluralistic aesthetic of the normative is not meant to undermine anyone's commitment to his own conception of the good or belief in the truth of his religion or secular outlook. It is not the aim of the pluralistic aesthetic to relativize everyone's convictions and propagate self-doubt, but to encourage recasting the differences that separate the others from the self in ways that promote better understanding and mutual accommodation. Instead of treating those who adhere to religions other than mine as enemies of the truth, the aesthetic approach counsels that I learn to focus on the latter as persons who seek the same type of spiritual goods and avenues to fulfillment as I do. This does not require me to give up my truth or to accept "their" truth as being equivalent to mine; it only requires that I accept that even if they are in error, they are still seeking the truth in good faith rather than denigrating it as its enemies.



Comprehensive pluralism is pluralist all the way down inasmuch as it requires that *prima facie* and *ex ante* there be equal room around the table for all conceptions of the good embraced by one person or more within the relevant polity – and for some matters, such as adherence to universal human rights standards, the relevant polity is the world at large. Put in another way, *ex ante* all conceptions of the good should be accepted on their own terms as their proponents conceive them from their own internal viewpoint.<sup>14</sup>

It may be reasonably objected that giving a place at the same table to a conception of the good centered on pacifism and helping the needy and to Nazism and proponents of global terrorism, even if only for a brief moment, is both absurd and dangerous. From the standpoint of comprehensive pluralism, however, all perspectives should be given an opportunity to be heard, and everyone should be afforded a view of every perspective, even the most frightful ones, “from the inside.” In part, this is justified because most conceptions of the good, including some of the most monstrous ones, may in part address legitimate needs and aspirations – and may even provide certain ways for dealing with these that may be in themselves widely acceptable – even if for the most part, they set to propagate unspeakable evils. In part also, giving an opportunity to be heard to the most pernicious conceptions of the good should make it possible to better understand them so as to combat them more efficiently and to provide viable alternatives means for addressing the genuine needs and aspirations that may have been highjacked and forcibly led into completely unacceptable directions.

Comprehensive pluralism is at the same time pluralistic all the way up. It seeks to maximize peaceful coexistence among the greatest possible number of conceptions of the good while maintaining a reciprocal equilibrium between self and other. Where that reciprocal equilibrium may be struck depends on the particular self and other involved, and on their actual respective conceptions of the good. Thus, for example, if the conception of the good of the other requires destruction of the self, then pluralism calls for the requisite equilibrium to be pursued through restraint of the other. That restraint, moreover, would have to extend all the way up. In other words, the search for a reciprocal equilibrium must extend to all arenas of intersubjective interaction, and it unleashes an unending continuous search as every pursuit

of the self, even if totally non-belligerent, impinges on any other with whom the self interacts and vice versa. Accordingly, the norms that comprehensive pluralism deploys to foster the requisite reciprocal equilibrium between self and other must be systematically applied to all intersubjective dealings.

I tried to capture comprehensive pluralism’s concurrent process of inclusion all the way down and of constraint all the way up in terms of a dialectic comprised of two different *logical* moments. The first, or negative, one calls for equalization of all conceptions of the good. Historically, in all typical polities, certain actual conceptions of the good are institutionally, traditionally, or culturally given preference over others. In its negative moment, comprehensive pluralism counterfactually levels all hierarchy and places all the conceptions of the good on the same footing. In its second, or positive, moment, in contrast, comprehensive pluralism imposes its normative constraints on all (now) equalized conceptions of the good to aim at the requisite reciprocal equilibrium, which could well result in exclusion of some conceptions, partial inclusion of others, and nearly full inclusion of yet others. Moreover, the criterion for inclusion is *compatibility*, as opposed to *consistency* with the constraints emanating from comprehensive pluralism, – the norms associated with all competing conceptions of the good being referred to as “first-order norms,” and those identified with comprehensive pluralism as “second-order norms.”

There is but little question that taken separately, the negative moment of the preceding dialectic appears to veer toward relativism, whereas the positive moment seems strongly to tend toward monism. Consistent with this, critics such as Michelman have suggested that, in the end, comprehensive pluralism either results in monism or in relativism (Michelman 2000: 1962–70). In order to be in a better position to counter these criticisms, it is necessary to clarify the sense in which comprehensive pluralism and the dialectic between the negative and positive moments that it launches are the product of a Hegelian vision and approach. Indeed, such a clarification is crucial, particularly in view of how discredited some of Hegel’s ideas have become, and how even some of his most sympathetic exponents, such as Charles Taylor, have concluded that his grandiose synthesis has become obsolete (Taylor 1975: 537–8).<sup>15</sup>

Whereas Hegel’s idea of inexorable historical progress culminating in the triumph of Absolute Spirit can be readily discarded, his insight that every generation is embedded in a concrete historical setting confronting particular conflicts and contradictions seems as valid today as it ever was. So is his dialectical approach,

<sup>14</sup> This raises a difficult question regarding what should count as a genuine conception of the good. Is the mere assertion by a thief that his stealing constitutes the good for him sufficient to cast that position as a conception of good? The answer would seem to be in the negative in as much as the assertion in question sounds more like an excuse, a whim, or an act of defiance than a principled expression of one’s normative vision and values. Thus, though some line drawing problems may be inevitable, there seem to be workable criteria available for deciding what should count as a conception of the good. Accordingly, mere rationalization for being a thief would not count, but Nazism and Stalinism, as monstrous, abhorrent and pernicious as they have proven to be, would.

<sup>15</sup> Most notably, as Taylor observes, the complete overlap of reason and reality in Absolute Spirit – the crowning culmination of Hegel’s system – seems highly implausible today. Taylor 1975: 547, 551. But see Žižek 1989: 6 (“[F]ar from being a story of [the] progressive overcoming [of antagonism], dialectics is for Hegel a systematic notation of the failure of all such attempts”).



which essentially seeks to resolve contradictions through reconciliation of the part with the whole – with the part only becoming understandable in terms of its place within the whole, and, conversely, the whole only susceptible to being adequately grasped in terms of the full panoply of determinate relationships that bind together its various constituent parts.<sup>16</sup> As applied to the intersubjective arena in which relationships center around law, ethics, and politics, moreover, the dialectical approach focuses on various antagonistic positions considered as partial and seeks to overcome existing conflicts and contradictions. The dialectical approach accomplishes this by mediating between the various partial perspectives and a suitable overall perspective meant to transcend all its partial counterparts, not by repudiating the latter, but rather by recasting each perspective in terms of its more comprehensive outlook, and then incorporating them into an integrated and cohesive whole. As will be more fully discussed later, each of these partial perspectives figures as one facet of a multifaceted theoretical construct.

