

**Rawls, self-respect, and assurance:  
How past injustice changes what publicly counts as justice**

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**Abstract**

This article adapts John Rawls's writings, arguing that past injustice can change what we ought to publicly affirm as the standard of justice today. My approach differs from forward-looking approaches based on alleviating prospective disadvantage and backward-looking historical entitlement approaches. In different contexts, Rawls's own concern for the 'social bases of self-respect' and equal citizenship may require public endorsement of different principles or specifications of the standard of justice. Rawls's difference principle focuses on the least advantaged socioeconomic group. I argue that a historicized difference principle (i) considers the relative standing of racial, gender, and other historically stigmatized groups, (ii) provides their members assurance by weakening incentives to manipulate justice to another group's advantage, and (iii) may result in policies resembling reparations, though justified by forward-looking considerations of self-respect and public assurance. I then examine how disrespectful justifications were historically used to forcibly include indigenous peoples as citizens. While Rawls thinks providing citizens one package of basic liberties signals respect, indigenous self-government could better support self-respect. I invoke Rawlsian international justice, which calls for mutual respect between peoples. Indigenous peoples' status should reflect their past and persisting peoplehood, providing assurance by weakening incentives to unjustly transform international into domestic contexts.

**Keywords**

Historical Injustice; Reparations; Rawls; Self-Respect; Indigenous Peoples; Difference Principle

[Penultimate version]

## Introduction

How does the past matter for justice? Many egalitarian or egalitarian-leaning theories of distributive justice have a forward-looking orientation, treating the past as not fundamentally mattering for justice.<sup>1</sup> They hold that the justification for addressing a disadvantage is not strengthened simply because it was caused by a major historical injustice: the original victims and perpetrators are dead, and it is present and future individuals who matter. At most, reparations for historical wrongs might be permissible only if they do not conflict with prospective distributive justice (Wenar, 2006).<sup>2</sup> John Rawls's domestic theory of justice, as typically interpreted, is a paradigmatic example of this first approach.<sup>3</sup>

Many advocates for reparations often adopt a second approach, arguing that backward-looking duties, such as honoring existing promises and respecting historical entitlements, have significant importance independent of prospective distributive justice. They often use Robert Nozick's entitlement theory of justice to argue for returning land to Native Americans, or giving descendants of slaves the money they would have inherited had their ancestors been paid a fair wage.<sup>4</sup> For Nozick, great inequalities may permissibly arise through a series of just steps or rectification of unjust ones (Nozick, 1974: 154); the justice of a distribution depends on its history (Nozick, 1974: 151-152).<sup>5</sup>

The *content* of Nozick's principles looks backward. But his theory's *form* does not change with history: the validity and content of Nozick's principles remain the same before and after the occurrence of historical injustice. Theories in the first approach, and many 'third way' theories, also have a historically invariant form.<sup>6</sup> I argue for a different

approach: past injustice can change what we ought to be willing to *publicly affirm* as a standard of justice.<sup>7</sup>

To show this, I use and adapt<sup>8</sup> Rawls's widely known writings on justice. Rawls's argument for his principles of justice relies partly on the public message of respect they convey. In different contexts, Rawls's own concern for what he calls the 'social bases of self-respect' may require the public endorsement of different principles of justice or different specifications of the standard of justice. A context of historical injustice can change the message a principle of justice can reasonably be said to express. If it does, then we may need to revise our construction of justice in light of the past, albeit still guided by general and recognizably forward-looking considerations of assurance and supporting self-respect.

In sections 1 and 2, I focus on Rawls's domestic theory of justice, where the lodestar is equal citizenship. In section 1, I argue on Rawlsian grounds that assuring equal citizenship may become more difficult following past injustice. In a Rawlsian well-ordered society, it would be publicly known that all abide by the principles of justice. Without this public knowledge, the social bases of self-respect are undermined, and society cannot be well-ordered. After past denials of equal citizenship, it can be harder to assure historically stigmatized groups of society's commitment to securing justice.

In section 2, I discuss how, after past injustice, assurance may take the form of constructing justice in new ways and publicly adopting different principles of justice. Assuming Rawls's other principles of justice are met, Rawls's difference principle normally assesses the justice of the basic institutional structure of society based on whether it tends to be to the greatest advantage of the least advantaged group, defined in terms of

wealth and income. I argue that the justice of society's basic institutional structure should also be judged with reference to the relative positions of racialized, gender-based, and other historically stigmatized groups, following a history of officially disrespecting such groups. A historicized difference principle is concerned to provide extra assurance to these groups, which might take the form of a concern for gaps between their standing and the standing of other groups. Additionally, the historicized difference principle is concerned to avoid incentives to manipulate justice to groups' advantage. Assurance could take a form looking like reparations, but its rationale would not refer to historical entitlements. I end section 2 by arguing that past injustice can change the principles of justice, not merely the temporary measures required in transitioning to a just society.

In section 3, I argue that past injustice can require moving beyond the lodestar of equal citizenship, examining how a Rawlsian concern for self-respect and assurance might apply to indigenous peoples. In sections 3.1 and 3.2, I first entertain an argument that indigenous self-government properly supports their self-respect as individual citizens, given a particular history. Rawls claims that providing all citizens with the same package of basic liberties will normally support the self-respect of citizens. However, indigenous peoples have often faced attempts to coercively destroy their existing societies and make them into mere individual citizens. Accompanying these attempts were disrespectful justifications denying the worth of the ways of life they had chosen and the societies they had built. Due to this history, affirming equal basic liberties might not affirm self-respect for indigenous peoples, but recall the stigmatizing messages associated with this past. The appropriate social bases of self-respect may change with history and now involve recognition of indigenous self-government.

However, in section 3.3, I ultimately argue that this line of argument is incomplete, as its focus on individuals suggests self-government is an unfortunate situation to be overcome. For reasons of assurance, the status of indigenous peoples should be thought of with reference to an international framework of justice. In Rawls's writings on international justice, peoples ought to accord mutual respect to other peoples, and the difference principle does not apply. I highlight that it may be advantageous for a party to unjustly transform an international context into a domestic context, so as to benefit from the differences in how justice is constructed in each of these contexts. I argue it would signal disrespect to indigenous peoples if unjust cross-context transformations were too easy. To provide assurance, indigenous peoples should be seen with reference to their past and persisting status as peoples. A past unjust transition from the international context of justice can affect what should be publicly affirmed as the standard of justice today.

### **1. Self-respect, assurance, and past denial of citizenship**

Rawls assesses the justice of the basic institutional structure of society by the possession of resources, or social primary goods, such as income and wealth, basic liberties, and opportunities. Rawls refers to the social bases of self-respect as perhaps the most important social primary good (1971: 440).<sup>9</sup> The actual realization of self-respect as an attitude toward oneself is not what counts as a social primary good (Rawls, 2001: 60; cf. Eyal, 2005: 204). What counts are 'those aspects of basic institutions normally essential if citizens are to have a lively sense of their worth as persons and to be able to advance their ends with self-confidence' (Rawls, 2001: 59). For Rawls, the social bases of self-respect include (1) that citizens have equal basic rights, (2) that there be a public recognition of (1),

and (3) that there be public recognition of the fact that everyone endorses the difference principle (Rawls, 2001: 60). It is important not only that certain institutions exist, but that there be a public political culture in which it is publicly known that everyone accepts the principles of justice (Rawls, 2005: 181).