In Hegel's view, the dialectical process of incorporating parts into a whole that transcends them implies both a cancellation and a preservation of the parts involved. Hegel refers to this process as *Aufhebung*. In his own words:

What transcends (*Aufheben*) itself does not thereby become [n]othing.... It... retains the determinateness whence it started. To transcend (*Aufheben*) has this double meaning, that it signifies to keep or to preserve and also to make to cease, to finish.... Thus, what is transcended is also preserved; it has only lost its immediacy and is not on that account annihilated. (Hegel 1999: 119–20)

In the context of Hegel's system, the unfolding of the dialectic results in a progression not only from part to whole but also from less differentiated wholes to ever more differentiated wholes, culminating in a fully differentiated whole. This process is made possible because the whole that results from the resolution of the conflict among its parts becomes itself a part in the new conflict, which erupts upon reaching the next higher stage of the dialectic. This process is then repeated until the culmination of the dialectic at the end of history, when the fully differentiated whole is to become completely intelligible.

Comprehensive pluralism, however, makes no assumptions concerning historical progress or the possibility of reaching higher stages of ever more encompassing integration. In spite of this agnosticism, comprehensive pluralism remains firmly within the Hegelian camp as it strives to cope with the conflicts it encounters through deployment of a dialectical approach moving from part to whole.

<sup>16</sup> As Hegel states, "The whole is a stable equilibrium of all the parts, and each part is ... at home in this whole ... because it is itself in this equilibrium with the whole" (Hegel 1977: Para. 277); see also Hyppolite 1946: 322 (explaining that, for Hegel, "the Truth is the Whole and ... each of its moments only acquires meaning in relation to its place in the overall dialectic") (author's translation).

Specifically, confronted with plurality and with competing conceptions of the good that are, at least in part, mutually incompatible, comprehensive pluralism strives for reconciliation beyond the current standoff. And given constraints imposed by its agnosticism, comprehensive pluralism must pursue reconciliation counterfactually, through postulation of an imagined resolution of existing conflicts into a larger whole. Such imagined resolution, moreover, needs to conform to the strict requirements of dialectical logic (which is not a formal logic, but rather one built on negation and confrontation as a means of progressing from the part to the whole<sup>17</sup>) and thus cannot be merely arbitrary or fanciful. Finally, even if the conflicts targeted by comprehensive pluralism proved impossible to resolve, their imagined resolution consistent with dialectical logic would still remain important, as it would provide a critical (counterfactual) perspective from which to gauge the failures of the status quo.

There is another crucial point of convergence between comprehensive pluralism and Hegel's philosophy: They both agree on the centrality of reciprocal recognition between self and other in the context of all normatively oriented relationships. To be sure, reciprocal recognition is also key for certain liberal theorists such as Habermas and Rawls, and undoubtedly has certain Hegelian roots for them. But, as we have seen, for Habermas and Rawls, the normative implications associated with the need for genuine reciprocal recognition turn out to be Kantian rather than Hegelian in nature.

For Hegel, all moral, ethical, and legal relationships are premised on previous acceptance of reciprocal recognition.<sup>18</sup> Moreover, reciprocal recognition for Hegel is the result of a struggle that he details, most notably through the celebrated dialectic between lord and bondsman (Hegel 1977: paras. 178–96). For present purposes, what is most important about this struggle is that the antagonists are transformed through a series of dialectical reverses. Thus, the lord seeks recognition without having to recognize the bondsman as another self, and therefore endeavors to become the master by enslaving the bondsman. But by forcing the bondsman to work for him, the lord becomes dependent on the labor of the bondsman, and accordingly the relationship becomes transformed. As a consequence of this dialectical reversal, in the words of Hyppolite, the slave becomes the master of the master, while the master becomes the slave of the slave (Hyppolite 1946: 166). Furthermore, this reversal makes it plain that the desired recognition, which led the lord to subordinate the bondsman, cannot be attained so long as the antagonists remain unequal. To resolve

<sup>17</sup> For a more extended summary of the principal features of dialectical logic, see Rosenfeld 1989: 1207–9.

<sup>18</sup> See Hegel 1952: para. 51A (noting that property rights entail recognition by others); and Id. para. 71R ("Contract presupposes that the parties entering it recognize each other as persons and property owners.").



the struggle for recognition, another dialectical reversal must take place, in order to put the antagonists in a position to grant each other mutual recognition as equals.

Just as reciprocal recognition emerges as the culmination of a dialectic process for Hegel, so, too, it does for comprehensive pluralism. Indeed, settings in which pluralism-in-fact prevails are characterized by a struggle among competing, and at least to some degree incompatible, conceptions of the good. So long as each actor remains entrenched within her conception of the good, one can only envisage keeping the competition among antagonistic conceptions of the good under control through subordination of some of these conceptions to others. To overcome this predicament and advance toward reciprocal recognition, it is necessary to embark on a dialectical course capable of defusing antagonisms among rival conceptions of the good by recombining them as parts of a yet to be fully articulated, more inclusive whole. Ideally, in this new whole the underlying conceptions of the good will not fade, but rather become better integrated within a more encompassing perspective.

In sum, for both Hegel and comprehensive pluralism, reciprocal recognition is the result of a dialectical process. Moreover, to adequately grasp the full import of such reciprocal recognition, it is as crucial to take proper account of the various phases of the dialectic as it is to appreciate the product emanating from that process. For liberal theory, such as that of Habermas or Rawls, on the other hand, reciprocal recognition is largely axiomatic, given the presupposition that all persons are inherently equal. In contrast, for comprehensive pluralism, keeping in mind the difference between reciprocal recognition *as process* as opposed to *as product* is indispensable for purposes of capturing its dialectics of recognition and its seemingly relativistic facets.

With the Hegelian dialectics of reciprocal recognition in mind, it is now possible to offer a systematic refutation of the claim that comprehensive pluralism must either collapse into monism or into relativism. Unlike a non-dialectical pluralism, such as Berlin's value pluralism, that cannot stand on its own, comprehensive pluralism can remain pluralistic through and through by emerging as a distinct whole from the struggle between its (partial) monistic moment and its (partial) relativistic moment. It is the *process* set in motion by the dialectic, which seeks to reconcile the clash between the first-order norms unleashed in that dialectic's first negative moment in ways that prove *compatible* (even if inconsistent) with the second-order norms activated in the positive moment of that dialectic. Moreover, it is the very process that channels the ongoing tension between monistic and pluralistic tensions toward a truly pluralistic resolution. The *product* of that process, in turn, is only pluralistic when taken retrospectively as a Hegelian whole that has transcended a prior contradiction. Viewed prospectively, however, the product in question will be transformed inevitably into one of the sides to a new conflict setting a new contradiction.

And that transformation will require continuing the pluralist process with the aim of generating new pluralistic products.

Because comprehensive pluralism forswears any design to follow a Hegelian path to anything resembling an Absolute Spirit, it is impossible to apprehend the particulars of its dialectical process and product beyond the actual socio-political context in which it happens to unfold. A clash between Catholics and Protestants will necessarily be concretized through a different conflict among different sets of first-order norms than a clash between Christians and Muslims, or between Serbs and Croats, or between Marxists and capitalists. By the same token, a clash between all the above will present comprehensive pluralism with quite a different challenge than would any conflict confined to any one of the aforementioned pairs.

Similarly, *which* second-order norms will have to be called upon to constrain conceptions of the good at war with one another; and *how* these second-order norms should channel the conflicting first-order norms toward a suitable reciprocal equilibrium; will also depend on the particulars of the actual cultures and norms at play. It certainly stands to reason that certain norms that play a key role in liberal approaches, such as tolerance, liberty, equality, and dignity should also figure prominently among the second-order norms activated by comprehensive pluralism's dialectic. It would be a serious mistake, however, to assume that these norms would end up being of a cloth with their liberal counterparts. Actually, the norms in question are likely to differ in their definition and scope even within the confines of pluralism as they must be constantly adapted to the actual first-order norms in conflict that they must confront. A fortiori, appearances of similarities with liberal counterparts may be, more often than not, deceiving as will be made plain through examination of certain concrete examples in the chapters that follow.

#### 1.6. FROM THE MODERN TO THE POST-MODERN AND FROM HOMOGENEOUS TO HETEROGENEOUS SOCIETIES

A key feature that sets comprehensive pluralism apart from liberal theories, such as those of Rawls and Habermas, is its commitment to the priority of the good over the right. I will detail this commitment in the next section but will first address in this section two important related background matters that will allow me to place the claim that comprehensive pluralism is a teleological theory in its proper context. The two matters in question are: first, the relation of the modern to the post-modern, not in its epistemological dimension alluded to earlier<sup>9</sup> but as it emerges from the *participant* perspective of those who experience the prevalent normative order within their polity and, second, the dichotomy between homogeneous and heterogeneous

<sup>9</sup> See *supra*, at 7–8.



societies – and not that between pluralistic-in-fact and non-pluralistic ones – also from the participant perspective of the political actors within them.

To place the following discussion in its proper setting, it is useful to start by mentioning three criticisms of comprehensive pluralism that I seek to refute in this section and the next. The first criticism made by Habermas is that “comprehensive pluralism is not substantive theory, but rather proceduralism in substantive garb” (Habermas 1998a: 405). Elaborating on this criticism, one could claim that the two-pronged dialectic launched by comprehensive pluralism boils down to a purely procedural approach. The first negative moment can be viewed as but a procedure to automatically put all competing conceptions of the good on an equal footing; the second, positive moment, as subjection of all now equalized conceptions of the good to the set bundle of normative constraints mandated by the second-order norms (which though labeled as goods, actually function as rights and correlative duties). Thus, comprehensive pluralism would rely on a proceduralism predicated on equalization and opening the space for a maximum of ordered plurality through subjection to rights-like norms, as contrasted to Habermas’s proceduralism based on open and fair communication combined with universalizability.

The second criticism consists in questioning the soundness of the distinction between the modern and the post-modern in relation to political actors (Arato 2000: 1931; Michelman 2000: 1947–9), and in maintaining further that if post-modernism has in fact displaced modernism, then comprehensive pluralism is bound to collapse into relativism (Michelman 2000: 1959).

The third criticism, in turn, uses the contrast between homogeneous and heterogeneous to question the soundness of comprehensive pluralism’s normative claim that pluralism-in-fact calls for pluralism-as-norm. Indeed, as these critics see it, there can well be a plurality of interests in a society, and yet its political actors might well agree on common principles for all (Id.: 1947). With this in mind, I will now attempt to clarify my conception of the distinction between the modern and the post-modern and that between homogeneous and heterogeneous societies.

#### 1.6.1. *The Modern versus the Post-Modern*

As Michelman points out, the distinction I draw between modern and post-modern societies is an “ideal-typical” one (Id.: 1949). A modern society is thus one in which social cohesion – albeit a tenuous one – is perceived as possible through the maintenance of procedural safeguards, notwithstanding widely diverging conceptions of the good. A post-modern society, on the other hand, is one in which no apparent common ground – procedural or substantive – can emerge above the clash between conceptions of the good, and in which any social order is bound to be considered by significant segments of the population as arbitrary, coercive, and unjust. Consistent

with this, whether a society is modern or post-modern is above all a matter of perception within the relevant society – that is, a matter of self-consciousness. In other words, insofar as it is relevant here, the divide between modern and post-modern must be gauged from the internal standpoint of participants rather than from the external standpoint of observers.

In view of the second criticism, two further points relating to the distinction between the modern and the post-modern must be briefly addressed. First, the conclusion that a particular society was modern at some point in its history need not be questioned solely because subsequently observers can give a cogent account of it in post-modern terms. For example, if participants within a society perceived certain procedural safeguards within their society as neutral among prevailing conceptions of the good, that society would properly be characterized as modern, even if outside observers could persuasively demonstrate that what was believed by participants to be neutral was in fact biased in favor of certain prevailing conceptions of the good as against others.

Second, the fact that a modern society requires rallying around certain procedural safeguards, perceived as transcending the clash among competing conceptions of the good, does not necessarily imply that there must be a consensus over which safeguards should be prevalent. Moreover, the fact in question does not require limiting the relevant procedural safeguards to ones that are purely procedural – or, in other words, entirely devoid of any substantive content. For example, a society would not cease being modern simply because there was a disagreement over whether fairness and greater social cohesion would best be secured through increased liberty or through greater equality. Similarly, a society’s modernity would not be altered depending on whether the procedural safeguards of its basic institutions depended on formal liberty and equality or on a more substantively grounded conception of the two.<sup>20</sup>