The social bases of self-respect are thus importantly tied to public recognition of the status of equal citizenship for all (Rawls, 1971: 545). Rawls discusses how this is the case for each principle of justice (Freeman, 2007).<sup>10</sup> Public affirmation of equal basic rights expresses citizens' mutual respect as reasonable and trustworthy enough to take part in the political process; it also recognizes that each sees worth in her own way of life (Rawls, 2005: 319). If, contrary to the opportunity principle, positions are not open to all, the message is sent that certain persons cannot possibly fill, say, positions requiring complex skills. Forms of hierarchy should be limited to secure the self-respect of the least advantaged (Rawls, 1971: 84; Freeman, 2007: 94). Public affirmation of the difference principle expresses solidarity, assuring that gains to some will redound to the benefit of all. Fair terms of cooperation are to be determined in accordance with an idea of reciprocity, as embodied by the difference principle (Rawls, 1971: 105; Rawls, 2001: 122-124; cf. Taylor, 2011: 233). The least advantaged need not worry that others will use their advantaged position in society to change the rules so as to disadvantage them further.

Publicity, reciprocity, and assurance are important parts of this account. Reasonable persons are willing to abide by fair terms of cooperation, *provided* they can rely on others to do the same (Rawls, 2005: 52-53). Accomplishing the aims of justice requires coordinated action on the basis of a view officially adopted by a political community, not each person acting independently according to what she thinks justice requires (Christiano,

2008: 54).

Even when everyone is moved by a sense of justice, we still need public assurance that others will cooperate; this can require the threat of public coercion against those who might not do their part out of weakness of will or uncertainty that others will do their part.<sup>11</sup> To be legitimate, the use of coercive public power must be justifiable to others. If individuals accept coercion merely as a result of their inferior political or social position, this undermines their self-respect as free and equal persons. They would be dependent on others, not free.

Part of justice is the securing of the social bases of self-respect; this requires that all have a publicly recognized status as free and equal persons. In a democratic society, individuals are not merely recipients of justice; they also take part in shaping the laws. The public adoption of the principles of justice provides a common basis by which citizens can reciprocally make claims on each other in a way that conveys mutual respect as free and equal citizens (Freeman, 2007: 187-188). Citizens are independent, and need not depend on others to look after their interests; no one need be subservient to the will of another (Freeman, 2007: 187). At minimum, individuals must be able to see, without an impossible or unreasonable amount of effort, that they are treated justly (Christiano, 2004: 270).

### **1.1. The example of the Confederate battle flag**

The following example is a first step to showing the relationship between assurance, past injustice, and the social bases of self-respect. The presence of a Confederate battle flag on a U.S. state flag would plausibly undermine the social bases of self-respect.<sup>12</sup> Suppose that African-Americans in a particular state were to interpret this as celebrating a racist

history of white supremacy. This would be a reasonable reaction, given the symbol's history: it was used as a Civil War battle flag for the slave-holding South and was incorporated into many official state flags during the struggle against school desegregation. The historical origins of the symbol and its re-adoption were closely connected with denying African-Americans full citizenship. This interpretation, although controversial, thus differs from someone who believes she was abducted by aliens and sees a flag as evidence of alien domination. What matters is not just subjective fear, but reasonable distrust given past history.

Flag-supporters could say they are celebrating Southern heritage, not intending to disrespect and dominate African-Americans. They could perhaps see their own support in this light and believe they are not racist. It is perhaps possible these citizens *do* generally vote for policies they believe align with the principles of justice. But the social bases of self-respect, on the Rawlsian account, also include the larger political culture, and what is *publicly known*. Private commitment is not enough. In a well-ordered society (or its near approximation),<sup>13</sup> it has to be publicly known that people affirm the principles of justice.

Thus, even if African-Americans do in fact have access to a just share of goods and rights, it would be understandable if they did not feel secure in this access. In a very real sense, this insecurity means that they lack some of the goods justice is meant to provide. They suffer from official disrespect by the state, as the state has a responsibility not only to respect rights but also to make it publicly known that it will do so.<sup>14</sup> Due to the flag's presence, African-Americans may understandably feel less able to effect change in the political arena and think their interests in living their own lives are not taken into account. They may withdraw from politics, thinking their efforts cannot make a difference, and

suffer a loss of self-respect. This is similar to how socioeconomically disadvantaged individuals might withdraw from politics because of great wealth inequalities (Freeman, 2007: 132-133).

This may occur even if the government with the Confederate battle flag happens to otherwise enact policies in accord with the principles of justice, whether accidentally or through a non-transparent commitment to those principles. Justice must be done and seen to be done. Suppose that a debtor deposited what he owed into a creditor's account, but because of the volume of transactions, the creditor could not verify the payment. Justice would be deficient in at least one respect (Christiano, 2008: 49). Conditions of complexity make it difficult to know that the demands of justice have been met.

It must be possible, with a reasonable amount of effort, to see that others are committed to justice (cf. Christiano, 2004: 270). Past history can change what types of efforts it is reasonable to expect, how easy it is to ascertain this, and what types of assurance are required.

## **1.2. The conversion of a 'democratic' public**

Now suppose a scenario where the franchise has historically been restricted to members of a majority, and the government has historically discriminated against an outcast group. Members of this group were not treated as full and equal citizens who could help formulate laws or whose interests in living a life should be adequately taken into account in the formulation of these laws.

Members of the outcast group were stigmatized and publicly proclaimed to be unfit for full citizenship. No person can have the primary good of self-respect as a free and equal

citizen if one is subject to coercive public power due to one's inferior social or public status (Rawls, 1999b: 14). Each citizen has an interest in having an equal public standing recognized by the institutions of society.<sup>15</sup> At the extreme, slaves were not counted as persons at all (Rawls, 2005: 35). Even those with income and wealth can have their self-respect affronted by social institutions that do not respect them as full members of society because of their membership in a group (McGary, 1999: 114; Freeman, 2007: 153).

In the recent past, members of the majority come to view themselves as newly enlightened. They end restrictions excluding the outcast group from voting, giving them the franchise and formal liberties. Still, what assurances do the minority have that the majority of citizens will act honestly on liberal democratic principles and at least take into account their interests and opinions?

One possible answer is that it suffices to publicly repudiate past injustices and to affirm the same principles that would be appropriate for a well-ordered society in which injustice had never occurred. Rawls says 'our sense of our own value, as well as our self-confidence, depends on the respect and mutuality shown us by others. By *publicly affirming* the basic liberties, citizens in a well-ordered society *express* their mutual respect for one another as reasonable and trustworthy, as well as their recognition of the worth all citizens attach to their way of life' (2005: 319, emphasis added). Rawls's argument is importantly tied not only to society providing the basic liberties for everyone, but also to the message of mutual respect such provision expresses. Rawls may be right that in a context where there has not historically been a denial of equal liberties, 'publicly affirming' the basic liberties does 'express' mutual respect in a way publicly knowable to all (2005: 319). But since the social bases of self-respect involve the public knowledge of such mutual respect, failure to

adequately express this to some would mean that this important primary good is not provided to all.<sup>16</sup>

Attempting to express respect by affirming the basic liberties may not necessarily succeed in a context where they have historically been denied. The same act can express different messages in different contexts, and thus might not amount to the same act (Hill, 1991). Indeed, it may only be possible to show sincerity in rejecting the past by taking affirmative action beyond words of repudiation. What needs to be considered is how mutual respect for others as equal citizens can be expressed and how repudiation of the past can be seen as sincere, given a history of disrespecting members of a group and conferring upon them a status as less than full citizens.

## **2. Demonstrating commitment: the historicized difference principle**

This concern for providing assurance in the wake of historical injustice can lend force not only to policies and principles that otherwise would not have such force—this much is well-known from debates about affirmative action—but can also *lead to different ways of constructing justice and specifying the public standard of justice*. In Rawls's construction of the original position, parties behind the veil of ignorance choose principles for a well-ordered society where injustice is assumed not to have occurred (Shelby, 2004: 1698).<sup>17</sup> As Mills (2007) has said, justice might need to be constructed differently in non-ideal contexts where injustice has occurred; theories like Rawls's, when constructed on the assumption that such injustice did not occur, might not be relevant in such contexts.<sup>18</sup>

We can imagine that in an ideal well-ordered society, where large-scale discrimination had never occurred (indeed where race itself did not exist), there is no

specific need to focus on how disrespect has racial and supra-individual aspects (Mills, 2000: 458-459). But, as Michele Moody-Adams notes, when widespread discrimination has been rooted in dehumanizing racial fictions, it can have a negative effect on the self-respect of group members (1995: 276). If justice in ideal circumstances is not concerned with such social attitudes, theorizing about justice must acknowledge them now. The inquiry does not end simply because official and quasi-official actors no longer actively convey that message. Stigma has a long half-life. When state institutions have promoted the idea that certain citizens are unworthy of respect, these institutions must act affirmatively to correct for the legacy left behind. While Rawls's principles might well convey respect in a society without a history of racial disrespect, more may be required in a society with a memory of that history.<sup>19</sup> This is not owed to any citizen simply because they have a subjective fear or lack self-respect; rather, history creates a special obligation to support the self-respect of, and publically assure, citizens in new ways not normally required.

One possibility is that the government or citizenry might demonstrate a commitment to justice by affirming a historicized difference principle concerned not simply with the standing of the least advantaged (socioeconomic) group, but with the standings of groups previously denied equal citizenship.

If members of a historically oppressed group disproportionately occupy the bottom rank, is that a problem for justice? If different basic structures could be selected so that such inequalities between groups could decrease, at little or no cost to the level of the least advantaged socioeconomic position, would it be permissible to change to this new basic structure?

A non-historicized difference principle would answer ‘no’. As long as principles of justice are fulfilled, it does not matter which particular individuals occupy which slots. Similarly, it does not matter if the particular individuals in the bottom rank are disproportionately members of historically stigmatized groups, so long as the difference principle holds and everyone has fair equality of opportunity. For Rawls, part of the social bases of self-respect is that it is known that everyone supports the difference principle, a form of reciprocity (Rawls, 2001: 60). However, it is hard to see how there could be reciprocal and public endorsement of a difference principle, if it is interpreted as allowing a switch between two otherwise equally just basic structures simply because it advantaged a particular party. It hardly accords with public reason for me to say we should switch basic structures, not to improve justice, but simply to improve *my* position at the cost of someone else, with no structural change.

In contrast, I explore two ways to historicize the difference principle: one concerned with assuring members of previously stigmatized groups that they are being treated justly, and a second concerned with avoiding encouraging injustice.

### **2.1. The historicized difference principle I: average group standing as assurance**

Rawls says that it typically suffices to assess the justice of a social system from two standpoints: the position of equal citizenship and a position defined by one’s place in the distribution of income and wealth (Rawls, 1971: 96, 99). A past denial of equal citizenship may require us to add the standpoint of being a member of a group historically denied equal citizenship. This can lead to extra assurance being owed to members of historically stigmatized groups, assurance not owed to members of groups defined in random or non-

salient ways.

If members of historically stigmatized groups, like African-Americans and women, consistently end up near the bottom, there could be a suspicion that the principle of fair opportunity is not fulfilled or that inequalities are not really to the maximum advantage of the least advantaged. Now, it *could* be true that the fair opportunity and difference principles are in fact fulfilled despite these inequalities; however, public assurance of this would be lacking. Without such assurance, it would not be publicly known that people adhere to the principles of justice. An important part of the social bases of self-respect is that it is publicly known that the difference principle is adhered to. Without such public knowledge, there is no (approximately) well-ordered society.

For the sake of assurance, society should concern itself with something it otherwise may not need to, such as large disparities between the majority group and historically oppressed groups like African-Americans and women. The need to provide this trust and assurance may result in something that looks like group-based reparations. However, the justification would not be based on historical entitlements, but on the need for assurance in the wake of past injustice.

Assurance might take another form, one that does not resemble reparations: new and more egalitarian principles of justice might be adopted, aiming at (greater) reduction of inequalities between *all* citizens.<sup>20</sup> This would still support my thesis that past history would change what we should be willing to accept as a public standard of justice. The need to provide assurance is present or increased due to historical injustice done to groups, even if assurance takes a non-group differentiated form.

## **2.2. The historicized difference principle II: incentives and assurance**

The difference principle can also be historicized in a second way, out of a concern for incentives and assurance. Consider first what happens if citizens publicly affirm a non-historicized difference principle, declaring that justice requires maximizing the position of the least advantaged with reference only to factual circumstances that are now possible going forward and not with reference to those circumstances once possible.

For illustrative purposes, imagine a society with two sets of possible factual circumstances, one with plentiful fish stock making it easier to fish, the second with fertile land making it easier to grow corn. Given the first set of circumstances, a basic structure with a fishing-focused economy would maximize the position of the least advantaged. Given the second set of circumstances, a corn-focused basic structure would best do so. If the fishing-focused economy exists, members of group F disproportionately benefit (they tend to be good fishers). In a corn-focused economy, members of group C would disproportionately benefit (their talents lie more with corn farming).

Suppose the present circumstances favor fishing, and society has adopted a fishing-focused basic structure. Members of group C are disproportionately among the least advantaged, but the difference principle is met. Now suppose that members of group C manage, through unjust means, to change the circumstances (say, by destroying fish stock), such that corn becomes more valuable to grow. They create factual circumstances on the ground, such that a return to the previous circumstances is no longer possible, or would require the use of valuable resources better employed to help the least advantaged in the new circumstances.

A non-historicized difference principle obviously sticks with a corn-focused economy

as a means of maximally benefitting the least advantaged *prospectively*. But this choice endorses and rewards past injustice. A historicized difference principle must treat this endorsement as itself a cost. It will assess basic structures also with reference to past circumstances and injustices. On that basis, it might choose a return to the prior circumstances, or endorse a different basic structure not so advantageous to group C.

Concerns that normally support the difference principle in Rawls's theory could provide reasons not to strictly adhere to a non-historicized difference principle. Part of the point of affirming the difference principle is to publicly declare that advantages accruing to the well-off will redound as much as possible to the disadvantaged. The difference principle expresses the idea that material inequality will not be turned into an attempt to game the rules of the system on the part of those well-off. It is a principle of solidarity or fraternity.

A non-historicized difference principle might not provide for this assurance and solidarity. Suppose it were publicly known beforehand that a non-historicized difference principle would operate after an injustice. This could encourage or allow strategic moves in order to change which specific individuals and groups occupy the advantaged and disadvantaged slots in society within a given basic structure. Additionally, it may encourage or allow the creation of new circumstances, which would demand a new basic structure if the difference principle is to be met prospectively. If a return to the old circumstances is difficult or impossible, as in the above scenario, there is a danger beyond simply rewarding injustice: those least advantaged in the new basic structure might be at a lower level than those least advantaged in the old basic structure.