<sup>20</sup> Admittedly, the use of “procedural” in the present context is rather broad, and at times can even be misleading. It is certainly not limited to a “pure” or “mere” procedure, such as the flipping of a coin to adjudicate a dispute. Beyond that, the distinction between “procedural” or “process based” and “substantive” is a highly contested one in both constitutional theory, compare, for example, Ely 1980 (arguing that the fundamental rights protected by the Bill of Rights of the U.S. Constitution are essentially process based), with Tribe 1980: 1063 (arguing that the Bill of Rights guarantees substantive rights above all), and in political philosophy (Rosenfeld 1998a :291). Thus, for example, Rawls’s “justice as fairness,” which he characterizes as procedural (Rawls 1971: 120), could just as plausibly be considered as being more substantive than procedural (Rosenfeld 1998a). Strictly speaking, the key distinction is not between “substantive” and “procedural,” but between “neutral” as between competing conceptions of the good and “biased” as between these competing conceptions. Accordingly, if justice depends on contract or democracy it ought to be viewed mainly as procedural, whereas if it depends on enforcement of natural rights it should be considered primarily substantive. However, if contract, democracy, and natural rights were equally neutral as between competing conceptions of the good, then they would all loom as equally suitable for purposes of modern justice. In short, within the perspective of modern societies, if a procedural standpoint is just it must be deemed neutral, and



These last two points can be usefully illustrated by means of a brief reference to the *Lochner* case, which recognized a constitutional “substantive due process” right to freedom of contract.<sup>21</sup> To better appreciate this illustration, moreover, let us set aside questions peculiar to American constitutional jurisprudence – such as those dealing with Framers’ intent issues – and focus instead on the more general question concerning the need for constitutional protection of freedom of contract as a requirement of justice for a modern society. *Lochner* was a 5–4 decision striking down a New York law prohibiting the employment of bakery employees in excess of ten hours per day or sixty hours per week on the ground that it violated the fundamental right to freedom of contract embedded in the federal Constitution. From a modern perspective, this decision can be regarded as just, provided freedom of contract is deemed neutral as between competing conceptions of the good, and fundamental to maintaining a requisite degree of social cohesion in the face of widely diverse aims and interests.

For the dissenting Justices, in contrast, freedom of contract was not essential to basic constitutional justice, but rather the cornerstone of a particular economic vision which a large part of the population did not share. In Justice Holmes’s famous words:

The 14th Amendment does not enact Mr. Herbert Spencer’s social statics ... [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire.<sup>22</sup>

Notwithstanding this conclusion, Holmes did not reject the proposition that liberty as enshrined in the Fourteenth Amendment can rise above partisan politics and become integrated as a pillar of constitutional justice. As he puts it:

I think that the word liberty in the 14th Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.<sup>23</sup>

Significantly, Holmes did not reject the possibility of fundamental principles that are neutral as between the diverse conceptions of the good embraced by Americans. He merely disagreed with the Court’s majority concerning which principles ought to count as truly neutral in the requisite sense. Therefore, both the majority Justices

and their dissenting brethren in *Lochner* held constitutional views entirely consistent with a modern outlook.

From a post-modern perspective, however, all positions articulated in *Lochner* fail the neutrality test and are ultimately reducible to partisan expressions inextricably linked to highly contestable as well as actually contested conceptions of the good. Indeed, even if laissez-faire, or any other economic regime, could be proven to lead to maximization of wealth, it would still fail the previously described test of neutrality. This is because wealth maximization is not a priority for all conceptions of the good and may even plausibly be considered a serious threat to certain fundamental values and objectives linked to certain conceptions of the good. On the other hand, from a post-modern perspective, neither rationality nor fairness nor any single set of traditions is ever likely to rise above divisions over the good in a country as diverse as the United States. Accordingly, from a post-modern perspective, Justice Holmes’s position in *Lochner*, in the end, is as partisan and as tied to particular conceptions of the good as that of the majority Justices.

Acceptance of the post-modern perspective has an important consequence – namely, that the meaning of norms can only be grasped from within the conception(s) of the good from which they issue. Accordingly, no norm transcends particular conceptions of the good, and anyone who becomes aware of this must concede that the norms that he or she embraces cannot be legitimately cast as neutral or universally valid. This does not mean that one should weaken one’s commitment to one’s conception of the good or to the norms derived from it, but it does mean that one has no right to be confident that one’s conception of the good and the norms associated with it would be good or right for others committed to different conceptions of the good. Furthermore, inasmuch as no such confidence is warranted, everyone should become more open to coexistence among a plurality of conceptions of the good.

Acceptance of the proposition that what is good for me is not necessarily good for others is the point of departure of the search for justice within the framework of comprehensive pluralism. Leaving aside, for the moment, whether justice falls within the domain of the good or within that of the right, which will be discussed in Section 1.7, the challenge confronting justice consists in finding a fair halfway point between self and other. Justice cannot fully meet that challenge, however, for that would require total reconciliation of all identities and differences and of the universal, the particular, the singular, and the plural. Under those circumstances, the best that can be hoped for is to inch closer to justice without ever achieving it, through deployment of a dialectic between a disassembling process to ferret out all differences that separate the self from the other and as reassembling or reconstructive process designed to locate knots of identity that would sustain common links between them.

if a neutral standpoint is just, then it must either be procedural or the functional equivalent of a procedural standard.

<sup>21</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>22</sup> *Id.* at 75.

<sup>23</sup> *Id.* at 76.



Viewed as two distinct moments within the same dialectic, the disassembling process focuses on differences between self and other, whereas the reconstructive one concentrates on the identities between the two. From the standpoint of justice, approaching full integration of all identities and differences within a larger whole arising from resolution of the struggle between self and other appears impossible, but achieving certain levels of integration seems quite plausible – at least from a critical counterfactual perspective. And, among plausible levels of imperfect integration, some will undoubtedly be more satisfactory than others. Thus, for example, regardless of the particular identities and differences most at stake in a given struggle between self and other, an attempted resolution of that struggle, which takes into account that the other has his or her own perspective, would, in all likelihood, be less just than one that seeks to accommodate the other in terms of the perspective the other has actually embraced.<sup>24</sup> In short, although all relevant identities and differences cannot be fully or definitely reconciled, and although justice can never be realized, the search for justice remains imperative, and some plausible resolutions of actual conflicts less unjust than others.

Within the ambit of comprehensive pluralism, the preceding conception of justice assumes that self and other, each from his or her own perspective, prefer some accommodation with one another to complete lack of contact. Moreover, this conception of justice also assumes that, in spite of unbridgeable differences, self and other share enough in common that dialogue between them and search for mutual accommodation (even if ultimately unsuccessful) are neither altogether impossible nor utterly futile. That said, however, comprehensive pluralism does not rely on the existence of any common perspective linking self to other, and it emphatically rejects the possibility of “the view from nowhere” (Nagel 1986). Even though self and other may both seek fair means of mutual accommodation, each of them can only do so from the standpoint of his or her own perspective.<sup>25</sup> Accordingly, the impossibility of full justice from the standpoint of comprehensive pluralism stems from the impossibility of at once preserving and transcending the respective perspectives of self and other.

<sup>24</sup> The former kind of justice corresponds to what I call “justice as mere reciprocity,” while the latter kind corresponds to what I call “justice as reversible reciprocity” (Rosenfeld 1998: 249–50).