A difference principle concerned with the position of historically discriminated-

against groups could help provide a sense of assurance for the position of the least advantaged *over time*. It is desirable to avoid publicly adopting principles of justice that create or strengthen incentives with counterproductive effects (Pogge, 1990).

So a society has reason to announce that henceforth it will adopt a historicized difference principle to all future cases. This means a society's justice will *not* be assessed simply by what always *prospectively* maximally raises the level of the least advantaged. This adoption is meant to discourage those who would, going forward, create circumstances that work to their own or their group's advantage. The difference principle is concerned about reciprocity and assurance; this takes these concerns to a higher level and extends them over time.

But does a society have a reason to apply a historicized difference principle to injustices that have *already* occurred, before the society publicly commits to the principle? Should we be concerned with "incentives" that would have been created or strengthened if past people had known how we would respond to their injustices? It seems that incentives should only be concerned with future action, as we cannot affect past actions. Nonetheless, retroactively applying the historicized difference principle provides assurance in two ways. First, it demonstrates a public commitment to this principle and weakens incentives to do injustice going forward. Second, such application is a good way to signal repudiation of past group-based disrespect and the principles actually invoked historically. It affirms that any proper set of principles would have been concerned with discouraging such injustice. True, it is possible to believe this without being committed to applying this principle retroactively. But since the intentions of those repudiating the past may be non-transparent, a commitment can be signaled through a costly reparations-like policy.

### **2.3. The objection from the fair opportunity principle**

It could be objected that Rawls' fair opportunity principle by itself would prevent large group disparities in a well-ordered society. This principle says that positions should be formally open to all, and that there should be roughly equal life prospects, regardless of one's social class, for those similarly motivated and endowed (Rawls, 2001: 42). The "opportunity objection" says that if the fair opportunity principle were fulfilled, then large group disparities in socio-economic positions would not occur and any disparities would not correlate by race. Even if past injustice has left a legacy of economic disadvantage for a group, members would still have equal life chances in a just society (Shelby, 2004: 1713). So there would be no need for a historicized difference principle in a just society.

One problem with this objection is that it slights how Rawls's opportunity principle is focused on class. Rawls seems to think that class is sticky, but that in the long-term, differences over race and the like will wash away.<sup>21</sup> I suggest a legacy of past injustice should strengthen our concern for the equal life prospects for racialized groups, different genders, and, more generally, any member of a group denied past equal citizenship in a manner where the stigma persists today. They are not just owed fair opportunity; they are owed an assurance that they have fair opportunity. In the wake of past stigmatization, this may best be done through considering matters from other vantage points than the equal citizen or the least advantaged group defined purely in socio-economic terms: namely, from the vantage point of being a member of a group historically denied equal citizenship.<sup>22</sup>

Another problem is that disparities between group outcomes may persist due to different group habits and norms rather than discrimination.<sup>23</sup> Now, it is often bad faith to

jump from this possibility to the conclusion that discrimination has ceased. In the wake of past injustice towards certain groups, the burden of proof should shift. I do not see how Rawls could have any objection if those least advantaged socioeconomically were disproportionately members of a group defined by, say, odd-numbered social security numbers. Similarly, in a well-ordered society without a history of injustice, I do not see how Rawls could have any particular objection to disparities in outcomes correlating with skin color or sex differences; skin color would not have been racially stigmatized and sex differences would not have been infused with hierarchal gender norms.

Rawls's opportunity principle refers to 'motivation' but does not question how past injustice could affect who is willing to try or pursue certain opportunities. Suppose that a group of people is prohibited from owning farmland and its members end up living in cities and disproportionately entering the poorly remunerated task of religious scholarship; in the future, after the prohibition is lifted, the norm of choice should be seen as resulting (in part) from the injustice at the earlier time.<sup>24</sup> Consider also that some women may not try to achieve success in certain professions because of still prevalent norms of what is lady-like (Arneson, 1998).<sup>25</sup> If group disparities persist due to cultural norms, society should not ignore the possibility that the relevant norms are in part the result of past disrespect.

#### **2.4. A well-ordered society and assurance**

It might further be objected that past history does not change the conception of justice appropriate for a well-ordered society; it only affects, at most, what we are to do in non-ideal situations when *transitioning* to a just society. All individuals in a well-ordered society, by definition, fully subscribe to the principles of justice and would not see women

or members of racialized groups as less than equals.<sup>26</sup> Alternatively, any bigotry would be idiosyncratic and would not affect the justice of the basic structure (Shelby, 2004: 1713). In a well-ordered society, this objection says, previously stigmatized groups would by definition not have the *status* of second-class citizens. Everyone would have the status of being an equal citizen. The only other publicly recognized position would be one's place in the distribution of income and wealth (Rawls, 1971: 96). It does not matter which specific individuals occupy the lower socio-economic slots, or if those individuals disproportionately belong to a historically oppressed group, so long as the fair opportunity principle and difference principle are met. Yes, Rawls seems to say that a well-ordered society, strictly speaking, cannot exist if there has been a history of publicly denying equal status (Mills, 2009). But we can talk about a well-ordered society in a loose sense, where such an injustice has been overcome, and the principles of justice appropriate for a strictly well-ordered society are the ones that should hold.

There are four reasons to doubt this objection. First, a society is not well-ordered unless there is public knowledge that the principles of justice are adhered to. So even if we define a well-ordered society as one in which individual bigotry has no effect on the justice of the basic structure, there remains the problem of *how we know* we are in a well-ordered society and have overcome past injustice. A well-ordered society needs to provide its members with assurance that they are indeed in a society where they are respected as equals (or that individual bigotry does not affect the justice of the basic structure). What a society *looks* like matters here, and this includes how the distribution of goods. Determining how much inequality the difference principle allows can be difficult. When members of historically stigmatized groups consistently end up at the bottom of the economic ladder,

they may suspect that alleviating inequalities would be taken more seriously if the color of inequality were perceived differently (Loury, 2002: 70). Without a concern for the visible appearance of society, society cannot provide the good of assurance.<sup>27</sup>

Second, individuals can be committed to principles, but occasionally lapse from them. A well-ordered society is made for human beings, who can suffer from weakness of will (Waldron, 2012: 80). Even if people are willing to do their part, they will do so on the condition that others likewise do their part. There must be an assurance that if individuals lapse, society will correct for this. A historicized difference principle can signal a public assurance that attempts to benefit through racial injustice will not be rewarded.

Third, citizens could sincerely believe they hold certain *attitudes* of equality, while at the same time being influenced by group stigma. Glenn Loury notes that racial stigma is a matter of social meanings, not personal attitudes. Historically, African-Americans as a group have been publicly accorded second-class status. It was seen as proper for them to be in an inferior social and economic station. Even if African-Americans are not now formally accorded second-class status publicly, the effects of being accorded that status in the past may remain. The presumption of black inferiority and social dishonor that emerged with slavery has yet to be eradicated (Loury, 2002: 70). It would not be enough for a “newly enlightened” citizenry to believe they see others as equals. The problem of racial stigma goes beyond this: an individual might consciously think he or she is not at all racist, yet be influenced subconsciously by racial stereotypes and racist stigmas. If African-Americans disproportionately continue to occupy the bottom group, this may not register as a problem, because it could be unconsciously accepted as normal that they occupy an inferior position (by many non-African-Americans and possibly African-Americans as well). So in the wake

of a history of racism (and the stigmatization of groups more generally), more may need to be done to assure that justice is being done.

Fourth, increasing the standing of a historically stigmatized group could reduce stigma or bigotry.<sup>28</sup> Distributional patterns may help reinforce certain attitudes or unconscious biases, if it is assumed that being on the bottom rung is the fault of the group members and reflects their inferiority. Alleviating the effects of previous stigmatization becomes a concern of justice in the wake of past injustice. If the stigma had never occurred, the reason to be particularly concerned about distributional effects would be weaker or nonexistent. The rationale is not that someone has inherited a claim to the wages that should have been paid to one's grandparent. Instead, it is that this past stigmatization affects the present person as a member of a group, and he or she is owed an assurance that justice will be done. This assurance can take the form of decreasing group disparities, which resembles reparations, though with a different rationale.

### **3. Indigenous peoples and self-respect**

I have so far argued that we may need to construct or specify justice differently in societies where a group has historically been publicly denied equal status as citizens. Below, I consider the case of indigenous peoples, and ultimately move beyond the lodestar of equal citizenship.

Charles Mills is the most prominent author to adapt Rawlsian justice for a society with a history of racial injustice. His primary case is African-Americans. On my reading, Mills argues that we should at least aspire to overcome these non-ideal conditions of racial injustice. Indeed, Mills thinks the ultimate, long-term goal (if only in aspiration) is still, as

in Rawls's ideal theory, a world without race.<sup>29</sup> We should aspire to create conditions where it is once again appropriate to be guided by the ideal suitable to a situation where injustice had not occurred (or by a very similar ideal).<sup>30</sup> Mills refers to this as the 'ideal ideal'. To be sure, Mills is quite clear that in non-ideal circumstances, we should be directly guided by a second-best ideal, that is, a 'non-ideal (rectificatory) ideal'. (Mills, 2009: 178-180). These ideals are second best when compared to all possible circumstances, but they are the ideal most appropriate in non-ideal circumstances. Further, I suspect Mills would have rather strict conditions for deeming racial injustice overcome, and would not think it likely to happen soon, if ever (Mills, 2009: 180). Still, the aspiration for Mills seems to be to remedy the injustice and subordination, and create a situation where we ought to be guided by the ideal (or something approaching the ideal) appropriate to a society in which injustice had never occurred.

Mills's approach has its virtues, such as emphasizing that the ideal of a well-ordered society should not always guide us (at least not directly) in non-ideal circumstances where historical injustices have occurred.<sup>31</sup> Nonetheless, it does not go far enough. As I suggested in the previous section, new ideals may need to guide us in the wake of historical injustice.

Moreover, Mills has focused on how to construct domestic justice differently when group members have been treated as second-class *citizens*. This focus is not directly relevant to the situation of Native Americans, who have historically exercised self-government and came into the orbit of colonists and the United States as peoples. Much of Mills's work does not deal with relations between peoples, and so neglects whether equal citizenship is even the appropriate ideal in the first place.<sup>32</sup>

In sections 3.1 and 3.2, I first entertain an argument for how a concern for the social

bases of self-respect under non-ideal circumstances might justify self-government for indigenous peoples. However, if this argument focuses on individual self-respect, then its logic suggests that, at least in aspiration, these conditions requiring self-government should be overcome. This would be similar to Mills's views on overcoming non-ideal circumstances. Just as race should ideally end, so should indigenous self-government. Indigenous peoples would lack the assurance that the larger society had any deep commitment to continuing indigenous self-government. Ultimately, I argue in 3.3 that assurance is best provided through respecting indigenous peoples as peoples. This looks beyond Rawls's framework of domestic social justice to Rawls's framework of international justice (1999b).

### **3.1. Indigenous peoples and the history of forced inclusion**

Rawls supposes that citizens 'not only are normal and fully cooperating members of society, but they further want to be, and to be recognized as, such members. This supports their self-respect as citizens' (Rawls, 2005: 81). Is it reasonable for society to uphold an ideal in which citizens would find support for their self-respect through a desire for membership and recognition as a member? Given that past stigmatization was used to justify destroying indigenous self-government in favor of forced inclusion, it is not reasonable for the larger society to *expect* Native Americans to find affirmation in such inclusion. The argument explored here does not assume that *anyone's* involuntary inclusion would be disrespectful. Rawls is concerned with terms of cooperation each participant can *reasonably* accept (Rawls, 2001: 60). What reasonable terms are can change with past injustice. The social bases of self-respect are 'features of the basic structure of society that may *reasonably* be

*expected* to affect people's self-respect' (Rawls, 1999a: 260, quoted in Eyal 2005; emphasis added). Once we realize that past history can change what it is reasonable to expect, we need to construct justice differently for Native Americans.

The history of Native Americans has certainly involved the denial of full citizenship, but it has also prominently involved forced *inclusion*. For example, the 1887 General Allotment Act was designed to break up Native American reservations and destroy tribal ways of life. The justification was that Native Americans should be civilized into white ways of living through possession of individual plots of land rather than residing on land communally owned by the tribe. The division of tribal land into individual parcels would prepare Native Americans for citizenship, which they would receive after twenty-five years of living on allotted land (Deloria and Lytle, 1983: 9; Barsh, 1991: 5; Spinner-Halev, 2007: 583). Congress unilaterally extended citizenship to all Native Americans in 1924, without seeking their consent; few Native Americans at the time had an unambiguously positive view of this (Bruyneel, 2007: 97).

Here the historical injustices were not merely violations of the standards of domestic justice involving treating Native Americans as second-class citizens. Violations of this sort surely occurred. But the aim of the policy was also disrespectful in another way. Native Americans often complain about attacks on their pre-existing distinct political and cultural societies. They were treated as individuals who belonged to a race incapable of self-government. Native Americans have often fought to remain at a distance from American society; they did not generally find their worth in being 'normal and fully cooperating' members of American society. They often view full inclusion as detrimental to the maintenance of their way of life (a concern of the social bases of self-respect). To impose

on them merely the same rights and obligations as other citizens is hardly sufficient to express respect.

This contrasts with various affirmative action policies that are seen as ways to include African-Americans and women, and are generally seen as temporary, at least in principle. Even where past discrimination is impossible to overcome, doing away with special distinctions based on past subordination arguably generally remains the aspiration (Williams, 1998).

However, most Native Americans view the right to self-government as permanent, rather than a remedial right that fades away if full inclusion on equal terms becomes possible. How can this view be compatible with the lodestar of Rawls's theory of domestic justice, the idea of equal citizenship? Before going beyond this lodestar below, I explore the argument regarding the social bases of self-respect for individual Native Americans.

### **3.2. Indigenous peoples, self-respect, and self-government**

Rawls says that a package of basic liberties is provided to all citizens in part for the purpose of ensuring the social bases of self-respect. Affirmation of this principle is intended to signal that everyone can equally participate in politics and law-making. Imposing a unitary set of citizenship rights seems to fail to achieve this aim for the case of Native Americans. A unitary package of citizenship rights does not secure the social bases of self-respect given the history of attempting to involuntarily incorporate Native Americans as citizens based on their supposed lesser worth.