<sup>25</sup> This last statement is not inconsistent with the commitment to justice as reversible reciprocity, see *supra* note – 24, which requires that the self seek to understand the claims of the other from the perspective of the other. While the latter requirement obligates the self to take into account what it would be like to be in the skin of the other, this can only be done through imagination and projection, which necessarily remain connected to the self’s perspective. For example, I can imagine and empathize with another’s pain – but only through an act of imagination based on recollection of my own pain, as I cannot literally feel any other person’s pain.

#### 1.6.2. *The Contrast Between Homogeneous and Heterogeneous Societies*

Critics of comprehensive pluralism challenge the claim that pluralism-in-fact necessarily makes for a heterogeneous society. Thus, Michelman questions my assertion that the crisis in constitutional interpretation experienced in the United States is only typical of a heterogeneous society and argues that the crisis in question also can be cogently understood in all its relevant respects as that of homogeneous society (Michelman 2000: 1950–1). In this connection, the crucial issue for Michelman is whether principles can maintain their identities under differing sets of applications. If they can, then, in Michelman’s view, even though Americans may disagree vehemently on particular applications of certain constitutional rights, such as those to the free exercise of religion or to equal protection, it would nonetheless be fair to conclude that they widely agree on the broad principles on which these rights are founded (Id.: 1950).

To deal with these issues, it is imperative to keep in mind that the distinction between homogeneous and heterogeneous societies, which is based on the distinction between self and other, is relational, fluid, and contextual, rather than fixed or pertaining to essence. As already noted, the relationship between self and other is in some contexts one between individuals, and in others one among groups. Moreover, a single individual may belong to different selves confronting different others as illustrated earlier in the example of the German Catholic feminist woman. Furthermore, what distinguishes a homogeneous society from a heterogeneous one is that in the former intersubjective dealings are intra-communal, whereas in the latter they are to a very significant degree inter-communal. In other words, in a homogeneous society, there is a strong sense at the group level that the entire society constitutes a single self – albeit that at the individual level most relationships remain best characterized as being between self and other. Conversely, in a heterogeneous society collective dealings, which are societywide – and most likely those that involve different groups without being societywide – are definitely structured as confrontations between self and other.<sup>26</sup>

Given these criteria, it seems fair to conclude that most, if not all, contemporary constitutional democracies – including the United States – are sufficiently heterogeneous that societywide dealings within any of them cannot be cogently regarded as being in all relevant respects intra-communal. Furthermore, inasmuch as modern

<sup>26</sup> Given the contextual nature of the relationship between self and other, societies can span the entire spectrum from completely homogeneous to extremely heterogeneous, with most being partly homogeneous and partly heterogeneous. For our purposes, it suffices to characterize a society as heterogeneous if it divides into self and other over important issues likely to have a significant impact on the realization or maintenance of social cohesion.



societies are heterogeneous,<sup>27</sup> the difference between modern and post-modern heterogeneous societies can be summarized as follows: In both modern and post-modern heterogeneous societies, societywide dealings are inter-communal, but in modern settings the relevant inter-communal norms are deemed fair and neutral among competing, purely intra-communal conceptions of the good.<sup>28</sup> In contrast, post-modern societies would deny the very possibility of finding fair and neutral inter-communal norms to mediate among those who adhere to different conceptions of the good.

Determining whether particular dealings within a heterogeneous society are best characterized as intra-communal rather than inter-communal is not always easy. This is because the nature of the relations involved is not fixed but rather depends on contextual factors that can only be properly assessed in terms of the totality of relevant circumstances in play. Moreover, the appearances surrounding such relations can often be deceiving. In particular, generalized professions of commitment to the same abstract principles may, in certain cases, conceal irreconcilable differences in perspective, which would ultimately undermine any genuine attempt to cast the conflicts involved as intra-communal.

Inter-communal relations can result from encounters among alien cultures, such as liberal Western culture and illiberal non-Western culture, or from a profound split within a particular culture, such as that between fundamentalist Protestants and liberals in the United States or between religious and secular Jews in Israel. It may not always be easy to pinpoint when splits within a culture are serious enough to transform relations within that culture from intra-communal to inter-communal ones. More specifically, in some cases, consensus – or apparent consensus – on broad abstract principles, combined with sharp disagreement on application of such principles, may fall within the ambit of intra-communal relationships; in others, such combinations definitely play out in the context of inter-communal relationships. For example, both partisans and foes of abortion may concur that respect for human dignity is a paramount value. However, to the extent that abortion foes consider abortion to be murder and defenders of the right to abortion consider it essential to a women's dignity, dealings between the two camps would clearly have to be characterized as inter-communal. Moreover, although Michelman's example relating to adherence to the principle of equality may not be as clear, it is certainly plausible that the dispute between supporters of the majority opinion and those of the dissent

in *Plessey v. Ferguson*<sup>29</sup> is better characterized as an inter-communal rather than an intra-communal disagreement. Similarly, some of the vehemence among professed supporters of equality over affirmative action suggest inter-communal rather than intra-communal feuds.<sup>30</sup> In such cases, ideals such as human dignity or equality mean such different things to different people that they share little in common other than their names.

### 1.7. COMPREHENSIVE PLURALISM AND THE PRIORITY OF THE GOOD OVER THE RIGHT

Along the lines of the criticism by Habermas cited previously, Michelman claims that comprehensive pluralism advances a position that, in the end, is much like that elaborated by Rawls in *Political Liberalism*. Michelman's claim depends heavily on the distinction he draws between the "right" and the "good." As Michelman puts it, the right "asks what ought to be done" whereas the good "asks what is of value to a person, group or society" (Id.: 1962). Furthermore, Michelman asserts that even if there were unanimous agreement on the good, questions concerning the right would still be inevitable in relation to issues of aggregation or distribution (Id.).

One may quibble with Michelman's last assertion, for it seems entirely plausible to have a sufficiently elaborated theory of the good, which could quite naturally subsume issues of aggregation and distribution. To take Michelman's own example of a society in which there is universal agreement that glory is the ultimate good for all humankind, it does not necessarily follow, as he claims, that determination of how much glory for whom would have to be a question of the right. Indeed, the theory of the good based on glory could be elaborated to the point that it would prescribe how much glory for whom would best approximate the ultimate good. Moreover, under those circumstances, any person's claim to glory would not be a claim of right but rather one predicated on the conviction that satisfaction of such claim would contribute to realization of the good.

In the context of a homogeneous society operating pursuant to a single, unanimously shared conception of good, there would arguably be no need for the right. Be that as it may, in the context of heterogeneous modern societies, there is an inescapable need for both the good and the right. And this squarely raises the question of priority between the two.