This may not entail abandoning a focus on securing the social bases of self-respect, but only for how they are specified in a given context. Arguably, the primary good of the

social bases of self-respect requires that treaties be respected and/or that relations between indigenous peoples and the larger state take place on a nation-to-nation basis. This may be the best way individual Native Americans can participate in politically shaping the structures that govern them. Native Americans generally, and reasonably, distrust the institutions of the larger state. Past attempts to assimilate have sometimes been met with disaster and hostility. (The most famous example is the Cherokee, who attempted to become farmers and adopt a Euro-American style constitution, but died in large numbers when sent out west in the ‘Trail of Tears’.) Without secure self-government, Native Americans may withdraw from political participation, convinced their efforts cannot make a difference. They may not see a worth to their political liberties, a primary component of the social bases of self-respect. A more or less permanent relationship based on something like ‘treaty federalism’ might better provide the social bases of self-respect for indigenous peoples, and allow them to shape the laws under which they live (Barsh and Henderson, 1980; Tully, 1995).<sup>33</sup>

My suggested argument differs from one defense of group-differentiated rights offered in the early work of Will Kymlicka.<sup>34</sup> Kymlicka starts from an abstract standard of equality of resources. Individuals are responsible for the choices they make, but not for their unchosen circumstances. It is only within a cultural context that one’s choices have value. Indigenous peoples lack a secure cultural context for choice, which most citizens of a country like Canada take for granted. Self-government rights are basically a way to compensate a minority who has an unchosen disadvantage, in that such rights help secure a cultural context in which choices can be made meaningfully (Kymlicka, 1989: 189-190).

In contrast, the argument I have been entertaining in sections 3.1 and 3.2 is based on

the form taken by the social bases of self-respect, given a particular history. A concern for self-respect refers in part to the conditions for seeing one's choices as worthwhile. In the history of injustice, racist justifications were invoked. This leaves a particular legacy today. Correcting for previous disrespect requires an orientation that otherwise might not be appropriate for a democratic polity. Having once said that Native Americans were an inferior race who could not maintain themselves as independent societies or polities, and whose people should not be able to pursue their chosen way of life, the United States has an obligation to repudiate this message. Affirmative steps need to be taken to repudiate the specific messages associated with the dehumanizing stigmas attached to Native Americans. Full inclusion against the wishes of Native Americans cannot be reasonably expected to provide the social bases of self-respect for them.

This history means that adequate support for their self-respect would likely require, at minimum, self-government rights. Because of the history of domination, a 'normal' democratic polity might not make Native Americans feel secure. They may have a reasonable and justified fear given past history. As discussed above, the role of assurance is crucial. Because trust is not initially possible (or because it is reasonable for one group to mistrust and hence to reject an insistence that there be one set of standard uniform rights), we cannot proceed in the 'normal' manner of ideal theory in which we assume that everyone can be expected to find worth in being mutually recognized as citizens. Indigenous peoples may still need to engage in 'fair terms of cooperation' with non-indigenous persons, but what constitutes fair terms may reflect a specific history.

This argument can be seen as falling within the scheme of Rawls's domestic theory (or domestic justice more generally), in the sense that this is the only way to make

individual persons secure in their rights (or in whatever justice secures) given a history of injustice. It may point outward to new standards (or new interpretations of Rawls's standards) that are usually thought relevant only in the international arena (for instance, that of honoring treaties). But this is perhaps still compatible with conceiving of Native Americans as individual citizens, albeit just ones with a 'peculiar' history. If so, the focus is still on the fair terms of cooperation between free and equal citizens in a (now closed) democratic society, but with a concern for what the social bases of self-respect amount to, given *how* some groups came to be *within* the society (cf. Turner, 2006: 62). Some of the fundamental elements relevant for how justice is constructed remain basically the same, but what this amounts to differs.

Again, the rationale here could be that this is the only way to secure non-domination for individuals in the context of historical injustice. It could be held that membership in a particular collective body is important for individuals' self-respect. Like Kymlicka's argument, the justification for the recognition of tribal self-government rights would ultimately refer to the advantage of individuals, not peoples. But note the difficulty: respecting the equal citizenship of individuals requires that persons in some respects be treated as having an identity as a non-citizen or treated as having a tribal, political membership in addition to their identity as a citizen. In order to respect individuals as free and equal citizens, they have to be treated as more than just free and equal citizens. Though liberalism would rather not be forced into making this potentially tragic choice, it is guided by liberal standards. It emerges from a dilemma faced by liberalism in an attempt to figure out how, in practice, to live up to its own standards and methods of justification.<sup>35</sup>

From the perspective of domestic justice focused on individual disadvantage,

indigenous self-government might simply be seen as a temporary measure, persisting only until current non-ideal conditions transform into circumstances where it is appropriate to implement (something like) the ‘ideal ideal’ of non-differentiated citizenship. This recalls Mills’s argument about how we should ideally aim to overcome racial injustice.<sup>36</sup> But such a defense of indigenous self-determination would leave indigenous peoples insecure; such rights might last only as long as the larger state *judges* that past injustice has yet to be overcome (cf. Kymlicka, 2001: 128). The inadequacies of such a defense suggest another route: indigenous claims should not be seen merely as a case of domestic justice.

### **3.3 Constructing justice between peoples**

Rawls constructs justice differently at the international and domestic levels, with different parties in the respective original positions and different objects of respect. Whereas domestic justice is concerned with mutual respect between free and equal *individuals*, Rawls’s international justice is concerned with maintaining mutual respect among free and equal *peoples* (Rawls, 1999b: 62). Whatever the merits of Rawls’s specific version of the law of peoples, his approach suggests that some fundamental features of justice might change between the domestic and international level.

It is often noted that there is a tension between a present-orientated principle of distributive justice – such as the difference principle – and claims based on historical injustice. Why, it is asked, should we care about past oppression? Isn’t present disadvantage what we really care about? True, those who belong to a group that suffered historical injustice are often among the most disadvantaged in society. But is not their present disadvantage the primary reason to help them? For Rawls, the difference principle

does not operate at the international level. The law of peoples includes principles such as ‘observe treaties’ (Rawls, 1999b: 37). But where do claims arising from Native American treaties lie? Consider a court ruling on whether treaty rights regarding fishing and hunting should be honored: what if a regime honoring such rights would make rural non-Native Americans even worse off than the Native Americans were, and worse off than anyone need be, so violating the difference principle?

Under Rawls’s domestic theory of justice, a ‘people’ holds no fundamental normative importance. Perhaps there are arguments for reparations (or policies that are responses to historical injustice) consistent with the premises of individualism and equality. For example, as discussed above, Rawls considers the social bases of self-respect a fundamental primary good. It may be that treaties should be honored, and Native Americans treated differently, because the social bases of self-respect cannot otherwise be fulfilled given the history of injustice and treaty violation. While this certainly alters Rawls’s theory, it is still a specification of his domestic theory of justice. A different public standard of justice may be required in order to secure these goods. Rawls’s domestic theory might allow for differentiated citizenship. Still, the ultimate concern is always ultimately with the status of individuals as free and equal citizens.

Here, I suggest a more fundamental challenge to Rawls’s view of domestic justice. Why should we accept normative individualism for Native Americans, given that part of the past wrong was disregarding their prior existence as distinct political and cultural societies, enacting plans to make them into individual citizens of the United States, which involved forcibly tearing them from the ‘savage’ ways of tribal societies through allotment and other means?<sup>37</sup>

Assume that Rawls's law of peoples (or something similar) would ideally apply to indigenous peoples. 'Peoples are free and independent' is a principle, and through this and other principles, we can condemn many actions in past history (Rawls, 1999b: 62). Now, justice as fairness (Rawls's domestic theory) might also condemn those actions on the basis that they violated basic liberties. But the law of peoples gives another reason, and is concerned with the fundamental normative importance of peoples. The very way we construct the principles of justice differs at the two levels. The question is not how to construct domestic social justice so as to take into account non-ideal circumstances, but rather whether or not indigenous peoples should be analyzed through the framework of (purely) domestic social justice.