<sup>27</sup> Even though I believe that all modern societies are pluralistic-in-fact, and hence heterogeneous, the argument I pursue here depends only on acceptance that some modern societies are heterogeneous.

<sup>28</sup> This does not necessarily mean that all relevant actors would agree on which particular norms would guarantee fairness and neutrality, but it does imply that they would all agree that it is possible to find some such norms.

<sup>29</sup> 163 U.S. 537 (1896). In *Plessey*, the majority held that "separate but equal" was consistent with equal protection and intimated that racial segregation was in the public good. The dissent deemed state-required segregation unconstitutional and pernicious, given its tendency to perpetuate the notion that African Americans are inherently inferior to whites.

<sup>30</sup> See Rosenfeld, 1989 (discussing the irreconcilable visions of race relations and affirmative action espoused, respectively, by Justice O'Connor and Justice Marshall).



The key to the split between the right and the good in modern societies is found in the pluralization or fragmentation of the good. This is most obvious in the case of pluralist societies with a multiplicity of competing conceptions of the good. In such societies, inter-communal dealings among the various different groups raise issues of distribution that fall within the domain of the right – at least in the sense that, to be fairly resolved, the distribution questions at issue must be considered above and beyond the competing conceptions of the good that divide the polity. Furthermore, the split between the right and the good would also remain important even in a society that shared a single conception of the good at the collective level, but that allowed each individual, to a significant extent, to pursue his or her own good consistent with that conception.

In any setting in which there is a multiplicity of conceptions of the good or a fragmentation of the good, there seems to be a need for coexistence between the right and the good. Moreover, inasmuch as the right can ascend above the conflict among conceptions of the good or the competition among individuals who seek to reach their own perceived good – or, in other words, inasmuch as the right can secure neutrality in relation to the conflict or competition in question – the right ought to receive priority over the good. Conversely, so long as the problems resulting from pluralization and fragmentation of the good can best be dealt with terms of a more encompassing conception of the good, the good ought to receive priority over the right.

Comprehensive pluralism emerges in the context of clashes among competing conceptions of good which do not lead to any fair or neutral resolution under any plausible conception of the right as having priority over the good. Indeed, although it shares with Habermas and Rawls the goal of fostering reciprocity among self and other, comprehensive pluralism parts company with them precisely because, as already pointed out, the reciprocity they promote from the standpoint of the priority of the right inherently favors certain conceptions of the good over others. Thus, the key question confronting comprehensive pluralism is: How can the normative impasse, stemming from the inability to overcome the clash among competing conceptions of the good by appealing to inter-communal norms predicated on the priority of the right, be adequately resolved?

The answer provided by comprehensive pluralism is that the only way out of the normative impasse in question is through counterfactual imagination of a community of communities, which would incorporate the various conceptions of the good associated with the different existing communities dialectically into a more broadly encompassing conception of the good. Moreover, consistent with its Hegelian underpinnings, comprehensive pluralism regards this community of communities as a whole seeking to incorporate the conceptions of the good emanating from the various existing communities that are its parts. To be sure, this projected community of communities remains ultimately counterfactual and retains the quality of a

work in progress. Also, it incorporates existing conceptions of good not on their own terms, but as reconceived from its more encompassing perspective.

Although mediation between the norms of the community of communities (second-order norms) and the norms of the individual community (first-order norms) requires reliance on the right, comprehensive pluralism clearly depends on the priority of the good over the right. Actually, structurally speaking, comprehensive pluralism shares much in common with a certain plausible version of utilitarianism. Utilitarianism as discussed in Section 1.3 can be conceived as resolving all normative questions by reference to the good, thus dispensing altogether with the right. However, another plausible conception of utilitarianism could stipulate that the individual is the best judge of what is good for her, and thus to the extent that the individual good figures in the determination of the greatest good for the greatest number, it would make sense to carve out some rights to allow each individual some space to discover and pursue what is good for her. In this conception of utilitarianism, the good is still prior to the right, but the latter plays a significant role that contributes to the overall good. In such a utilitarian vision, the individual good figures in the collective good and requires the right for its protection. Similarly, in the context of comprehensive pluralism, the good targeted through vindication of second-order norms depends on protection of first-order norms, which requires a certain degree of reliance on the right. Furthermore, in the utilitarian ethos, questions about proper limitations on the pursuits motivated by the good of the individual or about proper constraints on rights must be resolved in terms of the overall collective good (i.e., the greatest good for the greatest number). Likewise, in the normative universe carved out by comprehensive pluralism, limits on the vindication of first-order norms and proper delimitation of the domain of the right must be made in terms of the vision of the good projected by the totality of second-order norms. In sum, like utilitarianism, comprehensive pluralism is a teleological rather than a deontological theory. The crucial distinction between the two, however, is that they prescribe sharply different conceptions of the good. Whereas utilitarianism is concerned with maximizing utilities, comprehensive pluralism embraces a vision of the good predicated on the greatest possible accommodation of diverse conceptions of the good consistent with promotion of a reciprocal equilibrium between self and other.

Consistent with this, when properly viewed in its full dialectic dimensions, comprehensive pluralism is both substantive and non-neutral. It does not rely on agreement, consensus, or universalizability. It seems to carve out the largest possible space for the concurrent pursuit of the maximum possible number of perspectives and conceptions of the good. But in the course of this pursuit, comprehensive pluralism requires different prices of admission for different conceptions of the good, trampling heavily on some of them while imposing slight burdens on others. Comprehensive pluralism's good (as embodied in its second-order norms) is parasitic on all other conceptions of the good, for without even the potential of a conflict



among first-order norms gauged from different perspectives, comprehensive pluralism would become meaningless. So long as conflicts among competing conceptions of the good are prevalent, however, comprehensive pluralism sets out to be as inclusive as one could imagine and ends up standing against all of the conceptions of the good that vie for admission. In sum, comprehensive pluralism's ideal is a community of communities, but consistent with its Hegelian heritage, it can only integrate the communities it seeks to preserve by forcing upon the latter uneven burdens and limitations in the name of the greater good of which they are intended to become an integral part.

### 1.8. COMPREHENSIVE PLURALISM AND RAWLS'S POLITICAL LIBERALISM

Upon realizing that his conception of justice as fairness embodied in the two principles of justice articulated in *A Theory of Justice* did not properly account for the plurality of comprehensive views present in typical contemporary societies, Rawls set out to remedy this problem by shifting his focus from comprehensive to political justice in *Political Liberalism* (Rawls 1993: 59–60). By thus retreating and confining the quest for justice of the basic structure of society and of its constitutional essentials to the political sphere, *Political Liberalism* grounds justice on an “overlapping consensus” (Id.: 15) that allows for full inclusion of a plurality of comprehensive views<sup>31</sup> that differ on morals and ethics so long as these views come within the sweep of what he calls “reasonable pluralism” (Id.: 64). Moreover, Rawls continued to work till the end of his life on making his conception of political justice ever more inclusive of a wider range of plurality. Accordingly, the last version of Rawls's theory, first published in 1997 was, according to him, capable of accommodating all major Western religions, Catholicism, Protestantism, Judaism and Islam,<sup>32</sup> only excluding fundamentalism (Rawls 2005: 438).<sup>33</sup>

<sup>31</sup> Rawls's conception of a “comprehensive view” is in essence the equivalent of what I would characterize a “comprehensive conception of the good.” As I understand it, a comprehensive conception of the good is systematic and accounts for the entirety of the normative universe. From the standpoint of comprehensive pluralism, in contrast, a conception of the good need not be comprehensive to be entitled to as much consideration and inclusion as its comprehensive counterparts. For example, those who join together to run a worldwide NGO to promote environmentalist goals presumably do not have a common position on religion or personal morality. They are thus unlike the Catholic religion which is comprehensive in its normative vision.

<sup>32</sup> This does not imply that the latest version of Rawls's theory could not also include Eastern religions such as Buddhism or Hinduism, only that Rawls was not sufficiently familiar with them to opine on the matter.

<sup>33</sup> Rawls's last version of his position was first published in 1997 in the *Chicago Law Review* (Rawls 1997) and then reprinted posthumously in an expanded edition of *Political Liberalism* (Rawls 2005). All references in this book are made to the latter source.

It certainly seems that Rawls's last revised conception of political justice, overlapping consensus, and reasonable pluralism shares much in common with comprehensive pluralism. Michelman asserts that, in the end, there are no relevant differences between the two (Michelman 2000: 1959). And, admittedly, when viewed in the broadest terms there seems to be a remarkable analogy between Rawls's overlapping consensus and comprehensive pluralism. Within Rawls's sphere of political justice, the same set of norms is applicable to everyone; beyond that sphere, a large plurality of norms can coexist legitimately without threatening the justice or fairness of basic institutions. Similarly, comprehensive pluralism seems to divide into a core and a periphery, with commonly shared second-order norms operative at the core, and diverse first-order norms competing at the periphery.

Upon closer examination, however, and particularly if one does not lose sight of comprehensive pluralism's Hegelian underpinnings, the analogy between Rawls's overlapping consensus and comprehensive pluralism breaks down. In the first place, as will be briefly considered later, Rawls's last conception of overlapping consensus is far less pluralistic than he claims. In the second place, Rawls's deontological conception, even if he had taken it farther than he did at the end of his life (or if someone else now ventured along that path) could never be as encompassing of plurality as a teleological theory, such as comprehensive pluralism, which places fostering pluralism as extensively as possible as the top priority within the realm of the good. As I will seek to prove, the differences between Rawls's overlapping consensus and comprehensive pluralism far outweigh the similarities between them, both from the standpoint of theory and from that of practice.

Rawls's last revision of his theory does not go as far as he claims primarily because to be included within the realm of “reasonable pluralism,” a comprehensive view must consent to being bound by justice as fairness or a close equivalent within the political sphere. Rawls does not veer an iota from his allegiance to the priority of the right over the good, but he does depart from his requirement in the initial version of *Political Liberalism* that comprehensive views worthy of inclusion must adhere to justice as fairness. They can deviate, but the margin that Rawls allows for that is quite narrow.

As he specifies,

Political liberalism ... does not try to fix public reason once and for all in the form of one favored political conception of justice. That would not be a sensible approach. For instance, political liberalism also admits Habermas's discourse conception of legitimacy ... as well as Catholic views of the common good and solidarity when they are expressed in terms of political values. (Rawls 2005: 451–2)

As we have already indicated, shifting from Rawls's conception of justice to Habermas's may alter the final configuration of inclusions and exclusions, but does



not change much in terms of imposing on all conceptions of the good involved a right that is biased *ex ante* against some of them.<sup>34</sup> Moreover, presumably the Catholic values that Rawls has in mind are those that relate to social solidarity and to concern for the welfare of the poor, which can easily be incorporated within the precincts of the liberal vision, unlike, for instance, the Catholic stance on abortion or homosexuality.

Rawls's move from *A Theory of Justice* to *Political Liberalism* does make for accommodation of greater plurality. Those comprehensive views that cannot accept liberalism at the comprehensive level but can live with it if it is confined to the domain of the political can indeed find room within the revised Rawlsian normative universe. And, significantly the dichotomy between the moral and the political that this type of accommodation entails seems to fit quite naturally with Christianity's split between the realm of God and that of Caesar, but not with Judaism or Islam where no such split is recognized (Wallace 2009: 26–33).

Does Rawls's additional move to incorporate theories of political justice other than justice as fairness further expand plurality beyond opening the door to those like Habermas who are already firmly implanted in the liberal camp? The answer is most likely in the negative as it is hard to imagine that those whose comprehensive views are in conflict with liberal political justice (of whatever stripe) would willingly consent to be bound by it.

Take the example of equality between the sexes. It is undoubtedly fundamental to justice as fairness, to Habermas's discourse theory of justice and, at least in principle, to all contemporary conceptions of liberalism.<sup>35</sup> Moreover, equality between the sexes is a matter of political justice, which must be incorporated in the liberal polity's basic structure and in its constitutional essentials. It is most unlikely, however, that several non-fundamentalist branches or denominations of Christianity, Judaism and Islam would agree to be bound in the realm of politics to any liberal conception of gender-based equality. One need only consider a few examples, such as Jewish divorce law as interpreted by Orthodox Judaism (Esther Rosenfeld 1995) or property or inheritance law under the Shariah (Radford 2000), to realize that these deny basic equality rights to women under any conception of liberalism. Furthermore, since neither Judaism nor Islam draws any firm lines between the religious, the moral, and the political, there would be no reason for them to agree to be bound by liberal political justice, except if necessary to their survival as members of

minority religions in liberal polities. But in that case, the accord involved would be in the nature of a "modus vivendi," and not of an "overlapping consensus." Finally, substantial arguments can be mounted in support of the claim that many existing non-fundamentalist interpretations of Christianity and the practical consequences that follow from these would also run afoul the minimum requirements of liberal equality between the sexes or relating to sexual orientation (Fineman 2004: 131).