If an (indigenous) people is publicly denied the status of peoplehood through an injustice, what does justice require in the immediate aftermath of that denial? Presumably, justice should, at least at first, be constructed with reference to their peoplehood. Peoples are the parties for whom the fair terms of cooperation are constructed at the international level. 'A people will honor these terms when assured that other peoples will do so as well' (Rawls, 1999b: 61-62, 24-25). A law of peoples could not assure peoples, if it publicly affirmed that disrespectful violations – actions undermining mutual respect between peoples – would quickly and easily lead to peoples losing this status.

How is the appropriate level (or context) to be determined now? Is the relevant status one of citizenship or peoplehood or something in between? It is important to allow for the possibility that the status of indigenous peoples as peoples may continue in some way for a while after the injustice. But when should they be treated only as individual citizens, as per Rawls's domestic model? There is a need to identify when, if ever, it is appropriate to

switch fully to the domestic level, and give principled arguments for when, if ever, their status as peoples at the international level is fully superseded.<sup>38</sup>

The earlier discussion of domestic justice showed how a non-historicized difference principle would refer only to possible present (and future) social circumstances in determining the just basic structure. Making impossible certain circumstances through injustice could lead to a new basic structure advantaging the perpetrator or her group. Similarly, there is reason to weaken incentives to unjustly transition from the international to domestic level. This can be done by not defining the relevant status (citizen or people or something in between) simply with reference to present circumstances.

A domestic society should be able to assure the successors of victims of past injustice that citizens have honestly and thoughtfully considered whether claims arising from the status they held in past international contexts still persist. This includes claims resulting from an unjust transition. This cannot be done if domestic justice is simply *assumed* to be the appropriate standard now; such an unconditional standard allows too quick a ratification of unjust supersessions of their status at another level of justice.

For this reason, it is generally not appropriate to use the difference principle (or other strong egalitarian principles) as a way to measure the civic obligations *of* indigenous peoples. Prior to any supposed incorporation into the state, the appropriate level to examine fair treatment towards indigenous peoples would presumably have been the international level. It would not have been appropriate to use an international difference principle to redistribute resources from indigenous peoples (unless, *pace* Rawls, such duties existed under justice at the international level). The difference principle would normally include all resources, even unexploited ones, as part of one's wealth. Despite possible poverty, they

would be seen as advantaged under this measure.

We have a reason to avoid a theory that attributes to a resource-rich group of indigenous peoples a duty to share the minerals beneath their underutilized (from some points of view) sacred land (Kolers, 2009). It is problematic to demand difference-principle redistribution from indigenous peoples through counting their large tracts of underutilized land as part of their bundle of primary goods. Now, indigenous peoples arguably would accrue important benefits in the area of distributive justice if they were considered citizens. If indigenous peoples were seen as foreigners, then socio-economic transfers *to* them would presumably be seen as humanitarian foreign aid, or less demanding duties of justice, and the amounts might be much less robust than those required by domestic justice (Kymlicka, 1995: 119). So treating indigenous peoples merely as foreign peoples may not be advantageous for them either. Having been brought into the orbit of the state and forced into a system of ‘cooperation’, they should have a special claim regarding what status they want to opt for. The state should not have the ability to expel them when it is to the state’s disadvantage, after claiming indigenous peoples as citizens for years. Further, while indigenous peoples often do not see full independent statehood as realistic or desirable given how past history has made them dependent on or intertwined with a state, they generally see recognition of peoplehood as the basis of the political relationship (cf. Turner, 2006: 54, 78-79).

Indigenous peoples should have the option to be treated as holding a hybrid status between that of mere free and equal citizenship and that of independent peoplehood (cf. Bruyneel, 2007).<sup>39</sup> In this way, they could choose to gain the benefits of citizen status while being able to opt out of many burdens of citizenship. Normally, others might be able to

demand that indigenous peoples choose one or the other status, rather than picking the most advantageous parts of both. Such an attempt to ‘have it both ways’ appears to violate reciprocity. But the fact that indigenous peoples were brought into the orbit of the state through violations of the law of peoples could justify an exception to the normal rules of reciprocity. This new alternative of asymmetrical reciprocity would bar the larger citizenry from making a claim of full, symmetrical reciprocity against Native Americans. Indigenous peoples are dependent on domestic others because of historical violations at the level of the law of peoples. The proper approach then is to focus on the past or persisting status of indigenous peoples as peoples. In the ideal theory of international justice, indigenous peoples would hold the status of peoples and would not be treated as individuals. But because of unjustly created circumstances, it may be necessary to *also* allow indigenous peoples to choose to be treated in some respects as individual citizens.

In the previous sub-section, I noted the problems of assurance in basing group-differentiated rights on the status of equal citizenship. There is no assurance that the status of citizen in the future might not require abandoning these group-differentiated rights. My suggestion here is that an appropriate ideal following a past violation of international justice could include indigenous peoples having the option of a hybrid status with asymmetrical reciprocity.

## **Conclusion**

The content of the principles of justice in some theories, like Nozick’s entitlement theory, look backward. Nonetheless, Nozick’s principles are, broadly speaking, unchanging: justice should always be concerned with the history of entitlements. My argument did not

insist that justice must look backward in this way. Rather, I argued that the public standards of justice we should affirm could change, or be differently specified, depending on past history.

In section 1, I argued that a history of injustice can leave a legacy in the form of reasonable fears about the state's and the citizenry's commitment to justice for members of historically stigmatized groups. In Section 2, I argued for a historicized form of the difference principle concerned with the standing of historically stigmatized groups and incentives to do injustice.

In section 3, I explored the argument that the Rawlsian concern for the social bases of self-respect suggests that indigenous peoples ought to be accorded rights of self-government. Exceptions to Rawls's basic liberties principle were at first justified within domestic justice, and individuals were still the ultimate normative concern. However, referring only to domestic justice may leave indigenous peoples insecure, as the logic of the argument allows that self-government rights may be revoked. The remedy is to look beyond Rawls's theory of domestic justice to his theory of international justice. I argued that if international justice were the appropriate level to approach justice in the past, an approach other than fully domestic justice might be appropriate today. Equal citizenship may no longer be the lodestar for indigenous peoples. Nonetheless, a commitment to broadly Rawlsian principles remains at a more general level: there is still a concern for reciprocal justification and mutual respect between free and equal parties. Even exceptions, allowing for asymmetrical reciprocity, are justified through concerns regarding past injustice, mutual respect, and assurance. My analysis of Rawlsian justice shows how past history can change what ought to publicly count as justice today.