Consistent with these observations, Rawls's claim that Christianity, Judaism, and Islam can find room within his reasonable pluralism is highly exaggerated, if not downright misleading. It would be more accurate to assert that certain branches or denominations of these religions, such as Reform Judaism and mainstream American Protestantism or Anglicanism, all of which have already incorporated essential liberal tenets within their normative visions, would willingly subscribe to a Rawlsian overlapping consensus. But that would not be because Rawls's expanded conception of liberal political justice, but because these religious conceptions have already internalized key liberal values. In this respect, it is quite noteworthy that Rawls refers to an early version of Islam that supposedly interpreted Shariah as providing for equality between men and women, but which has not been prevalent for most of Islam's history, as lending support to his conclusion (Rawls 2005: 461, n. 46). Unfortunately for Rawls, the very consideration of this example leads most naturally precisely to the contrary conclusion that, for the most part, contemporary Islam cannot be included within reasonable pluralism.

Let us now turn briefly to the second main reason identified earlier why the apparent analogy between comprehensive pluralism and an overlapping consensus does not hold, for the most part, under close scrutiny. In a word, as already stressed in the course of the previous analysis, there is an unbridgeable gap between Rawls's deontological approach and the brand of dialectically grounded teleological position espoused by comprehensive pluralism. This is vividly illustrated by the case of fundamentalist religion that Rawls concludes cannot be included within the ambit of reasonable pluralism. Comprehensive pluralism, in contrast, is inclusive *ex ante* and accommodating *ex post* of fundamentalist religion – especially if it is non-belligerent – as it commands that efforts be made to "feel" and understand such religion from "within" and to provide, to the extent possible, consistent with the requirement of reciprocal equilibrium for the satisfaction of its needs and the realization of its aspirations. Also, at the same time, comprehensive pluralism remains indifferent concerning whether fundamentalist religion would freely accept under any circumstances to live by the requirements flowing from a set of second-order norms. As a matter of fact, comprehensive pluralism fully justifies imposing *its* conception of the good, as embodied in its second-order norms, on everyone, including proponents of religious fundamentalism. In the end, this is but another way of expressing comprehensive pluralism's core imperative in the pursuit of *it* own

<sup>34</sup> See *supra*, at 32–33, 35.

<sup>35</sup> This is true even in light of feminist critique of liberalism, such as those mentioned earlier. See *supra*, at 35. In other words, liberalism postulates equality between the sexes but may fall short either in successfully discarding certain remnants of illiberalism or in embracing policies that can successfully translate equality in theory into equality in practice, or it may even fall short on both counts. Be that as it may, all versions of liberalism require that all accept that men and women are inherently equal.



conception of the good, namely, its goal of establishing the community of communities. To encapsulate it in a slogan: “include, understand and accommodate the *inconsistent*, but impose on, and fight against, the *incompatible*.”

Even conceding that comprehensive pluralism differs from an overlapping consensus in the ways detailed previously, a Rawlsian may still insist that comprehensive pluralism amounts to a comprehensive view in Rawlsian terms, and that it satisfies the criteria of “reasonable pluralism.” Consistent with this, moreover, whatever relevant differences there may be between comprehensive pluralism and justice as fairness or any of the other conceptions deemed legitimate by Rawls would lie beyond the realm of political justice.

Notwithstanding the palpable appeal of the preceding argument, comprehensive pluralism ultimately fails to satisfy the Rawlsian requirements regarding “reasonable pluralism,” for both philosophical and practical reasons. From a philosophical standpoint, even in the absence of any practical differences, the mere fact that comprehensive pluralism prescribes the priority of the good over the right in the realm of political justice suffices to disqualify comprehensive pluralism from inclusion in the requisite Rawlsian overlapping consensus. Indeed, unless one can prove the existence of a fixed coincidence between the good prescribed by comprehensive pluralism and the right circumscribed by justice as fairness or its alternatives recognized by Rawls, it is always possible that comprehensive pluralism will legitimate institutional arrangements that are incompatible with the dictates of any of the theories of the right sanctioned by Rawls. In this sense, comprehensive pluralism is no different from other teleological theories, such as utilitarianism. Accordingly, just as the implementation of criteria of justice acceptable to Rawls would not always be consistent with maximizing utilities – and even if they were, this would be impossible to ascertain ex ante – so, too, it would not always be consistent with the good as dialectically articulated in accordance with the normative guidelines imposed by comprehensive pluralism.

From a practical standpoint, on the other hand, comprehensive pluralism parts company with justice as fairness, along with all other liberal theories of justice, insofar as it does not privilege individual-regarding claims over group-regarding ones. Although the issue of whether a particular group-regarding claim would prevail over a competing individual-regarding claim is always context-specific within comprehensive pluralism, as will be more fully addressed in Chapter 3, there are certainly significant cases in which group concerns would be entitled to priority. This would occur when the centrality of the relevant group right in relation to that group’s conception of the good was palpably greater than the centrality of the competing individual right in relation to that individual’s conception of the good. Thus, comprehensive pluralism would require a comparative weighing of the competing claims in terms of the respective perspectives on the good involved, in ways that

seem altogether incompatible with the lexical priority of the right over the good prescribed by Rawls.

Because what comprehensive pluralism prescribes in specific cases is very much context dependent, further specification of its functioning and potential is best postponed till consideration of the particular issues that will be addressed in the following chapters. Before proceeding, however, there is one point that warrants further clarification. The assertion that comprehensive pluralism is ultimately agnostic among individual-regarding goods and rights, on the one hand, and their group-regarding counterparts, on the other, and that, under certain circumstances, it would give priority to group-regarding goods over individual ones may appear to repudiate individualism which is not only inextricably linked to pluralism, but also key to the passage from the Middle Ages to the modern period.<sup>36</sup> If the group can prevail over the individual, does that foreshadow a return to an earlier age where the individual could only fit as a part of a larger collective whole?

Comprehensive pluralism does treat the individual as the equal to the group and not as its subordinate. The individual is an autonomous self, who has a perspective and a conception of the good, and so is a group that engages in the pursuit of normative ends. Moreover, the actual conception of the good of every individual is entitled ex ante to the same consideration as that of every other individual or group with the characteristics mentioned earlier. Comprehensive pluralism does not look backward; it looks forward, but forward in a dialectical way. In the struggle for differentiation from the Middle Ages, it became normatively imperative to put the individual ahead of the group. Given the shortcomings of liberal individualism that have emerged over time as discussed previously, however, it is now necessary to place the individual and the group on an equal normative footing. Indeed, in this increasingly concurrently globalized and balkanized world, the individual can seemingly best pursue self-realization through the group and against it – or, more precisely through and against a plurality of groups from which and through which that individual develops a distinct sense of self by weaving together elements drawn respectively from poles of identity and from poles of differentiation.

<sup>36</sup> See *supra*, at 24.