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## Notes

- <sup>1</sup> The term ‘egalitarian-leaning’ is meant to at least include egalitarian and prioritarian theories. References to ‘disadvantage’ below may refer to ‘unchosen disadvantage’ for some theories.
- <sup>2</sup> Wenar’s approach is still fundamentally forward-looking as Brooks (2008) notes.
- <sup>3</sup> I do not mean that Nozick’s criticism that ‘liberty upsets patterns’ applies to Rawls. See Pogge (1989: 28-29).
- <sup>4</sup> See, for example, Valls (1999), Lyons (1981), Hill (2002).
- <sup>5</sup> I ignore the shadow Nozick’s proviso on initial acquisition might cast on future just keepings (1974: 180).
- <sup>6</sup> See Simmons (2001); Spinner-Halev (2007); Young (2011: 174). Simmons argues that the distinction between backward-looking and forward-looking approaches is not a hard one. Still, his standard of justice remains the same over time, differing from my approach. Spinner-Halev argues that we should be concerned about ‘enduring injustice’ rather than historical injustice. Spinner-Halev’s standard for whether an injustice endures appears to remain the same over time, even if the injustice cannot be overcome. I briefly discuss Spinner-Halev below. Young is ambiguous and requires more attention. Briefly, I suspect her concern for the history of structures is fundamentally about causal explanations rather than about past events changing justifications.
- <sup>7</sup> The argument herein relies on Rawls’s view that a theory of justice is constructed for human beings in the circumstances of justice. For an opposing view holding that a principle of justice is valid for all possible worlds, see Cohen (2008: 274-344).
- <sup>8</sup> I ‘adapt’ Rawls by modifying his theory significantly in a still recognizably Rawlsian manner. I am not ‘adopting’ his theory with little or no change; nor am I ‘abandoning’ his framework entirely. I owe this distinction to Charles Mills (forthcoming). I adapt Rawls differently than does Mills.
- <sup>9</sup> In *A Theory of Justice*, Rawls refers to both self-esteem and self-respect. Rawls later says that *Theory* was ambiguous about the distinction between self-respect as an attitude and the social bases that help support that attitude (Rawls, 2001: 60).
- <sup>10</sup> Rawls’s first principle is the basic liberties principle. His ‘second’ principle has two parts: the opportunity principle and the difference principle.
- <sup>11</sup> See Rawls’s discussion of the assurance problem and the need for laws allowing for coercive sanctions (1971: 267-270).
- <sup>12</sup> Levy (2007: 188) briefly mentions this example.
- <sup>13</sup> After injustice occurs, there has not been full compliance with the principles of justice, so a well-ordered society is impossible in the strict sense apparently used by Rawls. An ‘approximately well-ordered society’, as I use that term,

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has an unfortunate history that can safely be ignored for practical purposes. For example, a society that discriminated against a group, but then remedied this injustice fully, may approximate a well-ordered society, at least in theory. It is another question whether and how such approximations can exist. I discuss well-ordered societies in this loose sense below.

<sup>14</sup> On ‘secure access’ and ‘official disrespect’, see Pogge (2002).

<sup>15</sup> See Wall (2006), summarizing Christiano’s view.

<sup>16</sup> People need not be protected from unreasonable hurts to self-respect (Eyal, 2005: 204), but what is an unreasonable hurt may change with past injustice. The past matters in determining how to specify the social bases of self-respect, which are those features which ‘may *reasonably* be expected to affect people’s self-respect’ in important ways (Rawls, 1999a: 260, emphasis added). See further section 3.1.

<sup>17</sup> Mills says: ‘In this framework, then, there is no need for affirmative action, reparations, or other measures of corrective racial justice because no racial group will have been discriminated against in the first place’ (2007: 113).

<sup>18</sup> Mills says: ‘we have to work with continuing non-ideal realities which Rawlsian concepts of an idealized polity or economy do little to illuminate. (For example, in trying to achieve proportional democratic representation in an electoral arena historically dominated by exclusionary white majoritarianism, or in giving people of color equal access to economic opportunities that encroach on what are seen as the legitimate entitlements, the racialized ‘property,’ of historically privileged whites)’ (2007: 114).

<sup>19</sup> It could be possible for a group to overcome a past history of stigmatization and no longer require additional assurance. Reaching such a conclusion could require going through analysis along the model presented by Melissa Williams (1998: ch. 6), who includes both memory (on the subjective side) and history (on the objective side). ‘Founding victims’ might form a special category.

<sup>20</sup> I thank an anonymous reviewer of this journal for prompting this.

<sup>21</sup> I thank Thomas Pogge for discussion on this point.

<sup>22</sup> Compare to Rawls (1971: §16). Rawls suggests that sometimes alternative positions beyond these two may be permissible, including those based on ‘fixed natural characteristics’ such as race, sex and culture (1971: 99). My suggestion here refers to being in a position of being a member of a group having been denied equal citizenship through stigmatization. This does not refer to any supposedly natural characteristics, as Rawls strangely does, though these characteristics could have been *naturalized*.

<sup>23</sup> I thank Jacob Levy for stressing this.

<sup>24</sup> I thank Jacob Levy for this example.

<sup>25</sup> Arneson (1998) argues for the abandonment of Rawls’s principle of fair opportunity. I invoke women here to discuss how many different types of groups, even non-hereditary ones, can face problems of the sort I am discussing. I do not argue here against the possibility that ultimately Rawls can be revised for race but not gender. Gender involves complicated issues not considered here.

<sup>26</sup> I thank David Peritz for pressing this objection.

<sup>27</sup> Waldron (2012) discusses the *look* of a well-ordered society, without stressing history. See also (1971: 267-270).

<sup>28</sup> I draw from (2002).

<sup>29</sup> This claim is explicitly made by Mills (forthcoming; personal communication 2014).

<sup>30</sup> Taylor is quite explicit that, for Rawls, ‘the goal of nonideal theory is to create a world in which the ideal theory can be applied’ (2009: 487). Simmons says that ‘the object of Rawls’s non-ideal theory is the eventual achievement of the ideal of perfect justice, not simply the elimination of particular or salient injustices... A good policy in nonideal theory is good only as transitionally just—that is, only as a morally permissible part of a feasible overall program to achieve perfect justice, as a policy that puts us in an improved position to reach that ultimate goal’ (2010: 21-22).

<sup>31</sup> ‘Ideal theory starts from ground zero; non-ideal theory starts from an already existing social order. So as with Rousseau, our starting-point is not the state of nature or its Rawlsian equivalent (the original position), but a particular social stage of an already-existing unjust society (the ‘later position?’)’ (2007: 119).

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<sup>32</sup> Mills (2009: 170-171) criticizes Rawls's silence in the *Law of Peoples* on the killing and expropriation of Native Americans and the transatlantic slave trade, but he *constructively* uses Rawls only to address domestic racial injustice. See also Mills (2015) on race and global justice.

<sup>33</sup> Okin (1998: 678-680) argues that group rights may not enhance the self-respect of women, but diminish it. For a response, see Spinner-Halev (2007).

<sup>34</sup> I draw primarily from Kymlicka (1989).

<sup>35</sup> This bears similarity to the argument of Spinner-Halev (2007: 588, 592). However, Spinner-Halev invokes the need for fellow citizens of a political community to work towards a more just future. For Spinner-Halev, the failure of liberalism apparently does not change how we are all merely citizens of a political community. Below, I problematize this as a starting point for indigenous peoples.

<sup>36</sup> Indeed, the above argument might suggest that only the *means* of incorporation were unjust, not the attempt itself. This thought is prompted by a comment from an anonymous reviewer of this journal.

<sup>37</sup> Two further coercive means I have not discussed are policies forcing children to attend boarding schools and bans on Native American spiritual practices.

<sup>38</sup> See Waldron (1992), whose arguments I address in Waligore (2008; 2009).

<sup>39</sup> Indigenous peoples were brought into the state's orbit, as peoples, through international injustice. Minorities who only suffered violations of domestic justice cannot claim this option on the same grounds. I do not have space to consider possible claims stemming from the transatlantic slave trade.